

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 26 July 2024

DOCKET NUMBER: AR20230011278

APPLICANT REQUESTS:

- upgrade of his under other than honorable conditions (UOTHC) discharge
- change of the narrative reason and corresponding Separation Program Designator (SPD) code for his separation to show he was medically retired due to disability rather than in lieu of trial by court-martial

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- Congressional Inquiry documents
- DA Forms 2166-7 (Noncommissioned Officer Evaluation Report (NCOER)) (4)
- DA Form 638 (Recommendation for Award)
- Training and Doctrine Command (TRADOC) Drill Sergeant School, U.S. Army Training Command (USATC) and Fort Jackson, Fort Jackson, SC memorandum, dated 14 March 1999
- Permanent Orders 084-58 issued by Headquarters, U.S. Army Maneuver Support Center and Fort Leonard Wood, Fort Leonard Wood, MO on 4 February 2000
- Orders 334-0361 issued by Headquarters, U.S. Army Maneuver Support Center and Fort Leonard Wood, Fort Leonard Wood, MO on 28 November 2000
- DA Form 2-1 (Personnel Qualification Record - Part II)
- DD Forms 214 (Certificate of Release or Discharge from Active Duty) (2)
- Military medical record documents (27 pages)
- Secretary of Defense, Washington, DC Memorandum, dated 3 September 2014
- Army Review Boards Agency (ARBA), Arlington, VA Public Notice, dated 28 April 2021
- OB Department of Veterans Affairs (VA) Medical Center, Patient Health History (6 pages)
- VA Progress Notes (28 pages)
- VA Rating Decision (15 pages)
- CHRISTUS Health After Visit Summary

FACTS:

1. The applicant did not file within the 3-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 he does not feel the characterization of his service was warranted due to the fact he was suffering from undiagnosed post-traumatic stress disorder (PTSD) as a result of him experiencing several traumatic events. He should have been screened for PTSD prior to his discharge based upon him exhibiting signs, symptoms, and behaviors related to PTSD. He was not aware that his erratic behavior was a means of coping with his undiagnosed PTSD. Prior to experiencing trauma, he was an exemplary Soldier with all types of meritorious awards. He was eventually diagnosed with PTSD due to stressors from active duty, mental behaviors, and unmentionable experiences he endured during his deployments. He has been receiving assistance through mental health counseling to cope with PTSD for a couple of years.
3. On 18 August 1987, the applicant enlisted in the Regular Army in the rank/grade of private/E-1 for a period of 3 years. Upon completion of One Station Unit Training, he was awarded military occupational specialty 11M (Fighting Vehicle Infantryman). He was assigned to a unit in Germany and subsequently reassigned to a unit at Fort Stewart, GA.
4. The applicant served in Saudi Arabia from 27 August 1990 to 24 March 1991.
5. He reenlisted on 12 August 1991 and was promoted to the rank/grade of sergeant (SGT)/E-5 effective 1 November 1992.
6. On 14 December 1992, he reenlisted for a period of 2 years. On 29 December 1993, he extended his term of enlistment by 8 months in order to meet the service remaining requirement for assignment to Korea. He was promoted to staff sergeant (SSG)/E-6 effective 1 March 1994, the highest rank he held while serving.
7. On 2 March 1995, the applicant reenlisted for a period of 4 years.
8. The applicant completed the Drill Sergeant training course during the period of 8 January to 1 April 1999. He was subsequently reassigned to Fort Leonard Wood, MO for duty as a Training Drill Sergeant.
9. On 16 October 1999, the applicant accepted nonjudicial punishment under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ) for, on or about 9 September 1999, assaulting a private by dry shaving him with his knife. His

punishment included forfeiture of \$275.00 per month for two months and a letter of reprimand.

10. Headquarters, 3d Battalion, 10th Infantry Regiment, U.S. Army Maneuver Support Center and Fort Leonard Wood, Fort Leonard Wood, MO memorandum, Subject: Trainee Abuse Allegation--Final 650-12 Report, dated 1 September 2000, shows an allegation of abuse was filed against the applicant. On or about 6 August 2000, the applicant was accused of physically abusing Soldiers within his platoon and giving them unlawful orders. He was specifically accused of striking approximately ten Soldiers and ordering 38 Soldiers to hit with a closed fist Private First Class (PFC)/E-3 BMO, whom he had placed against a wall. The process was again repeated against Private (PVT) KDM. The applicant also made verbal threats to the Soldiers saying that he would hit anyone who did not hit PFC BMO or PVT KDM hard enough, plus they would have to hit them again. An investigation determined the evidence fully supported that these allegations were founded.

