

IN THE CASE OF: [REDACTED]

BOARD DATE: 8 August 2024

DOCKET NUMBER: AR20230005423

APPLICANT REQUESTS:

- to be afforded a personally appearance before the Board
- an upgrade of his under honorable conditions (general) to an honorable discharge
- a change of his narrative reason for separation to Secretarial Authority
- to be afforded a medical evaluation board evaluation
- to be shown to have been medically retired
- receipt of backpay and appropriate promotions based on a medical retirement

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

- DD Form 149 (Application for Correction of Military Record)
- Counsel's Brief
- DD Form 214 (Certificate of Release or Discharge from Active Duty) two copies
- Department of Veterans Affairs (VA) Documents
 - VA Claims Intake Form
 - Privacy Act Request and VA reply
 - VA Rating Decision dated 20 August 2018
 - VA Rating Decision dated 24 August 2018

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.
2. The applicant states he believes the discharge was made in error at the time and remains so. He should have been afforded a medical evaluation board, been medically separated, and receive an active duty retirement.
3. Counsel states that the applicant was unjustly and erroneously separated. He had been seriously injured during military service and should have been medically evaluated

and separated as service connected and unfit for duty. The applicant was wrongfully separated from the military without proper medical disability system processing, resulting in the denial of a medical retirement, temporary disabled retirement, or a retirement and the benefits they confer. The applicant's discharge is inequitable and has served its purpose. The applicant's request is based on three errors:

a. The underlying basis of separation was procedurally defective at the time of the discharge;

b. The adverse action, to include the administrative discharge, was unfair at the time; and

c. The discharge is now inequitable.

4. On the applicant's DD Form 149, he indicates he was or is suffering from mental health issues that were or are contributing and mitigating factors in the circumstances that resulted in his separation. However, the applicant has not provided any evidence to support this contention.

5. The applicant enlisted in the U. S. Army Reserve on 8 March 1978 for 6 years with a 3 year active duty obligation. He entered active duty in the Regular Army on 15 March 1978. The applicant completed training with award of the military occupational specialty (MOS) 11B1P (Infantryman - Parachute qualified).

6. On 2 February 1979 the applicant was placed on a permanent profile, due to post traumatic pain in the right ankle. He was determined to be unfit to perform his duties as an infantryman and it was recommended he be retained into a different MOS.

7. The applicant's record indicates he had lost time from 5 July 1979 through 7 July 1979; however, it is void of any specific documentation of this period of lost time.

8. Court-martial charges were preferred against the applicant on 12 December 1979 for violation of the Uniform Code of Military Justice (UCMJ). The relevant DD Form 458 (Charge Sheet) shows he was charged with one specification of being absent without leave (AWOL) from on or about 11 October 1979 until on or about 2 December 1979.

9. The available record is void of a separation packet containing the specific facts and circumstances surrounding the applicant's discharge processing.

10. The applicant's DD Form 214 shows he was discharged on 18 January 1980, under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted), Chapter 10, with Separation Code of JFS (for the good of the service - in lieu of trial by court-martial). He was discharged in the grade of E-1, and his service was

characterized as under other than honorable conditions. He had 1 year, 8 months, and 8 days of net active service, 43 days in excess leave, with two periods of lost time totaling 56 days.

11. The issuance of a discharge under the provisions of Army Regulation 635-200, Chapter 10, required the applicant to have requested from the Army – voluntarily, willingly, and in writing – discharge in lieu of trial by court-martial. It is presumed that all requirements of law and regulation were met and the rights of the applicant were fully protected throughout the separation process. The applicant has provided no evidence that would indicate the contrary.

12. The applicant was charged due to the commission of an offense punishable under the UCMJ with a punitive discharge. Subsequent to being charged, he consulted with counsel and requested discharge under the provisions of Army Regulation 635-200, Chapter 10. Such discharges are voluntary requests for discharge in lieu of trial by court-martial.

13. The Army Discharge Review Board granted the applicant an upgrade of his characterization of service on 4 August 1982. The available copy of this decision is of very poor quality and vertically unreadable.

14. The VA denied the applicant service connection for the following conditions on 20 August 2018:

- a mental health condition hypertension
- heart condition sleep condition
- bilateral hearing loss neck condition
- right knee condition right ankle condition
- left ankle condition left knee condition
- back condition (also claimed as back injury)
- respiratory condition (also claimed as lung condition)

15. In determining whether to grant relief the Boards for Correction of Military/Naval Records (BCM/NR) can consider the applicant's petition, arguments and assertions, and service record in accordance with the published equity, injustice, or clemency guidance.

