

IN THE CASE OF: [REDACTED]

BOARD DATE: 25 April 2024

DOCKET NUMBER: AR20230010035

APPLICANT REQUESTS: reconsideration of his request for upgrade of his under other than honorable conditions (UOTHC) discharge to honorable.

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 293 (Application for the Review of 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 AC91-05715 on 27 March 1991.
2. The applicant states his discharge did not include any part of the incident that happened in 1984, when he was struck with a pool stick resulting in six staples and a fractured skull. He had out of character behavior with no therapy, no magnetic resonance imaging, nor a CAT scan. His head injury still affects him, and it had a major impact on the issues surrounding his discharge.
3. On 21 March 1984, the applicant enlisted in the Regular Army for 3 years. Upon completion of initial entry training, he was awarded military occupational specialty 11B (Infantryman). The highest grade he attained was E-2.
4. On 7 January 1985, the applicant was reported as absent without leave (AWOL) for the day, from 0615 hours until 1100 hours.
5. On 14 January 1985, the applicant accepted non-judicial punishment under Article 15 of the Uniform Code of Military Justice (UCMJ), for failing to go at the time prescribed to his appointed place of duty; and being AWOL. His punishment included reduction in grade to E-1, forfeiture of \$250.00 pay for one month, 45 days restriction, and 40 days extra duty.

6. On 2 February 1985, the applicant was admitted to the emergency room and treated for a head injury. Attending physician notes he was hit with a pool cube and received six staples to the wound.

7. On 15 March 1985, the applicant was reported as AWOL a second time, and remained absent until he was apprehended by military authorities on 26 March 1985.

8. On 2 April 1985, the applicant was reported as AWOL a third time, and remained absent until he was apprehended by military authorities on 11 May 1985.

9. Court-martial charges were preferred against the applicant on 14 May 1985, for violations of the UCMJ. His DD Form 458 (Charge Sheet) shows he was charged with two specifications of being AWOL, one specification of unlawfully entering the military quarters of another Soldier; and one specification of resisting apprehension.

10. On 4 June 1985, 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 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 submitted a statement in his own behalf, stating that early in his career he had problems and never was able to overcome them. He realized that he had ruined his chances for a career in the Army, and he apologized for any problems that he caused his unit.

c. He waived a separation medical examination.

11. On 5 June 1985, the applicant's commander recommended approval of the applicant's request for discharge.

12. Consistent with the chain of command's recommendations, the separation authority approved the applicant's request for discharge on 18 June 1985, and directed the issuance of a DD Form 794A (UOTHHC Discharge Certificate).

13. The applicant was discharged on 1 July 1985. 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. He was discharged in the lowest enlisted grade and his service was characterized as UOTHHC. He completed 1 year and 16 days of net active service this period with 88 days of lost time.

14. The applicant petitioned the ABCMR requesting upgrade of his UOTHHC discharge. On 27 March 1991, the Board voted to deny relief and determined the applicant had not presented and the records did not contain sufficient justification to conclude that it would be in the interest of justice to grant the relief requested or to excuse the failure to file within the time prescribed by law.

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 Army Review Boards Agency (ARBA) Medical Advisor reviewed the supporting documents, the Record of Proceedings (ROP), and the applicant's available records in the Interactive Personnel Electronic Records Management System (iPERMS), the Health Artifacts Image Management Solutions (HAIMS) and the VA's Joint Legacy Viewer (JLV). The applicant requests a discharge upgrade from Under Other Than Honorable Conditions. He contends that a head injury caused him to act in a way he otherwise would have not, which resulted in his discharge. He underwent a previous Board 27Mar1991 seeking a change in reenlistment code to allow enlistment in the Marines.

b. The ABCMR ROP summarized the applicant's record and circumstances surrounding the case. He entered active duty in the Regular Army 21Mar1984. His MOS was Infantryman. He was discharged 01Jul1985 under provisions of AR 635-200 chapter 10, for the good of the service. His charge sheet indicated he was charged with

2 specifications of being absent without leave (AWOL from 15Mar1985 to 26Mar1985, and from 02Apr1985 to 11May1985) and one specification of resisting being apprehended (03May1985). His service was characterized as Under Other Than Honorable Conditions.

c. The applicant submitted a 02Feb1985 Emergency Care and Treatment note showing that he had been struck with a pool cube. There was no loss of consciousness. There was no depression or crepitanace found on the occiput (the back of the head/skull). The two lacerations located on the occiput were closed with 6 staples. Diagnoses: 2 cm Lacerations, Occiput; and Alcohol Abuse. He was prescribed aspirin for headache, advised to stop drinking to excess, and returned to full duty. During separation processing, the applicant waived completing a separation medical examination. There were no other service treatment records available for review. JLV search showed the applicant has not been service connected for any disabilities (likely due to the characterization of his service).

d. Concerning the applicant's request for discharge upgrade, the 03Sep2014 Secretary of Defense Liberal Guidance Memorandum and the 25Aug2017 Clarifying Guidance, were considered. There were insufficient details from the medical record to substantiate a definitive diagnosis of traumatic brain injury. However, under Liberal Consideration, the applicant's self-assertion of TBI alone is sufficient to merit consideration of upgrade by the Board.

Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant incurred a head injury (mild TBI) which potentially mitigates his discharge.

(2) Did the condition exist, or did the experience occur during military service? Yes. The applicant incurred his head injury while on active duty.

(3) Does the condition or experience actually excuse or mitigate the discharge? Yes. The applicant's in-service TBI fully mitigates his discharge. Traumatic brain injury can be associated with confusion, difficulty making decisions, poor judgement, and impulsivity all of which can contribute to becoming AWOL and/or resisting apprehension.

BOARD DISCUSSION:

1. The Board carefully considered the applicant's request, 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 TBI 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.

2. The Board concurred with the conclusion of the medical advising official regarding his misconduct being mitigated by TBI. Based on a preponderance of the evidence, the Board determined the applicant's character of service should be changed to honorable.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board determined that the evidence presented was sufficient to warrant amendment of the ABCMR's decision in Docket Number AC91-05715 on 27 March 1991. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by reissuing his DD Form 214 to show his character of service as honorable.

9/18/2024

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. 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. 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.

3. 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.

4. 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 post-traumatic stress disorder (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.

5. 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.

6. 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//