

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 31 August 2023

DOCKET NUMBER: AR20230000585

APPLICANT REQUESTS: in effect, an upgrade of his general discharge under honorable conditions to a fully honorable discharge or a medical discharge.

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Report of Separation from Active Duty)

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 he was crushed in a jeep accident while guarding the new Bradley tank that was to be issued at McGregor Range in March 1977. The incident left him with head and back injuries. He has had migraine headaches since that time. His head injury was discovered in November 2019. The bone chips in his sinus were discovered in 2021. The Department of Veterans Affairs (VA) will only give him pain medication for his sinus problem. His head injury was not treated.
3. On 6 May 1976, the applicant enlisted in the Regular Army for 3 years. He held military occupational specialty (MOS) 76D (Materiel Supply). Following completion of training at Fort Lee, VA, he was reassigned to Fort Bliss, TX.
4. On 21 October 1977, he accepted nonjudicial punishment (NJP) under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ), for failing to go to his appointed place of duty at the time prescribed on 13, 18, and 20 October 1977. His punishment consisted of a forfeiture of \$90 pay (suspended for 30 days) and 14 days of extra duty.

- a. A DA Form 4187 (Personnel Action), dated 16 November 1977, shows he left his unit in an absent without leave (AWOL) status from 14 to 16 November 1977.
 - b. On 16 November 1977, the suspension of a portion of the above NJP that consisted of a forfeiture of \$90 pay was vacated and ordered executed.
5. A DA Form 4187, dated 5 December 1977, shows he was AWOL from 2 to 5 December 1977.
 6. On 13 December 1977, he accepted NJP for being AWOL from 2 to 5 December 1977 and for failure to repair. His punishment consisted of reduction from pay grade E-4 to E-3 (suspended for 90 days), and a forfeiture of \$200 pay.
 7. On approximately 6 February 1978, he accepted NJP for being AWOL from 18 January to 6 February 1978. His punishment consisted of reduction from pay grade E-3 to E-2, a forfeiture of \$221 pay, and 45 days of restriction and extra duty.
 8. On 9 February 1978, the applicant was barred from reenlistment. His commander cited the bases for the bar were the above NJP's, that he had been counseled by his chain of command on various occasions in two units and that he was returned to Headquarters and Headquarters Battery, 2d Battalion, 55th ADA from Battery A, 2d Battalion, 55th ADA for tardiness, failure to report to work, and poor duty performance. The applicant chose to place private and personal affairs ahead of his military responsibilities and obligations even after repeated counseling. His military appearance, attitude, and duty performance had fallen to a level lower than substandard. His commander believed if allowed to reenlist, he could not be depended upon to perform adequately in either a peacetime or combat environment, he could not be counted on to be present for duty on a consistent basis.
 9. On 15 March 1978, the applicant's immediate commander notified the applicant of his intent to initiate separation action against him in accordance with Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), paragraph 14-33b(1), for misconduct – pattern of misconduct. He was advised of his rights.
 10. On 17 March 1978, the applicant acknowledged receipt of the commander's notification of intent to separate him. He consulted with legal counsel and was advised of the basis for the contemplated separation action for misconduct, the type of discharge he could receive and its effect on further enlistment or reenlistment, the possible effects of this discharge, and of the procedures/rights that were available to him. The applicant further acknowledged:

- he understood that he could expect to encounter substantial prejudice in civilian life if a general discharge was issued to him
- he understood that as a result of the issuance of a discharge under other than honorable conditions, he could be ineligible for many or all benefits as a veteran under both Federal and State laws

11. He also elected to submit a statement in his own behalf in which he indicated he was accepting this discharge from the Army because he believed it was the best thing to do. However, he believed that based on his entire record, he should be issued a good discharge. He had been in the Army approximately 22 months. He believed he had performed his duties to the best of his ability. He had experienced problems like everyone else, but he had controlled them. He had received three NJP's and he apologized for causing problems.

12. Subsequent to this acknowledgement, the applicant's immediate commander initiated separation action against him in accordance with chapter 14 of AR 635-200 for misconduct. The intermediate and senior commander recommended approval.

13. On 6 April 1978, consistent with the chain of command's recommendations, the separation authority approved the recommendation to discharge the applicant under the provisions of chapter 14, AR 635-200, by reason of misconduct and directed the issuance of a discharge under honorable conditions. Accordingly, the applicant was discharged on 17 April 1978.

14. The DD Form 214 he was issued confirms he was discharged under the provisions of chapter 14, AR 635-200 by reason of a pattern of misconduct with service characterized as under honorable conditions. He completed 1 year, 10 months, and 18 days of creditable active military service and he had 24 days of lost time due to being AWOL.

15. 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.

16. 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.

17. 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.

15. 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 17 April 1978 discharge characterized as under honorable conditions (general) and, in essence, a referral to the Disability Evaluation System (DES). He states:

"Due to the fact that I was crushed in a jeep accident while guarding the new M1 Brady Tank [Bradley Fighting Vehicle] to be tested at McGregor Range in March of 1977. The incident left me with head and back injuries. The bone chips in my sinus were discovered in 2001 and my head injury was not treated.

