

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: ██████████

BOARD DATE: 5 December 2023

DOCKET NUMBER: AR20230006954

APPLICANT REQUESTS: in effect, upgrade of his under other than honorable conditions discharge to general, under honorable conditions or honorable.

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

- DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States) in lieu of DD Form 149 (Application for Correction of Military Record)
- Fax Transmission coversheet, 14 December 2021
- 32 pages of medical progress notes and healthcare records, (Company) primary care, dated between May 2021 and December 2021

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, in effect, he is suffering from post-traumatic stress disorder (PTSD) and he needs medical assistance. [On his DD Form 293, he checked other mental health conditions are related to his request for an upgrade of his discharge].
3. The applicant provided 32 pages of medical treatment and medical history documents for Board consideration.
4. A review of the applicants service records shows:
 - a. On 4 September 1997, he enlisted in the Regular Army for 3 years beginning in pay grade private (PV2)/E-2, at age 19.
 - b. His DA Form 2-1 shows he was reduced from PV2/E-2 to private/E-1. The administrative actions leading to this reduction are not contained in the available records.

c. A DA Form 4187-E shows his status changed from present for duty to absent without leave on 14 October 1998 and from AWOL to dropped from the rolls on 13 November 1998.

d. A DD Form 616 (Report of Return of Absentee) shows he surrendered to military authorities on 10 February 1999 at Fort Bragg and was transferred to Personnel Control Facility, Fort Knox. It further shows the unit from which he was absent was A Company, 1st Battalion, 22nd Infantry Regiment, Fort Hood.

e. On 16 February 1999, a court-martial charge was preferred against him. A DD Form 458 (Charge Sheet), dated 16 February 1999, shows he was charged with one specification of AWOL from his unit, A Company, 1st Battalion, 22nd Infantry Regiment, from on or about 14 October 1998 to 10 February 1999. Note: an erroneous entry on this form showing an AWOL start date of 14 December 1998 is marked out with a pen change of 14 October 1998.

f. After consulting with legal counsel on 16 February 1999, he voluntarily requested discharge in lieu of trial by court-martial, under the provisions of Army Regulation 635-200, chapter 10, in lieu of trial by court-martial. In doing so, he acknowledged that the charges preferred against him under the UCMJ, authorized the imposition of a bad conduct discharge or dishonorable discharge. He further acknowledged:

- he had not been subjected to coercion with respect to his request for discharge
- he had been advised of the implications that were attached to it
- by submitting the request, he was acknowledging he was guilty of the charges against him or of (a) lesser included offenses therein contained which also authorized imposition of a bad conduct or dishonorable discharge
- he could be discharged under other than honorable conditions and he could be ineligible for many or all benefits administered by the Department of Veterans Affairs (VA)
- he could be deprived of many or all Army benefits and he could be ineligible for many or all benefits as a veteran under both Federal and State laws
- he could expect to encounter substantial prejudice in civilian life by reason of an under other than honorable conditions discharge
- there was no automatic upgrading of or automatic review of a less than honorable discharge by any Government agency or the Army Board for the Correction of Military Records and that he must apply to either the Army Discharge Review Board or the Army Board for Correction of Military Records
- An act of consideration by either Board does not imply that his discharge would be upgraded
- he was advised he could submit any statements he desired in his own behalf, and elected not to do so

g. On 12 August 1999, the Commanding Officer, U.S. Army Personnel Control Facility, Headquarters and Law Enforcement Command, Fort Knox, Fort Knox, recommended approval of his Chapter 10 request, with an under other than honorable conditions discharge, and forwarded his request to the approval authority.

h. On 1 September 1999, the separation authority approved his request for discharge, under the provisions of Army Regulation 635-200, chapter 10, in lieu of trial by court-martial. He directed the applicant's discharge with an under other than honorable conditions character of service.

i. On 22 May 2000, he was discharged. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged under the provisions of Army Regulation 635-200, chapter 10, in lieu of trial by court-martial with a characterization of service of under other than honorable conditions. He was credited with completing 2 years, 4 months, and 20 days of net active service, with 119 days of time lost between 14 October 1999 and 9 February 1999. He had 459 days of excess leave between 19 February 1999 and 22 May 2000. He was assigned separation code KFS and the narrative separation listed as "In Lieu of Trial by Court-Martial," with reentry code 4. It also shows he was awarded or authorized the Army Service Ribbon

5. There is no evidence the applicant applied to the Army Discharge Review Board for upgrade of his discharge within its 15-year statute of limitations.

6. In reaching its determination, the Board can consider the applicant's petition and his service record in accordance with the published equity, injustice, or clemency determination guidance.

7. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his under other than honorable conditions (UOTHC) discharge to general or honorable. The applicant asserts PTSD mitigates his discharge, however, selected other mental health condition on his application.

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:

- Applicant enlisted in the RA on 4 September 1997.
- On 16 February 1999, court-martial charges were preferred against him. A DD Form 458 (Charge Sheet), dated 16 February 1999, shows he was charged with one specification of AWOL from his unit, A Company, 1st Battalion, 22nd Infantry Regiment, from on or about 14 October 1998 to 10 February 1999.

