

IN THE CASE OF: ██████████

BOARD DATE: 18 April 2024

DOCKET NUMBER: AR20230009403

APPLICANT REQUESTS: reconsideration of his previous request for an upgrade of his under other than honorable conditions (UOTHC) characterization of service to honorable.

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

- DD Form 149 (Application for Correction of Military Record)
- military personnel and medical records (102 pages), 1997 to 1999
- Department of Veterans Affairs (VA) (8 pages), 27 May 2022 to 6 June 2023

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 AR20220009480 on 29 March 2023.

2. As a new argument, the applicant states:

a. He was in an accident in downtown ██████████ and experienced a laceration to his right wrist when his hand went through a glass door. He suffered tears to all eight tendons, nerves, and arteries in his right wrist area as a result of this accident. He believes his disability came at the hands of Sergeant ██████ while in therapy. He was going to gain full use of his hand, but after his second surgery, the doctor told him that he was not able to repair two tendons, that he had suffered nerve damage, and that he would not be able to have 100 percent (%) sensation in his right hand.

b. He remembers the Army telling him he was going to receive 80% disability, but he was mad at the world for what the Army did to him and did not want anything from the Army. He felt worthless after the doctor told him he was no longer suitable for the Army and that the doctor would fix him to speed up the process so he could get the applicant out of the service.

c. Looking at his hand daily and adjusting to life is frustrating. He indicates increased use of leave without an apparent reason, increased disregard for military or

civilian authority, and episodes of depression, panic attacks, or anxiety without an identifiable cause as behavioral changes he experienced following his incident.

3. The applicant enlisted in the Regular Army on 12 August 1997 for 3 years. The highest rank/grade he held was private first class/E-3.
4. Two DA Forms 4187 (Personnel Action) and a DD Form 616 (Report of Return of Absentee) show, effective 17 November 1998, the applicant's unit reported him AWOL, and on 18 December 1998 he was dropped from the rolls. His duty status changed to returned to military control when he was apprehended by civilian authorities on 7 May 1999.
5. On 12 May 1999, court-martial charges were preferred against the applicant. The DD Form 458 (Charge Sheet) shows he was charged with absenting himself from his organization from on or about 17 November 1998 and did remain so absent until on or about 7 May 1999.
6. The applicant consulted with legal counsel on 13 May 1999 and was advised of the basis for the contemplated trial by court-martial; the maximum permissible punishment authorized under the uniform code of military justice (UCMJ); the possible effects of a UOTHC discharge; and the procedures and rights that were available to him.
 - a. Subsequent to receiving legal counsel, the applicant voluntarily requested discharge under the provision of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 10, for the good of the service – in lieu of trial by court-martial. In his request for discharge, he acknowledged his understanding that by requesting discharge, he was admitting guilt to the charge against him, or of a lesser included offense that also authorized the imposition of a bad conduct or dishonorable discharge. He further acknowledged he understood that if his discharge request was approved, he could be deprived of many or all Army benefits, he could be ineligible for many or all benefits administered by the Veterans Administration, and he could be deprived of his rights and benefits as a veteran under both Federal and State laws.
 - b. He elected not to submit a statement in his own behalf and to not undergo a physical evaluation prior to separation.
7. The applicant's immediate commander recommended approval of the applicant's request for discharge and the issuance of a discharge UOTHC.
8. On 9 September 1999, the separation authority approved the applicant's request for discharge in lieu of trial by court-martial. He directed the issuance of an UOTHC discharge in the lowest enlisted grade.

9. The applicant was discharged accordingly on 6 October 1999, under the provisions of Army Regulation 635-200, Chapter 10, in lieu of trial by court-martial, with an UOTHC characterization of service in the grade of E-1. His DD Form 214 contains the following entries:

a. He completed 1 year, 8 months, and 4 days of net active service during the period covered.

b. Block 18 (Remarks) shows the entry "MEMBER HAS NOT COMPLETED FIRST FULL TERM OF SERVICE."

c. Block 29 (Dates of Time Lost During This Period), shows the entry 17 November 1998 thru 6 May 1999.

10. As new evidence, the applicant provides the following documents which are available in their entirety for the Board's review within the supporting documents:

a. 102 pages of military personnel records and medical records from 1997 to 1999.

b. Eight pages of documents submitted to the VA from 27 May 2022 to 6 June 2023.

11. The ABCMR considered the applicant's request for an upgrade on 29 March 2023. After reviewing the application and all supporting documents, the Board determined relief was not warranted. The Board found the evidence presented did not demonstrate the existence of a probable error or injustice as a basis for correction of the applicant's records.