11. On 6 September 2000, the findings of the investigation were approved, and it was directed to initiate action to remove the applicant from the Drill Sergeant Program.

12. On 13 September 2000, the applicant's battalion commander notified the applicant that he was initiating action to have him removed from the Drill Sergeant Program. The applicant acknowledged receipt of the notification the same date and indicated he would submit a statement in his own behalf within 7 days.

13. On 27 September 2000, the applicant submitted a rebuttal wherein he provided a synopsis of his career in the Army. He also stated, in part, he is very proud of his status as a Drill Sergeant and had always tried to conduct himself to bring favorable credit to his unit and country. He understood the many challenges they faced every day and that one must be strong enough to adapt. He had tried to do this in all situations and clearly understood he was a role model and must carry himself as such.

14. After reviewing all statements and documents presented, the applicant's battalion commander recommended that he be removed from the Drill Sergeant Program due to infractions of training policies. He further recommended the applicant's Skill Qualification Identifier (SQI) "X" be withdrawn, and his Drill Sergeant Identification Badge be revoked. These actions were approved by the proper authority on 10 October 2000. Orders show the applicant's SQI "X" was revoked effective 10 October 2000.

15. A DD Form 458 (Charge Sheet) shows on 17 October 2000, court-martial charges were preferred against the applicant for violation of the following Articles of the UCMJ:

- Charge I - Article 128 (Assault):

- One specification of unlawfully scraping each side of a Soldier's face with the sharpened edge of a knife in an effort to shave him
- Six specifications of unlawfully striking Soldiers in the chest with a closed fist
- Charge II - Article 134 (All disorders and neglects to the prejudice of good order and discipline in the Armed Forces, all conduct of a nature to bring discredit upon the Armed Forces)
 - specification 1: soliciting 37 Soldiers to consummate battery by punching PFC BMO
 - specification 2: soliciting 37 Soldiers to consummate battery by punching PVT KDM
 - specification 3: wrongfully communicating to 11 Soldiers a threat that he would strike each individual or place that individual against the wall for all of the privates to strike if they did not follow his orders

16. On 8 November 2000, 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.

a. He consulted with legal counsel and was advised of the basis for the trial by court-martial; the maximum permissible punishment authorized under the UCMJ; the possible effects of a UOTHC discharge; and the procedures and rights that were available to him.

b. He elected to submit a statement in his own behalf wherein he acknowledged his misconduct and apologized. He wanted his Soldiers to have the skills to survive on the next battlefield. It was not his intent to harm the Soldiers, but he knew through tough training and discipline his Soldiers could overcome any challenges that lay before them, as well as pull themselves out of difficult problem they may have had before joining the Army. He knew that he crossed a line with his Soldiers, but he was only trying to instill a toughness and discipline in them that would serve them later. He knew he could not recover from his misconduct and that the Army no longer had a need for his services. He requested to be administratively separated in lieu of trial by court-martial.

17. Both the applicant's Defense Counsel and the Staff Judge Advocate recommended approval of the applicant's request.

18. On 21 November 2000, the separation authority approved the applicant's request for discharge in lieu of trial by court-martial, with his service characterized as UOTHC. He further directed the applicant be reduced to the lowest enlisted grade.

19. The applicant's NCOER rendered for the period from December 1999 to November 2000 shows he was relieved for cause due to hazing of his Soldiers.

20. Orders and the applicant's DD Form 214 show he was discharged on 7 December 2000, in the grade of E-1, under the provisions of Army Regulation 635-200, Chapter 10, by reason of "In Lieu of Trial by Court-Martial" with Separation Program Designator code "KFS" and Reentry Eligibility code "4." He was credited with completing 13 years, 3 months, and 20 days of active service this period. He had continuous honorable active service from 18 August 1987 to 8 November 1998. He was awarded or authorized:

