

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 2 April 2024

DOCKET NUMBER: AR20230010543

APPLICANT REQUESTS: upgrade of his dishonorable discharge for Department of Veterans Affairs (VA) purposes due to post-traumatic stress disorder (PTSD).

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

- DD Form 149 (Application for Correction of Military Record)
- Memorandum Sanity Board
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- DD Form 215 (Correction to DD Form 214)
- Southeast Missouri Hospital History and Physical Exam
- Scales of Cognitive Ability for Traumatic Brain Injury (TBI)
- Excerpt of Preliminary Intake Risk Assessment
- Eye Exam
- Medical Documentation
- Standard Form (SF) 600 (Chronological Record of Medical Care)
- Bureau of Prisons Health Service Clinical Encounter
- Medication 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 indicates on his application he suffers from PTSD, TBI, and other mental health issues. He states he is requesting an upgrade of his discharge for VA disability purposes. All branches of the military consider a Soldier has a strong case for a discharge upgrade if they can show their discharge was connected to mental health conditions including PTSD and TBI. The applicant served honorably from 22 January 2004 through 16 April 2008 as a decorated combat Veteran serving in Taji, Iraq from 4 October 2006 through 10 December 2007. [His misconduct was] due to TBIs prior to and during service resulting in defects in problem solving, memory, judgment, impulse control, and emotional regulation among others requiring medication usage for

regulation. The applicant's history of TBI along with PTSD were connected to his discharge according to the medical records he provided to the Board. The error or injustice was discovered after his release from incarceration, while attempting to apply for VA disability benefits, when he served both an honorable term of service and a dishonorable term of service, however, he is still barred from any benefits.

3. The applicant provided the following documents:

a. Memorandum, Subject: Sanity Board for the applicant, dated 13 May 2009, which states in pertinent part:

(1) The applicant's psychiatric diagnoses were PTSD- chronic, post-concussive Syndrome, and problems with primary support group.

(2) At the time of the alleged criminal conduct, the applicant was not able to appreciate the nature or quality and wrongfulness of his conduct. The applicant had sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and had a rational, as well as factual, understanding of the proceedings against him. The applicant had sufficient mental capacity to understand the nature of the proceedings against him and to cooperate intelligently in his defense.

(3) The doctor rendered the opinion that at the time of the alleged criminal conduct, the applicant was not able to appreciate the nature or quality and wrongfulness of his conduct. This opinion was based on the applicant's mental health history. PTSD is a serious mental health condition, especially in the applicant's case. A PTSD diagnosis alone would not necessarily be enough to render a person unable to appreciate the nature or quality and wrongfulness of his conduct. What was even more significant to the doctor was the applicant's history of TBI resulting in a diagnosis of post-concussive syndrome.

(4) The first thing the doctor noticed about the applicant was his speech impediment. He was unable to communicate effectively. The applicant described a history of head injuries, prior to entering the service. The injuries occurred to the left side of his head, in the general vicinity of the left temporal lobe or speech center of the brain.

(5) The single most serious brain injury the applicant described was when he indicated he had been hit in the forehead. The forehead is directly in front of the frontal lobe area of the brain, which is generally described as the seat of the personality but they are responsible for a lot more than that. The frontal lobes control motor function, problem solving, spontaneity, memory language initiation, judgment, impulse control, and emotional regulation. People with frontal lobe damage often experience extreme changes in their personality. They can also experience difficulty in interpreting

feedback from the environment, uncontrollable risk taking, non-compliance with rules and regulations, and impaired associated learning or using external cues to help guide their behavior. These injuries occurred prior to the applicant joining the Army.

(6) After joining the Army, the applicant deployed and reports subsequent TBIs and exposure to combat related trauma. Patients who have a history of brain injuries are more susceptible to subsequent TBIs probably due to poorer judgment and increased risk behaviors. The applicant should have never been allowed to join the Army, based on his medical history. By letting him enlist, the Army put him at risk to suffer additional TBIs. Adding his PTSD symptoms to his TBI history gives the Army a pretty seriously impaired individual who may not be able to understand what is going on around them and may not be capable of executing the socially appropriate behavior response.

