

1. Applicant's Name:

- a. **Application Date:** 26 April 2021
- b. **Date Received:** 26 April 2021
- c. **Counsel:** None

2. REQUEST, ISSUES, BOARD TYPE, AND DECISION:

a. **Applicant's Requests and Issues:** The current characterization of service for period under review is under other than honorable conditions. The applicant requests an upgrade to honorable.

The applicant seeks relief contending, in effect, being diagnosed with chronic post-traumatic stress disorder (PTSD) and other emotional disorders. The applicant was diagnosed after the 2004 deployment to Iraq. After the applicant was involved in firefights and rocket-propelled grenade (RPG) and improvised explosive device (IED) attacks and witnessed friends killed in action, the applicant decided to always take care of their battle buddies. The applicant was about to be deployed for a third time when a person hit the applicant's friend with a car and tried to hit the friend a second time. The person placed the applicant's life and the applicant's battle buddy in danger. The applicant reacted to the situation as the applicant was trained to do. The event led to the applicant being court-martialed and separated from the Army. The applicant had two honorable discharges before the final discharge.

b. **Board Type and Decision:** In a records review conducted on 23 May 2024, and by a 5-0 vote, the Board denied the request upon finding the separation was both proper and equitable.

Please see Section 9 of this document for more detail regarding the Board's decision.

(Board member names available upon request)

3. DISCHARGE DETAILS:

a. **Reason / Authority / Codes / Characterization:** Misconduct (Serious Offense) / AR 635-200, Paragraph 14-12c / JKQ / RE-3 / Under Other Than Honorable Conditions

b. **Date of Discharge:** 3 November 2009

c. **Separation Facts:**

(1) **Date of Notification of Intent to Separate:** 10 July 2009

(2) **Basis for Separation:** The applicant was informed of the following reason: The applicant was in a car accident which resulted in a fatality of one individual and severely injuring two others on 21 March 2009.

(3) **Recommended Characterization:** Under Other Than Honorable Conditions

(4) **Legal Consultation Date:** 14 July 2009

(5) **Administrative Separation Board:** On 1 September 2009, the applicant was notified to appear before an administrative separation board and advised of rights.

The applicant's AMHRR is void of the administrative separation board proceedings, but the record shows on 28 October 2009, the separation authority approved the findings and recommendations of the administrative separation board.

(6) Separation Decision Date / Characterization: 28 October 2009 / Under Other Than Honorable Conditions

4. SERVICE DETAILS:

a. Date / Period of Enlistment: 29 June 2005 / 3 years / The applicant extended the most recent enlistment by a period of 5 months on 12 August 2005, giving the applicant a new ETS of: 28 November 2008. The applicant's AMHRR is void of any enlistment contract or extension retaining the applicant on active duty after the most recent enlistment period.

b. Age at Enlistment / Education / GT Score: 22 / AED / 94

c. Highest Grade Achieved / MOS / Total Service: E-5 / 13B20, Cannon Crewmember / 6 years, 16 days

d. Prior Service / Characterizations: RA, 3 September 2003 – 28 June 2005 / HD

e. Overseas Service / Combat Service: Germany, SWA / Iraq (29 October 2006 – 10 December 2007)

f. Awards and Decorations: ARCOM-2, VUA-2, AGCM, NDSM, GWOTSM, ICM-CS, NCOPDR, ASR OSR-2, CAB

g. Performance Ratings: 1 November 2007 – 31 October 2008 / Fully Capable

h. Disciplinary Action(s) / Evidentiary Record: Four Personnel Action forms, reflect the applicant's duty status changed as follows:

From Present for Duty (PDY) to Confined by Civil Authorities (CCA), effective 21 March 2009;

From CCA to PDY, effective 20 April 2009;

From Present for Duty (PDY) to Absent Without Leave (AWOL), effective 12 September 2009; and

From AWOL to PDY, effective 28 September 2009.

