

IN THE CASE OF: [REDACTED]

BOARD DATE: 20 June 2024

DOCKET NUMBER: AR20230009556

APPLICANT REQUESTS: in effect,

- a change to the narrative reason for her separation from "Unsatisfactory Participation" to "Medical Disability"
- an upgrade of her under honorable conditions (general) discharge to an honorable discharge

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

- DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States)
- U.S. Army Reserve (USAR) discharge orders
- Physician letters (five)
- Department of Veterans Affairs (VA) Rating Decision letter
- VA Statement of Benefits letter

FACTS:

1. The applicant did not file within the three-year time frame provided in Title 10, U.S. Code (USC), 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. The applicant states she would like her discharge to be changed to either a medical discharge or an honorable discharge. Prior to her separation, she provided multiple letters from her neurologist stating that she suffers from migraine headaches and the frequency. She was also battling depression at the time; and as a result, she missed unit training assemblies (UTAs) and was ultimately discharged from the USAR.

3. The applicant enlisted in the USAR on 23 September 2008 for a period of 8 years. She entered initial active duty for training on 6 January 2012. The Reserve Annex document rendered at the time of her enlistment shows the applicant understood the following:

a. As a member of the Army Reserve, she must participate satisfactorily during the entire period of her enlistment, reenlistment, immediate reenlistment, transfer, assignment, or reassignment in accordance with the rules and regulations now in effect, or which may hereafter be placed in effect, by the proper authority. As a member of a Selected Reserve troop program unit, her satisfactory participation would be determined by the following:

(1) She would serve as a member of a Selected Reserve troop program unit for the entire period specified in the terms of her service agreement unless otherwise reassigned or separated by proper authority.

(2) She would be required to attend all scheduled UTAs (at least 48 per year) unless she was excused by proper authority. She must attend scheduled UTAs in the prescribed uniform, present a neat soldierly appearance, and perform her duties in a satisfactory manner to receive credit for attendance. If she did not receive credit for attendance for any of these reasons, she would be charged with an unexcused absence. If she accrued nine or more unexcused absences during any continuous 365-day period, she would be declared an unsatisfactory participant.

(3) She was required to satisfactorily complete a period of annual training of not less than 14 days per year, exclusive of travel time, unless excused by proper authority. If she failed to attend or complete the entire period of annual training she would be declared an unsatisfactory participant.

(4) She must keep her commander advised of her current mailing address, where she would receive official correspondence, and she must reply to and comply with all official orders and correspondence that she may receive.

b. If she failed to participate satisfactorily for any of the reasons cited above, or which may be placed into effect hereafter by proper authority. She would be declared an unsatisfactory participant and, by law, subject to order to 45 days of active duty for training or a period of active duty that would not cause her total active duty service to exceed 24 months. She would also be subject to separation from the Selected Reserve or the Ready Reserve, as appropriate, either by reassignment or discharge, which may result in a pay grade reduction and an other than honorable characterization of her military service. In addition, entitlement to educational assistance under the Montgomery GI Bill, or to bonus payments and loan repayments, which were based on service in the Selected Reserve, may be terminated and she may be required to repay all or a portion of the funds I received to the U.S. Government.

4. The applicant's record contains four memoranda, subject: Letter of Instruction -- Unexcused Absence wherein the applicant's immediate commander informed her

attendance records for the unit showed that she was absent from multiple unit training assemblies (MUTAs).

a. The applicant was reminded of the regulatory requirement for her to attend all scheduled UTAs and annual training periods and to participate in a satisfactory manner with regard to military appearance and performance of assigned duties. In each letter, the applicant was informed of the number of unexcused absences accrued within a 1-year period.

b. She was advised that absences from training assemblies may be excused only for reasons of sickness, injury, emergency, or other circumstances beyond her control. If her absence was for one of these reasons, she should furnish the unit an appropriate affidavit or certification by a doctor, medical officer, or other person(s) having specific knowledge of the emergency or circumstances, requesting that it be excused. Her absence could not be excused unless her request, and affidavit or certificate, were received within 15 days of the dates she received the letters.

