

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 5 November 2024

DOCKET NUMBER: AR20230008573

APPLICANT REQUESTS:

- Reconsideration of her previous request to change her uncharacterized character of service to honorable and, in effect, to show her discharge as being due to a service-incurred disability, vice a disability that existed prior to service (EPTS)
- As a new request, correction of her service record to show her identity as "American Indian" not "Black"
- Permission to appear personally before the Board, via video/telephone

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

- Three DD Forms 149 (Application for Correction of Military Record)
- "Your Steps for Upgrading Your Discharge"
- Request to U.S. Representative
- Department of Veterans Affairs (VA) Form 21-4138 (Statement in Support of Claim)
- DD Form 214 (Certificate of Release or Discharge from Active Duty)

FACTS:

1. Incorporated herein by reference are military records, as were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20200009688, on 9 September 2021.

2. The applicant states the Army discharged her after she incurred injuries due to a fall from Victory Tower while in basic combat training (BCT).

a. For five to seven days after she fell, the applicant reported to sick call to receive medical check-ups and pain medications. Additionally, the doctors subjected her to multiple x-rays, MRIs (magnetic resonance imaging), and "with contrast" bone scans to measure the extent of her injuries. Despite being on crutches for the duration of BCT, the cadre still forced her to participate in most activities. Also, during this period, the applicant affirms she was exposed to fraternization while on night watch.

b. The applicant maintains her physical injuries are well-documented. While she continues to experience discomfort from those injuries, she needs the Board to correct her separation documents so they reflect the proper discharge coding (i.e., stating her injuries resulted from a fall). The applicant adds that, during night watch, the cadre would try to exploit her through verbal promises of favors and advancement; "Most of the female privates obliged for fear of retaliation and (because they wished) to advance their military careers. While I did not have to engage in physical activities, I did not have much fear due to knowing I was being discharged...."

c. On her application, the applicant has checked blocks for "Sexual Assault/Harassment" and "Reprisal/Whistleblower"; attached to her application, she includes documents already reviewed by the Board's in its previous consideration but does not offer documentary substantiation to support assertions of sexual assault/harassment or reprisal/whistleblower retaliation.

d. Regarding the amendment of her records to show she is "American Indian" not "Black," the applicant offers no documentary evidence that would help to verify that request.

4. A review of the applicant's service record shows the following:

a. On 20 November 1996, the applicant enlisted into the Regular Army for 4 years; she was 17 years old. Orders immediately transferred her to Fort Jackson, SC for initial entry training.

b. On 21 January 1997, in preparation for a medical evaluation board (MEB), a physician completed a narrative summary pertaining to the applicant. The doctor reported that the applicant had gone on sick call complaining of back and leg pains; the applicant had a history of recurrent back pain due to a 1994 motor vehicle accident. While the applicant was still in high school, she started having recurrent pain in her hamstring muscles because she competed in track. The examining physician listed the following:

(1) Subjective Findings – Low back pain and hamstring pains which prevent satisfactory performance of military duties.

(2) Objective Findings – PE – Tenderness L-S paraspinal; Tenderness hamstring muscles.

(3) Diagnosis – Recurrent Low Back Pain; Recurrent Hamstring Pains, bilateral

(4) Recommendations – "This Soldier meets the criteria of paragraph

5-2 (Separation for Non-Service Aggravated, EPTS Conditions upon Soldier's Waiver of PEB (Physical Evaluation Board) Evaluation – Criteria), AR (Army Regulation) 635-40 (Physical Evaluation for Retention, Retirement, or Separation) and has been informed of the right to appeal these proceedings to a PEB if so desired. Legal counsel was made available to the Soldier."

c. On 21 January 1997, an MEB determined the applicant failed the medical retention standards outlined in AR 40-501 (Standards of Medical Fitness) for the following two EPTS conditions: recurrent low back pain and recurrent hamstring pains, bilateral. The MEB recommended separation under the provisions of AR 635-40, chapter 5 (Separation for Non-Service Aggravated, EPTS Conditions upon Soldier's Waiver of PEB Evaluation).

d. On 21 January 1997, the applicant concurred with the MEB's findings; in addition, the applicant submitted a request for separation and waiver for PEB evaluation. In her request, she wrote:

(1) "I request discharge for physical disability based upon the findings and recommendations of a medical evaluation board (MEBD). The MEBD considers me unqualified for retention in the military service because of physical disability that was found to have existed prior to my entry into active service (EPTS). The MEBD found the disability neither incident to nor aggravated by my military service."