Criminal Investigation Division (CID) Report of Investigation – Final/SSI/Collateral, 5 May 2009, reflects an investigation by the El Paso Sheriff's Office (EPSO), determined on 21 March 2009, the applicant committed the offenses of Murder and Aggravated Assault when while driving the applicant's personal vehicle the applicant swerved and intentionally struck J. D. and two other individuals. The collision resulted in the death of J. D. The applicant was interviewed and admitted to hitting the pedestrians with the vehicle and fleeing the scene.

Military Police Report, 22 September 2009, reflects the applicant was under investigation for: AWOL, departed from place of duty (on post). Investigation revealed the applicant was declared AWOL on 12 September 2009. The applicant surrendered to Trial Defense Services and was declared present for duty, effective 0900, 28 September 2009. The applicant was transported to the Military Police Station, processed, and released to the unit.

Department of Behavioral Health, William Beaumont Army Medical Center document, undated, reflects the applicant was treated for PTSD in 2008. On 14 May 2009, the applicant underwent a mental status evaluation and was cleared for any administrative actions deemed appropriate by the command. The provider found no evidence of any mental disease or defect which warranted disposition through medical/psychiatric channels.

i. Lost Time / Mode of Return: 46 days:

CCA, 21 March 2009 – 19 April 2009 / Released from Confinement

AWOL, 12 September 2009 – 27 September 2009 / Surrendered to Military Authorities

j. Behavioral Health Condition(s):

(1) Applicant provided: Chronological Record of Medical Care, between 2 September 2008 and 18 May 2009, reflects the applicant was diagnosed with chronic PTSD; alcohol abuse; other interpersonal problem; adjustment disorder, with disturbance of emotions; and depression.

Provider Assessment, 5 December 2008, reflects the provided assess the applicant as having PTSD and depression.

(2) AMHRR Listed: Department of Veterans Affairs (VA) letter, 24 December 2015, reflects the VA granted the applicant 100 percent service-connected disability for PTSD, effective 31 July 2014. The period of service from 3 September 2003 through 28 June 2008 was deemed honorable for VA purposes and service from 29 June 2008 through 3 November 2009, was deemed dishonorable. The document indicates the applicant served in Iraq from 17 February 2004 through 28 February 2005 and from 29 October 2006 through 10 December 2007.

5. APPLICANT-PROVIDED EVIDENCE: DD Form 149 (two copies); DD Form 214 (four copies); Chronological Record of Medical Care; Provider Assessment; separation documents; Army Review Boards Agency Case Management Division letter (two copies).

6. POST SERVICE ACCOMPLISHMENTS: None submitted with the application.

7. STATUTORY, REGULATORY AND POLICY REFERENCE(S):

a. Section 1553, Title 10, United States Code (Review of Discharge or Dismissal) provides for the creation, composition, and scope of review conducted by a Discharge Review Board(s) within established governing standards. As amended by Sections 521 and 525 of the National Defense Authorization Act for Fiscal Year 2020, 10 USC 1553 provides specific guidance to the Military Boards for Correction of Military/Naval Records and Discharge Review Boards when considering discharge upgrade requests by Veterans claiming Post Traumatic Stress Disorder (PTSD), Traumatic Brain Injury (TBI), sexual trauma, intimate partner violence (IPV), or spousal abuse, as a basis for discharge review. The amended guidance provides that Boards will include, as a voting board member, a physician trained in mental health disorders, a clinical psychologist, or a psychiatrist when the discharge upgrade claim asserts a mental health condition, including PTSD, TBI, sexual trauma, IPV, or spousal abuse, as a basis for the discharge. Further, the guidance provides that Military Boards for Correction of Military/Naval Records and Discharge Review Boards will develop and provide specialized training specific to sexual trauma, IPV, spousal abuse, as well as the various responses of individuals to trauma.

b. Multiple Department of Defense Policy Guidance Memoranda published between 2014 and 2018. The documents are commonly referred to by the signatory authorities' last names

(2014 Secretary of Defense Guidance [Hagel memo], 2016 Acting Principal Deputy Under Secretary of Defense for Personnel and Readiness [Carson memo], 2017 Official Performing the Duties of the Under Secretary of Defense for Personnel and Readiness [Kurta memo], and 2018 Under Secretary of Defense for Personnel and Readiness [Wilkie memo].

