

IN THE CASE OF: ██████████

BOARD DATE: 21 February 2024

DOCKET NUMBER: AR20230007465

APPLICANT REQUESTS: Upgrade of his under other than honorable conditions (UOTHC) discharge to honorable. Additionally, he requests personal appearance before the Board.

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

- DD Form 149 (Application for Correction of Military Record)
- Veterans Affairs (VA) appeal decision 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 his fear of death on missile sites caused him to use alcohol and drugs to cope with the fear of dying. The VA states the Army gave him a dishonorable discharge, not an UOTHC. His life is getting better as he is no longer homeless.
3. On his DD Form 149, the applicant notes post-traumatic stress disorder (PTSD) issues are related to his request.
4. On 27 May 1980, the applicant enlisted in the Regular Army. Upon completion of training, he was awarded military occupational specialty 16R (Air Defense Artillery Short Range Gunnery Crewman). The highest grade he attained was E-2.
5. On 23 March 1981, he accepted non-judicial punishment (NJP) under Article 15 of the Uniform Code of Military Justice (UCMJ), for disobeying a lawful order from his superior noncommissioned officer (NCO), on or about 12 March 1981. His punishment included reduction to E-1, forfeiture of \$100.00 per month for one month, and 14 days restriction and extra duty.

6. On 9 June 1981, he accepted NJP under Article 15 of the UCMJ, for being disrespectful in language toward a superior NCO, on or about 5 May 1981. His punishment included forfeiture of \$116.00, and 14 days restriction and extra duty.
7. On 13 July 1981, he accepted NJP under Article 15 of the UCMJ, for disobeying a lawful order from his superior NCO, on or about 18 June 1981; and for failing to go at the time prescribed to his appointed place of duty, on or about 22 June 1981. His punishment included forfeiture of \$200.00 per month for two months, and 20 days restriction and extra duty.
8. On 11 January 1982, the applicant was reported as absent without leave (AWOL) and remained absent until he returned to military authorities on 12 January 1982.
9. On 2 February 1982, he accepted NJP under Article 15 of the UCMJ, for going AWOL. His punishment included 15 days restriction and extra duty.
10. On 13 February 1982, the applicant was reported as AWOL a second time and remained absent until he returned to military authorities on 25 February 1982.
11. On 16 March 1982, the applicant underwent a mental status evaluation. He was psychiatrically cleared to participate in any administrative action deemed appropriate by the command.
12. The applicant's commander notified him on 4 May 1982, that he was initiating actions to separate him under the provisions of Army Regulation 635-200 (Personnel Separation – Enlisted Personnel), paragraph 14-33b(2), for patterns of misconduct – an established pattern for shirking. As the specific reasons, his commander noted that he had never shown any improvement in his military bearing or duty performance, which had been extremely poor, during his time in the unit. He also had a total disregard for the rules and regulations of the Army and the NCO's placed above him.
13. The applicant's commander formally recommended his separation under the provisions of Army Regulation 635-200, paragraph 14-33b(2), for patterns of misconduct – an established pattern for shirking.
14. On 20 May 1982, he accepted NJP under Article 15 of the UCMJ, for disobeying a lawful order from his superior officer, on or about 30 March 1982; and for unlawfully dragging a Soldier on the floor with his hands, on or about 30 March 1982. His punishment included forfeiture of \$250.00 per month for two months, and 45 days restriction and extra duty.
15. By legal review on 24 May 1982, the applicant's Chapter 14, separation action was found to be legally sufficient for further processing.

16. On 7 June 1982, the applicant acknowledged that he had been advised by counsel of the contemplated separation action, the possible effects of the discharge, and the rights available to him. He indicated he understood he could expect to encounter substantial prejudice in civilian life if a general discharge under honorable conditions were issued to him. He acknowledged he understood that, as the result of issuance of a discharge UOTHC, he may be ineligible for many or all benefits as a Veteran under both Federal and State laws. He declined to submit a statement in his own behalf.

17. Consistent with the chain of command recommendations, the separation authority approved the recommended discharge on 30 June 1982, and directed the issuance of a DD Form 794A (UOTHC Discharge Certificate).

18. The applicant was discharged on 12 July 1982. His DD Form 214 (Certificate of Release or Discharge from Active Duty) confirms he was discharged under the provisions of Army Regulation 635-200, paragraph 14-33b(2), for misconduct – an established pattern for shirking. He was discharged in the lowest enlisted grade and his service was characterized as UOTHC. He was assigned Separation Code JKJ and Reentry Code 4. He completed 2 years, 1 month, and 4 days of net active service this period with 12 days of lost time.

