ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [redacted]

BOARD DATE: 26 March 2024

DOCKET NUMBER: AR20230008764

APPLICANT REQUESTS:

- upgrade of his under honorable conditions (general) discharge
- a different, presumably more favorable, narrative reason for separation
- medical retirement or referral into the Disability Evaluation System

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

- DD Form 149 (Application for Correction of Military Record)
- Legal brief on behalf of the applicant
- Self-authored letter
- In-service personnel and medical records
- Veterans Affairs (VA) documents

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. Counsel states, in pertinent part:

a. The applicant's discharge from the Army is an error and injustice. He was suffering from the effects of traumatic brain injury (TBI) and covering up the symptoms with alcohol. He admits he made a few poor decisions but his accuser in the Sexual Harassment and Assault Response Program (SHARP) allegations made a last-ditch desperate attempt to stay in the service. Further, the applicant requested to go through the medical board process for his TBI but was not referred. Since his discharge, he is rated 100 percent (%) service-connected by the VA. As such, he now requests that these errors and injustices be remedied. He exhausted all previous administrative remedies available to him, and his current discharge classification is an injustice.

b. The applicant spent 12 years and one month in service receiving a number of awards and deploying to Iraq. Throughout his career, he suffered from a number of concussions and TBIs. The applicant was committed to his service in the Army. His career started out promising but was unfortunately derailed by a series of physical traumas that enveloped his overall health. He suffered from numerous TBIs, head injuries, and concurring symptoms that affected not only his ability to function as a Soldier, but as a citizen.

3. The applicant states:

a. Prior to joining the military, he was active in high school. He was interested in the military most of his life as his family has a history of service. His dad was in the Army which is why he wanted to be a Soldier. During his junior year of high school is when he first spoke to a recruiter. He wanted to make a difference in people's lives and thought a medic would be a good fit for him. He graduated high school and went to training with no incidents and volunteered nearly every opportunity.

b. His first unit was in Fort Bragg, N.C. He was a medic in the emergency room where he was on stand-by for natural disasters. He deployed to Iraq at a Level 3 hospital in the emergency department. While deployed he saw amputations, injuries from improvised explosive devices, rollovers, mass traumas, and after hour outpatient care. His base also was under attack a few times from small arms and mortar attacks. In fact, one mortar landed and detonated about 200-300 yards from him. Based on his performance during that deployment. He received an Army Commendation Medal, and his unit received the Meritorious Unit Citation.

c. Prior to going through the separation process he had been on profile for a year based on his TBI, or at least he had thought. He also had shoulder and nerve pain. He was going through the TBI protocol for a couple of months and in early 2020 the brigade surgeon asked him if he would prefer to go through a medical board, he said yes. They both agreed he was likely unfit for retention. However, this is when he found out he had not been on profile for one year straight and had to wait a couple of months before being referred to a medical board. This was a shock to him as he thought he had been on profile for his TBI for over a year.

d. While being chaptered out his company commander originally told him he would receive no less than a general discharge and that is what would be recommended. At this point he was so demoralized he really didn't care and said sure. He requested terminal leave because he was accepted to college and he would be starting a job, but it was denied. He knows he has made mistakes while in the service; but he feels as though he should have been evaluated through the medical board based on the prolonged and serious conditions he had.

4. The applicant enlisted in the Regular Army, on 20 November 2007. Upon completion of initial entry training, he was awarded military occupational specialty 68W (Health Care Specialist). The highest grade he attained was E-6.

5. He began service in Iraq on 29 October 2009. He reenlisted on 27 April 2010 and he departed Iraq on 9 October 2010.

6. On 26 August 2011, the applicant was admitted to the emergency room and treated for a concussion and TBI that occurred during airborne operations.

7. On 20 October 2011, the applicant was admitted to the emergency room and treated for a concussion.

8. He reenlisted on 3 November 2011, 5 August 2015, and again on 2 August 2016.

9. On 10 November 2016, the applicant was admitted to the emergency room and treated for a concussion that occurred during airborne operations.

