

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 12 December 2023

DOCKET NUMBER: AR20230002566

APPLICANT REQUESTS: an honorable, physical disability discharge in lieu of his general, under honorable conditions, discharge for failure to participate.

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

- ARBA online application in lieu of DD Form 149 (Application for Correction of Military Record)
- memorandum, subjected: Request for Discharge, Medically Disqualified, dated 15 July 2006
- NGB Form 22 (National Guard Bureau Report of Separation and Record of Service)

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:

a. On 15 July 2006, he signed and accepted a request for discharge, medically disqualified letter stating he was accepting the findings of the MED and wished to be medically discharged. Years later he has discovered he was not medically discharged and was discharged on his NGB Form 22 as a General Discharge for being an unsatisfactory participant (absent without leave (AWOL)). He would like this discharge and his NGB Form 22 to be changed/upgraded to reflect a medical discharge due to injuries sustained during his military service.

b. He has no idea why the error occurred other than attempting to leave in a time of max exodus from military service.

c. He discovered the mistake recently after finishing his dealings with the Veterans Affairs. He had a DD Form 214 he was utilizing and after going through his military

record he discovered his NGB Form 22 had the discharge status as General due to being AWOL. This struck him as odd as he thought he was discharged from the New Jersey Army National Guard (NJARNG) under a medical discharge.

3. The applicant enlisted in the Florida Army National Guard (FLARNG) and as a Reserve of the United States Army on 28 September 1996. He was discharged from the FLARNG with an uncharacterized character of service on 8 November 1997.

4. The applicant enlisted in the NJARNG and as a Reserve of the United States Army on 24 February 1998. He was ordered to Initial Active Duty for Training and entered active service on 29 January 1999. He completed his required training and was awarded the military occupational specialty (MOS) 92A (automated logistical specialist). He was released from active duty on 1 July 1999, with an uncharacterized character of service. His DD Form 214 shows he completed 5 months and 3 days net active service this period.

5. The applicant was ordered to active duty in support of Operation Enduring Freedom and entered active service on 4 February 2003.

6. A DA form 3349 (Physical Profile) shows the applicant was placed on a temporary profile on 29 April 2004 for lower back pain (LBP) with an expiration date of 28 May 2004. He was assigned a physical profile of 311111.

A physical profile, as reflected on a DA Form 3349 (Physical Profile) or DD Form 2808, is derived using six body systems: "P" = physical capacity or stamina; "U" = upper extremities; "L" = lower extremities; "H" = hearing; "E" = eyes; and "S" = psychiatric (abbreviated as PULHES). Each body system has a numerical designation: 1 meaning a high level of fitness; 2 indicates some activity limitations are warranted, 3 reflects significant limitations, and 4 reflects one or more medical conditions of such a severity that performance of military duties must be drastically limited. Physical profile ratings can be either permanent or temporary.

7. A DA Form 2173 (Statement of medical Examination and Duty Status), dated 3 May 2004, shows the following:

a. On 26 February 2003 at Fort Dix, NJ, the applicant injured his low back while riding in the back of a 5-ton truck, he got tossed around and landed on his tail bone and the pain radiates to his left leg. Thus far he has received an MRI and physical therapy.

b. He was examined on 27 March 2003 at Fort Dix Mills clinic.

c. The injury is likely to result in a claim against the government and was incurred in the line of duty.

- d. The applicant was on active duty at the time of the injury.
8. He served in Kuwait/Iraq from 18 April 2003 – 27 April 2004.
9. A DA Form 2173, dated 3 May 2004, shows the following:
 - a. On 7 February 2003 in Iraq, the applicant has been experiencing problems hearing, especially in his right ear.
 - b. He was examined on 29 April 2004 at Fort Dix Mills clinic.
 - c. The injury is likely to result in a claim against the government and was incurred in the line of duty.
10. The applicant was released from active duty and returned to his reserve unit on 2 June 2004.
11. A Line of Duty Investigation (LODI) was initiated for the applicant's low back pain. His injury was found in the line of duty (LOD) on 9 May 2005.
12. On 25 August 2005, a request for reclassification to MOS 88M (motor transport operator) was submitted on the applicant's behalf under the one-time approval of on-the-job training for soldiers deployed to Southwest Asia area of operation. A DA Form 4187 (Personnel Action), dated 26 August 2005, shows the applicant's last physical occurred on 3 June 2001 and he had a physical profile of 211221. On 18 October 2005, the request for reclassification to 88M was approved and 92A was withdrawn.
13. Orders 131-026, issued by Department of Military and Veterans Affairs, Trenton, NJ, on 11 May 2006, shows the applicant was released from his current unit of assignment and transferred to Medical Hold, Trainees, Transients, (Holding Company), NJARNG, effective 1 May 2006. The period and purpose was not applicable.
14. The applicant was discharged from the NJARNG on 27 February 2007 in accordance with paragraph 8-35j of National Guard Regulation (NGR) 600-200 (Enlisted Personnel Management) for unsatisfactory participation (AWOL) with a character of service of general, under honorable conditions. His NGB Form 22 shows he completed 9 years and 4 days net service this period. His lost time is not reflected.
15. Orders D-03-706342, issued by U.S. Army Human Resources Command, St. Louis, MO, show the applicant was honorably discharged from the United States Army Reserve effective 14 March 2007.