(7) The doctor did not know exactly what happened at the time of the alleged criminal conduct the applicant was accused of. The doctor was not sure that applicant knew exactly what happened, at the time in question, either. The doctor did know the applicant had a very significant history of brain injuries. The areas of his brain affected control memory, problem solving, judgement, impulse control, and emotional regulation. Impairment to any of these areas could explain how the applicant could have been directly or indirectly involved in the criminal conduct he was accused of and unable to appreciate the quality and wrongfulness of his conduct or have no memory of his role at all.

b. Southwest Missouri Hospital History and Physical Exam, dated 18 May 2000 shows the reason for the consult was TBI. The final impression was TBI with agitated confusion. The applicant was admitted to the intensive care unit for observation and TBI care. He had been in a motor vehicle accident and was not restrained. The car rolled three times. The applicant was still behind the wheel and there was some unconsciousness.

c. Scales of Cognitive Ability for TBI, dated 24 May 2000, shows the scale scores for testing for TBI. The entire document is available for the Board's consideration.

d. Excerpt of Preliminary Intake Risk Assessment, dated 28 July 2009, shows the applicant has a mental health diagnosis of PTSD.

e. Eye exam, dated 12 January 2012, which includes single field analysis for the left and right eye and a thickness average analysis report.

f. An unnamed medical document, dated 12 February 2012 shows the applicant has a history of migraine headaches, concussion from fall and improvised explosive device exposure.

g. SF Form 600, dated 11 May 2012, shows an MRI scan was done and there were abnormalities in the right and left lobes. The injuries were consistent with a past head injury.

h. Bureau of Prison Health Service Clinical Encounter, dated 20 October 2022 shows the applicant was seen for PTSD and bipolar depression.

i. Adult Preventive and Chronic Care Flowsheet, undated, shows the applicant's chronic illnesses, which include right inferior quadrantanopsia, migraine headaches, depression, chronic PTSD, sleep disturbances, physical trauma, transient alteration of awareness, post-concussion syndrome, PTSD, psychophysiological insomnia, and reaction to chronic stress.

j. Medication record, which shows the medications the applicant is prescribed.

4. The applicant's service record contains the following documents:

a. DD Form 4 (Enlistment/Reenlistment Document Armed Forces of the United States) shows the applicant enlisted in the Regular Army on 22 January 2004.

b. Memorandum administrative reprimand, dated 29 August 2006 shows the applicant was reprimanded for driving while intoxicated on 29 June 2006. On 12 September 2006 the applicant acknowledged receipt of the administrative reprimand and did not make a selection regarding submitting written statements or other documentation in support of his rebuttal. On 3 October 2006, the issuing authority ordered the reprimand be filed in the applicant's official military personnel file.

c. Permanent Order Number 180-16, published by 2nd Battalion, 277th Aviation Regiment, dated 28 June 2007 awarded the applicant the Driver and Mechanic Badge with Component Bar - W (Wheeled Vehicle) for attainment of a high degree of skill in the maintenance of motor vehicles while assigned as primary driver for a minimum of 12 consecutive months with no recorded accidents or traffic violations.

d. DA Form 4187 (Personnel Action) shows the applicant's duty status was changed from present for duty to confined by military authorities effective 10 July 2009.

e. General Court-Martial Order Number 1, published by Headquarters, United States Army Maneuver Support Center of Excellence and Fort Leonard Wood, dated 6 January 2010 shows on 10 July 2009, the applicant was found guilty at a general court-martial. The order shows:

(1) The Charge: In that the applicant did, at or near St. Robert, Missouri on or about 28 September 2008, maim Master N.H. a child under the age of two, by shaking

Master N.H. and striking him about the head and body causing vision loss, hearing loss, and necessitating a permanent feeding tube. The applicant pled not guilty to the Charge and was found guilty of the Charge.

(2) The sentence was adjudged on 10 July 2009 and included reduction to the grade of E1, forfeiture of all pay and allowances, to be confined for 20 years, and to be dishonorably discharged from the service.