(2) "I have been fully informed and understand that I am entitled to the same consideration and processing as any other Soldier of the Army separated for physical disability. I understand this includes consideration of my case by a PEB. However, I elect not to exercise this right. I also understand the VA will determine entitlement to VA benefits."

(3) "If this application is approved, I understand that I will be separated by reason of EPTS physical disability. I also understand that I will receive a discharge in keeping with the character of my service as decided by the officer designated to (direct) my separation."

e. On 31 January 1997, the separation authority approved the applicant's separation request and ordered her uncharacterized discharge; on 10 February 1997, the Army separated her accordingly.

f. Her DD Form 214 shows she completed 2 months and 21 days of her 4-year enlistment contract. The report additionally reflects the following:

- Item 11 (Primary Specialty) – "None"

- Item 13 (Decorations, Medals, Badges, Citations, and Campaign Ribbons Awarded or Authorized) – Marksman Marksmanship Qualification Badge with Rifle Bar
- Item 14 (Military Education) – "None"
- Item 25 (Separation Authority) – AR 635-40, chapter 5
- Item 26 (Separation (Separation Program Designator (SPD) Code) – "KFN"
- Item 27 (Reentry (RE) Code) – RE-3
- Item 28 (Narrative Reason for Separation) – "Disability, Existed Prior to Service – Medical Board"

g. On 15 July 2020, the applicant petitioned the ABCMR, requesting the upgrade of her uncharacterized discharge to an honorable physical disability separation.

(1) The applicant detailed how she sustained her injuries as a result of a fall:

(a) In November 1996, while participating in basic combat training, she and the other Soldiers were instructed to climb to the top of the 50-foot Victory Tower and rappel down the wall as a partner was at the bottom securing your rope.

(b) The applicant was at the top of the rope and her partner at the bottom; as the applicant rappelled, the partner was to pull on the applicant's rope to prevent her from coming straight down. The applicant's partner failed to secure the rope and, as a result, the applicant came straight down feet first. The applicant felt pain in her left leg, but she did not bother to ask for assistance and continued with the training.

(c) The next morning, the applicant felt severe pain and had difficulty walking. After this, she made regular visits to sick call, and on days when she was in too much pain, they sent her to the clinic to help register Soldiers, take vital signs, and assist in scheduling appointments. Throughout her remaining time on active duty, she had to deal with daily leg pain, muscle spasms, low back pain, and thigh stiffness. At her separation, they assured her she would receive an honorable discharge under medical pretenses.

(2) The Army Review Boards Agency (ARBA) Medical Advisor provided a medical review and noted the following:

(a) The applicant's pre-entrance Report of Medical History (Standard Form (SF) 93) and Report of Medical Examination (SF 88) show she was in good health, without significant medical history or conditions. She did receive an entrance waiver for her weight being one pound below enlistment standards. Early in her training, she presented multiple times for back and leg pain and was subsequently referred for evaluation under provisions in chapter 5 of AR 635-40.

(b) The ARBA Medical Advisor opined that a current referral of the applicant into the Army's Disability Evaluation System was not warranted.

(3) After considering the applicant's arguments and evidence; the applicant's service record; and the ARBA Medical Advisor's review, the Board voted to deny relief. The Board determined that the applicant's discharge based on an EPTS condition was executed in accordance with the governing regulations and there was no basis for any other disposition of her case. Additionally, because the applicant was in an entry-level status at the time of her separation, and uncharacterized character of service was appropriate.

