

IN THE CASE OF: [REDACTED]

BOARD DATE: 28 March 2024

DOCKET NUMBER: AR20230008030

APPLICANT REQUESTS:

- upgrade of his under honorable conditions (general) discharge
- change of his narrative reason for separation to medical

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

- DD Form 293 (Application for the Review of Discharge)
- Self-authored letter
- Veterans Affairs (VA) Form 21-2680 (Examination for Housebound Status or Permanent Need for Regular Aid and Attendance)
- Medical progress notes
- DD Form 214 (Armed Forces of the U.S. Report of Transfer or Discharge)

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:

a. He always wanted to be a [REDACTED] Trooper, so he joined the Army. All of his friends were getting drafted, so he left home. Hopefully upon return, he could get a job as a State Trooper after being a military policeman (MP).

b. After graduating basic training, he was told he was too short to be an MP and he had to change his military occupational specialty (MOS). He went airborne and was sent to Fort Benning, GA, for jump school. After the third week, he received a phone call that his nephew was hospitalized; he had been run over by a car. He was given permission to go see his nephew and was told to return by Monday. He missed his return flight and was given an Article 15. Upon his late return, he was placed in a holding company to await future orders.

c. He had an incident at the mess hall which led to him being assaulted in the barracks by 8-10 Soldiers. He thought they were going to kill him. He talked to his immediate leadership who said he would get the captain to sign his discharge paperwork so he could go home. He was told he could keep his benefits and he would get an honorable discharge in six years, so he agreed. For the next two weeks, he lived in pain and fear. He has been having bad headaches for the past 50 years. He has had thoughts of suicide; it has been hell.

3. On 23 September 1971, the applicant enlisted in the Regular Army for two years. His record shows he was not awarded a MOS.

4. On 5 December 1971, the applicant accepted non-judicial punishment (NJP) under Article 15 of the Uniform Code of Military Justice, for absenting himself from his unit from on or about 4 December 1971, until on or about 5 December 1971. His punishment included forfeiture of \$35.00 pay for one month, and five days extra duty.

5. On 27 January 1972, the applicant underwent a mental status evaluation. He was psychiatrically cleared to participate in any administrative action deemed appropriate by the command. The examining psychiatrist noted he lacked motivation for serving in the military and expressed a desire to be discharged. He was recommended for expeditious discharge and diagnosed with:

- character & behavior: Inadequate Personality
- predisposition: Marked
- precipitating stress: Moderate
- impairment: Moderate

6. On 3 February 1972, the applicant's commander notified him of his intent to initiate separation actions against him under the provisions of Army Regulation 635-212 (Personnel Separations – Discharge – Unfitness and Unsuitability), by reason of unsuitability.

7. On 22 February 1972, the applicant consulted with legal counsel and affirmed he had been advised of the basis for the contemplated separation action. Following his consultation, he waived his right to personally appear before, and to have his case considered by a board of officers. He declined to submit a statement in his own behalf and waived his right to further representation by military counsel. He acknowledged he could expect to encounter substantial prejudice in civilian life, if given either a general discharge (under honorable conditions) or an undesirable discharge.

8. On 25 February 1972, the applicant's commander formally recommended the applicant's discharge, under the provisions of Army Regulation 635-212, for unsuitability with issuance of a General Discharge Certificate. As the specific reasons, the

commander cited unsuitability, character, and behavior disorder. Additionally, the commander provided a request for waiver, dated 24 February 1972, stating the applicant had received three NJPs for AWOL and misconduct. He strongly felt that counseling or transferring the applicant to another unit would not be the problem.

9. Consistent with the chain of command's recommendations, the separation authority approved the recommended discharge on 1 March 1972, and directed the issuance of a DD Form 257A (General Discharge Certificate).

10. The applicant was discharged on 8 March 1972. He was credited with 5 months, and 15 days of net active service this period with one day of lost time. His DD Form 214 contains the following entries in:

- Item 11c (Reason and Authority) – Army Regulation 635-212, Separation Program Number 264 (unsuitability, character and behavioral disorders)
- Item 13a (Character of Service) – Under Honorable Conditions (General)

11. The applicant provides the following (provided in entirety for the Board):

a. VA form that shows a family has requested special monthly compensation on behalf of the applicant due to a service-related disability and required aid and attendance of another person to perform personal functions.

b. Medical progress notes that show the applicant has received treatment for various injuries and illnesses to include cluster headaches.

