

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: ██████████

BOARD DATE: 16 April 2024

DOCKET NUMBER: AR20230009574

APPLICANT REQUESTS: Reconsideration of his request for a 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)
- Self-authored statement
- Character reference letter (2)
- Social Security Administration (SSA) letter

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 AR20190003668 on 3 August 2021.

2. The applicant states:

a. He left the Army in self-defense. He was placed in the area with those that assaulted and almost murdered him. He should be given a medical discharge being 100% disabled, and unable to work due to post-traumatic stress disorder (PTSD). He has done nothing wrong.

b. He was hospitalized for an inguinal hernia repair at Fort Jackson, SC. When he was sent home for Christmas break, he continued to do exercises as directed by his sergeants. While doing exercises at home the hernia opened again. It has steadily grown larger in his scrotal area, (grapefruit size), becoming painful all across his abdomen with sharp pain. He has to wear an appliance. He was in the operating room when his heart was having fibrillation and his second hernia repair was cancelled.

c. He was violently sexually assaulted in December 1986, at Fort Jackson, SC. He talked to his sergeant about the attack, and he said it would be the applicant's word against their word and he could be dishonorably discharged from the Army. He was having mental health symptoms for the first time in early 1987. After three or four years

and unable to work, he applied and received health insurance. A medical Doctor saw his condition and sent him to mental health in 1993 for treatment. He was prescribed a variety of medications; he took for several years. The assault comes back in his mind constantly. He keeps reliving this horrible crime against his person. He continues to experience depression, anxiety, panic attacks, insomnia, extreme nervousness, low self-esteem, suicidal thoughts and much more. He planned to return to the Army after those that attacked him had moved on. His mental status continued to deteriorate.

d. When he was being discharged, an officer asked him if he wanted to stay in; but the applicant told him he needed hernia surgery again. The officer said, "you can receive disability."

3. On his DD Form 149, the applicant notes PTSD, and sexual assault/harassment issues are related to his request.
4. On 20 November 1986, the applicant enlisted in the Regular Army, for 3 years. His record shows he was not awarded a military occupational specialty.
5. On 4 January 1987, the applicant was reported as absent without leave (AWOL) and remained absent until he returned to military authorities on 16 January 1991.
6. On 18 January 1991, the applicant voluntarily declined a separation medical examination.
7. Court-martial charges were preferred against the applicant on 24 January 1991, for violations of the Uniform Code of Military Justice (UCMJ). His DD Form 458 (Charge Sheet) shows he was charged with one specification of going AWOL from on or about 4 January 1987 until on or about 16 January 1991.
8. On 24 January 1991, the applicant consulted with legal counsel and was advised of the basis for the contemplated trial by court-martial; the maximum permissible punishment authorized under the UCMJ; the possible effects of a bad conduct discharge; and the procedures and rights that were available to him.
 - a. Subsequent to receiving legal counsel, the applicant voluntarily requested discharge under the provisions 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 declined to submit a statement in his own behalf.

9. On 6 February 1991, the applicant's commander recommended approval of the applicant's request for discharge. The commander noted there did not appear to be any reasonable ground to believe that the applicant was, at the time of his misconduct, mentally defective, deranged or abnormal.

10. Consistent with the chain of command's recommendations, the separation authority approved the applicant's request for discharge in lieu of trial by court-martial on 12 February 1991, and directed the issuance of an UOTHC Discharge Certificate.

11. The applicant was discharged on 19 March 1991. His DD Form 214 (Certificate of Release or Discharge from Active Duty) confirms he was discharged under the provisions of Army Regulation 635-200, Chapter 10, for the good of the service – in lieu of court-martial. He was discharged in the lowest enlisted grade and his service was characterized as UOTHC. He was assigned Separation Code KFS and Reentry Code 3. He completed 3 months and 19 days of net active service this period with 1,581 days of lost time.

12. The applicant petitioned the ABCMR requesting upgrade of his UOTHC discharge. On 3 August 2021, the Board voted to deny relief and determined that the overall merits of this case were insufficient as a basis for correction of the records.

13. In the processing of this case, a search of the Criminal Investigation Division database was requested for a Report of Investigation and/or Military Police Report pertaining to the applicant. The search revealed no records pertaining to the applicant.