c. The applicant was reminded if she accumulated nine unexcused absences within a 1-year period, she would become an unsatisfactory participant and she would be processed for separation from the Selected Reserve either by reassignment or discharge. She was advised that the separation could result in pay grade reduction and an other than honorable characterization of her military service. In addition, if she was entitled to educational assistance under the Montgomery GI Bill, or to bonus payments or loan repayments based on Selected Reserve service, this separation will terminate any such entitlement and may require her to repay all or a portion of the incentives she received to the U.S. Government.

d. The memoranda were dated as follows for the periods of absence shown:

- 16 June 2014, for MUTAs 1 and 2 on 15 June 2014, resulting in an accrued total of 12 unexcused absences within a 1-year period
- 20 August 2014, for MUTAs 1 and 2 on 16 August 2014; and 1 and 2 on 17 August 2014, resulting in an accrued total of 16 unexcused absences within a 1-year period
- 17 September 2014, for MUTAs 1 and 2 on 13 September 2014; and 1 and 2 on 14 September 2014, resulting in an accrued total of 20 unexcused absences within a 1-year period

5. On 14 December 2014, an administrative flag was imposed upon the applicant to prevent her from receiving any favorable personnel actions because she was pending field initiated involuntary separation.

6. On 14 December 2014, the applicant's immediate commander notified the applicant that she was initiating actions to separate the applicant from the USAR for Unsatisfactory Participation, in accordance with the provisions of Army Regulation 135-178 (Enlisted Administrative Separations), Chapter 13.

a. The commander advised the applicant that she was recommending the applicant be separated with a service characterization of under honorable conditions (general). She informed the applicant that the reason for this proposed action was the applicant's accrual of nine or more unauthorized absences from scheduled UTAs in a 1-year period.

b. She further advised the applicant that the intermediate commander(s) and separation authority were not bound by her recommendations and the separation authority could direct that she be separated from service or that she be retained. If she was separated, her service may be characterized as honorable, or under honorable conditions (general), of under other than honorable conditions (UOTHC).

c. The proposed separation could result in discharge from the USAR; transfer or reassignment from her USAR unit to the Individual Ready Reserve; or release from custody and control of the Army. The commander advised the applicant she was suspending separation action for 30 days to give the applicant an opportunity to exercise her rights to consult with an appointed military counsel, a reasonably available military counsel of his choice, or civilian counsel at her own expense.

7. On 14 December 2014, the applicant acknowledged receipt of the notification and her understanding that she may expect to encounter substantial prejudice in civilian life if her service was characterized as general (under honorable conditions) or UOTHC. She further understood that if she was discharged UOTHC, she may be ineligible for many or all benefits as a Veteran under both Federal and State laws. She waived her right to consult with an appointed counsel, with a military counsel of her own choice, or with a civilian counsel at her own expense. She indicated written statements and/or documents were submitted with her response; however, there are no such statements filed in her record. She waived her right to request a hearing before a board, on the condition that her service would be characterized upon separation as general.

8. The applicant's immediate commander formally recommended that she be separated from the USAR under the provisions of Army Regulation 135-178, Chapter 13, based upon her accrual of 24 unexcused absences within a 1-year period. The commander recommended the applicant's service be characterized as under honorable conditions (general). The interim commander's concurred with the recommendations.

9. The Deputy Staff Judge Advocate reviewed the applicant's separation packet and determined no legal or administrative errors were contained in the file. The applicant

was properly notified of a separation action on 14 December 2014. The applicant signed the conditional waiver for a general, under honorable conditions discharge in lieu of a hearing before and administrative separation board on 14 December 2014. The proceedings were determined to be legally sufficient.

10. On 26 March 2015, the separation authority approved the conditional waiver and directed that the applicant be separated from the USAR with a general, under honorable conditions discharge, under the provisions of Army Regulation 135-178, Chapter 13, due to unsatisfactory participation.