12. 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.

13. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his under honorable conditions (general) characterization of service and a change of his narrative reason for separation to medical.

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 23 September 1971.
- On 5 December 1971, the applicant accepted non-judicial punishment (NJP) under Article 15 of the Uniform Code of Military Justice, for absenting himself

from his unit from on or about 4 December 1971, until on or about 5 December 1971.

- On 25 February 1972, the applicant's commander formally recommended the applicant's discharge, under the provisions of Army Regulation 635-212, for unsuitability with issuance of a General Discharge Certificate. As the specific reasons, the commander cited unsuitability, character, and behavior disorder. Additionally, the commander provided a request for waiver, dated 24 February 1972, stating the applicant had received three NJPs for AWOL and misconduct. He strongly felt that counseling or transferring the applicant to another unit would not solve the problem.
- Applicant was discharged on 8 March 1972, under the provisions of Army Regulation (AR) 635-212. His DD Form 214 (Certificate of Release or Discharge from Active Duty) confirms his service was characterized as Under Honorable Conditions (General), with separation program number 264 and reentry code 3, 3B.

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 293, DD Form 214, ABCMR Record of Proceedings (ROP), self-authored statement, and documents from his service record and separation. 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. The applicant states he always wanted to be [REDACTED] Trooper, so he joined the Army. All of his friends were getting drafted, so he left home. Hoping upon return, he could get a job as a State Trooper after being a military policeman (MP). After graduating basic training, he was told he was too short to be an MP and he had to change his military occupational specialty (MOS). He went airborne and was sent to Fort Benning, GA, for jump school. After the third week, he received a phone call that his nephew was hospitalized, he had been run over by a car. He was given permission to go see his nephew and was told to return by Monday. He missed his return flight and was given an Article 15. Upon his late return, he was placed in a holding company to await future orders. He had an incident at the mess hall which led to him being assaulted in the barracks by 8-10 Soldiers. He thought they were going to kill him. He talked to his immediate leadership who said he would get the captain to sign his discharge paperwork, so he could go home. He was told he could keep his benefits and he would get an honorable discharge in six years, so he agreed. For the next two weeks, he lived in pain and fear. He has been having bad headaches for the past 50 years. He has had thoughts of suicide; it has been hell.

d. Due to the period of service, no active-duty electronic medical records were available for review. However, the applicant submitted hardcopy medical documentation

from his time in service. A mental status evaluation dated 27 January 1972 indicates the applicant had been evaluated previously related to his three Article 15's. The clinician noted the applicant's characterological deficits and difficulty with authority and structure which predated military service. In addition, it was noted the applicant lacked motivation for serving in the military and had expressed a desire to be discharged. The applicant was psychiatrically cleared to participate in any administrative action deemed appropriate by the command and was recommended for expeditious discharge. In addition, the applicant participated in a medical examination, dated 3 February 1972, for separation that indicates the applicant reported having headaches related to sinusitis not related to any injury, fight, or assault.

e. The VA electronic medical records available for review show the applicant is not service connected and has not participated in any behavioral health services. The applicant initiated services with the VA in October 2014, over forty year post-military service. The record evidences no BH conditions and indicates he has sought medical care for conditions typically related to aging including: vascular disease, hypertension, kidney disease, headaches without a clear etiology, sciatica, hearing loss, and erectile dysfunction.

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 condition that mitigates his misconduct. In addition, there is insufficient evidence to support a referral to the IDES process at this time since the applicant has not been treated and is not service connected for any BH condition. Even if the applicant had a service connection based on a behavioral health diagnosis, VA examinations are based on different standards and parameters; they do not address whether a medical condition met or failed Army retention criteria or if it was a ratable condition during the period of service. Therefore, a VA disability rating would not imply failure to meet Army retention standards at the time of service. Even if the applicant had received a subsequent diagnosis through the VA, it would not be indicative of an injustice at the time of service. Based on the documentation available for review, there is no indication that an omission or error occurred that would warrant a referral to the IDES process. In summary, his separation process appears proper, equitable and free of error, and insufficient new evidence has been provided to determine otherwise.

