

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 30 November 2023

DOCKET NUMBER: AR20230004240

APPLICANT REQUESTS:

- Reconsideration of his previous request to upgrade his under other than honorable conditions (UOTHC) discharge.
- As new issues he requests:
  - A medical separation, due to traumatic brain injury (TBI) and post-traumatic stress disorder (PTSD), based on an explosion that occurred in 1983
  - Addition of the Korea Defense Service Medal and the Combat Infantryman Badge to his DD Form 214
- Personal appearance with the Board, via a video or telephone conference call.

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:

- Three DD Forms 149 (Application for Correction of Military Record)
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- Department of Veterans Affairs (VA) Eligibility Determination

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20210010123 on 11 February 2022.

2. The applicant makes the following statements in three applications:

a. In the first application he states, in effect, he is requesting correction of his DD Form 214 for the period 16 May 1985 through 13 October 1989. He served in Germany 3 years in different countries. During a previous enlistment in 1983, while attending the Primary Non-Commissioned Officer's Course (PNCOC) at Fort Ord, CA, he suffered a TBI due to an explosion caused by negligence of the cadre. What they did to cover it up was unconscionable. He was unable to march, hear, or perform his duties 110 percent (%).

b. In the second application he states he was awarded the Korea Defense Service Medal and the Combat Infantryman Badge, which are not reflected on his DD Form 214.

c. In the third application he states he believes his discharge should be upgraded based on PTSD and TBI. He had medical issues at the time and there was no help. The [VA] medical records he provided show he is a 100 percent (%) disabled veteran.

3. Regarding the Combat Infantryman Badge (for Korea), Army Regulation 600-8-22 (Military Awards), paragraph 8-6e (3), states the special requirements for award of the Combat Infantryman Badge for service in Korea on the DMZ (Demilitarized Zone) are rescinded. Army veterans who served in Korea on or after July 28, 1953 and meet the criteria for award of the Combat Infantryman Badge may submit an application with supporting documentation directly to the U.S. Army Human Resources Command (HRC), ATTN: Veterans Support Branch, 1600 Spearhead Division Avenue, Fort Knox, KY, 40122. This award may be requested by letter and must contain your assignment, attachment, or operational control orders for the period during which you contended you qualified for the award, a narrative description of the qualifying incident, a copy of the DD Form 214 (Certificate of Release or Discharge from Active Duty), and any other supporting documentation or applicable military records that shows the member meets the criteria for this award. Therefore, the issue of the Combat Infantryman Badge will not be considered further in this Record of Proceedings.

4. Having had prior service in the Army National Guard, the applicant enlisted in the Regular Army (RA) on 3 February 1982. He held military occupational specialty (MOS) 11B (Infantryman).

5. His DA Form 2-1 shows he served in Korea from 15 February 1982 to 11 February 1983 with Headquarters and Headquarters Company, 1st Battalion, 31st Infantry, 2nd Infantry Division. He completed 4-weeks of PNCOC at Fort Ord CA in 1983.

6. He was honorably released from active duty on 2 February 1985, by reason of expiration term of service. The DD Form 214 he was issued shows he was credited with completing 3 years of net active service this period. Item 12f (Foreign Service) shows 11 months and 27 days. His awards are listed as the:

- Army Service Ribbon
- Overseas Service Ribbon
- Expert Marksmanship Qualification Badge Hand Grenade
- Expert Marksmanship Qualification Badge Rifle (M-16)
- Army Good Conduct Medal (1st Award)
- Army Commendation Medal
- Expert Infantry Badge
- Noncommissioned Officer Professional Development Ribbon.

7. On 16 May 1985, the applicant reenlisted in the RA. He attained the rank/grade of sergeant (SGT)/E-5 and he held MOS 63T (Bradley Fighting Vehicle System Mechanic/Repairer). He served in the Federal Republic of Germany from 26 September 1985 through 7 November 1987. He was assigned to Fort Polk, LA, on 17 December 1987.