16. 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 (EMR – AHLTA and/or MHS Genesis), the VA electronic medical record (JLV), the electronic Physical

Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and/or 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 18 January 1980 discharge characterized as under honorable conditions (general) and referral to the Disability Evaluation System. On his DD Form 149, he had indicated other mental health issues are related to this request. From counsel's brief explaining the applicant's period of absence without leave following a right foot injury:

[Applicant] was scheduled to see an orthopedic doctor, but the doctor was injured on post and [Applicant] was rescheduled. During this time, [Applicant] sought the advice of a Chaplain, regarding the harassment he experienced. The Chaplain advised [Applicant] to go AWOL, then turn himself in after forty days. Several other people in [Applicant] 's company agreed this was a solution for [Applicant].

[Applicant] was assigned to be a hometown recruiter again, and he went AWOL as had been suggested. He turned himself into military police in Salinas.

[Applicant] was asked if he wanted to stay in the military or get out. IF [Applicant] stayed in, he was to be sent back to his company where he experienced the harassment from the E-7. [Applicant] chose to get out of the Army, but his discharge was less than honorable because of his AWOL. [Applicant] suffered deep shame from his AWOL."

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 15 March 1978 and was discharged on 18 January 1980 under the provisions provided in chapter 10 of AR 635-200, Personnel Management – Enlisted Personnel (1 March 1978): Discharge for the Good of the Service – Conduct Triable by Court Martial.

d. The applicant was placed on a duty limiting permanent profile for "Post traumatic pain in right ankle" on 2 February 1979. The profile stated: "No running over 1 mile. No prolonged standing (over 20 minutes). Recommend MOS [military occupational specialty] change." The applicant was an Infantryman (11B) at the time. A Disposition Form shows the applicant was absent without leave from 11 October 1979 thru 3 December 1979.

e. The applicant underwent a pre-separation examination on 4 December 1979. The provider documented a normal examination, listed no defects or diagnoses, and cleared the applicant for separation.

f. Even had the applicant been unable to serve in a new MOS, his misconduct made him ineligible for referral to the DES. Paragraph 1-2c of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (1 October 1970) or (25 February 1975) states:

“A member who is charged with an offense for which he could be dismissed or given a punitive discharge may not be referred for disability processing. However, if the officer exercising appropriate court-martial jurisdiction dismisses the charge or refers it for trial to a court-martial which cannot adjudge such a sentence, the case may be referred for disability processing.”

g. Paragraph 1-2e provides similar guidance:

“No enlisted member may be referred for physical disability processing when action has been or will be taken to separate him for unfitness under chapter 13 or misconduct under chapter 14, AR 635-200, except when the officer exercising general court-martial jurisdiction determines that the disability was the cause or substantial contributing cause of the misconduct, or that circumstances warrant physical disability processing in lieu of administrative processing.”

h. No additional medical documentation was submitted with the application. The applicant’s period of service predates the EMR. JLV shows he has one VA service-connected disability rating of 10% for tinnitus and no diagnosed mental health conditions.

i. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Applicant asserts a mental health condition.

(2) Did the condition exist or experience occur during military service? Applicant asserts mental health condition was present while he was in the Army.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. The applicant has submitted no medical documentation indicating a diagnosis a mental health condition. Review of the EMR and VA medical records indicates that the

applicant has not been diagnosed with either a service connected or nonservice connected BH condition.

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, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant's request, supporting documents, evidence in the record, and published DoD guidance for liberal consideration of discharge upgrade requests.

a. Discharge Upgrade: Deny. Although the complete separation packet is not available for review, other documentary evidence in the service record shows the applicant was charged with commission of offense(s) punishable under the UCMJ with a punitive discharge. After being charged, he presumably consulted with counsel and requested discharge under AR 635-200, Chapter 10. Such discharges are voluntary requests for discharge in lieu of trial by court-martial and carry an under other than honorable conditions discharge. The Board found no error or injustice in his available separation processing. The Board also considered the medical records, any VA documents provided by the applicant and the review and conclusions of the medical reviewing official. The Board agreed with the medical reviewer's determination that there is insufficient evidence to support that the applicant had a condition or experience that mitigates his misconduct. Also, the applicant provided no evidence of post-service achievements or letters of reference of a persuasive nature in support of a clemency determination. Based on a preponderance of available evidence, the Board determined that the character of service the applicant received upon separation was not in error or unjust.