16. The applicant provided a memorandum, subjected: Request for Discharge, Medically Disqualified, dated 15 July 2006, showing he accepted the findings of the Medical Evaluation Board (MEB) and wished to be medically discharged. He had been counseled on retention and feel he cannot stay in the military at this time. The applicant signed the document the same day and it was witnessed by Colonel C_.

17. Based on the applicant's contention the Army Review Boards Agency medical staff provided a medical review for the Board members. See "MEDICAL REVIEW" section.

18. On 30 November 2023, the ABCMR contacted the Army Physical Disability Agency (PDA) to obtain a copy of the applicant's MEB. The PDA responded they did not have any documentation in any of their records showing the applicant went through the Disability Evaluation System (DES).

19. A search of the Human Resources Command (HRC) Soldier Management System (SMS) shows applicant's physical profile as 211221 with no significant limitations. It also shows he passed an Army Physical Fitness Test in February 2004.

20. 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 27 February 2007 under honorable conditions (general) discharge and, in essence, a referral to the Disability Evaluation System (DES). He states:

"On 15 July 2006, I signed and accepted a request for discharge, Medically disqualified letter stating I was accepting the findings of the MED and wished to be medically discharged. Years later, I have discovered I was not medically discharged and was discharged on my NGB Form 22 as a General Discharge for being an unsatisfactory participant (AWOL).

I would like this discharge and my NGB Form 22 to be changed/ upgraded to reflect a medical discharge due to injuries sustained during my military service."

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. The applicant's final National Guard Report of Separation

and Record of Service (NGB Form 22) shows he entered the Army National Guard on 24 February 1998 he was discharged from the New Jersey Army National Guard (NJARNG) on 27 February 2007 under paragraph 8-35j of NGB 600-200, Enlisted Personnel Management: Unsatisfactory participation (AWOL).

d. Medical documentation shows the applicant was treated for low back pain for most of 2003. MEDCHART contains only one physical profile and it is a temporary duty limiting physical profile for lumbar radiculopathy / back pain dated 25 March 2006.

e. There is no evidence the applicant was referred to or entered into the DES. A 15 July 2006 memorandum to a NJARNG commander signed by the applicant informs him that the applicant had accepted the findings of a local medical evaluation board and desired to be medically discharged.

f. Neither the applicant's separation packet nor documents addressing his involuntary administrative separation were submitted with the application or uploaded into iPERMS. 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 discharge for unsatisfactory participation; 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 this discharge. Furthermore, there is no evidence that a medical condition prevented him from attending drill and/or maintaining contact with his unit.

g. JLV shows he has several VA service-connected disability ratings. 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.

h. It is the opinion of the Agency Medical Advisor that neither a discharge upgrade nor a referral of his case to the DES is warranted.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. The evidence shows the applicant was discharged from the NJARNG on 27 February 2007 in accordance with NGR 600-200 for unsatisfactory participation (AWOL) with an under

honorable conditions (general) character of service. Neither his separation packet nor documents addressing his administrative separation were submitted with the application or filed in his service record. The Board reviewed and agreed with the medical advisor's finding no evidence the applicant had a mental health or other medical condition which would have then contributed to or would now mitigate his discharge for unsatisfactory participation; 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 disability evaluation system (DES) prior to this discharge. Furthermore, there is no evidence that a medical condition prevented him from attending drill and/or maintaining contact with his unit. Based on his finding, the Board determined that neither a discharge upgrade nor a referral of his case to the DES is 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.

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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. Army Regulation (AR) 135-178 (Army National Guard and Army Reserve - Enlisted Administrative Separations) establishes policies, standards, and procedures governing the administrative separation of certain enlisted soldiers of the Army National Guard of the United States and the United States Army Reserve as directed by Department of Defense Directive 1332.14, December 1993 Subject: Enlisted Administrative Separations.
3. Title 10, USC, 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.

4. Title 38 USC, 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 USC, 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. AR 635-40 (Physical Evaluation for Retention, Retirement, or Separation) 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. Once a determination of physical unfitness is made, all disabilities are rated using the Department of Veterans Affairs Schedule for Rating Disabilities (VASRD).

a. Paragraph 3-2 states 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. Paragraph 3-4 states 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.

7. AR 40-501 (Standards of Medical Fitness) governs medical fitness standards for enlistment, induction, appointment (including officer procurement programs), retention, and separation (including retirement). The Department of Veterans Affairs Schedule for Rating Disabilities (VASRD). VASRD is used by the Army and the VA as part of the process of adjudicating disability claims. It is a guide for evaluating the severity of disabilities resulting from all types of diseases and injuries encountered as a result of or incident to military service. This degree of severity is expressed as a percentage rating which determines the amount of monthly compensation.

8. 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.

//NOTHING FOLLOWS//