

IN THE CASE OF: [REDACTED]

BOARD DATE: 20 June 2024

DOCKET NUMBER: AR20230011538

APPLICANT REQUESTS: reconsideration of his prior requests for an upgrade of his characterization of service and a change of the narrative reason for his separation to an unspecified, presumably more favorable reason.

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

- Automated DD Form 293 (Request for the Review of Discharge from the Armed Forces of the United States), 22 August 2023
- DD Form 214 (Certificate of Release or Discharge from Active Duty), 22 April 2013
- Department of Veterans Affairs (VA) benefit information, 1 July 2021
- VA claim letter, 22 August 2023

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 AR20130008072 on 15 November 2013 and in Docket Number AR20160000463 on 24 August 2017.

2. The applicant states, in effect, he started to suffer from post-traumatic stress disorder (PTSD) before he deployed to Afghanistan in 2010. After he was shot at Fort Bliss, TX in 2012, the effects from his PTSD only worsened. He knows his PTSD was the sole reason for his pattern of misconduct and he did not get counseling during his service. He was undiagnosed with PTSD until approximately 10 years ago, and his symptoms include night terrors, being on high alert, reoccurring memories of the incident, depression, anxiety, and not being able to go out as often as he wants.

3. The applicant enlisted in the Regular Army on 23 September 2008 for a period of 5 years and 33 weeks.

4. His Enlisted Record Brief shows he was awarded military occupational specialty 25B (Information Technology Specialist), the highest rank he attained was specialist/E-4, and he deployed to Afghanistan from 22 June 2010 through 15 May 2011.

5. The Criminal Investigation Division (CID) opened an investigation on 17 January 2012 involving the applicant, for willfully discharging a firearm and aggravated assault. One of the applicant's friends became involved in a verbal altercation in the parking lot of a nightclub. The applicant heard someone shout "Gun, Gun!" and he subsequently retrieved his .40 caliber pistol from another Soldier's vehicle and fired approximately 5-6 rounds in the air. Witnesses stated the applicant fired 8-12 rounds in the air and his weapon was recovered with an empty 12-round magazine. During this incident, the applicant was struck and was subsequently taken to the hospital for treatment of his injury.

6. On 15 February 2012, the applicant received developmental counseling from his First Sergeant (1SG) denying him leave due to an investigation with the CID and local police. He refused to sign the counseling and the 1SG annotated the applicant was advised by his squad leader not to sign the counseling and to talk to the Inspector General.

7. The applicant was counseled for lying to his 1SG and commander about leaving the local area without requesting and receiving a mileage pass.

8. The applicant accepted nonjudicial punishment, under the provisions of Article 15, of the Uniform Code of Military Justice (UCMJ) on 1 April 2012, for making an official statement with the intent to deceive on or about 7 March 2012. His punishment imposed was reduction to private first class/E-3; forfeiture of \$462.00 pay, suspended, to be automatically remitted if not vacated before 12 July 2012; extra duty for 14 days; and restriction for 14 days.

9. On 15 March 2013, the applicant was counseled for his behavior and conduct bringing discredit upon the Army. The relevant DA Form 4856 (Developmental Counseling Form) shows the applicant disagreed with the counseling and stated, in effect, he took leave because his command refused to grant him leave, and he was unable to take Christmas or Thanksgiving leave prior to his incident. He had experienced a traumatic incident, and he wanted to see his family and be with his daughter. He admitted a chair was thrown in the dining facility out of frustration from not receiving support from his chain of command. He referenced requesting rehabilitative transfer and no action being taken. He asked to be transferred to a different unit because he felt his command did not like him.

10. The applicant underwent a separation medical examination. His DD Form 2807-1 (Report of Medical History) and DD Form 2808 (Report of Medical Examination) show

the applicant reported being in good health. The examining physician determined he was physically qualified for service.

11. The applicant was notified on 18 March 2013 of his immediate commander's intent to initiate separation action against him under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), paragraph 14-12b, for a pattern of misconduct. His commander noted the applicant's Article 15 for lying to the chain of command, making a false statement, and engaging in disorderly conduct at a night club as the reasons for his proposed action.

12. The applicant consulted with counsel and was advised of the basis for the contemplated action to separate him and of the rights available to him. He understood he may encounter prejudice in the civilian life and elected to submit the following statement in his own behalf via an email message from his counsel, dated on 9 April 2013:

a. He had an open-door meeting with Major General [REDACTED] and requested the Commander not take any final action on his separation until he had his meeting with him.

b. He requested rehabilitative transfer from his current unit to another on post or at a different installation for a fresh start.

c. He was facing an administrative separation board for his arrest by civilian authorities for two counts of murder. On 21 February 2013, he was fully acquitted of all charges brought by the civilian authorities. Major General P terminated the applicant's administrative separation board upon his acquittal in civilian court.

d. The applicant's unit initiated a new administrative separation proceeding based on an Article 15 he received on 29 March 2012 for engaging in disorderly conduct, which was almost a year old at the time. Since the acquittal of his civilian charges, he had been subjected to actions by the unit that call into question the unit's impartiality and fair treatment of him.

e. The unit had interfered with the applicant's ability to meet his legal counsel and he had been denied an Army Emergency Relief loan. The chain of command expedited his separation instead of giving him recovery time after being on Charge of Quarters duty.

f. After being in civilian confinement for almost a year, for charges which were acquitted, he requested the opportunity to put the incidents behind him and Soldier on, stating he could not Soldier on in his current unit because of the way he was being treated.