10. On 10 April 2017, the applicant was admitted to the emergency room and treated for depressive thoughts/moods. He was diagnosed with persistent depressive disorder; relationship distress with spouse.

11 On 18 July 2017, the applicant received non-judicial punishment (NJP) under Article 15 of the Uniform Code of Military Justice (UCMJ), for:

- violating a lawful federal regulation by engaging in undue familiarity with an officer, between on or about 1 September and 25 November 2016
- wrongfully having sexual intercourse with an officer, a married woman not his wife, between on or about 1 September and 25 November 2016

12. His punishment included reduction in grade to E-4 (suspended), forfeiture of $1,267.00 pay per month for two months (suspended), and 15 days extra duty.

13. A DA Form 1574-1 (Report of Proceedings by Investigating Officer) dated 30 October 2019, notes the applicant was under investigation for potential sexual harassment, fraternization and/or maltreatment during his time as the acting platoon sergeant. The investigating officer found there was no evidence to support the allegation that the conduct of the applicant amounted to sexual harassment; and there was not enough evidence to suggest his conduct amounted to the offense of maltreatment. However, the applicant’s conduct did amount to fraternization.

14. On 15 November 2019, the applicant was admitted to the emergency room and treated for concussion, tremor, and cervicalgia that occurred during airborne operations.

15. On 2 December 2019, the applicant received NJP under Article 15 of the UCMJ, for wrongfully fraternizing with a junior enlisted Soldier between on or about 1 May 2019 and on or about 7 October 2019. His punishment included reduction in grade to E-5, forfeiture of $1,688.00 pay per month for two months (suspended), and 45 days extra duty and restriction.

16. On 11 December 2019, the applicant underwent a brain magnetic resonance imaging. Radiologist noted pineal gland findings are favored to represent benign cysts.

17. On 2 April 2020, the applicant underwent a mental status evaluation. He was psychiatrically cleared to participate in all administrative proceedings deemed appropriate by the command.

18. The applicant's record is void of a complete separation packet containing the specific facts and circumstances surrounding his discharge processing. However, memorandum, dated 28 May 2020, shows the separation authority approved the applicant’s conditional waiver for separation prior to the expiration of his term of service, under the provisions of Army Regulation 635-200 (Personnel Separations - Active Duty Enlisted Administrative Separations), Chapter 14-12c, for commission of a serious offense. He directed the applicant’s service be characterized as under honorable conditions (general).

19. The applicant was discharged on 23 June 2020, in the rank/grade of sergeant/E-5. He was credited with 12 years, 7 months, and 4 days of net active service this period. His DD Form 214 (Certificate of Release or Discharge from Active Duty) contains the following entries in:

- Item 24 (Character of Service) – Under Honorable Conditions (General)
- item 25 (Separation Authority) – AR [Army Regulation] 635-200, PARA 14-12c
- item 26 (Separation Code) – JKQ
- item 27 (Reentry Code) – 3
- item 28 (Narrative Reason for Separation) – Misconduct (Serious Offense)

20. Additionally his DD Form 214 shows he was awarded or authorized the:

- Army Commendation Medal (3rd Award)
- Army Achievement Medal (4th Award)
- Meritorious Unit Commendation
- Good Conduct Medal (3rd Award)
- National Defense Service Medal
- Global War on Terrorism Service Medal
- Iraq Campaign Medal with Campaign Star
- Noncommissioned Officer Professional Development Ribbon

- Army Service Ribbon
- Overseas Service Ribbon (2nd Award)
- Expert Field Medical Badge
- Senior Parachutist Badge
- Parachutist Badge
- Driver and Mechanic Badge – Mechanic
- Expert Marksmanship Badge with Carbine Bar

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

a. Self-authored letter detailing his professional accomplishments, injuries, his shortcomings, and the events that led to his discharge.

b. VA decision letter that's shows he was granted a combined 100% rating evaluation for various service connected injuries including TBI.

22. 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.