(3) On 6 January 2010, the convening authority took action on the case stating only so much of the sentence as provided for reduction to Private/E-1, confinement for 20 years, and a dishonorable discharge was approved, and except for the part of the sentence, extending to a dishonorable discharge was executed. The automatic forfeiture of all pay and allowances was waived effective 6 January 2010 for a period of six months with direction that the funds be paid to the wife of the applicant. The applicant was credited with 136 days of confinement against the sentence to confinement.

f. General Court-Martial Order Number 38, published by Headquarters, U.S. Army Fires Center of Excellence and Fort Sill, dated 24 February 2012 states the sentence to reduction to the grade of Private/E1, confinement for 20 years, and a dishonorable discharge adjudged on 10 July 2009 had been finally affirmed. The automatic forfeitures of all pay and allowances was waived for a period of six months with direction the funds be paid to the wife of the applicant. The applicant would be credited with 136 days confinement against the sentence to confinement. The dishonorable discharge would be executed.

g. Enlisted Record Brief, dated 25 August 2017, shows the applicant had service in Iraq from 4 October 2006 through 10 December 2007 and in Korea from 31 July 2004 through 15 June 2005. His PULHES rating reflects, "111121". PULHES is Physical condition, Upper extremity, Lower extremity, Hearing-ears, vision-Eyes, neuropsychiatric-Stability, and physical work capacity. The value of a characteristic can range from 1 to 4; 1 is the best.

h. DD Form 214, shows the applicant was dishonorably discharged on 19 July 2012 in accordance with chapter 3 of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations) with a dishonorable discharge (Separation Code JJD and Reentry Code 4). He had 5 years, 1 month, and 2 days of active duty service. He had service in Iraq from 4 October 2006 through 10 December 2007. His DD Form 215 (provided by the applicant), added "continuous honorable active service from 22 January 2004 through 16 April 2008." He was awarded or authorized the:

- Army Commendation Medal
- Army Achievement Medal

- Army Good Conduct Medal
- National Defense Service Medal
- Global War on Terrorism Service Medal
- Iraq Campaign Medal with Campaign Star
- Army Service Ribbon
- Overseas Service Ribbon (2nd Award)
- Korean Presidential Unit Citation

i. The applicant's service record was void of disciplinary or derogatory information prior to his deployment.

5. Based on the applicant's assertion he suffered from PTSD, TBI, and other mental health issues and on the documentation the applicant provided, the ARBA Medical Section provided a medical review for the Board's consideration.

6. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his dishonorable discharge. He contends he experienced a traumatic brain injury (TBI), mental health conditions, including PTSD that mitigates his misconduct.

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 into the Regular Army on 22 January 2004; 2) The applicant deployed to Iraq from 4 October 2006-10 December 2007; 3) General Court-Martial Orders, dated 9 January 2010, show the applicant was found guilty at a general court-martial of significant physical assault on a child under the age of two resulting in permeant long-term damage; 3) The applicant was dishonorably discharged on 19 July 2012.

c. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's military service and available medical records. The military electronic medical record (AHLTA), the VA electronic medical record (JLV), military forensic medical records, and civilian medical records provided by the applicant were also examined.

d. The applicant asserts he was experiencing a TBI, mental health conditions including PTSD, which mitigates his misconduct. There was evidence the applicant was initially seen for a Social Work intake on 20 August 2008. However, the encounter was not written till 08 October 2008. The applicant was reporting to want to "better understand my/his anger problem, learn how to control it and possibly eliminate it." He was self-referred due to his yelling and punching things in his home. He also described experiencing anxiety and a history of head trauma before and during his military enlistment. The applicant also reported a history of childhood physical and emotional

trauma and exposure to combat trauma and TBI. He was enrolled into group therapy for anger management, and he was diagnosed with partner relational problem.

