

IN THE CASE OF: [REDACTED]

BOARD DATE: 7 December 2023

DOCKET NUMBER: AR20230005408

APPLICANT REQUESTS: reconsideration of previous requests that the under other than honorable conditions (UOTHC) character of service of her late husband, a deceased former service member (FSM), be upgraded.

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- Selective Service System - Order to Report for Induction
- Standard Form (SF) 88 (Report of Medical Exam) (Page 1), 22 September 1969
- 1st Air Cavalry Division Chaplains' letter
- DA Form 2349 (Military Pay Voucher)
- Military medical record documents (24 pages)
- Notification of FSM being Dropped from the Rolls
- SF 93 (Report of Medical History)
- SF 88, 4 January 1972
- DA Form 20 (Enlisted Qualification Record) (pages 3 and 4)
- DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge)
- Civilian Medical History and Examination
- Certificate of Death
- Letters from Medical Doctor (two)
- Letters from designated representative, [REDACTED] (five)

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 Numbers AC-87-06524 on 30 November 1988 and AR20070001938 on 22 February 2007.

2. The applicant states the previous requests were to have the FSM's discharge upgraded from UOTHC to fully honorable. This time, she is requesting to have the FSM's discharge upgraded to under honorable conditions (general). The applicant

states the FSM was stricken with malaria while home on leave from Vietnam to attend his grandmother's funeral. He had sores all over his body and his weight dropped down to 97 pounds. Doctors advised the FSM that another case of malaria would kill him. The Army chose to have him return to Vietnam and the applicant elected to go absent without leave several times.

3. The applicant designated Mr. [REDACTED] as a representative allowed to receive and provide communication regarding this application. Mr. [REDACTED] provides five letters which are available in their entirety for the Board's consideration. In his letters he contends:

a. Malaria infection exerts a tremendous impact on the body, which can have long-term health repercussions, ranging from accrued susceptibility to bacterial infection to cognitive impairment. During the Vietnam War, there were 24,606 cases of malaria, an estimated 391,965 sick-days because of malaria, and 46 deaths due to malaria. On 21 January 1977, President Carter granted an unconditional pardon to hundreds of thousands of men who evaded the draft during the Vietnam War. In total, some 100,000 young Americans went abroad in the late 1960s and early 1970s to avoid serving in the war. In 1994, the Department of Veterans Affairs (VA) officially recognized respiratory cancers (including laryngeal cancer, and cancer of the lung, bronchus, and trachea) as a presumptive condition caused by exposure to Agent Orange. The Army might not have known the effects of agent orange, but if they did not they should have known. They were spraying that known carcinogen on their troops. These facts indicate the FSM should have been forgiven a general discharge many years ago. Had he avoided the draft he would have been forgiven many years ago & instead of dying of lung cancer at 49 chances are good that he would still be alive & living with his family.

b. The FSM was drafted in early 1970 and by June 1970 he was in the jungles of Vietnam. In September 1970, the FSM was sent home to attend his grandmother's funeral. During the time the FSM was in country, he was in several firefights and contracted jungle rot, malaria, and post-traumatic stress disorder (PTSD). The FSM was treated for his jungle rot and malaria. My question is how the Army can expect a Soldier to return to combat after suffering as he did. You say that the FSM signed a discharge agreement with the Army and therefore the agreement stands. The agreement the FSM signed must be considered null and void because of his state of mental health. [REDACTED] contends that the FSM was suffering from PTSD when he agreed to the UOTHC discharge. Considering his Vietnam and medical records, how could he not have been suffering from PTSD? The FSM's wife says he spent his life suffering from PTSD. He told her several stories about his multiple stressors. The FSM went AWOL each time he was supposed to return to Vietnam because he was certain he would die if he went back to Vietnam. The FSM spent his life suffering because of his Army service. He died at the age of 49 from cancer caused by being sprayed by agent orange while he was in the jungle in Vietnam. His son died while serving in the Army in Iraq. The Army owes the FSM's wife a lifetime debt.

