

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 26 November 2024

DOCKET NUMBER: AR20240002838

APPLICANT REQUESTS: upgrade of his under honorable conditions (general) discharge to an honorable discharge, and an appearance before the Board via video/telephone.

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Forms 149 (Application for Correction of Military Record) (2)
- DD Forms 293 (Application for the Review of Discharge from the Armed Forces of the United States) (2)
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- Character reference statements (3)
- Medical status letters (3)
- Department of Veterans Affairs (VA) medical records

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 prior to 9/11 he lost his eyesight and sustained multiple injuries while dismantling a land mine during road clearing operations. The Army has no records of the incident. He woke up to a general discharge, which was an act of discrimination. He served his country, and his contributions played an important role in 9/11 operations. It has been over 20 years since he was separated. Since his discharge, he continued his education, and his blindness has not interfered with pursuing his goals. Now that he is divorced, he is going through hardship but will continue to push forward with living independently. He is currently rated as 100 percent disabled and receives VA medical benefits due to his service-connected injuries. The applicant indicates that post-traumatic stress disorder (PTSD), traumatic brain injury (TBI), other mental health conditions, skeletal injuries, and blindness are related to his request.

3. On 5 July 2000, the applicant enlisted in the Regular Army in the rank/pay grade of private (PV1)/E-1 for a period of 4 years. Upon completion of initial entry training, he was assigned to a unit at Fort Bragg, NC. He was advanced to private first class (PFC)/E-3 on 1 April 2001, the highest rank he held.

4. The applicant's duty status was changed from Present for Duty to Ordinary Leave (OLV) when he signed out on leave on 1 July 2001. His duty status was changed from OLV to Absent Without Leave (AWOL) on 4 August 2001 when he failed to return from leave.

5. The applicant's record is void of documentation showing the facts and circumstances regarding his separation under the provisions of Army Regulation 635-200 (Personnel Separations - Enlisted Personnel), Chapter 14, paragraph 14-12c (Misconduct). However, his DD Form 214 shows he was discharged on 30 October 2001 in the rank/grade of PFC/E-3, under the provisions of Army Regulation 635-200, paragraph 14-12c, by reason of Misconduct. His service was characterized as "Under Honorable Conditions (General)." He was assigned Separation Code "JKQ" and Reentry Code "3." He was credited with completion of 1 year, 3 months, and 26 days of net active service. He did not complete his first full term of service.

6. The applicant provides the following documents, which are available in their entirety for the Board's consideration:

a. Three letters wherein the authors render favorable comments about the applicant's character, academic achievements, kindness, perseverance, and sense of accomplishment.

b. A letter confirming the applicant is a registered voter and was in the process of securing housing.

c. Letters from three healthcare providers who attest he was diagnosed with and treated for PTSD.

d. The applicant's VA medical records show he was diagnosed with and treated for several conditions, to include but not limited to, PTSD, TBI, and depression.

7. Army Regulation 635-200, Chapter 14, establishes policy and prescribes procedures for separating members for misconduct. Action will be taken to separate a member for misconduct when it is clearly established that rehabilitation is impracticable or is unlikely to succeed. 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 merited by the Soldier's overall record.

8. Army Regulation 15-185 (ABCMR) 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 has occurred by a preponderance of the evidence. It is not an investigative body.

9. In reaching its determination, the Board shall consider the applicant's petition, available records and/or submitted documents in support of the petition. Applicants do not have a right to a hearing before the ABCMR.

10. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his under honorable conditions (general) discharge to an honorable discharge.

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 in the Regular Army on 5 July 2000.
- The applicant's duty status was changed from Present for Duty to Ordinary Leave (OLV) when he signed out on leave on 1 July 2001. His duty status was changed from OLV to Absent Without Leave (AWOL) on 4 August 2001 when he failed to return from leave.
- The applicant's record is void of documentation showing the specific facts and circumstances regarding his separation under the provisions of Army Regulation 635-200 (Personnel Separations - Enlisted Personnel), Chapter 14, paragraph 14-12c (Misconduct). However, his DD Form 214 shows he was discharged on 30 October 2001 in the rank/grade of PFC/E-3, under the provisions of Army Regulation 635-200, paragraph 14-12c, by reason of Misconduct. His service was characterized as "Under Honorable Conditions (General)". He was assigned Separation Code "JKQ" and Reentry Code "3." He was credited with completion of 1 year, 3 months, and 26 days of net active service. He did not complete his first full term of service.

