

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 23 January 2024

DOCKET NUMBER: AR20230003731

APPLICANT REQUESTS: an honorable characterization of service or a medical discharge vice an under other than honorable separation due to unsatisfactory participation.

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:
DD Form 149 (Application for Correction of Military Record)

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 is asking for a medical or honorable discharge for medical reasons. The first reason is his poor vision due to Amblyopia caused by traumatic brain injury (TBI) from a car accident as a child. His vision was so bad he was only ever able to qualify with his weapon in basic training after numerous attempts. The second reason is that he was diagnosed with Hypothyroidism while serving in the National Guard or Army Reserve. He is unsure how he got the disease; he was told it was caused by post-traumatic stress disorder (PTSD), the condition caused him to become very sick and he was unable to travel to drill or annual training.
 - a. He believes the error to be unjust on his part for not submitting his medical information on his first attempt for a discharge review. The hospital does not have his record anymore for the TBI as a child, but he does have medical records for the Hypothyroidism treatment and amblyopia treatment from Veterans Affairs and private doctors. He was very sick while serving and unable to communicate and drive most of the time. He suffered from Hypothyroidism for a long time causing slow brain function and brain fog and many other health problems associated with Hypothyroidism. Additionally, he has Amblyopia and low vision. His vision is very bad and Lasik surgery is not an option for a person with Amblyopia. He will submit all medical records if needed as they are in the Veterans Affairs system.

3. The applicant underwent a medical examination for the purpose of enlistment on 22 January 2008. He was found qualified for service and issued a PULHES of 111121.

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.

4. The applicant enlisted in the New Mexico Army National Guard (NMARNG) on 31 January 2008.

5. He entered a period of active-duty training (ADT) on 4 February 2008 and completed training for award of military occupational specialty 88N, Traffic Management Coordinator. He was honorably released from ADT on 19 June 2008. He was returned to his ARNG unit.

6. Orders 271-018, 28 September 2009, issued by Department of Military Affairs, NM on 28 September 2009, shows the applicant was discharged from the Army National Guard effective 28 September 2009, with a general discharge and transferred to U.S. Army Reserve Control Group (Individual Ready Reserve).

7. His NGB Form 22 (National Guard Report of Separation and Record of Service) shows he was discharged from the NMARNG on 28 September 2009. He completed 1 year, 7 months, and 28 days net service this period. He was issued a general, under honorable conditions, character of service under the provisions of National Guard Regulation 600-200 (Enlisted Personnel Management), paragraph 6-35j, for unsatisfactory participation.

8. An unsatisfactory participation packet was completed in 2012. The packet includes a/an:

a. Annual Training (AT) Order 035019, issued by 88th Regional Support Command, on 7 March 2012, showing he was ordered to attend AT for 2 days reporting to Seagoville, TX on 14 April 2012.

b. Certified mail receipt, 26 March 2012, showing the AT order was sent to the applicant's last known residence.

c. Affidavit of service by mail (AT Order) stating the human resources specialist mailed the AT order to the applicant on 9 March 2012, by certified mail to his last known residence.

d. Developmental Counseling Form, 14 April 2012, states, due to unexcused absence on 14 April 2012. A message was left on his cell phone. The plan of action shows recommend discharge. The applicant was not available.

e. Notification of separation proceedings under Army Regulation (AR) 135-178 (Enlisted Administrative Separations), chapter 13, dated 14 April 2012, with a suspense of 13 May 2012. The commander stated under the provisions of AR 135-178, Chapter 13, paragraph 13-1, he is initiating action to separate the applicant from United States Army Reserve for unsatisfactory participation. The reason for his proposed action was the applicant's unexcused absence from 9 or more UTAs or his absence from Extended Combat Training as defined by AR 135-91, chapter 4. The commander recommended the applicant receive an under other than honorable characterization of service. His recommendation and the applicant's reply, if any, will be submitted to the Separation Authority, who would make the final decision in the case.

f. Certified mail receipt, 26 April 2012, showing the chapter packet was sent to the applicant's last known residence.

g. Affidavit of service by mail (Notification of separation) stating the human resources specialist mailed the notification of separation proceedings to the applicant on 16 April 2012, by certified mail to his last known residence. Included with the notification was Acknowledgement/Election of rights, Request for conditional waiver, Response for separation proceedings, and acknowledgement of separation.

h. There was no response from the applicant.

i. On 14 May 2012 the commander recommended the applicant be separated from the U.S. Army Reserve prior to the expiration of his term of military service, and that his service be under other than honorable conditions. The specific reason for the recommendation was that the applicant had not attended battle assembly since 11 December 2011, the unit has tried to contact him. The unit and battalion tried several times to recover the Soldier unsuccessfully.

j. DA Form 4187 (Personnel Action) showing action to separate the applicant due to unsatisfactory participation in accordance with (IAW) AR 135-178, chapter 13.