23. MEDICAL REVIEW:

1. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents, integrated Personnel Electronic Records Management System (iPERMS), and the applicant's medical records in the Armed Forces Health Longitudinal Technology Application (AHLTA) and Joint Legacy Viewer (JLV) and made the following findings and recommendations: The applicant was consistently evaluated via multiple methods with objective imaging and testing for asserted TBIs. The applicant was not diagnosed as TBI was consistently ruled out and asserted symptoms at the time of discharge were determined to be the result of non-TBI origins. Accordingly, at the time of separation, the applicant did NOT fail medical retention standards for TBI and did NOT require a referral to the Disability Evaluation System (DES). Of note, while the applicant is service connected for TBI, documentation does not support the diagnosis, nor the significant impairment suggested by the rating. Rather, he has not required TBI care and has reported working, exercising, socializing, and overall expressing a high level of functioning. Regarding behavioral health involvement, interaction was isolated and determined to be in reaction to acute stressors; he had a pattern of responding to stressors with depression and suicidal ideation rather than having a chronic psychiatric condition. The applicant did not require persistent or reoccurring treatment, higher level of care, or duty limitations. Accordingly, documentation does NOT support the applicant failed medical retention standards at the time of separation for a behavioral health condition and did NOT require a referral to the DES. Finally, there is no medical

mitigation as the applicant did not have a cognitive or behavioral health condition influencing behavior. Rather, the applicant clearly related conscious choices with justification and subsequent regret with identification of interventions implemented to prevent reoccurring misconduct.

2. The applicant was discharged on 23 June 2020 under AR 635-200, para 14-12c, Serious Misconduct, with a General characterization. The basis for separation is unknown. However, the separation packet contains the applicant's waiver for separation prior to the expiration of his term of service. The applicant is requesting a characterization upgrade, change in narrative reason for separation, and referral to the Disability Evaluation System. The applicant, through counsel, indicates he was separated for a SHARP violation; however, denies the allegations. Counsel's statement suggests the applicant is asserting a TBI lead to an inappropriate relationship, but consensual. Counsel notes the separation was in error and unjust as he should have been referred to the medical evaluation board (MEB) process due to TBI.

3. Documented disciplinary history includes July 2017 non-judicial punishment (NJP) for engaging in undue familiarity with an officer, between September and November 2016, and wrongfully having sexual intercourse with an officer who was a married woman not his wife. In October 2019, he was under investigation for sexual harassment, fraternization, and maltreatment as an acting platoon sergeant. The Investigating Officer (IO) indicated there was not evidence to support the allegation of sexual harassment and maltreatment. However, there was evidence to support fraternization. In December 2019, he received NJP for wrongfully fraternizing with a junior enlisted between May and October 2019.

4. In October 2010, the applicant had a post-deployment screening for "neurological disorders traumatic brain injury." The applicant denied any symptoms of concussion, neurological difficulties, or head injury while deployed. The Mental Status Exam (MSE) and physical were normal. He denied a need for TBI services.

5. In August 2011, the applicant was seen in the ER two days after a hard landing during a night jump; he hit the ground on his back with neck and head hitting afterward. The applicant denied loss of consciousness (LOC), vomiting, or other symptoms outside of being dazed. The CT scan was unremarkable and he was monitored and released. He had follow-up denying symptoms with normal exam and presentation. He was placed on limited training for 14 days as a precaution. In October, he was seen for jump clearance denying any symptoms. The exam was normal, but the provider referred to the TBI clinic for clearance as a precaution. The applicant was seen in TBI reporting initial symptoms lasted 2-3 days, dissipating with fatigue the only symptoms for a few weeks afterward. He reported mostly improved by the time he went to the ER with normal CT scan. At the time of the TBI appointment, he "felt very good and has had no

symptoms." The provider completed a physical and mini-mental status exam (MMSE) with normal findings and perfect MMSE score of 30/30. The provider indicated the applicant had a history of mild concussion with full recovery. He was cleared without "restrictions or limitations" and no follow-up required.

6. The applicant had multiple exams from August 2011 to November 2016, to include flight physicals, with no difficulties or abnormal results.

