

IN THE CASE OF: [REDACTED]

BOARD DATE: 24 October 2024

DOCKET NUMBER: AR20240000988

APPLICANT REQUESTS: in effect, an upgrade of her bad conduct discharge (BCD) to honorable based on disability.

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

DD Form 149 (Application for Correction of Military Record)

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 she has been diagnosed with anxiety disorder, chronic back pain, and chronic migraines, all caused by the Army, which date back to basic training. Since her discharge, she has received two associate degrees and a college level certification. The applicant notes other mental health as a condition related to her request.
3. The applicant enlisted in the Regular Army on 27 June 2006. Upon completion of initial entry training, she was awarded military occupational specialty 56M (Chaplain Assistant). She reenlisted on 10 October 2008 for 6 years. The highest rank she attained was specialist/E-4.
4. The applicant served in Iraq from 20 June 2008 to 20 November 2008.
5. The applicant's record is void of documents detailing the specific facts and circumstances surrounding her court-martial; however, General Court-Martial Order 1, issued by Headquarters, U.S. Army Garrison, Fort Belvoir, VA, on 15 February 2012, shows the applicant pled guilty to and was found guilty of stealing currency of a value of over \$20,000.00, property of the U.S. Government, on diverse occasions, between on or about 1 October 2009 and 30 June 2011. She was sentenced to reduction to

private/E-1, confinement for four months, and a BCD. The sentence was adjudged on 20 December 2011.

6. The applicant's service record is void of documentation showing the appellate review or further action by the Convening Authority.

7. The applicant was discharged on 29 August 2013, under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), Chapter 3, by reason of court-martial, other. Her DD Form 214 (Certificate of Release or Discharge from Active Duty) shows her service was characterized as bad conduct, with separation code JJD and reentry code RE-4. She completed 6 years, 10 months, and 23 days of net active service, with time lost from 20 December 2011 to 29 March 2012. She was awarded or authorized the following:

- Army Achievement Medal (2nd award)
- Army Good Conduct Medal
- National Defense Service Medal
- Global War on Terrorism Service Medal
- Iraq Campaign Medal with one campaign star
- Army Service Ribbon

8. The applicant listed additional evidence on her application that was not included in her application package. The Army Review Boards Agency (ARBA) sent the applicant a request for the noted documents on 28 June 2024. To date, no additional documentation has been received.

9. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, USC, 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.

10. Regulatory guidance provides a Soldier will receive a BCD pursuant only to an approved sentence of a general or special court-martial. The appellate review must be completed, and the affirmed sentence ordered duly executed.

11. MEDICAL REVIEW:

a. The ARBA Medical Advisor was asked to review this case. Documentation reviewed included the applicant's ABCMR application and accompanying documentation, the military electronic medical record (EMR – AHLTA and/or MHS Genesis), the VA electronic medical record (JLV), the electronic Physical Evaluation

Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and/or the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

- b. The behavioral health aspects of this case will be addressed in a separate behavioral health advisory.
- c. The applicant is applying to the ABCMR requesting an upgrade of her 29 August 2013 bad conduct discharge and, in essence, a referral to the Disability Evaluation System (DES). She states:

“I have been diagnosed with anxiety disorder, chronic back pain, and chronic migraines, all caused by the army, dated back to basic training.”

- d. The Record of Proceedings details the applicant’s military service and the circumstances of the case. The DD 214 for the period of service under consideration shows the former Chaplain Assistant (56M) entered the regular Army on 27 June 2006 and was discharged on 29 August 2013 under the separation authority provided chapter 3 of AR 635-200, Active Duty Enlisted Administrative Separations (17 December 2009): Court-Martial (Other). It shows Service in Iraq from 20 June 2008 thru 20 November 2008
- e. General Court-Martial Order Number 1 dated 15 February 2012 shows she pled guilty to and was found guilty of stealing more than \$20,000 from the United States Government.
- f. The EMR shows she was first evaluated for migraine headaches on 29 January 2009, and she was seen for this condition a total of eight times, with the final encounter occurring on 16 July 2012.
- g. Her management included evaluation and treatment by neurology. From her on 18 November 2011 follow-up neurology encounter:

“Since her last visit with me on 10/4/11, she states that she has been taking Neurontin 300 mg orally every night and the headaches are less frequent but more intense. She used to experience up to 10/10 dull, throbbing, and squeezing sensation in her head which lasted for 4 days but would occur every week.

Now that she is on Neurontin 300 mg orally every night, she states that she has only had 3-4 up to 8/10 throbbing whole head pain since her last visit lasting 1-2 days ...