(1) The battalion commander concurred with the commander's recommendation process IAW AR 135-178.

(2) The brigade commander stated the applicant made multiple decisions over a significant period of time to ignore the participation requirements of the USAR. He recommended the applicant be discharged, and that the discharge be characterized as under other than honorable conditions IAW AR 135-178.

9. Orders 12-177-00005, issued by Headquarters, 88th Regional Support Command, on 25 June 2012, shows the applicant was reduced to private/E-1 on 25 June 2012. He was discharged from the U.S. Army Reserves effective 2 July 2012, IAW AR 135-178 under other than honorable conditions.

10. The applicant applied to the Army Discharge Review Board (ADRB) for an upgrade of his character of service. After considering the evidence, the ADRB denied his request.

11. Reserve component Soldiers separated for unsatisfactory participation generally receive an under other than honorable conditions characterization of service.

12. The applicant provided argument or evidence that the Board should consider in accordance with the published equity, injustice, or clemency determination guidance.

13. 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/or 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 14 October 2010 under honorable conditions (general) discharge and, in essence, a referral to the Disability Evaluation System (DES). He states: "To whom it may concern I am asking for a medical or honorable discharge. The reasons beings are medical. The first reason being bad vision, never being able to qualify with my weapon, only in basic training after many attempts due to Amblyopia caused by traumatic brain injury from a car accident as a child. The second reason is Hypothyroidism unsure how I got the disease I was told was caused by PTSD but I was diagnosed while serving in the National Guard or Army Reserve which caused me to become very sick and unable to travel to drill or annual training."

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. The National Guard Report of Separation and Record of Service (NBG Form 22) for the period of service under consideration shows the applicant entered the Army National Guard on 31 January 2008 and was separated with an under honorable conditions (general) characterization of service from the New Mexico Army National Guard (NMARNG) on 28 September 2009 under the separation authority provided by paragraph 6-35j of NGR 600-200, Enlisted Personnel Management (31 July 2009): Unsatisfactory Participation.

d. The applicant's request for a discharge upgrade was denied by the ADRB on 2 April 2014 (AR20130012670). Rather than repeat their findings here, the board is referred to the record of proceedings for that case. This review will concentrate on the new evidence submitted by the applicant.

e. No medical documentation was submitted with the application. The EMR shows he was seen for amblyopia ("Lazy Eye") on 6 February 2008 at which time he was found to have "good ocular health" in both eyes. He was also seen for atraumatic left knee pain while in initial entry training (IET) from 4 February 2008 thru 19 June 2008. He graduated with a military occupational specialty of 88N – Traffic Management Coordinator.

f. JLV shows he receives care as a non-service-connected Veteran and has no VA service-connected disability ratings. It shows he was diagnosed with hypothyroidism in 2016 and affective disorder in 2019.

g. 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. There are no duty limiting physical profiles or other probative evidence indicating the applicant had a permanent service incurred medical condition failed the medical retention standards of chapter 3 of AR 40-501, Standards of Medical Fitness, prior to his voluntary discharge; or which prevented him from attending inactive duty for training and/or maintaining contact with his chain of command prior to his voluntary discharge. Thus, there was no cause for referral to the Disability Evaluation System. 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 her discharge. It is the opinion of the ARBA medical advisor that a referral to the DES is unwarranted.

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.

a. The evidence of record shows the applicant was discharged from the ARNG as an unsatisfactory participant in accordance with National Guard regulation(s) for unsatisfactory participation. He was transferred to the USAR and continued his unsatisfactory participation. His command initiated separation action against him, and he was discharged with an under other than honorable conditions discharge due to this unsatisfactory participation. The Board found no error or injustice in his discharge processing or character of service.

b. The Board reviewed and agreed with the medical advisor's finding no duty limiting physical profiles or other probative evidence indicating the applicant had a permanent service incurred medical condition failed the medical retention standards of chapter 3 of AR 40-501, Standards of Medical Fitness, prior to the discharge; or which prevented him from attending inactive duty for training and/or maintaining contact with his chain of command prior to his voluntary discharge. Thus, there was no cause for referral to the Disability Evaluation System. 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 her discharge. The Board determined that neither a referral to the disability evaluation system nor a change to the characterization of service 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) 135-91 (ARNG and USAR Service Obligations, Methods of Fulfillment, Participation Requirements, and Enforcement Procedures) states a Soldier is an unsatisfactory participant when 9 or more unexcused absences from scheduled training occurs during a 1-year period. Unless an absence is authorized, a Soldier failing to attend a scheduled drill will be charged with an unexcused absence.