7. Sep-Nov 2016 infidelity
On 10 November 2016, he was seen in Neurology 24 hours after a hard landing resulted in hitting his head. The applicant denied LOC, reporting the initial difficulties was inability to verbalize his thoughts. As of the appointment, he reported pain across his scalp, nausea, and slight confusion. The provider indicated the applicant likely had a concussion, but absent of neurological signs or symptoms. Due to reported symptoms, he was given 72hrs of quarters, light indoor duty the following week, and medication, Tylenol, as needed. The provider indicated before the applicant could be cleared to return to flight duty, he would require exams through neurology and neuropsychology. On 15 November, he reported ongoing headaches and neck pain with some difficulties communicating and nausea with photopia and dizziness. He reported non-compliance with treatment, to include medication. He was given an injection in the clinic and sent home on quarters with medication. An updated CT scan was normal.

8. On 06 December, the applicant was noted to be improving; symptoms limited to headaches and neck pain with stiffness. The provider noted possible post-concussional syndrome extending his profile for light duty, limited physical training, and medication until he could see TBI.

9. In January 2017, during a primary care follow up, the applicant reported depressive symptoms over the prior 6 weeks due to his marital situation. He requested medication. The applicant reported depression several years prior with suicidal ideation. He denied active suicidal ideation. Regarding prior concussion, the provider reported the applicant was "fully functioning" and back to full physical activity. The provider prescribed an anti-depressant and referred him to behavioral health. The provider indicated the applicant "may continue full duty…"

10. The applicant went to behavioral health reporting depressive episodes on and off since adolescence with recent episode secondary to marital issues; he admitted to an affair in November 2016. He reported starting marital therapy with improvement. His MSE, outside of affect and mood, was normal; there were no cognitive deficits. The applicant reported no symptoms of TBI or concussion. He was performing well and still scheduled for Flight Medical Training in July. He noted stress over the last 10 months secondary to being the Battalion Air NCO. The provider noted depressive symptoms were secondary to multiple life stressors, specifically marital and occupation. He was

not diagnosed. In follow up, he voiced concern for his career if the unit investigated his affair. His MSE was still normal. The applicant attended a few supportive sessions.

11. In February, the applicant met with psychiatry. His MSE reflects normal cognitive functioning. The provider diagnosed Persistent Depressive Disorder with medication. The therapist carried the diagnosis over. In medication follow up, he reported improvement.

12. In March, he requested to stop medication allowing for training. He met with psychiatry reporting he "feel(s) great" since marital therapy was resolving their difficulties. He reported tapering off the medications already with no problems. His MSE reflected normal cognitive functioning. The provider noted the prior diagnosis of Persistent Depressive Disorder may be in error. The diagnosis was removed and he was cleared with no diagnosis.

13. In March, the applicant had follow-up in the Concussion Care Clinic denying symptoms and cleared.

14. On 11 April, he was seen in the ER after having "a rough day" with thoughts of hurting himself. He reported getting upset with himself when he learned of marital separation. The applicant denied concussive symptoms. He was cleared and released to follow up. He followed up with behavioral health noting suicidal thoughts began after being released from the field to manage marital separation tasks. However, since talking with his supports, he felt better. He declined behavioral health services and released with a recommendation for increased Command support. The provider carried over the historical diagnosis of Persistent Depressive Disorder. (alcohol negative)

15. On 14 April, the applicant had an Aeromedical Evaluation; a full psychological and cognitive assessment to determine fitness. The applicant reported marital issues in 2013 with successful resolution after marital therapy. However, in the fall of 2016, difficulties resurfaced. He "declined" to provide details of what occurred in the marriage, but indicated he was unfaithful during that time. The applicant indicated they started martial therapy which he thought was going well, but "it all changed" when he was fully open and honest. He reiterated the most recent ER visit was secondary to being informed his wife filed separation paperwork which included a no contact order for 10 days. Since that time, the provider indicated he had been "observed" doing better with improvement tied to his "realization that he has social, occupational, and spiritual support." He noted intent to seek pastoral care due to concern behavioral health would negatively impact his career. In obtaining history, the applicant was not forthright and had to be confronted with available documentation. He agreed to minimizing previous reports, but continued to deny ongoing symptoms. The applicant's MSE reflects intact cognitive functioning. Deployment wife, he reported during his 2009-2010 deployment he saw "a little bit more than sick call." Upon follow up, he indicated non-combat injuries

