

IN THE CASE OF: ██████████

BOARD DATE: 22 February 2024

DOCKET NUMBER: AR20230008954

APPLICANT REQUESTS: Reconsideration of his previous requests for an upgrade of his bad conduct discharge to an honorable discharge.

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

- DD Form 149 (Application for Correction of Military Record)
- Personal Statement
- DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge)

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 AR20090011474 on 15 December 2009, AR20150005713 on 29 March 2016, and AR20160019426 on 23 May 2017.

2. The applicant states:

a. He is making this request so that he may be able to access VA healthcare. He expresses his sincerest apologies for his actions during his period of service. In the face of the overwhelming trauma, he resorted to self-medicating with alcohol, marijuana, and cocaine to cope with the unimaginable horrors he witnessed. With great remorse he acknowledges the incident where he accidentally discharged his weapon in the company area. He was wounded prior to the incident during a wire check which he feels contributed to this incident.

b. Additionally, he regrets the theft of a portable television, an act that was completely out of his character. He regrets and fully acknowledges such behavior does not reflect his values, training, and upbringing.

c. Despite the above regrettable incidents, he has made it his mission to turn his life around and overcome the challenges he faced upon returning from Vietnam. The

trauma endured during the war, coupled with exposure to Agent Orange, have lasting effects on his physical and mental well-being.

d. He was diagnosed with Post-Traumatic Stress Disorder (PTSD), experiencing recurrent nightmares, cold sweats, and other symptoms associated with this condition. Moreover, the exposure to Agent Orange has resulted in his diagnosis of diabetes mellitus type 2 and high blood pressure, both of which require ongoing medical attention and treatment.

e. Additionally, he witnessed the toll of Agent Orange exposure on his eldest son, who was diagnosed with a bone disorder that is not present in any other family member. This further strengthens his belief in the connection between his exposure to Agent Orange and the subsequent health issues faced by him and his family.

f. He worked diligently to rebuild his life and become a contributing member of society. He sought therapy and support to manage his PTSD symptoms. He also proactively managed his diabetes and high blood pressure through lifestyle modifications and medications.

g. He successfully reintegrated into the workforce as a professional truck driver, and he strives to be a positive influence within his community. He firmly believes, with the proper support and care, he can continue to make meaningful contributions to society. He is determined to use his past experiences as a catalyst for personal growth and positive change.

3. The applicant was inducted into the Army of the United States on 17 April 1969. He held military occupational specialty (MOS) 94B (Cook). He served in Vietnam from on or about 30 April 1970 to 9 April 1971 with the 23rd Supply and Transport Battalion.

4. On 7 August 1970, in Vietnam, he accepted nonjudicial punishment (NJP) under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ) for being absent without leave (AWOL) from 3 to 5 August 1970 and for being apprehended in an off-limits area. His punishment consisted of reduction from pay grade E-4 to E-3 and a suspended forfeiture of pay.

5. On 29 August 1970, his commander imposed a Bar to Reenlistment Certificate against him. The bar was approved on 7 September 1970.

6. On 13 November 1970, he was arraigned before a special court-martial in Vietnam, on the following charges:

a. Charge I, one specification of stealing a stereo, and one specification of stealing a portable TV, the property of two other individuals.

b. Additional Charge I, one specification of committing an assault upon another individual by shooting at him with a dangerous weapon, an M-16 Rifle.

c. Charge II, one specification of wrongfully and willfully discharging a firearm in the company area under circumstances such as to endanger human life.

7. He pled not guilty to all charges and specifications. However, the court found him guilty of all charges and specifications. The court sentenced him to a bad conduct discharge, confinement at hard labor for 3 months, forfeiture of \$70 pay for 3 months, and reduction to the lowest enlisted grade.

8. On 7 January 1971, the convening authority approved the sentence and except for the bad conduct discharge, ordered it executed. The convening authority also ordered the record of trial forwarded to the Judge Advocate General of the Army for review by the U.S. Army Court of Military Review.

9. The U.S. Army Court of Military Review affirmed the approved finding of guilty and the sentence. Special Court-Martial Order Number 185, issued by Headquarters, U.S. Army Training Center, Fort Dix, NJ, dated 1 August 1972, shows after completion of all required post-trial and appellate reviews, the convening authority ordered the bad conduct discharge executed.

