

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 1 November 2024

DOCKET NUMBER: AR20240003530

APPLICANT REQUESTS: in effect, an upgrade of his under other than honorable conditions discharge to an honorable medical separation.

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

- DD Form 149 (Application for Correction of Military Record)
- Department of Veterans Affairs (DVA) letter, 28 August 2023
- Rating decision
- Medical records, 14 pages
- DVA letter, 24 October 2023

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 he was injured in the Army and had post-traumatic stress disorder (PTSD) and Attention-deficit/hyperactivity disorder (ADHD) and was not able to get treatment or support for either condition. He now has severe hearing loss and tinnitus disabilities related to his military duty and require treatment. He has been approved to receive treatment and need to get help for other conditions PTSD and ADHD.
3. The applicant enlisted in the Regular Army on 3 October 1996.
4. He received nonjudicial punishment (NJP) under the Uniform Code of Military Justice (UCMJ) on 26 November 1997, for between on or about 4 October 1997 and 4 November 1997, wrongful use of marijuana, a controlled substance. Also, wrongfully disobeying a lawful command. His punishment included reduction to private (E-1).
5. He underwent a separation examination on 17 February 1998, showing he was qualified for separation/retention.

6. He underwent a mental status evaluation on 17 February 1998, showing he had the mental capacity to understand and participate in the proceedings, was mentally responsible, and met the retention requirements of Army Regulation (AR) 40-501 (Standards of Medical Fitness).

7. He received NJP under UCMJ on 23 March 1998, for between on or about 28 September 1997 and 13 January 1998, wrongfully use his government American Express card while not in a temporary duty status, for the amount of approximately \$3,606.55.

8. On 11 March 1998, his commander notified him of his intent to separate him for misconduct – abuse of illegal drugs under the provisions of AR 635-200 (Personnel Separations – Enlisted Personnel), Chapter 14-12c. The specific reason for his proposed action was he wrongfully used marijuana for which on 26 November 1997 he received a Field Grade Article 15. He also misused his Government American Express Card for which on 3 March 1998 he received another Field Grade Article 15. The applicant acknowledged receipt on the same day.

9. On 17 March 1998, having been advised by consulting counsel of the basis for the contemplated action to separate him for commission of a serious offense under the provisions of AR 635-200, Chapter 14-12c, and its effects of the rights available to him and the effect of any action taken by him in waiving his rights. He understood that if being considered for discharge under other than honorable conditions he was entitled to have his case considered by an administrative separation board. He voluntarily waived consideration of his case by an administrative separation board contingent upon him receiving a characterization of service or description of service no less favorable than General Under Honorable Conditions.

10. On 17 March 1998, his chain of command recommended that he be separated under the provisions of AR 635-200, chapter 14-12c and his character of service be other than honorable.

11. Staff Judge Advocate recommended that the separation authority sign the attached memorandum and endorsement disapproving the conditional waiver and refer the applicant to an administrative separation board.

12. On 25 March 1998, the separation authority reviewed the administrative separation packet and the conditional waiver submitted. He disapproved the conditional waiver request and determined his case will be heard before and administrative separation board.

13. On 3 April 1998, the applicant having been advised by consulting counsel voluntarily waived consideration of his case by an administrative separation board.

14. The separation authority ordered the separation under the provisions of AR 635-200, chapter 14-12c, for commission of serious offenses. He directed him to be discharged with an other than honorable discharge and be reduced to the lowest enlisted grade.

15. Accordingly, he was discharged on 15 April 1998, under other than honorable conditions in accordance with AR 635-200, chapter 14-12c. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 1 year, 6 months, and 13 days active service. It also shows:

- Item 26 (Separation Code): JKQ
- Item 27 (Reentry Code): 3
- Item 28 (Narrative Reason for Separation): Misconduct

16. There is no evidence the applicant applied to the Army Discharge Review Board within the Board's 15-year statute of limitations.

17. The applicant provides:

a. DVA letter, 28 August 2023, showing he was service connected for bilateral hearing loss. However, he was denied for asthma.

b. Rating decision for the above mentioned conditions related to his 28 August 2023 DVA letter.

c. Medical records, 14 pages in support of his claim.

d. DVA letter, 24 October 2023, showing he was service connected for tinnitus.