13. The applicant's immediate commander formally recommended his separation from service, on 27 March 2013, under the provisions of Army Regulation 635-200, paragraph 14-12b, by reason of patterns of misconduct. The intermediate commander concurred with the recommendation and further recommended an under honorable conditions (general) discharge on 9 April 2013.

14. On 9 April 2013, the separation authority approved the recommended separation action and directed an under honorable conditions (general) characterization of service.

15. The applicant was discharged on 22 April 2013, under the provisions of Army Regulation 635-200, paragraph 14-12b, by reason of pattern of misconduct. His DD Form 214 confirms his character of service was under honorable conditions (general). He was credited with 4 years and 7 months of net active service with 10 months and 24 days of foreign service to Afghanistan. He was awarded or authorized the following:

- Afghanistan Campaign Medal with Campaign Star
- Army Commendation Medal (2nd award)
- Valorous Unit Award
- Army Good Conduct Medal
- National Defense Service Medal
- Global War on Terrorism Service Medal
- Army Service Ribbon
- Overseas Service Ribbon
- North Atlantic Treaty Organization Medal

16. The Army Discharge Review Board reviewed the applicant's discharge on 15 November 2013. After careful consideration, the Board determined the applicant was properly and equitably discharged. His request for a change in the character and/or reason of his discharge was denied.

17. The ABCMR reviewed the applicant's request for discharge upgrade on 9 September 2014 and on 24 August 2017. The Board determined in both cases the evidence presented did not demonstrate the existence of a probable error or injustice, and the overall merits of the case were insufficient as a basis for correction.

18. The applicant provides a VA benefits letter showing his service connected disabilities include PTSD and tinnitus. He also provides a VA letter, dated 22 August 2023, showing he has one or more service-connected disabilities and his combined service connected evaluation is 80 percent.

19. In reaching its determination, the Board can consider the applicant's petition, service record, and statements in light of the published guidance on equity, injustice, or clemency.

21. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting reconsideration of his prior requests for an upgrade of his under honorable conditions (general) characterization of service and a change of the narrative reason for his separation to an unspecified, presumably more favorable reason.

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:

- The applicant enlisted into the Regular Army 23 September 2008.
- The applicant deployed to Afghanistan from 22 June 2010 to 15 May 2011. On 17 January 2012 the applicant was involved in incident at a night club that resulted in him discharging a firearm into the air, and the applicant was struck and taken to the hospital for treatment. Two individuals were killed in this incident. On 1 April 2012, he received NJP for making an official statement with intent to deceive, and on 15 March 2013 he was counseled for his behavior and conduct related to leaving the area without granted leave by command. After civilian confinement of nearly a year, the applicant was acquitted, and the applicant's immediate commander formally recommended separation on 27 March 2013.
- The applicant was discharged on 22 April 2013 under the provisions of Army Regulation 635-200, paragraph 14-12b, by reason of pattern of misconduct, and he was credited with 4 years and 7 months of net active service with 10 months and 24 days of foreign service to Afghanistan.

c. Review of Available Records: The Army Review Boards Agency (ARBA) Behavioral Health Advisor reviewed the supporting documents contained in the applicant's file. The applicant asserts he has PTSD from events before deployment to Afghanistan, and his PTSD worsened following the shooting at Fort Bliss in 2012. A VA rating decision letter dated 1 July 2021 was reviewed, and it was noted that the applicant's rating for PTSD went from 50% to 70%. A letter from VA dated 22 August 2023 showed a combined total rating of 80%. A Report of Medical History dated 15 March 2013 was reviewed and noted that the applicant had no health conditions but was treated for a bullet wound during his time in service. There was insufficient evidence that the applicant was diagnosed with PTSD while on active service.

