

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 23 August 2024

DOCKET NUMBER: AR20230007230

APPLICANT REQUESTS: a medical retirement.

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

- DD Form 149 (Application for Correction of Military Record)
- California Army National Guard (CAARNG) Orders
- DD Form 214 (Report of Separation from Active Duty)
- National Guard Bureau (NGB) Form 55 (Honorable Discharge Certificate)
- Indorsement for Trainee Discharge Program
- Department of Veterans Affairs (VA) appeal documents
- CAARNG memorandum
- Army Review Boards Agency letter

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. Through counsel, the applicant states he has suffered from schizophrenia from an early age, but his active duty service aggravated his condition such that a military retirement is warranted.

a. Statement of Facts. Counsel explains that the applicant enlisted into the CAARNG in January 1977 and, from 28 January until 21 February 1977, the applicant served on initial active duty for training.

(1) During basic combat training (BCT), the applicant's fellow Soldiers severely hazed him. While still in BCT, the applicant's leadership initiated separation action against him due to "marginal or non-productive performance."

(2) In 1998, the applicant applied to the Board of Veterans' Appeals for entitlement to service-connection for an acquired psychiatric disorder. The board initially

denied the applicant's request, but the U.S. Court of Appeals for Veterans' Claims vacated that decision.

(3) "In preparing his argument for the Board of Veterans' Appeals, it had to be determined when the Applicant's disability started. There were no previous medical records available for the determination by the Board, only medical records that had been created in preparation of the case before the Board of Veterans' Appeals."

(4) "In preparing the case, it was determined by one doctor that the Applicant suffered from Schizophrenia and has likely been affected by the disorder since 9-11...However, the other doctor diagnosed the Applicant with schizo-affective disorder and found that the demands of military service likely had increased the Applicant's already fragile psychological balance."

b. Argument. After addressing the Board's jurisdiction and the timeliness of the applicant's request, counsel argues the following:

(1) "The Applicant should have been evaluated for a 'Medical/Disability Retirement' based on his subsequent diagnosis of a schizo-affective disorder that was exasperated (sic) due to his brief time in the military. Instead of being referred to a Medical Examination Board (sic), which was warranted given the noticeable mental illness symptoms the Applicant was displaying during his active-duty training, the Applicant was simply discharged....But for this mental disorder, the Applicant likely would have had a successful and honorable career in the ARNG. It was a material error to discharge the Applicant, who was clearly suffering from some type of mental disorder, without being evaluated for a 'Medical Retirement.'"

(2) "Without the 'Medical Retirement,' the Applicant is unable to receive any benefits that he may be entitled to and is left to attempt to deal with his disorder with no assistance from the military after his service...It is a material injustice to allow the Applicant to continue to suffer from his disorder that was substantially affected by his service without the benefit of receiving a 'Medical Discharge.'"

3. The applicant provides documents from his service records, his Board of Veterans' Appeals, and letters received from ARBA and the CAARNG. The VA appellate documents indicate the Board remanded the applicant's case back to a VA regional office for further review; the documents additionally affirm the applicant's schizophrenia diagnosis.

4. The National Personnel Records Center (NPRC) states the applicant's service records are unavailable for review; however, the applicant has provided service record documents with this and previous applications, and they provide sufficient information to address the applicant's request.

a. On 9 December 1976, the applicant underwent a pre-enlistment physical and the examining physician found him qualified for enlistment into the CAARNG. On 16 December 1976, the applicant enlisted into the CAARNG for 6 years and, on 28 January 1977, he entered initial active duty for training at Fort Gordon, GA.

b. On 10 February 1977, the applicant's leadership counseled him for being unresponsive, unwilling to work, and showing a "don't care" attitude; at that point, the applicant had completed 2 weeks of BCT.

c. Also, on 10 February 1977, the applicant's BCT commander advised him, via memorandum, that he was initiating separation action against the applicant, under the provisions of paragraph 5-39 (Trainee Discharge Program (TDP)), Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel). The commander stated his reasons were the applicant's "lack of motivation, negative attitude, failure to adjust to military life, and failure to respond to counseling." Additionally, the commander indicated his intent to recommend the applicant for an honorable character of service, but the final decision rested with the separation authority.