18. By regulation, AR 635-200 (Personnel Separations-Enlisted Personnel) sets forth the basic authority for the separation of enlisted personnel. Chapter 14 (Separation for Misconduct) deals with separation for various types of misconduct, which includes drug abuse, and states that individuals identified as drug abusers may be separated prior to their normal expiration of term of service.

19. 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. The VA does not have authority or responsibility for determining physical fitness for military service. The VA may compensate the individual for loss of civilian employability.

20. Title 38, U.S. Code, Sections 1110 and 1131, permit the 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.

21. Title 38, CFR, Part IV is the VA's schedule for rating disabilities. The VA awards disability ratings to veterans for service-connected conditions, including those conditions detected after discharge. 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.

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

23. MEDICAL REVIEW:

a. The Army Review Boards Agency (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 (AHLTA), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant is applying to the ABCMR requesting an upgrade of his 15 April 1998 discharge characterized as under other than honorable conditions, and, in essence, a referral to the Disability Evaluation System (DES). On his DD 149, he has indicated that PTSD and Other Mental Health conditions are issues related to his requests. He states:

"I am requesting an upgrade to honorable. I was injured in the Army and had PTSD as well as ADHD and was not able to get treatment or support for either condition. I was injured in the Army and had PTSD as well as ADHD. I was not able to get treatment or support for either condition. I now have severe hearing loss and tinnitus disabilities related to my military duty and require treatment. I have been approved to receive treatment and need to get help for the other conditions. PTSD and ADHD."

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. The applicant's DD 214 shows he entered the regular Army on 3 October 1996 and was discharged on 15 April 1998 under the separation authority provided by paragraph 14-12c of AR 635-200, Personnel Separations – Enlisted Personnel (26 June 1996): Commission of a serious offense.

d. The applicant's company commander recommended his separation under paragraph 14-12c of AR 635-200 on 11 March 1998:

"The reasons for my proposed action are: You wrongfully used marijuana for which on 26 November 1997 you received a Field Grade Article 15. You also misused your Government American Express Card for which on 3 March 1998 you received another Field Grade Article 15. Your conduct is highly prejudicial to the good order and discipline of the Armed Forces and will not be tolerated by this command."

e. The applicant underwent a pre-separation medical examination on 17 February 1998. The provider documented mild hearing loss and found the applicant qualified for separation. He also completed his Mental Status Evaluation that day. The provider documented a normal examination, going on to opine the applicant was mentally responsible, met the medical retention standards in chapter 3 of AR 40-501, Standards of Medical Fitness, and had the mental capacity to understand and participate in the proceedings.

f. On 25 March 1998, the Commanding General of the 10<sup>th</sup> Mountain Division (Light Infantry) and Fort Drum approved the applicant's administrative separation under paragraph 14-12c of AR 635-200 and disapproved his conditional waiver.

g. Submitted medical documentation shows he has been diagnosed and treated for ADHD and has hearing loss.

h. There is no evidence the applicant any duty incurred medical condition which would have failed the medical retention standards of chapter 3 of AR 40-501, Standards of Medical Fitness, prior to his discharge. Thus, there was no cause for referral to the Disability Evaluation System. Furthermore, there is no evidence that any medical condition prevented the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his discharge.

i. JLV shows he has been awarded multiple 0% VA service-connected disability ratings for treatment purposes only, including ratings for bilateral tinnitus, hearing loss, and neurosis (aka generalized anxiety disorder). However, the DES only compensates

an individual for service incurred medical condition(s) which have been determined to disqualify him or her from further military service and consequently prematurely ends their career. The DES has neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions which were incurred or permanently aggravated during their military service; or which did not cause or contribute to the termination of their military career. These roles and authorities are granted by Congress to the Department of Veterans Affairs and executed under a different set of laws.

j. It is the opinion of the ARBA medical advisor a referral of his case to the DES is not warranted.

k. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? YES: Neurosis

(2) Did the condition exist or experience occur during military service? YES: The condition has been service connected by the Veterans Benefits Administration

(3) Does the condition or experience actually excuse or mitigate the discharge? Partially: As there is a nexus between neurosis with difficulty with authority figures and self-medicating with alcohol and/or drugs, the condition mitigates the acts of disobeying senior Soldiers and Officers and his misuse of marijuana. However, the condition does not interfere with one's ability to distinguish between right and wrong and act in accordance with the right and therefore cannot mitigate his misuse of the Government American Express Card with which he had been entrusted to use appropriately.

