

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 16 April 2024

DOCKET NUMBER: AR20230008440

APPLICANT REQUESTS: reconsideration of his previous request for upgrade of his bad conduct discharge (BCD). He also requests a personal appearance before the Board.

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Certificate of Release or Discharge from Active Duty), ending 7 February 2003
- Service Treatment Record (254 pages), 22 August 1997 to 27 November 2001

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 AR20220004119 on 7 November 2022.
2. As a new argument, the applicant states his discharge resulted in his mother's early death. He was robbed of time with his mother and deserves justice. He further states, he got hurt in-service. The applicant notes other mental health and sexual assault/harassment as conditions related to his request.
3. The applicant enlisted in the Regular Army on 31 December 1997 for a 4-year period. Upon completion of initial entry training, he was awarded military occupational specialty 11B (Infantryman). The highest rank he attained was private first class/E-3.
4. General Court-Martial Order Number 17, issued by Headquarters, 101st Airborne Division (Air Assault), Fort Campbell, KY, on 7 June 2001, shows:
 - a. The applicant was found guilty of one specification of committing sodomy with Private J.J., by force and without consent, on or about 7 November 1998, and one specification of committing an indecent assault upon Specialist J.S.F., a person not his spouse, on or about 17 August 2000.

b. The court sentenced him to reduction to private/E-1, forfeiture of all pay and allowances, confinement for 15 months, and separation from service with a BCD. The sentence was adjudged on 3 April 2001.

c. On 7 June 2001, the convening authority approved the sentence, and except for the portion extending to the BCD, ordered the sentence executed. The record was forwarded for appellate review; however, the appellate review is not available.

5. General Court-Martial Order Number 281, issued by Headquarters, U.S. Field Artillery Center, Fort Sill, OK on 14 November 2002, shows the sentence was finally affirmed, the provisions of Article 71(c) had been complied with, and the discharge was ordered to be duly executed.

6. Accordingly, the applicant was discharged on 7 February 2003, under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), Chapter 3, as a result of court-martial, in the rank of private/E-1. His service was characterized as bad conduct, with separation code JJD and reentry code RE-4. His DD Form 214 shows he was credited with 5 years, 1 month, and 6 days of net active service, with one day of lost time. He was awarded or authorized the National Defense Service Medal, Army Service Ribbon, and Air Assault Badge.

7. The ABCMR reviewed the applicant's petition for an upgrade of his discharge on 7 November 2022. After careful consideration, the Board found insufficient evidence of in-service mitigating factors for the misconduct to weigh a clemency determination. The Board denied the applicant's request for relief.

8. On 7 November 2023, the Army Review Boards Agency (ARBA), Case Management Division (CMD) requested a copy of any Redacted U.S. Army Criminal Investigation Division (CID) reports for sexual assault/harassment and Military Police Reports, which pertained to the applicant. CID responded on 14 November 2023, providing the following:

a. CID Report of Investigation 00836-1998-CID033-090906, dated 12 March 1999, shows the applicant was the subject of an investigation which established probable cause to believe [the applicant] committed the offense of forcible sodomy (oral), on or about 7 November 1998.

b. CID Report of Investigation 0637-00-CID033-52873-6C1, dated 12 October 2000, shows the applicant was the subject of an investigation which established probable cause to believe [the applicant] committed the offense of indecent assault, on or about 17 August 2000.

9. The ARBA, CMD, sent the applicant a letter on 8 November 2023, requesting additional medical documentation to support his issues. In response, the applicant provided his Service Treatment Record (254 pages), dated 22 August 1997 to 27 November 2001.

10. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, U.S. Code (USC), Section 1552, the authority under which this Board acts, the ABCMR is not empowered to set aside a conviction. Rather, it is only empowered to change the severity of the sentence imposed in the court-martial process and then only if clemency is determined to be appropriate. Clemency is an act of mercy or instance of leniency to moderate the severity of the punishment imposed.

11. The Board should consider the applicant's argument and/or evidence in accordance with the published equity, injustice, or clemency determination guidance.

12. MEDICAL REVIEW:

1. The Army Review Boards Agency (ARBA) Medical Advisor reviewed the supporting documents, the Record of Proceedings (ROP), and the applicant's records in the Interactive Personnel Electronic Records Management System (iPERMS), the Armed Forces Health Longitudinal Technology Application (AHLTA), the Health Artifacts Image Management Solutions (HAIMS) and the VA's Joint Legacy Viewer (JLV). The applicant requests a discharge upgrade from Bad Conduct to Honorable. In his ABCMR application (DD Form 149 signed 15Aug2022), he stated that he was injured while in service and selected boxes indicating that disability, Other Mental Health, and Sexual Assault (and other categories) were related to his claim. It was also noted he underwent previous Board proceedings in 07Nov2022.

