

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 26 June 2024

DOCKET NUMBER: AR20230012055

APPLICANT REQUESTS, through counsel: in effect a retirement due to disability versus a under other than honorable conditions discharge in lieu of trial by court-martial (upgraded to honorable, Secretarial Authority).

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

- DD Form 149, Application for the Review of Discharge
- DD Form 214, Certificate of Release or Discharge from Active Duty
- Client (self) Request for Records Form
- Medical Records

FACTS:

1. The applicant's counsel states, in effect, the military failed to properly recognize the applicant's injuries and a Medical Evaluation Board failed to review his service-connected injuries. As the result of this substantial procedural error, the applicant is entitled to a medical retirement and back pay.
2. A review of the applicant's military records shows he enlisted in the Regular Army on 16 August 2006. He was awarded military occupational specialty 11B, infantryman. The highest grade held was specialist/E-4.
3. His Enlisted Record Brief shows he completed foreign service in:
  - Iraq from 13 October 2007 to 14 November 2008
  - Afghanistan from 12 Mary 2010 to 11 May 2011
4. The applicant went absent without leave (AWOL) on 17 August 2012 and he was dropped from the rolls (DFR) on 17 September 2012.
5. On 7 November 2012, he was apprehended by civilian authorities and returned to military control at Fort Campbell, KY.

6. Court-martial charges were preferred against the applicant on 7 November 2012 for violations of the Uniform Code of Military Justice (UCMJ). His DD Form 458, Charge Sheet, shows he was charged with the following offenses:

- failure to go at the time prescribed to his appointed place of duty (accountability formation) on or about 12 March 2012
- failure to go at the time prescribed to his appointed place of duty (accountability formation) on or about 8 May 2012
- willfully disobeying a lawful order from a superior noncommissioned officer on or about 15 May 2012
- failure to go at the time prescribed to his appointed place of duty (accountability formation) on or about 21 May 2012
- being AWOL from on or about 18 June 2012 to 20 June 2012
- being AWOL with intent to remain away permanently from on or about 17 August 2012 to on about 7 November 2012

7. On 19 November 2012, the applicant requested to be discharged in lieu of court-martial. In his request, he stated, in effect, that after serving two deployments he suffered with post-traumatic stress disorder (PTSD) and had recurring pain in his back, neck and spine. He had nightmares of the events he witnessed in combat, and he was a very different person from when he enlisted six years ago. He contends that only after being denied leave to go see his terminally ill mother, did he go absent without leave (AWOL). He accepted responsibility for his misconduct and asked that his request for discharge be granted.

8. On 10 December 2012, the applicant's trial defense counsel submitted the applicant's request for discharge to the Commander, 101st Airborne Division (Air Assault), Fort Campbell, KY. Counsel stated the applicant was charged with desertion, multiple specifications of AWOL, disrespect towards noncommissioned officers, and disobeying lawful orders. The applicant had been confined since 7 November 2012. The Command initially elected to dispose of these charges via non judicial punishment; however, the applicant elected to have his offenses litigated before a court-martial. A discharge in lieu of court-martial was appropriate when considering his age, time served, the death of his mother, and his young family.

9. On 9 January 2013, the separation authority approved the applicant's request for discharge, and directed that his service be characterized as under other than honorable conditions (UOTHC).

10. His DD Form 214 confirms he was discharged on 23 January 2013 in accordance with AR 635-200, chapter 10, in lieu of trial by court-martial (Separation Code KFS and Reentry Code 4). His service was characterized as UOTHC. He completed 6 years and 14 days of active service with lost time from 17 August to 16 September 2012, 17 September to 6 November 2012, and 7 November 2012 to 10 January 2013.

11. Subsequent to his discharge the applicant petitioned the Army Discharge Review Board (ADRB) for an upgrade to the characterization of his service. On 7 March 2022, the ADRB determined that the characterization of service was inequitable based on the applicant's length of quality of service, to include combat service, the circumstances surrounding the discharge (other behavioral health issues and asserted PTSD diagnosis) and post service accomplishments. Accordingly, the Board voted to grant relief in the form of an upgrade of the characterization of service to honorable and by changing the separation authority to AR 635-200, Chapter 15, and the narrative reason for separation to Secretarial Authority, with a corresponding separation code to JFF, and a change to the reentry eligibility (RE) code to 3.

12. On 1 July 2022, the applicant was issued a new DD Form 214 which shows he was discharged on 23 January 2013, under the provisions of AR 635-200, Chapter 15, Secretarial Authority (Separation Authority JFF and Reentry Code 3). The applicant's DD Form 214 confirms his service was characterized as honorable. He was credited with 6 years, and 14 days of net active service.

