

IN THE CASE OF: [REDACTED]

BOARD DATE: 19 September 2024

DOCKET NUMBER: AR20230014660

APPLICANT REQUESTS: his under honorable conditions (general) discharge be upgraded to honorable.

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

- DD Form 149 (Application for Correction of Military Record)
- Self-Authored Statement
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- Department of Veterans Affairs (DVA) Letter

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code (USC), Section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.

2. The applicant states:

a. He has disabilities, and his service should be honorable due to the disabilities. He understands his behavior and actions were highly unacceptable and for that he takes full responsibility and sincerely apologizes. If he had sought the proper care and help for the obstructive sleep apnea things would have been different for him.

b. He has severe obstructive sleep apnea, major depressive disorder, and other psychical conditions, which hindered his ability to be the best Soldier he could have been. His mental health condition made him experience multiple symptoms differently, which were exacerbated by his sleep apnea. The symptoms he was suffering in service were: lasting sadness, anxious, empty mood, loss of interest in almost all activities, changes in sleep patterns (inability to sleep or sleeping too much) slowing of physical activity speech, thinking or agitation increased restlessness, irritability decreased energy, feeling tired or slowed down almost every day, ongoing feelings of worthlessness and/or feeling of undue guilt, trouble concentrating or making decisions and wishing to die.

c. He states that he served proudly in the Army. His energy level decreased while in basic training and he was hospitalized with pneumonia. He struggled with his own physical and mental health. He still lives his life by the Army values and the only thing he feels that is missing in his life is honor.

3. The applicant enlisted in the Regular Army on 12 September 2006. His military occupational specialty was 11C (Indirect Fire Infantryman).

4. The applicant was counseled on numerous occasions between 6 December 2007 and 27 May 2008 for:

- disrespect to a noncommissioned officer (NCO) (two)
- monthly counseling (two)
- failure to be at an appointed place of duty (three)
- failure to follow a direct lawful order by an NCO and subordinates (three)
- late to physical training formation
- wear of an unauthorized rank insignia
- violation of hair and grooming standards (two)
- failure to obey order or regulation (two)
- insubordinate conduct toward warrant officer, NCO officer, or petty officer

5. The applicant accepted nonjudicial punishment (NJP) under Article 15 of the Uniform Code of Military Justice (UCMJ) on 30 January 2008 for:

- failing to go at the time prescribed to his appointed place of duty (work) on or about 9 January 2008; on or about 16 November 2007 (accountability formation); and on or about 23 October 2007 (accountability formation)
- willfully disobeying a lawful order on or about 6 December 2007 and on or about 7 November 2007
- his punishment consisted of reduction to private 2/E-2 (suspended), forfeiture of \$368.00 for one-month, extra duty and restriction

6. A recommendation from the Community Mental Health Services, dated 26 March 2008 shows the applicant was psychiatrically cleared for any administrative action deemed appropriate by command. He was under the supervision of the unit; they would conduct safety checks until the applicant was released by Mental Health Provider at Community Mental Health.

7. The applicant accepted nonjudicial punishment (NJP) under Article 15 of the UCMJ on 18 April 2008 for:

- without authority, failing to go at the time prescribed to his appointed place of duty on or about 8 February 2008 (extra duty), on or about 9 February 2008

(extra duty), on or about 10 February 2008 (extra duty) and on or about 13 February 2008 (accountability formation) and with intent to deceive, make a false statement known by the applicant to be false on or about 13 February 2008

- his punishment consisted of forfeiture of \$314.00 pay for one-month, extra duty and restriction

8. On 11 June 2007, the applicant's immediate commander notified him of his intent to initiate action to separate him from the Army under the provisions of Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations), Chapter 14-12b, for a pattern of misconduct. The applicant had numerous counselings and he continued to be a discipline problem despite efforts to rehabilitate him. His commander recommended he receive a under honorable conditions (general) discharge. The applicant acknowledged receipt on 24 June 2008.