IMPRESSION/PLAN:

Migraines without aura: Given that she has seen a decrease in the frequency of her headaches with Neurontin, we discussed that she can increase her dose to 400 mg orally every night for 3 nights, then 500 mg for 3 nights, then 600 mg. She may have increasing sleepiness as well as imbalance with this increased dose."

h. Her assessment and plan from her final encounter on 16 July 2012 shows her condition was continuing to be treated with modifications of her medial management:

"CLASSIC MIGRAINE (WITH AURA): Ms. [applicant] is a 24-year-old woman with frequent migraine with visual aura. She is only on a small dose of gabapentin currently. I will increase the dosage. She understands the side effects associated with gabapentin.

She will try Midrin and Compazine as an abortive medication. She will try cutting back on caffeine for a longer duration. She will make sure she is hydrated.

She was given a migraine information packet about headache types, triggers, treatments, and information on keeping a migraine diary.

She noticed that a new "bump" formed on her head. She will have an updated MRI of the brain. She will follow up in 2 months ...

Released without limitations."

i. The EMR contains several encounters for musculoskeletal conditions and multiple encounters starting in August 2006 for low back pain which continued intermittently throughout her period of Service. An MRI obtained on 1 August 2011 revealed multilevel chronic degenerative changes. Her treatment included oral medications and management by the Pain Management Clinic to include multiple epidural steroid injections (ESI).

j. Her final encounter for this condition was on 24 July 2012 at the Pain Management Clinic. The provider's assessment and plan:

"INTERVERTEBRAL DISC DEGENERATION - LUMBAR: PVT [Applicant] is status post 3 previous ESI injections at L5-S1 with very good results. She has much relieved pain and is now able to 'crack my back' which she was not able to do so before.

This to her indicates much pain relief. I have told her that we can repeat this series of injections if/when her pain returns. No need to schedule clinic visit before repeat

series as long as she has recurrence of the same pain symptoms as we have just treated.

Released without limitations
Follow-up as needed"

k. The applicant's low back pain, a common condition in Soldiers, had been successfully treated and her migraine headaches were improving with medical management. Thus, neither condition was a cause for a permanent physical profile or referral to the DES. Paragraph 3-1 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (20 March 2012) states:

"The mere presence of an 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 Soldier reasonably may be expected to perform because of their office, grade, rank, or rating."

l. Even had one or both of the applicant's conditions warrant referral to the DES, her UCMJ violation made her ineligible for such a referral. Paragraph E3.P3.5.1 of Department of Defense Instruction 1332.38 Subject: Physical Disability Evaluation (14 November 1996) states: "The DES compensates disabilities when they cause or contribute to career termination."

m. In addition, paragraphs 4-3a and 4-3b of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (20 March 2012) state:

"a. Except as provided below, an enlisted Soldier may not be referred for, or continue, physical disability processing when action has been started under any regulatory provision which authorizes a characterization of service of under other than honorable conditions.

b. If the case comes within the limitations above, the commander exercising general court-martial jurisdiction over the Soldier may abate the administrative separation. This authority may not be delegated. A copy of the decision, signed by the General Court Martial Convening Authority (GCMCA), must be forwarded with the disability case file to the PEB. A case file may be referred in this way if the GCMCA finds the following:

(1) The disability is the cause, or a substantial contributing cause, of the misconduct that might result in a discharge under other than honorable conditions.

(2) Other circumstances warrant disability processing instead of alternate administrative separation.”

n. There was no evidence in the case file, her separation packet, nor iPERMS that his GCMCA had rendered this required decision.

o. It is the opinion of the ARBA medical advisor that a referral of her case to the DES is clearly unwarranted.

12. BEHAVIORAL HEALTH REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of her bad conduct discharge (BCD) to honorable. On her DD Form 149 the applicant indicated Other Mental Health Issues are related to her request and marked disability and discharge/separation as the categories of her request. More specifically, the applicant noted that she has been diagnosed with Anxiety Disorder, Chronic Back Pain, and Chronic Migraines, which she asserts were caused by the Army dating back to basic training. 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 enlisted in the Regular Army (RA) on 27 June 2006 as a Chaplain Assistant, 2) the applicant served in Iraq from 20 June 2008 to 20 November 2008, 3) the applicant's record is void of the documents detailing the specific facts and circumstances surrounding her court-martial. General Court-Martial Order 1 dated 15 February 2012 shows the applicant was found guilty of stealing currency of a value of over \$20,000, property of the U.S. Government, on diverse occasions, between on or about 01 October 2009 and 30 June 2011, 4) the applicant was discharged on 29 August 2013 under the provisions of Army Regulation (AR) 635-200, Chapter 3, by reason of court-martial, other. Her DD Form 214 shows her service was characterized as bad conduct with a separation code of JJD and reentry code of RE-4. She received several medals and ribbons during her career.

