

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: ██████████

BOARD DATE: 8 March 2024

DOCKET NUMBER: AR20230006037

APPLICANT REQUESTS: reconsideration of his prior request for physical disability separation in lieu of honorable discharge under the Trainee Discharge Program (TDP).

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Certificate of Release or Discharge from Active Duty), for the period ending 23 May 1977
- Department of Veterans Affairs (VA) Letter, dated 13 January 2023
- Privacy Act Release Form, dated 25 April 2023
- Army Review Boards Agency (ARBA) Letters, dated 2 and 16 May 2023
- Email Correspondence from Member of Congress, dated between 15 May 2023 and 6 December 2023

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20100028535 on 19 May 2011.

2. The applicant states he needs to change his type of separation to a medical discharge. He is trying to apply for housing/home loans and the VA states he does not qualify due to his time in service. For people who enlisted prior to 8 September 1980, no minimum length of service is necessary to be considered a veteran for VA benefits. The VA is telling him he does not qualify for housing because he does not have enough days of service unless the discharge description on his DD Form 214 is changed to medical.

3. The applicant enlisted in the Regular Army on 26 April 1977.

4. A Training and Doctrine Command (TRADOC) Form 871-R (TDP Counseling) shows the applicant received the following counseling during his first week of Basic Combat Training (BCT):

a. On 4 May 1977, Staff Sergeant (SSG) B_____ indicated he observed the applicant as having a quitter's attitude and that he will not try to keep up in physical training or drill and ceremony.

b. On 7 May 1977, his platoon sergeant counseled the applicant on 7 and 9 May 1977, and the applicant stated he did not feel he was fit for military service and wanted out. He seemed willing to go to any lengths to get out and had become a disciplinary problem. On 9 May 1977, he referred the applicant to the first sergeant for further counseling and rehabilitative attempts.

c. On 11 May 1977, his immediate commander indicated the applicant failed to respond to the efforts of the first sergeant and he recommended the applicant's discharge.

5. A statement from the applicant's first sergeant, dated 11 May 1977, shows he counseled the applicant on 9, 10, and 11 May 1977. The applicant had a very poor attitude and refused to try anything. On 10 May 1977, he tried to skip the drug abuse class and on 11 May 1977, he had to get the applicant from the hospital when he became insubordinate and unruly with the doctor and specialist five in the Podiatry Clinic. He recommended the applicant be discharged for his lack of motivation and extremely poor attitude.

6. A DA Form 2627 (Record of Proceedings Under Article 15, Uniform Code of Military Justice (UCMJ)) shows the applicant accepted nonjudicial punishment (NJP) under Article 15 of the UCMJ on 12 May 1977, for without authority failing to go at the prescribed time to his place of duty at the drug abuse class on 10 May 1977.

7. On 13 May 1977, the applicant was notified by his immediate commander of initiation of his honorable discharge under the provisions of Army Regulation 635-200 (Personnel Separations - Enlisted Personnel), paragraph 5-39, under the Trainee Discharge Program.

a. The specific reasons for the proposed action were his lack of motivation and negative attitude, which rendered him unsuitable for further military service. He had sufficient time for improvement since his last counseling session and no improvement was noted.

b. He was advised if he did not have sufficient prior military service, due to his non-completion of requisite active duty time, VA and other benefits normally associated with completion of honorable active duty service would be affected.

c. He was advised he had the right to present any rebuttal or statements in his behalf to the discharge authority or waive those rights. He was also informed he had the

right to request a separation physical if he felt his physical status had changed since his last examination.

8. On 13 May 1977, the applicant acknowledged notification of his proposed honorable discharge under the provisions of the Trainee Discharge Program. He acknowledged he understood if he did not have sufficient prior service, that due to non-completion of requisite active duty time, VA and other benefits normally associated with completion of honorable active service would be affected. He indicated he did not desire to submit statements in his own behalf and did not desire to have a separation medical examination if his discharge were approved.

9. On 13 May 1977, the applicant's immediate commander recommended his discharge due to lack of motivation and negative attitude. On the same date, the applicant's battalion commander indicated he personally interviewed the applicant on 13 May 1977 and recommended his discharge from the military as an unproductive Soldier.

10. On 16 May 1977, the approval authority directed the applicant's honorable discharge under the provisions of Army Regulation 635-200, paragraph 5-39, Trainee Discharge Program.

11. The applicant's DD Form 214 shows he was honorably discharged on 23 May 1977, under the provisions of Army Regulation 635-200, paragraph 5-39, under the Trainee Discharge Program, with corresponding separation code JEM. He was credited with 28 days of net active service.

12. An Explanation of Separation from Service, dated 23 May 1977, shows the applicant declined a copy of his DD Form 214 and declined an explanation of the narrative reason for his separation. The authority for separation shows Army Regulation 635-200, paragraph 5-39, with separation code JEM and a reentry code of 3. The narrative reason for separation shows marginal or non-productive performance (Trainee Discharge Program).

13. The applicant has not provided any medical records and his available service records do not show:

- he was issued a permanent physical profile rating
- he suffered from a medical condition, physical or mental, that affected his ability to perform the duties required by his Military Occupational Specialty (MOS) and/or grade or rendered him unfit for military service
- he was diagnosed with a medical condition that warranted his entry into the Army Physical Disability Evaluation System (PDES)

- he was diagnosed with a condition that failed retention standards and/or was unfitting

14. The applicant previously applied to the ABCMR in November 2010, requesting correction of his DD Form 214 to reflect physical disability separation due to an ankle injury he sustained while in the Army. He stated during BCT, they were trying to force him to train, but his ankle was hurting as a result of injury and now he has problems with his ankle and is being denied benefits. With his prior application, the applicant provided a VA Form 21-4138 (Statement in Support of Claim), dated 22 June 2010, which shows:

a. He claims he was denied access to medical attention prior to his release from Fort Jackson, SC, and there may not be any records of the injury to his right foot and ankle. He has come into the possession of a statement written by his first sergeant attesting to the fact that he went to the hospital Podiatry Clinic where he removed him before he could receive medical attention. He was also never counseled and he received an honorable discharge.

b. Had the military repaired his ankle at the time of his initial injury or when he applied for help on 21 January 1983, the injury would probably have healed by now and he would not be requesting any help. The fact of the matter is that he cannot work as he is in constant pain and cannot stand for more than half an hour at a time.