9. The applicant's DD Form 2807-1 (Report of Medical History), dated 3 June 2008 shows in:

- item 8 (Current Medications) Anti-depressants Zoloft
- item 29 (Explanation of Yes Answers) problems sleeping and suffering from depression
- item 30 (Examiner's Summary) currently seeing mental health for his issues

10. DD Form 2697 (Report of Medical Assessment), dated 3 June 2008 shows:

- item 10 easily tired and having sleeping problems
- item 12 been to hospital and mental health for depression and suicidal thoughts
- item 15 taking anti-depressants
- item 20 (Health Care Provider Comments) chronic shin splints treated with profile and depression treated by mental health

11. The applicant consulted with legal counsel on 2 July 2008 and was advised of the basis for his separation and the procedures and rights that were available to him. He declined consideration of his case by a board of officers. He understood he was not entitled to have his case heard by an administrative separation board. He elected not to submit statements in his own behalf.

12. The applicant's immediate commander formally recommended the applicant be separated from the Army and receive an under honorable conditions (general) discharge. His chain of command recommended approval.

13. The separation authority approved the recommended discharge on 21 July 2008 and directed that the applicant was ineligible for transfer to the Individual Ready Reserve and directed he receive a under honorable conditions (general) discharge.

14. The applicant was discharged on 5 August 2008 in the rank/grade of private/E-1. His DD Form 214 shows he was discharged under the provisions of AR 635-200, Paragraph 14-12b, for pattern of misconduct. His service was characterized as under honorable conditions (general). He completed 1 year, 10 months, and 24 days of net active service this period.

15. Soldiers are subject to separation under the provisions AR 635-200, Chapter 14, for misconduct. 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 such is merited by the overall record.

16. The applicant provides a DVA rating decision dated 9 July 2019 that shows service-connected disability for sleep apnea, also claimed as sleep disorder, major depressive disorder, and bilateral shin splints.

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

18. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting consideration of an upgrade to his characterization of service from under honorable conditions (general) to honorable. He contends he experienced a mental health condition that mitigates his misconduct.

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 on 12 September 2006.
- The applicant was counseled on numerous occasions between 6 December 2007 and 27 May 2008, and he accepted NJP on 30 January 2008 for failing to be at his appointed place of duty on three occasions and willfully disobeying a lawful order on two occasions. He also accepted NJP on 18 April 2008 for again failing to be at his appointed place of duty on four occasions and making a false statement. On 11 June 2008, the applicant's immediate commander notified him of his intent to initiate action to separate him from the Army under the provisions of Army Regulation (AR) 635-200, Chapter 14-12b, for pattern of misconduct. The applicant met with legal counsel and declined consideration of his case by a board of officers.
- The applicant was discharged on 5 August 2008 and completed 1 year, 10 months, and 24 days of net active service.

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 his Sleep Apnea contributed to his depression, and his mental health symptoms and health condition resulted in his misconduct. The application included a Rating Decision notice dated 9 July 2019, which showed the applicant is 50% service connected for Major Depressive Disorder and 50% service connected for Sleep Apnea. A Report of Medical Examination and a Report of Medical History dated 31 May 2006 showed the applicant denied any psychiatric symptoms or history of diagnoses. A document dated 26 March 2008 showed that the applicant was psychiatrically cleared for any administrative action deemed appropriate by command, and his unit was to conduct safety checks until release by a mental health provider. A Report of Medical Examination dated 27 June 2008 did not note any psychiatric conditions, but a Report of Medical History, completed by the applicant, stated current medication as Zoloft and indicated sleep difficulty, depression or excessive worry, attempted suicide, and evaluated or treated for a mental condition. The provider noted, "currently seeing mental health for his issues." A Report of Medical Assessment dated 2 June 2008 showed the applicant reported being easily tired, having sleep problems, and having been seen by mental health for depression and suicidal thoughts. There was insufficient evidence that the applicant was diagnosed with PTSD or another psychiatric condition while on active service.

d. The Joint Legacy Viewer (JLV), which includes medical and mental health records from DoD and VA, was also reviewed and showed the applicant initiated mental health treatment through the ER on 11 April 2008 and reported suicidal thoughts, depression, and sleep difficulty secondary to worries about his family and problems in his unit. At subsequent sessions, he reported symptoms of depression, irritability, and thoughts of harming his platoon sergeant, which prompted a recommendation to move him to a different platoon. He was started on an antidepressant medication and was diagnosed with Depression. Between April and July 2008, he reported continued escalating suicidal ideation associated with problems with his unit and incompatibility with the military, and he was seen on a weekly basis due to concerns about self-harm. On 3 June 2008 he was seen by his psychiatrist for a follow up visit and for a Mental Status Evaluation as part of the Chapter 14 separation. The applicant reported a desire to be out of the military, and documentation indicated his psychiatrist consulted with command and advised that the applicant's behavior would likely continue to escalate until he is released from service. He was diagnosed with Adjustment Disorder with depressed mood and was cleared for administrative action. As his separation became finalized, his symptoms began improving. Therapy also focused on the applicant's history of childhood abuse and neglect as well as difficulty in fitting into the military environment.

