

IN THE CASE OF: [REDACTED]

BOARD DATE: 12 December 2024

DOCKET NUMBER: AR20240004014

APPLICANT REQUESTS: upgrade of his under other than honorable conditions discharge to under honorable conditions (general) or to honorable.

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

- DD Form 149 (Application for Correction of Military Record), 20 February 2024
- DD Form 214 (Certificate of Release or Discharge from Active Duty), 13 July 1981
- Veterans Administration (VA) Rating Decision, 2 January 2024
- VA Form 21-4138 (Statement in Support of Claim), 31 March 2023
- 80 pages of medical progress notes, 1979-1980

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:

a. Due to an injury sustained in service, he became dependent on pain killers which led to an under other than honorable conditions discharge. He has consistently been battling this issue and was finally seen at the VA and awarded a service-connected disability rating for his in-service injuries. He has been in continuous pain, but he can only be seen for treatment purposes because of his discharge.

b. The VA determined his situation was a direct result of his service once they looked in his service files. He was struck by a drunk driver while he was off-duty. He spent months at Madigan Army Medical Center. He persevered and gradually regained mobility with the help of medical professionals and fellow patients.

c. He encountered difficulties managing pain and anxiety. He sought relief through various means, including prescribed medications and marijuana use. This led to a less than honorable discharge.

d. Following his discharge, he struggled with physical and mental health issues, including substance abuse and homelessness. Over the years, he has sought treatment and support through detox programs, rehabilitation, and mental health services. He has remained sober for the past 22 years. He acknowledges his mistakes and takes full responsibility for his actions, but he believes the circumstances surrounding his discharge, including the injury and subsequent challenges, warrant a review for a more equitable outcome.

3. The applicant provides:

a. His DD Form 214, for the period ending 13 July 1981.

b. A VA Form 21-4138, dated 31 March 2023, in which he requests VA service-connected disability compensation.

c. A VA Rating Decision letter, dated 2 January 2024, in which he was granted service-connected disability compensation, in part, for radiculopathy of the upper right extremity.

d. Medical progress notes from 1979 to 1980, showing treatment and progress notes for a cervical spine injury he sustained as the result of being struck by a car while walking late at night on 16 December 1979.

(1) He was admitted on 16 December 1979 and diagnosed with fracture and dislocation of the cervical spine, C5-C6.

(2) The examining physician recommended he be placed on the Temporary Disability Retirement List and be reevaluated in one year.

e. Five letters of reference and support from people who support his efforts for an upgrade of his discharge:

(1) A letter from [REDACTED] a person he met at a halfway house during a recovery program.

(2) A letter from [REDACTED] a person who has known him for 40 years, noting he suffered from a neck injury in service and has been in constant pain since then.

(3) A letter from [REDACTED] a person who he met during an Alcoholics Anonymous (AA) meeting 20 years ago.

(4) A letter from [REDACTED] a friend of 27 years, who has supported him through his recovery at AA and in his church.

(5) A letter from [REDACTED] a friend who supports his effort for an upgrade.

4. A review of the applicant's service records show:

a. On 30 June 1978, he enlisted in the Regular Army for 3 years.

b. On 31 December 1979, he was promoted to specialist 4/E-4.

c. On 30 July 1980, his status was changed from convalescent leave to absent without leave (AWOL).

d. On 31 July 1980, his status was changed from AWOL to present for duty (PDY).

e. On 9 September 1980, he accepted nonjudicial punishment (NJP) under provisions of Article 15 of the Uniform Code of Military Justice (UCMJ) for absenting himself from Holding Company, Madigan Army Medical Center (MAMC), from 30 July 1980 to 31 July 1980. His punishment consisted of forfeiture of \$120.00 for 1 month, reduction to private first class (PFC)/E-3, and extra duty for 14 days. The portion of forfeiture of \$120.00 for 1 month and reduction to PFC were suspended for 90 days. He did not appeal this punishment.

f. On 24 November 1980, supplemental NJP under provisions of Article 15 of the UCMJ were imposed against him; he was reduced to PFC, and forfeited \$120.00 of pay for 1 month.

g. A DA Form 268 (Report for Suspension of Favorable Personnel Actions), dated 9 February 1981, reflects he was being discharged while assigned to the Medical Hold Company, MAMC.