b. Narrative Reason for Separation: Deny. The Board noted that the applicant's narrative reason for separation was assigned based on the fact that after he committed his offense(s), court-martial charges were preferred against him. He chose the voluntary discharge in lieu of trial by a court-martial in accordance with chapter 10 of AR 635-200. The underlying reason for his discharge was his request for voluntary discharge in lieu of trial by court-martial. The only valid narrative reason for separation permitted under chapter 10 of AR 635-200 is "in Lieu of Trial by Court-Martial." The Board found no error or injustice in the reason for separation.

c. Medical Separation: Deny. The Board noted that the applicant submitted no medical documentation indicating a diagnosis a mental health condition. A review of the

medical records and VA medical records indicates that the applicant has not been diagnosed with either a service-connected or non-service connected behavioral health condition. The Board reviewed and concurred with the medical official's finding no probative evidence the applicant had any additional medical condition(s) which would have failed the medical retention standards of chapter 3 of AR 40-501, Standards of Medical Fitness, prior to his discharge. Thus, there was no cause for referral to the Disability Evaluation System (DES). Furthermore, there is no evidence that any additional medical condition prevented the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his discharge. Therefore, the Board determined that neither an increase in his military disability rating nor a referral of his case to the DES is warranted.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

:	:	:	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 the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.

	8/8/2024
X	[REDACTED]
CHAIRPERSON	
[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.

REFERENCES:

1. Title 10, U.S. Code, section 1552(b), provides that applications for correction of military records must be filed within 3 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 3-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 the Army Review Boards Agency (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. Title 10, US Code, Chapter 61 sets forth provisions for retirement or separation due to a physical disability including for personnel receiving medical retirement with a 30% or greater disability rating.
4. 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 ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, 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. Further, paragraph 2-9 states 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.
5. Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation) establishes the Army Physical Disability Evaluation System (PDES) and set forth policies, responsibilities, and procedures that apply in determining whether a Soldier is unfit because of physical disability to reasonably perform the duties of his or her office, grade, rank, or rating. Separation or retirement by reason of disability requires processing through the PDES.
 - a. Disability compensation is not an entitlement acquired by reason of service-incurred illness or injury; rather, it is provided to Soldiers whose service is interrupted, and they can no longer continue to reasonably perform because of a physical disability incurred or aggravated in service.
 - b. Paragraph 4-1, provides that a member who is under investigation for or charged with an offense for which he could be dismissed or given a punitive discharge may not be referred for disability processing. However, if the officer exercising appropriate court-

martial jurisdiction dismisses the charge or refers it for trial to a court-martial which cannot adjudge such a sentence, the case may be referred for disability processing. When forwarded, the records of such a case must contain a copy of the action signed by the court-martial authority who made the decision.

c. When a member is undergoing evaluation because of a referral arising during processing for separation for reasons other than physical disability, his/her continued performance of duty until scheduled separation creates a presumption that the member is fit for duty.

6. Army Regulation 635-200 sets forth the basic authority for the separation of enlisted personnel. The version in effect at that 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. A characterization of under honorable conditions may be issued only when the reason for the Soldier's separation specifically allows such characterization.

c. Chapter 10 of that regulation 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 under other than honorable conditions discharge was normally considered appropriate.

d. Paragraph 5-3 (Secretarial plenary authority) provides that:

(1) Separation under this paragraph is the prerogative of the Secretary of the Army. Secretarial plenary separation authority is exercised sparingly and seldom delegated. Ordinarily, it is used when no other provision of this regulation applies, and early separation is clearly in the best interest of the Army. Separations under this paragraph are effective only if approved in writing by the Secretary of the Army or the Secretary's approved designee as announced in updated memorandums.

(2) Secretarial separation authority is normally exercised on a case-by-case basis but may be used for a specific class or category of Soldiers. When used in the latter circumstance, it is announced by special Headquarter, Department of the Army directive that may, if appropriate, delegate blanket separation authority to field commanders for the class category of Soldiers concerned.

7. Army Regulation 635-5-1 (SPD Codes) provides the specific authorities (regulatory or directive), reasons for separating Soldiers from active duty, and the separation codes to be entered on the DD Form 214. It provides that the separation code "JFS" is the appropriate code to assign to Soldiers separated under the provisions of Army Regulation 635-200, Chapter 10, for the Good of the Service, in lieu of trial by court-martial.

8. The Under Secretary of Defense for Personnel and Readiness issued guidance to DRBs and BCM/NR on 25 July 2018, 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.

//NOTHING FOLLOWS//