d. In his recommendation to the separation authority, the commander stated, "[Applicant] is a slow and unresponsive trainee. He continually makes mistakes in D&C and, when corrected, laughs in the drill sergeant's face. This laughing continues all the time, even when I counsel him. He thinks the Army is one big joke." "[Applicant] has also repeatedly stated that he wants out of the Army and doesn't care how he gets out."

e. On 21 February 1977, he was honorably released from active duty and returned him to the CAARNG. His DD Form 214 shows he completed 24 days of active duty service. The report additionally reflects the following:

- Item 9a (Type of Separation) - "Relief from ADT See Item 27"
- Item 9c (Authority and Reason) – paragraph 5-39, AR 635-200; SPD (separation program designator) LEM
- Item 9e (Character of Service) - Honorable
- Item 10 (Reenlistment (RE) Code) – "NA"
- Item 27 (Remarks) – "item 9a: Release from active duty for training and returned to National Guard Control for disposition under National Guard Regulations – Marginal or Non-productive performance (Trainee Discharge Program)"

f. On 21 February 1977, the CAARNG honorably discharged the applicant. His NGB Form 22 (Report of Separation and Record of Service) states he completed 2 months and 6 days of CAARNG service; the form does not list a regulatory separation authority.

g. On 13 July 2018, the applicant petitioned the ABCMR, requesting retroactive pay from 16 December 1976, a VA Home Loan Certificate, VA benefits, and Army retirement benefits.

(1) The applicant stated he had been diagnosed with schizophrenia, paranoid-type, and had been on medication since age 16 or 17. While on active duty, he suffered abuse when a captain grabbed him by the collar and assaulted him. Additionally, he submitted documentation indicating he was receiving care from the VA for schizoaffective disorder and severe symptoms of PTSD (post-traumatic stress disorder).

(2) Subsequently, ARBA administratively closed the applicant's request because he had not exhausted all available administrative remedies; the applicant failed to first seek relief from the CAARNG.

h. On 20 August 2020, the applicant filed a second DD Form 149, again requesting retroactive pay from 1977. ARBA administratively closed this application stating the applicant had failed to clearly identify the corrective action he sought.

i. On 20 November 2020, the applicant reapplied to the ABCMR, stating, "The injustice to be corrected: my 100 percent from VA to be reflected VA 100 percent benefit Dec 16/76 to the present time...June 30, 1998 reflected November 25, 2015 benefits. Thank you, Sir/Madam." On 13 August 2021, ARBA administratively closed the applicant's request because, per NPRC, the applicant's service records were unavailable.

## 5. 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 has indicated on his DD 149 that PTSD and Other Mental Health conditions are issues related to this request. He states through counsel that he should have been referred to a medical evaluation board for his schizophrenia, a condition later diagnosed and service connected by the VA:

"The applicant should have been evaluated for a "Medical/Disability Retirement" based on his subsequent diagnosis of a schizoaffective disorder that was exasperated due to his brief time in the military. Instead of being referred to a Medical Examination Board, which was warranted given the noticeable mental illness symptoms the Applicant was displaying during his active-duty training, the Applicant was simply discharged."

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. The applicant's DD 214 shows the former Army National Guard Soldier entered active duty for training on 28 January 1977 and was honorably discharged on 28 February 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. The applicant was first counseled for poor performance in his second week of basic training. On this notification, he drew stick figures which appear non-human, twice referenced a spaceship, and stated he dropped out of the 6<sup>th</sup> grade.

e. On 10 February 1977 (day 14 in the Army), his company commander notified him of the initiation of action to separate him under paragraph 5-39 of AR 635-200: The specific reasons for my proposed action are: Your lack of motivation, negative attitude, failure to adjust to military life, and failure to respond to counseling.

f. Given his markedly poor performance, references to spaceships, and his command's move to separate him within two weeks of his entering active duty, it is almost a certainty the applicant's mental health condition had existed prior to his entering active duty and therefore he was not eligible for referral to the DES for a condition which had existed prior to service.

g. Paragraph 1-8.2a(1) and (2) of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (10 September 1973).

"a. There are certain abnormalities and residual conditions which, when discovered, impel the conclusion that they must have existed or have originated before the individual entered the military service.

