

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 19 January 2024

DOCKET NUMBER: AR20230005992

APPLICANT REQUESTS: reconsideration of his request for an upgrade of his under conditions other than honorable discharge.

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Armed Forces of the United States Report or Discharge), for the period ending 24 October 1968

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 AR20110013128 on 15 December 2011.

2. The applicant states, in effect, he loved the service and his Country. Agent Orange changed his life mentally and physically, and he believes one man destroyed his records. Before he dies, he wants closure and someone to respect him. He wants his country to know he is honest and hardworking, but most of all he loves the United States of America.

3. On the applicant's DD Form 149, he notes post-traumatic stress disorder (PTSD), and other mental health are related to his request.

4. A DA Form 20 (Personnel Qualification Record) shows he enlisted in the Regular Army on 18 October 1965 for a 3-year period. He was awarded the military occupational specialty of 62E (Heavy Equipment Operator) and the highest rank he attained was private first class (PFC)/E-3.

5. DA Form 20B (Record of Court-Martial Conviction) shows:

a. He was found guilty before a summary court martial for violation of the Uniform Code of Military Justice (UCMJ) Article 86, for being absent without leave (AWOL) on or

about 8 August until on or about 19 August 1966. His sentence was forfeiture of \$37.00, hard labor for 45 days, and reduction to private/E-1. The sentence was adjudged on 1 September 1966 and approved on 2 September 1966.

b. He was found guilty before a special court martial for violation of the UCMJ Article 86, for being AWOL from on or about 6 September 1966 until on or about 30 January 1967. He was sentenced to confinement at hard labor for 6 months, and forfeiture of \$37.00 pay for 6 months. The sentence was adjudged on 29 March 1967 and approved on 6 April 1967.

c. He was found guilty by a special court martial for violation of the UCMJ Article 86, for being AWOL from on or about 3 June 1967 until on or about 13 July 1967. He was sentenced to confinement at hard labor for 6 months and forfeiture of \$64.00 pay for 6 months. The sentence was adjudged on 28 July 1967 and approved on 1 August 1967.

6. The applicant's commander notified the applicant of his intent to recommend his discharge under the provisions of Army Regulation 635-212 (Personnel Separations - Discharge - Unfitness and Unsuitability) by reason of unfitness. On 9 August 1968, the applicant consulted with legal counsel. He elected to waive consideration and a personal appearance of his case by a board of officers, he waived representation by counsel, and he did not submit statements on his own behalf. He additionally understood he may encounter substantial prejudice in civilian life if he received a general discharge under conditions other than honorable and may be ineligible for many or all benefits as a veteran under both Federal and State laws.

7. On 3 September 1968, the applicant's commander formally recommended his discharge for unfitness under the provisions of Army Regulation 635-212. He stated the applicant's habits and traits of character manifested by repeated commission of petty offenses and AWOL as the basis for taking the separation action.

8. On 8 October 1968, the separation authority approved the recommended discharge for unfitness and further directed the issuance of an DD Form 258A (Undesirable Discharge Certificate) and reduction to the lowest enlisted grade.

9. His DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge) shows he was discharged on 24 October 1968, under the provisions of Army Regulation 635-212, with separation program number 28B, by reason of unfitness and reenlistment code RE-3B. His service was characterized as under conditions other than honorable. He was credited with 1 year and 10 months of net active service with a total of 433 days of lost time.

10. On 1 November 1973, the Army Discharge Review Board (ADRB) reviewed the applicant's request for a discharge upgrade and determined the applicant was properly discharged and his appeal was denied.

11. On 2 December 1977, the ADRB reconsidered the applicant's request for an upgrade of his discharge and concluded the applicant was properly and equitably discharged, once more denying his appeal.

12. On 15 December 2011, the ABCMR considered the applicant's request for an upgrade of his characterization of service, the Board denied his request stating the evidence presented did not demonstrate the existence of a probable error or injustice. The Board determined that the overall merits of the case were insufficient as a basis for correction for his records.

13. The Board should consider the applicant's statement in accordance with the published equity, injustice, or clemency determination guidance.

14. MEDICAL REVIEW:

a. Background: The applicant is requesting reconsideration of his request for an upgrade of his under conditions other than honorable discharge. The applicant asserts PTSD and other mental health as a mitigating factor in his discharge.

b. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Below is a summary of information pertinent to this advisory:

- The applicant enlisted in the Regular Army on 18 October 1965.
- DA Form 20B (Record of Court-Martial Conviction) shows he was found guilty before a summary court martial for being absent without leave (AWOL) on or about 8 August until on or about 19 August 1966.
- He was found guilty before a special court martial for being AWOL from on or about 6 September 1966 until on or about 30 January 1967.
- He was found guilty by a special court martial for being AWOL from on or about 3 June 1967 until on or about 13 July 1967.
- The applicant's commander notified the applicant of his intent to recommend his discharge under AR 635-212 (Personnel Separations - Discharge - Unfitness and Unsuitability) by reason of unfitness. On 3 September 1968, the applicant's commander formally recommended his discharge for unfitness. It was approved.
- He was discharged 24 October 1968 with an UOTHC discharge.
- The ADRB denied his request for upgrade on 1 November 1973 and 2 December 1977.
- On 15 December 2011 the ABCMR denied his request for upgrade.

