

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 12 March 2024

DOCKET NUMBER: AR20230008806

APPLICANT REQUESTS: in effect –

- reconsideration of his previous request to upgrade his bad conduct characterization of his service to under honorable conditions (general)
- personal appearance via video or telephone

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

- DD Form 149, Application for Correction of Military Record, 11 April 2023
- DD Form 149, 8 November 2023
- Applicant's statement
- Neurorehabilitation Center-Preadmission Memorandum, 23 August 2007
- Transfer Medical Health Assessment, 26 January 2009
- Brief Neuropsychological Screening Examination, 12 September 2018

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. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the ABCMR in Docket Number AC93-06141 on 5 May 1993.
3. The applicant indicates his request is related to post-traumatic stress disorder (PTSD), traumatic brain injury (TBI), and other mental health conditions. He states, in effect, that he served in the Republic of Vietnam (RVN) and as a result he suffered with significant PTSD upon return. He contends that he was diagnosed with PTSD, but mental health treatments were not given at the time of separation and caused extreme life changes including alcoholism, drug use, homelessness, anxiety, severe depression and TBI. He further states that he has been sober since 3 June 2007 and as he gets older, he believes that he should have the veteran's benefits he earned.

4. The applicant enlisted in the Regular Army on 30 April 1971 for 3 years. He held military occupational specialty 96Y, armor/unit supply specialist. The highest rank held was private first class/E-3.

5. The applicant served in the RVN from 31 October 1971 to 21 June 1972 while assigned to an infantry unit.

6. His record contains a DA Form 20, Enlisted Qualification Record, which shows during his period of service the applicant had numerous periods of lost time which totaled 317 days.

- absent without leave (AWOL) - 5 October 1971 to 21 October 1971
- AWOL - 14 August 1972 to 15 August 1972
- Imprisonment - 21 March 1973 to 22 March 1973
- AWOL - 2 July 1973 to 30 July 1973
- Imprisonment - 26 October 1973 to 13 January 1974
- Confinement - 27 September 1974 to 30 January 1975

7. The applicant's record contains a notification of his commander's intent to recommend him for separation under the provisions of AR 635-212, Personnel Separations-Discharge-Unfitness and Unsuitability, for Unfitness, 29 February 1972. The basis of the recommendation was the applicant's history of committing offenses which included being AWOL, failure to repair, and misbehavior of sentinel or lookout.

8. Before a special court-martial (SPCM) on 20 March 1973, at Fort Benning, GA, the applicant was charged with, pled guilty to, and was convicted of disobeying a lawful order from his commander not to drive his privately owned vehicle, driving without a valid state driver's license, and failing to stop at a posted stop sign.

a. SPCM Order Number 298, Headquarters, 931st Engineer Group (Combat), Fort Benning, GA, 26 November 1974, shows the applicant was sentenced to forfeiture of \$200.00 pay per month for six months and confinement at hard labor for four months. The sentence was approved on 3 April 1973.

b. In a subsequent court-martial orders the applicant's approved sentence was suspended until 20 July 1973 at which time unless sooner vacated, the suspended portion of the sentence would be remitted without further action.

9. Before a special court-martial (SPCM) on 6 August 1973, at Fort Knox, KY, the applicant was charged with, pled not guilty, and was found guilty of being AWOL from on or about 2 July 1973 to on or about 31 July 1973.

a. SPCM Order Number 54, U.S. Army Armor Center Headquarters, Command, Fort Knox, Kentucky, 7 November 1973, shows the applicant was sentenced to confinement at hard labor for four months, and forfeiture of \$215.00 pay per month for four months.

b. The sentence was approved on 7 November 1973. Subsequent court-martial orders suspended the approved sentence until 25 February 1974, at which time unless sooner vacated, the suspended portion of the sentence would be remitted without further action.

10. Before a special court-martial (SPCM) on 18 October 1974 at Fort Carson, CO, the applicant was charged with six specifications of being AWOL of which three were dismissed.

a. He pled guilty and was found guilty of the remaining charges of being AWOL from on or about 16 July 1974 to on or about 30 July 1974, being AWOL from on or about 19 August 1974 to on or about 29 August 1974; and being AWOL from on or about 3 September 1974 to on or about 27 September 1974.

b. SPCM Order Number 298, Headquarters, Fort Carson & 4th Division, Fort Carson, CO, 26 November 1974, shows the applicant was sentenced to a bad conduct discharge, and confined at hard labor for five months, forfeiture of \$200.00 pay per month for five months, and to be reduced to the grade of private/E-1.

c. The sentence was approved on 26 November 1974. Subsequent court-martial orders suspended the approved sentence until 25 February 1974, at which time unless sooner vacated, the suspended portion of the sentence would be remitted without further action.

11. SPCM Order Number 805, Headquarters, U.S. Disciplinary Barracks, Fort Leavenworth, Kansas, 27 December 1974 noted the applicant's sentence had been complied with, and ordered the sentence be duly executed.

12. The applicant was discharged according on 30 January 1975. His DD Form 214 shows he was discharged in accordance with chapter 11-2 of Army Regulation (AR) 635-200 (Personnel Separations) with an under other than honorable conditions characterization of service and he received a Bad Conduct Discharge Certificate (Separation Code JJD, Reenlistment Code 4). He completed 2 years, 10 months, 14 days of active service and he had 317 days of lost time.