e. The applicant initiated mental health care through the VA on 12 February 2010, and he reported symptoms of depression with sleep dysregulation since 2007. He was

living in a homeless shelter at the time and was referred for psychotherapy and started on a medication. However, he did not follow up and was discharged from treatment. His next encounter was in January 2011 reporting continued sleep difficulty and depression. He was started on light box therapy and eventually an antidepressant was added, and in March 2011 he initiated therapy where he primarily addressed his childhood history. He missed appointments and did not follow up until January 2012, and he reported discontinuation of medication, intermittent use of the light box, and non-compliance with CPAP machine for sleep apnea. Documentation from 2011 to 2018 showed the applicant utilized the VA rental assistance and homeless program and Vocational Rehabilitation, and he intermittently engaged in mental health treatment, repeatedly seeking initial appointments but not staying consistent with treatment. In 2019 through 2020, the applicant more regularly engaged in psychotherapy, which focused on situational stressors, and he was involved in the Veterans Justice Outreach program as related to alleged neglect of his pets. He was lost to follow up through the pandemic and reengaged in treatment in October 2022, reporting continued symptoms of depression. His most recent mental health visit was 16 August 2024, and treatment focused on management of daily stressors and supportive therapy.

f. Compensation and pension evaluations related to mental health were conducted on 25 July 2011, 29 March 2016, and on 13 December 2023. VA records show the applicant is 90% service connected for several health conditions, including 70% for Major Depressive Disorder and 50% for Sleep Apnea.

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 a mental health condition at the time of the misconduct. In-service records show he was treated for an Adjustment Disorder with depressed mood, and he is service-connected through the VA for Major Depressive Disorder.

(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 there is documentation to support that he received mental health treatment.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. A review of military medical and mental health records revealed the applicant was treated for an Adjustment Disorder, and his mental health providers recommended separation based on his desire to be out of the military as well as his inability to function

appropriately within the military environment. The applicant was evaluated and determined to meet retention standards and was cleared by his treating psychiatrist for administrative separation.

i. The applicant's pattern of misconduct provides further support for a diagnosis of an Adjustment Disorder. Behaviors such as disrespect toward an NCO, punctuality, lack of motivation, failure to report for duty, failure to follow orders, wearing the wrong rank, and general disregard for military standards (i.e., appropriate hair cut; shaving) are more indicative of failure to adjust to a military environment, and while symptoms of depression can underlie such behaviors, depression also can be a consequence of an adjustment difficulty.

j. However, the applicant contends he had a 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, the frequency and nature of his misconduct and the reason for his separation. The Board considered the applicant's mental health claim and the review and conclusions of the ARBA Behavioral Health 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 a mental health condition. Based on a preponderance of the evidence, the Board determined the character of service the applicant received upon separation was 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 for correction of the records of the individual concerned.

3/6/2025

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 (USC), 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, USC, Section 1556, provides the Secretary of the Army shall ensure that an applicant seeking corrective action by ARBA is provided a copy of all correspondence and communications, including summaries of verbal communications, with any agencies or persons external to agency or board, or a member of the staff of the agency or Board, that directly pertains to or has material effect on the applicant's case, except as authorized by statute.



3. Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations), sets forth the basic authority for the separation of enlisted personnel. The version in effect at the time provided that:

a. 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. 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 established policy and prescribed procedures for separating members for misconduct. Specific categories included minor disciplinary infractions, a pattern of misconduct, commission of a serious offense, conviction by civil authorities, desertion, or absences without leave. Action would be taken to separate a member for misconduct when it was clearly established that rehabilitation was impracticable or was unlikely to succeed. A discharge under other than honorable conditions was normally considered appropriate. However, the separation authority could 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 (TBI); sexual assault; or sexual harassment. Boards are to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based in whole or in part to those conditions or experiences.

5. The Under Secretary of Defense (Personnel and Readiness) issued guidance to Service DRBs and BCM/NRs on 25 July 2018, 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 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.

//NOTHING FOLLOWS//