11. Orders Number 15-090-00080, issued by Headquarters, 81st Regional Support Command, Fort Jackson, SC on 31 March 2015, discharged the applicant from the USAR under the authority of Army Regulation 135-178, effective 3 April 2015 with an under honorable conditions (general) discharge.

12. The applicant provides the following documents:

a. Five letters rendered by her doctor at the [REDACTED] VA Medical Center, [REDACTED] None of the letters were addressed to anyone in particular. A synopsis of the letters follows.

(1) 21 January 2014, [The applicant] is a patient here for frequent migraine headaches. When she has one of these severe headaches, she is essentially unable to function. She has severe malaise and nausea and vomiting. She is extremely sensitive to light and sound. It is impossible for her to participate in drill when she has one of these severe headaches. Right now, she is having very frequent headaches, three or four severe ones a month. She is on medication, but her headaches have not stopped at this point.

(2) 13 May 2015, [The applicant] is a patient here for frequent migraine headaches. She was here in the office today. When she has one of these severe headaches, she is essentially unable to function. She has severe malaise and nausea and vomiting. She is extremely sensitive to light and sound. We are starting a new medication, but her headaches have not stopped at this point.

(3) 27 April 2016, [The applicant] is a patient here in the neurology clinic. She is seen here for frequent migraine headaches. When she has a severe migraine headache, she is unable to function. She has severe malaise and nausea and vomiting. She is extremely sensitive to light and sound. There have been occasions when she has temporarily lost her vision. Her headaches have increased in frequency. She is getting one at least 4 days out of 5. She is on medication, but her headaches continue. Due to the severity of the headaches and the frequency with which she is having them,

she is unable to work at this time. I will continue to work with her and monitor her progress. I do not expect that she will be able to return to work before 22 June 2016. I do plan to see her in the office at that time and can provide an updated report.

(4) 17 March 2020, [the applicant] is a patient here in the neurology clinic. She suffers from severe migraine headaches. When she has a migraine, she gets sensitivity to light and sound, and gets nausea. She has to lie down due to severe migraine pain and associated symptoms. She gets migraines every day. Due to her medical condition, she is unable to function in an employment situation.

(5) 26 June 2020, [The applicant] is a patient here in the neurology clinic. She suffers from severe migraine headaches. When she has a migraine she gets sensitivity to light and sound, and gets nauseous. She is "prostrated" with the migraines and unable to function. She is on oral medication as well as regularly Botox injections. She continues to get frequent migraines. She has a migraine essentially every day. She must go to bed and lie down and take medication. She cannot drive at this time and could not function in a work environment with these daily migraines. Due to the frequency and severity of her migraines, I do believe she is unemployable. She also suffers from depression. She is on medication and receives counselling. She still suffers with depression. The depression makes it difficult for her to be around people and focus on details that are needed in a work environment. I believe that her depression also causes her to be unemployable.

b. A letter from the VA, dated 2 September 2020, shows in part, the applicant's evaluation for major depressive disorder with anxious distress was raised from 70 percent (%) to 100% disabling effective 27 June 2020. Her evaluation of asthma was continued at 30%. Her evaluation of migraine headaches was continued at 50%.

c. A VA letter, dated 29 October 2020, provides a summary of benefits she received from the VA at the time. It shows, in part, the applicant was receiving compensation for a combined service-connected evaluation of 100% disabling.

13. In reaching its determination, the Board shall consider the applicant's petition, available records and/or submitted documents in support of the petition.

