

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 12 February 2025

DOCKET NUMBER: AR20240006430

APPLICANT REQUESTS:

- reconsideration of his previous request for upgrade of his under other than honorable conditions (UOTHC) discharge to under honorable conditions (general)
- referral to a Medical Evaluation Board

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

- DD Form 149 (Application for Correction of Military Record), 8 April 2024
- DD Form 689 (Individual Sick Slip), 18 June 1981
- four Standard Forms 600 (Chronological Record of Medical Care)
- DA Form 4700 (Medical Record – Supplemental Medical Date)
- Medical Document

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's cases by the Army Board for Correction of Military Records (ABCMR) in Dockets Number AR20140001365 on 4 September 2014 and AR20150014295 on 29 November 2016.
2. The applicant states the Chapter 14 discharge for misconduct failed to adhere to the Veterans benefits manual and Army Regulations, by failing to be referred to the Medical Evaluation Board for in-service chronic disease discovered prior to any other separation being finalized. The failure of referring him to the Medical Evaluation Board amounts to a dereliction of duty by the treating physician, who diagnosed and treated his disease. He believes the Chapter 14 discharge is erroneous because he was discharged after a hospitalization for the disease in the issue.
3. The applicant enlisted in the Regular Army on 17 October 1980, for a 3-year period. He was awarded the military occupational specialty of 19E (Armor Crewman).

4. The applicant received nonjudicial punishment under the provisions of Article 15, of the Uniform Code of Military Justice (UCMJ) for the following:

a. On 11 March 1981, for failing to go to his prescribed appointed place of duty on or about 5 March 1981, and for being absent without leave (AWOL) from 7 March 1981 to 8 March 1981. His punishment imposed was forfeiture of \$112.00 per month for one-month, extra duty for 14 days, and restriction for 14 days.

b. On 17 April 1981, for wrongfully possessing some quantity of marijuana on or about 5 April 1981. His punishment imposed was forfeiture of \$250.00 pay per month for a period of one-month, extra duty for 15 days, and restriction for 15 days.

c. On 29 May 1981, for breaking restriction on or about 17 May 1981. His punishment imposed was forfeiture of \$116.00 pay per month for one-month, extra duty for seven days, restriction for 14 days.

5. A DA Form 268 (Report for Suspension of Favorable Personnel Actions) shows he was flagged due to pending elimination under the provisions of Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), Chapter 14 (Separation for Misconduct).

6. The applicant's service record is void of the complete facts and circumstances surrounding his discharge processing. However, his DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged on 6 July 1981, in the grade of E-1, under the provisions of AR 635-200, Chapter 14, for misconduct – frequent incidents of a discreditable nature with civil or military authorities. His service was characterized as UOTHC, with separation code JKA, and reenlistment code of 4. He completed 8 months and 15 days of net active service.

7. The applicant was issued a DD Form 215 (Correction to DD Form 214) correcting his reenlistment code from 4 to show RE-3, RE-3B, and RE-3C.

8. The ABCMR reviewed the applicant's petition for his discharge to be upgraded on 4 September 2014 and on 29 November 2015. The evidence did not demonstrate the existence of a probable error or injustice and the Board determined that the overall merits of the case were insufficient as a basis for correction of the applicant's records. The board denied both of his requests.

9. The applicant additionally provides a sick call slip showing he sought medical attention for a migraine headache, four Standard Forms 600, medical record supplemental data, and a medical document summarizing his health record.

10. Regulatory guidance states when an individual is discharged under the provisions of AR 635-200, Chapter 14, for misconduct, an UOTHC characterization of service is normally appropriate. However, the separation authority may direct a general discharge if such is merited by the Soldier's overall record.

11. In reaching its determination, the Board can consider the applicant's petition, service record, and statements in light of the published guidance on equity, injustice, or clemency.

12. 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 again applying to the ABCMR requesting an upgrade of his 6 July 1982 discharge characterized as under other than honorable conditions and, in essence, referral to the Disability Evaluation System (DES) for an unnamed "Chronic Disease."

c. The Record of Proceedings outlines the applicant's military service and the circumstances of the case. The applicant's DD 214 shows that he entered the Regular Army on 17 October 1980 and was discharged 6 July 1982 under authority provided in paragraph 14-33b(2) of AR 635-200, Personnel Separations – Enlisted Personnel (1 May 1980): Misconduct - Frequent incidents of discreditable nature with civil or military authorities.

d. This request for a discharge upgrade was previously denied in full by the ABCMR on 4 September 2014 (AR20140001365) and again on 29 November 2016 (AR20150014295). Rather than repeat their findings here, the board is referred to the record of proceedings for those cases. Because this denial was before the full implementation of liberal consideration policies, this review will concentrate on evidence of a potentially mitigating mental health condition, new evidence submitted with this application, and evidence of a medical condition which would have warranted referral to the DES.

e. Because the period of service under consideration, there are no encounters in AHLTA or documents in iPERMS.

f. Six pages of medical documentation submitted with the application show the applicant was treated for headaches due to hypertension in June 1981.

g. The prior ROPs detail the number of UCMJ violations for which the applicant received Article 15's.

h. There is no evidence the applicant had 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 is not registered with the VA.

j. It is the opinion of the ARBA medical advisor that referral of his case to the DES is unwarranted.

k. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? NO

(2) Did the condition exist or experience occur during military service? N/A

(3) Does the condition or experience actually excuse or mitigate the discharge? N/A

BOARD DISCUSSION:

1. 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 record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation. Upon review of the applicant's petition, available military record and medical review, the Board concurred with the advising opinion of the ARBA medical advisor that referral of his case to the DES is unwarranted.

