

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 3 July 2024

DOCKET NUMBER: AR20230014429

APPLICANT REQUESTS:

- an upgrade of his character of service, separation code, and the narrative reason for separation
- a personal appearance before the Board

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

- DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States)
- Department of Veteran Affairs (VA) – Health Summary
- VA Claim Letter

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.
2. The applicant states, in effect, that he is requesting an upgrade to his DD Form 214 (Certificate of Release or Discharge from Active Duty). The applicant marked on his DD Form 293, Operation Iraqi Freedom (OIF) and Operation Enduring Freedom (OEF) are contingency operations related to his request, in addition to post-traumatic stress disorder (PTSD) and other mental health as conditions related to his request.
3. The applicant provides the following:
 - a. A VA Health Summary, listed details of the applicant's conditions including, but not limited to, back pain, dental issues, depression, headaches, joint pain, personal history of traumatic brain injury (TBI), schizophrenia, and tinnitus.

b. A VA summary of benefits letter which states the applicant is permanently disabled due to his service-connected disabilities. He receives 100% combined service-connected evaluation with the most current award effective 1 December 2022.

4. A review of the applicant's service record shows:

a. He enlisted in the Regular Army on 27 June 2006 for a period of four years. A DA Form 1695 (Oath of Enlistment) shows on 5 February 2010 he extended to a period of 5 years and 3 months with a new expiration of term of service date of 26 October 2011.

b. He extended on 5 February 2010 for a period of 15 months. His DA Form 1695 (Oath of Extension of Enlistment) shows he extended in support of a contingency operation.

c. A DA Form 3975 (Military Police (MP) Report), dated 7 July 2010, indicated on 1 July 2010 the MP's detected the odor of marijuana emitting from the applicant's vehicle during a deliberate vehicle inspection. A search and seizure were conducted by the MP's whereby the applicant was then apprehended and advised of his rights.

d. On 29 August 2010, the applicant accepted nonjudicial punishment for one specification of wrongful possession of a marijuana cigarette, a Schedule I controlled substance on or about 1 July 2010. His punishment included reduction to private (E-2), and extra duty for 45 days.

e. On 12 January 2011, a Standard Form 600E (Rehabilitation Team Meeting) shows, the applicant attended the Army Substance Abuse Program Rehabilitation Team Meeting. The following recommendations were made during the meeting:

- the commander was advised to conduct Rehabilitation Urinalysis Testing (Code RO) once a month
- expected minimum length of treatment in the program: 60 to 90 days
- individual counseling: as scheduled
- attendance of Alcoholics Anonymous: once a week
- medical evaluation
- implementation of Antabuse and Naltrexone for alcohol and narcotic drug dependency

r. On 14 February 2011, a MEDCOM Form 699-R (Report of Mental Status Evaluation) shows, the applicant underwent a mental status evaluation in conjunction with a pending Chapter 14 (Separation for Misconduct), under provision of Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations). The applicant was not cleared psychologically at the time for administrative separation

action, and was recommended by Dr. M.G., Psychologist that he be considered for a Medical Evaluation Board (MEB).

g. On 23 March 2011, the applicant's immediate commander notified the applicant of her intent to separate him under the provisions of Chapter 14-12c, AR 635-200 for commission of a serious offense. The specific reason for her proposed recommendation was the applicant's apprehension for the possession of marijuana and he failed to report to his appointed place of duty on numerous occasions. He acknowledged receipt on the same day.

h. On 4 April 2011, a Joint Department of Defense and Veteran Affairs Disability Evaluation Pilot Referral document shows that Lieutenant Colonel M.V.P. referred the applicant into the Integrated Disability Evaluation System (IDES) for MEB processing.

i. On 14 June 2011, a DA Form 3947 (Medical Evaluation Board Proceedings) states that the applicant did not meet retention standards in accordance with AR 40-501 (Standards of Medical Fitness), Chapter 3, paragraph 3-33. He was referred to a Physical Evaluation Board (PEB) for schizophrenia, paranoid type which was incurred while entitled to base pay; and the condition did not exist prior to military service.

j. On 15 June 2011, after consulting with legal counsel, he acknowledged:

