

IN THE CASE OF: [REDACTED]

BOARD DATE: 14 February 2024

DOCKET NUMBER: AR20230007047

APPLICANT REQUESTS:

- an upgrade of his characterization of service from under honorable conditions (general) to honorable.
- a telephonic/video appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Character Letter

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 requests to have his general discharge upgraded to honorable, as it affects his educational benefits in order to pursue a college degree.
 - a. He additionally states that after an injury he began using cannabis to deal with the pain, when pain killers were no longer available to him.
 - b. He made a huge mistake and was demoted from private first class/E-3 to private/E-1 and received 45 days of extra duty and restriction.
 - c. Having been rejected from employment and educational opportunities, he is now seeking a second chance to rebuild his life, attend school, and get a job to provide for his family.
 - d. Due to the cost associated with obtaining copies of medical reports and supporting documents, he is unable to provide the necessary documents to support his request as he does not have the financial means to do so.

3. The applicant provides a character letter from his brother-in-law, which states:

a. He strongly endorses the applicant for disability compensation from the Department of Veterans Affairs (VA). He has known him since 2009 and has seen his physical condition deteriorate over the years due to a back injury he sustained during his time in the Army. He says the applicant used to be a highly active person who pursued a career in the automotive industry, but due to his back injury he saw a steady decline in his physical capabilities.

b. The applicant is a patriotic individual who has always been reluctant to ask for help but has reached a point where he cannot help himself or others due to his disability. He needs the VA's support to manage his condition and maintain a decent standard of living.

4. A review of the applicant's service record shows prior inactive service time was omitted from his DD Form 214 (Certificate of Release or Discharge from Active Duty). The total prior inactive service will be added to his DD Form 214 as an administrative correction and will not be considered by the Board. The Board will consider his request for an upgrade of his characterization of service.

5. A review of the applicant's service record shows:

a. The applicant enlisted in the U.S. Army Reserve (USAR) Delayed Enlistment Program (DEP) on 3 July 2001.

b. On 26 June 2002 he was discharged from the USAR DEP in order to enlist in the Regular Army.

c. On 27 June 2002, he enlisted in the Regular Army for a term of 3 years.

d. DA Form 2624 (Specimen Custody Document – Drug Testing), shows that a specimen was collected for an individual with the applicant's social security number, and shows a positive result for THC. The form was signed on 29 August 2003, by a certifying official.

e. On 13 September 2003, he accepted nonjudicial punishment for the wrongful use of marijuana. His punishment included reduction to private/E-1, forfeiture of \$575 pay per month for 2 months, and extra duty and restriction for 45 days.

f. His DD Form 2808 (Report of Medical Examination) shows on 14 October 2003, he was evaluated by the brigade surgeon and was deemed qualified for service. A summary of defects and diagnosis shows:

- Back pain, improved with PT
- Substance abuse
- Anxiety d/t pending chapter/UCMJ (Uniform Code of Military Justice)
- Smoker

g. His DA Form 3822-R (Report of Mental Status Evaluation) shows on 21 October 2003, the applicant was evaluated by the community mental health services (CMHS), as requested by the command. According to DA Form 3822-R he met retention requirements of Chapter 3, Army Regulation 40-501 (Standards of Medical Fitness), and did not meet the criteria for a medical evaluation board. There was no evidence of an emotional or mental condition of sufficient severity to warrant disposition through medical channels. It also shows:

- normal behavior and fully alert
- fully oriented with depressed mood
- clear thinking process and normal thought content with good memory

h. On 5 November 2003, the applicant's immediate commander notified the applicant of his intent to separate him under the provisions of Chapter 14, AR 635-200 (Active Duty Enlisted Administrative Separations) for commission of a serious offense. The specific reasons for his proposed recommendation were based upon his use of marijuana between on or about 20 July 2003 and 19 August 2003. The applicant acknowledged receipt of the notification of separation action on 5 November 2003.

i. After being given the opportunity to consult with legal counsel, he declined and acknowledged:

- he was not entitled to have his case heard before an administrative separation board because he did not have more than 6 years of service
- the rights available to him and the effect of waiving said rights
- he may encounter substantial prejudice in civilian life if a general discharge under honorable conditions is issued to him
- he may apply to the Army Discharge Review Board or the ABCMR for an upgrade request

j. On 5 November 2003, the immediate commander-initiated separation action against the applicant for commission of a serious offense. He recommended that his period of service be characterized as general, under honorable conditions. The intermediate commander recommended approval on 6 November 2003.

k. In an undated memorandum, consistent with the chain of command recommendations, the separation authority approved the discharge recommendation for immediate separation under the provisions of Chapter 14, AR 635-200, paragraph 14-

12c for commission of a serious offense. He would be issued a general, under honorable conditions discharge.