c. Review of Available Records Including Medical:

The Army Review Boards Agency (ARBA) Behavioral Health (BH) Advisor reviewed this case. Documentation reviewed included the applicant's completed DD Form 149, his ABCMR Record of Proceedings (ROP), his DD Form 214, and documents from his service record and separation. The VA electronic medical record and DoD health record were reviewed through Joint Longitudinal View (JLV), though minimal data was available. Lack of citation or discussion in this section should not be interpreted as lack of consideration.

d. The applicant asserted in his application that PTSD and other mental health mitigate his discharge. He noted that "agent orange changed my life mentally and physically, and one man alone destroyed by records." The applicant provided no further explanation of what mental health concerns or conditions he experienced, and no medical records were provided to substantiate his assertion.

e. The applicant's time in service predates use of electronic health records (EHR) by the Army, hence no EHRs are available for review. His service record and supporting documents did not contain his service treatment records (STR). If a separation medical exam or mental status exam were completed, they were not available in his record. No other records were provided to substantiate his claim.

f. In the applicant's separation records, it is noted that he was discharged under AR 635-212 due to unfitness, and that he was recommended for this discharge due to "habits and traits of character manifested by repeated commission of petty offenses and AWOL." His performance was characterized by intentional shirking of his duties and by behavior rendering him repeatedly subject to punitive action. It was also noted that his behavior was not believed to be due to incapability or unsuitability. No medical records were included to further validate a characterological disorder (now understood as personality disorders).

g. There is no evidence the applicant is service connected. He has not been engaged in any care through the VA and he holds no mental health diagnoses with the VA. However, given the characterization of his discharge, he would not typically be eligible for most VA benefits. Through review of JLV, this applicant did have "Community Health Summaries and Documents" available, though there was no record of a mental health diagnoses, nor mental health encounters. No other medical records were provided.

h. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence, beyond self-report, to support the applicant had a condition or experience at the time of service that mitigated his

discharge. However, per Liberal Consideration guidance, the applicant's contention is sufficient to warrant the Board's consideration.

Kurta Questions:

(1) Does any evidence state that the applicant had a condition or experience that may excuse or mitigate a discharge? Yes. The applicant asserts PTSD and other mental health as a mitigating factor.

(2) Did the condition exist or experience occur during military service? Unclear. The applicant asserted that agent orange changed his life, mentally and physically and he asserts PTSD and other mental health. However, he gives no further information about his asserted conditions.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. The applicant asserts mitigation due to PTSD and other mental health, though gave no further context to his mental health concerns other than agent orange potentially being related. No medical records were available from his period of service. The applicant did not provide any mental health records from his time in service, nor since his discharge, to substantiate his assertions. In addition, there is no evidence the applicant was ever exposed to agent orange, nor is there a presumption of potential exposure given his records do not indicate that he ever served in Vietnam. Of note, going AWOL is an avoidance behavior associated with the natural history and sequelae of PTSD. However, this behavior is not sufficient to establish a history of a condition during active service. That said, the applicant contends he was experiencing PTSD and other mental health, and per Liberal Consideration his contention is sufficient to warrant the board's consideration.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence 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 records, and published DoD guidance on consideration of discharge upgrade requests. The Board considered the frequency and nature of the applicant's misconduct, the reason for separation and his reference to agent orange and PTSD. Documentation available for review does not reveal supporting evidence that the applicant was exposed to agent orange and his application does not reveal any provided on own behalf. His record shows he was discharged due to unfitness in accordance with applicable regulatory guidance after an extended period of being absent without leave. After due

consideration of the applicant's request, the Board determined the evidence presented does not meet the burden of proof in determining the existence of an error or injustice and a recommendation for relief is not warranted.

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 Board determined 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 Army Board for Correction of Military Records (ABCMR) in Docket Number AR20110013128 on 15 December 2011.

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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. Section 1556 of Title 10, U.S. Code, requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) be provided with a copy of any correspondence and communications (including

summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to ABCMR applicants (and/or their counsel) prior to adjudication.

2. Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), then in effect, provided the criteria governing the issuance of honorable, general, and undesirable discharge certificates.

a. Paragraph 1-9d provided that an honorable discharge was a separation with honor and entitled the recipient to benefits provided by law. The honorable characterization was appropriate when the quality of the member's service generally had met the standards of acceptable conduct and performance of duty for Army personnel or was otherwise so meritorious that any other characterization would be clearly inappropriate.

b. Paragraph 1-9e provided that a general discharge was a separation from the Army under honorable conditions. When authorized, it was issued to a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

3. Army Regulation 635-212, then in effect, provided the policy and procedures for administrative separation of enlisted personnel for unfitness and unsuitability. It provided that individuals would be discharged by reason of unfitness when their records were characterized by one or more of the following: frequent incidents of a discreditable nature with civil or military authorities, sexual perversion, drug addiction, an established pattern of shirking, and/or an established pattern showing dishonorable failure to pay just debts. This regulation also prescribed that an undesirable discharge was normally issued.

4. 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. 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.

5. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military DRBs and Service 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.

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, BCM/NRs 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//