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 (MER – AHLTA and/or MHS Genesis), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant is applying to the ABCMR requesting reconsideration of their prior denial of her request that her DD 214 be changed to show she was discharged for a service-connected disability and not for a medical condition which had been determined to have existed prior to her entrance onto active duty; and that her discharge be upgraded from uncharacterized to honorable. She states in part:

"I was discharged after suffering from injuries from a fall off of Victory Tower at Fort Jackson (SC). After fall, I reported to Sick Hall 5-7 days a week for medical checks and medication for pain. I was subjected to multiple X-rays, MRI, and with contrast bone scans to measure the extent of my injuries. I utilized crutches for duration of time at Basic Training, while being forced to participate in most activities. Also exposed to fraternization acts/ practices during night watch duty.

For my injury I was directed to complete nightly watch duties where I was in the company of, and in receipt of verbal attempted offerings, exploitation of female privates being enticed by superiors for favors and advancement opportunities. Most of the female privates obliged for fear of retaliation and wishing to advance their military careers. While I did not have to engage in physical activities, I did not have

much fear due to knowing I was being discharged, just not sure when. 2 months later.”

c. The Record of Proceedings details the applicant’s military service and the circumstances of the case. Her signed DD 214 shows she entered the regular Army on 20 November 1996 and received an uncharacterized discharge on 10 February 1997 under the provisions in Chapter 5 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (17 October 1990): “Expeditious Discharge.” The military separation code KFN denotes “Disability, Existed Prior to Service, Med Board.”

d. This request is very similar to the one which was previously denied by the ABCMR on (AR20200009688). In that application, the applicant indicated on her DD 149 the PTSD and Sexual Harassment were issues related to her request. In the current application, she had indicated that Sexual Assault/Harassment and Reprisal/Whistleblower are issues related to this request. However, the requests per se are the same - an upgrade of her uncharacterized discharge and a referral to the DES.

e. Rather than repeat their findings here, the board is referred to the record of proceedings and medical advisory opinion for that case. This review will concentrate on the new evidence submitted by the applicant. Because of the period of Service under consideration, there are no clinical encounters in the EMR or documents in iPERMS. JLV shows the applicant is not registered with the Veterans Hospital Administration.

f. No new medical evidence was submitted with this application. No evidence supporting her assertions of Sexual Assault/Harassment and Reprisal/Whistleblower was submitted with the application.

g. There remains no evidence the applicant had any service incurred medical condition which would have failed the medical retention standards of chapter 3, AR 40-501 prior to her discharge. Thus, there was no cause for referral to the Disability Evaluation System.

h. An uncharacterized discharge is given to individuals who separate prior to completing 180 days of military service, or when the discharge action was initiated prior to 180 days of service. This type of discharge does not attempt to characterize service as good or bad.

i. It is the opinion of the Agency Medical Advisor that neither a referral of her case to the DES nor a discharge upgrade is warranted.

BOARD DISCUSSION:

1. The Board determined the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.
2. 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 applicant was separated while in training due to a preexisting condition that existed prior to service. There is no new medical evidence submitted by the applicant with this application. Likewise, there is no evidence supporting her assertions of Sexual Assault/Harassment and Reprisal/Whistleblower submitted with the application. The Board reviewed and agreed with the medical reviewer's determination that there remains no evidence the applicant had any service incurred medical condition which would have failed the medical retention standards of chapter 3, AR 40-501 prior to her discharge. Thus, there was no cause for referral to the Disability Evaluation System. Since the applicant did not complete initial entry training, was not awarded an MOS, and completed 2 months and 21 days and was separated in the first 180 days of active service, her service was properly uncharacterized. An uncharacterized discharge is given to individuals who separate prior to completing 180 days of military service, or when the discharge action was initiated prior to 180 days of service. This type of discharge does not attempt to characterize service as good or bad.
 - b. Designation as "American Indian": Deny. The Army has an interest in maintaining the accuracy of its records; for historical purposes, the data and information contained in those records should reflect the conditions and circumstances, as they existed at the time of the records' creation. For that reason, the Board normally limits its corrections to documents like the DD Form 214, which is routinely reviewed by such outside agencies as the VA and by potential civilian employers.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

