

**DEPARTMENT OF VETERAN AFFAIRS  
Decision Review Operations Center (DROC)  
RO 317, St. Petersburg, FL**

**File Number:** [REDACTED]

**ADMINISTRATIVE DECISION**

**ISSUE:** Statutory Bar Determination

**EVIDENCE:**

- VA Form 20-0996, *Decision Review Request: Higher-Level Review*, received November 11, 2021.
- Decision notification letter dated October 5, 2021, character of discharge.
- Administrative decision dated October 4, 2021.
- VA Form 21-4138, *Statement in Support of Claim*, dated February 4, 2021.
- Character of discharge due process letter dated December 14, 2020.
- Complete active-duty personnel records received from Defense Personnel Records Information Retrieval System (DPRIS), received September 30, 2020.
- Facts and circumstances from military records including the General Court Martial leading to the serviceman's discharge from the United States Army and resulting in a Bad Conduct discharge and the review of service medical records.
- Character of discharge due process letter dated September 29, 2020.
- DD-214, Certificate of Separation and/or Discharge from Active Duty, United States Army service from March 24, 2000, to July 29, 2020, received September 23, 2020.
- VA form 21-526EZ, *Application for Disability Compensation and Related Compensation Benefits*, received September 23, 2020.
- General Court-Martial Order No 3, dated March 20, 2019, received from US Army post-trial processing April 15, 2019.

**DECISION:**

Your United States Army service for the period of March 24, 2000, through August 23, 2010, is Honorable for VA purposes. You and your dependents are eligible for VA benefits for this period of military service.

Your United States Army service for the period of August 24, 2010, through July 29, 2020, is dishonorable for VA purposes under the provisions of 38 CFR 3.12(c)(2). You and your dependents are not eligible for any VA benefits for this period of military service.

You are not entitled to health care benefits under Chapter 17, Title 38 U.S.C. and 38 CFR 3.360(b) for any disability determined to be service connected for active service from August 24, 2016, through July 29, 2020.

- This discharge was the result of a bad conduct discharge issued by sentence of a general court-martial.

## **REASON AND BASES:**

According to 38 CFR 3.12(a), if the former service member did not die in service, then pension, compensation, or Dependency and Indemnity Compensation (DIC) is not payable unless the period of service on which the claim is based was terminated by discharge or release under conditions other than dishonorable (§38 U.S.C. 101(2)).

As stated in 38 CFR 3.360(a) and (b), the health care and related benefits authorized by Chapter 17 of Title 38 U.S.C. shall be provided to certain former service members with administrative discharges under other than honorable conditions for any disability incurred or aggravated during active military, naval, or air service in line of duty. With certain exceptions such benefits shall be furnished for any disability incurred or aggravated during period of service terminated by a discharge under other than honorable conditions. Specifically, they may not be furnished for any disability incurred or aggravated during a period of service terminated by a bad conduct discharge or when one of the bars listed in 38 CFR 3.12(c) applies.

38 CFR 3.12(c) Benefits are not payable where the former service member was discharged or released under one of the following conditions:

(1) As a conscientious objector who refused to perform military duty, wear the uniform, or comply with lawful order of competent military authorities.

**(2) By reason of the sentence of a general court-martial.**

(3) Resignation by an officer for the good of the service.

(4) As a deserter.

(5) As an alien during a period of hostilities, where it is affirmatively shown that the former service member requested his or her release. See § 3.7(b).

(6) By reason of a discharge under other than honorable conditions issued as a result of an absence without official leave (AWOL) for a continuous period of at least 180 days. This bar to benefit entitlement does not apply if there are compelling circumstances to warrant the prolonged unauthorized absence. This bar applies to any person awarded an honorable or general discharge prior to October 8, 1977, under one of the programs listed in paragraph (h) of this section, and to any person who prior to October 8, 1977, had not otherwise established basic eligibility to receive Department of Veterans Affairs benefits. The term established basic eligibility to receive Department of Veterans Affairs benefits means either a Department of Veterans Affairs determination that an other than honorable discharge was issued under conditions other than dishonorable, or an upgraded honorable or general discharge issued prior to October 8, 1977, under criteria other than those prescribed by one of the programs listed in paragraph (h) of this section. However, if a person was discharged or released by reason of the sentence of a general court-martial, only a finding of insanity (paragraph (b) of this section) or a decision of a board of correction of records established under 10 U.S.C. 1552 can establish basic eligibility to receive Department of Veterans

Affairs benefits. The following factors will be considered in determining whether there are compelling circumstances to warrant the prolonged unauthorized absence.

(i) Length and character of service exclusive of the period of prolonged AWOL. Service exclusive of the period of prolonged AWOL should generally be of such quality and length that it can be characterized as honest, faithful, and meritorious and of benefit to the Nation.

(ii) Reasons for going AWOL. Reasons which are entitled to be given consideration when offered by the claimant include family emergencies or obligations, or similar types of obligations or duties owed to third parties. The reasons for going AWOL should be evaluated in terms of the person's age, cultural background, educational level and judgmental maturity. Consideration should be given to how the situation appeared to the person himself or herself, and not how the adjudicator might have reacted. Hardship or suffering incurred during overseas service, or as a result of combat wounds or other service-incurred or aggravated disability, is to be carefully and sympathetically considered in evaluating the person's state of mind at the time the prolonged AWOL period began.

