

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 9 February 2024

DOCKET NUMBER: AR20230007772

APPLICANT REQUESTS: reconsideration of his previous request for upgrade of his under other than honorable conditions (UOTHC) discharge to under honorable conditions (General).

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- Request for Reconsideration, dated 13 April 2023
- Military medical record extracts (4 pages)
- Department of Veterans Affairs (VA) Form 21-0781a (Statement in Support of Claim for Service Connection for Post-Traumatic Stress Disorder (PTSD) Secondary to Personal Assault)
- VA Rating Decision

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 AR20060017756 on 17 July 2007 and in Docket Number AR20190002063 on 16 July 2019.

2. The applicant states at the time of his previous request, he had not applied for service connection from the VA. However, he was recently awarded service connection for PTSD, and he firmly believes his PTSD contributed to the poor decisions he made that ultimately led to his discharge from the Army.

a. While he was stationed in Germany, he was attacked and severely beaten by several guys, one of whom had a bat. He was able to back up into the corner of a German man's house and he covered his face with his arms. The guy with the bat struck the right side of his face and right leg. The owner of the house came out and they ran away. He was treated at the hospital for a concussion, a cut on his head, and a cut on his leg. His head injury required 18 stitches and his leg injury required 12 stitches.

b. This incident caused his Army career to take a turn for the worse. He was already dealing with issues with his wife who was not making good decisions about their

children. He was sending most of his money to her for their care and did not even know where they were most of the time due to her constantly moving from place to place. Obviously, his decision to sell hashish was foolish; however, he firmly believes he would not have made such a decision had he been in a better mental state. He has dealt with the anxiety and depression caused by the assault ever since.

3. The applicant's complete military service record is not available for review. This case is being considered based upon documents in the available record and those provided by the applicant.
4. The applicant enlisted in the Regular Army on 20 May 1976.
5. The applicant's duty status was reported as Absent Without Leave (AWOL) from 7 November 1977 to 11 November 1977, a period of 5 days.
6. He was assigned to a unit in Germany on or about 5 July 1978.
7. A DA Form 2800 (Criminal Investigation Division (CID) Report of Investigation (ROI)), dated 17 October 1979, shows the applicant was apprehended by military authorities and charged with Wrongful Transfer and Possession of a Controlled Substance (Marihuana); and Attempted Wrongful Sale of a Controlled Substance (Marihuana).
8. Court-martial charges were preferred against the applicant. The relevant DD Form 458 (Charge Sheet) and his subsequent voluntary request for administrative discharge under the provisions of Army Regulation (AR) 635-200 (Personnel Separations - Enlisted Personnel), Chapter 10, for the good of the service in lieu of trial by court-martial are not available for review. However, the Special Agent in Charge of the Department of the Army, Mainz Resident Agency, Second Region, U.S. Army CID Command (USACIDC), Europe, rendered a memorandum, dated 10 March 1980, wherein he informed the Director, USACIDC Crime Records Center, Baltimore, MD, that the applicant was administratively given a Chapter 10 discharge, under the provisions of AR 635-200.
9. The applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged in the grade of E-1 on 22 January 1980, for conduct triable by court-martial, under the provisions of AR 635-200, Chapter 10. His service was characterized as UOTHC. He was issued Separation Code "JFS", and Reenlistment Codes "3, 3b." He was credited with complying 3 years, 7 months, and 28 days of active service. He had time lost from 7 November 1977 to 11 November 1977.
10. AR 635-200 states a Chapter 10 is a voluntary discharge request in-lieu of trial by court-martial. In doing so, he would have waived his opportunity to appear before a

court-martial and risk a felony conviction. A characterization of UOTHC is authorized and normally considered appropriate.

11. The applicant petitioned the Army Discharge Review Board (ADRB) for relief. On 19 July 1982, the applicant was informed that after careful consideration, the ADRB had determined he was properly and equitably discharged and denied his request.

12. The applicant petitioned the ABCMR for relief. On 23 July 2007, the applicant was informed the Board had considered his application under procedures established by the Secretary of the Army and had denied his request for relief.