15. On 19 May 2011, the Board denied the applicant's request, determining the evidence presented does not demonstrate the existence of a probable error or injustice and the overall merits of his case are insufficient as a basis for correction of his records.

16. A VA letter, dated 13 January 2023, shows the applicant has a combined permanent and total service-connected disability rating of 100 percent effective 1 December 2022.

17. 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.

18. 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 again applying to the ABCMR requesting a modification of his discharge to reflect a medical discharge so, in essence, a referral to the Disability Evaluation System. He states:

“I need to change my type of separation to medical discharge under the Army Regulation 635-200. I am trying to apply for housing/home loan and the Department of Veterans Affairs States I do not qualify due to my time in service. For people who enlisted prior to SEPT. 8, 1980, no minimum length of service is necessary to be considered a Veteran for VA benefits.”

c. The Record of Proceedings details the applicant’s military service and the circumstances of the case. The applicant’s DD 214 shows he entered the regular Army 26 April 1977 and was honorably discharged on 23 May 1977 under provision provided in paragraph 5-39 of AR 635-200, Personnel Separations – Enlisted Personnel (25 July 1973): Trainee Discharge Program (TDP), Marginal or Non-productive Performance.

d. This request was previously denied by the ARCMR on 19 May 2011 (AR20100028535). 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. Excerpts from his early May 1977 counseling statement:

“He has a quitter’s attitude and wont tri to keep u in PT [physical training] ...”

“I have counsel PVT [Applicant] on 5, 6, and 7 May 1977. He is disrespectful and will not attempt to train.” (Platoon Sergeant)

“I counseled PVT [Applicant] on 7 and 9 May 1977. He doesn’t feel he is a fit for military service and wants out ... PVT [Applicant} has failed to respond to the efforts of 1SG J. I recommend he be discharged” (Company Commander)

f. On 13 May 1977, his company commander informed him of the initiation of action to discharge him under paragraph 5-39 of AR 635-200:

“The specific reasons form my proposed action are: Your lack of motivation and negative attitude renders you unsuitable for further military service. You have had sufficient time for improvement since your last counseling session, and none has been seen.

- g. The brigade commander approved the discharge on 16 May 1977.
- h. No medical documentation was submitted with the application and the period of Service under consideration predates AHLTA.
- i. There is insufficient evidence the applicant had any duty incurred medical condition which would have failed the medical retention standards of chapter 3 of AR 40-501, Standards of Medical Fitness, prior to his discharge. Thus, there was no cause for referral to the Disability Evaluation System.
- j. JLV shows he has been two service-connected disability ratings: Major Depressive Disorder (100%) and Limited Motion of Ankle, Right (20%). 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 and consequently prematurely ends their career. 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 a referral of his case to the DES is 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 request, supporting documents, evidence in the records, and published DoD guidance for liberal consideration of discharge upgrade requests.
2. The Board reviewed and concurred with the medical advisor's review finding insufficient evidence the applicant had any duty incurred medical conditions that would have failed medical retention standards. The Board determined the narrative reason for separation should remain Trainee Discharge Program and therefore, a referral to the IDES is not warranted.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
■	■	■	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis to amend the decision of the ABCMR set forth in Docket Number AR20100028535 on 19 May 2011.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

REFERENCES:

1. Army Regulation 635-200 (Personnel Separations Enlisted Personnel), in effect at the time, sets forth the basic authority for the separation of enlisted personnel from the Army. The version of the change regulation dated 1 December 1975, incorporated the policy promulgated in Department of the Army Message DAPE MPE 011510Z (Evaluation and Discharge of Enlistees before 180 Active Duty Days), dated August 1973, pertaining to the Army Trainee Discharge Program. The Trainee Discharge Program provided for the expeditious separation of service members who lacked the necessary motivation, discipline, ability, or aptitude to become productive Soldiers or who failed to respond to formal counseling.

a. For discharge under the Trainee Discharge Program, the service member must have the following:

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

b. Soldiers could be separated under this provision when they demonstrated that they:

- were not qualified for retention due to failure to adapt socially or emotionally to military life
- could not meet minimum standards prescribed for successful completion of training because of lack of aptitude, ability, motivation, or self-discipline,
- demonstrated character and behavior characteristics not compatible with satisfactory continued service

2. 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 (DES) and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with DOD Directive 1332.18 (Discharge Review Board (DRB) Procedures and Standards) 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 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 (MMRB); 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.

3. 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.

c. The percentage assigned to a medical defect or condition is the disability rating. A rating is not assigned until the PEB determines the Soldier is physically unfit for duty. Ratings are assigned from the Department of Veterans Affairs (VA) Schedule for Rating Disabilities (VASRD). The fact that a Soldier has a condition listed in the VASRD does not equate to a finding of physical unfitness. An unfitting, or ratable condition, is one which renders the Soldier unable to perform the duties of their office, grade, rank, or rating in such a way as to reasonably fulfill the purpose of their employment on active duty. There is no legal requirement in arriving at the rated degree of incapacity to rate a physical condition which is not in itself considered disqualifying for military service when a Soldier is found unfit because of another condition that is disqualifying. 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.

4. 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.

5. 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.

6. 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.

7. 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//