"handful of cardiac and DOAs." The provider DID NOT recommend a waiver due to the Aviation Policy Letters (APLs); these set the disqualifiers for clearance to include history of suicidal ideation, diagnoses, and stability off medications. The provider discussed for reconsideration, he'd have to undergo a course of treatment supported by demonstrated significant improvement in symptoms, insight, coping skills, and resiliency. While he was self-reporting improvement, this was not supported by the suicidal ideation only 5 days prior to the appointment. Additionally, he held a prior Persistent Depressive Disorder diagnosis with recent medication discontinuation. The applicant was recommended for treatment to address acute stressors. The provider noted the applicant met medical retention standards but on temporary duty limitations due to recent symptoms. However, "BH treatment will likely support long-term fitness for service." In the feedback session, the applicant voiced intent to obtain services off-post but encouraged to seek on-post care so there was documentation of progress and adherence for future clearance. The diagnosis of Persistent Depressive Disorder was carried over with recommendation of increased support and oversite to ensure coping and adjustment to the disqualification. Although, he was fit for his current MOS and could continue working in his MOS duties.

16. The July 2017 PHA was normal. An August 2018 exam was normal.

17. In January 2019, the applicant reported intermittent, monthly or less, headaches since 2016. He was unsure if his neck pain proceeded or followed the headaches. He reported some hand tremors with nausea when the headaches occur. The provider indicated a need for ongoing evaluation to differentiate whether the headaches were tension or migraine. The applicant was provided medication and given stretching guidance. He initially declined a PT referral, but called back requesting it.

18. May-Oct 19 fraternization
On 16 May, he presented two days after hitting his head. The applicant reported he fell during a ruck and hit his head with flash of white light. There was no LOC and he was able to get up and pack his ruck to continue. As of the appointment, he reported feeling better with some irritability. Regarding previously reported headaches, he indicated they came in waves, but stable since taking the medication. The exam was normal. He was given 24hrs quarters and follow up. He attended the follow up with no documented concerns.

19. In July, he had a psychological security clearance evaluation. The applicant reiterated his April 2017 ER visit was due to a "spiteful" divorce, but they had reunited since then. He "endorsed a history of adultery with his supervisor in 2017 which was why his wife sought divorce. He noted the Article 15 and punishment were placed in his restricted file. He indicated he'd taken responsibility for the affair and knows how to avoid these relationships in the future." During the interview, the applicant was "able to

give several examples of things that he no longer does with other SMs in order to remain professional." The provider he was two years free of depression or suicidality which negated the prior diagnosis; Persistent Depressive Disorder is a chronic condition that would have presented within the two years. The provider believed his pattern of depression and suicidal thoughts were in reaction to acute stressors rather than a psychiatric condition. The applicant denied concussive symptoms or resulting impairment. The provider noted he was not in treatment with the TBI or Concussive Care clinics. The provider noted a normal MSE; in addition to cognition being intact, his "judgment/reasoning and analytical skills were good, as measured by the interpretation of hypothetical situations and proverbial statements." The provider summarized that the applicant did not have a psychiatric condition and prior symptoms were in reaction to acute stressors. Additionally, he did not meet criteria or a substance use disorder as "SM has not endorsed ongoing misuse of alcohol or drug use." Furthermore "Regarding his TBI history, SM has only endorsed headaches and pain" but not "cognitive complaints." Moreover "there are no impairments in social and occupational functioning … no ongoing changes in his performance and maintains a leadership position." He was determined to meet retention standards with no alterations to duty status and recommended for a security clearance.