- the rights available to him and the effect of waiving said rights
- he may encounter substantial prejudice in civilian life if an under other than honorable conditions discharge is issued to him
- he may be ineligible for many or all benefits as a Veteran under both Federal and State laws
- he may apply to the ADRB or the ABCMR for upgrading

k. On 16 June 2011, the immediate commander-initiated separation action against the applicant for commission of a serious offense. The chain of command recommended a general, under honorable conditions discharge.

l. On 30 June 2011, a memorandum indicated MEB proceedings had been placed on hold and could not be forwarded to the PEB until a review by the General Court Martial Convening Authority (GCMCA) had been completed. The GCMCA must recommend that the service member is either entitled to continue processing through the IDES or separation under the administrative action was warranted.

m. On 29 September 2011, the separation authority disapproved the MEB recommendation and directed the applicant be separated, under the provisions of AR 635-200, paragraph 14-12c for commission of a serious offense. He would be discharged with a characterization of service of general, under honorable conditions.

n. On 19 October 2011, he was discharged from active duty with a general, under honorable conditions characterization of service. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 5 years, 2 months, and 23 days of active service with no lost time. Two periods of deployment were listed in Block 18 (Remarks), Iraq from 16 June 2008 to 31 May 2009 and Afghanistan from 9 July 2010 to 9 November 2010. He was assigned separation code JKK and the narrative reason for separation listed as "Misconduct (Drug Abuse)" with reentry code 4. It also shows he was awarded or authorized the following:

- Afghanistan Campaign Medal with Campaign Star
- Iraq Campaign Medal with two Campaign Stars
- North Atlantic Treaty Organization Afghanistan Service Medal
- Army Commendation Medal
- National Defense Service Medal
- Global War on Terrorism Service Medal
- Army Service Ribbon
- Overseas Service Ribbon
- Driver and Mechanic Badge – Mechanic Clasp (Second Award)

5. On 19 April 2013, the Army Discharge Review Board reviewed the applicant's characterization of service and determined that he was properly and equitably discharged. The request for a change in the character and/or reason of discharge was denied.

6. By regulation, action will be taken to separate a Soldier for misconduct when it is clearly established that despite attempts to rehabilitate or develop him or her as a satisfactory Soldier, further effort is unlikely to succeed.

7. In reaching its determination, the Board can consider the applicants petition and his service record in accordance with the published equity, injustice, or clemency determination guidance.

8. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his character of service, separation code and the narrative reason for separation. He contends his he experienced Traumatic Brain Injury (TBI) and Other Mental Health Issues that mitigates his misconduct. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Pertinent to this advisory are the following: 1) The applicant is 100% service-connected (SC) through the VA for Schizoaffective Disorder, 2) the applicant enlisted in the Regular Army on 27 June 2006 and extended on 5 February 2010 in support of a contingency operation, 3) The applicant accepted nonjudicial punishment (NJP) on 29 August 2010 for wrongful possession of marijuana

on 1 July 2010, 4) On 14 February 2011, the applicant's Mental Status Examination (MSE) conducted as part of a Chapter 14 separation indicated the applicant was not cleared psychologically for administrative separation, was recommended he be considered for Medical Evaluation Board (MEB), and was referred to the IDES on 06 April 2011 for MEB processing, 5) The separation authority disapproved the MEB recommendation and directed the applicant be separated under the provisions of AR 635-200, paragraph 14-12c for commission of a serious offense, 6) the applicant was discharged on 19 October 2011 with a general, under honorable conditions characterization of service, 7) the applicant has two deployments to Iraq (2008-2009) and Afghanistan (2010), and 8) on 19 April 2013, the Army Discharge Review Board (ARDB) determined the applicant was properly and equitably discharged and relief was denied.

