

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 3 September 2024

DOCKET NUMBER: AR20240001240

APPLICANT REQUESTS: Reconsideration of his previous request for upgrade of the characterization of his service from under other than honorable conditions (UOTHC) to honorable.

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States)
- Self-authored declaration (4 pages)
- Military medical records (22 pages)
- DA Form 3822 (Report of Mental Status Evaluation)
- DD Form 2807-1 (Report of Medical History)
- DD Form 2697 (Report of Medical Assessment)
- Army Board for Correction of Military Records (ABCMR) Record of Proceedings (ROP) for Docket Number AR20220009901 (8 pages)
- Department of Veterans Affairs (VA) Form 20-0995 (Decision Review Request: Supplemental Claim)
- Descriptions of the uses and side effects of the following medications: Phenergan, Concerta, Zoloft, Ritalin, and Bupropion

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the ABCMR in Docket Number AR20220009901 on 6 March 2023.

2. The applicant states he maintained an honorable disposition and did not discredit the U.S. Military for the majority of his service. The reason for his discharge was not willful misconduct, because his state of mental health and reaction to medication were contributing factors. His misconduct was a manifestation of mental health issues exasperated by anxiety attacks, multiple new medications, and their side effects; all prescribed to him by Fort Hood medical doctors.

a. The applicant notes the ROP for his previous request mistakenly indicated it was his roommate who informed a noncommissioned officer (NCO) of the alleged marijuana located in their shared room. The informant was actually another Soldier, Specialist/E-4 C___, who worked in the same office as the applicant.

b. His medical records specifically show he was treated for significant family problems, poor sleep, anxiety, anxiety attacks, depression, adult attention-deficit/hyperactivity disorder (ADHD), and other behavioral concerns during the timeframe of the behavioral issues surrounding the characterization of his service. He was prescribed Phenergan, Concerta, Zoloft, and Bupropion before and after his behavioral issues manifested and the side effects of these medications were known to the military doctors who prescribed them.

c. Despite being diagnosed with Substance-Induced Anxiety Disorder and Alcohol Dependence with Physiological Dependence, he still performed well at work and tried to take his military duties seriously while respecting the service uniform he wore.

d. The record shows most of his issues stemmed from oversleeping and not being at the place prescribed; these behaviors are directly related to the medication he was prescribed. He wasn't in his proper state of mind because the medications and their adverse side effects caused his mental health issues.

3. On 11 April 2001, the applicant enlisted in the Regular Army for a period of 4 years. Upon completion of initial entry training, he was assigned to a unit at Fort Hood, TX.

4. A DA Form 3822 shows the applicant underwent a mental status evaluation on 9 October 2002 and was psychiatrically cleared for administrative action as deemed appropriate by command.

5. A DD Form 458 (Charge Sheet) shows on 23 October 2002, court-martial charges were preferred against the applicant for the following violations of the Uniform Code of Military Justice (UCMJ):

- four specifications of failing to go at the time prescribed to his appointed place of duty
- without authority, going from his appointed place of duty
- without authority absenting himself from his unit on or about 24 September 2002 and remaining so absent until 1 October 2002
- wrongfully possessing an unknown amount of marijuana

6. On 14 November 2002, the applicant voluntarily requested discharge under the provisions of Army Regulation 635-200 (Personnel Separations - Enlisted Personnel), Chapter 10, for the good of the service in lieu of trial by court-martial. He consulted with

legal counsel and was advised of the basis for the trial by court-martial; the maximum permissible punishment authorized under the UCMJ; the possible effects of a UOTHC discharge; and the procedures and rights that were available to him. He elected not to submit statements in his own behalf.

7. On 25 November 2002, the applicant underwent a preseparation medical examination. A DD Form 2807-1 shows he self-reported experiencing nervous trouble in the form of anxiety or panic attacks due to medication, frequent trouble sleeping due to medication and stress, depression or excessive worry due to pressure from his unit and financial woe, and receiving counseling and/or treatment for ADHD. The examiner noted the applicant was taking Wellbutrin/Zoloft at the time for ADHD. A DD Form 2697 shows he self-reported his overall health as being the same as when he took his last medical assessment. He also indicated he was taking Wellbutrin and Zoloft at the time for his diagnosis of ADHD.

8. The applicant's chain of command recommended approval of his request for discharge with his service characterized as UOTHC.

9. On 25 November 2002, the separation authority approved the applicant's request for discharge in lieu of trial by court-martial. He directed his service be characterized as UOTHC, and further directed that the applicant be reduced to the lowest enlisted grade.

10. Orders and the applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) show he was discharged on 18 December 2002, in the rank/grade of private/E-1, under the provisions of Army Regulation 635-200, Chapter 10, by reason of "In Lieu of Trial By Court-Martial" with Separation code "KFS" and Reentry Eligibility (RE) code "4." He was credited with completing 1 year, 8 months, and 1 days of net active service this period. He had time lost from 24 September 2002 to 30 September 2002. He did not complete his first full term of service.

11. On 11 August 2009, the applicant petitioned the ABCMR for an upgrade of his RE code. On 22 January 2010, the applicant was informed that after considering his application under procedures established by the Secretary of the Army, the Board denied his request.

12. On 15 June 2022, the applicant petitioned the ABCMR for an upgrade of his discharge. On 21 April 2023, the applicant was informed the ABCMR had considered his application under procedures established by the Secretary of the Army and denied his request for relief.

13. The applicant provides the following documents (available in entirety for the board):

- VA Form 20-0095, dated 20 October 2023, shows he submitted a supplemental claim for disability compensation from the VA
- descriptions of the uses and side effects of the following medications: Phenergan, Concerta, Zoloft, Ritalin, and Bupropion

14. Army Regulation 635-200 states a Chapter 10 is a voluntary discharge request in-lieu of trial by court-martial. In doing so, he would have waived his opportunity to appear before a court-martial and risk a felony conviction. A characterization of UOTHC is authorized and normally considered appropriate.