12. The applicant was charged due to the commission of an offense punishable under the UCMJ with a punitive discharge. Subsequent to being charged, he consulted with counsel and requested discharge under the provisions of Army Regulation 635-200, Chapter 10. Such discharges are voluntary requests for discharge in lieu of trial by court-martial.

13. The Board should consider the applicant's argument and evidence, along with the overall record, in accordance with the published equity, injustice, or clemency determination guidance.

14. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. Documentation reviewed included the applicant's ABCMR application and accompanying documentation, the military electronic medical record (AHLTA), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the

Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and/or the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant is applying to the ABCMR requesting reconsideration of their prior denial of his request for an upgrade of his 6 October 1999 discharge characterized as under other than honorable conditions.

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. His DD 214 for the period of Service under consideration shows he entered the regular Army on 12 August 1997 and was discharged on 6 October 1999 under the separation authority provided chapter 10 of AR 635-200, Active Duty Enlisted Administrative Separations (26 June 1996): Discharge in Lieu of Trial by Court-Martial. The DD 214 show lost time under 10 USC § 972 of 171 days (17 November 1998 thru 6 May 1999). There is no period of Service in a hazardous duty pay area.

d. This request was denied by the ABCMR on 29 March 2023 (AR20220009480). Rather than repeat their findings here, the board is referred to the record of proceedings and medical advisory opinion for that case. This review will concentrate on the new evidence submitted by the applicant.

e. The submitted contemporaneous medical records show that other than administrative encounters, the applicant sustained left knee collateral lateral ligament strain on 22 April 1998 for which he received conservative treatment. No additional medical conditions were listed on the applicant's medical problem list or identified in the documentation.

f. JLV show the applicant is not registered with the VA.

g. There is no evidence the applicant had a mental health or other medical condition which would have then contributed to or would now mitigate his UCMJ violation; or that would have failed the medical retention standards of chapter 3, AR 40-501, Standards of Medical Fitness, and been a cause for referral to the DES prior to his discharge.

Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? NO

(2) Did the condition exist or experience occur during military service? N/A

(3) Does the condition or experience actually excuse or mitigate the discharge? N/A

BOARD DISCUSSION:

The Board carefully considered the applicant's request, supporting documents, evidence in the records, a medical review, and published Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement, his record of service, the frequency and nature of his misconduct, and the reason for his separation. The Board considered the applicant's mental health claim and the review and conclusions of the ARBA Medical Advisor. The applicant provided no evidence of post-service achievements or letters of reference in support of a clemency determination. The Board found insufficient evidence of in-service mitigating factors and concurred with the conclusion of the medical advising official regarding his misconduct not being mitigated by a mental health condition. Based on a preponderance of the evidence, the Board determined 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 that the overall merits of this case are insufficient as a basis to amend the decision of the ABCMR set forth in Docket Number AR20220009480 on 29 March 2023.

9/3/2024

X

CHAIRPERSON

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

REFERENCES:

1. Title 10, U.S. Code, Section 1556, provides the Secretary of the Army shall ensure that an applicant seeking corrective action by ARBA is provided a copy of all correspondence and communications, including summaries of verbal communications, with any agencies or persons external to agency or board, or a member of the staff of the agency or Board, that directly pertains to or has material effect on the applicant's case, except as authorized by statute.

2. Army Regulation 635-200, in effect at the time, set forth the primary authority for separating enlisted personnel.

a. Chapter 10 states in part, a member who has committed an offense or offenses, the punishment for any of which, under the UCMJ and the Manual for Court-Martial, include bad conduct or dishonorable discharge, may submit a request for discharge in lieu of trial by court-martial. In addition, the request for discharge may be submitted at any stage in the processing of the charges until the court-martial convening authority's final action on the case. Commanders will also ensure that a member will not be coerced into submitting a request for discharge in lieu of trial by court-martial. The member will be given a reasonable time (not less than 72 hours) to consult with a consulting counsel and to consider the wisdom of submitting such a request for discharge.

b. An honorable discharge is a separation with honor. The issuance of an honorable discharge certificate is predicated upon proper military behavior and proficient performance of duty during the member's current enlistment or period of obligated

service with due consideration for the member's age, length of service, grade, and general aptitude. Where a member has served faithfully and performed to the best of his ability, and there is no derogatory information in his military record, he should be furnished an honorable discharge certificate.

c. An under honorable conditions (general), discharge is a separation from the Army under honorable conditions. It is issued to a member whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

d. An under other than honorable discharge is an administrative separation from the service under conditions other than honorable. It may be issued for misconduct and in lieu of trial by court-martial.

3. 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 post-traumatic stress disorder; traumatic brain injury; sexual assault; or sexual harassment. Boards are to give liberal consideration to Veterans petitioning for discharge relief when the application for relief is based in whole or in part to those conditions or experiences.

4. 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//