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the ROP and casefiles, supporting documents and the applicant's military service, VA's Joint Legacy Viewer (JLV), and available medical records. Lack of citation or discussion in this section should not be interpreted as lack of consideration.

c. In-service health records were available for review from 03 August 2006-12 October 2011. Per review of JLV, the applicant has the following BH conditions listed on his problem list: Major Depressive Disorder-Recurrent, Personal History of Traumatic Brain Injury, Posttraumatic Stress Disorder, Schizoaffective Disorder-Chronic with Acute Exacerbation, and Schizophrenia. He is 100% service-connected (SC) through the VA for Schizoaffective Disorder.

d. The applicant was diagnosed with Delusional Disorder, Schizophrenia-Paranoid Type, and Schizoaffective Disorder while in-service in 2010 and 2011. He was referred for an MEB on 06 April 2011 for Delusional Disorder. The MEB proceedings documented the applicant's condition as Schizophrenia, Paranoid type with the date of onset as 01 July 2009 and that it did not exist prior to service. In the DoD, his diagnosis was changed to Schizoaffective Disorder in May 2011. An in-service BH record on 13 June 2011 noted that the applicant likely demonstrated prodromal symptoms (i.e., initial symptoms prior to full onset of a condition) of Schizophrenia as evidenced by previous substance use and inability to follow the laws prior to his official diagnosis of a psychotic disorder in 2010. Furthermore, it was documented that the applicant did not meet retention standards in accordance with (IAW) AR 40-501. The applicant was psychiatrically hospitalized twice while on active duty, once in 2010 after being medically evacuated from theater for suicidal and homicidal ideation and once 2011 due to homicidal ideation. The applicant was treated with Quetiapine and Risperdal while in-service for management of his psychotic symptoms. He was also prescribed Hydroxyzine as needed for the management of anxiety and Celexa on 13 May 2011 for Depression.

e. The applicant was enrolled in the Army Substance Abuse Program (ASAP) after he was found to be in possession of marijuana in 2010. A chapter evaluation conducted as part of Chapter 14 proceedings on 14 February 2011 indicated that although the applicant was judged to be able to participate in administrative proceedings there was evidence of a significant mental illness that warranted disposition through medical channels and was not cleared for administrative separation. He screened negative for PTSD and TBI at the time of the interview. The applicant was referred for an MEB on 06 April 2011 for Delusional Disorder.

f. Per a VA compensation and pension (C&P) examination completed on 02 April 2015, the applicant was diagnosed with Schizoaffective Disorder, Depressive type and documented as incurred during service.

g. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is sufficient evidence that the applicant had a BH condition while in-service that mitigated his misconduct. The applicant was diagnosed with Schizophrenia, Paranoid Type and Delusional Disorder (later changed to Schizoaffective Disorder) while in-service and was referred to IDES as his condition fell below retention standards. Furthermore, it was documented while in-service that some of the applicant's previous behaviors and misconduct (e.g., substance use) were likely indicators of prodromal symptoms of Schizophrenia prior to the onset of the condition. Given the nexus between psychotic disorders and substance use, there was likely an association between the applicant's diagnosis of Schizoaffective Disorder while in-service and possession of marijuana that led to his separation. After applying liberal consideration, medical mitigation is supported.

h. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant is 100% SC for Schizoaffective Disorder, Depressive type through the VA. Schizoaffective disorder is on the spectrum of Psychotic disorders and related to his in-service diagnoses of Schizophrenia, Paranoid type and Delusional Disorder.

(2) Did the condition exist or experience occur during military service? Yes, the applicant is 100% SC for Schizoaffective Disorder, Depressive type and had in-service diagnoses of Schizophrenia, Paranoid Type, Delusional Disorder, and Schizoaffective Disorder.

(3) Does the condition experience actually excuse or mitigate the discharge? Yes. The applicant asserts mitigation due to TBI and Other Mental Health Issues at the time of his discharge. This assertion alone merits consideration by the Board. The applicant was diagnosed with a psychotic disorder while in-service and is 100% SC for Schizoaffective Disorder, Depressive Type. Given the nexus between psychotic

disorders and substance use, there was likely an association between the applicant's diagnosis of Schizoaffective Disorder and possession of marijuana that led to his separation. As such, medical mitigation is supported.