(1) Individually and collectively, these documents provide further clarification to the Military Discharge Review Boards and Boards for Correction of Military/Naval Records when considering requests by Veterans for modification of their discharge due to mental health conditions, including PTSD; TBI; sexual assault; or sexual harassment. Liberal consideration will be given 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; TBI; sexual assault; or sexual harassment. Special consideration will be given to Department of Veterans Affairs (VA) determinations that document a mental health condition, including PTSD; TBI; or sexual assault/harassment potentially contributed to the circumstances resulting in a less than honorable discharge characterization. Special consideration will also be given in cases where a civilian provider confers diagnoses of a mental health condition, including PTSD; TBI; or sexual assault/harassment if the case records contain narratives supporting symptomatology at the time of service or when any other evidence which may reasonably indicate that a mental health condition, including PTSD; TBI; or sexual assault/harassment existed at the time of discharge might have mitigated the misconduct that caused a discharge of lesser characterization.

(2) Conditions documented in the service record that can reasonably be determined to have existed at the time of discharge will be considered to have existed at the time of discharge. In cases in which a mental health condition, including PTSD; TBI; or sexual assault/harassment may be reasonably determined to have existed at the time of discharge, those conditions will be considered potential mitigating factors in the misconduct that caused the characterization of service in question. All Boards will exercise caution in weighing evidence of mitigation in cases in which serious misconduct precipitated a discharge with a less than Honorable characterization of service. Potentially mitigating evidence of the existence of undiagnosed combat related PTSD, PTSD-related conditions due to TBI or sexual assault/harassment as causative factors in the misconduct resulting in discharge will be carefully weighed against the severity of the misconduct. PTSD is not a likely cause of premeditated misconduct. Caution shall be exercised in weighing evidence of mitigation in all cases of misconduct by carefully considering the likely causal relationship of symptoms to the misconduct.

c. Army Regulation 15-180 (Army Discharge Review Board), sets forth the policies and procedures under which the Army Discharge Review Board is authorized to review the character, reason, and authority of any Servicemember discharged from active military service within 15 years of the Servicemember's date of discharge. Additionally, it prescribes actions and composition of the Army Discharge Review Board under Public Law 95-126; Section 1553, Title 10 United States Code; and Department of Defense Directive 1332.41 and Instruction 1332.28.

d. Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), provides the basic authority for the separation of enlisted personnel.

(1) Chapter 3, Section II provides the authorized types of characterization of service or description of separation.

(2) Paragraph 3-7a states an Honorable discharge is a separation with honor and 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.

(3) Paragraph 3-7b states a General discharge is a separation from the Army under honorable conditions and is issued to a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

(4) Paragraph 3-7c states Under Other Than Honorable Conditions discharge is an administrative separation from the Service under conditions other than honorable and it may be issued for misconduct, fraudulent entry, security reasons, or in lieu of trial by court martial based on certain circumstances or patterns of behavior or acts or omissions that constitute a significant departure from the conduct expected of Soldiers in the Army.

(5) Chapter 14 establishes policy and prescribes procedures for separating members for misconduct. Specific categories include minor disciplinary infractions, a pattern of misconduct, and commission of a serious offense, to include abuse of illegal drugs, convictions by civil authorities and desertion or being absent without leave. Action will be taken to separate a member for misconduct when it is clearly established that rehabilitation is impractical or unlikely to succeed.

(6) Paragraph 14-3 prescribes 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 such is merited by the Soldier's overall record.