I. On 17 December 2003, he was discharged from active duty in accordance with chapter 14-12c of AR 635-200 with a general, under honorable conditions characterization of service. His DD Form 214 shows he completed 1 year, 5 months, and 21 days of active service. It also shows he was awarded or authorized:

- National Defense Service Medal
- Army Service Ribbon
- Overseas Service Ribbon
- Marksman Marksmanship Qualification Badge with Rifle Bar
- Marksman Marksmanship Badge with Grenade Bar

6. There is no evidence the applicant has applied to the Army Discharge Review Board for review of his discharge within that board's 15-year statute of limitations.

7. By regulation, the ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that 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.

8. By regulation (AR 635-5), the DD Form 214 is a summary of the Soldier's most recent period of continuous active duty. It provides a brief, clear-cut record of all current active, prior active, and prior inactive duty service at the time of release from active duty, retirement, or discharge. The information entered thereon reflects the conditions as they existed at the time of separation.

9. Also by regulation (AR 635-200), action will be taken to separate a Soldier for misconduct, such as commission of a serious offense, when it is clearly established that despite attempts to rehabilitate or develop him or her as a satisfactory Soldier, further effort is unlikely to succeed.

10. 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.

11. MEDICAL REVIEW:

a. Background: The applicant is requesting that his Under Honorable Conditions (General) discharge be upgraded to Honorable due to experiencing other mental health difficulties including physical pain during his time in service.

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 Regular Army on 27 Jun 2002. His military occupational specialty was Heavy Wheeled Vehicle Mechanic. His awards included the National Defense Service Medal, Army Service Ribbon and Overseas Service Ribbon.
- On 13 Nov, applicant received an NJP Article 15 for use of marijuana between 20 Jul and 19 Aug 2003.
- Applicant's commander-initiated notification (05 Nov 2003) for separation of applicant from the Army.
- The applicant's separation packet is available for review. Additionally, the applicant's service record includes his DD Form 214 (Report of Separation from Active Duty), which shows that the Army discharged the applicant "Under Honorable Conditions" with narrative reason (Misconduct) on 17 Dec 2003.

c. 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), Personal Statement, his DD Form 214, as well as documents from his service record. The VA electronic medical record and DOD health record were reviewed through Joint Longitudinal View (JLV).

d. This applicant asserted that other mental health issues were mitigating factors in his discharge. He also contends his substance abuse was due to the impact of his behavioral health conditions and physical pain. His service record and supporting documents did include a Medical History (14 Oct 2003) in which applicant reported "trouble sleeping because of excessive worries," as well as "feel depressed - going to seek mental help ASAP." A Mental Status Evaluation (21 Oct 2003) indicated, "met retention standards...no evidence emotional or mental conditions," even though mood or affect indicated "depressed" and some signs/symptoms suggestive of an "Adjustment Disorder with Depressed Mood" and a referral to a mental health provider. Based on this documentation in its entirety, there is noteworthy evidence the applicant was diagnosed or treated for potentially mitigating conditions that occurred during his time in service.

e. Per the applicant's VA EHR, he is 60% service connected for medical conditions, 40% for Intervertebral Disc Syndrome and 20%(x2) for Paralysis of Sciatic Nerve. There were a total of six outpatient encounter entries, all focused on his physical injury and chronic pain during his time on active duty. An SF 600 SB Troop Medical Clinic note, Tripler Army Medical Center (19 Jun 2003) indicated, "19 y/o male with low back pain x

one month...pain has failed to improve with profile, NSAID, Flexaril etc. No hx of trauma or sig MOI. Pain is constant and worsens with increased activity. No radicular pain. No pain at night. No fever chills or flank pain. Feels like he needs to "crack his back" but can't."

f. In summary, although applicant is not service connected for any behavioral health conditions, there is some documented evidence he was evaluated and possibly treated for depression and anxiety in concert with chronic pain during his time in service. Consequently, after reviewing the application and all supporting documents, it is the opinion of this Agency Medical Advisor that there is sufficient evidence of mitigating conditions (Unspecified Depressive Disorder and anxiety symptoms) that contributed to the specific misconduct of marijuana abuse. A reasonable degree of documentation was provided by Army medical and behavioral health providers to support the contention that the applicant had more likely than not experienced Unspecified Depressive Disorder and anxiety accompanied by chronic physical pain during his time in service.