(iii) A valid legal defense exists for the absence which would have precluded a conviction for AWOL. Compelling circumstances could occur as a matter of law if the absence could not validly be charged as, or lead to a conviction of, an offense under the Uniform Code of Military Justice. For purposes of this paragraph the defense must go directly to the substantive issue of absence rather than to procedures, technicalities or formalities.

Review of your Official Military Personnel Folder identifies on October 17, 2018 a General Court Martial was convened, and you were found guilty of the following charges:

**Charge I: Violation of Article 80, Uniform Code of Military Justice**

- Specification: On or about March 6, 2017, attempt to cause Ms. A.M.A to touch, through the clothing, the penis of Sergeant First Class [REDACTED] by causing bodily harm to her, to Wit: an offensive touching, with an intent to arouse or gratify the sexual desire of himself and without the consent of Ms. AM.A Plea: Not Guilty. Finding: Guilty by Exceptions and Substitutions. Plea: Not Guilty. Finding: Guilty.

**Charge II: Violation of Article 92, Uniform Code of Military Justice**

- Specification: On or about March 6, 2017, fail to obey a lawful general regulation, by wrongfully making sexual advances toward Ms. A.M.A, a subject of recruiting efforts. Plea: Not Guilty. Finding: Guilty.

**Charge III: Violation of Article 120c, Uniform Code of Military Justice**

- Specification: On or about March 6, 2017, intentionally expose in an indecent manner his penis. Plea: Not Guilty. Finding: Conditionally Dismissed (contingent upon surviving appellate review).

**Charge II: Violation of Article 128, Uniform Code of Military Justice**

- Specification: On or about March 6, 2017, unlawfully grab Ms. A.M.A, on the thigh with his hand. Plea: Not Guilty. Finding: Guilty.

Sentence adjudged by military judge on October 17, 2018, reviewed March 20, 2019: reduction to the grade of E-1, confinement for 90-days, and a bad conduct discharge.

According to 38 CFR 3.13(c), despite the fact no unconditional discharge may have been issued, a person shall be considered to have been unconditionally discharged or released from active military, naval or air service when the following conditions are met:

- (1) The person served in the active military, naval or air service for the period of time the person was obligated to serve at the time of entry into service;
- (2) The person was not discharged or released from such service at the time of completing that period of obligation due to an intervening enlistment or reenlistment; and
- (3) The person would have been eligible for a discharge or release under conditions other than dishonorable at that time except for the intervening enlistment or reenlistment.

A comprehensive review of the evidence of record shows [REDACTED] service includes multiple periods of conditional discharge under honorable conditions for VA purposes based on the following service information: from March 24, 2000, through August 23, 2016.

- March 24, 2000 to March 23, 2003 (Enlisted for 3 years on March 24, 2000)
- March 24, 2003 to March 23, 2006 (signed re-enlistment for 3 years on November 22, 2002)
- March 24, 2006 to August 23, 2010 (signed re-enlistment for 3 years on January 7, 2005 and signed an 18- month extension of service on January 5, 2006)
- August 24, 2010 to August 23, 2016 (signed re-enlistment for 6 years on May 28, 2008)
- August 24, 2016 to July 29, 2020 (signed an indefinite re-enlistment on October 1, 2012)

[REDACTED] committed the offenses charged on March 6, 2017 during a conditional period of service identified as August 24, 2010 through August 23, 2016. The subsequent commission of the offenses charged, and the resulting General Court Martial render the period(s) of service identified from August 24, 2010 through July 29, 2020 dishonorable for VA purposes and is a statutory bar to VA benefits under the provisions of 38 CFR 3.12 (c)(2).

Sanity is not an issue.

An original character of discharge determination was conducted October 4, 2021. The administrative decision found the claimant was discharged under dishonorable conditions, and not eligible for benefits under CFR 3.12 (c) (2). A subsequent Higher Level Review completed

on March 31, 2022, determined the previous administrative decision was not proper based on a conditional discharge.

A comprehensive review of your conditional periods of service determined a readjudication of your character of discharge determination dated October 4, 2021, was warranted.

You provided a statement in support of your character of discharge determination received on February 4, 2021. Your statement did not provide additional relevant facts or circumstances or show sufficient reason why the bar to benefits imposed under 38 CFR 3.12 should be set aside in your favor.

In the absence of any additional evidence, it is therefore determined that your discharge from US Army for the period of service August 24, 2010, through July 29, 2020, is dishonorable for VA purposes under the provisions of 38 CFR 3.12(c)(2). You and your dependents are not eligible for any VA benefits for this period of military service.

VA has the authority to determine the COD for any type of discharge that is not binding on it; therefore, VA has the authority to determine the COD for all periods of service identified in a conditional discharge.

You are not entitled to health care benefits under Chapter 17, Title 38 U.S.C. and 38 CFR 3.360(a) for the period of service August 24, 2010, through July 29, 2020.

You were provided information and documentation concerning the proper procedures for correction of military records and petitioning a review of discharge from military service.