- Army Commendation Medal (3rd Award)
- Army Achievement Medal (9th Award)
- Army Good Conduct Medal (4th Award)
- National Defense Service Medal
- Southwest Asia Service Medal with 3 Bronze Service Stars
- NCO Professional Development Ribbon with Numeral 2
- Army Service Ribbon
- Overseas Service Ribbon (2nd Award)
- Kuwait Liberation Medal (Kuwait)
- Kuwait Liberation Medal (Saudi Arabia)
- Expert Marksmanship Qualification Badge with Rifle Bar and Grenade Bar
- Combat Infantryman Badge
- Expert Infantryman Badge
- Driver and Mechanic Badge with Driver-T (indicating tracked vehicle) Bar

21. In addition to the previously discussed evidence, the applicant provides the following documents:

a. Four NCOERs rendered for the periods ending February 1995, July 1998, May 1999, and November 1999, wherein he received favorable ratings and remarks regarding his performance and potential from his Raters and Senior Raters.

b. A DA Form 638 dated 30 October 1998, which shows he was recommended for a Meritorious Service Medal for meritorious service as a dismount squad leader during the period from 5 July 1995 to 17 March 1999. The award was downgraded to an Army Commendation Medal

c. A TRADOC Drill Sergeant School, USATC and Fort Jackson, Fort Jackson, SC memorandum, dated 14 March 1999, which shows he was authorized permanent wear of the Drill Sergeant Identification Badge upon graduation of Class 3/4-99.

d. Permanent Orders 084-58 issued by Headquarters, U.S. Army Maneuver Support Center and Fort Leonard Wood, Fort Leonard Wood, MO on 4 February 2000 show he was awarded the Army Good Conduct Medal (3rd Award) for exemplary behavior, efficiency, and fidelity in active military service from 18 August 1993 to 17 August 1996.

e. Orders 334-0361 issued by Headquarters, U.S. Army Maneuver Support Center and Fort Leonard Wood, Fort Leonard Wood, MO on 28 November 2000 which show he was discharged from the Regular Army effective 7 December 2000.

f. Military medical record documents pertaining to his pre-enlistment medical examination and the treatment he received while serving in the Army.

g. Secretary of Defense, Washington, DC memorandum, Subject: Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming PTSD, dated 3 September 2014, commonly referred to as "The Hagel Memorandum." This document is discussed in the "References" portion of these proceedings.

h. ARBA, Arlington, VA Public Notice, dated 28 April 2021, announced that as part of a settlement agreement in a lawsuit filed in the U.S. District Court for the District of Connecticut, ARBA has agreed to have the Army Discharge Review Board (ADRB) automatically reconsider discharge upgrade applications of a group of former Soldiers who previously applied to the ADRB and to accept new applications from a separate group of former Soldiers who previously applied to the ADRB for discharge upgrades.

i. An OB VA Medical Center, Patient Health History form shows what the applicant reported as his medical history as of 10 June 2016.

j. VA Progress Notes extracted from his VA medical record which show he received treatment for numerous physical and mental health conditions.

k. A VA Rating Decision, dated 16 June 2022, shows the applicant was awarded service-connected disability ratings effective 9 December 2021 for:

- PTSD/major depressive disorder, moderate with anxious distress with a disability evaluation of 70 percent (%)
- patellofemoral pain syndrome, right is granted with a disability evaluation of 10%
- tinnitus is granted with a disability evaluation of 10%
- tendinoplasty, tendinitis, left wrist with a disability evaluation of 0%

I. An After Visit Summary shows the applicant was seen on 24 October 2022, regarding Osteonecrosis of left hip; preop examination; postoperative pain; and status post total hip replacement, left.

22. The Army rates only conditions determined to be physically unfitting at the time of discharge, which disqualify the Soldier from further military service. The Army disability rating is to compensate the individual for the loss of a military career. The VA does not have authority or responsibility for determining physical fitness for military service. The VA may compensate the individual for loss of civilian employability.

23. Title 38, USC, Sections 1110 (General - Basic Entitlement) and 1131 (Peacetime Disability Compensation - Basic Entitlement), permit the VA to award compensation for disabilities which were incurred in or aggravated by active military service. However, an award of a VA rating does not establish an error or injustice on the part of the Army.

24. Title 38, Code of Federal Regulations (CFR), Part IV is the VA's schedule for rating disabilities. The VA awards disability ratings to veterans for service-connected conditions, including those conditions detected after discharge. As a result, the VA, operating under different policies, may award a disability rating where the Army did not find the member to be unfit to perform his duties. Unlike the Army, the VA can evaluate a veteran throughout his or her lifetime, adjusting the percentage of disability based upon that agency's examinations and findings.