13. The applicant petitioned the ABCMR for relief. On 16 July 2019, his case was reconsidered by the Board and denied.

14. In addition to the previously discussed evidence, the applicant provides the following documents which are available in their entirety for the Board's consideration:

a. Four Standard Forms 600 (Chronological Record of Medical Care) extracted from his military medical record which show, in part, he was transported by ambulance to a hospital on 8 October 1978 and claimed to have been assaulted by an unknown number of military personnel. His wounds were cleaned and treated that day and he had several follow-up appointments for evaluation and treatment.

b. A VA Form 21-0781a, dated 7 July 2022, shows the applicant submitted a claim for service connection for PTSD secondary to personal assault in Germany while serving in the Army.

c. A VA Rating Decision shows the applicant was granted service connection for treatment purposes only for PTSD. He was denied payment of benefits due to the characterization of his discharge being considered dishonorable.

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

MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his under other than honorable conditions (UOTHC) discharge. He contends he had a mental health condition that mitigated his misconduct, 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 in the Regular Army on 20 May 1976; 3) On 17 October 1979, the applicant was charged with the Wrongful Transfer and Possession of a Controlled Substance and Attempted Wrongful Sale of a Controlled Substance; 4) Court-martial charges were preferred against the applicant. The relevant DD Form 458 (Charge Sheet) and his subsequent voluntary request for administrative discharge under the provisions of Army Regulation 635-200 (Personnel Separations - Enlisted Personnel), Chapter 10, for the good of the service in lieu of trial by court-martial were not available for review; 5) The applicant was discharged on 22 January 1980, for conduct triable by court-martial, Chapter 10. His service was characterized as UOTHC.

c. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's military service records. The VA's Joint Legacy Viewer (JLV) was also examined. In addition, the applicant provided hardcopy military and VA medical documentation for review.

d. On his application, the applicant contends PTSD was a contributing and mitigating factor in the circumstances that resulted in his separation. There is insufficient evidence the applicant ever reported or was diagnosed with a mental health condition while on active service. A review of JLV provided evidence the applicant has been diagnosed with PTSD related to his report of being assaulted during his military service. He is currently engaged in behavioral health care at the VA for this condition and other physical concerns. The applicant has not been awarded any service-connected disability for these conditions, but he has been provided care for his service-connected conditions.

e. Based on the available information, it is the opinion of the Agency BH Advisor that there is insufficient evidence to support the applicant had condition or experience that mitigated his misconduct.

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 has been diagnosed with service-connected PTSD by the VA.

(2) Did the condition exist, or experience occur during military service? Yes. The applicant contends he was experiencing mental health conditions while on active service, and he has been diagnosed with service-connected PTSD by the VA.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. There was sufficient evidence the applicant has been diagnosed with service-connected PTSD by the VA, which resulted from a physical assault that occurred on active service. However, there is no nexus between the applicant's PTSD and his misconduct of

transfer and attempted sale of a controlled substance given that: 1) transfer and attempted sale of a controlled substance are not part of the natural history or sequelae of PTSD; 2) Also PTSD does not affect one's ability to distinguish right from wrong and act in accordance with the right. However, the applicant contends he was experiencing a mental health condition or an experience that mitigated his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

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 concurred with the medical advisor's review there is insufficient evidence to support the applicant had a condition or experience that mitigated his misconduct. The Board determined the characterization of service the applicant received upon separation was not in error or unjust.

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 to amend the decision of the ABCMR set forth in Docket Number AR20190002063 on 16 July 2019.



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 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.

2. Army Regulation 635-200, in effect at the time, set forth the basic authority for the separation of enlisted personnel.

a. Chapter 10 stated a member who committed an offense or offenses for which the authorized punishment included a punitive discharge could, at any time after the charges have been preferred, submit a request for discharge for the good of the service in lieu of trial by court-martial. Although an honorable or general discharge was authorized, a discharge under other than honorable conditions was normally considered appropriate. At the time of the applicant's separation the regulation provided for the issuance of an UOTHC discharge.

b. 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.

c. 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.

d. When a Soldier was to be discharged UOTHC, the separation authority would direct an immediate reduction to the lowest enlisted grade.

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