14. The applicant provides the following:

a. Two character reference letters that provide graphic detail of the applicant's current mental health and change to his personality due to the military sexual trauma (MST) he experienced while serving in the Army.

b. SSA letter, dated 28 January 2020, regarding the applicant's application for supplemental security income benefit. The Administrative Law Judge determined he was disabled under the Social Security Act. There was evidence that he may have difficulty in managing his benefits due to mental illness and history of alcohol dependence (in remission).

15. 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.

16. In reaching its determination, the Board can consider the applicant's petition, his arguments and assertions, and his service record in accordance with the published equity, injustice, or clemency guidance.

17. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting reconsideration of his request for a medical retirement or referral into the Disability Evaluation System. He contends he was experiencing PTSD as a result of military sexual trauma (MST), which mitigates his discharge.

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 20 November 1986; 2) Court-martial charges were preferred against the applicant on 24 January 1991 for one specification of going AWOL from 4 January 1987 until 16 January 1991; 3) The applicant was discharged on 19 March 1991, Chapter 10, for the good of the service – in lieu of court-martial service. His service was characterized as UOTHC. He completed 3 months and 19 days of net active service with 1,581 days of lost time.

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 documentation provided by the applicant were also examined.

d. The applicant asserts he was experienced MST and resultant PTSD, which mitigates his misconduct and warrants a medical discharge. There is insufficient evidence the applicant reported or was diagnosed with a mental health condition while on active service. A review of JLV provided evidence the applicant was reported deceased in July 2023. There was insufficient evidence the applicant was diagnosed or treated for service-connected PTSD by the VA. The applicant did not receive any service-connected disability for any mental health condition. He did provide civilian medical documentation indicating her had been diagnosed with a mental health condition many years after his discharge. He provided a SSA letter, dated 28 January 2020, regarding the applicant's application for supplemental security income benefit. The Administrative Law Judge determined he was disabled under the Social Security Act. There was evidence that he may have difficulty in managing his benefits due to mental illness and history of alcohol dependence (in remission).

e. Based on the available information, it is the opinion of the Agency BH Advisor that there is insufficient evidence to support the applicant had condition or experience that mitigated his misconduct. In addition, there is insufficient evidence the applicant warrants a referral to IDES from a behavioral health perspective at this time.

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 PTSD as a result of MST while on active service. The applicant was found to be experiencing a mental health condition many years after his discharge.

(2) Did the condition exist or experience occur during military service? Yes, the applicant contends he was experiencing PTSD as a result of MST while on active service.

(3) Does the condition or experience actually excuse or mitigate the discharge? No, there is insufficient evidence that the applicant was experiencing PTSD while on active service. The applicant contends he experienced MST while on active service, and that contention alone with sufficient for the Board's consideration. The applicant's misconduct of going AWOL could be an avoidant behavior that is a natural sequelae for PTSD and MST. However, the presence of misconduct is not sufficient evidence of a mental health condition. Therefore, there is insufficient evidence the applicant warrants a referral to IDES from a behavioral health perspective at this time.

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 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 applicant was charged with commission of an offense punishable under the UCMJ with a punitive discharge. After being charged, he consulted with counsel and requested a voluntary discharge in lieu of trial by court-martial. The Board found no error or injustice in his separation processing. 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 reviewer's finding insufficient evidence to support the applicant had condition or experience that mitigated his misconduct. In addition, there is insufficient evidence the applicant warrants a referral to disability evaluation system. Therefore, the Board determined relief remains unwarranted.

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 to amend the decision of the ABCMR set forth in Docket Number AR20190003668 on 3 August 2021.



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 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 15-185 (ABCMR) sets forth procedures for processing requests for the correction of military records. Paragraph 2-15a governs requests for reconsideration. This provision of the regulation allows an applicant to request reconsideration of an earlier decision of the ABCMR. The applicant must provide new relevant evidence or argument that was not considered at the time of the ABCMR's prior consideration.
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. 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 10 provided that a member who had committed an offense or offenses, for which the authorized punishment included a punitive discharge, could submit a request for discharge for the good of the service in lieu of trial by court-martial. The request could be submitted at any time after charges had been preferred and must have included the individual's admission of guilt. Although an honorable or general discharge was authorized, a UOTHC discharge was normally considered appropriate.

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 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, traumatic brain injury, 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//