20. On 15 November, the applicant went to primary care reporting chronic neck pain. The provider noted no access to the electronic medical records, but the applicant asserted intermittent cervical spine pain since 2016 worsening in May 2019. Additionally, he asserted intention tremors since 2016 worsening in May 2019 The provider referenced prior imaging which was normal. During the appointment, the applicant asserted 8 TBIs with only 3 evaluated. Specifically, first in 2011 that was evaluated, second in 2011 that was not evaluated, third in 2015 that was not evaluated, fourth in June 2016 that was not evaluated, fifth in November 2017 that was evaluated, sixth in 2018 that was not evaluated, seventh in 2018 that was not evaluated, and eight in 2019 that was evaluated. Given his self-report, he was referred to TBI with additional imaging ordered. The subsequent 3 view C-Spine imaging was normal. The subsequent multiplanar/multisequence MRI of the brain was "without findings to reflect traumatic brain injury."

21. On 22 November, he was seen for an initial case management intake with normal cognitive MSE. He reported the purpose of the TBI evaluation was "to figure out where I am, where I need to go, to get the help that I need." He was not in an MEB process and profile was set to expire in December for hernia post-op and neck pain. The applicant noted he was pending UCMJ/Chapter action.

22. In primary care follow up, the provider noted "incidental finding of enlarged and heterogeneous pineal gland." The radiologist was consulted and based on the imaging

and normal neurological exam concluded there was a “low suspicion that current active symptoms are linked to findings on pineal gland.” The radiologist recommended further work-up to ensure the enlarged glands were benign versus a tumor; however, unrelated to concussion or TBI. The applicant was referred to pain management for neck pain since imaging was normal, not suggestive of a concussion or TBI origin. He was referred to occupational therapy for the asserted tremors with lab work as the neurological exam and imaging “did not demonstrate essential tremor or any tremor” that could be related to a head injury, thus “suspicion for enhanced physiological tremor which can resolve on his own.” Additionally, any indications of Parkinson’s were not found. Lastly, imaging indicated the asserted vertigo was unrelated to any neurological conditions; he was referred to audiology. Regarding the asserted headaches, the ongoing evaluation was to clarify whether origins were tension or migraine secondary to neck pain; unrelated to concussion or TBI.

23. On 11 December, the applicant underwent a neuropsychological evaluation in the TBI clinic. His MSE was normal. The provider indicated the applicant was asserting post-concussive symptoms with neck pain and tremor although symptoms were not observed during the appointment. The provider indicated symptoms were not related to a mTBI, but providers could continue to assess if there was a separate medical or neurological condition. The provider highlighted symptoms appeared to correlate with psychosocial stressors, escalating with disciplinary action. Recommendation was for follow up with pain management, neurology, mental health for stress, speech for skill building, and possible occupational therapy for stress management. Other resources for stress management facilitating relaxation were provided. The applicant declined a TBI follow up indicating he’d call back. The provided marked “no” to “Profile Needed” and indicated “Member IS suitable/fit for continued military service.” The muti-disciplinary team met with agreement on the findings and plan.

24. On 13 December, he presented to primary care requesting a profile extension asserting more symptoms and implying he was receiving TBI care. It does not appear the primary care provider reviewed the records to identify TBI did not diagnose a TBI and did not recommend a profile; the provider extended his cervical spine and concussive profile.

25. On 30 December, he went to the ER after experiencing dizziness during his MRI. He reasserted history of symptoms and implying he was receiving TBI care. The provider noted his presentation was “odd” as his neurological exam was normal not supporting his self-report. The applicant was discharged reporting he was doing well and would follow up with primary care, not TBI. Of note, the MRI indicated the pineal gland cysts were benign.

26. In January 2020, he met with speech indicating he was not going to follow up with behavioral health. He continued to assert a variety of symptoms, although “feels good when he is working and reported confidence in his knowledge of medicine and emergency care.” He was attending JRTC suggesting his work performance was intact with no concerns for cognitive or physical difficulties. The applicant reported strengths in “response inhibition, flexibility, metacognition, and stress tolerance.”

27. In primary care follow up, headaches were noted to be secondary to chronic pain, multiple social and family stressors, and possible “left sinus disease.” The neck pain, cervicalgia, was determined to be musculoskeletal. Vertigo was still being referred to audiology as it was not neurological.