13. The applicant provided a request for post-service medical records. These records show the applicant was diagnosed with unspecified depressive disorder on or about 11 March 2015. Other medical records, 18 January 2023, show the applicant underwent therapy after his discharge and was diagnosed with anxiety, PTSD, depression, and migraines. He had not been on medication since 2013. His treatment record further show he had a left thumb injury, lower back pain, constant ringing in the ear, and sleep issues.

14. By regulation –

a. Enlisted Soldiers who are approved for discharge in lieu of trial by court-martial are ineligible for referral to the MEB and Physical Evaluation Board (PEB) phases of the Disability Evaluation System (DES). If the Soldier is in the DES process, their DES case will be terminated, and the Soldier is discharged in lieu of trial by court-martial.

b. Soldiers under processing for an administrative separation for fraudulent enlistment or misconduct remain eligible to be referred to the MEB.

15. The Board should consider the applicant's statement in accordance with the published equity, injustice, or clemency determination guidance.

## 16. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting consideration of change in the narrative reason for discharge to include a disability. His current characterization of service is honorable with narrative reason as Secretarial Authority.

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 16 August 2006.
- The applicant deployed to Iraq from 13 October 2007 to 14 November 2008 and to Afghanistan from 12 May 2010 to 11 May 2011. Court-martial charges were preferred against the applicant on 7 November 2012 for failure to go at the time prescribed to his appointed place of duty (three charges); willfully disobeying a lawful order; and being AWOL (two charges). He requested discharge in lieu of court-martial, which was approved on 9 January 2013.
- The applicant petitioned the ADRB for an upgrade to the characterization of his service, which was granted on 7 March 2022. His corrected DD214 shows characterization of service as honorable with the narrative reason changed to Secretarial Authority.
- The applicant was discharged on 23 January 2013 and completed 6 years and 14 days of active service.

c. Review of Available Records: The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents contained in the applicant's file. The applicant asserts he had a disability at the time of discharge. Medical records dated 11 March 2015 from Centerstone were reviewed and showed a diagnosis of Unspecified Depressive Disorder with no documentation of symptoms to support this diagnosis. A medication list indicating three antidepressant medications was also included. A mental health evaluation dated 18 January 2023 showed symptoms irritability, nightmares, and sleep issues, and it concluded with a diagnosis of PTSD. An antidepressant medication was prescribed. There was insufficient evidence that the applicant was diagnosed with PTSD or another psychiatric condition while on active service.

d. The VA's Joint Legacy Viewer (JLV) was also reviewed and showed the applicant is 100% service connected for PTSD. Records show he initially engaged with mental health on 21 August 2007 as referred by his attorney because he was going through a court martial. He reported insomnia, anxiety, and worry about his future. He was diagnosed with Adjustment Disorder. His next visit was on 2 March 2009, and he was referred by the SRP site. He endorsed irritability, anxiety, and nightmares "about once a week." Primarily he discussed work-related problems and elected not to follow up. The applicant was then seen on 17 February 2010 due to nightmares, aggression in his sleep, feeling depressed, and "hates work." He was diagnosed with Adjustment Disorder. On 27 April 2010 he was seen for an SRP and reported some nightmares

related to previous deployment, but he was cleared to deploy from a mental health perspective. The applicant presented as a walk-in to BH on 23 April 2012 and reported stress associated with a pending chapter and going through a divorce. He endorsed some symptoms of anxiety, depression, and sleep difficulty and was diagnosed with Adjustment Disorder. It does not appear that the applicant has engaged care with the VA for mental health treatment.

e. 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 disabling mental health condition. He had five visits with mental health while on active service, and although he endorsed some anxiety, sleep difficulty, and nightmares, these symptoms were attributed to situational stressors. He was diagnosed with Adjustment Disorder.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant asserts he had a disabling mental health condition at the time of discharge. There was documentation of history of Adjustment Disorder while on active service, and he is 100% service connected for PTSD through the VA. Additionally, the applicant's misconduct has been mitigated, and his characterization of discharge has been upgraded to honorable.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he was experiencing a mental health condition while on active service. The applicant has been found to be 100% disabled for service-connected PTSD.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. There is insufficient evidence that the applicant was experiencing a disabling mental health condition while on active service. While the applicant is currently service connected for PTSD, documentation does not support the applicant had PTSD at the time of discharge. Moreover, documentation does not support the applicant was psychiatrically unfit at the time of discharge for any condition as he did not have persistent or reoccurring symptoms requiring extended or recurrent psychiatric hospitalization or persistent and reoccurring symptoms that interfered with duty performance or necessitated duty limitations (AR 40-501, para 3-33c).

g. However, the applicant contends he had a disabling mental health condition while on active service, and per Liberal Consideration his contention is worthy of the board's consideration.

