

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 12 July 2022

DOCKET NUMBER: AR20220000438

APPLICANT REQUESTS: a physical disability discharge.

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- Department of Veterans Affairs (VA) letter, 15 February 2018
- VA letter, 26 July 2019
- VA Form 21-4138 (Statement in Support of Claim), 15 September 2021
- excerpt from unknown source regarding VA Home Loan eligibility

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, United States 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. He would like his DD Form 214 to show his type of discharge as disability. In order for him to receive a Certificate of Eligibility (COE) for a VA home loan, his DD Form 214 needs to show he was discharged due to a service-connected disability because he does not have the required length of service to otherwise qualify. An exception for eligibility without proper length of service is allowed for discharge for a service-connected disability.

b. He is now rated at 100 percent disabled for his service-connected disability of post-traumatic stress disorder (PTSD), due to sexual assault in the military, which caused the behavioral changes that resulted in his discharge.

c. He is a 63-year-old disabled African American veteran who was honorably discharged from the U.S. Army. He has experienced challenges for the last 2 years trying to receive a COE from the VA for a home loan. The COE serves as proof to a

lender that an applicant has officially met the minimum service required so receive a VA home loan. The primary reason he is having these challenges is because of his length of time in the military, which was less than 6 months.

d. While serving in the Army, he was bound and sexually assaulted by two other members. Shortly after this incident, he was asked if he would like to leave the military with an honorable discharge and free medical care for the rest of his life. He did agree to leave the military due to the shame and embarrassment it caused him. He had been made the laughingstock of the base. But now, in hindsight, he wishes he would have stayed in the military as planned and had a full military career.

e. He currently has a 100 percent service-connected disability rating from the VA and receives all the other benefits associated with an honorable discharge, except a COE for a VA home loan due to the requirement of at least 181 days of continuous active service. The exception for the required length of service is if discharged for a service-connected disability.

f. He has been treated at the VA Medical Center (VAMC) in Fresno, CA, for the last 20 years for this assault where he was diagnosed with PTSD. He has been taking Fluoxetine and Amitriptyline for many years for this disorder. At the time he left the military, his disability was not service-connected nor his discharge due to disability.

g. Thank God, years later, he did win a sexual assault case against the VA and at that time his narrative reason for discharge should have read "due to service-connected disability," which would have made him eligible for a COE. As you can see, it is just a matter of correcting his discharge on his DD Form 214. This is why he has come to the Board. He has labored all his life and would like to grow old gracefully in his own home. He will forever be grateful to the Board if they could help him to obtain this COE.

3. The applicant enlisted in the Regular Army on 18 January 1977.
4. A DD Form 3349 (Medical Condition – Physical Profile Record), shows the applicant was given a temporary physical profile rating of "2" in the category P (Physical capacity or stamina) on 8 April 1977, for pseudofolliculitis (ingrown facial and neck hairs) of the face. He was to shave all areas of his face once a week and did not have to shave on Mondays. He was found medically qualified for duty and was to be reevaluated on 10 June 1977.
5. A DA Form 2627 (Record of Proceedings under Article 15 of the Uniform Code of Military Justice (UCMJ)) shows the applicant accepted nonjudicial punishment (NJP) under Article 15 of the UCMJ on 31 May 1977 for failing to go to his appointed place of duty on 6 May 1977 and for breaking restriction on the same date.

6. Multiple memoranda, with the subject: "Statements of Formal Counseling in Support of Administrative Action" reflect the applicant received formal counseling on 14 occasions between 20 April 1977 and 1 June 1977, for various reasons, including multiple counts of test failure, recycle at various stages of the Finance Course of Instruction, wearing the improper uniform, not following directions, missing formation, breaking restriction, failure to repair, lack of motivation, and poor attitude.

7. A second DD Form 3349 shows on 2 June 1977, he was given a temporary physical profile rating of "3" in the category P for muscle spasms of the lower back. He was found medically qualified for limited duty, was to limit his physical training to his upper extremities, and his limitations were to be lifted after 7 days, on 9 June 1977.