(7) Paragraph 14-12c prescribes a Soldier is subject to action per this section for commission of a serious military or civilian offense, if the specific circumstances of the offense warrant separation and a punitive discharge is, or would be, authorized for the same or a closely related offense under the Manual for Courts-Martial.

e. Army Regulation 635-5-1 (Separation Program Designator (SPD) Codes), provides the specific authorities (regulatory or directive), reasons for separating Soldiers from active duty, and the SPD codes to be entered on the DD Form 214. It identifies the SPD code of "JKQ" as the appropriate code to assign enlisted Soldiers who are discharged under the provisions of Army Regulation 635-200, Chapter 14, paragraph 12c, misconduct (serious offense).

f. Army Regulation 601-210, (Regular Army and Reserve Components Enlistment Program), governs eligibility criteria, policies, and procedures for enlistment and processing of persons into the Regular Army, the U.S. Army Reserve, and Army National Guard for enlistment per DODI 1304.26. It also prescribes the appointment, reassignment, management, and mobilization of Reserve Officers' Training Corps cadets under the Simultaneous Membership Program. Chapter 4 provides the criteria and procedures for waiverable and nonwaiverable separations. Table 3-1, defines reentry eligibility (RE) codes. RE-3 Applies to: Person who is not considered fully qualified for reentry or continuous service at time of separation, but disqualification is waiverable. Eligibility: Ineligible unless a waiver is granted.

8. SUMMARY OF FACT(S): The Army Discharge Review Board considers applications for upgrade as instructed by Department of Defense Instruction 1332.28.

The applicant requests an upgrade to honorable.

The applicant contends being diagnosed with various mental health conditions and the conditions affected behavior which led to the discharge. The applicant submitted medical records reflecting the applicant was diagnosed with in-service mental health conditions. The ARBA records show in 2008, the applicant was treated for a mental health condition. On 14 May 2009, the applicant underwent a mental status evaluation and was cleared for any administrative actions deemed appropriate by the command. The provider found no evidence of

any mental disease or defect which warranted disposition through medical/psychiatric channels. The applicant's AMHRR is void of the mental status evaluation. The applicant's AMHRR reflects the VA granted the applicant 100 percent service-connected disability for a mental health condition.

The applicant contends the applicant's actions, which led to the discharge, were a result of protecting a battle buddy from injury or death. The applicant did not submit any evidence, other than the applicant's statement, to support the contention. The evidence of record reflects an investigation by the El Paso Sheriff's Office (EPSO), determined the applicant committed the offenses of murder and aggravated assault. The record is void of a judgment by the civilian court.

The applicant contends good service, including a combat tour and two honorable discharges.

9. BOARD DISCUSSION AND DETERMINATION:

a. As directed by the 2017 memo signed by A.M. Kurta, the board considered the following factors:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? **Yes.** The Board's Medical Advisor, a voting member, reviewed the applicant's DOD and VA health records, applicant's statement, and/or civilian provider documentation and found that the applicant has the following potentially-mitigating diagnoses/experiences: Adjustment Disorder, Depression, PTSD.

(2) Did the condition exist or experience occur during military service? **Yes.** The Board's Medical Advisor found that the applicant was diagnosed in service with an Adjustment Disorder, Depression, and PTSD. The VA has also service connected the applicant's PTSD.

(3) Does the condition or experience actually excuse or mitigate the discharge? **No.** The Board's Medical Advisor applied liberal consideration and opined that the applicant's behavioral health conditions do not mitigate or excuse the discharge. There is no natural sequela between an Adjustment Disorder, Depression, or PTSD and recklessly driving a vehicle intentionally hitting pedestrians resulting in a fatality and severe injury of two others. On the contrary, the applicant admitted in his application that his actions were conscious and intentional with motivation since he was retaliating for actions taken against a friend. As such, the applicant's BH conditions do not provide any mitigation for the basis of separation.

(4) Does the condition or experience outweigh the discharge? **No.** After applying liberal consideration to the evidence, including the Board Medical Advisor opine, the Board determined that the available evidence did not support a conclusion that the applicant's Adjustment Disorder, Depression, and Post Traumatic Stress Disorder outweighed the applicant's medically unmitigated offense of recklessly driving a vehicle and intentionally hitting pedestrians, resulting in a fatality and severe injury of two others.

b. Response to Contention(s):

(1) The applicant contends being diagnosed with various mental health conditions and the conditions affected behavior which led to the discharge. The Board liberally considered this contention but determined that the available evidence did not support a conclusion that the applicant's Adjustment Disorder, Depression, and Post Traumatic Stress Disorder outweighed the applicant's medically unmitigated offense of recklessly driving a vehicle and intentionally hitting pedestrians, resulting in a fatality and severe injury of two others.