25. Army Regulation 635-200 states a Chapter 10 is a voluntary discharge request in-lieu of trial by court-martial. In doing so, he would have waived his opportunity to appear before a court-martial and risk a felony conviction. A characterization of UOTHC is authorized and normally considered appropriate.

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

27. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his under other than honorable conditions (UOTHC) discharge. In addition to a change of the narrative reason and corresponding Separation Program Designator (SPD) code for his separation to show he was medically retired due to disability rather than in lieu of trial by court-martial.

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:

- Applicant enlisted in the Regular Army on 18 August 1987.
- Applicant served in Saudi Arabia from 27 August 1990 to 24 March 1991.

- He reenlisted on 12 August 1991 and was promoted to the rank/grade of sergeant (SGT)/E-5 effective 1 November 1992.
- On 14 December 1992, he reenlisted for a period of 2 years. On 29 December 1993, he extended his term of enlistment by 8 months in order to meet the remaining service requirement for assignment to Korea. He was promoted to staff sergeant (SSG)/E-6 effective 1 March 1994, the highest rank he held while serving.
- On 2 March 1995, the applicant reenlisted for a period of 4 years.
- Applicant completed the Drill Sergeant training course during the period of 8 January to 1 April 1999. He was subsequently reassigned to Fort Leonard Wood, MO for duty as a Training Drill Sergeant.
- On 16 October 1999, the applicant accepted nonjudicial punishment under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ) for, on or about 9 September 1999, assaulting a private by dry shaving him with his knife.
- Headquarters, 3d Battalion, 10th Infantry Regiment, U.S. Army Maneuver Support Center and Fort Leonard Wood, Fort Leonard Wood, MO memorandum, Subject: Trainee Abuse Allegation--Final 650-12 Report, dated 1 September 2000, shows an allegation of abuse was filed against the applicant. On or about 6 August 2000, the applicant was accused of physically abusing Soldiers within his platoon and giving them unlawful orders. He was specifically accused of striking approximately ten Soldiers and ordering 38 Soldiers to hit with a closed fist Private First Class (PFC)/E-3 BMO, whom he had placed against a wall. The process was again repeated against Private (PVT) KDM. The applicant also made verbal threats to the Soldiers saying that he would hit anyone who did not hit PFC BMO or PVT KDM hard enough, plus they would have to hit them again. An investigation determined the evidence fully supported that these allegations were founded.
- On 13 September 2000, the applicant's battalion commander notified the applicant that he was initiating action to have him removed from the Drill Sergeant Program. The applicant acknowledged receipt of the notification the same date and indicated he would submit a statement in his own behalf within 7 days.
- After reviewing all statements and documents presented, the applicant's battalion commander recommended that he be removed from the Drill Sergeant Program due to infractions of training policies. He further recommended the applicant's Skill Qualification Identifier (SQI) "X" be withdrawn, and his Drill Sergeant Identification Badge be revoked. These actions were approved by the proper authority on 10 October 2000. Orders show the applicant's SQI "X" was revoked effective 10 October 2000.
- A DD Form 458 (Charge Sheet) shows on 17 October 2000, court-martial charges were preferred against the applicant for violation of the following Articles of the UCMJ:
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- (b) Charge 2, Article 134 (All disorders and neglects to the prejudice of good order and discipline in the Armed Forces, all conduct of a nature to bring discredit upon the Armed Forces)
- specification 1: soliciting 37 Soldiers to consummate battery by punching PFC BMO
- specification 2: soliciting 37 Soldiers to consummate battery by punching PVT KDM
- specification 3: wrongfully communicating to 11 Soldiers a threat that he would strike each individual or place that individual against the wall for all of the privates to strike if they did not follow his orders
- On 8 November 2000, 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.
- He elected to submit a statement in his own behalf wherein he acknowledged his misconduct and apologized. He wanted his Soldiers to have the skills to survive on the next battlefield. It was not his intent to harm the Soldiers, but he knew through tough training and discipline his Soldiers could overcome any challenges that lay before them, as well as pull themselves out of difficult problem they may have had before joining the Army. He knew that he crossed a line with his Soldiers, but he was only trying to instill a toughness and discipline in them that would serve them later. He knew he could not recover from his misconduct and that the Army no longer had a need for his services. He requested to be administratively separated in lieu of trial by court-martial.
- Orders and the applicant's DD Form 214 show he was discharged on 7 December 2000, in the grade of E-1, under the provisions of Army Regulation 635-200, Chapter 10, by reason of "In Lieu of Trial by Court-Martial" with Separation Program Designator code "KFS" and Reentry Eligibility code "4." He was credited with completing 13 years, 3 months, and 20 days of net active service this period. He had continuous honorable active service from 18 August 1987 to 8 November 1998.