#### 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 Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement and record of service, the frequency and nature of the applicant's misconduct and the reason for separation. The applicant was separated for misconduct with the commander citing wrongful use of marijuana. The Board found no error or injustice in the separation proceedings and designated characterization of service assigned during separation. The Board noted the applicant's contention of PTSD and review the medical advisor's

review; however, determined the entirety of the misconduct was not mitigated by the PTSD. Based on a preponderance of the evidence, the Board concluded that the characterization of service the applicant received upon separation was appropriate.

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 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. Army Regulation (AR) 635-200 (Personnel Separations-Enlisted Personnel) sets forth the basic authority for the separation of enlisted personnel. Chapter 14 (Separation for Misconduct) deals with separation for various types of misconduct, which includes drug abuse, and states that individuals identified as drug abusers may be separated prior to their normal expiration of term of service. The regulation in effect at the time stated individuals in pay grades E-5 and above could be processed for separation upon discovery of a drug offense. Those in pay grades below E-5 could also be processed after a first drug offense and must have been processed for separation after a second offense. The issuance of a discharge under other than honorable conditions was normally considered appropriate.

a. Paragraph 3-7a (1) states an honorable discharge is a separation with honor. The honorable characterization is appropriate when the quality of the member's service generally has met the standards of acceptable conduct and performance of duty for Army personnel, or is otherwise so meritorious that any other characterization would be clearly inappropriate. Only the honorable characterization may be awarded a member upon completion of his or her period of enlistment or period for which called or ordered to active duty or active duty for training, or where required under specific reasons for separation, unless an entry level status separation (uncharacterized) is warranted.

b. Paragraph 3-7b (1) states a general discharge is a separation from the Army under honorable conditions. When authorized, it is issued to a member whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Paragraph 3-7b (2) states a characterization of under honorable conditions may be issued only when the reason for the member's separation specifically allows such characterization. It will not be issued to members upon separation at expiration of their period of enlistment, military service obligation, or period for which called or ordered to active duty.

3. Title 10, U.S. Code, chapter 61, provides the Secretaries of the Military Departments with authority to retire or discharge a member if they find the member unfit to perform military duties because of physical disability. The U.S. Army Physical Disability Agency is responsible for administering the Army physical disability evaluation system and executes Secretary of the Army decision-making authority as directed by Congress in



chapter 61 and in accordance with DOD Directive 1332.18 and Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation).

a. Soldiers are referred to the disability system when they no longer meet medical retention standards in accordance with Army Regulation 40-501 (Standards of Medical Fitness), chapter 3, as evidenced in an MEB; when they receive a permanent medical profile rating of 3 or 4 in any factor and are referred by an MOS Medical Retention Board; and/or they are command-referred for a fitness-for-duty medical examination.

b. The disability evaluation assessment process involves two distinct stages: the MEB and PEB. The purpose of the MEB is to determine whether the service member's injury or illness is severe enough to compromise his/her ability to return to full duty based on the job specialty designation of the branch of service. A PEB is an administrative body possessing the authority to determine whether or not a service member is fit for duty. A designation of "unfit for duty" is required before an individual can be separated from the military because of an injury or medical condition. Service members who are determined to be unfit for duty due to disability either are separated from the military or are permanently retired, depending on the severity of the disability and length of military service. Individuals who are "separated" receive a one-time severance payment, while veterans who retire based upon disability receive monthly military retired pay and have access to all other benefits afforded to military retirees.

c. The mere presence of a medical impairment does not in and of itself justify a finding of unfitness. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier may reasonably be expected to perform because of his or her office, grade, rank, or rating. Reasonable performance of the preponderance of duties will invariably result in a finding of fitness for continued duty. A Soldier is physically unfit when a medical impairment prevents reasonable performance of the duties required of the Soldier's office, grade, rank, or rating.

