

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 6 August 2024

DOCKET NUMBER: AR20230014302

APPLICANT REQUESTS: Reconsideration of his request for upgrade of his bad conduct discharge (BCD) to under honorable conditions (general) or honorable, based on disability.

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

- DD Form 293 (Application for the Review of Discharge)
- Self-authored letter

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 AR20150011513 on 8 December 2016.

2. The applicant states his injuries sustained in Iraq were treated with Percocet and prescribed by Army providers, which led to his opioid dependence. He sustained multiple physical injuries to his back, neck, legs, knees, feet, and shoulders. He experienced the mental health consequences of participating in combat. He would get refills of Percocet every two weeks without assessment, referral to mental health, nor alternative pain management methods. He found himself in legal trouble for his behaviors due to opioid dependency; even then, he was never offered mental health or addiction services. Prior to his discharge, he was awarded a 100 percent (%) Veterans Affairs (VA) disability rating; however, it was rescinded. He has been opioid free since 2015, without any further legal incidents. He lives in severe pain and hears crackling noises in his ears, which worsens his depression, anger, and anxiety. Sometimes he believes that death would be a better option, so that he would no longer be in pain.

3. On his DD Form 149, the applicant notes post-traumatic stress disorder (PTSD) issues are related to his request.

4. The applicant enlisted in the Regular Army on 24 September 2007. Upon completion of training, he was awarded military occupational specialty 92F (Petroleum Supply).

5. On 13 September 2008, the applicant began service in Kuwait. He reenlisted in the Regular Army on 15 March 2009. He returned from Kuwait on 13 September 2009.

6. The applicant underwent a Medical Evaluation Board (MEB), to determine whether his medical conditions met medical retention standards. The Board determined that the applicant did not meet retention standards, under Army Regulation (AR) 40-501 (Standards of Medical Fitness). Further, the Board recommended the applicant's referral to a Physical Evaluation Board (PEB); however, the available record is void of the MEB proceedings.

7. A DA Form 199 (Informal PEB Proceedings) shows a PEB convened on 26 September 2012, and the Board determined the applicant was physically unfit and recommended his medical separation with a disability rating of 10% with entitlement to severance pay. The PEB considered his left (non-dominant) shoulder instability, post repair with decreased range of motion and determined the injury to be unfitting. The PEB also considered the MEB diagnoses 2, 4-15 (anxiety disorder, not otherwise specified; right posterior tibialis tendinitis; right side medial epicondylitis; left olecranon/triceps tendinitis; right patellofemoral syndrome; left patellofemoral syndrome; Schonberg's syndrome; lumbar sprain; bilateral constant tinnitus; cervical strain; migraine headaches; right plantar fasciitis and right plantar heel spurs; and left plantar fasciitis and right plantar heel spurs) both individually and in combination with other conditions. The PEB determined those conditions (were not associated with profile limitations and did not impact the Soldier's ability to perform any one of the ten functional activities.

8. On 15 January 2013, the applicant acknowledged he had been advised of the PEB's findings and recommendations. He concurred with the results, waived his right to a formal hearing, and did not request reconsideration of his VA ratings.

9. Court-martial charges were preferred against the applicant for violations of the Uniform Code of Military Justice (UCMJ); however, the relevant DD Form 458 (Charge Sheet) is not available for review.

10. Before a general court-martial on 21 March 2013, at Fort Stewart, GA, the applicant was found guilty of :

- one specification of violating a lawful general order by wrongfully ingesting a synthetic cannabinoid commonly known as "SPICE" on divers occasions from on or about 11 September 2011, until on or about 18 April 2012
- one specification of wrongfully distributing up to 500 pills of Oxycodone, commonly known as Percocet on divers occasions, between on or about 1 January 2011 and on or about 1 May 2012

11. The court sentenced the applicant to confinement for nine months, and to be discharged from the service with a BCD. The sentence was approved on 6 November 2013, and the record of trial was forwarded for appellate review.

12. The applicant was discharged on 6 February 2015. His DD Form 214 (Certificate of Release or Discharge from Active Duty) confirms he was discharged under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), Chapter 3, by reason of court-martial. His service was characterized as bad conduct. He was assigned Separation Code JJD and Reentry Code 3. He was credited with 6 years, 8 months, and 25 days of net active service this period with 233 days of lost time. The applicant's DD Form 214 listed his continuous honorable service from 24 September 2007 to 14 March 2009.