c. Review of Available Records: The Army Review Board Agency (ARBA) Behavioral Health Advisor reviewed the supporting documents contained in the applicant's file. The applicant states, "he does not feel the characterization of his service was warranted due to the fact he was suffering from undiagnosed post-traumatic stress disorder (PTSD) as a result of experiencing several traumatic events. He should have been screened for PTSD prior to his discharge based upon him exhibiting signs, symptoms, and behaviors related to PTSD. He was not aware that his erratic behavior was a means of coping with his undiagnosed PTSD. Prior to experiencing trauma, he was an exemplary Soldier with all types of meritorious awards. He was eventually diagnosed with PTSD due to

stressors from active duty, mental behaviors, and unmentionable experiences he endured during his deployments. He has been receiving assistance through mental health counseling to cope with PTSD for a couple of years.”

d. Due to the period of service no active-duty electronic medical records were available for review. However, the applicant provides hardcopy documentation showing medical care he received during active duty. No mental health concerns or encounters were found in the documentation. In addition, the applicant submitted four NCO evaluations wherein he received favorable ratings and remarks regarding his performance and potential. The evaluations indicate the applicant was successful in all areas rated and exceeded expectations; his overall performance was rated as “among the best”. In addition, on 4 February 2000, he received an award for “exemplary behavior, efficiency, and fidelity in active military service”. There is no evidence in the applicant's available records indicating he was unable to perform his military duties due to a medical disability. Overall, the applicant's available service record does not show any evidence that he was issued a permanent physical profile rating, was treated for any behavioral health condition, was diagnosed with a condition that failed retention standards and/or rendered him unfit for military service.

e. The VA's Joint Legacy Viewer (JLV) was reviewed and indicates the applicant is 80% service connected, including 70% for PTSD. The record indicates the applicant was seen for a preliminary assessment and evaluation to determine appropriateness and eligibility for Substance Use Disorder Services (SUDS) on 1 September 2016. He was recommended for services and an in-depth intake SUDS consultation was completed on 20 September 2016. The applicant did not follow-up on recommended services. Almost two years later, the applicant was referred for mental health care by his primary care provider and participated in an intake appointment on 9 April 2018. Based on that appointment behavioral health services were recommended with the goals of decreasing irritability, anxiety, and depression, and improved sleep. He did not follow-up on the treatment recommendations but presented to psychiatry as a walk-in on 10 September 2018 and was started on medication. Overall, the applicant has received intermittent BH services via the VA with the primary intervention of psychiatry/ medication management since he has been reluctant to participate in SUDS or other therapeutic interventions. The VA record indicates the applicant is diagnosed with Posttraumatic Stress Disorder (PTSD), Alcohol Dependence, Mood Disorder, and Insomnia,

f. Based on the information available, it is the opinion of the Agency Behavioral Health Advisor that there is sufficient evidence to support the applicant had an experience during military service and subsequently a behavioral health condition. However, his BH condition of PTSD does not mitigate his discharge. In addition, based on the evidence provided, a referral to the IDES process is not indicated, at this time. There is no evidence the applicant's current service-connected PTSD failed the medical retention standards of AR 40-501, Chapter 3, Standards of Medical Fitness, prior to his

separation. Furthermore, there is no evidence that any medical condition prevented the applicant from being able to reasonably perform the duties of his grade, rank, or rating prior to separation. The applicant's NCO evaluations and numerous awards are not indicative of a soldier who was unable to meet medical retention standards. Although the applicant has been service connected for PTSD, VA examinations are based on different standards and parameters; they do not address whether a medical condition met or failed Army retention criteria or if it was a ratable condition during the period of service. Therefore, a VA disability rating would not imply failure to meet Army retention standards at the time of service. A subsequent diagnosis of PTSD through the VA is not indicative of an injustice at the time of service. Furthermore, even an in-service diagnosis of PTSD is not automatically unfitting, per AR 40-501, and would not automatically result in medical separation processing. Based on the documentation available for review, there is no indication that an omission or error occurred that would warrant a referral to the IDES process. In summary, his separation process appears proper, equitable and free of error, and insufficient new evidence has been provided to determine otherwise.

g. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant asserts post-traumatic stress disorder (PTSD).