8. The applicant was notified by his immediate commander on 7 June 1977 of his initiation of action to discharge him from the Army under the provisions of Army Regulation (AR) 635-200 (Personnel Separations Enlisted Personnel) paragraph 5-39, under the Trainee Discharge Program (TDP).

a. The reasons for the proposed action were the applicant demonstrated a complete lack of motivation toward becoming a productive Soldier through his inability to successfully complete the Finance Course of Instruction. He also demonstrated his inability to conform to acceptable military standards through his incidents of failure to repair and violation of restriction.

b. The applicant was advised if the discharge were approved, he would be furnished an honorable discharge certificate; however, if he did not have sufficient prior military service, VA and other benefits normally associated with completion of active duty service would be affected. He was advised of his right to present any rebuttal statement in his behalf and request a separation physical if he felt his physical status had changed since his last examination.

9. On 7 June 1977, the applicant acknowledged notification of his proposed honorable discharge from the Army under the provisions of the TDP and that he understood non-completion of requisite active duty time would affect VA and other benefits normally associated with completion of honorable active duty service. He did not make statements in his behalf, did not desire to have a separation medical examination, and did not desire to have counsel.

10. On 10 June 1977, after personally interviewing the applicant, the applicant's battalion commander recommended approval of the applicant's honorable discharge under the provisions of the TDP.

11. On 20 June 1977, the approval authority directed the applicant's honorable TDP discharge under the provisions of AR 635-200, paragraph 5-39.

12. The applicant's DD Form 214 shows he was honorably discharged under the provisions of AR 635-200, paragraph 5-39, on 28 June 1977, after 5 months and 1 days of net active service as a trainee.

13. The applicant provided a letter from the VA, dated 15 February 2018, which shows they made the following benefits determinations:

- his basic eligibility to Dependents' Educational Assistance was established from 30 December 2016
- his entitlement to individual unemployability was granted effective 30 December 2016
- his evaluation of PTSD with alcohol use disorder, which was rated at 70 percent disabling effective 30 December 2016, was increased to 100 percent effective 20 January 2018

14. The applicant provided a second letter from the VA, dated 26 July 2019, wherein the applicant was informed his application for a COE to utilize the VA home loan benefit was carefully considered and it was determined he was not eligible for the VA home loan benefit based on his length of service for time served on active duty. To meet the requirements for length of service for time served on active duty during peace time, the veteran must have served at least 181 days. The only length of service exception is a discharge for a service-connected disability.

15. In the adjudication of this application, the U.S. Army Criminal Investigation Division (CIDC) was asked to provide a sanitized Report of Investigation (ROI) and/or Military Police Report pertaining to the applicant's military sexual assault and trauma. On 19 April 2022, CIDC advised that search of the Army criminal file indexes revealed no records pertaining to the applicant.

16. 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.

17. 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.

18. 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.