d. The VA's Joint Legacy Viewer (JLV) was also reviewed and showed documentation of a mental health visit on 24 January 2012. The applicant reported depressed mood, irritability, and sleep difficulty following the shooting incident and his fiancé getting out of the military and moving to Nevada. He was seen for another

session with similar complaints on 2 February 2012 and was diagnosed with Adjustment Disorder with Depressed Mood. He was also seen for two more visits in March and April 2012 with continued stress associated with the incident and legal involvement as well as concerns about his family. In February 2013, the applicant initiated mental health treatment again following incarceration and acquittal. Documentation discusses financial problems and difficulty in feeling supported by his unit. He was diagnosed with Adjustment Disorder with Depressed Mood and was seen for a follow up session on 13 March 2013. A Report of Mental Status Evaluation, as part of the separation process, was conducted on 19 March 2013. The applicant was deemed fit for duty and able to understand the administrative proceedings. The document included a diagnosis of Adjustment Disorder with Depressed Mood and noted current mental health treatment. The applicant was seen for a final session on 1 April 2013 and documentation noted improved mood and symptoms associated with knowing he was being chaptered out, but he also discussed worry about finances and work in the future.

e. The applicant initiated mental health treatment with the VA in August 2021, and he reported history of depression and PTSD symptoms. Documentation discusses exposure to small arms fire during deployment to Afghanistan in 2010-2011, and then shortly after returning from deployment, he was involved in the night club incident. He was diagnosed with Depression and PTSD. He had two follow up visits where skills training was provided and evidence-based treatment for PTSD was discussed but declined. The applicant did not show up for subsequent appointments, and when reached by phone on 1 April 2022, he declined services.

f. Nine documents related to the applicant's VA compensation and pension claims were also reviewed. The initial Disability Benefits Questionnaire (DBQ) dated 30 October 2020 indicated that the applicant reported symptoms of PTSD developing over the previous three years and these included: exaggerated startle response, hypervigilance, irritability, and emotional numbing. He discussed some impairment in occupational functioning as well as difficulty in maintaining stable relationships. The documentation lists his primary trauma as the shooting incident at the night club that occurred while on active service and a secondary trauma related to spending a year in jail. The documentation also discusses traumatic experiences in Afghanistan, including witnessing another soldier stepping on a mine that blew up, mortar attacks, and bombings. Review DBQs related to the PTSD claim dated 9 June 2021, 24 January 2022, 13 July 2022, and 16 November 2023 showed progressively worsening symptoms of PTSD. The most recent DBQ, dated 19 March 2024, discussed hallucinations of seeing the deceased soldiers from the shooting incident as well as hearing explosions or "random war sounds" as related to his deployment. He also reported increased alcohol intake. Finally, there were two DBQs with claims of migraines and Irritable Bowel Syndrome secondary to PTSD.

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

h. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant asserts he had an undiagnosed PTSD at the time of the misconduct. Records from his time on active service show that he was treated for Adjustment Disorder related to the incident surrounding the misconduct.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts and there is documentation of DoD mental health records showing the applicant was diagnosed with Adjustment Disorder with Depressed Mood while on active service.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. There is insufficient evidence, beyond self-report, that the applicant was experiencing PTSD at the time of the misconduct. There is documentation that the applicant engaged in mental health treatment while on active service, and he was diagnosed with Adjustment Disorder with Depressed Mood as a result of the shooting incident. VA documentation shows he is service-connected for PTSD at 70%, and a review of the DBQs indicated the applicant reported PTSD symptoms developing after discharge from the military. Additionally, the documentation identifies the primary traumatic event as the shooting incident.

i. However, the applicant contends he was experiencing mental health condition or an experience that mitigated his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

BOARD DISCUSSION:

The Board carefully considered the applicant's request, supporting documents, 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 to include deployment, the frequency and nature of his misconduct, and the reason for his separation. The Board considered the applicant's PTSD 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. The Board found insufficient evidence of in-service mitigating factors and concurred with the conclusion of the medical advising official regarding his misconduct not being mitigated by PTSD. Based on a preponderance of the evidence, the Board determined the character of service the

applicant received upon separation and the reason for his separation were 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:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined that the overall merits of this case are insufficient as a basis to amend the decision of the ABCMR set forth in Docket Number AR20130008072 on 15 November 2013 and in Docket Number AR20160000463 on 24 August 2017.

12/19/2024

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. 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. Section 1556 of Title 10, USC, 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.

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

a. Paragraph 3-7a provides that 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. Paragraph 3-7b states 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 14 establishes policy and prescribes procedures for separating members for misconduct. Specific categories include minor disciplinary infractions (a pattern of misconduct consisting solely of minor military disciplinary infractions), a pattern of misconduct (consisting of discreditable involvement with civil or military authorities or conduct prejudicial to good order and discipline). Action will be taken to separate a member for misconduct when it is clearly established that rehabilitation is impracticable or is unlikely to succeed. A discharge under other than honorable conditions is normally appropriate for a Soldier discharged under this chapter; however, the separation authority may direct a general discharge if merited by the Soldier's overall record.

4. 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 Discharge Review Boards (DRB) and Boards for Correction of Military/Naval Records (BCM/NR) when considering requests by Veterans for modification of their discharges due in whole or in part to: mental health conditions, including post-traumatic stress disorder; 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 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.

5. 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/NR) 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//