

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 16 February 2024

DOCKET NUMBER: AR20230007939

APPLICANT REQUESTS: an honorable physical disability retirement in lieu of his general, under honorable conditions discharge for unsuitability.

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

- DD Form 149 (Application for Correction of Military Record)
- Department of Veterans Affairs (VA) Total and Permanent (T&P) disability letter, 7 January 1993
- VA Nurse letter, 9 January 2007
- Board of Veterans' Appeals decision, 28 September 2010
- VA Rating Decision, 14 October 2010
- VA Appointed Fiduciary letter, 30 August 2017
- VA summary of benefits letter, 22 February 2018
- VA summary of benefits letter, 11 February 2022
- VA Form 20-0995 (Decision Review Request: Supplemental Claim), undated
- VA Form 21-0781a (Statement in Support of Claim for Service Connection for Post-Traumatic Stress Disorder (PTSD) Secondary to Personal Trauma), undated
- VA Form 21-4138 (Statement in Support of Claim), undated

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code (USC), 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 his mental status was never taken into consideration and some of his non-commissioned officers (NCOs) knew his state of mind was substandard. He was sexually assaulted while in the stockade. His VA documentation shows he has an honorable discharge, but the Army has not updated his discharge status on his

DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge). He requests a 100 percent rating for posttraumatic stress disorder.

3. The applicant enlisted in the Regular Army on 28 July 1966.

4. The applicant accepted nonjudicial punishment (NJP) on the following occasions:

a. 23 September 1966 for absenting himself from his unit from 2130 hours, 20 September 1966 until 0730 hours 21 September 1966. He was restricted to the company area for 7 days and assigned extra duties for 7 days.

b. On 30 November 1966 for absenting himself from his unit from 25 November 1966 until 29 November 1966. He was restricted to the company area for 14 days and assigned extra duties for 14 days.

c. On 19 May 1967 for violating a battery pass policy by using a fraudulent pass at 2300 hours, 18 May 1967. He was restricted to the Will Kaserne barracks for 14 days and assigned extra duties for 14 days.

d. On 26 September 1967 for failing to go at the time prescribed to his appointed place of duty at 0600 hours, 26 September 1967. He was restricted to the Will Kaserne barracks for 14 days and assigned extra duties for 14 days.

6. A Report of Psychiatric Evaluation, dated 4 October 1967, shows the applicant underwent a psychiatric evaluation prior to administrative action under the provision of Army Regulation (AR) 635-212 (Personnel Separations - Discharge - Unfitness and Unsuitability). He was diagnosed with passive aggressive personality found to have existed prior to service and was psychiatrically cleared for administrative separation. The applicant indicated to his interviewer he felt further military service would only result in meaningless, fruitless, punitive confinement.

7. The applicant accepted NJP on 11 October 1967 for failing to go at the time prescribed to his appointed place of duty at 0600 hours, 11 October 1967. He was restricted to the Will Kaserne barracks for 14 days and assigned extra duties for 14 days.

8. On 12 October 1967, the applicant was notified he was being considered for elimination because of his immature and maladaptive modes of relating to authority figures as well as a passive-aggressive personality, which will persist despite attempts at counselling and administrative manipulations. It was also felt this disorder was not amenable to rehabilitation efforts which could normally be provided by the military.

9. The applicant underwent a medical examination for separation purposes on 13 October 1967. A Standard Form (SF) 89 (Report of Medical History) shows the applicant reported he was in good health with a history of fainting in hot weather, ear, nose and throat issues, tooth and gum issues, ingrown toenails, seasickness, and shortness of breath from smoking.

10. The corresponding SF 88 (Report of Medical Examination) shows the applicant was assigned a physical profile of 111111 and found qualified for separation.

A physical profile 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.

11. Special Court-Martial Order 44 shows the applicant was arraigned and tried on 27 October 1967.

a. He was found guilty of the following offenses committed on 24 October 1967:

- stealing a camera
- breaking restriction
- wrongfully having an unauthorized Liberty Pass in his possession with the intent to deceive

b. He was sentenced to:

- be reduced to the grade of Private, E-1
- be confined at hard labor for six (6) months
- forfeit \$64.00 per month for six (6) months

12. On 9 November 1967, the applicant's commanding officer recommended the applicant be discharge for unsuitability due to his immature and maladaptive mode of relating to authority figures and his passive-aggressive personality which was not amenable to rehabilitation efforts. The recommendation notes, the applicant's behavior was due to incapacity to become a satisfactory Soldier within the meaning of unsuitability.

13. On 4 December 1967, having been advised by counsel of the basis for action to separate him for unsuitability elected to waived consideration of his case by a board of

officer and did not submit statements on his own behalf. He acknowledged his understanding of the consequences of his discharge.

14. The applicant's discharge was approved on 26 December 1967.

15. The applicant was discharged on 3 January 1968 under the provisions of AR 635-212 with a character of service of general, under honorable conditions. He was credited with 1 year 2 months 28 days total active service.

