

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 15 May 2024

DOCKET NUMBER: AR20230003130

APPLICANT REQUESTS:

- correction of his records to show he was medically retired.
- a video/telephonic appearance before the Board.

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

- DD Form 149 (Application for Correction of Military Record)
- Applicant Statement
- Excerpt from National Guard Regulation (NGR) Army Regulation (AR) 600-200 (Enlisted Personnel Management), 1 March 1997
- DA Form 638 (Recommendation for Award), 9 September 2005
- DD Form 2697 (Report of Medical Assessment), 9 December 2005
- DD Form 2807 (Report of Medical History), 11 December 2005
- DD Form 214 (Certificate of Release or Discharge from Active Duty), 8 January 2006
- Medical Treatment Record, 14 March 2006
- Medical Treatment Record, 28 March 2006
- Orders Number 151-249, 31 May 2006
- DD Form 2808 (Report of Medical Examination), 2 December 2006
- DA Form 7349-R (Initial Medical Review – Annual Medical Certificate), 26 April 2007
- Letter, Declaration of Intent to Pursue Disciplinary Action, 8 July 2007
- Letter, Declaration of Intent to Reduce for Unsatisfactory Participation, 8 July 2007
- Letter of Instruction – Unexcused Absence, 8 July 2007
- Letter, Return of Government Property, 8 July 2007
- Department of Veterans Affairs (VA) Rating Decision, 11 April 2009
- Medical Record, 1 June 2010
- Orders Number D-01-200752, 17 January 2012
- VA Summary of Benefits, 20 January 2017
- VA Rating Decision, 7 April 2023

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, in effect:

a. "Pay was not received for dependent. Dept of Edu said my discharge use to show other than honorable. So audit for over payments." He was told to give up his disability rating from the VA prior to his second tour to Iraq and he did not. He was not allowed to deploy or drill anymore. He was told that he was scheduled for a medical board by his first sergeant, but it was not true. He contacted the NG Office of the Inspector General after trying his chain of command.

b. He was injured during a Quick Reaction Force (QRF) mission while deployed to Tikrit, Iraq. He sustained a Traumatic Brain Injury (TBI). He returned to his unit in Texas, and he was told that he had a medical review scheduled at Ellington Airfield in Houston, TX. When he arrived for the appointment, he was told that his unit had not scheduled the medical evaluation board (MEB).

c. His unit was scheduled to deploy to Iraq again, but he was told that he could not deploy because of his disability. He went to the unit in Beaumont, TX to talk to the commander but instead of talking to the applicant about the false MEB, he was told not come to drill anymore, but he still received threats of taking his rank and calling the local law enforcement.

3. The applicant provides the following:

a. An excerpt from NGR (AR) 600-200, dated 1 March 1997, which shows paragraph 11-60 (Reduction for inefficiency) and paragraph 11-60 (Reduction for misconduct or civil conviction).

b. DA Form 638 dated 3 September 2005, and shows the applicant was awarded the Army Commendation Medal for the period his exceptionally meritorious service while serving as a rifleman during combat operations in support of Operation Iraqi Freedom III. The award also states he was a member of the Forward Operating Base QRF.

c. DD Form 2697 dated 9 December 2005, wherein the applicant stated he had lower back pain and a rash on his back that would not go away.

d. DD Form 2807, back page, dated 11 December 2005, which shows the purpose of the medical assessment was for separation. The document shows he had intermittent back pain from wearing heavy gear and developed a rash on his back that would not go away. The applicant stated he had scoliosis. He was referred to his primary care provider for the rash.

e. Medical treatment records dated 14 March 2006, which shows the applicant complained of being tired all the time, depressed, angered easily, had a poor appetite, and poor sleep. He was diagnosed with depression and lethargy and prescribed the medication Effexor.

f. Medical treatment records dated 28 March 2006, which shows he still complained of fatigue and depression. He stated that he only took one of the Effexor because it made him sleep for three days. He was prescribed Lexapro.

g. Orders Number 151-249, issued by the Texas Military Forces, Army National Guard (ARNG), Austin, TX on 31 May 2006, and ordered the applicant to annual training (AT) for the period 3 June 2006 to 17 June 2006.

h. DD Form 2808, which shows he underwent a medical examination on 2 December 2006 for the purpose of retention. The examiner noted that he had cervical spinal stenosis or some form of impingement. He was issued a medical profile and the examiner noted that he needed to return to the exam facility.

i. DA Form 7349-R dated 26 April 2007, which shows the provider assigned the applicant a P3 medical profile (nondeployable).