c. The Army doctors told the FSM if he came down with malaria again he could easily die. VA doctors do not put opinions that favor Veterans in medical records. The FSM went AWOL because he did what he had to do to stay alive. If the Army had done the right thing and not tried to send him back to Vietnam, he would have finished his service and received an honorable discharge. His death at the age of 49 from lung cancer was caused by his exposure to Agent Orange. His death should be considered as evidence. Because of his susceptibility to malaria, an illness that has killed millions, he should not have been sent back to Vietnam. After his service, he got a good job, got married, and raised a family. I doubt he was ever told he could apply for a hardship discharge. The Army also says the FSM did not mention what the doctors said about dying if he caught malaria again even though he traveled to the Pentagon and tried to get someone to listen to him. Army commanders are not known for treating Soldiers that disobey orders justly or with compassion.

d. The United States is a democracy, however in the Armed Forces that democracy does not exist. The company commander controls his company period. Even if a company commander could have allowed the FSM to use his bouts with malaria as reason for not wanting to return to Vietnam, I doubt his superiors would have allowed it. Anyone who has ever been in the service knows this.

e. The Army had control of the FSM and kept him in the Army until he agreed to the discharge condition they set. He did not know of the danger of the chemicals he was sprayed with while in Vietnam. The Army did not know, but they should have. The three months he spent in Vietnam and his exposure to Agent Orange caused his death. Not to consider his death from the cancer he suffered is grossly unfair. The FSM's punishment has ended. His son gave even more when he died in Iraq in 2005. The Army has decided to punish his widow. How can the person responsible for making the decision make it without considering the FSM's suffering and death? How can you not take care of his widow, a Gold Star mother?

4. The FSM underwent a pre-induction medical examination on 22 September 1969. A Selective Service System letter, dated 30 December 1969, shows the applicant was ordered to report for induction into the Armed Forces of the United States on 19 January 1970.

5. A DA Form 20 and DD Form 214 show the FSM was inducted into the Army of the United States for a period of 2 years on 19 January 1970. Upon completion of initial entry training, he was awarded military occupational specialty 11B (Light Weapons Infantryman) and assigned to a unit in Vietnam. He was advanced to the rank/grade of private first class/E-3 on 21 May 1970. He was credited with serving in the Republic of Vietnam from 10 June 1970 to 9 June 1971.

7. Medical documents provided by the applicant show:

a. The FSM sought medical attention while he was home on leave due to a death in his family. On 30 September 1970, the FSM was admitted to the VA Hospital located in [REDACTED]. He reported that since he returned home on 15 September 1970, he did not seek any pills for malaria or get treatment for the sores on his extremities that his company physician had referred to as jungle rot. He reported feeling well until three days prior to his admission when he suddenly developed the onset of chest chills, fever, sweating, headache, light nausea, and anorexia. A blood smear test for malarial parasite was positive, but not definite for the type of malarial parasite. It was noted that he was discharged on 3 October 1970 and transferred to Kenner Army Hospital located at Fort Lee, VA for other administrative reasons.

b. An SF 509 (Doctor's Progress Notes) shows he received his initial dose of Chloroquine (antimalarial medication) at an Army hospital on 2 October 1970.

c. On 18 October 1970, while on convalescent leave, the FSM had a sudden onset of elevated body temperature of 103 and 104 degrees. He sought treatment at the VA Hospital in [REDACTED], because it was the closest hospital to where he was staying. Once stabilized, he was discharged for other administrative reasons and transferred back to the Kenner Army Hospital located at Fort Lee, VA.

d. The FSM's Clinical Record – Narrative Summary shows he was admitted to Kenner Army Hospital on 30 September 1970. His condition continued to improve, and he was granted 2 weeks of convalescent leave beginning 24 November 1970. He had no difficulties while on leave and was seen again on 9 December 1970 and discharged from the hospital.

8. The FSM's DA Form 20 and DD Form 214 show he was reported as AWOL during the following periods:

- from 7 March 1971 to 15 August 1971
- from 16 August 1971 to 17 August 1971
- from 7 September 1971 to 1 January 1972
- from 2 January 1972 to 9 January 1972

9. An SF 93 and SF 88 show the FSM underwent a pre-separation medical examination and was deemed qualified for separation.