e. The applicant was seen for two weekly group therapy appointments. On 03 September 2008, he came as a walk-in appointment. He was describing increased anxiety and sadness related to his deployment and difficulty sleeping. He also reported outbursts of anger in the home, but he denied any domestic violence. The applicant stated he was placed on psychiatric medication following one of his head traumas, and he found it helpful. He was recommended to be assessed by a prescribing behavioral health provide and for individual therapy focused on his trauma from deployment. There was insufficient evidence he attended any of these appointments.

f. On 29 September 2008, the applicant was seen at the Emergency Room by an on-call Social Worker. The applicant was being charged with alleged child abuse. The applicant denied knowing what happened to his stepson to cause the injury, and he found him unresponsive after a hearing a crash. The applicant was alone with his two stepchildren at the time, and he was waiting to attend WLC.

g. The applicant was evaluated for on 29 October 2008 at the RCF. He was noted to require psychiatric medication and was diagnosed with Chronic Stress, Insomnia, Post concussion Syndrome, and abuse as a child. Later, on 03 December 2008, the applicant was diagnosed with PTSD while he was confined to the RCF.

h. On 26 Feb 2009, the applicant underwent a Sanity Board. The complete evaluation was not available for review, but he was reported to be not fit for duty based on his diagnoses of PTSD and Post concussion Syndrome. It was recommended the applicant receive a MEB discharge, because he was not responsible for his behavior, and there was concern he could not participate in his trial. In a Memorandum for Commander, on 13 May 2009, the evaluating psychologist stated the applicant was competent to participate in his trial. Also, he stated in his opinion the applicant was not able to distinguish the difference between right and wrong due to his history of trauma and TBIs. He did not use psychological testing to complete this assessment. He reviewed the charges, a clinical interview, and relevant medical records. He described the applicant as experiencing a speech impediment, but this behavior was not noted previously in his medical records. In March 2009, the applicant completed a neuropsychological test (RBANs). He was found to be within the normal limits of functioning excepted his delayed memory. No further testing was recommended. The applicant continued in medication management appointment till his discharge.

i. The applicant provided additional evidence that he experienced a head injury prior to and during his enlistment. He also provided additional evidence that he has been diagnosed with PTSD related to his childhood and combat trauma. Later on 20 October 2022, the applicant provided evidence he was also diagnosed with Bipolar Depression.

j. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support the applicant had condition or experience that mitigates his misconduct.

Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, there is sufficient evidence the applicant was experiencing PTSD and TBI during his active service and misconduct. He was later diagnosed with Bipolar Disorder while incarcerated.

(2) Did the condition exist or experience occur during military service? Yes, there is sufficient evidence the applicant was experiencing PTSD and TBI during his active service and misconduct.

(3) Does the condition experience actually excuse or mitigate the discharge? No, there is sufficient evidence beyond self-report the applicant was experiencing a TBI and PTSD while on active service. There is insufficient evidence during his active service that he was diagnosed with Bipolar Disorder. He was experiencing anxiety, depression, anger management problems, and insomnia while in active service. The examining psychologist, who completed his sanity board, thought there was sufficient evidence the applicant was unable to determine the difference between right and wrong at the time of his misconduct. However, there was insufficient evidence the psychologist utilized any psychological testing to make this determination. Later, the applicant was provided brief neuropsychological testing for a head injury, and he was found to be operating within the normal limits except for delayed memory. No further testing was warranted. Also, the examining psychologist described behavior that was inconsistent with previous descriptions of the applicant. While the applicant did have sufficient evidence of experiencing PTSD and TBI during his active service, he there was insufficient evidence he was unable to determine the difference between right and wrong. He was still attending his military duties, and it was noted, he was preparing to attend WLC at that time. Under Liberal consideration, the applicant was experiencing a mental health condition and TBI which warrants consideration for mitigation. However, there is no nexus between his PTSD, mental health conditions, and TBI and the totality of the applicant's misconduct: 1) this type of misconduct is not a part of the natural history or sequelae of the applicant's PTSD, TBI, and mental health conditions; 2) the applicant's PTSD, TBI, and mental health conditions does not affect one's ability to distinguish right from wrong and act in accordance with the right.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the applicant's military records, the Board found that relief was 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.