b. The ARBA Behavioral Health (BH) Advisor reviewed the ROP and casefiles, supporting documents and the applicant's military service and available medical records. The VA's Joint Legacy Viewer (JLV) was also examined. Lack of citation or discussion in this section should not be interpreted as lack of consideration.

c. Review of JLV shows the applicant attended a 6-session anger management class from 26 October 2011 through 30 November 2011. The diagnostic code associated with her attendance was noted as Phase of Life or Circumstance Problem. On 06 December

2011, she self-referred to BH noting that she was experiencing depression and anxiety due to her pending court-martial, childhood trauma, potential jail time, and problems in her marriage. It was documented that she reported experiencing episodes of depression and self-mutilation [*Advisor's note: this is outdated terminology and is now referred to non-suicidal self-injury (NSSI)*] as a result of childhood physical and emotional abuse. She reported experiencing nightmares, problems sleeping, being easily startled, feeling numb, and experiencing occasional paranoia. It was also noted that the applicant was in a relationship with a partner who could be violent at times and was unsure as to how to get out of the relationship. She was diagnosed with Adjustment Disorder with Depressed Mood and was scheduled for individual psychotherapy. The applicant had 3 appointments with her outpatient provider with the last visit occurring on 16 December 2011 prior to being incarcerated. At the time of her last visit, it was documented that the applicant's husband continued to be verbally abusive towards her and the last episode of physical abuse had occurred approximately one year prior. The provider documented that the applicant was encouraged to speak with her lawyer about her defense in light of her report of domestic violence. The applicant was seen by BH in the Brig on 24 February 2012 at the request of the Brig staff due to a deterioration in her mood. It was documented that the applicant reported her depressive symptoms began at age 18 and she had briefly seen a counselor at that time. She reported her symptoms and behaviors progressively worsened over time to include chronic feelings of emptiness, a marked disturbance in self-image, making efforts to avoid abandonment, and having unstable relationships. The applicant reported that, after joining the military, she was in a verbally and physically abusive relationship. She noted that her husband did not aid in supporting their family and in order to make ends meet she began stealing money from the Chapel, which resulted in her being caught and brought up on charges. She was diagnosed with Panic Disorder without Agoraphobia, Depressive Disorder, Not Otherwise Specified (NOS), and Borderline Personality Disorder. The applicant returned to outpatient psychotherapy with her previous provider following release from incarceration starting 18 April 2012 due to ongoing psychosocial stressors (e.g., lack of job, vehicle, getting custody of her daughter back, etc.). She was diagnosed with Adjustment Disorder with Depressed Mood and was referred for medication management and individual psychotherapy. She met with a Family Advocacy Program (FAP) provider on 18 April 2012; however, the details of the appointment were unavailable for review. On 23 April 2012, she was prescribed Sertraline (antidepressant), and her medication was adjusted to Prozac (antidepressant) on 14 May 2012 due to side effects. She continued to follow-up with BH through 17 May 2012.

d. Review of JLV shows the applicant is not service-connected through the VA. It is of note that due to her BCD, she is ineligible for VA services.

e. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is sufficient information that the applicant was diagnosed with several potentially mitigating BH condition(s) while in-service, Depressive Disorder

(NOS) and Panic Disorder without Agoraphobia. Although the applicant was also diagnosed with Adjustment Disorder with Depressed Mood, Borderline Personality Disorder, and Phase of Life or Circumstance Problem, these are not mitigating conditions. Review of JLV shows the applicant is not service-connected for any BH conditions. Although the applicant was diagnosed with two potentially mitigating BH conditions in-service, Depressive Disorder NOS and Panic Disorder without Agoraphobia do not interfere with the ability to distinguish between right and wrong and act in accordance with the right. As such, BH mitigation is not supported.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant was diagnosed with Depressive Disorder NOS and Panic Disorder without Agoraphobia in-service.

(2) Did the condition exist or experience occur during military service? Yes, the applicant was diagnosed with Depressive Disorder NOS and Panic Disorder without Agoraphobia in-service.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. Review of in-service medical records shows that the applicant was diagnosed with two potentially mitigating BH conditions, Depressive Disorder NOS and Panic Disorder without Agoraphobia. Larceny is not consistent with the natural history and sequelae of Depressive Disorder NOS or Panic Disorder without Agoraphobia nor do either of these conditions interfere with one's ability to distinguish between right and wrong and act in accordance with the right. As such, BH mitigation is not supported.