2. The ABCMR ROP provided a summary of the applicant's record and circumstances of his case. He entered Regular Army 19971231. His MOS was Infantryman. He was discharged 07Feb2003 by court-martial. He was found guilty of committing sodomy by force on another soldier (07Nov1998); and wrongfully committing indecent assault (fondling the penis) of a different soldier (17Aug2000). His court-martial was adjudged 03Apr2001 and included confinement for 15 months and a Bad Conduct discharge.

3. The applicant stated that his trial was an injustice but did not provide further explanation. He did indicate that he was injured during service and was requesting disability. He did not specify the medical condition for which he was requesting disability; however, review of the medical records submitted showed that a MEB was started for Migraine/Tension Headaches and Herniated Nucleus Pulposus (C8-T1). Of note, during the 22Aug1997 enlistment history (DD Form 93), the applicant reported occasional headaches. The accompanying exam also revealed he had an

asymptomatic curve in his spine. The applicant's medical record did not appear to be complete; but reportedly, a 30Mar1999 note indicated the applicant sustained a left shoulder/neck injury while lifting his ruck.

4. Headache

a. During the enlistment physical exam, the applicant disclosed a history of occasional headaches for which he took aspirin (22Aug1997 enlistment history, DD Form 93). In August 1999, the applicant was seen for a 3-week history of headaches. He reported the headaches started with a neck/shoulder injury (27Aug1999 Chronological Record of Medical Care and 26Jun2001 Neurology Reynolds ACH). His headaches had a migrainous element (accompanied by nausea and light sensitivity), they also had some characteristics of tension headaches. Head CT (27Mar2000 Blanchfield ACH) and brain MRI (05Jun2000 brain MRI Blanchfield ACH) were normal.

b. Care for his headache condition was managed by primary care and neurology services. The applicant tried the following types of abortive medications with varying results: Pain relievers including anti-inflammatories (Indomethacin, Ibuprofen), narcotics (Tylox), and combination pain relivers (Midrin, Fioricet and Fiorinal); muscle relaxants (Flexeril, Baclofen); metoclopramide (Reglan); anxiolytic (Valium); and Imitrex. Maintenance medications were also used: Antidepressant (Elavil, Celexa) and anticonvulsant (Depakote, Neurontin). In June 2000, he was command referred for neurology consultation for Chronic Headaches (14Jun2000 Referral for Civilian Medical Care, DD Form 2161). In October 2000, neurology assessed that the migraines were not well controlled. They were occurring 2-3 days per week, and they were debilitating—he couldn't work or drive when he had them. The 24Apr2001 Chronological Record of Medical Care note indicated the applicant had a history of chronic headaches, and he had been in the process of a MEB before incarceration. He reported having a P3 profile although a copy could not be found. In June 2001, his migraines were occurring twice weekly but with less intensity. On 04Sep2001, he was issued a three-month profile for Atypical Migraines with PULHES 111111. The profile authorized use of sunglasses as his intense headaches were aggravated by sunlight. Later in September 2001, the applicant reported a decrease in frequency and severity of headaches (27Sep2001 Neurology Reynolds ACH). There were no other notes after this date that were available for review concerning the Migraine/Tension Headaches condition.

5. Neck Condition

The applicant stated he sustained a neck injury 1.5 years ago (27Jun2001 Review of Systems Civilian Neurologist). He stated that he fell and hit the back of his head while walking—during a neurology consult later, he reported he fell during JRTS in February

1999. He noted left hand numbness in 4th and 5th digit afterwards. He also reported neck and left shoulder pain. The 04May1999 cervical spine film showed degenerative changes. A cervical spine MRI (02Jun1999) showed C5 broad-based disc bulge with resultant severe right side foraminal narrowing. He was placed on a 30-day profile and underwent physical therapy 19Jul1999, 02Sep1999 with some improvement in neck ROM: Flexion was 100%, and extension was 75%. The 27Jan2000 cervical MRI showed improvement in the right side neural foraminal narrowing—it was only ‘mild’ now instead of ‘severe’. Orthopedics diagnosed C-spine Discogenic Pain and consulted with neurosurgery. The applicant also reported severe pain in left shoulder since August which was diagnosed as C8-T1 Radiculopathy. *The 24Feb2000 EMG/NCS results showed left C8-T1 radiculopathy, left upper extremity.* Neurosurgery determined he was not a surgical candidate (22Mar2000 and 06Apr2000 Blanchfield ACH). The 13Apr2000 physical profile for Headaches/Bulging Neck Disc was set to expire 13May2000. A MEB evaluation was under consideration. The profile limitations included walk at own pace and distance. In October 2000, neurology was discussing a MEB evaluation for both Severe Migraine Headaches and C8-T1 radiculopathy. There were no further records concerning the C8-T1 radiculopathy condition. The last attempt at physical therapy was in 1999 (with only two visits). There was no pain specialist consult. The most recent profile, issued for Atypical Migraines on 04Sep2001, showed no functional activity limitations (PULHES 111111). It was noted that a neck condition was not listed on the profile.