(2) Did the condition exist or experience occur during military service? Yes. The applicant is service connected for PTSD and the record indicates he deployed to a combat zone.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. Court-martial charges were preferred against the applicant for assault including unlawfully scraping each side of a soldier's face with the sharpened edge of a knife in an effort to shave him and six specifications of unlawfully striking soldiers in the chest with a closed fist. In addition, soliciting 37 soldiers to consummate battery by punching two soldiers as well as wrongfully communicating a threat to 11 soldiers. There is no nexus between PTSD and abuse of power. The applicant's misconduct of threatening 11 soldiers, committing assault, and soliciting battery are not part of the natural history or sequelae of PTSD, as such, his BH condition would not mitigate his misconduct under Liberal Consideration. In addition, PTSD does not affect one's ability to distinguish right from wrong and act in accordance with the right.

BOARD DISCUSSION:

1. 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 Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement and record of service, the frequency and nature of the applicant's misconduct and the reason for separation. The applicant was charged with seven violations of various trainee abuse and three violations of assault upon trainees, punishable under the Uniform Code of Military Justice with a punitive discharge. After being charged, he consulted with counsel and voluntarily requested discharge in lieu of trial by court-martial. The Board found no error or injustice in the separation proceedings and designated characterization of service. The Board noted the applicant's contention of post-traumatic stress disorder (PTSD); however, reviewed and concurred with the medical advisor's review finding sufficient evidence to support the applicant had PTSD during active service, but that condition did not mitigate the type of misconduct and ultimate discharge of the applicant. Based on a preponderance of the evidence, the Board concluded that the characterization of service and corresponding narrative reason for separation and separation program designator code were not in error or unjust and denied relief.

2. Additionally, the Board reviewed and concurred with the medical advisor's review finding no evidence a medical condition prevented the applicant from being able to reasonably perform the duties of his grade, rank, or rating prior to separation and therefore denied his request pertaining to being medically retired due to disability vice in lieu of trial by court-martial.

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, 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. The ABCMR may, in its discretion, hold a hearing. 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.
4. Army Regulation 635-200, in effect at the time, set forth the basic authority for the separation of enlisted personnel.
 - a. Chapter 10 stated a member who committed an offense or offenses for which the authorized punishment included a punitive discharge could, at any time after the charges have been preferred, submit a request for discharge for the good of the service in lieu of trial by court-martial. Although an honorable or general discharge was authorized, a discharge under other than honorable conditions was normally considered appropriate. At the time of the applicant's separation the regulation provided for the issuance of an UOTHC discharge.
 - b. 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. 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.

d. When a Soldier was to be discharged UOTHC, the separation authority would direct an immediate reduction to the lowest enlisted grade.

5. Title 10, USC, Chapter 61, provides for the retirement and discharge of members of the Armed Forces who incur a physical disability in the line of duty while serving on active or inactive duty. However, the disability must have been the proximate result of performing military duty. It further provides for disability retirement or separation for a member who is physically unfit to perform the duties of his office, rank, grade, or rating because of disability incurred while entitled to basic pay.

6. Title 38, USC, Section 1110 provides: For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

7. Title 38, USC, Section 1131 provides: For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during other than a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

8. Army Regulation 40-501 (Medical Services - Standards of Medical Fitness) provides information on medical fitness standards for induction, enlistment, appointment, retention, and related policies and procedures. Chapter 3 (Medical Fitness Standards for Retention and Separation, Including Retirement) provides a listing of all medical conditions and specific causes for referral to an Medical Evaluation Board (MEB). It states:

a. The various medical conditions and physical defects which may render a Soldier unfit for further military service and which fall below the standards required for all

enlisted Soldiers of the Active Army, Army Reserve National Guard, and United States Army Reserve. The medical conditions and physical defects, individually or in combination, are those, that:

(1) Significantly limit or interfere with the Soldier's performance of their duties.