(1) Examples of these conditions are scars; fibrosis of the lungs; atrophy following disease of the central or peripheral nervous system; healed fractures; absent, displaced, or resected organs; supernumerary parts; congenital malformations; and similar conditions in which medical authorities are in such

consistent and universal agreement as to their cause and time of origin that no additional confirmation is needed to support the conclusion of their existence prior to military service.

(2) Similarly, manifestation of lesions or symptoms of chronic disease from date of entry, or so close to that date that the disease could not have originated in so short a period, will be accepted as proof that the disease existed prior to entrance into active military service.”

h. Conditions which are found to have existed prior to service and not permanently aggravated by military service are not compensable.

i. There is insufficient evidence the applicant had any duty incurred or permanently service aggravated preexisting 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 one service-connected disability ratings of 100% for disorganized Schizophrenia. However, the DES only compensates an individual for service incurred or permanently service aggravated 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. 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:

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 review based on law, policy, and regulation. Upon review of the applicant's petition, available military records, and the medical review, the Board concurred with the advising official finding that the applicant's Department of Veterans Affairs rating determinations are based on the roles and authorities granted by Congress to the Department of Veterans Affairs and executed

under a different set of laws. Based on this, the Board determined referral of his case to the Disability Evaluation System (DES) 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 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. Title 10, USC, section 1556 (Ex Parte Communications Prohibited) 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 applicant's (and/or their counsel) prior to adjudication.
3. AR 635-200, in effect at the time, set forth the basic authority for the separation of enlisted personnel from the Army. DA Message DTG 011510Z August 1973 (later incorporated into the regulation as paragraph 5-39) outlined the requirements for the TDP.
  - a. The TDP provided for the separation of Soldiers who lacked the necessary motivation, discipline, ability, or aptitude to become productive soldiers or have failed to respond to formal counseling; in addition, the message authorized the discharge of trainees who did not meet physical standards for enlistment.
  - b. The regulation further mandated that the Soldier being considered for separation had to have voluntarily enlisted; be in BCT or advanced individual training; and, by his/her separation date, completed less than 180 days of active duty on their current enlistment. Additionally, the regulation stated it was contrary to the intent of the policy for commanders to use this provision in place of processing Soldiers through medical channels due to physical or mental defects.
  - c. If the Soldier opted not to rebut the proposed discharge, the commander exercising special court-martial authority was authorized to order separation. The characterization of service for Soldiers separated under this provision of regulation was honorable.



4. AR 635-5-1 (SPD), in effect at the time, stated Soldiers involuntarily released from active duty under the TDP received an SPD of "LNF." The associated reason for separation was, "Miscellaneous-General (Trainee Discharge Program)."

5. AR 40-501, in effect at the time, outlined standards for medical fitness, to include the medical requirements for entry into military service and retention on active duty.

a. Chapter 2, section XVI (Psychoses, Psychoneuroses, and Personality Disorders) stated the following were causes for rejection for appointment, enlistment, and induction:

- Psychosis or authenticated history of a psychotic illness
- History of a psychoneurotic reaction that caused hospitalization; prolonged care by a physician; loss of time from normal pursuits for repeated periods; symptoms or behavior of a repeated nature which impaired school or work efficiency
- History of a brief psychoneurotic reaction or nervous disturbance within the preceding 12 months that required medical attention
- Personality disorders

b. Chapter 3 (Retention Medical Fitness Standards), section XV (Psychoses, Psychoneuroses, and Personality Disorders) stated the following were causes for referral into the Army's Physical Disability Evaluation System:

- Recurrent psychotic episodes, existing symptoms, or residuals thereof, or a recent history of psychotic reaction sufficient to interfere with performance of duty or with social adjustment
- Persistence or severity of symptoms of psychoneurosis sufficient to require frequent hospitalization, or the lack of improvement by hospitalization, or the necessity to place in a very protected environment for duty
- Soldiers with personality disorders were considered administratively unfit and were to be recommended for administrative separation
- Disorders of intelligence, i.e., primary mental deficiency or special learning defects of such a degree as to interfere with satisfactory duty performance; these Soldiers were considered administratively unfit and were to be recommended for administrative separation

6. AR 40-3 (Medical, Dental, and Veterinary Care), in effect at the time, included policies and procedures for the referral of Soldiers for medical evaluation and a physical fitness determination.