13. The applicant petitioned the ABCMR requesting upgrade of his BCD. On 8 December 2016, the Board voted to deny relief and determined the overall merits of the case were insufficient as a basis for correction of the applicant's records.

a. The applicant requests his BCD be upgraded so that he may be able to obtain VA benefits. He implies that his addiction to a prescription drug mitigates his misconduct of distributing a seemingly large quantity of that drug. The ABCMR does grant requests for discharge upgrades solely for the purpose of making an applicant eligible for benefits from other agencies. Each case is considered on its own merits.

b. There is no error or injustice in the fact that the applicant's PEB had been finalized prior to his conviction. Soldiers charged under the UCMJ with offenses authorizing a punitive discharge are prevented from continuing disability separation processing. His sentence to a punitive discharge precluded separation under any other authority. Trial by court-martial was warranted by the gravity of the offenses charged and his conviction and discharge were effected in accordance with applicable laws and regulations.

14. In reaching its determination, the Board can consider the applicant's petition, arguments and assertions, and service record in accordance with the published equity, injustice, or clemency guidance.

15. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting reconsideration of an upgrade to his bad conduct discharge (BCD) characterization of service so that he can be considered for all disabilities sustained during his enlistment from 2007-2013. 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 24 September 2007 and reenlisted on 15 March 2009.
- The applicant served in Kuwait from 13 September 2008 to 13 September 2009.
- The applicant was found physically unfit by a PEB and a medical separation with a disability of 10% was recommended. He was rated at 100% by the VA for multiple conditions, including Anxiety Disorder.
- Before a general court-martial on 21 March 2013, the applicant was found guilty of one specification of violating a lawful general order by wrongfully ingesting a synthetic cannabinoid commonly known as "SPICE" on diverse occasions from 11 September 2011, until on or about 18 April 2012; and one specification of wrongfully distributing up to 500 pills of Oxycodone between on or about 1 January 2011 and on or about 1 May 2012.
- The applicant was discharged on 6 February 2015 under the provisions of Army Regulation 635-200, Chapter 3, by reason of court-martial. His service was characterized as bad conduct. He was credited with 6 years, 8 months, and 25 days of net active service.

b. 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 that he began using opioid medication prescribed by his military healthcare providers for physical injuries that he incurred during deployment. He indicated he also used opioid medication to "numb the PTSD symptoms." He contends he was never offered any mental health or addiction services, but he also admits that he hid his addiction from leadership and comrades due to fear of stigma. After his misconduct, his 100% VA disability rating was rescinded, and he is requesting to be considered for all disabilities sustained during his second enlistment. The application included the Informal Physical Evaluation Board (PEB) Proceedings dated 26 September 2012, which stated, in part, that the diagnosis of Anxiety Disorder, Not Otherwise Specified is "not associated with profile limitations and does not impact the soldier's ability to perform any one of the ten functional activities" and that the MEB indicated these conditions meet medical retention standards and are not considered unfitting. The document does show a Department of Veterans Affairs rating of 100% in the amount of \$2,950.00 based on a single veteran with two dependents. The application did not include any medical or mental health records. There was insufficient evidence that the applicant was diagnosed with PTSD or Opioid Dependence while on active service. Per the PEB documentation, there is indication he was diagnosed with Anxiety Disorder.

c. The VA's Joint Legacy Viewer (JLV) was also reviewed and showed that the applicant is 50% service connected for the following conditions: flatfoot acquired, intervertebral disc syndrome, tinnitus, anterior crural nerve paralysis, and sciatic nerve, paralysis. DoD documentation indicated that in October 2010 the applicant was screened for depression during three separate primary care encounters and all were

negative. There were also negative depression screenings noted in August and November 2011. On 28 February 2012, the applicant underwent a psychiatric evaluation in conjunction with his MEB. Documentation indicated that he had no prior history of mental health treatment, and he endorsed symptoms of anxiety, depression, and PTSD. However, the evaluation concludes that he did not meet full criteria for PTSD, and he was diagnosed with Anxiety Disorder Not Otherwise Specified, which did not render him unfit for duty or generate a profile. He was also diagnosed with Alcohol Abuse, in remission. A primary care visit dated 29 May 2012 indicated the applicant screened positive for PTSD and discussed trauma exposure, including a rocket attack and hearing Iraqis screaming. He requested a referral to "Respect MIL." The note also stated that the applicant had been on opioid medication for two years. There were 16 encounters with Respect MIL between February 2012 and March 2013, but there is no actual documentation of a visit; only screenings for depression that were negative.