- On 22 May 2000, he was discharged. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged under the provisions of Army Regulation 635-200, chapter 10, in lieu of trial by court-martial with a characterization of service of under other than honorable conditions.

c. The Army Review Boards Agency (ARBA) Behavioral Health (BH) Advisor reviewed this case. Documentation reviewed included the applicant's completed DD Form 293, his ABCMR Record of Proceedings (ROP), medical documentation, and documents from his service record and separation packet. The VA electronic medical record and DoD health record were reviewed through Joint Longitudinal View (JLV). Lack of citation or discussion in this section should not be interpreted as lack of consideration.

d. The applicant states he is suffering from post-traumatic stress disorder (PTSD) and needs medical assistance. However, on his application he checked other mental health conditions as related to his request for an upgrade of his discharge and did not indicate PTSD.

e. No active-duty electronic medical records were available for review. Applicant is not service connected, possibly due to the characterization of his discharge, and no VA electronic records were available for review. However, he submitted mental health records from a private provider, Benson Health. The records indicate the applicant was seen on 21 May 2021 and reported ongoing depressed mood for approximately a year related to stressors in his life causing him to feel down. The applicant was diagnosed with Major Depressive Disorder, single episode, moderate. The applicant was treated with medication and his symptoms appeared to resolve by the time he was seen on 31 Aug 2021. The record indicates, at that time, he denied any depressive symptoms, was doing well on his medication, had infrequent symptoms, and denied any identifiable stressors. Overall, the medical documentation provided by the applicant indicates he experienced a situationally based depressive episode that started over two decades post-military service due to psychosocial stressors and resolved within three months with medication.

f. Based on the information available, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support the applicant had a behavioral health diagnosis that mitigates his misconduct. However, per Liberal Consideration guidelines, applicant's self-assertion of PTSD merits consideration by the board.

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 a mitigating condition.

(2) Did the condition exist or experience occur during military service? Yes. The applicant self-asserts PTSD and selected other mental health condition on his application.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. There is insufficient evidence of a mitigating BH condition while in military service. There is no evidence of an in-service BH diagnoses, and the VA has not service-connected the applicant for any BH condition. And while the applicant self-asserted PTSD, the applicant did not submit any medical documentation substantiating the diagnosis and did not endorse it in his application. The medical documentation submitted by the applicant evidences a single depressive episode, over twenty years post-military service and unrelated to his military service, that appeared to quickly resolve with medication and was triggered by current psychosocial stressors.

BOARD DISCUSSION:

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 records, and published DoD guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement and record of service, the frequency and nature of the applicant's misconduct and the reason for separation. 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 are 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 concurred with the medical advisory opinion finding insufficient evidence of in-service mitigating factors to overcome the misconduct. 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 evidence, the Board determined that the character of service the applicant received upon separation was not in error or unjust.

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.

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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, 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. Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), in effect at the time, set policies, standards, and procedures to ensure the readiness and competency of the force while providing for the orderly administrative separation of Soldiers for a variety of reasons.

a. Chapter 3-7 provides:

(1) An honorable discharge is a separation with honor. The honorable characterization is appropriate when the quality of the Soldier'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. Only the honorable characterization may be awarded a Soldier upon completion of his/her period of enlistment or period for which called or ordered to active duty or active duty training or where required under specific reasons for separation unless an entry level status separation (uncharacterized) is warranted.

(2) 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 separation specifically allows such characterization. It will not be issued to Soldiers solely upon separation at expiration of their period of enlistment, military service obligation, or period for which called or ordered to active duty.

b. Chapter 10 provided, that a member who has committed an offense or offenses for which the authorized punishment included a punitive discharge may submit a request for discharge in lieu of trial by court-martial. The request may be submitted at any time after charges have been preferred and must include the individual's admission of guilt. Although an honorable or general discharge is authorized, a discharge under other than honorable conditions is normally considered appropriate.

3. On 3 September 2014 the Secretary of Defense directed the Service Discharge Review Boards (DRBs) and Service Boards for Correction of Military/Naval Records (BCM/NRs) to carefully consider the revised PTSD criteria, detailed medical considerations and mitigating factors when taking action on applications from former service members administratively discharged under other than honorable conditions 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.

4. The acting Under Secretary of Defense for Personnel and Readiness provided clarifying guidance on 25 August 2017, which expanded the 2014 Secretary of Defense memorandum, that directed the BCM/NRs and DRBs to give liberal consideration to veterans looking to upgrade their less-than-honorable discharges by expanding review of discharges involving diagnosed, undiagnosed, or misdiagnosed mental health conditions, including PTSD; traumatic brain injury; or who reported sexual assault or sexual harassment.

5. The Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records on 25 July 2018, regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. Boards for Correction of Military/Naval Records 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.

6. Section 1556 of Title 10, United States 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 Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//