Kurta Questions:

(1) Does any evidence state that the applicant had a condition or experience that may excuse or mitigate a discharge. Yes, he more likely than not experienced Unspecified Depressive Disorder and anxiety symptoms contributing to his marijuana abuse while still on active duty that was identified by Army medical and behavioral health providers.

(2) Did the condition exist or experience(s) occur during military service? Yes, there is evidence he initially encountered Unspecified Depressive Disorder and anxiety symptoms in concert with physical pain while on active duty.

(3) Does the condition or experience actually excuse or mitigate the discharge? Yes, the Unspecified Depressive Disorder and anxiety symptoms mitigates for his misconduct of marijuana abuse as Unspecified Depressive Disorder and anxiety symptoms are associated with the emergence or escalation of illicit marijuana abuse, all the more magnified with chronic physical pain.

BOARD DISCUSSION:

1. 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 record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation, and published Department of Defense guidance for liberal and clemency determinations requests for upgrade of his characterization of service. Upon review of the applicant's petition, available military records and the medical review, the Board

considered the advising official finding sufficient evidence of mitigating conditions (Unspecified Depressive Disorder and anxiety symptoms) that contributed to the specific misconduct of marijuana abuse. Additionally, the opine noted a reasonable degree of documentation was provided by Army medical and behavioral health providers to support the contention that the applicant had more likely than not experienced Unspecified Depressive Disorder and anxiety accompanied by chronic physical pain during his time in service.

2. However, notwithstanding the opine, the Board determined there is insufficient evidence of mitigating factors to overcome the misconduct of drug use. The Board determined the applicant's service record exhibits numerous instances of misconduct during his enlistment period for 1 year 5 months and 21 days of net service for this period. Consideration was given by the Board for the applicant character letter of support attest to his character as a patriotic individual, the Board noted the applicant provided no post service accomplishments for the Board to weigh as a clemency determination. The Board noted based on the preponderance of evidence the applicant made a choice to continuously use illicit drugs and it is not the purview of the Board to grant relief based on seeking the use of his educational benefits. Therefore, the Board denied relief.

3. The Board noted based on the preponderance of evidence the applicant made a choice to continuously use illicit drugs and it is not the purview of the Board to grant relief based on seeking the use of his educational benefits. The Board agreed the applicant was discharged for misconduct and was provided an under honorable conditions (general) characterization of service. The Board found the applicant's discharge characterization is warranted as he did not meet the standards of acceptable conduct and performance of duty for Army personnel to receive an Honorable discharge. Therefore, the Board denied relief.

4. Prior to closing the case, the Board did note the analyst of record administrative notes below, and recommended the correction is completed to more accurately depict the military service of the applicant.

5. The applicant's request for a personal appearance hearing was carefully considered. In this case, 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.

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:

Except for the correction addressed in Administrative Note(s) below, the Board found 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.

3/29/2024

X [Redacted Signature]

CHAIRPERSON

[Redacted Name]

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:

A review of the applicant's records shows he has prior inactive service time that is not listed on his DD Form 214 for the period ending 17 December 2003. As a result, amend his DD Form 214 in item 12e (Total Prior Inactive Service) to show: 0000 11 23.

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 (AR) 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 begins its consideration of each case with the presumption of administrative regularity, which is that what the Army did was correct.

3. AR 635-5 (Separation Documents) states the DD Form 214 is a summary of the Soldier's most recent period of continuous active duty. It provides a brief, clear-cut record of all current active, prior active, and prior inactive duty service at the time of release from active duty, retirement, or discharge. The information entered thereon reflects the conditions as they existed at the time of separation.

4. AR 635-200 (Personnel Separations – Enlisted Personnel), in effect at the time, sets forth the basic authority for the separation of enlisted personnel.

a. Paragraph 3-7a (Honorable Discharge) states an honorable discharge is a separation with honor. 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. Chapter 14 of the regulation states action will be taken to separate a Soldier for misconduct when it is clearly established that despite attempts to rehabilitate or develop him or her as a satisfactory Soldier, further effort is unlikely to succeed.

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 DRBs and BCM/NRs when considering requests by Veterans for modification of their discharges due in whole or in part to: mental health conditions, including PTSD, 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, 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.

6. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records (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. 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 based on 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. 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.

7. 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//