2. Consideration was given to the Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? NO

(2) Did the condition exist or experience occur during military service? N/A

(3) Does the condition or experience actually excuse or mitigate the discharge? N/A

3. The Board acknowledged the applicant’s contentions that his Chapter 14 discharge for misconduct was procedurally flawed, citing a failure to refer him to an MEB for a chronic medical condition diagnosed during service. He also asserts that this omission constituted a dereliction of duty by the treating physician and invalidated the discharge process. However, the Board found no evidence in the available record to support that the applicant’s medical condition warranted referral to an MEB under applicable Army regulations at the time of separation. The Board noted the mental and medical evaluations conducted prior to discharge did not identify any condition that would have required disposition through medical channels.

4. Furthermore, the applicant’s record reflects multiple instances of misconduct, including nonjudicial punishments for AWOL, wrongful possession of marijuana, and breaking restriction all of which formed the basis for his separation under Army Regulation 635-200, Chapter 14. The Board determined the applicant’s characterization of service as UOTHC is consistent with regulatory guidance for separation due to frequent incidents of a discreditable nature. The applicant proved no post service achievements or character letters of support for the Board to weigh a clemency determination. Therefore, the Board found no basis to upgrade the applicant’s discharge or to refer his case to a Medical Evaluation Board.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
XXX	XXX	XXX	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board found 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 AR20140001365 on 4 September 2014 and AR20150014295 on 29 November 2016.

X //SIGNED//

CHAIRPERSON

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

REFERENCES:

1. Title 10, U.S. Code (USC), Section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the 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. Section 1556 of Title 10, USC, 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.
3. Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation) establishes the Army Disability Evaluation System (DES) in accordance with Title 10, USC, Chapter 61 and the Department of Defense Instruction 1332.18 (DES). It 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 or her office, grade, rank, or rating. If a Soldier is found unfit because of physical disability to reasonably perform their duties it provides for the disposition of the Soldier according to applicable laws and regulations.

a. Paragraph 3-2b (Presumptions – Processing for Separation or Retirement from Active Service) provides, in pertinent part, that 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. When a Soldier is being processed for separation or retirement for reasons other than physical disability, continued performance of assigned duty commensurate with his or her rank or grade until the Soldier is scheduled for separation or retirement, creates a presumption that the Soldier is fit. The presumption of fitness may be overcome if the evidence establishes that:

(1) The Soldier was, in fact, physically unable to perform adequately the duties of his or her office, grade, rank or rating for a period of time because of disability. There must be a causative relationship between the less than adequate duty performance and the unfitting medical condition or conditions.

(2) An acute, grave illness or injury or other significant deterioration of the Soldier's physical condition occurred immediately prior to, or coincident with processing for separation or retirement for reasons other than physical disability and which rendered the Soldier unfit for further duty.

b. Public law defines physical Disability Evaluation System as a system or process of the DoD for evaluating the nature and extent of disabilities affecting members of the armed forces. It is comprised of Medical Evaluation Boards, Physical Evaluation Boards, counseling of Soldiers, and mechanism for final disposition.

c. A Soldier may not be discharged or released from active duty because of a disability until they have made a claim for compensation, pension or hospitalization with the Veterans Affairs or signed a statement that their right to make such a claim has been explained or have refused to sign such a statement.

4. Army Regulation 635-200 (Personnel Separations – Enlisted Personnel) sets forth the basic authority for the separation of enlisted personnel.

a. Paragraph 1-33 (Disposition through medical channels) provides:

(1) Except in separation actions under chapter 10 and as provided in para 1–33b, disposition through medical channels takes precedence over administrative separation processing.

(2) When the medical treatment facility (MTF) commander or attending medical officer determines that a Soldier being processed for administrative separation under chapters 7, 14, or 15, does not meet the medical fitness standards for retention (see Army Regulation 40–501, chapter 3, he/she will refer the Soldier to a Medical Evaluation Board (MEB) in accordance with Army Regulation 40-400. The administrative separation proceedings will continue, but final action by the separation authority will not be taken, pending the results of MEB.

(a) If the MEB findings indicate that referral of the case to a physical evaluation board (PEB) is warranted for disability processing under the provisions of Army Regulation 635–40, the MTF commander will furnish copies of the approved MEB proceedings to the Soldier's General Court-Martial Convening Authority (GCMCA) and unit commander. The GCMCA may direct, in writing, that the Soldier be processed through the physical disability system when action under the UCMJ has not been initiated, and one of the following has been determined:

- The Soldier's medical condition is the direct or substantial contributing cause of the conduct that led to the recommendation for administrative elimination
- Other circumstances of the individual case warrant disability processing instead of further processing for administrative separation.

(b) The authority of the GCMCA to determine whether a case is to be processed through medical disability channels or under administrative separation provisions will not be delegated.

(3) Disability processing is inappropriate if the conditions in (2)(a) do not apply, if UCMJ action has been initiated, or if the Soldier has been medically diagnosed as drug dependent. (See paragraph 14–12c.) Accordingly, disability processing is inappropriate in separation actions under chapter 10.

b. 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.

c. 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.

d. 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 post-traumatic stress disorder; traumatic brain injury; sexual assault; or sexual harassment. Standards for review should rightly consider the unique nature of these cases and afford each veteran a reasonable opportunity for relief even if the sexual assault or sexual harassment was unreported, or the mental health condition was not diagnosed until years later. Boards are to give liberal consideration to Veterans petitioning for discharge relief when the application for relief is based in whole or in part on those conditions or experiences. The guidance further describes evidence sources and criteria and requires Boards to consider the conditions or experiences presented in evidence as potential mitigation for misconduct that led to the discharge.

6. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military DRBs and Service 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//