j. A Declaration of Intent to Pursue Disciplinary Action from the applicant's commander, dated 8 July 2007, which states he was absent without permission for the 6-8 July 2007 drill assembly. The letter stated that it was his first offense for the year that began 6 July 2007. In accordance with the Commander's Drill Attendance Policy, he faced Article 15 disciplinary action and a fine. The commander noted that he had 15 days to contact him to explain his reason for being absent without leave (AWOL).

k. A Declaration of Intent to Reduce for Unsatisfactory Participation, dated 8 July 2007, which states the applicant accrued 4 periods of unexcused absences within the one-year period beginning 6 July 2007, which was in violation of the membership participation requirements. He was thereby notified that he was an unsatisfactory participant and would be reduced in grade to private (PV2/E2). The action was delayed for 15 days to give the applicant an opportunity to provide a written response as to why he should not be reduced.

l. A letter of instruction – unexcused absence, dated 8 July 2007, which shows the applicant was AWOL from the multiple unit training assembly (MUTA 6) on 6-8 July 2007 for 6 periods. It states that unless the applicant's absences were excused, he would have accrued 4 unexcused absences over a one-year period. The one-year period began on 6 July 2007 when he incurred his first unexcused absence. It was explained that for his absences to be excused he needed to provide the commander with an appropriate affidavit or certification by a doctor, medical officer, or other people having specific knowledge of the emergency or circumstances. If he accumulated nine unexcused absences within a one-year period, he could be declared an unsatisfactory participant and if action was taken, he would be transferred to the Individual Ready Reserve for the balance of his obligation, and he would receive a General Discharge with an Other Than Honorable characterization.

m. A letter from his commander, dated 8 July 2007, which advised the applicant to return all property that was issued to him by the unit. He was given 5 working days to clear his clothing and equipment records. The commander explained that the maximum penalty for not returning government property was a fine of \$10,000 or 10 years in prison, or both.

n. VA rating decision dated 11 April 2009, which shows he was service connected for Post Traumatic Stress Disorder (PTSD) with an evaluation of 50 percent, effective 31 July 2008. He was denied service connection for the following:

- Migraine headaches
- Stiff neck condition
- Scoliosis (claimed as back condition)
- Joint aches/pains

o. Medical Record dated 1 June 2010, which shows he was admitted to the hospital on 10 May 2010. The medical record states the reason for hospitalization was PTSD.

p. VA summary of benefits dated 20 January 2017, which states the applicant has a combined service-connected evaluation of 90 percent. It shows that he was being paid at the 100 percent rate because he was unemployable due to his service-connected disabilities, and he was considered to be totally and permanently disabled due to his service-connected disabilities. The VA determined that the following conditions were related to his military service:

- Migraine headaches, rated at 50 percent, effective 19 October 2011
- Traumatic Brain Injury (TBI) (claimed as head injury due to blasts), rated at 10 percent, effective 19 October 2011

q. VA rating decision dated 7 April 2023, which shows he was service connected for posttraumatic tinnitus with an evaluation of 10 percent, effective 1 December 2022. Evaluation of PTSD and cannabis use disorder and TBI, which was 70 percent disabling, continued.

4. A review of the applicant's service records show:

a. DD Form 4 (Enlistment/Reenlistment Document) shows he enlisted in the ARNG of the United States on 12 January 2004. He completed initial active-duty training, and he was awarded military occupational specialty 13B (Cannon Crewmember).

b. A DD Form 214 shows he was honorably released from active duty on 8 January 2006. His DD Form 214 shows he was ordered to active duty in support of Operation Iraqi Freedom and served in an imminent danger pay area Kuwait/Iraq from 6 January 2005 to 6 December 2005. It shows he completed 1 year, 4 months, and 24 days of net active service during this period.

c. NGB Form (Report of Separation and Record of Service), shows the applicant was honorably discharged from the TXARNG by reason of expiration of active status commitment in the selective reserve on 11 January 2010, and transferred to the U.S. Army Reserve (USAR) Control Group (Annual Training).

d. Orders Number D-01-200752, issued by the U.S. Army Human Resources Command (AHRC), Fort Knox, KY shows he was honorably discharged from the USAR, effective 17 January 2012.

e. The applicant applied for Combat-Related Compensation (CRSC) on 18 November 2021. On 29 November 2021 his claim was denied. The letter from AHRC stated that his available military personnel file was reviewed and according to his DD Form 214 he was discharged from service. He must be in a retired status and receiving military retirement pay to be eligible for CRSC consideration.

f. On 4 December 2023, the applicant submitted an application for reconsideration to CRSC and on 7 December 2023, AHRC stated they were unable to process his CRSC claim, because they reviewed his military personnel file and according to his DD Form 214 he was discharged from service, and he must be in a retired status and receiving military retirement pay to be eligible for CRSC consideration.