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

BOARD DETERMINATION/RECOMMENDATION:

1. Regarding the issue being reconsidered (character of service and reason), 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 AR20200009688, on 9 September 2021

2. Regarding the new issue (show her identity as "American Indian" not "Black"), 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 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 (ABCMR) applicant's (and/or their counsel) prior to adjudication.

2. Army Regulation (AR) 635-40 (Physical Evaluation for Retention, Retirement, or Separation), in effect at the time, set forth policies, responsibilities, and procedures for determining whether Soldiers were unfit for continued military service due to physical disability. Chapter 5 (Separation for Non-Service Aggravated, EPTS Conditions upon Soldier's Waiver of PEB Evaluation) provided guidance for separating enlisted Soldiers on active duty for more than 30 days and based on a non-service aggravated medical condition that existed prior to the Soldiers entering military service.

a. Criteria.

- The Soldier had to be eligible for referral into the disability evaluation system
- He/she failed AR 40-501 (Standards of Medical Fitness) medical retention standards
- The disqualifying medical condition existed prior to he/she entering the current term of duty and was not aggravated by such duty
- The Soldier was mentally competent
- Further hospitalization was not required
- The Soldier was advised that a physical evaluation board (PEB) assessment was required in order to receive Army disability benefits, but that waiving a PEB would not prevent him/her applying for Department of Veterans Affairs benefits

b. Commanders with special court-martial convening authority could approve discharges under this chapter. Unless otherwise indicated, the Soldier was to be issued a DD Form 256A (Honorable Discharge Certificate) or DD Form 257A (General Discharge Certificate (Under Honorable Conditions)).

3. AR 635-200 (Active Duty Enlisted Administrative Separations), in effect at the time, set forth the basic authority for the separation of enlisted personnel.

a. Paragraph 3-7a (Honorable Discharge) stated an honorable discharge was separation with honor.

(1) Issuance of an honorable discharge certificate was appropriate when the quality of the Soldier's service generally met the standards of acceptable conduct and performance of duty or was otherwise so meritorious that any other characterization would clearly be inappropriate. Where there were infractions of discipline, commanders were to consider the extent thereof, as well as the seriousness of the offense.

(2) Separation authorities could furnish an honorable discharge when subsequent honest and faithful service over a greater period outweighed disqualifying entries in the Soldier's military record. It was the pattern of behavior, and not the isolated instance, which commanders should consider as the governing factor.

b. Paragraph 3-7b (General Discharge) stated a general discharge was a separation from the Army under honorable conditions. When authorized, separation authorities issued general discharges to Soldiers whose military record was satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Paragraph 3-9 (Uncharacterized Separations). Soldiers separated in an entry-level status receive an uncharacterized character of service. A separation was considered to be entry level when processing was initiated during the Soldier's first 180 days of continuous active duty. The Secretary of the Army was authorized, on a case-by-case basis, to direct the issuance of an honorable character of service when such action was clearly warranted by unusual circumstances involving personal conduct or duty performance.

4. AR 635-5 (Separation Documents), in effect at the time, prescribed policies and procedures for DD Form 214 preparation. The regulation stated the narrative reason for separation was tied to the Soldier's regulatory separation authority and directed DD Form 214 preparers to AR 635-5-1 (Separation Program Designators (SPD)) for the appropriate entries in item 28 (Narrative Reason for Separation). For item 27 (RE Code), the regulation referred preparers to AR 601-210 (Active and Reserve Components Enlistment Program).

5. AR 635-5-1, in effect at the time, stated Soldiers separated in accordance with chapter 5, AR 635-40 were to receive an SPD of "KFN" and have "Disability, Existed Prior to Service – Medical Board" entered in item 28 of their DD Form 214.