19. MEDICAL REVIEW:

The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's military service records. The Armed Forces Health Longitudinal Technology Application (AHLTA) & Health Artifacts Image Solutions (HAIMS) were not in use at the time of his service. His hardcopy medical records were not available for review. A review of his service record indicates he was placed on a temporary profile for ingrown facial and neck hair. The profile dated 8 Apr 1977 indicates his PULHES were all 1's except for the no shave profile except for Mondays. 1's and 2's met retention standards. On 2 May 1977, his PULHES were all 1's except for a T3 for low back muscle spasms. S is for psychiatric conditions and was again a 1 (meeting retention standards). His separation packet indicates he completed a separation physical. A review of JLV indicates the applicant has received medical treatment in the VA system since December 1994. His first behavioral health diagnosis was on 13 Dec 2005 during an ER visit. He reported anxiety over various psychosocial issues including being homeless, needing surgery and needing various documentation completed to get social services. His first behavioral health appointment was on 15 May 2006. He reported that he was haunted by an episode that occurred when he was 8 years old. He was forced to perform fellatio on a neighbor that was 10 years older than him. About 6 months ago he saw that the person was now a minister. He stated he was consumed by this incident with images always in his mind, interfering with his sleep and fearful of what he might do if he encounters this man again. He stated he wants to heal from the incident but insists the man must pay. He wants an apology and maybe some money. He denied any MST. He reported injuring his back during AIT while dumping a trash can and was offered early out and he took it. He reported past incarcerations for harassment and petty theft. He stated he had never been treated for mental health issues other than substance abuse treatment 2 years prior. He reported working as a painter until an injury on the job 2 years ago. He became disabled due to feet and back problems. His diagnosis was listed as ineffective personal coping relate to intrusive memories and possible substance abuse. On 17 May 2006, he attended his first Mood Disorder group session with a diagnosis of Depressive Disorder, not otherwise specified (NOS). He attended a second group session and discontinued treatment. On 19 Feb 2007, he was seen in the ER asking for help with anger issues. He stated problems started approximately 6 months before when his best friend was mugged and shot to death. He wasn't able to travel to Ohio to attend the funeral. He was diagnosed with unresolved bereavement. On 27 Feb 2007, he attended a PTSD psychoeducation group. On 1 Apr 2007, he was diagnosed with Depression. Treatment note from 7 Mar

2008 indicates diagnoses of Adjustment Disorder with anxiety, Depressive Disorder, NOS, and PTSD (childhood trauma). On 19 Jul 2008, he was seen in the ER due to depression over childhood trauma issues. He also reported auditory hallucinations. He reported continued depression for 10 years and hears voices. He reported getting flashbacks about childhood abuse. He was psychiatrically admitted for 2 days with a diagnosis of Depression exacerbation. He did not return to behavioral health until 9 Jun 2011. His diagnosis were Depression and Alcohol Abuse in early remission and prior diagnosis of PTSD (childhood trauma). On 21 Jun 2011, he was evaluated for medication management. He reported positive response to Prozac. His treatment diagnoses were Alcohol Dependence in partial remission, PTSD, and Depression, NOS. His next behavioral health appointment was 3 Dec 2012. He reported a positive response to medication. In March 2013, he completed the Compensation and Pension examination process. He was evaluated for back pain and flatfoot. He returned to behavioral health on 9 Apr 2013. He stated he had returned to his childhood neighborhood and met a lady that had been molested by the same man. He reported an increase in his depression and anxiety symptoms. On 17 Oct 2013, he reported taking classes at Fresno city college. He reported there was a meeting on campus about recent campus shooting. He stopped taking his medication after a friend was also on SSRI killed himself. He agreed to restart his medication. On 31 Dec 2013, he reported increased anxiety after receiving a DUI the month before. His provider increased his Prozac dosage with a treatment diagnosis of Unspecified Anxiety Disorder and Unspecified Depressive Disorder. His next behavioral health appointment on 4 May 2015 when he was admitted to the substance abuse treatment program. He had 4 DUIs in the previous 12 months. Treating diagnosis was Alcohol Dependence. He completed the 30-day program. On 6 Jan 2017, he returned to behavioral health. He reported he has to report to jail today to serve the remainder of his jail time. If he completes a residential treatment program, he could get time served. He asked if his previous substance abuse outpatient treatment could be considered residential since he was staying at the homeless emergency housing. On 12 Jan 2017, he was admitted to the substance abuse treatment program. He reported that he had served as an Army Ranger and had received an Article 15 for assault. He completed the substance use IOP on 15 Mar 2017. On 25 May 2017, the applicant contacted the MST coordinator. He reported that he was pursuing a disability claim for MST. He stated that he had never reported MST to anyone at the VA and had always talked about his childhood sexual abuse. He asked for a new psychiatrist to evaluate and treat him. On 15 Oct 2017, he completed a PTSD C&P. He received a service connected disability rating of 70% effective 30 Dec 2016. After a second C&P, his PTSD rating was increased to 100% effective 20 Jan 2018. In accordance with the 3 Sep 2014 Secretary of Defense Liberal Guidance Memorandum and the 25 Aug 2017, Clarifying Guidance there is documentation to support behavioral health diagnosis at the time of his discharge. The