16. The applicant provided:

a. A letter from the VA, dated 7 January 1993, stating he is considered by the VA to be totally and permanently disabled.

b. A letter of support from a VA nurse, dated 9 January 2007, stating he receives compensation for chronic PTSD symptoms resulting from a sexual trauma.

c. The results of his Board of Veterans' Appeals of 28 September 2010 showing his entitlement to service connection for PTSD related to an in-service sexual assault.

d. His VA Rating Decision, dated 14 October 2010, shows he is service connected for PTSD with a 100 percent rating effective 15 July 2004.

e. A VA Appointed Fiduciary letter, dated 30 August 2017, showing his spouse was appointed to care for his finances.

f. Two VA summary of benefits letters, dated 22 February 2018 and 11 February 2022, stating he has a 100 percent rated service-connected disability.

g. A copy an undated in Support of Claim for Service Connection for PTSD Secondary to Personal Trauma stating he was sexually assaulted by several male service members while he was in the stockade.

h. A copy of an undated Statement in Support of Claim from his wife stating due to his mental capacity, the applicant is unable to complete his forms and she is doing so on his behalf.

17. On 30 August 2023, the ABCMR requested the Army Criminal Investigation Command provide a copy of any redacted reports related to the applicant. On 5 September 2023, the ABCMR was notified no reports exist pertaining to the applicant's sexual assault.

18. 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.

19. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor reviewed the supporting documents, the Record of Proceedings (ROP), and the applicant's available records in the Interactive Personnel Electronic Records Management System (iPERMS), the Health Artifacts Image Management Solutions (HAIMS) and the VA's Joint Legacy Viewer (JLV). The applicant requests an upgrade in his General, Under Honorable Conditions discharge and consideration for a medical discharge. He stated that PTSD, Other Mental Health, and Sexual Assault conditions were related to his request. He further stated that he was awarded 100% rating for PTSD by the VA in 2010.

b. The applicant's record and circumstances surrounding the case were summarized in the ABCMR ROP. Of note, the applicant enlisted in the Regular Army on 28Jul1966. His MOS was 36K20 Wireman. While in service, he underwent 07Nov1967 court-martial proceedings and was adjudged guilty of committing the following offences on 24Oct1967: Stealing a camera; breaking restriction; and being wrongfully in possession of an unauthorized Liberty Pass. Other instances of misconduct are mentioned below. He was discharged on 03Jan1968 under the provisions of AR 635-212 for unsuitability. His service was characterized as General, Under Honorable Conditions.

c. The applicant reports in his 2023 ABCMR application, that while in the stockade between October 1967 and December 1967, he was raped several times per week, and that he reported this to command/officer on duty and nothing was done. The following evidence was noted in the applicant's record:

- 04Oct1967 Report of Psychiatric Evaluation. He was in service a little over a year and had 6 Article 15s for AWOL and disobeying orders of NCOs and officers. His affect was appropriate. There was no anxiety, depression, or psychosis. He was assessed to be intellectually limited and his judgement appeared immature. He was raised in an environment of fighting among all family members. He ran away from home 4 times. He reported many power struggles with teachers which resulted in 3 suspensions from school. He left school at age 16. He reported a record of numerous arrests by civilian police for underage drinking and petty theft. Diagnosis: Passive Aggressive Personality, Not in Line of Duty; Existed Prior to Service. He was noted to have an immature

and maladaptive manner of relating to authority figures. He was psychiatrically cleared for administrative discharge processing under provisions of AR 635-212.

- JLV showed anti-anxiety medication (alprazolam) was prescribed in 2001. In April 2001 a physician noted his history of atypical chest and shortness of breath (negative work up in 2000) and suspected Anxiety Disorder (18Apr2001 Primary Care Note). He reported getting very nervous around people and difficulty controlling his anger. Psychiatry diagnosed him with Adjustment Disorder. In 2004, he was seen for increasing anxiety and paranoia. He implied having endured serious trauma while in service but refused to discuss it. He reported a wide variety of substance use in his early 20's. Psychiatry diagnosed PTSD.
- In his 2007 personal statement, he described his mental health symptoms (panic attacks, depression hearing voices, anger), abuse of multiple substances, difficulty in relationships, and difficulty with maintaining employment due to rape while in service.
- 28Sep2010 Board of Veterans' Appeals proceedings indicated the applicant was granted service connection for PTSD attributed to in service sexual assault. They found evidence of behavior changes in response to the assault.
- 14Oct2010 Disabled American Veterans Rating Decision showed that service connection for PTSD was granted at 100%, effective 15Jul2004.

d. In the 13Oct1967 Report of Medical History (SF 89, completed for separation proceedings), the applicant endorsed the following: Dizziness/fainting in the heat; tooth and gum problems; ingrown toenails; infrequently seasick; and minor shortness of breath due to smoking. Of note, there were no positive responses to items related to behavioral health. In the 13Oct1967 Report of Medical Examination (SF 88), the applicant's physical profile was PULHES 111111, and he was deemed qualified for service. There were no service treatment records for medical conditions (including BH) that were available for review. Based on records available for review, there was insufficient medical evidence to support the applicant had a condition which failed retention standards or AR 40-501 chapter 3 at the time of discharge from service.

e. Concerning the applicant's request for discharge upgrade, the 03Sep2014 Secretary of Defense Liberal Guidance Memorandum and the 25Aug2017 Clarifying Guidance were considered. The record showed service-connected MST and PTSD diagnoses. These conditions are mitigating for offences which led to his discharge from service. The Board may consider upgrade from General, Under Honorable Conditions to Honorable and change in reason for separation to Secretarial Authority.

Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant was diagnosed with service incurred PTSD and MST.

(2) Did the condition exist, or did the experience occur during military service? Yes. The applicant was diagnosed with service incurred PTSD and MST.

(3) Does the condition or experience actually excuse or mitigate the discharge? Yes, in part. His AWOL, failure to report, missing formation/reveille, insubordination and breaking restriction offences are mitigated. PTSD/MST condition can be associated with the following sequelae: Avoidant behavior and distrust/disrespect of authority (and substance abuse as well). The applicant's misconduct involving theft of property and wrongful possession of unauthorized pass misconduct are not mitigated as these actions would not be considered part of the natural history of any of the applicant's diagnosed BH conditions.

BOARD DISCUSSION:

1. The Board reviewed the applicant's request to upgrade his discharge to an honorable physical disability retirement in lieu of his general, under honorable conditions discharge for unsuitability, his supporting documents, his statement and the statements he provides, the evidence in the records, the ARBA Medical Advisors opinion, and published Department of Defense guidance for consideration of discharge upgrade requests and for liberal consideration of discharge upgrade requests.
2. After carefully considering the applicant's request and all the available evidence, argument, and references to include the various Department of Defense guidance for consideration of discharge upgrade requests and for liberal consideration of discharge upgrade requests, the Board determined relief was not warranted.
3. The Board concurs with the advisor's opinion that while some of the applicant's misconduct could be mitigated, the applicant's misconduct involving theft of property and wrongful possession of unauthorized pass misconduct are not mitigated as these actions would not be considered part of the natural history of any of the applicant's diagnosed BH conditions.
4. Based on records available for review, there was insufficient medical evidence to support the applicant had a condition which failed retention standards or AR 40-501 chapter 3 at the time of discharge from service.
5. The Board found insufficient evidence of in-service mitigating factors and the applicant provided no evidence of post-service achievements or letters of reference in support of a clemency determination.

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, USC, 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. AR 635-212 (Personnel Separations - Discharge Unfitness and Unsuitability) provides the provisions for eliminating enlisted personnel who are found to be unfit or unsuitable for further military service.

a. Action will be taken to separate an individual for unfitness when it is clearly established that-

(1) Despite attempts to rehabilitate or develop him as a satisfactory soldier further effort is unlikely to succeed; or

(2) Rehabilitation is impracticable, or he is not amenable to rehabilitation measures; or

(3) An unfitting medical condition is not the direct or substantial contributing cause of his unfitness.

b. An individual separated by reason of unsuitability will be furnished an honorable or general discharge certificate as warranted by his military record.

3. 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 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 grounds. This guidance does not mandate relief, but rather provides standards and principles to guide BCM/NRs 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.

4. Title 10, USC, chapter 61, provides the Secretaries of the Military Departments with authority to retire or discharge a member if they find the member unfit to perform military duties because of physical disability. The U.S. Army Physical Disability Agency is responsible for administering the Army physical disability evaluation system and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with DOD Directive 1332.18 and Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation).

5. Title 38 USC, section 1110 (General - Basic Entitlement) states for disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

6. Title 38 USC, section 1131 (Peacetime Disability Compensation - Basic Entitlement) states for disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during other than a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

7. AR 635-40 (Physical Evaluation for Retention, Retirement, or Separation) establishes the Army Disability Evaluation System and sets forth policies, responsibilities, and procedures that apply in determining whether a Soldier is unfit because of physical disability to reasonably perform the duties of his office, grade, rank, or rating. Only the unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability. Once a determination of physical unfitness is made, all disabilities are rated using the Department of Veterans Affairs Schedule for Rating Disabilities (VASRD).

a. Paragraph 3-2 states disability compensation is not an entitlement acquired by reason of service-incurred illness or injury; rather, it is provided to Soldiers whose service is interrupted and who can no longer continue to reasonably perform because of a physical disability incurred or aggravated in military service.

b. Paragraph 3-4 states Soldiers who sustain or aggravate physically-unfitting disabilities must meet the following line-of-duty criteria to be eligible to receive retirement and severance pay benefits:

(1) The disability must have been incurred or aggravated while the Soldier was entitled to basic pay or as the proximate cause of performing active duty or inactive duty training.

(2) The disability must not have resulted from the Soldier's intentional misconduct or willful neglect and must not have been incurred during a period of unauthorized absence.

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

9. Section 1556 of Title 10, USC, requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//