13. The applicant provides:

a. A preadmission memorandum, 23 August 2007 which shows he was admitted for trauma service and intensive care after he was attacked with a 2x4 board. In the attack he sustained a "TBI, "R 5th metacarpal fx s/p ORIF and casting, and multiple fx's of his right frontal occipital bones." He was homeless at the time of the attack. The document lists a pre-admission diagnosis (per referral source) of subarachnoid hemorrhage, intraventricular hemorrhage, subdural hematoma, history of alcohol abuse, chronic polysubstance abuse, PTSD, stable hydrocephalus, history of suicide attempts (2x), depression and anxiety.

b. A medical health assessment, 26 January 2009, which shows the applicant had multiple health issues which included TBI, substance abuse, alcoholism and major depression disorder.

c. A brief neuropsychological screening examination, 12 September 2018, which states the applicant's medical records show a diagnosis of PTSD and major depression.

14. The Board should consider the applicant's overall record in accordance with the published equity, injustice, or clemency determination guidance.

15. Court-martial convictions stand as adjudged or modified by appeal through the judicial process.

16. The ABCMR will decide cases on the evidence of record. It is not an investigative body. 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.

17. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade his bad conduct characterization of his service to under honorable conditions (general). He contends he experienced mental health conditions including PTSD and a Traumatic Brain Injury (TBI) that mitigates his misconduct.

b. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Pertinent to this advisory are the following: 1) The applicant enlisted in the Regular Army on 30 April 1971; 2) The applicant served in Vietnam from 31 October 1971-21 June 1972 while assigned to an infantry unit; 3) The applicant was found AWOL multiple times. One time before his deployment, once while deployed, and multiple times after returning from his deployment; 4) On 30 January 1975, the applicant was discharged from active duty with a Bad Conduct Discharge Certificate with an under other than honorable conditions characterization of service.

c. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's military service records. The VA's Joint Legacy Viewer (JLV) and civilian medical records provided by the applicant were also examined.

d. The applicant asserts he was experiencing mental health conditions including PTSD and TBI as a result of his combat deployment to Vietnam. There is insufficient evidence the applicant reported or was diagnosed with a mental health condition, including PTSD or TBI while on active service. A review of JLV was void of medical documentation, and the applicant does not any receive service-connected disability. The applicant provided civilian medical documentation regarding his medical conditions. He has reported being homeless and received injury resulting in a TBI in 2007. He was also reported to be experiencing PTSD, substance abuse, depression, and anxiety. There was no specific etiology of the applicant's reported history of mental health conditions including PTSD or a prior history of TBI before 2007.

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

Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant contends he was experiencing mental health conditions including PTSD and a TBI while on active service, and he has been diagnosed with mental health conditions including PTSD.

(2) Did the condition exist or experience occur during military service? Yes, the applicant contends he was experiencing mental health conditions including PTSD and a TBI while on active service.

(3) Does the condition or experience actually excuse or mitigate the discharge? Yes, there is sufficient evidence that the applicant was deployed to a combat zone and could have been experiencing of symptoms of a mental health condition including PTSD while on active service. The applicant had multiple incidents of avoidant behavior such as going AWOL. PTSD can be associated with avoidant behavior. The applicant's misconduct could be a natural sequelae to his mental health conditions including PTSD, which occurred as the result of his deployment to Vietnam. However, there is insufficient evidence he received a TBI. Therefore, there is sufficient evidence to upgrade the applicant's discharge to a general discharge under honorable conditions.

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 applicant's military records, the Board found that relief was warranted. The Board carefully considered the applicant's request, supporting documents, evidence in the records, and published DoD guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement, the applicant's record of service, the frequency and nature of the applicant's misconduct and the reason for separation.

a. The applicant's trial by a court-martial was warranted by the gravity of the offenses charged (multiple specifications of AWOL). 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 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.

b. 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 advisory official's finding sufficient evidence to support the applicant had condition or experience that mitigated his misconduct. The Board also determine that given the applicant's multiple court-martial convictions, and given his extensive misconduct, his service clearly did not rise to the level required for an honorable characterization of service. However, the Board determined a general, under honorable conditions characterization of service is appropriate under published DoD guidance for liberal consideration of discharge upgrade requests.

c. Additionally, the Board also determined that such upgrade did not change the underlying reason for his separation, and that there would be no change to the narrative reason for separation and/or corresponding codes.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

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:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board determined the evidence presented is sufficient to warrant amendment of the ABCMR's decision in Docket Number AC93-06141 on 5 May 1993. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by amending the applicant's DD Form 214 for the period ending 30 January 1975, showing:

- Character of Service: General, Under Honorable Conditions
- Separation Authority: No Change
- Separation Code: No Change
- Reentry Code: No Change
- Narrative Reason for Separation: No Change

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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 Army Board for Correction of Military Records (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. Army Regulation (AR) 635-200, Personnel Separations-Enlisted Personnel, in effect at the time, sets forth the basic authority for the separation of enlisted personnel.
 - a. Paragraph 3-7a provides 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 provides 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 11 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.
3. 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.
4. The Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records on 25 July 2018, regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. Boards for Correction of Military/Naval Records may grant clemency regardless of the court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds.

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.

5. Section 1556 of Title 10, United States Code, requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (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 ABCMR applicants (and/or their counsel) prior to adjudication.

6. AR 15-185, ABCMR, prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR will decide cases on the evidence of record. It is not an investigative body. 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. Additionally, applicants may be represented by counsel at their own expense.

//NOTHING FOLLOWS//