6. Behavioral Health Condition: In January 2001, the applicant was having headaches 2 times/week lasting 1-2 days. His diagnosis was Intractable Migraines/Tension Headaches and Mild Depressed Mood Secondary to Chronic Pain (11Jan2001 Blanchfield ACH). He endorsed depression, loss of appetite and loss of sleep (27Jun2001 Review of Systems Civilian Neurologist). He stated that he fell while walking and sustained a neck injury 1.5 years prior. He hit the back of his head. *No TBI related symptoms were reported at the time of the note. The record did show he had a headache condition prior to the injury.* He was taking Celexa which had a dual purpose for migraine prevention and depression symptoms. In September 2001, he reported the following symptoms: Insomnia, anxiety, decreased appetite, nightmares, and flashbacks (27Sep2001 Neurology Reynolds ACH). *The content of the nightmares and flashbacks was not discussed.* A trial of Doxepin was started at bedtime. The applicant’s BH counseling and profile history is unknown. There was no record of suicide attempt, psychosis, or mania. There was no record of substance use treatment or psychiatric hospitalization.

7. Based on records available for review, evidence was insufficient to conclude the applicant had condition(s) for which there were functional activity limitations, or which failed medical retention standards of AR 40-501 at the time of separation in 2003. JLV search revealed documentation that the applicant was not service connected by the VA

due to the characterization of his service. Concerning the applicant's request for discharge upgrade, the 03Sep2014 Secretary of Defense Liberal Guidance Memorandum and the 25Aug2017 Clarifying Guidance were considered. The applicant indicated that Other Mental Health and Sexual Assault/Harassment conditions were related to his requests. Since the record showed he was found guilty of perpetrating 2 sexual assaults, it is unclear if the applicant was referring to these or whether he was indicating he was also a victim of sexual assault. If the applicant meant to assert that he was a victim of military sexual trauma; under Liberal Consideration, it is acknowledged. The record also revealed a Depression diagnosis. However, none of the applicant's BH diagnoses are mitigating for the sexual assault offences for which he was the perpetrator, and which led to his discharge.

Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? No. Neither the injuries he sustained nor the BH diagnoses which developed while in service, are mitigating for the sexual assault offences the applicant was found guilty of committing.

(2) Did the condition exist, or did the experience occur during military service? No. The applicant did not have an in-service injury or BH diagnosis that was mitigating for the sexual assault offences for which the applicant was found guilty of committing.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. None of the applicant's conditions are not mitigating for the sexual assault offences he was found guilty of committing.

BOARD DISCUSSION:

1. The Board determined 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.

2. 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 applicant's trial by a general court-martial was warranted by the gravity of the offenses charged (committing sodomy by force and without consent and committing an indecent assault upon another Soldier). His conviction and discharge were conducted in accordance with applicable laws and regulations and the discharge appropriately characterizes the misconduct for which he was convicted. He was given a bad conduct discharge pursuant to an approved sentence of a general court-martial.

The appellate review was completed, and the affirmed sentence was ordered duly executed. All requirements of law and regulation were met with respect to the conduct of the court-martial and the appellate review process, and the rights of the applicant were fully protected. The Board found no error or injustice in the separation processing. 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 official's finding insufficient to conclude the applicant had condition(s) that failed medical retention standards of AR 40-501 at the time of separation in 2003 or conditions that are mitigating for the sexual assault offences which led to his discharge. Also, 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:

<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 AR20220004119 on 7 November 2022.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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, USC, Section 1556, 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.
2. 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. The regulation provides that the ABCMR may, in its discretion, hold a hearing. 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.
3. Army Regulation 635-200, in effect at the time, set forth the basic authority for the separation of enlisted personnel.
 - a. Paragraph 3-7a provided that 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. Paragraph 3-7b provided that 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 3 provided that an enlisted person would be given a bad conduct discharge pursuant only to an approved sentence of a general or special court-martial, after completion of appellate review, and after such affirmed sentence has been ordered duly executed.
4. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, USC, Section 1552, the authority under which this Board acts, the ABCMR is not empowered to set aside a conviction. Rather, it is only empowered to change the severity of the sentence imposed in the court-martial process and then only if clemency is determined to be appropriate. Clemency is an act of mercy or instance of leniency to moderate the severity of the punishment imposed.

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 Discharge Review Boards (DRB) and Boards for Correction of Military/Naval Records (BCM/NR) 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. Standards for review should rightly consider the unique nature of these cases and afford each veteran a reasonable opportunity for relief even if the sexual assault or sexual harassment was unreported, or 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.

6. 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//