(2) The applicant contends the applicant's actions, which led to the discharge, were a result of protecting a battle buddy from injury or death. The Board considered this contention but found that the justification for the applicant's actions does not outweigh the applicant's medically unmitigated offense of recklessly driving a vehicle intentionally and hitting pedestrians, resulting in a fatality and severe injury of two others.

(3) The applicant contends good service, including a combat tour and two honorable discharges. The Board considered the applicant's six years of service and combat service in Iraq, but determined that the applicant's record does not outweigh the applicant's medically unmitigated offense of recklessly driving a vehicle intentionally and hitting pedestrians, resulting in a fatality and severe injury of two others.

c. The Board determined that the discharge is, at this time, proper and equitable, in light of the current evidence of record. The applicant has exhausted all available appeal options available with ADRB. However, the applicant may still apply to the Army Board for Correction of Military Records. The applicant is responsible for satisfying the burden of proof and providing documents or other evidence sufficient to support the applicant's contention(s) that the discharge was improper or inequitable.

d. Rationale for Decision:

(1) The Board voted not to change the applicant's characterization of service because, despite applying liberal consideration to all the evidence before the Board, the applicant's Adjustment Disorder, Depression, and Post Traumatic Stress Disorder did not outweigh the applicant's medically unmitigated offense of recklessly driving a vehicle intentionally and hitting pedestrians, resulting in a fatality and severe injury of two others. The Board also considered the applicant's contention regarding good service and found that the totality of the applicant's record does not warrant a discharge upgrade. The applicant did not present any issues of impropriety for the Board's consideration. The discharge was consistent with the procedural and substantive requirements of the regulation, was within the discretion of the separation authority, and the applicant was provided full administrative due process. Therefore, the applicant's Under Other Than Honorable Conditions discharge was proper and equitable as the applicant's conduct fell below that level of satisfactory service warranting a General discharge or meritorious service warranted for an upgrade to Honorable discharge.

(2) The Board voted not to change the applicant's reason for discharge or accompanying SPD code under the same pretenses, as the reason the applicant was discharged was both proper and equitable.

(3) The RE code will not change, as the current code is consistent with the procedural and substantive requirements of the regulation.

10. BOARD ACTION DIRECTED:

- a. Issue a New DD-214 / Separation Order: No
- b. Change Characterization to: No Change
- c. Change Reason / SPD Code to: No Change
- d. Change RE Code to: No Change
- e. Change Authority to: No Change

Authenticating Official:

6/27/2024

X

Presiding Officer, COL, U.S. ARMY
Army Discharge Review Board

Legend:

AWOL – Absent Without Leave
AMHRR – Army Military Human
Resource Record
BCD – Bad Conduct Discharge
BH – Behavioral Health
CG – Company Grade Article 15
CID – Criminal Investigation
Division
ELS – Entry Level Status
FG – Field Grade Article 15

GD – General Discharge
HS – High School
HD – Honorable Discharge
IADT – Initial Active Duty Training
MP – Military Police
MST – Military Sexual Trauma
N/A – Not applicable
NCO – Noncommissioned Officer
NIF – Not in File
NOS – Not Otherwise Specified

OAD – Ordered to Active Duty
OBH (I) – Other Behavioral
Health (Issues)
OMPF – Official Military
Personnel File
PTSD – Post-Traumatic Stress
Disorder
RE – Re-entry
SCM – Summary Court Martial
SPCM – Special Court Martial

SPD – Separation Program
Designator
TBI – Traumatic Brain Injury
UNC – Uncharacterized
Discharge
UOTHC – Under Other Than
Honorable Conditions
VA – Department of Veterans
Affairs