28. On 18 February, he returned to primary care noting symptoms but acknowledging he’d not been back to TBI. The provider updated the profile but indicated he’d only do so through March as he needed to see Neurology and TBI for the profile. However, even with the profile extended, the provider indicated the profile would be adjusted allowing for progression back to duty versus full restrictions. The applicant reported to physical therapy that neck pain would flare up at times, but only for a day and “was able to still function.”

29. On 21 February, he had a separation physical with normal exam and cleared. The PULHES reflects all 1’s. The applicant’s endorsements reflect the asserted symptoms already reviewed. The separation provider noted the applicant continued to be cleared by TBI and neurology.

30. On 31 March, speech noted although the applicant was reporting cognitive-communicative deficits, there was no evidence of dysarthria, dysphonia, anomia, apraxia, or dysfluent speech. Additionally, he was observed to have normal auditory comprehension and verbal expression at conversional level. Lastly, reading comprehension was intact with written education provided.

31. In April, he had a Chapter MSE noting 2 Article 15s for “morally negligible choices and inability to uphold Army standards and values.” He reported deployment was “okay, he did not fire his weapon and did not witness KIA or WIA.” He noted some indirect fire exposure. His MSE was normal to include motor, cognitive, and judgment. Pain was reported to be a 2/10 in his neck. The only positive screener was TBI, but the provider noted the applicant was already involved in the associated clinics and cleared. He was cleared for separation and noted to meet medical retention standards.

32. On 06 April, the applicant had TBI appointment. The provider noted reported headaches and facial pain were secondary to work stressors. The provider listed Other Headache Syndrome was due to “headaches with migrainous features due to

musculoskeletal component. An 07 April MRI was normal, there was no evidence of TBI and benign penal glands unchanged.

33. The 24 April speech appointment noted he could recall an acronym from the prior appointment and give examples of how he used the strategy while talking with his lawyer the prior week. Additionally, he could recall and provide examples of how he used self-talk. The note continues to reflect an absence of objective or observed symptoms to support the applicant's self-assertions. Rather, the abilities noted reflect intact cognitive abilities.

34. On 28 April, the applicant attended a required TBI follow-up but indicated he had to leave early. Thus, no exam could be performed; the note contains self-report alone.

35. In the applicant's speech follow ups, the provider noted he was still using strategies, could read/summarize and ask questions on articles read, and could discuss the articles "at length" in session. The provider noted the applicant was "able to demonstrate good comprehension and adequate recall of material read … Pt with good attention … able to recall information previously discussed and apply it in-between sessions."

36. In May physical therapy sessions, the applicant was noted to be doing well and tolerating interventions; headaches were improving with interventions focused on musculoskeletal system.

37. On 18 May, the applicant met with TBI. The provider indicated there was no evidence of TBI or post-concussive syndrome. Rather, symptoms were likely secondary to stress and resulting mood.

38. In a 04 June TBI appointment, the applicant admitted he'd not been taking his medications when he asserted ongoing headaches and neck pain.

39. In a June speech appointment, the applicant reported he was working on his separation paperwork for ARBA with no noted difficulties in doing so; intact cognitive processes. He declined additional appointments with TBI and cancelled other scheduled appointments.

40. The applicant is 100% service connected for TBI. In January 2021, the applicant had a TBI Compensation and Pension (C&P) exam with diagnosis of TBI with determination he had "severe impairment of memory, attention, concentration, or executive functioning resulting in severe functional impairment" and an "inability to communicate … more than occasionally" or to comprehend language "more than occasionally." The provider supported this with self-report and screeners easily feigned versus neuropsychological assessment especially in the face of in-service documentation and prior objective assessments. In March 2022, the applicant went to a

primary care requesting a Chiropractic referral due to chronic neck pain and headaches. The applicant denied symptoms at the time of the appointment. The physical and exam were normal with the provider specifically noting normal range of motion of his neck and good grip strength. The provider noted the applicant reported occasional tremors, but these were not observed; he was instructed to return if the symptom returned. The applicant was working on the ski slopes as security, lifting weights, and otherwise without functional impairment. The appointment further supports the applicant's TBI diagnosis and service connection, especially at 100%, are more likely than not in error. The provider entered the requested chiropractic referral with a sleep study for OSA. The applicant has not been back to the VA.