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 through counsel carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation, and published Department of Defense guidance for liberal and clemency determinations requests for upgrade. Upon review through counsel of the applicant's petition, available military records and medical review, the Board concurred with the advising official finding insufficient evidence to support that the applicant had a disabling mental health condition. The opine noted the applicant's documentation does not support he had PTSD at the time of discharge. Moreover, documentation does not support the applicant was psychiatrically unfit at the time of discharge for any condition as he did not have persistent or reoccurring symptoms requiring extended or recurrent psychiatric hospitalization.

2. The Board found insufficient evidence to support the applicant's and his counsel's contentions for a retirement due to disability. The Board determined the applicant had five visits with mental health while on active service, and although he endorsed some anxiety, sleep difficulty, and nightmares, these symptoms were attributed to situational stressors. The applicant was diagnosed with adjustment disorder. The Board agreed the applicant was not found unfit at the time of discharge for any condition as he did not have persistent or reoccurring symptoms requiring extended or recurrent treatment. Based on the preponderance of evidence, the Board denied relief.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	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.

[REDACTED]

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. Army Regulation (AR) 635-200, Personnel Separations-Active Duty Enlisted Administrative Separations, sets forth the basic authority for the separation of enlisted personnel. Chapter 15, Secretarial Plenary Authority states:

a. Separation under this chapter is the prerogative of Secretary of the Army (SECARMY). Secretarial plenary separation authority is exercised sparingly and used when no other provision of this regulation applies. Separation under this chapter is limited to cases where the early separation of a Soldier is clearly in the best interest of the Army. Separations under this chapter are effective only if approved in writing by SECARMY or the Secretary's approved designee as announced in updated memoranda.

b. Secretarial separation authority is normally exercised on a case-by-case basis but may be used for a specific class or category of Soldiers. When used in the latter circumstance, it is announced by special Headquarters, Department of the Army directive that may, if appropriate, delegate blanket separation authority to commanders with General Court Martial Convening Authority for the class of Soldiers concerned.

c. The service of Soldiers separated under Secretarial plenary authority will be characterized as honorable or under honorable conditions as warranted by their military records, unless an entry-level status separation (uncharacterized) is warranted. No Soldier will be awarded a character of service under honorable conditions in accordance

with this chapter unless the Soldier is notified of the specific factors in his or her service record that warrant such a characterization, using the notification procedure.

2. AR 635-40, Personnel Separations-Physical Evaluation for Retention, Retirement, or Separations, states

a. Enlisted Soldiers who are approved for discharge in lieu of trial by court-martial are ineligible for referral to the Medical Evaluation Board (MEB) and Physical Evaluation Board (PEB) phases of the Disability Evaluation System (DES). If the Soldier is in the DES process, their DES case will be terminated, and the Soldier is discharged in lieu of trial by court-martial.

b. Soldiers under processing for an administrative separation for fraudulent enlistment or misconduct remain eligible to be referred to the MEB. The Soldier's commander must notify the Soldier's PEB liaison officer in writing that administrative separation action has been initiated. The Soldier's completed MEB must be referred to the Soldier's General Court-martial Convening Authority (GCMCA) in accordance with AR 635-200 to determine whether the Soldier will be referred to the PEB. Approval and suspension of an AR 635-200 separation action is not authorized when the Soldier is pending both an AR 635-200 and AR 635-40 action. The GCMCA must decide which action to pursue. Soldiers continue to be eligible for these administrative separation actions up until the day of their separation or retirement for disability even though their PEB findings have been previously completed and approved by USAPDA for the SECARMY. In no case will a Soldier, being processed for an administrative separation for fraudulent enlistment or misconduct be discharged through the DES process without the approval of the GCMCA.

3. Title 38, U.S. Code, section 1110, General - Basic Entitlement: 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.

4. Title 38, U.S. Code, section 1131, Peacetime Disability Compensation - Basic Entitlement: 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.

5. The Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records on 25 July 2018, regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. Boards for Correction of Military/Naval Records may grant clemency regardless of the court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds.

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.

6. Title 10, U.S. Code, section 1556 of 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.

7. AR 15-185, ABCMR, prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR begins its consideration of each case with the presumption of administrative regularity, which is that what the Army did was correct. The ABCMR is not an investigative body and

decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

//NOTHING FOLLOWS//