19. The applicant petitioned the Army Discharge Review Board requesting upgrade of his under honorable conditions (general) discharge. On 20 November 1997, the Board voted to deny relief and determined his discharge was both proper and equitable.

20. The applicant provides a decision letter from the Board of a Veterans' Appeals in support of his request for reconsideration of his VA compensation application. The Board denied his appeal and determined his misconduct during service was willful and persistent and did not consist of minor offenses offset by otherwise honest, faithful, and meritorious service. Additionally, the Board noted that there had been no removal of any bar to VA benefits via an upgrade to his character of discharge. This letter is provided in its entirety for the Board's review within the supporting documents.

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

22. MEDICAL REVIEW:

a. The applicant requests upgrade of his under other than honorable conditions (UOTHC) discharge to honorable. He contends his misconduct was related to PTSD.

b. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Pertinent to this advisory are the following: 1) The applicant enlisted into the Regular Army on 27 May 1980; 2) As outlined in the ROP the

applicant accepted NJP under provisions of the UCMJ Article 15 on 23 March 1981 (disobeying a NCO), 9 June 1981 (disrespectful in language to an NCO), 13 July 1981 (disobeying an NCO and FTR), and on 2 February 1982 for being AWOL; 3) On 13 February 1982, the applicant was reported as AWOL a second time and remained absent until he returned to military authorities on 25 February 1982; 4) The applicant's commander notified him on 4 May 1982, that he was initiating actions to separate him under the provisions of Army Regulation 635-200 (Personnel Separation – Enlisted Personnel), paragraph 14-33b(2), for patterns of misconduct; 5) On 20 May 1982, he accepted NJP under Article 15 of the UCMJ, for disobeying a lawful order from his superior officer, on or about 30 March 1982; and for unlawfully dragging a Soldier on the floor with his hands, on or about 30 March 1982; 6) Consistent with the chain of command recommendations, the separation authority approved the recommended discharge on 30 June 1982 and the applicant was discharged accordingly on 12 July 1982.

c. The VA electronic medical record (JLV), ROP, and casefiles were reviewed. The military electronic medical record, AHLTA, was not reviewed as it was not in use during the applicant's period of service. Included in the applicant's casefile is a Mental Status Evaluation for Chapter 5 separation, dated 16 March 1982, that indicated that the appellant was stubbornly uncooperative and resistant to change. It noted he had demonstrated chronic poor performance and dawdled. He was recommended for removal. Impression was of no psychiatric disease, and he was psychiatrically cleared for Chapter 5. No other military BH records were provided for review. A review of JLV shows the applicant does not have a SC disability but does have a BH treatment history with the VA. Records show the applicant initial BH-related visit occurred in July 2018 whereby he presented for assistance with homelessness and was entered into the GPD program on 12 July 2018. On 18 December 2018 he was seen for a BH treatment encounter and reported a history of depressive symptoms on and off for most of his life but experienced significant depression beginning in November 2017 subsequent resigning from his warehouse job due to being unable to handle the physical demands. He was reportedly able to survive off his saving until April 2018, after which he reportedly lived on the street. He reported low mood, fatigue, concentration problems, guilt about the death of his mother who died in 1990, and feelings of hopelessness and helplessness that occurs on and off. He also endorsed SI without plan or intent that occurs 2 to 3 times per year. He denied military related trauma but endorsed childhood physical abuse that did not meet criteria for a trauma-related diagnosis. He reported use of alcohol 3 to 4 times per week, consuming 750ml per instance with onset in the military. He reported cutting back since 2005, when he would drink 2 gallons daily. He was diagnosed with MDD moderate recurrent, and Alcohol Use Disorder severe, started on psychotropic medication, and scheduled for outpatient follow-up. On 16 January 2019 the applicant presented for a PCP visit with complaints of right foot and knee pain. During the visit the applicant was noted to have screen positive on a 4-question screener for PTSD. No official assessment of PTSD was rendered; however, the

diagnosis was added to the applicant's problem list. Encounter note dated 28 January 2020 shows the applicant present for an evaluation in order to reside at the US Vets Center. The provider cleared the applicant and noted a diagnosis of PTSD per record, referring to the 16 January 2019. It should be noted the applicant had previously denied any military trauma history and endorsed a history of childhood physical abuse that did not meet threshold for a trauma-related diagnosis. The applicant's remaining BH-related visits were centered on housing and homelessness. Records show the applicant remained engaged in a VA housing/homelessness veteran's related program through April 2023.