41. The applicant submitted medical records already reviewed above.

42. In reviewing the applicant's performance and school evaluations, he excelled with no concerns. The 2019 NCOER's rating is secondary to disciplinary issues rather than an issue with performance. The performance and school evaluations highlight intact cognitive processes aligning with medical records indicating the applicant was not experiencing post-concussive or mTBI symptoms or conditions.

Kurta Questions:

(1) Does the applicant have a condition or experience that may excuse or mitigate the discharge? YES. The applicant is asserting in-service TBI influenced the misconduct.

(2) Did the condition exist or experience occur during military service? YES. The applicant is asserting in-service TBI influenced the misconduct.

(3) Does the condition or experience actually excuse or mitigate the discharge? NO. Documentation consistently and clearly indicates the applicant did not have a TBI or related at the time of the misconduct or separation requiring mitigation or referral to DES.

(4) Does the condition or experience outweigh the discharge? NO. Documentation consistently and clearly indicates the applicant did not have a TBI or related at the time of the misconduct or separation requiring mitigation or referral to DES.

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 applicant's contentions, the military record, and regulatory guidance were carefully considered.

a. The applicant's service record does not contain, and he does not provide his complete separation packet. However, his record contains a memorandum that shows the separation authority approved the applicant's conditional waiver for separation under the provisions of AR 635-200, Chapter 14-12c, for commission of a serious offense. He directed the applicant's service be characterized as under honorable conditions (general). Accordingly, the applicant was discharged with a general characterization of service. In the absence of his separation packet, the Board presumed no error or injustice in his separation processing.

b. Discharge Upgrade: Deny. The Board considered the medical records, any VA documents provided by the applicant and the review and conclusions of the medical reviewing official. The Board concurred with the medical official's finding insufficient evidence to support the applicant had condition or experience that mitigated his misconduct. 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.

c. Disability: Deny. The Board also agreed that the available documentation consistently and clearly indicates the applicant did not have a TBI or related at the time of the misconduct or separation requiring mitigation or referral to disability evaluation system (DES). The Board also found insufficient probative evidence the applicant had any duty incurred medical condition which would have failed the medical retention standards of chapter 3 of AR 40-501, Standards of Medical Fitness, prior to his discharge. Thus, there was no cause for referral to the Disability Evaluation System. Furthermore, there is no evidence that any medical condition prevented the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his discharge.

d. Narrative Reason for Separation: Deny. The Board noted that the applicant's narrative reason for separation was assigned based on the fact that he was discharged under the provisions of AR 635-200, chapter 14-12c due to misconduct – commission of serious offense. Absent his commission of a serious offense, there was no reason to process him for separation. The underlying reason for his discharge was his commission of a serious offense. The only valid narrative reason for separation permitted under chapter 14-12c is "Misconduct" and the appropriate separation code associated with this discharge is JKQ which had a corresponding RE-3 Code.

BOARD VOTE:

Mbr 1	Mbr 2	Mbr 3	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
[redacted]	[redacted]	[redacted]	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.

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. 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.

2. Title 10, U.S. Code, Section 1201, 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. Title 10, U.S. Code, Section 1203, 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. Army Regulation 635-5-1 (Separation Program Designator (SPD) Codes) provides the specific authorities (regulatory or directive), reasons for separating Soldiers from active duty, and the separation codes to be entered on the DD Form 214. At the time, this regulation prescribed the separation code "JKQ" as the appropriate code to assign to Soldiers separated under the provisions of Army Regulation 635-200, for misconduct (serious offense).

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 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. Chapter 14 (Separation for Misconduct) established policy and prescribed procedures for separating members for misconduct. It states that action will be initiated to separate a Soldier for misconduct when it was clearly established that rehabilitation was impracticable or unlikely to succeed.

7. 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 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.

8. 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, TBI, 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.

9. 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//