3. AR 135-178 (Enlisted Administrative Separations) establishes policies, standards, and procedures governing the administrative separation of certain enlisted Soldiers of the ARNG and USAR. Chapter 13 provides that a Soldier is subject to discharge for unsatisfactory participation when it is determined that the Soldier is unqualified for further military service because:

a. The Soldier is an unsatisfactory participant as prescribed by Army Regulation 135-91.

b. Attempts to have the Soldier respond or comply with orders or correspondence have resulted in:

(1) The Soldier's refusal to comply with orders or correspondence.

(2) A notice sent by certified mail was refused, unclaimed, or otherwise undeliverable.

c. Characterization of service normally will be under other than honorable conditions, but characterization as general (under honorable conditions) may be warranted. For Soldiers who have completed entry level status, characterization of service as honorable is not authorized unless the Soldier's record is otherwise so meritorious that any other characterization clearly would be inappropriate. In such cases, separation for unsatisfactory participation with an honorable characterization will be approved by the separation authority. As an exception, the separation authority will approve separation with service characterized as honorable when an administrative separation board has recommended such characterization.

4. AR 135-178, paragraph 2-9 of the regulation in effect at the time states:

a. An honorable characterization is appropriate when the quality of the Soldier'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. An honorable characterization may only be awarded a Soldier upon completion of his or her service obligation, or where required under specific reasons for separation, unless an uncharacterized description is warranted.

b. General (under honorable conditions). If a Soldier's service has been honest and faithful, it is appropriate to characterize that service as under honorable conditions. Characterization of service as general under honorable conditions is warranted when significant negative aspects of the Soldier's conduct or performance of duty outweigh positive aspects of the Soldier's military record. When authorized, a characterization of under honorable conditions is awarded to a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Under other than honorable conditions. Service may be characterized as under other than honorable conditions only when discharge is for misconduct, fraudulent entry, unsatisfactory participation, or security reasons. No Soldier will be discharged in accordance with this regulation, with service characterized as under other than honorable conditions, unless he or she is afforded the right to present his or her case before an administrative separation board. The Soldier will be afforded the advice and assistance of counsel. As an exception, a discharge with service characterized as under other than honorable conditions may be issued without board action if the Soldier waives their right to board action.

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 (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.

6. AR 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.

7. AR 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 with the following caveats:

a. U.S. Army Reserve (USAR) or Army National Guard (ARNG) Soldiers not on active duty, whose medical condition was not incurred or aggravated during an active duty period, will be processed in accordance with chapter 9 and chapter 10 of this regulation.

b. Reserve Component Soldiers pending separation for In the Line of Duty injuries or illnesses will be processed in accordance with Army Regulation 40-400 (Patient Administration) and Army Regulation 635-40.

c. Normally, Reserve Component Soldiers who do not meet the fitness standards set by chapter 3 will be transferred to the Retired Reserve per Army Regulation 140-10 (USAR Assignments, Attachments, Details, and Transfers) or discharged from the Reserve Component per Army Regulation 135-175 (Separation of Officers), Army Regulation 135-178 (ARNG and Reserve Enlisted Administrative Separations), or other applicable Reserve Component regulation. They will be transferred to the Retired Reserve only if eligible and if they apply for it.

d. Reserve Component Soldiers who do not meet medical retention standards may request continuance in an active USAR status. In such cases, a medical impairment incurred in either military or civilian status will be acceptable; it need not have been incurred only in the line of duty. Reserve Component Soldiers with non-duty related medical conditions who are pending separation for not meeting the medical retention standards of chapter 3 may request referral to a PEB for a determination of fitness in accordance with paragraph 9-12.

8. 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.

9. National Guard Regulation 600-200 (Enlisted Personnel Management) prescribes the criteria, policies, processes, procedures and responsibilities to classify, assign utilize,

transfer within and between States, provides special duty assignment pay, separate and appoint to and from Command Sergeant Major ARNG and Army National Guard of the United States enlisted Soldiers. Paragraph 6-35j in effect at the time, provides for the separation of Soldiers for unsatisfactory participation.

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.

11. 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.

a. 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 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.

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.

NOTHING FOLLOWS//