h. A DA Form 458 (Charge Sheet), listing the charges and specifications, if any; his request for discharge memorandum, his company commander's recommendation memorandum for discharge in lieu of court-martial proceedings, and the separation authority approval memorandum, are not contained in the available records.

i. Orders 18-2, dated 9 February 1981, issued from Headquarters, MAMC, reflect he was reassigned to U.S. Army separation transfer point with a date of discharge of 13 February 1981.

j. On 13 February 1981, the applicant was discharged. His DD Form 214 shows he was discharged under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 10, by reason of conduct triable by court-martial, with a character of service of under other than honorable conditions. It further shows he had 1 day of time lost on 30 July 1980. His DD Form 214 further indicates:

(1) Block 4a (Grade, Rate, or Rank) – private (PV1)/E-1.

(2) Block 12c (Record of Service-Net Active Service this Period), he completed 2 years, 7 months, and 13 days net active service this period.

(3) Block 13 (Decorations, Medal, Badges, Citations, and Campaign Ribbons Awarded or Authorized): Expert Marksmanship Qualification Badge with Rifle Bar (M-16).

5. 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.

6. 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 13 February 1981 under other than honorable discharge. He states in part:

“Due to injury sustained in service, I became dependent on pain killers which led to my OTH [other than honorable] from service. I have constantly been battling this issue and was finally seen by the VA on this. I was awarded Service Connection for my injuries I sustained and have continuous pain with but I can only be seen for treatment purposes only due to my discharge. The VA through pulling my files and looking into the matter see that it is a direct result to service.”

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. The applicant's DD 214 for the period of service under

consideration shows he entered the regular Army on 30 June 1978 and was discharged under other than honorable conditions on 13 February 1981 under the separation authority provided by chapter 10 of AR 635-200, Personnel Management – Enlisted Personnel (1 March 1978): Discharge for the Good of the Service. It does not contain a period of service in a hazardous duty or imminent danger pay area. It shows (1) day of time lost – 30 July 1980.

d. The applicant states in his self-authored letter that while in service he was struck by a drunk driver and seriously injured:

“Unfortunately, my military career was cut short due to a severe injury. While off-duty, I was struck by a drunk driver, resulting in a broken neck and paralysis. I spent months in recovery undergoing extensive medical treatment and rehabilitation at Madigan Army Medical Center. Despite the challenges, I persevered and gradually regained mobility with the help of medical professionals and fellow patients.

During my recovery, I encountered difficulties managing pain and anxiety. I sought relief through various means, including prescribed medications and, regrettably, marijuana use. Additionally, I engaged in unauthorized activities, such as selling marijuana, which led to legal consequences and a less-than-honorable discharge offer from the military.

Following my discharge, I struggled with physical and mental health issues, including substance abuse and homelessness. Over the years, I have sought treatment and support through detox programs, rehabilitation facilities, and mental health services.

Despite setbacks, I have remained sober for the past 22 years and have actively engaged in therapy to address underlying issues.

I acknowledge my past mistakes and take full responsibility for my actions. However, I believe that the circumstances surrounding my discharge, including the injury and subsequent challenges, warrant a review for a more equitable outcome. I am committed to continued rehabilitation and contributing positively to society.”

e. The applicant underwent an Initial Evaluation of Residual of Traumatic Brain Injury evaluation yesterday (9 December 2024). It states he has headaches every 10 days, neurological issues in all four extremities, cervical pain, and depression with mood swings. Excerpts from the VA Disability Benefits Questionnaire:


“Vet claims that when he woke up in Madigan in 1979, he was unable to move his arms, but his arm strength returned to normal within 2 years. Vet claims urination normal without retention or urgency. Vet claims neck pain onset in 1979, progressive since onset, ongoing currently, constant, flares frequency weekly, flare duration 12 hours, flare severity 9/10, caused by exertion and relieved by rest.

Vet claims tingling in hands and forearms onset in 1979, progressive since onset, ongoing currently, constant, no flares. Vet claims pain in the hands, onset in 1979, progressive since onset, ongoing currently, constant, no flares, severity 6/10. Vet claims C5-6 fracture by C-spine CT scan in 1979.