c. Review of Available Records: The Army Review Board Agency (ARBA) Behavioral Health Advisor reviewed the supporting documents contained in the applicant's file. The applicant states, prior to 9/11 he lost his eyesight and sustained multiple injuries while dismantling a land mine during road clearing operations. The Army has no records of the incident. He woke up to a general discharge, which was an act of discrimination. He served his country, and his contributions played an important role in 9/11 operations. It has been over 20 years since he was separated. Since his discharge, he continued his education, and his blindness has not interfered with pursuing his goals. Now that he is divorced, he is going through hardship but will continue to push forward with living independently. He is currently rated as 100 percent disabled and receives VA medical

benefits due to his service-connected injuries. The applicant indicates that post-traumatic stress disorder (PTSD), traumatic brain injury (TBI), other mental health conditions, skeletal injuries, and blindness are related to his request.

d. The VA's Joint Legacy Viewer (JLV) was reviewed and indicates the applicant is 100% service connected for various medical conditions, including 10% for Dysthymic Disorder. The applicant initiated services with the VA in April 2016 and a note in the record states he was homeless following his release from prison. A C and P Examination, dated 24 January 2020, specifically notes the applicant does not meet criteria for PTSD and diagnosed him with Adjustment Disorder with Mixed Anxiety and Depressed Mood. The report states, "while Mr. Tsosie attributes his blindness to the explosion in military service, medical records indicate that his blindness is the result of methanol ingestion after military service". The examiner reviewed, the applicant's SSA Medical Evaluation dated 11 October 2017 and the summary indicates the applicant's blindness is due to "ingesting methanol" on 25 December 2012 that was "toxic to his brain and he developed blindness with associated optic atrophy". He was listed as having the following Medically Determinable Impairments and Severity related to this ingestion, including: Loss of Central Visual Acuity (Severe), Fracture of Lower Limb (severe), Statutory Blindness (severe), substance addiction disorders alcohol (non-severe), and Substance addiction disorders drugs (non-severe). The report further notes the applicant's history of prior incarceration and being legally registered as a sex offender. Overall, the VA electronic record repeatedly evidences administrative notes regarding the applicant's frequent requests to obtain benefits he is ineligible for, such as, a letter to the electric company indicating he is on oxygen or denial of compassionate assistance for family caregiver. The applicant has also inaccurately informed VA mental health providers that his blindness is as a result of an explosion during military service which has led to his erroneously being diagnosed with PTSD, although there is evidence of providers updating the diagnosis when accurate information is received that his blindness is as a result of methanol ingestion.

e. Based on the information available, this Agency Behavioral Health Advisor is unable to opine regarding mitigation without the specific facts and circumstances that led to his discharge.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant asserts mitigating conditions of PTSD, TBI, and OMH.

(2) Did the condition exist or experience occur during military service? No. There is no medical documentation indicating the applicant was diagnosed with any BH condition during military service.

(3) Does the condition or experience actually excuse or mitigate the discharge? Unable to opine regarding mitigation without the specific facts and circumstances that led to his separation.

BOARD DISCUSSION:

1. The Board determined 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.
2. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant's request, supporting documents, evidence in the records, and published DoD guidance for liberal consideration of discharge upgrade requests. The applicant's separation packet is not available for review. However, other evidence shows the applicant was discharged on 30 October 2001 under the provisions of AR 635-200, paragraph 14-12c, by reason of Misconduct. His service was characterized as under honorable conditions (general). He was assigned Separation Code "JKQ" and RE-3. He completed 1 year, 3 months, and 26 days of net active service. He did not complete his first full term of service. The Board found no error or injustice in the applicant's available separation processing. 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 of inability to establish mitigation without the specific facts and circumstances that led to his discharge. Likewise, although he provides three letters in support of a clemency determination, in the absence of the specific misconduct, the Board found insufficient evidence to establish clemency. Therefore, based on a preponderance of available 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.

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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 three 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 three-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, provides the Secretary of the Army shall ensure that an applicant seeking corrective action by the Army Review Boards Agency (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 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. It is not an investigative body. The ABCMR may, in its discretion, hold a hearing. 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 635-200 (Personnel Separations - Enlisted Personnel) sets forth the basic authority for the separation of enlisted personnel.

a. Paragraph 3-7a provides that an honorable discharge is a separation with honor and entitles the recipient to benefits provided by law. The honorable characterization is appropriate when the quality of the member's service generally has met the standards of acceptable conduct and performance of duty for Army personnel or is otherwise so meritorious that any other characterization would be clearly inappropriate.

b. Paragraph 3-7b states 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 establishes policy and prescribes procedures for separating members for misconduct. Specific categories include minor disciplinary infractions (a pattern of misconduct consisting solely of minor military disciplinary infractions), a pattern of misconduct (consisting of discreditable involvement with civil or military authorities or conduct prejudicial to good order and discipline). Action will be taken to separate a member for misconduct when it is clearly established that rehabilitation is impracticable or is unlikely to succeed. 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 merited by the Soldier's overall record.

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 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 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, 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//