i. Furthermore, there is in-service documentation that the applicant was referred to IDES for disposition through medical channels as his condition fell below retention standards per AR 40-501. His case was not adjudicated through medical channels as it was denied by the separation authority in favor of administrative separation for misconduct due to possession of marijuana. Specific to this applicant, it is the opinion of the BH advisor that his case should be referred to IDES for further disposition and evaluation for disability. He has a well-established diagnosis of a psychotic disorder (e.g., Schizophrenia, Paranoid Type, Delusional Disorder and Schizoaffective Disorder) while in-service which is associated with his service connection through the VA for Schizoaffective Disorder, Depressive Type. There is ample information available documenting psychiatric hospitalizations for suicidal and homicidal ideation and treatment for psychosis while in-service. He also underwent treatment for substance use following his possession of marijuana. As documented in his in-service treatment record, the applicant's condition fell below retention standards per AR 40-501 at the time of discharge and therefore out of an abundance of caution should be referred to IDES for further processing.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was/was not warranted. The Board 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 of his characterization of service. Upon review of the applicant's petition, available military records and medical review, the Board concurred with the advising official finding sufficient evidence that the applicant had a BH condition while in-service that mitigated his misconduct.

2. The opine noted, given the nexus between psychotic disorders and substance use, there was likely an association between the applicant's diagnosis of Schizoaffective Disorder while in-service and possession of marijuana that led to his separation. The Board determined there is sufficient evidence to support that the applicant's case should be referred to IDES for further disposition and evaluation for disability. Based on this the Board granted partial relief.

3. The applicant's request for a personal appearance hearing was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable

decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

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| : | : | : | GRANT FULL RELIEF |
| ■ | ■ | ■ | GRANT PARTIAL RELIEF |
| : | : | : | GRANT FORMAL HEARING |
| : | : | : | DENY APPLICATION |

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined the evidence presented is sufficient to warrant a recommendation for partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by directing the applicant be entered into the Disability Evaluation System (DES) and a Medical Evaluation Board concerned to determine whether the applicant's conditions(s), met medical retention standard at the time-of-service separation.

a. In the event that a formal physical evaluation board (PEB) becomes necessary, the individual concerned may be issued invitational travel orders to prepare for and participate in consideration of his case by a formal PEB if requested by or agreed to by the PEB president. All required reviews and approvals will be made subsequent to completion of the formal PEB.

b. Should a determination be made that the applicant should have been separated under the DES, these proceedings will serve as the authority to void his administrative separation and to issue him the appropriate separation retroactive to his original separation date, with entitlement to all back pay and allowances and/or retired pay, less any entitlements already received.

2. The Board further determined the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to an upgrade of the applicant's character of service, separation code, and the narrative reason for separation.

[REDACTED]

[REDACTED]

[REDACTED]

[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. 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. Title 10, U.S. Code, section 1556, requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

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 ABCMR begins its consideration of each case with the presumption of administrative regularity, which is that what the Army did was correct.

a. 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.

b. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that 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 40-501 (Standards of Medical Fitness), in effect at the time, sets forth the basic authority of medical fitness standards for induction, enlistment, appointment, retention, and related policies and procedures. Additionally, Chapter 3, paragraph 3-33 would have been used for Anxiety, somatoform, or dissociative disorders.

5. Army Regulation 635-5-1 (Separation Program Designator Codes) provides separation program designator (SPD) codes are three-character alphabetic

combinations that identify reasons for, and types of, separation from active duty. The narrative reason for the separation will be entered in Block 28 of the DD Form 214 exactly as listed in Tables 2-2 and Tables 2-3 of the regulation. Table 2-3 (Enlisted Personnel) lists for SPD code JKK, the narrative reason as, "Misconduct (Drug Abuse)" in accordance with AR 635-200.

6. Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), in effect at the time, sets forth the basic authority for the separation of enlisted personnel.

a. Paragraph 3-7a (Honorable Discharge) states an honorable discharge is a separation with honor. 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. Chapter 14 of the regulation states action will be taken to separate a Soldier for misconduct when it is clearly established that despite attempts to rehabilitate or develop him or her as a satisfactory Soldier, further effort is unlikely to succeed.

7. On 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRBs) and Service Boards for Correction of Military/Naval Records (BCM/NRs) to carefully consider the revised post-traumatic stress disorder (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. 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, 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, 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.

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 based on 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.

//NOTHING FOLLOWS//