14. MEDICAL REVIEW: 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 (EMR – AHLTA and/or MHS Genesis), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, the Army Aeromedical Resource Office (AERO), and/or the Interactive Personnel Electronic Records

Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

a. The applicant is applying to the ABCMR requesting an upgrade of her under honorable conditions (general) discharge, and, in essence, a referral to the Disability Evaluation System (DES). She states:

“I would like for my discharge to be changed to a medical or Honorable discharge. I have provided multiple letters stating that I suffer from migraines from my neurologist explaining these migraine attacks and frequency. I was also battling depression and as a result of these two things, it caused me to mis battle assembly resulting in my discharge. I would like to have my discharge upgraded due to these reasons.”

b. The Record of Proceedings details the applicant’s military service and the circumstances of the case. Discharge orders published by Headquarters, 81st Regional Support command on 31 March 2015 show the drilling applicant was to be discharged with an under honorable conditions (general) characterization of service on 3 April 2015 under authority provided in AR 135-178, Enlisted Administrative Separations. The orders do not cite the authorizing paragraph or chapter.

c. The five “To Whom It May Concern Memorandums, with dates from 2014 thru 2020, state the applicant had episodes of incapacitating headaches and would then be unable to attend drill (aka battle assembly) while suffering from one of these headaches.

d. The applicant received multiple memorandums informing her of her failures to attend battle assembly and the potential consequence of continuing to do so. On 14 December 2014, her company commander informed her of his initiation of action to separate her from the USAR for unsatisfactory participation.

e. On 26 March 2015, the Commanding General of the 143D Sustainment Command (Expeditionary) directed she be discharge with a General (Under Honorable Conditions) characterization of service.

f. Review of her EMR shows she was evaluated and treated for migraine headaches on several occasions in 2009. The encounters show this was a pre-service condition “Past medical history migraines for the past year.” There are no behavioral health related encounters.

g. Submitted documentation shows the applicant has three VA service-connected disability ratings: Major Depressive Disorder (100%), Migraine Headaches (50%), and Bronchial Asthma (30%). While these conditions have been service connected, there is no evidence any medical condition were incurred or permanently aggravated while she

was in a qualified duty status, i.e., incurred in the line of duty. Thus, they are not eligible for referral to the DES.

h. In addition, there is insufficient probative evidence any of the three conditions would have failed the medical retention standards of chapter 3, AR 40-501 prior to his discharge; or that prevented the applicant from attending drills so many drills and/or maintaining contact with her unit. Thus, there was no cause for referral to the Disability Evaluation System.

i. The DES compensates an individual only for service incurred condition(s) which have been determined to disqualify him or her from further military service. The DES has neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions which were incurred or permanently aggravated during their military service; or which did not cause or contribute to the termination of their military career. These roles and authority were granted by Congress to the Department of Veterans Affairs and are executed under a different set of laws.

j. It is the opinion of the Agency Medical Advisor that a referral of this case to the Disability Evaluation System is unwarranted.

Kurta Questions:

A. Did the applicant have a condition or experience that may excuse or mitigate the discharge?

YES: Depression

B. Did the condition exist or experience occur during military service?

YES: The condition has been service connected by the VA

C. Does the condition or experience actually excuse or mitigate the discharge?

YES: As the condition is associated with avoidant behaviors, it fully mitigates the unsatisfactory participation for which she was involuntarily administratively separated.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found partial relief is warranted.

2. The Board concurred with the conclusion of the ARBA Medical Advisor that the evidence does not demonstrate that the applicant should have been considered for retirement or separation due to a disabling medical condition that did not meet retention standards. Based on a preponderance of the evidence, the Board determined the reason for her discharge was not in error or unjust.

3. The Board further concurred with the conclusion of the ARBA Medical Advisor that the applicant's misconduct was mitigated by a behavioral health condition. In consideration of the guidance on liberal consideration provided by the Under Secretary of Defense for Personnel and Readiness, the Board determined the applicant's character of service should be changed to honorable.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

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

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined the evidence presented is sufficient to warrant a recommendation for partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by amending her discharge orders to show her character of service as honorable.
2. The Board further determined the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to any relief in excess of that described above.