10. The FSM's DA Form 20 and DD Form 214 show he was discharged under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel) for the good of the service in lieu of court-martial on 2 February 1972 in the grade E-1. His service was characterized as UOTHC, his separation program number was "246" with reenlistment code "3B." He was credited with completion of 1 year, 2 months, and 24 days of net active service. He was credited with time lost due to AWOL from 7 March

1971 to 15 August 1971, from 16 August 1971 to 17 August 1971, from 7 September 1971 to 1 January 1972, and from 2 January 1972 to 9 January 1972.

11. Army Regulation 635-200 states a Chapter 10 is a voluntary discharge request in-lieu of trial by court martial. In doing so, he would have waived his opportunity to appear before a court-martial and risk a felony conviction. A characterization of UOTHC is authorized and normally considered appropriate.

12. The FSM petitioned the ABCMR for relief. On 30 November 1988, the ABCMR considered his application under procedures established by the Secretary of the Army and denied his request.

13. The applicant petitioned the ABCMR for relief on the FSM's behalf. On 27 February 2007, the applicant was informed that after considering her application under procedures established by the Secretary of the Army, the ABCMR had denied her petition on the FSM's behalf.

14. In addition to the previously discussed evidence, the applicant provides the following documents:

a. A letter sent to the FSM's family from the 1st Air Cavalry Division, Office of the Chaplain upon his arrival in Vietnam.

b. The FSM's DA Form 2349 for the pay period of 1 to 31 July 1970.

c. A letter dated 1 October 1971 that was sent to the FSM's mother to notify her the FSM had been dropped from the rolls as a deserter on 7 September 1971.

d. The FSM's Certificate of Death, which establishes the FSM's widow as a proper applicant.

e. Two letters rendered by Doctor ██████ regarding the FSM on the dates shown:

(1) 13 March 2001 - the FSM was admitted to a hospital on 14 April 2000 with severe right side chest pain due to his extensive underlying lung cancer and pulmonary embolus.

(2) 23 February 2004 – The FSM died of lung cancer in 2000. Before he got sick the FSM advised the doctor that he contracted malaria twice while serving in Vietnam. He said a military physician advised him at the time that if he returned to Vietnam he would never recover from the illness. Apparently, he had a very severe disease and was near death while in the hospital.

15. 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, his previous ABCMR denial (9 October 1991, AC91-05639), 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 widow of the deceased former service member is applying to the ABCMR requesting an upgrade of his 2 February 1972 discharge characterized an under conditions other than honorable. She states:

“Veteran was stricken with malaria while home from Vietnam attending his grandmother's funeral. Sores all over him and he lost weight to 97 lbs. Doctors told him another case of malaria would kill him. Army chose to send him back! John went AWOL [absent without leave] several times.”

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. His DD 214 shows the former Infantryman entered the regular Army on 19 January 1970 and was discharged on 2 February 1972 under the provisions provided in AR 635-200, Personnel Management – Enlisted Personnel. His separation program number of 246 denotes “Discharge for the Good of the Service.”

d. Medical documentation submitted with the application shows the applicant began spiking fevers while stateside for a death in the family and was subsequently admitted to a VA facility for 3 days in October 1970. He was diagnosed with malaria and was to be transferred to an Army Hospital for further care.

e. It appears he was treated in an outpatient setting with oral medications thru 18 October 1970 at which time he was readmitted to the VA facility for 6 days for a “flare-up” of his malaria (falciparum type). He was transferred back to Kenner Army Hospital where he continued treatment with periods of convalescent leave until he was discharged on 9 December 1970.

f. His mother was notified in a 1 October 1971 memorandum that her son had been AWOL since 7 September 1971.

g. Part II of his Personnel Qualification Record shows two periods of AWOL: 7 March thru 15 August 1971 and 7 September 1971 thru 1 January 1972.

h. The applicant completed his pre-separation medical examination on 4 January 1972. Other than this history of malaria, he had no significant medical history or conditions and was determined qualified for separation.

i. The applicant died from non-small cell lung cancer in May 2000 at the age of ■. Several studies have shown higher risks of this and other cancers due to exposure to agent orange.

j. The widow's designated representative states the applicant had PTSD and that his lung cancer was due to his exposure to agent orange.

k. There are no health records in JLV.

Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Claim of PTSD.

(2) Did the condition exist or experience occur during military service? The applicant served as an Infantryman in Vietnam.

(3) Does the condition or experience actually excuse or mitigate the discharge? There was no probative evidence submitted, found in AHLTA or other electronic records, or in JLV (to include VA endorsement), for PTSD or a behavioral health disorder of any kind. However, under liberal consideration policies, the applicant's self-assertion of PTSD is sufficient per se to merit consideration by the board.

l. As there is an association between PTSD and avoidant behaviors, there is a nexus between this condition and his periods of AWOL.

BOARD DISCUSSION:

1. The Board carefully considered the applicant's request, supporting documents, evidence in the records, a medical review, and published Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the provided statements, the FSM's record of service to include deployment, the frequency and nature of the FSM's misconduct, and the reason for the FSM's separation. The Board considered the claim that the FSM had PTSD and the review and conclusions of the ARBA Medical Advisor.

2. A majority of the Board found insufficient evidence of in-service mitigating factors and, while the majority concurred with the conclusion of the medical advising official

regarding there being a nexus between his misconduct and PTSD, the majority found the length and frequency of his periods of AWOL preclude a recommendation for relief in this case. The majority also found the letters of support provided with the application insufficient as a basis for clemency Based on a preponderance of the evidence, the Board determined the character of service the FSM received upon separation was not in error or unjust.

3. The member in the minority found the statements provided by the applicant and the conclusion of the medical advising official support a recommendation for relief. Based on a preponderance of the evidence, the member in the minority determined the FSM's character of service should be changed to under honorable conditions (general).

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:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined that the overall merits of this case are insufficient as a basis to amend the decision of the ABCMR set forth in Docket Numbers AC-87-06524 on 30 November 1988 and AR20070001938 on 22 February 2007.

2/12/2024

X █

CHAIRPERSON

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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.

REFERENCES:

1. Title 10, U.S. Code (USC), Section 1552(b), provides that applications for correction of military records must be filed within three years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the three-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.

2. Title 10, USC, Section 1556, provides the Secretary of the Army shall ensure that an applicant seeking corrective action by ARBA is provided a copy of all correspondence and communications, including summaries of verbal communications, with any agencies or persons external to agency or board, or a member of the staff of the agency or Board, that directly pertains to or has material effect on the applicant's case, except as authorized by statute.

3. 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.

4. Army Regulation 635-200, in effect at the time, set forth the basic authority for the separation of enlisted personnel.

a. Chapter 10 stated a member who committed an offense or offenses for which the authorized punishment included a punitive discharge could, at any time after the charges have been preferred, submit a request for discharge for the good of the service in lieu of trial by court-martial. Although an honorable or general discharge was authorized, a discharge under other than honorable conditions was normally considered appropriate. At the time of the applicant's separation the regulation provided for the issuance of an UOTHC discharge.

b. 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.

c. 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.

d. When a Soldier was to be discharged UO THC, the separation authority would direct an immediate reduction to the lowest enlisted grade.

5. On 25 August 2017, the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to Discharge Review Boards (DRB) and Boards for Correction of Military/Naval Records (BCM/NR) when considering requests by Veterans for modification of their discharges due in whole or in part to: mental health conditions, including post-traumatic stress disorder; traumatic brain injury; sexual assault; or sexual harassment. Boards are to give liberal consideration to Veterans petitioning for discharge relief when the application for relief is based in whole or in part to those conditions or experiences.

6. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military DRBs and BCM/NRs 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 type of court-martial. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to other corrections, including changes in a discharge, which may be warranted based on equity or relief from injustice.

//NOTHING FOLLOWS//