My head injury wasn't discovered until November of 2019, but from the time of the accident until then, I continue to have migraine headaches. VA would only give me pain meds for sinus problems."

c. The Record of Proceedings outlines the applicant's military service and the circumstances of the case. The applicant's DD 214 shows he entered the regular Army on 6 May 1976 and was discharged 17 April 1978 under authority provided in paragraph 14-33b of AR 635-200, Personnel Separations – Enlisted Personnel: Frequent incidents of discreditable nature with civil or military authorities. His separation code JKA denotes "Pattern of Misconduct." It shows he had 24 days of lost time under 10 USC § 972: 14 - 15 November 1977; 2 - 4 December 1977; and 18 January - 5 February 1978.

d. No medical documentation was submitted with the application. Because the period of Service under consideration, there are no encounters in AHLTA or documents in iPERMS.

e. The applicant received an Article 15 on 21 October 1977 for multiple failures to repair. He received a second Article 15 on 13 December 1977 for multiple failures to repair. His third Article 15 was for the 18 January - 5 February 1978 period of absence without leave.

f. He received a Bar to Enlistment/Reenlistment Certificate (DA Form 4126-R) on 9 February 1978. The company commander cited the above UCMJ violations and went on to opine:

“Additionally, SM [service member] has been counseled on various occasions by the chain of command in two units. SM was returned to HHB [Headquarters and Headquarters Battery], 2nd Battalion, 55th ADA [Air Defense Artillery] from Battery A, 2nd Battalion, 55th ADA for tardiness, failure to report to work, and poor duty performance.

SM has chosen to place private and personal affairs ahead of his military responsibilities and obligation even after repeated counselings. SM's military appearance, attitude, and duty performance have fallen to level lower than substandard.

If SM were allowed to reenlist, he could not be depended upon to perform adequately in either a peacetime or combat environment, or even be counted upon to be present for duty on a consistent basis.”

g. His company commander notified the applicant of the initiation of separation action under paragraph 14-33b of AR 635-200 on 15 March 1978. The applicant acknowledged the separation action and waived all rights. From his written statement:

“I am accepting this discharge from the Army because I feel this is the best thing to do. However, I would like to say that I do believe that, based on my entire record, I should be issued a good discharge.

I have been in the Army approximately 22 months. In that period of time, I believe I have performed my duties to the best of my ability. I have had my problems just like anybody else, but I do believe I have been able to control them. I have received three Article 15s. I do apologize if I have caused anybody

h. His Commanding General approved his discharge with an under other than honorable conditions discharge certificate on 6 April 1978.

i. There is no evidence the applicant had a mental health or other medical condition which would have then contributed to or would now mitigate his multiple UCMJ violations and other actions which led to his administrative discharge; or that would have failed the medical retention standards of chapter 3, AR 40-501, Standards of Medical Fitness, and been a cause for referral to the DES prior to his discharge.

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.

j. Review of his records in JLV shows he has been awarded multiple VA service-connected disability ratings, including intervertebral disc syndrome in 1999, chronic pansinusitis in 2000, and major depressive disorder in 2017. However, the DES only compensates an individual for service incurred medical condition(s) which have been determined to disqualify him or her from further military service. The DES has neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions which were incurred or permanently aggravated during their military service; or which did not cause or contribute to the termination of their military career. These roles and authorities are granted by Congress to the Department of Veterans Affairs and executed under a different set of laws.

k. It is the opinion of the ARBA medical advisor that neither a discharge upgrade nor a referral of his case to the DES is warranted.

BOARD DISCUSSION:

The Board carefully considered the applicant's request, supporting documents, evidence in the records, a medical review, and published Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement, his record of service, the frequency and nature of his misconduct, and the reason for his separation. The Board considered the applicant's medical claim and the review and conclusions of the ARBA Medical Advisor. The applicant provided no evidence of post-service achievements or letters of reference in support of a clemency determination. The Board found insufficient evidence of in-service mitigating factors and concurred with the conclusion of the medical advising official regarding his misconduct not being mitigated by any medical conditions nor there being evidence of any conditions that would have warranted referral to the disability evaluation system prior to his discharge. Based on a preponderance of evidence, the Board determined the character of service the applicant received upon separation and the reason for his separation were not in error or unjust.

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.

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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. AR 635-200, in effect at the time, set forth the basic authority for the separation of enlisted personnel. Chapter 14 established policy and prescribed procedures for separating members for misconduct. Specific categories included minor disciplinary infractions, a pattern of misconduct, commission of a serious offense, and convictions by civil authorities. Action would be taken to separate a member for misconduct when it was clearly established that rehabilitation was impracticable or was unlikely to succeed.

A discharge under other than honorable conditions was 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.

a. 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.

b. 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 the Soldier's separation specifically allows such characterization.

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 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.

4. 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.

5. 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.

6. 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 (Disability 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 a Medical Evaluation Board (MEB); when they receive a permanent medical profile rating of 3 or 4 in any factor and are referred by an Military Occupational Specialty (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 Physical Evaluation Board (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.

7. 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.

8. Army Regulation 40-501 provides information on medical fitness standards for induction, enlistment, appointment, retention, and related policies and procedures. Soldiers with conditions listed in chapter 3 who do not meet the required medical standards will be evaluated by an MEB and will be referred to a PEB as defined in Army Regulation 635-40.

9. 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//