15. 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.

16. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting reconsideration of an upgrade to his characterization of service from under other than honorable conditions (UOTHC) 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 11 April 2001.
- The applicant had court-martial charges preferred against him on 23 October 2002 for the following violations: four specifications of failing to be at his appointed place of duty; without authority, going from his appointed place of duty; being AWOL from 24 September 2002 to 1 October 2002; wrongfully possessing marijuana. He voluntarily requested discharge for the good of the service in lieu of trial by court-martial.
- The applicant was discharged on 18 December 2002 and was credited with completing 1 year, 8 months, and 1 days of net active service.

c. Review of Available Records: The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents contained in the applicant's file. The applicant asserts his misconduct was associated with mental health issues that were exasperated by anxiety attacks and new medications with side effects. The application included medical documentation dated 11 March 2002, which indicated the applicant was referred by a supervisor due to "changes in job performance" and problems with short-term memory. He reported a childhood history of ADHD with medication management until age 15 and current symptoms including sleep difficulty, fatigue, significant family problems, increased alcohol use, and loss of interest in activities. He

was diagnosed with “mild depression” and ADHD, and he was started on Zoloft and Concerta. A follow up note dated 28 March 2002 discussed improvement in symptoms with the medication and no side effects. He was next seen on 17 April 2002, and it was noted that he reported “head seems more clear, less stressed...feels more in task, more productive.” Additionally, he reported he was staying out until 0430-0500 and was “seeing a stripper; gets 1-2 hours of sleep per night.” The provider noted, “anticipated benefit of meds is compromised by behavior” and “patient attributes sudden burst of energy to suddenly feeling better.” Documentation on 21 May 2002 showed that he continued to have improvements in his work, and he had “stopped seeing the stripper and is not staying out all night.” A Report of Mental Status Evaluation dated 9 October 2002 showed he was seen for a chapter physical, and he was deemed to meet retention standards and was cleared for administrative action. He was diagnosed with Substance-induced Anxiety Disorder and Alcohol Dependence with physiological dependence, in partial remission. A Report of Medical History dated 25 November 2002 showed that the applicant indicated he was taking Welbutrin and Zoloft, and he endorsed trouble sleeping, depression, excessive worry, and treatment for a mental health condition. The provider noted he was taking Welbutrin and Zoloft for ADHD. There was sufficient evidence that the applicant was diagnosed with a psychiatric condition while on active service.

d. The VA’s Joint Legacy Viewer (JLV) was also reviewed and showed DoD medical records with a history of prescriptions for bupropion (Welbutrin) and sertraline (Zoloft) from March 2002 to November 2002. There was also a prescription history of methylphenidate (Concerta) from March to June 2002.

e. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is sufficient evidence to support that the applicant had a mental health condition while on active service, but this condition does not mitigate his misconduct. The applicant reported a history of ADHD diagnosis, which existed prior to service, and he was treated for this condition while on active service. According to the medical documentation provided, he reported improvement in symptoms, and he denied side effects of the medications. He was also seen by a mental health provider who noted diagnoses of Substance-induced Anxiety Disorder and Alcohol Dependence in remission, but he was determined to meet retention standards and cleared for administrative action.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant asserts he had a mental health condition at the time of the misconduct. Documentation from his time in service showed he had been diagnosed with mild depression and ADHD, and he was treated with medications. A Report of Mental Status Evaluation, which was conducted as part of his separation process,

showed diagnoses of Substance-induced Anxiety Disorder and Alcohol Dependence, in remission.

(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 the documentation supports this assertion.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. While there is sufficient evidence that the applicant was diagnosed with ADHD and depression while on active service, the documentation showed that the applicant's condition had improved with treatment, and he denied any side effects of the medication. ADHD can be associated with behaviors such as failing to be at one's appointed place of duty or going from an appointed place of duty without authority, but the condition does not affect one's ability to distinguish right from wrong and act in accordance with the right. Additionally, being AWOL for eight days and wrongfully possessing marijuana are not natural sequela of ADHD or depression.

g. However, the applicant contends he was experiencing 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:

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.

a. The applicant was charged with commission of an offense (4 counts of failing to go at the time prescribed to appointed place of duty, without authority, going from his appointed place of duty, absenting himself from his unit on or about 24 September 2002 and remaining so absent until 1 October 2002, and wrongfully possessing marijuana) punishable under the UCMJ with a punitive discharge. After being charged, he consulted with counsel and requested discharge under the provisions of AR 635-200, Chapter 10. Such discharges are voluntary requests for discharge in lieu of trial by court-martial and carry an under other than honorable conditions discharge. 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 sufficient evidence to support that the applicant had a mental health condition while on active service, but this condition does not mitigate his misconduct. 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 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 to amend the decision of the ABCMR set forth in Docket Number AR20220009901 on 6 March 2023.

I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

REFERENCES:

1. Army Regulation 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.

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 635-200 (Personnel Separations - Enlisted Personnel), in effect at the time, set forth the basic authority for the separation of enlisted personnel.

a. Chapter 10 stated a member who committed an offense or offenses for which the authorized punishment included a punitive discharge could, at any time after the charges have been preferred, submit a request for discharge for the good of the service in lieu of trial by court-martial. Although an honorable or general discharge was authorized, a discharge under other than honorable conditions was normally considered appropriate. At the time of the applicant's separation the regulation provided for the issuance of an UOTHC discharge.

b. 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. 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.

d. When a Soldier was to be discharged UOTHC, the separation authority would direct an immediate reduction to the lowest enlisted grade.

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

5. 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 to 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.

6. 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//