a. Paragraph 6-11 (Psychoneurotic Patients). The regulation stated that, in many cases, treatment or clarification and possible removal of situational pressures resulted

in the cessation of neurotic symptomatology, leaving only the basic substrata of a personality or character defect. Since personality and character defects fell within the group of character and behavior disorders, military patients manifesting these conditions were candidates for disposition under the provisions of AR 635-200, when separation was indicated. Such cases were to be referred to a medical board only when the professional or administrative factors were complex.

b. Paragraph 6-12 (Psychotic Patients). At those medical treatment facilities that did not provide specialized psychiatric care and the preponderance of clinical evidence indicated the presence of a psychosis, and treatment, observation, or evaluation for a period of more than 30 days was indicated, the MTF was to transfer the patient to a facility with specialized psychiatric services. At facilities with specialized psychiatric services, an evaluation of response to treatment was to be made as soon as practicable after a definite diagnosis had been established. In those cases where treatment had not resulted in substantial improvement, disposition was to be made as expeditiously as practicable.

7. AR 635-40 (Physical Evaluation for Retention, Retirement, or Separation), in effect at the time, prescribed policies and procedures for Soldiers who might be physically unfit for continued military service. Per chapter 8 (Reserve Components), Reserve Component members called or ordered to active duty for a period of more than 30 days were to be processed in the same manner as a member of the Regular Army.

a. Chapter 4 (Procedures).

(1) Section I (Initiation of Medical Evaluation). Medical evaluations could be initiated either by the Soldier's commander, when the commander believed the Soldier was unable to perform the duties of his/her office, trade, rank, or rating due to physical disability, or by the MTF commander, when the Soldier was under treatment.

(2) Section II (Medical Evaluation). MTF commanders had primary medical care responsibility and were to conduct an examination of Soldiers referred for evaluation. When it appeared the Soldier was not medically qualified to perform his/her duties, the MTF commander referred the Soldier to a medical evaluation board (MEB).

(a) The MEB evaluated the Soldier based upon the medical retention standards outlined in AR 40-501; those failing retention standards were referred to a physical evaluation board (PEB) for a fitness determination.

(b) For psychiatric cases, in the statement of present condition, there was to be a clear description as to how the member's symptoms affected his employability and ability to function, (e.g., Could the member work independently; could the member work

with minimal supervision; or would he/she require close supervision? Was the mental impairment cause extensive, occasional, or minimal job instability?).

(3) Section III (PEB). The PEB determined whether the Soldier was unfit for continued military service.

(a) When found unfit, the PEB was to assess whether the disability resulted from willful misconduct or willful neglect; whether the disability was permanent or temporary; and what percentage of disability applied for each diagnosed condition.

(b) For Reserve Component Soldiers called to active duty for more than 30 days, the PEB additionally evaluated whether the disability or aggravation thereof occurred while the Soldier was entitled to basic pay and, when the Soldier had completed less than 8 years of military service, whether performing active duty was the proximate cause of any medical condition incurred in the line of duty.

(c) EPTS (existed prior to service) Conditions. A member was not to be found unfit because of physical defects which were known to have existed at the time of his acceptance for military service and which had remained essentially unchanged since acceptance and had not interfered with his performance of effective military service. The fact that a member was examined and accepted for active duty was not conclusive evidence that the disability was incurred after such acceptance. Additionally, due consideration was to be given to the length of service of the member with respect to the aggravation of such disability.

(d) Service Aggravation. When it was determined that a member had a physical defect that existed prior to entry on active duty or inactive duty for training (EPTS), or which resulted from some other nonservice connected condition (not in line of duty), the board had to further consider whether the defect was aggravated by military service. If the worsening of such condition was attributable to or had been accelerated by the member's military service beyond the normally anticipated rate, had he not been exposed to such service, a finding of aggravation must be considered.

b. The Commanding General, U.S. Army Military Personnel Center (MILPERCEN) acted on behalf of the Secretary of the Army in the disposition of physical disability cases. Available dispositions were the following:

- Returned to duty
- Separated with severance pay when the combined disability rating was 20 percent or less and the disability was incurred in the line of duty
- Concerning combined ratings of 30 percent or more: when the PEB could not confirm the permanency of a disabling condition, it recommended the Soldier

for the Temporary Disability Retired List; conditions not likely to change over time resulted in placement on the Permanent Disability Retired List

//NOTHING FOLLOWS//