5. The Chief, Special Actions Branch, NGB, provided an advisory opinion in this case on 12 December 2023 and recommended disapproval.

a. The TXARNG did an extensive review of the Soldier's ABCMR claim and could not find any medical documents that would support the Soldier being entered into the MEB and the Integration Disability Evaluation Process (IDES). The Soldier did have a permanent profile, but the medical condition associated with the profile was not service connected and therefore not a medical condition that was caused by the military according to the information provided by the TXARNG.

b. Department of Defense (DoD) Financial Management Regulation 7000.14.R, Volume 7, Chapter 63, section 4.0 defines the eligibility for a Soldier to apply and claim CRSC (which is to be retired with 20 years of military service).

c. It is the opinion of the Chief, Special Actions Branch, NGB, that the applicant's request to receive a medical retirement be disapproved. The Soldier did not provide any evidence that he was injured by an improvised explosive device (IED) while deployed in support of Operation Iraqi Freedom as he claims on his request to receive CRSC. Additionally, his request to receive CRSC was denied because he did not retire with 20 plus years of military service per the eligibility guidance defined on the DoD Financial Management Regulation.

d. This opinion was coordinated with the TXARNG.

## 6. 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, her previous ABCMR denial (AR20160018395, 17 May 2019), 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 in essence requesting a referral to the Disability Evaluation System (DES).

c. The Record of Proceedings outlines the applicant's military service and the circumstances of the case. His Report of Separation and Record of Service (NGB Form 22) shows he entered the Army National Guard on 12 January 2004 and was honorably discharged from the Texas Army National Guard (TXARNG) on 11 January 2010 under provisions in paragraph 6-36n of NGR 600-200, Enlisted Personnel Management (31 July 2009), Expiration of active status commitment in the Selected Reserve.

d. The 12 December 2023 National Guard Bureau thoroughly addresses the applicant's concerns and will not be repeated here. Interesting, the referenced profile was not available to this reviewer in MEDCHART.

e. The only encounters in the EMR were for treatments of a common cold on 27 January 2005 and 18 February 2009.

f. A 7 August 2009 VA encounter shows the applicant was being treated for PTSD and improving with medication:

"I have seen and evaluated this 25-year-old male, an Army veteran of OIF, who presented today to TRP Clinic for a scheduled appointment. He reported that he has been doing better since his last appointment, and that he thinks the medication has 'finally kicked in.' His mood is less irritable and his outlook is more positive. He gets about six hours of sleep per night with frequent awakenings but no recalled nightmares. (He used to have frequent nightmares.) No reported mood instability. He is tolerating his medications well."

g. His final pre-separation VA mental health encounter occurred on 24 November 2009. It reveals that he was still doing relatively well but there had been some increased stress due to a recent change in his living situation:

"Reported that the last several weeks have been stressful for him: He was 'kicked out' of his living situation. He now has an apartment but is sleeping poorly, with frequent awakening and nightmares 3 times/week. Stated that divalproex works much better for him than fluoxetine. Denied SI [suicidal ideation]."

h. Paragraph 3-33 of AR 40-501, Standards of Medical Fitness (14 December 2007), states the cause for anxiety disorders (which includes PTSD) to be referred to the MEB are:

"a. Persistence or recurrence of symptoms sufficient to require extended or recurrent hospitalization; or

b. Persistence or recurrence of symptoms necessitating limitations of duty or duty in protected environment; or

c. Persistence or recurrence of symptoms resulting in interference with effective military performance."

i. There was no probative evidence identified showing his PTSD or any other medical condition failed medical retention standards in chapter 3 of AR 40-501 prior to his voluntary separation from the ARNG; or which prevented the applicant from reenlisting. Thus, there is no cause for a referral to the DES.

j. Paragraph 3-1 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (8 February 2006) states:

“The mere presence of an impairment does not, of itself, justify a finding of unfitness because of physical disability. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier reasonably may be expected to perform because of their office, grade, rank, or rating.”

k. Submitted medical documentation shows the applicant was hospitalized for treatment of PTSD on 10 May 2010.

l. JLV shows he has been awarded four VA service-connected disability ratings: PTSD (70%), migraine headaches (50%), tinnitus (10%), and traumatic brain disease (0%). However, the DES compensates an individual only 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.

m. It is the opinion of the ARBA medical advisor that a referral of his case to the DES in not warranted.

#### BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation. Upon review of the applicant's petition, available military records and medical review, the Board concurred with the advising official finding that a referral of his case to the DES in not warranted. The Board found based on the opine a lack of evidence identified showing the applicant's PTSD or any other medical condition failed



medical retention standards. The Board noted regulatory guidance stating the presence of an impairment does not, of itself, justify a finding of unfitness because of physical disability. The Board determined there is insufficient evidence to support the applicant's contentions for correction of his records to show he was medically retired. As such, the Board denied relief.

2. The applicant's request for a personal appearance hearing was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

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. National Guard Regulation 600-200 (Enlisted Personnel Management), paragraph 6-35, provide the reasons for administrative separation for Reserve of the Army, the State Army National Guard only, or both. It states, Commanders who suspect that a Soldier may not be medically qualified for retention, will direct the Soldier to report for a complete medical examination per Army Regulation (AR) 40-501. Commanders who do not recommend retention will request the Soldier's discharge. It shows in Table 6-1 defines the differences between RE codes. It shows an RE code of 3 is not fully qualified for reentry or continuous service at time of separation, but this disqualification is waivable.
3. Army Regulation 40-501 (Standards of Medical Fitness), governs medical fitness standards for enlistment, induction, appointment, retention, and separation. It states medical evaluation of certain enlisted military occupational specialties and officer duty assignments in terms of medical conditions and physical defects are causes for rejection or medical unfitness for these specialized duties. If the profile is permanent the profiling officer must assess if the Soldier meets retention standards. Those Soldiers on active duty who do not meet retention standards must be referred to a medical evaluation board.
4. Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation) prescribes 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.
  - a. The objectives are to maintain an effective and fit military organization with maximum use of available manpower; provide benefits to eligible Soldiers whose military service is terminated because of a service-connected disability; provide prompt disability evaluation processing ensuring the rights and interests of the Government and Soldier are protected; and, establish the Military Occupational Specialty Administrative Retention Review (MAR2) as an Army pre-DES evaluation process for Soldiers who require a P3 or P4 (permanent profile) for a medical condition that meets the medical retention standards of Army Regulation 40-501.

b. Public Law 110-181 defines the term, physical DES, as a system or process of the DoD for evaluating the nature and extent of disabilities affecting members of the Armed Forces that is operated by the Secretaries of the military departments and is composed of medical evaluation boards, physical evaluation boards, counseling of Soldiers, and mechanisms for the final disposition of disability evaluations by appropriate personnel.

c. The DES begins for a Soldier when either of the events below occurs:

(1) The Soldier is issued a permanent profile approved in accordance with the provisions of Army Regulation 40–501 and the profile contains a numerical designator of P3/P4 in any of the serial profile factors for a condition that appears not to meet medical retention standards in accordance with AR 40–501. Within (but not later than) 1 year of diagnosis, the Soldier must be assigned a P3/P4 profile to refer the Soldier to the DES.

(2) The Soldier is referred to the DES as the outcome of MAR2 evaluation.

d. A medical evaluation board is convened to determine whether a Soldier's medical condition(s) meets medical retention standards per Army Regulation 40-501. This board may determine a Soldier's condition(s) meet medical retention standards and recommend the Soldier be returned to duty. This board must not provide conclusions or recommendations regarding fitness determinations.

e. The physical evaluation board determines fitness for purposes of Soldiers' retention, separation, or retirement for disability under Title 10, U.S. Code, chapter 61, or separation for disability without entitlement to disability benefits under other than Title 10, U.S. Code, chapter 61. The physical evaluation board also makes certain administrative determinations that may benefit implications under other provisions of law.

f. Unless reserved for higher authority, the U.S. Army Physical Disability Agency approves disability cases for the Secretary of the Army and issues disposition instructions for Soldiers separated or retired for physical disability.

5. 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, 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.

6. 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 regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. Boards for Correction of Military/Naval Records 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. This guidance does not mandate relief but provides standards and principles to guide Boards in application of their equitable relief authority.

a. In determining whether to grant relief on the basis of equity, injustice, or clemency grounds, Boards 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.

b. 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.

7. Section 1556 of Title 10, United States Code, 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.

8. Army Regulation 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR begins its consideration of each case with the presumption of administrative regularity, which is that what the Army did was correct.

a. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

b. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

//NOTHING FOLLOWS//