8. The applicant's service records contain three DA Forms 4187 (Personnel Action) that show his status was changed from:

- Present for duty to absent without leave (AWOL), on 8 August 1988
- AWOL to dropped from rolls (DFR), on 7 September 1988
- DFR to attached/present for duty, on 5 July 1989
- Apprehended by civilian authorities at West Plains, MO, on 5 July 1989, and was returned to military control at Fort Knox, KY

9. On 7 July 1989, he signed a statement declining a separation medical examination.

10. On 13 July 1989, court martial charges were preferred against the applicant. His DD Form 458 (Charge Sheet) indicates he was charged with one specification of being AWOL from on or about 8 August 1988 through 5 July 1989. He signed an admission/AWOL statement the same day.

11. On 13 July 1989, the applicant consulted with legal counsel and was advised of the basis for the contemplated trial by court-martial, the maximum permissible punishment authorized under the uniform code of military justice (UCMJ), the possible effects of a bad conduct or dishonorable discharge, and the procedures and rights that were available to him. Subsequent to being charged, he consulted with counsel and requested discharge under the provisions of chapter 10, Army Regulation 635-200. Such discharges are voluntary requests for discharge in lieu of trial by court-martial.

a. Subsequent to receiving legal counsel, the applicant voluntarily requested discharge under the provision of chapter 10, Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), for the good of the service – in lieu of trial by court-martial. In his request for discharge, he acknowledged he understood by requesting discharge, he was admitting guilt to the charge against him, or of a lesser included offense that also authorized the imposition of a bad conduct or dishonorable discharge. He further acknowledged he understood that if his discharge request was approved, he could be deprived of many or all Army benefits, he could be ineligible for many or all benefits administered by the Veterans Administration, and he could be deprived of his rights and benefits as a veteran under both Federal and State laws.

b. He was advised there was no automatic upgrading nor review by any Government agency of a less than honorable discharge and that he must apply to the

Army Discharge Review Board (ADRB) or the ABCMR if he wished for a review of his discharge. He acknowledged he realized the act of consideration by either board did not imply that his discharge would be upgraded. He also elected not to submit a statement in his own behalf.

12. The applicant was placed on involuntary excess leave on 13 July 1989, pending completion of the discharge approval process.

13. On 18 July 1989, the applicant's commander recommended approval of the applicant's request for discharge under the provision of chapter 10, AR 635-200, for the good of the service in lieu of court-martial, with an UOTHC discharge.

14. On 27 July 1989, the separation authority approved the applicant's request for discharge under the provisions of chapter 10, Army Regulation 635-200, for the good of the service in-lieu of court-martial, with an UOTHC discharge. The approval authority directed the applicant's reduction to the lowest enlisted grade.

15. On 13 October 1989, the applicant was discharged. His DD Form 214 shows he was discharged in accordance with chapter 10 (for the good of the service, in lieu of trial by court-martial) of AR 635-200 with an under other than honorable conditions characterization of service. He completed 3 years, 5 months, and 1 day of net active service this period and he had lost time from 1988-08-08 to 1989-07-04. He completed 3 years and 29 days of foreign service.

a. He was assigned Separation Code KFS and Reenlistment Code 3/3B/3C.

b. His awards are listed as the Army Service Ribbon, Expert Marksmanship Qualification Badge Hand Grenade, Overseas Service Ribbon (2nd Award), Noncommissioned Officer Professional Development Ribbon (Primary), Army Commendation Medal, Good Conduct Medal, Expert Marksmanship Qualification Badge M-16 (Rifle), Army Commendation Medal, and Expert Infantry Badge.

16. In a previous request for his under other than honorable conditions discharge to be upgraded. The Board determined in AR20210010123 convened on 11 February 2022, that the character of service the applicant received upon separation was not in error or unjust.

17. The applicant provided a VA Eligibility Determination Claim received on 13 July 2023. The VA concluded his combined Disability Rating was 100%. He was rated:

- 100% for Meniere's Syndrome (previously bilateral hearing loss and tinnitus), service-connected disability? Yes

- 70% for PTSD with TBI residuals, service-connected disability? Yes, effective date: 10/31/2019

18. Army Regulation 15-185, states an applicant is not entitled to a hearing before the Board; however, the request for a hearing may be authorized by a panel of the Board or by the Director of ABCMR.