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 self-asserts a mitigating condition.

(2) Did the condition exist or experience occur during military service? No. the applicant did not submit any medical documentation substantiating any BH condition.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. The applicant provides no medical documentation substantiating any BH diagnosis or condition. There is no evidence of any in-service BH diagnoses, and the VA has not service-connected the applicant for any BH condition. And while the applicant reports headaches related to an alleged fight while in service, there is no medical documentation indicating his headaches are as a result of injury. In fact, the discharge physical indicates the applicant reported headaches due to sinusitis.

BOARD DISCUSSION:

The Board carefully considered the applicant's request, supporting documents, evidence in the records, a medical review, and published Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement, his record of service, the frequency and nature of his misconduct and the reason for his separation. The Board considered the applicant's BH claim and the review and conclusions of the ARBA BH Advisor. The applicant provided no evidence of post-service achievements or letters of reference in support of a clemency determination. The Board found insufficient evidence of in-service mitigating factors and concurred with the conclusion of the medical advising official regarding his misconduct not being mitigated by a BH condition. Based on a preponderance of the evidence, the Board determined the character of service the applicant received upon separation and the reason for his separation were 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.

7/24/2024

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 1201, Title 10, U.S. Code, provides for the physical disability retirement of a member who has at least 20 years of service or a disability rating of at least 30 percent.
3. Section 1203, Title 10, U.S. Code, provides for the physical disability separation of a member who has less than 20 years of service and a disability rating at less than 30 percent.
4. Section 1556 of Title 10, U.S. Code, requires the Secretary of the Army to ensure that an applicant seeking corrective action by 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.
5. Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation) establishes the Physical Disability Evaluation System (PDES) and sets forth policies, responsibilities, and procedures that apply in determining whether a Soldier is

unfit because of physical disability to reasonably perform the duties of his or her office, grade, rank, or rating. It provides for a medical evaluation board that is convened to document a Soldier's medical status and duty limitations insofar as duty is affected by the Soldier's status. A decision is made as to the Soldier's medical qualifications for retention based on the criteria in Army Regulation 40-501 (Standards of Medical Fitness), Chapter 3. Disability compensation is not an entitlement acquired by reason of service-incurred illness or injury; rather, it is provided to Soldiers whose service is interrupted and who can no longer continue to reasonably perform because of a physical disability incurred or aggravated in service.

a. Paragraph 2-1 provides that the mere presence of impairment does not of itself justify a finding of unfitness because of physical disability. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the member reasonably may be expected to perform because of his or her office, rank, grade, or rating. The Army must find that a service member is physically unfit to reasonably perform his or her duties and assign an appropriate disability rating before he or she can be medically retired or separated.

b. Paragraph 2-2b (1) provides that when a member is being processed for separation for reasons other than physical disability (e.g., retirement, resignation, reduction in force, relief from active duty, administrative separation, discharge, etc.), his or her continued performance of duty (until he or she is referred to the PDES for evaluation for separation for reasons indicated above) creates a presumption that the member is fit for duty. Except for a member who was previously found unfit and retained in a limited assignment duty status in accordance with chapter 6 of this regulation, such a member should not be referred to the PDES unless his or her physical defects raise substantial doubt that he or she is fit to continue to perform the duties of his or her office, grade, rank, or rating.

c. Paragraph 2-2b (2) provides that when a member is being processed for separation for reasons other than physical disability, the presumption of fitness may be overcome if the evidence establishes that the member, in fact, was physically unable to adequately perform the duties of his or her office, grade, rank, or rating even though he or she was improperly retained in that office, grade, rank, or rating for a period of time and/or acute, grave illness or injury or other deterioration of physical condition that occurred immediately prior to or coincidentally with the member's separation for reasons other than physical disability rendered him or her unfit for further duty.

6. 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.

7. 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.

8. The Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Naval Records (BCM/NR), on 3 September 2014, to carefully consider the revised post-traumatic stress disorder (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.

9. 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.

10. 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//