12/19/2024

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, USC, Section 1552(b), provides that applications for correction of military records must be filed within three years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the three-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.
2. Title 10, USC, 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.
3. Army Regulation 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The regulation provides that the ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence. It is not an investigative body.
4. Army Regulation 135-91 (Service Obligations, Methods of Fulfilment,

Participation Requirements, and Enforcement Procedures), defines ARNGUS and USAR service obligations and prescribes policy and procedures governing the various types of service obligations and participation requirements. It provides:

a. A Soldier becomes an unsatisfactory participant when he has accrued nine or more unexcused absences from scheduled drills during a 1-year period. After accruing four unexcused absences in a 1-year period, the unit commander is required to notify the Soldier via a prescribed letter of instructions – unexcused absence. The delivery of this notice will be either in person or by certified mail, restricted delivery, return receipt requested. After each additional unexcused absence in a 1-year period, the Soldier will receive a similar letter of instructions. Each of these notices will be filed in the Soldier's military personnel records.

b. The unit commander or acting commander is authorized to excuse absences. Any absence not authorized by the approving official is considered unexcused. A Soldier is an unsatisfactory participant when nine or more unexcused absences occur during a 1-year period. Unless the absence is authorized, a Soldier failing to attend a scheduled single or multiple unit training assembly (MUTA), will be charged with an unexcused absence. When the absence involves a MUTA, the charge will be for one unexcused absence for each 4-hour period not attended, but not to exceed four unexcused absences.

c. Unit commanders will notify Soldiers with unexcused absence(s) by prescribing a letter of instructions-unexcused absence [U-Letters]. The first notification commences with the fourth unexcused absence and each succeeding unexcused absence up to and including the ninth absence in a 12-month period.

d. Delivery of the letter will be either in person or by U.S. mail. If mail is used in lieu of deliver in person, the first notification will be sent by certified mail, return receipt requested and the remaining notification(s) will be sent by first class mail. The notice will be mailed during or immediately following the unit training assembly (UTA) or multiple unit training assemblies (MUTA) from which absent. Whether notices required are delivered in person or sent by U.S. mail, a copy of each notice, and the following will be place in the soldier's personnel file.

(1) When the notices are personally delivered, the Soldier's signature will be obtained on the file copy as acknowledgment of receipt.

(2) When certified mail is used, a copy of the notice and either a post office receipt confirming delivery or the returned unopened envelope showing the notice was not delivered. Mail refused, unclaimed, or otherwise not delivered may not be used as a defense against unexcused absences when the notices were correctly addressed.

(3) When first class mail is used, a copy of the notice and the envelope showing the notice was sent to the soldier's most recent mailing address. Also, the individual mailing the notice will prepare an "affidavit of service by mail." Mail refused, unclaimed, or otherwise not delivered may not be used as a defense against unexcused absences when the notices were correctly addressed; and

(4) The commander's statement showing his or her decision as to whether the reason which prevented the soldier from attending training assembly which resulted in a declaration of unsatisfactory participation was valid or any emergency. The facts or circumstances on which the decision is based will be included in the statement.

e. When it has been determined that an ARNGUS or USAR enlisted soldier is an unsatisfactory participant, the immediate commander will initiate proceedings that result in the reassignment, transfer, or separation of the unsatisfactory participant as prescribed.

5. Army Regulation 135-178 sets forth the basic authority for the separation of enlisted Reserve Component personnel. It provides:

a. An honorable characterization of service is appropriate when the quality of the Soldier'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 (under honorable conditions) characterization of service is warranted when significant negative aspects of the Soldier's conduct or performance of duty outweigh positive aspects of the Soldier's military record.

c. Paragraph provides that service may be characterized as UOTHC when discharge is for misconduct, fraudulent entry, unsatisfactory participation, or security reasons.

6. 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. The guidance further describes evidence sources and criteria and requires Boards to

consider the conditions or experiences presented in evidence as potential mitigation for misconduct that led to the discharge.

7. The Under Secretary of Defense for Personnel and Readiness issued guidance to Service DRBs and Service BCM/NRs on 25 July 2018, 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 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.

//NOTHING FOLLOWS//