19. The applicant's DD Forms 214 nor his Personnel Qualification Records (PQR) show award of the Korea Defense Service Medal. This award is further addressed in the Administrative Notes portion of these proceeding.

20. The Army rates only conditions determined to be physically unfitting at the time of discharge, which disqualify the Soldier from further military service. The Army disability rating is to compensate the individual for the loss of a military career. The VA does not have authority or responsibility for determining physical fitness for military service. The VA may compensate the individual for loss of civilian employability.

21. Title 38, U.S. Code, Sections 1110 and 1131, permit the VA to award compensation for disabilities which were incurred in or aggravated by active military service. However, an award of a VA rating does not establish an error or injustice on the part of the Army.

22. Title 38, CFR, Part IV is the VA's schedule for rating disabilities. The VA awards disability ratings to veterans for service-connected conditions, including those conditions detected after discharge. As a result, the VA, operating under different policies, may award a disability rating where the Army did not find the member to be unfit to perform his duties. Unlike the Army, the VA can evaluate a veteran throughout his or her lifetime, adjusting the percentage of disability based upon that agency's examinations and findings.

23. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. Documentation reviewed included the applicant's ABCMR application and accompanying documentation, the military electronic medical record (AHLTA), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant is applying to the ABCMR requesting an upgrade of his 13 October 1989 discharge characterized as under other than honorable conditions. He states he sustained a traumatic brain injury (TBI) in 1983 in a training accident.

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. The applicant's DD 214 for the period of service under consideration shows he entered the regular Army on 16 May 1985 and was discharged under other than honorable conditions on 13 October 1989 under the separation authority provided by chapter 10 of AR 635-200, Personnel Separations – Enlisted Personnel (26 May 1989): Discharge for the Good of the Service.

d. This request was previously denied by the ABCMR on 11 February 2022 (AR20210010123). Rather than repeat their findings here, the board is referred to the record of proceedings and medical advisory opinion for that case. This review will concentrate on the new evidence submitted by the applicant.

e. The only new documentation submitted with this application is a "My VA" printout showing the applicant has a VA service-connected disability rating, to include a 70% rating for PTSD.

f. A Charge Sheet (DA Form 458) shows he was charged with AWOL from on or about 8 August 1988 thru on or about 5 July 1989. On 13 July 1989, the applicant voluntarily requested discharge for the good of the service under chapter 10 of AR 635-200. His request was approved by the brigade commander on 27 July 1989.

g. There is no evidence the applicant had any medical condition prior to his discharge which would have failed the medical retention standards of chapter 3, AR 40-501, and would therefore have been a cause for referral to the Disability Evaluation System.

h. Review of his records in JLV shows the possibility the applicant may have PTSD was noted in an August 2021 VA psychology encounter as "Rule out PTSD." He was later diagnosed with PTSD after being evaluated through an Initial Post-Traumatic Stress Disorder (PTSD) Disability Benefits Questionnaire on 21 August 2021.

i. Under liberal consideration polices, the applicant's recently diagnosed and VA service-connected PTSD, with its association with avoidant behaviors, fully mitigates his period of AWOL.

#### Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? YES: PTSD

(2) Did the condition exist or experience occur during military service? YES

(3) Does the condition or experience actually excuse or mitigate the discharge? YES: As this condition is associated with avoidant behaviors, the condition fully

mitigates the period of absence without leave for which he was administratively separated.