Regarding the applicant's request for disability, there is no evidence that the applicant's diagnosed BH conditions fell between retention standards IAW AR 40-501 while in-service. As such, a referral to IDES is not warranted.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, the evidence found within the military record, and published DoD guidance for consideration of discharge upgrade requests, the Board found that relief was not warranted.
2. The Board carefully considered the applicant's contentions, her statement regarding behavioral health diagnoses, her record and length of service, her service in Iraq, the charges against her, the outcome of the General Court-martial and the character of service she received upon separation. The Board considered the review and conclusions of the medical and behavioral health advisors. The Board agreed that there

was insufficient evidence to support the applicant had a medical or behavioral health condition that failed to meet medical retention standards during service. As such, a referral to the Disability Evaluation System is not warranted. The Board considered her in-service behavioral health diagnoses and agreed with the medical advisor that her misconduct is not a natural sequela of her diagnosed conditions. The Board found that the applicant was: (1) diagnosed with a condition and (2) that it existed during military service. Further, the Board found insufficient evidence that the conditions mitigated the misconduct that led to the court-martial and separation. Based on a preponderance of evidence, the Board determined that 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.

6/10/2025

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 Army Board for Correction of Military Records (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 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 percent (%).
3. Title 38, USC, Sections 1110 and 1131, permit the Department of Veterans Affairs (VA) to award compensation for disabilities which were incurred in or aggravated by active military service. However, an award of a VA rating does not establish an error or injustice on the part of the Army.
 - a. The Army rates only conditions determined to be physically unfitting at the time of discharge which disqualify the Soldier from further military service. The Army disability rating is to compensate the individual for the loss of a military career.
 - b. The VA does not have authority or responsibility for determining physical fitness for military service. The VA awards disability ratings to veterans for service-connected conditions, including those conditions detected after discharge, to compensate the individual for loss of civilian employability. As a result, the VA, operating under different policies, may award a disability rating where the Army did not find the member to be unfit to perform his duties. Unlike the Army, the VA can evaluate a veteran throughout his or her lifetime, adjusting the percentage of disability based upon that agency's examinations and findings.
4. Section 1556 of Title 10, USC, requires the Secretary of the Army to ensure that an applicant seeking corrective action by 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 ABCMR applicants (and/or their counsel) prior to adjudication.

5. 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 regulation provides that the ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

6. Army Regulation 40-501 (Standards of Medical Fitness) governs medical fitness standards for enlistment, induction, appointment (including officer procurement programs), retention, and separation (including retirement). Once a determination of physical unfitness is made, the physical evaluation board (PEB) rates all disabilities using the Veterans Affairs Schedule for Rating Disabilities (VASRD).

a. Chapter 2, provides physical standards for enlistment, appointment, and induction with the purpose to ensure members medically qualified are medically capable of completing required to training, adapt to a military environment without geographical limitations, perform duties without aggravation of existing physical defects or medical conditions.

b. The standards in Chapter 2 are applicable to individuals who enlist in the Regular Army - for medical conditions or physical defects pre-dating original enlistment, standards are applicable for enlistee's first 6 months of active duty. It states that enlisted Soldiers identified within the first 6 months of active duty with a condition that existed prior to service that does not meet the physical standards may be separated following an evaluation by an Entrance Physical Standards Board, under the provisions of AR 635-200, Chapter 5.

7. Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation) establishes the Army Disability Evaluation System (DES) 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 office, grade, rank, or rating. It states, in part:

a. Only the unfitting conditions or defects and those that contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability. The mere presence of impairment does not, in and of itself, justify a finding of unfitness because of physical disability.

b. The PEB-appointed counsel advises the Soldier of the Informal PEB (IPEB) findings and recommendations and ensures the Soldier knows and understands his or her rights. The Soldier records his or her election to the PEB on the DA Form 199 and has 10 calendar days from the date of receiving the PEB determination to make the election, submit a rebuttal, or request an extension.

8. Army Regulation 635-200 (Active Duty Enlisted Administrative Separations) sets forth the basic authority for the separation of enlisted personnel. The regulation provides:

- 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 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.

9. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, USC, 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.

10. On 25 August 2017, the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to Discharge Review Boards (DRB) and Boards for Correction of Military/Naval Records (BCM/NR) when considering requests by Veterans for modification of their discharges due in whole or in part to: mental health conditions, including Post-Traumatic Stress Disorder; traumatic brain injury; sexual assault; or sexual harassment. Standards for review should rightly consider the unique nature of these cases and afford each veteran a reasonable opportunity for relief even if the sexual assault or sexual harassment was unreported, or the mental health condition was not diagnosed until years later. Boards are to give liberal consideration to Veterans petitioning for discharge relief when the application for relief is based in whole or in part on those conditions or experiences. The guidance further describes evidence sources and criteria and requires Boards to consider the conditions or experiences presented in evidence as potential mitigation for misconduct that led to the discharge.

11. 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, 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//