10. Accordingly, on 12 October 1972, the applicant was discharged. His DD Form 214 shows he was discharged under the provisions of Army Regulation (AR) 635-200 (Personnel Separations - Enlisted Personnel) with an under other than honorable conditions characterization of service and he was issued a Bad Conduct Discharge Certificate, a separation code of 292, and a reentry code of 4. This form further shows he completed 3 years, 2 months, and 25 days of active service during this period, of which 90 days were lost time under Title 10, U.S. Code, section 972. He was awarded or authorized the National Defense Service Medal, Vietnam Service Medal, Vietnam Campaign Medal, and Marksman Marksmanship Qualification Badge with Rifle Bar (M-16).

11. On 15 December 2009, 29 March 2016, and 23 May 2017, the ABCMR denied his petitions for an upgrade of his bad conduct discharge.

a. Based on the applicant's claim that he has PTSD, his Board Decision, dated 23 May 2017, was reviewed under the 2014 Secretary of Defense's guidance to Military Boards for Correction of Military (BCMR)/Naval Records (NR). The Case Management Division (CMD) requested a medical advisory opinion review of this case for: Medical condition(s) not considered during medical separation processing.

b. On 15 March 2017, the Army Review Boards Agency (ARBA) psychologist reviewed the applicant's supporting documents in their entirety and provided an advisory. This official did not discover evidence of a mental-health consideration that bears on the character of the discharge in this case. A nexus between the applicant's misconduct and his mental health was not discovered.

c. On 17 March 2017, the processing of the applicant's case was placed on hold for 30 days to allow him the opportunity to submit comments on the advisory opinion. However, the opinion was returned undeliverable on 30 March 2017. His case was reconsidered by the Board on 23 May 2017.

15. The applicant provided argument or evidence that the Board should consider in accordance with the published equity, injustice, or clemency determination guidance.

16. MEDICAL REVIEW:

a. The applicant requests and reconsideration of his previous request to upgrade his BCD to honorable. He contends his misconduct was related to PTSD.

b. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Pertinent to this advisory are the following: 1) The applicant was inducted into Army of the United States on 17 April 1969; 2) On 7 August 1970, in Vietnam, he accepted nonjudicial punishment (NJP) under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ) for being absent without leave (AWOL) from 3 to 5 August 1970 and for being apprehended in an off-limits area; 3) On 13 November 1970, he was arraigned before a special court-martial in Vietnam, on the following charges:

- Charge I, one specification of stealing a stereo, and one specification of stealing a portable TV, the property of two other individuals.
- Additional Charge I, one specification of committing an assault upon another individual by shooting at him with a dangerous weapon, an M-16 Rifle.
- Charge II, one specification of wrongfully and willfully discharging a firearm in the company area under circumstances such as to endanger human life.
- 4) He pled not guilty to all charges and specifications. However, the court found him guilty of all charges and specifications. The court sentenced him to a bad conduct discharge, confinement at hard labor for 3 months, forfeiture of \$70 pay for 3 months, and reduction to the lowest enlisted grade; 5) On 7 January 1971, the convening authority approved the sentence and except for the bad conduct discharge, ordered it executed. Accordingly, on 12 October 1972, the applicant was discharged.

c. The VA electronic medical record (JLV), and ROP were reviewed. The military electronic medical record, AHLTA, was not reviewed as it was not in use during the applicant's period of service. No military BH-related documents were provided for review. A review of JLV shows the applicant does not have a SC diagnosis but does have a BH treatment history with the VA. Records show the applicant has approximately 269 treatment encounters with the VA, with the majority of the BH-related records reflecting treatment for substance use. His BH problem lists includes Unspecified Mood Disorder, Depressive Disorder NOS, and Alcohol Dependence. The records show a single encounter, dated 27 June 2006, reflecting a diagnosis of PTSD, which is not listed on his BH problem list. The encounter was conducted by an RN and the records is without evident basis or diagnostic precedence. Furthermore, an RN is not credential to diagnose PTSD. Records show the applicant received intensive outpatient (IOP) treatment for Unspecified Alcohol Dependence from December 2006 to 1 February 2007 and outpatient treatment for the same disorder from 6 February 2007 through August 2007; however, encounter documentation was sparse on treatment details. Records also show the applicant had 4 treatment sessions for Depressive Disorder NOS, comprised of a group session in 2006 and 3 individual sessions (27 June 2008, 18 July 2008, 12 September 2008). The 2006 encounter was sparse on session details. The 2008 encounters show the applicant reported depressive symptoms in the context of situational stressors such as expired license, inability to pay bills, lack of work, and fear of leaving his apartment. The applicant reported onset of his depressive symptoms occurred during deployment. The provider noted the applicant also reported symptoms of hypervigilance, isolation, and exaggerated startle response but did not report traumatic reexperiences or intrusive recollections. The provider listed a rule-out of PTSD but did not diagnose the applicant with PTSD at subsequent encounters. Records also show the applicant engaged the VA for housing assistance at various points between 2006 to the current date, last seeking housing assistance on 24 February 2024.