d. Author's note: Respect MIL ("Re-engineering Systems of Primary Care Treatment in the Military") is a system of care designed to screen, assess, and treat PTSD and depression among active duty service members in the Army's primary care settings. The program uses a "care facilitator" to ensure continuity of care for those with unmet depression and PTSD treatment needs and assists primary care providers with follow up, symptom monitoring, and treatment adjustments as well as interfacing with specialty mental health services.

e. The applicant engaged mental health care through the VA in January 2019 with primary complaint related to marital problems. There did not appear to be any follow up. However, in reviewing the records, it was noted that on 28 March 2023, a primary care provider entered documentation indicating they were discontinuing refilling opioid medication due to the applicant's report that he smokes marijuana and drinks 10 beers to help with pain and sleep. The most recent mental health note was dated 7 March 2024 and stated that the applicant had completed 12 therapy sessions through VA's primary care mental health services. He was initially referred due to an alcohol screening being positive, and the content of sessions focused on marital and family difficulties. It was noted that the applicant reported continued daily drinking and declined referral to a substance abuse program. Therapy was terminated by the applicant.

f. 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. 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 mental health condition, including PTSD, at the time of the misconduct. He was evaluated by a DoD psychologist as part of the MEB process and was diagnosed with Anxiety Disorder. However, he was determined to meet retention standards. He was also screened and monitored through

the Respect MIL program, providing him access to primary care mental health treatment.

(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, and records show he was diagnosed with Anxiety Disorder.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. A review of military medical and mental health records revealed a diagnosis of Anxiety Disorder, Not Otherwise Specified while on active service, and the applicant endorsed symptoms of PTSD but did not meet full criteria for the diagnosis. While self-medicating behaviors, such as substance abuse, can be a natural sequelae to mental health conditions associated with exposure to traumatic and stressful events, there is no nexus between his asserted mental health condition, including PTSD, and his misconduct related to wrongfully distributing oxycodone: 1) this type of misconduct is not part of the natural history or sequelae of mental health conditions; 2) his asserted mental health conditions does not affect one's ability to distinguish right from wrong and act in accordance with the right. However, the applicant contends he was experiencing mental health condition, including PTSD, that mitigated his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

BOARD DISCUSSION:

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 DoD guidance for liberal consideration of discharge upgrade requests. The applicant's trial by a court-martial was warranted by the gravity of the offenses charged (wrongfully ingesting SPICE on divers occasions and wrongfully distributing up to 500 pills of Oxycodone, commonly known as Percocet on divers occasions)

a. The applicant's 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 bad conduct 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 his separation processing.

b. The Board also considered the medical records, any VA documents provided by the applicant and the review and conclusions of the medical reviewing official. The Board concurred with the medical official's determination finding insufficient evidence to support the applicant had a condition or experience that mitigates his discharge. 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 available evidence, the Board determined that the character of service the applicant received upon separation were not in error or unjust. Therefore, based on a preponderance of available evidence, the Board determined that the character of service the applicant received upon 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 the overall merits of this case are insufficient as a basis to amend the decision of the ABCMR set forth in Docket Number AR20150011513 on 8 December 2016.1.

■

■
■

■

■

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 1203, provides for the physical disability separation of a member who has less than 20 years of service and a disability rating at less than 30%.
2. Title 10, U.S. Code, Section 1556, requires the Secretary of the Army to ensure that an applicant seeking corrective action by ARBA be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.
3. Army Regulation 15-185 (ABCMR) sets forth procedures for processing requests for the correction of military records. Paragraph 2-15a governs requests for reconsideration. This provision of the regulation allows an applicant to request reconsideration of an earlier decision of the ABCMR. The applicant must provide new relevant evidence or argument that was not considered at the time of the ABCMR's prior consideration.
4. Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation) establishes the Physical Disability Evaluation System (PDES) and sets forth policies, responsibilities, and procedures that apply in determining whether a Soldier is unfit because of physical disability to reasonably perform the duties of his or her office, grade, rank, or rating. It provides for a medical evaluation board that is convened to document a Soldier's medical status and duty limitations insofar as duty is affected by the Soldier's status. A decision is made as to the Soldier's medical qualifications for retention based on the criteria in Army Regulation 40-501 (Standards of Medical Fitness), Chapter 3. 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 who can no longer continue to reasonably perform because of a physical disability incurred or aggravated in service.
 - a. Paragraph 2-1 provides that the mere presence of impairment does not of 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 with the requirements of the duties the member reasonably may be expected to perform because of his or her office, rank, grade, or rating. The Army must find that a service member is physically unfit to reasonably perform his or her duties and assign an appropriate disability rating before he or she can be medically retired or separated.

