

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 26 April 2024

DOCKET NUMBER: AR20230009663

APPLICANT REQUESTS:

- upgrade of his under other than honorable conditions discharge
- correction of his records to show he was discharged for medical reasons
- personal appearance before the Board

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

DD Form 149 (Application for Correction of Military Record)

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. The applicant states he would like to receive benefits. His discharge should be reconsidered because he was incarcerated and unable at the time to appeal or process the necessary paperwork. His application notes his request is related to "Other Mental Health."
3. The applicant was inducted into the Army on 27 September 1972.
4. The applicant received nonjudicial punishment under the provisions of Article 15, Uniform Code of Military (UCMJ) on:
 - 25 April 1973, for being disrespectful in language toward his superior noncommissioned officer
 - 14 May 1973, for negligently discharging his M-16 service rifle in front of the battalion motor offices (while serving in Germany)
 - 20 August 1973, for disobeying a lawful command from his superior commissioned officer on two occasions

5. The applicant's available records are devoid of a separation packet containing the specific facts and circumstances surrounding his discharge processing. However, his records contain a memorandum, subject: Court Martial Charges Against (applicant), showing his commander recommended his separation from the service "due to the seriousness of the charges" and also recommended trial by a court-martial empowered to adjudge a bad conduct discharge.

6. The applicant's DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge) shows he was discharged on 26 September 1973 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), with a character of service of under other than honorable conditions.

7. The Army Discharge Review Board (ADRB) denied the applicant's request for an upgrade of his discharge on 26 June 1979. The ADRB Record of Proceedings shows in Part VI (Contentions and Issues), the applicant indicated that he was off post without a proper pass and was caught with drugs in his possession.

8. The applicant provided an argument or evidence the Board should consider in accordance with the published Department of Defense guidance regarding liberal consideration, equity, injustice, or clemency determinations.

MEDICAL REVIEW:

1. The applicant requests upgrade his UOTHC discharge to honorable and correction to his records to show he was discharged for medical reason. He contends his misconduct was related to Other Mental Health Issues.

2. 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 into the Regular Army on 27 September 1972; 2) He accepted NJP under provisions of Article 15 of the UCMJ on 25 April 1973 for being disrespectful to an NCO, on 14 May 1973 for negligently discharging his firearm, and on 20 August 1973 for disobeying a lawful order; 3) The applicant's available records are devoid of a separation packet containing the specific facts and circumstances surrounding his discharge processing. However, his records contain a memorandum, subject: Court Martial Charges Against (applicant), showing his commander recommended his separation from the service "due to the seriousness of the charges" and also recommended trial by a court-martial empowered to adjudge a bad conduct discharge; 4) The applicant's DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge) shows he was discharged on 26 September 1973 under the provisions of

Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), chapter 10, for the good of the service.

3. The VA electronic medical record (JLV), ROP, and casefiles were reviewed. The electronic military medical record (AHLTA) was not reviewed as it was not in use during the applicant's time in service. No military BH-related records were provided for review. A review of JLV was void of any BH treatment history for the applicant and he does not have a SC disability. No civilian BH-related records were provided for review.

4. The applicant requests upgrade his UOTHC discharge to honorable and correction to his records to show he was discharged for medical reason. He contends his misconduct was related to Other Mental Health Issues. A review of the records was void of any BH diagnosis or treatment for the applicant during or after service and he provided no medical documentation supporting his assertion of Other Mental Health Issues. In absence of supporting documentation there is insufficient evidence to establish his misconduct was related to or mitigated by Other Mental Health Issues.

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

6. Kurta Questions:

a. Does any evidence state that the applicant had a condition or experience that may excuse or mitigate a discharge? Yes. The contends his misconduct was related to Other Mental Health Issues.

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

c. Does the condition or experience actually excuse or mitigate the discharge? No. A review of the records was void of any BH diagnosis or treatment for the applicant during or after service and he provided no medical documentation supporting his assertion of Other Mental Health Issues. In absence of supporting documentation there is insufficient evidence to establish his misconduct was related to or mitigated by Other Mental Health Issues.

BOARD DISCUSSION:

1. The applicant's contentions, the military record, and regulatory guidance were carefully considered. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted.
2. The applicant's request for a personal appearance hearing was carefully considered. However, in this case, the evidence of record and independent evidence provided by the applicant 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.
3. The Board concurs with the opinion of the ARBA medical advisor, who states, the applicant requests upgrade his UOTHC discharge to honorable and correction to his records to show he was discharged for medical reason. He contends his misconduct was related to Other Mental Health Issues.
 - a. A review of the records was void of any BH diagnosis or treatment for the applicant during or after service and he provided no medical documentation supporting his assertion of Other Mental Health Issues.
 - b. In absence of supporting documentation there is insufficient evidence to establish his misconduct was related to or mitigated by Other Mental Health Issues.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

:	:	:	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.

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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 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 635-200 sets forth the basic authority for the separation of enlisted personnel.

a. Chapter 10 provides that a member who committed an offense or offenses under the UCMJ for which the authorized punishment included a punitive discharge, could submit a request for discharge for the good of the service at any time after court-martial charges were preferred. Commanders would ensure that an individual was not coerced into submitting a request for discharge for the good of the service. Consulting counsel would advise the member concerning the elements of the offense or offenses, the type of discharge normally given under the provisions of this chapter, the loss of Department of Veterans Affairs benefits, and the possibility of prejudice in civilian life because of the characterization of such a discharge. An under other than honorable conditions discharge was normally considered appropriate.

b. Paragraph 3-7a states 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.

c. Paragraph 3-7b states a general discharge is a separation from the Army under honorable conditions. When authorized, it is issued to Soldiers whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

3. Army Regulation 40-501 (Standards of Medical Fitness) provides that for an individual to be found unfit by reason of physical disability, they must be unable to perform the duties of their office, grade, rank or rating. Performance of duty despite impairment would be considered presumptive evidence of physical fitness.

4. Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation) establishes policies and prescribes procedures for the physical disability evaluation of members of the Army for retention, retirement, or separation. Paragraph 1-4c, of the regulation in effect at time, states a member who is charged with an offense for which he could be dismissed or given a punitive discharge may not be referred for disability processing. However, if the officer exercising court-martial

jurisdiction dismisses the charge, or refers it for trial to a court-martial which cannot adjudge such a sentence, the case may be referred for disability processing.

5. Army Regulation 15-185 (ABCMR) provides Department of the Army policy, criteria, and administrative instructions regarding an applicant's request for the correction of a military record. Paragraph 2-11 states 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.

6. Department of Defense Guidance pertaining to requests for discharge upgrade on liberation or clemency guidance:

a. On 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRBs) and Service Boards for Correction of Military/Naval Records (BCM/NRs) 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.

b. On 24 February 2016, the Acting Principal Deputy Under Secretary of Defense directed the Service Discharge Review Boards (DRBs) and Service Boards for Correction of Military/Naval Records (BCM/NRs) to waive the imposition of the statute of limitation for service members requesting discharge upgrades related to PTSD or TBI. Additionally, cases previously considered by either the DRBs, BCMRS, or BCNR without the benefit of the application of the Supplemental Guidance, shall be, upon petition, granted de novo review utilizing the Supplemental Guidance.

c. 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 DRBs and BCM/NRs when considering requests by Veterans for modification of their discharges due in whole, or in part, to mental health conditions, including PTSD; TBI; sexual assault; sexual harassment. Boards were directed 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 that misconduct which led to the discharge.

d. 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.

(1) This guidance does not mandate relief but 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.

(2) 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.

7. Title 10, U.S. Code, section 1556 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.

//NOTHING FOLLOWS//