Vet claims tingling in legs and feet, onset in 2014, progressive since onset, ongoing currently, constant. Vet claims pain in feet, onset in 2015, progressive since onset, ongoing currently, constant, no flares, severity 5/10. Vet claims care for tingling and pain in hands and feet, saw MGH PCP and neurologist, had NCV/EMG [nerve conduction velocities/electromyography] of both arms in 2014, told bilateral carpal tunnel syndromes, had nocturnal CTS splints without relief of pain or tingling. Vet claims currently forgets conversations or tasks once a day. Vet claims misplaces objects once every 3 days. Vet denies getting lost driving or walking. Vet claims VA brain MRI 6 weeks ago. Vet claims depression and mood swings onset in 1979, static since onset, ongoing currently.

EMG shows chronic left C7-T1 radiculopathy. 2024 C-spine MRI quoted in 10/08/2024 Bed VA neuro note showed cervical osteoarthritis, severe right C-4 foraminal stenosis, and “probably post-traumatic findings” with myelomalacia at C6-7.”

f. “Myelomalacia is a condition in which the spinal cord softens. This softening is often the result of a lack of blood supply to the spine – due to an acute injury (sporting injury, car accident injury, etc.) or degeneration of the spine over time. When the spine softens, the nerves are put at an increased risk.”



g. The VA examiner nicely summarized the injuries and his care from the contemporaneous medical documentation:

“07/01/1980 Madigan AMC [Army Medical Center] Discharge Summary note says pedestrian hit by car on 12/15/1979 had brief LOC [loss of consciousness at the scene but awake and following commands in ER [emergency room]. Note says in ER Vet complained of neck pain and arm weakness, and hand pain, silent on HA [headache].

ER Exam showed weakness of elbow extension and hand extrinsics [Forearm muscles which move the fingers]. ER X-rays showed subluxation of C5 on C6. Tomograms showed lateral mass fractures of C5 and C6. Vet was stabilized in Gardiner-Wells tongs and Stryker Frame, then Philadelphia collar. Repeat X-rays in flexion and extension showed cervical spine was stable. Entire Discharge summary is silent on HA.”



h. The pins of the Gardner-Wells tongs penetrate the outer table of the skull and the patient is maintained in cervical traction until the fracture stabilizes, then placed in a halo body jacket, and then finally changed over to a hard Philadelphia collar until healing is complete. Today, these injuries are typically treated with surgical stabilization.

i. The discharge summary notes the applicant was admitted on 16 December 1979 and while not containing the date of discharge, inpatient orders run thru mid-June 1980. It lists his discharge diagnoses as “Fracture dislocation cervical spine C5-C6” and “Spinal cord injury manifest by paresthesias (tingling) and weakness in both hands.”

j. It is unclear why/how the applicant was returned to duty as the medical officer at Madigan AMC had recommended placement on the Temporary Disability Retirement List (TDRL):

“DISPOSITION: It was initially hoped this individual could be returned to active-duty military with a profile. As a practical matter, however, his restrictions would be so great, both with respect to his cervical stability, and the use of his hands, that it is my recommendation he be placed on TDRL and reevaluated by the undersigned in one year.”

k. JLV shows the applicant has been diagnosed with “Diffuse traumatic brain injury with loss of consciousness greater than 24 hours with return to pre-existing conscious levels with sequela,” cervical spondylosis (degenerative changes) with cervical myelopathy (spinal cord compression resulting in nerve dysfunction), and cervical radiculopathies. It also shows his two cervical radiculopathies, cervical spine fracture, impaired hearing, and tinnitus have been service connected for treatment purposes only.

I. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? YES: Diffuse traumatic brain injury with sequela

(2) Did the condition exist or experience occur during military service? YES: The records show the applicant was injured while in the Army.

(3) Does the condition or experience actually excuse or mitigate the discharge? YES: Residuals of a TBI include impulsivity, poor decision making, and poor judgement. His service incurred TBI thus mitigates the period of absence without leave, illicit drug use, and illicit confessed selling of marijuana for which he has accepted full responsibility.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, the evidence found within the military record, and published Department of Defense guidance for consideration of discharge upgrade requests, the Board found that relief was warranted.