b. Paragraph 2-2b (1) provides that when a member is being processed for separation for reasons other than physical disability (e.g., retirement, resignation, reduction in force, relief from active duty, administrative separation, discharge, etc.), his or her continued performance of duty (until he or she is referred to the PDES for evaluation for separation for reasons indicated above) creates a presumption that the member is fit for duty. Except for a member who was previously found unfit and retained in a limited assignment duty status in accordance with chapter 6 of this regulation, such a member should not be referred to the PDES unless his or her physical defects raise substantial doubt that he or she is fit to continue to perform the duties of his or her office, grade, rank, or rating.

c. Paragraph 2-2b (2) provides that when a member is being processed for separation for reasons other than physical disability, the presumption of fitness may be overcome if the evidence establishes that the member, in fact, was physically unable to adequately perform the duties of his or her office, grade, rank, or rating even though he or she was improperly retained in that office, grade, rank, or rating for a period of time and/or acute, grave illness or injury or other deterioration of physical condition that occurred immediately prior to or coincidentally with the member's separation for reasons other than physical disability rendered him or her unfit for further duty.

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

a. Paragraph 1-33 (Disposition through medical channels) provides:

(1) Except in separation actions under chapter 10 and as provided in para 1-33b, disposition through medical channels takes precedence over administrative separation processing.

(2) When the medical treatment facility (MTF) commander or attending medical officer determines that a Soldier being processed for administrative separation under chapters 7, 14, or 15, does not meet the medical fitness standards for retention (see Army Regulation 40-501, chapter 3, he/she will refer the Soldier to a MEB in accordance with Army Regulation 40-400. The administrative separation proceedings will continue, but final action by the separation authority will not be taken, pending the results of MEB.

(a) If the MEB findings indicate that referral of the case to a physical evaluation board (PEB) is warranted for disability processing under the provisions of Army Regulation 635-40, the MTF commander will furnish copies of the approved MEB proceedings to the Soldier's General Court-Martial Convening Authority (GCMCA) and unit commander. The GCMCA may direct, in writing, that the Soldier be processed

through the physical disability system when action under the UCMJ has not been initiated, and one of the following has been determined:

- The Soldier's medical condition is the direct or substantial contributing cause of the conduct that led to the recommendation for administrative elimination
- Other circumstances of the individual case warrant disability processing instead of further processing for administrative separation.

(b) The authority of the GCMCA to determine whether a case is to be processed through medical disability channels or under administrative separation provisions will not be delegated.

(3) Disability processing is inappropriate if the conditions in (2)(a) do not apply, if UCMJ action has been initiated, or if the Soldier has been medically diagnosed as drug dependent. (See paragraph 14–12c.) Accordingly, disability processing is inappropriate in separation actions under chapter 10.

b. 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.

c. Chapter 3, Section IV provided that a member would be given a BCD pursuant only to an approved sentence of a general or special court-martial, after completion of appellate review, and after such affirmed sentence has been ordered duly executed.

6. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, U.S. Code, 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.

7. The Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Naval Records (BCM/NR), on 3 September 2014, 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.

8. The Under Secretary of Defense for Personnel and Readiness provided clarifying guidance to Service DRBs and Service BCM/NRs on 25 August 2017. The memorandum directed them to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters relating to mental health conditions, including PTSD, traumatic brain injury (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 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.

9. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military DRBs and BCM/NRs regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. BCM/NRs may grant clemency regardless of the type of court-martial. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to other corrections, including changes in a discharge, which may be warranted based on equity or relief from injustice.

a. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. In determining whether to grant relief on the basis of equity, injustice, or clemency grounds, Boards shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment.

b. Changes to the narrative reason for discharge and/or an upgraded character of service granted solely on equity, injustice, or clemency grounds normally should not result in separation pay, retroactive promotions, and payment of past medical expenses or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded service characterization.

10. 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 continued service due to that PTSD or TBI condition as a discreet issue, without applying liberal consideration to the unfitness claim or carryover of any of the findings made when applying liberal consideration.

//NOTHING FOLLOWS//