4. AR 635-40 establishes the Army Disability Evaluation System 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. Only the unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability.

a. Paragraph 3-2 states disability compensation is not an entitlement acquired by reason of service-incurred illness or injury; rather, it is provided to Soldiers whose service is interrupted and who can no longer continue to reasonably perform because of a physical disability incurred or aggravated in military service.

b. Paragraph 3-4 states Soldiers who sustain or aggravate physically-unfitting disabilities must meet the following line-of-duty criteria to be eligible to receive retirement and severance pay benefits:

(1) The disability must have been incurred or aggravated while the Soldier was entitled to basic pay or as the proximate cause of performing active duty or inactive duty training.

(2) The disability must not have resulted from the Soldier's intentional misconduct or willful neglect and must not have been incurred during a period of unauthorized absence.

c. Paragraph 4-10 provides that Medical Evaluation Boards (MEBs) are convened to document a Soldier's medical status and duty limitations insofar as duty is affected by the Soldier's status. A decision is made as to the Soldier's medical qualification for retention based on criteria in Army Regulation 40-501 (Standards of Medical Fitness), Chapter 3 (Medical Fitness Standards for Retention and Separation, Including Retirement). If an MEB determines the Soldier does not meet retention standards, the board will recommend referral of the Soldier to a PEB.

d. Paragraph 4-12 provides that each case is first considered by an informal PEB. Informal procedures reduce the overall time required to process a case through the disability evaluation system. An informal board must ensure that each case considered is complete and correct. All evidence in the case file must be closely examined and additional evidence obtained, if required. In addition, in all informal cases, the PEB Liaison Officer of the medical treatment facility having control of the Soldier will be the counselor for the Soldier. As such, the PEB Liaison Officer is primarily concerned with the Soldier's interests. The Soldier will be made fully aware of the election options available to him or her, the processing procedures, and the benefits to which he or she will be entitled if separated or retired for physical disability.

5. Title 10, USC, Section 1201 provides for the physical disability retirement of a member who has either 20 years of service or a disability rating of 30% or greater.

6. 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%.

7. Title 38, USC, Sections 1110 and 1131, permit the 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 her 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.

8. The Acting Principal Deputy Under Secretary of Defense (Personnel and Readiness) provided clarifying guidance to Service DRBs and Service BCM/NRs on 24 February 2016 [Carson Memorandum]. The memorandum directed the BCM/NRs to waive the statute of limitations. Fairness and equity demand, in cases of such magnitude that a Veteran's petition receives full and fair review, even if brought outside of the time limit. Similarly, cases considered previously, either by DRBs or BCM/NRs, but without benefit of the application of the Supplemental Guidance, shall be, upon petition, granted de novo review utilizing the Supplemental Guidance.

9. The Under Secretary of Defense (Personnel and Readiness) provided clarifying guidance to Service DRBs and Service BCM/NRs on 25 August 2017 [Kurta Memorandum]. The memorandum directed them to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters relating to mental health conditions, including PTSD, traumatic brain injury (TBI), 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.

a. Guidance documents are not limited to under other than honorable conditions discharge characterizations but rather apply to any petition seeking discharge relief including requests to change the narrative reason, re-enlistment codes, and upgrades from general to honorable characterizations.

b. An honorable discharge characterization does not require flawless military service. Many veterans are separated with an honorable characterization despite some relatively minor or infrequent misconduct.

c. Liberal consideration does not mandate an upgrade. Relief may be appropriate, however, for minor misconduct commonly associated with mental health conditions, including PTSD; TBI; or behaviors commonly associated with sexual assault or sexual harassment; and some significant misconduct sufficiently justified or outweighed by the facts and circumstances.

10. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records (BCM/NRs) regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. BCM/NRs may grant clemency regardless of the type of court-martial. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to other corrections, including changes in a discharge, which may be warranted based on equity or relief from injustice.

a. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. In determining whether to grant relief based on equity, injustice, or clemency grounds, BCM/NRs shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment.

b. Changes to the narrative reason for discharge and/or an upgraded character of service granted solely on equity, injustice, or clemency grounds normally should not result in separation pay, retroactive promotions, and payment of past medical expenses or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded service characterization.

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

opinions), and reviews to Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//