BOARD DISCUSSION:

1. The Board determined the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.
2. After reviewing the application and all supporting documents, the Board found that relief was not warranted. The Board carefully considered the applicant's request, supporting documents, evidence in the records, and published DoD guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement, the applicant's record of service, the frequency and nature of the applicant's misconduct and the reason for separation.
  - a. The applicant was charged with commission of an offense punishable under the UCMJ with a punitive discharge. After being charged, he consulted with counsel and requested discharge under the provisions of AR 635-200, Chapter 10. Such discharges voluntary requests for discharge in lieu of trial by court-martial and carry and under other than honorable conditions discharge. The Board considered the medical records, any VA documents provided by the applicant and the review and conclusions of the advising official. The Board considered the medical records, any VA documents provided by the applicant and the review and conclusions of the advising official. The Board concurred with the medical advisory opinion finding evidence of in-service mitigating factors. However, the Board also determined such mitigating factors did not outweigh the misconduct for two reasons: to overcome the misconduct. the applicant's length of AWOL and the fact that he was apprehended (rather than surrendered), implying that he had no intent to return to military control. Based on a preponderance of evidence, the Board determined that the character of service the applicant received upon separation was not in error or unjust.
  - b. The Board noted that the applicant was discharged under the provisions of chapter 10 of AR 635-200. His narrative reason for separation was assigned based on his request for voluntary discharge in lieu of trial by court-martial. The Board agreed with the medical reviewer's finding no evidence the applicant had any medical condition prior to his discharge which would have failed the medical retention standards of chapter 3, AR 40-501, and would therefore have been a cause for referral to the Disability Evaluation System. Therefore, the Board determined there is no merit to his request for a medical separation.
  - c. The applicant served a qualifying period of service for award of the Korea Service Medal and this award should be administratively added to his DD Form 214.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
■	■	■	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

1. Regarding the issue being reconsidered (upgrade), except for the correction addressed in Administrative Note(s) below, the evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis to amend the decision of the ABCMR set forth in Docket AR20210010123 on 11 February 2022.

2. Regarding the new issues, the evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.

[REDACTED]

[REDACTED] [REDACTED]

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[REDACTED]

[REDACTED]

I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

ADMINISTRATIVE NOTE(S):

A review of the applicant's service records shows his DD Form 214, item 13 (Decorations, Medals, Badges, Commendations, Citations and Campaign Ribbons Awarded or Authorized) covering the period ending 13 October 1989, should be amended by adding the Korea Defense Service Medal.



REFERENCES:

1. Army Regulation 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The regulation provides that the ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence. It is not an investigative body. The ABCMR may, in its discretion, hold a hearing. Applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires
2. Army Regulation 600-8-22 (Military Awards) provides guidance on individual and unit military awards, decorations, badges, and service medals. The Korea Defense Service Medal is authorized for award to members of the Armed Forces of the United States who have served on active duty in support of the defense of the Republic of Korea. The period of eligibility is 28 July 1954 to a date to be determined by the Secretary of Defense.
3. Army Regulation 635-200 sets forth the basic authority for the separation of enlisted personnel. The version in effect at the time provided that:
  - a. An honorable discharge is a separation with honor and entitles the recipient to benefits provided by law. The honorable characterization is appropriate when the quality of the member's service generally has met the standards of acceptable conduct and performance of duty for Army personnel or is otherwise so meritorious that any other characterization would be clearly inappropriate.
  - b. A general discharge is a separation from the Army under honorable conditions. When authorized, it is issued to a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.
  - c. Chapter 10 provided, in pertinent part, that a member who had committed an offense or offenses for which the authorized punishment included a punitive discharge, could submit a request for discharge for the good of the service in lieu of trial by court-martial. The request could be submitted at any time after charges had been preferred and must have included the individual's admission of guilt. Although an honorable or general discharge was authorized, an UOTHC discharge was normally considered appropriate.
4. The Secretary of Defense directed the Service Discharge Review Boards (DRBs) and Service Boards for Correction of Military/Naval Records (BCM/NRs), on 3 September 2014 [Hagel Memorandum], to carefully consider the revised PTSD criteria, detailed medical considerations, and mitigating factors when taking action on

applications from former service members administratively discharged UOTHC and who have been diagnosed with PTSD by a competent mental health professional representing a civilian healthcare provider in order to determine if it would be appropriate to upgrade the characterization of the applicant's service.