d. The applicant requests and reconsideration of his previous request to upgrade his BCD to honorable. He contends his misconduct was related to PTSD. A review of the records does not support the applicant had PTSD during his time of deployment or post-service. The single record in the EMR that reflects PTSD was completed by an RN, who was not qualified to render the diagnosis and the encounter provided no evidence or precedent supporting the disorder. Additionally, of the 269 records in the EMR only that one reflected a PTSD diagnosis. The applicant is also diagnosed with Depressive Disorder NOS that appear most related to psychosocial/environment issues proximal to the diagnosis dates in 2006 and 2008, however, he claimed symptom onset in Vietnam. Again, there is insufficient evidence to support the claim but even if one accept the applicant had a Depressive Disorder during his time in Vietnam, his misconduct characterized by theft, assault upon another individual, and wrongfully and willfully discharging a firearm such to endanger human life is not natural sequelae of Depressive Disorder NOS as the disorder does not render one unable to differentiate between right

and wrong and adhere to the right. This also holds true for PTSD, if one takes as fact the applicant had PTSD during deployment.

e. Based on the available information, it is the opinion of the Agency BH Advisor that there is insufficient evidence that the applicant had an experience or condition during his time in service that mitigated his misconduct. However, he contends his misconduct was related to PTSD, and per liberal guidance, his assertion is sufficient to warrant the Board's consideration.

Kurta Questions:

(1) Does any evidence state that the applicant had a condition or experience that may excuse or mitigate a discharge? Yes. The applicant contends his misconduct was related to PTSD

(2) Did the condition exist or experience occur during military service? Yes.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. A review of the records does not support the applicant had PTSD during his time of deployment or post-service. The single record in the EMR that reflects PTSD was completed by an RN, who is not qualified to render the diagnosis and the encounter provided no evidence or precedent for the Disorder. Additionally, of the 269 records in the EMR only that one reflected a PTSD diagnosis. The applicant is also diagnosed with Depressive Disorder NOS that appear most related to psychosocial/environment issues proximal to the diagnosis in 2006 and 2008 but he claims onset in Vietnam. Again, there is insufficient evidence to support the claim but even if one accept the applicant had a Depressive Disorder during his time in Vietnam, his misconduct characterized by theft, assault upon another individual, and wrongfully and willfully discharging a firearm such to endanger human life is not natural sequelae of Depressive Disorder NOS as the disorder does not render one unable to differentiate between right and wrong and adhere to the right. This also holds true for PTSD, if one takes as fact the applicant had PTSD during deployment.

BOARD DISCUSSION:

After reviewing the application and all supporting documents, to include the DoD guidance on liberal consideration when reviewing discharge upgrade requests, the Board determined relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. Based upon the serious and criminal nature of some of the misconduct leading to the applicant's separation, the Board concluded there was insufficient evidence of an error or injustice warranting a change to the applicant's characterization of service.

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 for correction of the records of the individual concerned.

5/15/2024

X

CHAIRPERSON

I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

REFERENCES:

1. AR 635-200, in effect at the time, set forth the basic authority for the separation of enlisted personnel. It states:
 - 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. 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. A discharge under other than honorable conditions is an administrative separation from the service under conditions other than honorable. It may be issued for misconduct, fraudulent entry, security reasons, or for the good of service in selected circumstances.

d. In paragraph 3-11, a member will be given a bad conduct discharge pursuant only to an approved sentence of a general or special court-martial. The appellate review must be completed, and the affirmed sentence ordered duly executed.

2. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, U.S. Code, 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.

3. By law, any redress by this Board of the finality of a court-martial conviction is prohibited. The Board is only empowered to change a discharge if clemency is determined to be appropriate to moderate the severity of the sentence imposed. The evidence shows the court sentenced him to a bad conduct discharge. Additionally, the appellate court affirmed the approved findings of guilty and the sentence.

4. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records (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.

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 Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//