(2) May compromise or aggravate the Soldier's health or well-being if they were to remain in the military Service. This may involve dependence on certain medications, appliances, severe dietary restrictions, or frequent special treatments, or a requirement for frequent clinical monitoring.

(3) May compromise the health or well-being of other Soldiers.

(4) May prejudice the best interests of the Government if the individual were to remain in the military Service.

b. Soldiers with conditions listed in Chapter 3, who do not meet the required medical standards will be evaluated by an MEB. Possession of one or more of the conditions listed in this chapter does not mean automatic retirement or separation from service. Physicians are responsible for referring Soldiers with conditions listed in Chapter 3 to an MEB.

9. Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation) establishes the Physical Disability Evaluation System according to the provisions of Title 10, USC, Chapter 61 (Retirement or Separation for Physical Disability) and Department of Defense Directive 1332.18.2. This regulation governs the evaluation for physical fitness of Soldiers who may be unfit to perform their military duties because of physical disability. It states:

a. The mere presence of an impairment does not, 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 the requirements of the duties the Soldier reasonably may be expected to perform because of tier office, grade, rank or rating. To ensure all solders are physically qualified to perform their duties in a reasonable manner, medical retention qualification standards have been established in Army Regulation 40-501. These guidelines are used to refer a Soldier to an MEB.

b. The Soldier will not be declared physically unfit for military service because of disabilities known to exist at the time of the Soldier's acceptance for military service that have remained essentially the same in degree since acceptance and have not interfered with the Soldier's performance of effective military service.

c. 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 they can no longer continue to reasonably perform because of a physical disability incurred or aggravated in service.

d. When a Soldier is being processed for separation or retirement for reasons other than physical disability, continued performance of assigned duty commensurate with his or her rank or grade until the Soldier is scheduled for separation or retirement, creates a presumption that the Soldier is fit. An enlisted Soldier whose reenlistment has not been approved before the end of his or her current enlistment, is not processing for separation; therefore, this rule does not apply. The presumption of fitness may be overcome if the evidence establishes that:

(1) The Soldier was, in fact, physically unable to perform adequately the duties of his or her office, grade, rank or rating for a period of time because of disability. There must be a causative relationship between the less than adequate duty performance and the unfitting medical condition or conditions.

(2) An acute, grave illness or injury or other significant deterioration of the Soldier's physical conditions occurred immediately prior to, or coincident with processing for separation or retirement for reasons other than physical disability and which rendered the Soldier unfit for further duty.

e. The fact that a Soldier has a condition listed in the VA Schedule of Ratings Disability does not equate to finding of physical unfitness. An unfitting, or ratable condition, is one which renders the Soldier unable to perform the duties of their office, grade, rank, or rating, in such a way as to reasonably fulfill the purpose of their employment on active duty.

f. The medical treatment facility commander with the primary care responsibility will evaluate those referred to him/her and will, if it appears as though the member is not medically qualified to perform duty or fails to meet retention criteria, refer the member to a MEB. Those members who do not meet medical retention standards will be referred to a PEB for a determination of whether they are able to perform the duties of their grade and Military Occupational Specialty with the medically disqualifying condition. The PEB evaluates all cases of physical disability equitably for the Soldier and the Army. The PEB investigates the nature, cause, degree of severity, and probable permanency of the disability of Soldiers whose cases are referred to the board. Finally, it makes findings and recommendations required by law to establish the eligibility of a Soldier to be separated or retired because of physical disability.

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

(BCM/NR) to carefully consider the revised PTSD criteria, detailed medical considerations and mitigating factors when taking action on applications from former service members administratively discharged UOTHC 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.

11. 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. 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.

12. 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, 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.

13. On 4 April 2024, 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 eligibility for medical

retirement or separation benefits. This guidance is being promulgated in light of *Doyon v. United States* and is consistent with that decision. Accordingly, the BCM/NR will apply liberal consideration to the eligible applicant's assertion that combat- or military sexual trauma -related PTSD or TBI potentially contributed to the circumstances resulting in their discharge or dismissal to determine whether any discharge relief is appropriate. After making that determination, the BCM/NR will then separately assess the individual's claim of medical unfitness for to the unfitness claim or carryover of any of the findings made when applying liberal consideration continued service due to that PTSD or TBI condition as a discreet issue, without applying liberal consideration.

//NOTHING FOLLOWS//