5. The Acting Principle Deputy Under Secretary of Defense (Personnel and Readiness) provided clarifying guidance to Service DRBs and Service BCM/NRs on 24 February 2016 [Carson Memorandum]. The memorandum directed the BCM/NRs to waive the statute of limitations. Fairness and equity demand, in cases of such magnitude that a Veteran's petition receives full and fair review, even if brought outside of the time limit. Similarly, cases considered previously, either by DRBs or BCM/NRs, but without benefit of the application of the Supplemental Guidance, shall be, upon petition, granted de novo review utilizing the Supplemental Guidance

6. The Under Secretary of Defense (Personnel and Readiness) provided clarifying guidance to Service DRBs and Service BCM/NRs on 25 August 2017 [Kurta Memorandum]. The memorandum directed them to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters relating to mental health conditions, including PTSD, traumatic brain injury (TBI), sexual assault, or sexual harassment. Standards for review should rightly consider the unique nature of these cases and afford each veteran a reasonable opportunity for relief even if the sexual assault or sexual harassment was unreported, or the mental health condition was not diagnosed until years later. Boards are to give liberal consideration to Veterans petitioning for discharge relief when the application for relief is based in whole or in part on those conditions or experiences. The guidance further describes evidence sources and criteria and requires Boards to consider the conditions or experiences presented in evidence as potential mitigation for misconduct that led to the discharge.

a. Guidance documents are not limited to UOTHC discharge characterizations but rather apply to any petition seeking discharge relief including requests to change the narrative reason, re-enlistment codes, and upgrades from general to honorable characterizations.

b. An honorable discharge characterization does not require flawless military service. Many veterans are separated with an honorable characterization despite some relatively minor or infrequent misconduct.

c. Liberal consideration does not mandate an upgrade. Relief may be appropriate, however, for minor misconduct commonly associated with mental health conditions, including PTSD; TBI; or behaviors commonly associated with sexual assault or sexual harassment; and some significant misconduct sufficiently justified or outweighed by the facts and circumstances.

7. The Under Secretary of Defense (Personnel and Readiness) issued guidance to Service DRBs and Service BCM/NRs on 25 July 2018 [Wilkie Memorandum], regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. BCM/NRs may grant clemency regardless of the court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds.

a. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. In determining whether to grant relief on the basis of equity, injustice, or clemency grounds, Boards shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment.

b. Changes to the narrative reason for discharge and/or an upgraded character of service granted solely on equity, injustice, or clemency grounds normally should not result in separation pay, retroactive promotions, and payment of past medical expenses or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded service characterization.

9. AR 40-501 (Standards of Medical Fitness) governs medical fitness standards for enlistment; induction; appointment, including officer procurement programs; retention; and separation, including retirement. Once a determination of physical unfitness is made, the VA/DOD jointly rate all disabilities using the Veteran's Administration Schedule for Rating Disabilities (VASRD). Ratings can range from 0 to 100 percent, rising in increments of 10 percent.

8. AR 635-40 (Physical Evaluation for Retention, Retirements, or Separation), in effect at the time, set forth the policies for the disposition of Soldiers found unfit because of physical disability to reasonably perform the duties of his/her office, grade, rank, or rating.

a. The mere presence of a medical impairment does not in and of itself justify a finding of unfitness. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier may reasonably be expected to perform because of his or her office, grade, rank, or rating. The Soldier will not be declared physically unfit for military service because of disabilities known to exist at the time of the Soldier's acceptance for military service that have remained essentially the same in degree since acceptance and have not interfered with the Soldier's performance of effective military service.

b. Disability compensation is not an entitlement acquired by reason of a service-incurred illness or injury; rather, it is provided to Soldiers whose service is interrupted and who can no longer continue to reasonably perform because of a physical disability incurred or aggravated in service.

9. Title 38 USC 1110 (General - Basic Entitlement): For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

10. Title 38 USC 1131 (Peacetime Disability Compensation - Basic Entitlement): For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during other than a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

//NOTHING FOLLOWS//