6. The SPD/RE Code Cross Reference Table, in effect at the time, provided instructions for determining the RE code for Active Army Soldiers. This cross reference table showed the SPD code and a corresponding RE code. The SPD code of "KFN" had a corresponding RE code of "3."

7. AR 601-210, in effect at the time, prescribed policies and procedures for the enlisting prospective and former Soldiers. Paragraph 3-22 (U.S. Army RE Codes) showed the following:

- RE-1 – Fully qualified for immediate reenlistment
- RE-3 – Not eligible for reenlistment unless waiver consideration was permissible and was granted

8. AR 15-185 (ABCMR), currently in effect, states:

a. Paragraph 2-2 (ABCMR Functions). The ABCMR decides cases on the evidence of record; it is not an investigative body.

b Paragraph 2-9 (Burden of Proof) states:

(1) The ABCMR begins its consideration of each case with the presumption of administrative regularity (i.e., the documents in an applicant's service records are accepted as true and accurate, barring compelling evidence to the contrary).

(2) The applicant bears the burden of proving the existence of an error or injustice by presenting a preponderance of evidence, meaning the applicant's evidence is sufficient for the Board to conclude that there is a greater than 50-50 chance what he/she claims is verifiably correct.

c. Paragraph 2-11 (ABCMR Hearings). An applicant is not entitled to a hearing before the Board; however, the request for a hearing may be authorized by a panel of the Board or by the Director of ABCMR.

9. On 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRBs) and Service Boards for Correction of Military/Naval Records (BCM/NRs) to carefully consider the revised PTSD criteria, detailed medical considerations and mitigating factors when taking action on applications from former service members administratively discharged under other than honorable conditions and who have been diagnosed with PTSD by a competent mental health professional representing a civilian healthcare provider in order to determine if it would be appropriate to upgrade the characterization of the applicant's service.

10. On 25 August 2017, the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to Discharge Review Boards (DRBs) and Board for Correction of Military/Naval Records (BCM/NRs) when considering requests by Veterans for modification of their discharges due in whole or in part to: mental health conditions, including Post Traumatic Stress Disorder (PTSD); Traumatic Brain Injury (TBI); sexual assault; or sexual harassment.

Boards are to give liberal consideration to Veterans petitioning for discharge relief when the application for relief is based in whole or in part to those conditions or experiences. The guidance further describes evidence sources and criteria and requires Boards to consider the conditions or experiences presented in evidence as potential mitigation for misconduct that led to the discharge.

11. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military DRBs and 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.

12. Title 10, U.S. Code, section 1034 (Military Whistleblower Protection Act (MWPA), enacted 29 September 1988, amended Title 10 provisions relating to communications with a Member of Congress by prohibiting any person from restricting a member of the U.S. Armed Forces to communicate with an Inspector General (IG), except for communications that were prohibited by statute.

a. The law prohibited retaliatory personnel actions against a member for making or preparing to make such a communication.

b. The law also directed the Department of Defense IG (DOD IG) to promptly investigate any allegation that a prohibited personnel action has taken place or been threatened with respect to any communication to a Member of Congress or IG complaining or disclosing information reasonably believed to evidence a violation of law, mismanagement, a gross waste of funds, an abuse of authority, or a substantial and

specific danger to public health or safety. Within 10 days of completing such an investigation, the IG was required to report the results to the Secretary of Defense.

c. Members of the U.S. Armed Forces could, within 30 days after receipt of a copy of such investigative report, to petition the appropriate military board for correction of his or her military record concerning the matter, and the members were entitled to receive legal assistance by a judge advocate in any such matter before a military corrections board. The Act provided administrative procedures for the hearing of such petitions, together with appropriate corrective and disciplinary action to be taken and allowed for judicial review of any order resulting from such hearing, if petitioned for within 60 days after notice of the hearing's result.

//NOTHING FOLLOWS//