applicant met retention standards at the time of his discharge. In addition, post discharge the applicant received behavioral health care in May 2006 and did not meet diagnostic criteria for PTSD until April 2007. The applicant met retention standards at the time of his discharge. It is acknowledged that the applicant has a service-connected disability PTSD. This determination alone, however, does not automatically mean that military medical disability/retirement is warranted. It is important to understand that the VA operates under different rules, laws, and regulations when assigning disability percentages than the Department of Defense (DoD). In essence, the VA will compensate for all disabilities felt to be unsuiting. The DoD does not compensate for unsuiting conditions but rather for conditions that are determined to be unfitting. In addition, the role of compensating for post-separation progression or complications of service-connected conditions was granted by Congress to the Department of Veterans Affairs and not a function or role of the DoD. Military medical disability/retirement is not warranted.

BOARD DISCUSSION:

The Board carefully considered the applicants request, supporting documents, evidence in the records, and regulatory guidance. The Board considered the applicant's statement, the medical records, and the review and conclusions of the medical reviewing official. Based upon a preponderance of the evidence, the Board concurred with the medical reviewer's finding of insufficient evidence the contested medical conditions failed to meet retention standards during his period of service. Therefore, the Board determined referral to DES for consideration of a medical separation is not warranted.

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.

[REDACTED]

[REDACTED]

[REDACTED]

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, United States 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 Army Board for Correction of Military Records (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. 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 DRBs and BCM/NRs when considering requests by veterans for modification of their discharges due in whole or in part to: mental health conditions, including PTSD, traumatic brain injury, sexual assault, or sexual harassment. 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.
3. 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 court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds. This guidance does not mandate relief, but rather provides standards and principles to guide BCM/NRs 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.

4. 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.

5. Army Regulation 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. 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. 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.

6. Title 10, U.S. Code, section 1201, provides for the physical disability retirement of a member who has at least 20 years of service or a disability rating of at least 30 percent. Title 10, U.S. Code, section 1203, provides for the physical disability separation of a member who has less than 20 years of service and a disability rating of less than 30 percent.

7. Army Regulation 635-200 (Personnel Separations Enlisted Personnel), in effect at the time, sets forth the basic authority for the separation of enlisted personnel from the Army. Paragraph 5-39 (Trainee Discharge Program (TDP)) incorporates the policy promulgated in Department of the Army Message DAPE MPE 011510Z (Evaluation and Discharge of Enlistees before 180 Active Duty Days), dated August 1973, pertaining to the Army TDP. The TDP provided for the expeditious separation of service members who lacked the necessary motivation, discipline, ability, or aptitude to become productive Soldiers or who failed to respond to formal counseling.

a. For discharge under the TDP, the service member must meet the following criteria:

- voluntarily enlisted

- were in basic, advanced individual, on-the-job, or service school training prior to award of a military occupational specialty
- had not completed more than 179 days of active duty on their current enlistment by the date of separation

b. Soldiers could be separated under this provision when they demonstrated that they were not qualified for retention for one or more of the following reasons:

- cannot or will not adapt socially or emotionally to military life
- cannot not meet minimum standards prescribed for successful completion of training because of lack of aptitude, ability, motivation, or self-discipline,
- demonstrated character and behavior characteristics not compatible with satisfactory continued service
- do not meet the moral, mental, or physical standards for enlistment

8. Title 38, U.S. Code, section 1110 (General – Basic Entitlement) states for disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

9. Title 38, U.S. Code, section 1131 (Peacetime Disability Compensation – Basic Entitlement) states for disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during other than a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

10. Title 10, U.S. Code, section 1556 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//