d. Also included in the applicant's casefile was a Board of Veteran's Appeal dated 18 April 2023 that found, in part, the misconduct committed by the appellant during service was willful and persistent and did not consist of minor offenses offset by otherwise honest, faithful, and meritorious service, and that the most probative evidence of record does not show the applicant was insane at the time of the offense. The document also shows the applicant submitted a claim for PTSD in November 2018. The outcome of the 2018 evaluation was not outlined in the report, however, a VA Rating Decision Letter, dated 12 June 2023 reflects "Service connection for treatment purposes only under 38 USC chapter 17 for posttraumatic stress disorder (PTSD) is denied because the records show this condition neither occurred in nor was caused by service. Service connection may be granted for a disability which began in military service or was caused by some event or experience in service. We did not find a link between your medical condition and an event or treatment from your military service. Your service treatment records do not contain complaints, treatment, or diagnosis for this condition. There is no evidence that the condition permanently worsened as a result of service".

e. The applicant requests upgrade of his under other than honorable conditions (UOTHC) discharge to honorable. He contends his misconduct was related to PTSD. A review of the records was avoid of any BH diagnosis or treatment history during service. Post service records show the applicant diagnosed with MDD not associated with military service and although there is a diagnosis of PTSD in the applicant VA records, A VA Decision Rating Letter, dated 12 June 2023 reflects the applicant diagnosis was not related to military service and not exacerbated by military service; the Initial PTSD DBQ was not available for review by this advisor. In absence of documentation supporting the applicant met criteria for PTSD during service, there is insufficient evidence to establish his misconduct was related to or mitigated by PTSD and insufficient evidence to recommend an upgrade based on medical mitigation.

f. Based on the available information, it is the opinion of the Agency BH Advisor that there is insufficient evidence that the applicant had an experience or condition during his time in service that mitigated his misconduct. However, the applicant contends his misconduct was related to PTSD, and per liberal guidance, his 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 contends his misconduct was related to PTSD.

(2) Did the condition exist or experience occur during military service? Yes.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. A review of the records was void of any BH diagnosis or treatment history during service. Post service records show the applicant diagnosed with MDD not associated with military service and although there is a diagnosis of PTSD in the applicant VA records, A VA Decision Rating Letter, dated 12 June 2023 reflects the applicant diagnosis was not related to military service and not exacerbated by military service; the Initial PTSD DBQ was not available for review by this advisor. In absence of documentation supporting the applicant met criteria for PTSD during service, there is insufficient evidence to establish his misconduct was related to or mitigated by PTSD and insufficient evidence to recommend an upgrade based on medical mitigation.

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 concurred with the advising official finding insufficient evidence that the applicant had an experience or condition during his time in service that mitigated his misconduct. The Board noted the opine found the applicant's record is absent documentation supporting he met criteria for PTSD during service. Additionally, the Board agreed with the opine that there is insufficient evidence to establish his misconduct was related to or mitigated by PTSD and insufficient evidence to recommend an upgrade based on medical mitigation.

2. The applicant did not provide post service achievements or character letters of support attesting to his honorable conduct for the Board to weigh for clemency. The Board determined there is insufficient evidence on in-service mitigating factors to overcome the misconduct of unlawfully dragging a Soldier on the floor and disobeying a lawful order from his superior officer. The Board found the applicant has not demonstrated by a preponderance of evidence an error or injustice warranting the

requested relief, specifically an upgrade of the under other than honorable conditions (UOTHC) discharge to a honorable discharge. Therefore, the Board denied relief.

3.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:

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.

3/4/2024

X █

CHAIRPERSON

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. Section 1556 of Title 10, U.S. Code, requires the Secretary of the Army to ensure that an applicant seeking corrective action by the 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.

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.

a. Paragraph 2-9 states 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.

b. 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.

4. Army Regulation 635-200 sets forth the basic authority for the separation of enlisted personnel. The version in effect at the 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.

c. Chapter 14, paragraph 14-33b(2) provides for the separation of Soldiers when they have patterns of misconduct – an established pattern for shirking.

5. The Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Navy Records (BCM/NR), on 3 September 2014, 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.

6. The Under Secretary of Defense for Personnel and Readiness provided clarifying guidance to Service DRBs and Service BCM/NRs on 25 August 2017. The memorandum directed them to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters relating to mental health conditions, including PTSD, 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 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.

7. 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.

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//