2. The Board carefully considered the applicant’s contentions, his record of service, his injury, the frequency and nature of his misconduct, the charges against him, his request for discharge, the reason for his separation and the character of service he received upon discharge. The Board considered the applicant’s statement, the nature of his injury, the VA diagnosis of diffuse traumatic brain injury with sequela and the review and conclusions of the Agency medical advisor. The Board found: (1) the applicant had a condition or experience that may excuse or mitigate the discharge; (2) the condition existed during military service and; (3) the applicant’s condition mitigates the misconduct that led to his discharge. Based on a preponderance of evidence, the Board determined that an upgrade of the applicant’s character of service to Under Honorable Conditions (General) is warranted as a matter of liberal consideration.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

■	■	■	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board determined the evidence presented is sufficient to warrant relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by amending the applicant's DD Form 214, for the period ending 13 February 1981 to show in block 24 (Character of Service) – Under Honorable Conditions (General).

X		
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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, 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 15-185 (Army Board for Correction of Military Records) prescribes the policies and procedures for correction of military records by the Secretary of the

Army acting through the ABCMR. The ABCMR begins its consideration of each case with the presumption of administrative regularity.

a. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

b. The ABCMR may, in its discretion, hold a hearing (sometimes referred to as an evidentiary hearing or an administrative hearing) or request additional evidence or opinions. 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.

3. Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), in effect at the time, set policies, standards, and procedures to ensure the readiness and competency of the force while providing for the orderly administrative separation of Soldiers for a variety of reasons.

a. Chapter 3-7 provided:

(1) An honorable discharge is a separation with honor. The honorable characterization is appropriate when the quality of the Soldier'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/her period of enlistment or period for which called or ordered to active duty or active-duty training or where required under specific reasons for separation unless an entry level status separation (uncharacterized) is warranted.

(2) 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. A characterization of under honorable conditions may be issued only when the reason for separation specifically allows such characterization. It will not be issued to Soldiers solely upon separation at expiration of their period of enlistment, military service obligation, or period for which called or ordered to active duty.

b. Chapter 10 stated a member who has committed an offense or offenses, the punishment of which under the UCMJ and the Manual for Court Martial, 1969 (Revised Edition) includes a bad conduct or dishonorable discharge, may submit a request for discharge for the good of the service. The discharge request may be submitted after court-martial charges are preferred against the member, or, where required, after referral, until final actions by the court-martial convening authority.

(1) A medical examination is not required but may be requested by the member under Army Regulation 40-501 (Medical Services – Standards of Medical Fitness), chapter 10. A member that requests a medical examination must also have a mental status evaluation before discharge.

(2) Commanders will insure that a member will not be coerced into submitting a request for discharge for the good of the service. The member will be given a reasonable time (not less than 72 hours) to consult with consulting counsel and to consider the wisdom of submitting such a request for discharge. Consulting counsel will advise the member concerning:

- the elements of the offense or offenses charged
- burden of proof
- possible defenses
- possible punishments
- provisions of Chapter 10
- requirements of voluntariness
- type of discharge normally given under provisions of Chapter 10
- rights regarding the withdrawal of the member's request
- loss of Veterans Administration benefits
- prejudice in civilian life because of the characterization of the discharge

(3) The separation authority will be a commander exercising general court-martial jurisdiction or higher authority. However, authority to approve discharges in cases in which a member has been AWOL for more than 30 days and has been dropped from the rolls of his or her unit as absent in desertion, and has been returned to military control, may be delegated to the commander exercising special court-martial convening authority over the member.

(4) An under other than honorable discharge certificate normally is appropriate for a member who is discharged for the good of the service. However, the separation authority may direct a General Discharge Certificate if such is merited by the member's overall record during the current enlistment.

4. Army Regulation 635-5-1 (Personnel Separations – Separation Program Designators), in effect at the time, listed the specific authorities, regulatory, statutory, or other directive, and reasons for separation from active duty, active duty for training, or full-time training duty. The separation program designator "JFS" corresponded to "Administrative discharge-conduct triable by court-martial," and the authority, Army Regulation 635-200, chapter 10.

5. 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 under other than honorable conditions 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.

6. The acting Under Secretary of Defense for Personnel and Readiness provided clarifying guidance on 25 August 2017, which expanded the 2014 Secretary of Defense memorandum, that directed the BCM/NRs and DRBs to give liberal consideration to veterans looking to upgrade their less-than-honorable discharges by expanding review of discharges involving diagnosed, undiagnosed, or misdiagnosed mental health conditions, including PTSD; traumatic brain injury; or who reported sexual assault or sexual harassment.

7. 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. 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. 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.

8. Section 1556 of Title 10, U.S. 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//