a. The applicant's trial by a court-martial was warranted by the gravity of the offense charged. His conviction and discharge were conducted in accordance with applicable laws and regulations and the discharge appropriately characterizes the misconduct for which he was convicted. He was given a dishonorable discharge pursuant to an approved sentence of a court-martial. The appellate review was completed, and the affirmed sentence was ordered duly executed. All requirements of law and regulation were met with respect to the conduct of the court-martial and the appellate review process, and the rights of the applicant were fully protected. The Board found no error or injustice in the separation processing.

b. The Board considered the medical records, any VA documents provided by the applicant and the review and conclusions of the advising medical official. The Board concurred with the reviewing medical official's finding insufficient evidence to support the applicant had condition or experience that mitigates his misconduct. Also, the applicant provided no evidence of post-service achievements or letters of reference of a persuasive nature in support of a clemency determination. Based on a preponderance of evidence, the Board determined that the character of service the applicant received upon separation was not in error or unjust.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

: : : GRANT FULL RELIEF

: : : GRANT PARTIAL RELIEF

: : : GRANT FORMAL HEARING

█ █ █ DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

Except for the corrections addressed in Administrative Note(s) below, 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.



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.

ADMINISTRATIVE NOTE(S):

A review of the applicant's service records show he is authorized the following awards not listed on his DD Form 214:

- Driver and Mechanic Badge with Component Bar - W
- Korean Service Medal

Add the awards to the applicant's DD Form 214 for the period ending 19 July 2012

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 (AR) 635-200 (Active Duty Enlisted Administrative Separations) provides a Soldier would be given a bad conduct or dishonorable discharge pursuant only to an approved sentence of a general and that the appellate review must be completed and the affirmed sentence ordered duly executed.

a. An honorable character of service represented a separation with honor and entitled the recipient to benefits provided by law. The honorable characterization was appropriate when the quality of the member's service had generally met the standards of acceptable conduct and performance of duty for Army personnel, or was otherwise so meritorious that any other characterization would be clearly inappropriate.

b. A general discharge was a separation from the Army under honorable conditions. When authorized, it was issued to a Soldier whose military record was satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. A discharge under other than honorable conditions is an administrative separation from the Service under conditions other than honorable. It may be issued in lieu of trial by court martial.

d. A Soldier will be given a bad conduct discharge pursuant only to an approved sentence of a general or special court-martial. The appellate review must be completed and the affirmed sentence ordered duly executed. Questions concerning the finality of appellate review should be referred to the servicing staff judge advocate.

e. A Soldier will be given a dishonorable discharge pursuant only to an approved sentence of a general court-martial. The appellate review must be completed and the affirmed sentence ordered duly executed. Questions concerning the finality of appellate review should be referred to the servicing staff judge advocate.

3. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, USC, section 1552, the authority under which this Board acts, the ABCMR is not empowered to set aside a conviction. Rather, it is only empowered to change the severity of the sentence imposed in the court-martial process and then only if clemency is determined to be appropriate. Clemency is an act of mercy or instance of leniency to moderate the severity of the punishment imposed.

4. AR 635-5-1 (Personnel Separations – Separation Program Designator (SPD) Codes), in effect at the time, prescribes the specific authorities, reasons for separating Soldiers from active duty, and the SPD codes to be entered on DD Form 214. It shows code JJD is used for discharge for court-martial with a dishonorable discharge.

5. AR 601-210 (Regular Army and Reserve Components Enlistment Program) table 3-1 (U.S. Army reentry eligibility codes) states:

a. RE-1: Applies to: Person completing his or her term of active service who is considered qualified to reenter the U.S. Army.

b. RE-3: Applies to: Person who is not considered fully qualified for reentry or continuous service at time of separation or disqualification is waiverable.

c. RE-4: Applies to: Person separated from last period of service with a nonwaiverable disqualification.

d. RE-4R: Applies to: A person who retired for length of service with 15 or more years active federal service.

6. 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.

7. 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; traumatic brain injury (TBI); 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 sexual assault or sexual harassment was unreported, or 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. 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.

8 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.

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.

9. 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 Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//