

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 26 March 2024

DOCKET NUMBER: AR20230008619

APPLICANT REQUESTS: in effect, correction of his records to show he was separated due to service-connected medical disabilities.

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

- DD Form 149 (Application for Correction of Military Record)
- Department of Veterans Affairs (VA) summary of benefits letter
- 1,200 pages of medical records

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.
2. The applicant states he is requesting his medical board be reviewed and reevaluated. He contends that he is still having the same medical problems.
3. The applicant enlisted in the Regular Army on 23 January 2002. He reenlisted on 30 December 2005 and on 10 May 2008.
4. A DA Form 5691-R (Request for Reserve Component Assignment Orders), dated 20 August 2015, shows the applicant voluntarily accepted an assignment to an Army National Guard (ARNG) unit upon completion of his active service.
5. The applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was honorably released from active duty under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), chapter 4 (Separation for Expiration of Service Obligation), by reason of completion of required active service, and transferred to an ARNG unit on 9 February 2016.

6. The applicant's National Guard Bureau Form 22 (Report of Separation and Record of Service) shows he was discharged from the ARNG on 18 April 2018 by reason of unsatisfactory performance.

7. The applicant provided a VA summary of benefits letter showing he is receiving service-connected disability compensation, for undisclosed medical disabilities, with a combined service-connected evaluation of 100%.

8. 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.

9. 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 (EMR – 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/or the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant is applying to the ABCMR requesting an upgrade of his 18 April 2018 under honorable conditions (general) discharge and, in essence, a referral to the Disability Evaluation System (DES). He states: "I'm currently still having the same medical problems."

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. His DD 214 shows he entered the regular Army on 23 January 2002 and was honorably discharged on 9 February 2016 at the completion of his required active service under authority provided in chapter 4 of AR 635-200, Active Duty Enlisted Administrative Separations (17 December 2009). Though it does not list a period of service in a hazardous duty pay area, his Enlisted Record Brief shows he Served in Iraq for 15 months, from 27 December 2007 thru 22 March 2009.

d. The National Guard Report of Separation and Record of Service (NBG Form 22) for the period of service under consideration shows he entered the ARNG on 10 February 2016 and was discharged from the GAARNG with an Under Other Than Honorable characterization of service on 18 April 2018 under the separation authority provided by paragraph 6-35j of NGR 600-200, Enlisted Personnel Management (31 July

2009): Unsatisfactory Participation. Discharge orders published 26 April 2018 by the GAARNG show he was involuntarily separated effective 18 April 2018 under other than honorable conditions for "Continuous and willful absence." Neither the separation packet nor documents addressing this separation were submitted with the application or uploaded into iPERMS.

e. While still on active duty (Compo 1), the applicant was placed on a non-duty limiting permanent physical profile for "Difficulty breathing with running" on 8 July 2015. No other conditions were listed on the profile. The applicant was marked as fully capable of performing all the functional activities required of all Soldiers, including live in an austere environment. The profile simply allowed the applicant to perform an alternate aerobic event in lieu of the 2-mile run event for his Army Physical Fitness Test (APFT). No further permanent profiles were issued.

f. The EMR shows that in addition to being evaluated and treated for this breathing condition and a variety of minor conditions, he sustained a left anterior cruciate ligament (ACL) rupture for which he underwent left ACL reconstruction/augmentation with allograft on 9 October 2015 as an outpatient. Six weeks later he informed the surgeon his knee was much improved, he had completed his four weeks of physical therapy and did not feel he needed more, had been jogging, and felt great. The provider encouraged the applicant to reengage with physical therapy to complete the post-operative protocol, to only perform light impact activities, and to follow-up with him in 2 months. There are no further encounters related to his knee.

g. The applicant underwent his pre-separation mental health evaluation on 6 January 2016 at which time he presented with symptoms of PTSD and requested a referral for further evaluation: "Reviewed SM's [Service Member] medical record and met with SM to assess need for continued behavioral health services. Actively listened to SM and provided resources for behavioral health as an intervention. SM reports that he has been having flashbacks, anxiety, and avoidance of triggers related to being "blown up by a suicide bomber" back in 2008. SM reports poor concentration and the inability to be in groups or crowds. SM reports increasing symptoms and wants to be tested for PTSD. A referral will be put in today and marked as expediated as SM's final out in February. SM agreed to call and follow up on consult placed Friday, ..."

h. No such evaluation was identified in the EMR.

i. On his 25 January 2018 pre-separation examination, the applicant was noted to have a history of ACL reconstruction, the asthma for which he was on a non-duty limiting permanent physical profile, and his PTSD for which he was undergoing evaluation. The provider cleared him for separation.

j. eCase notes in MEDCHART written by a GAARNG nurse case manager show the applicant was undergoing a mental health evaluation at the VA during his transition from active duty to the ARNG: 20160516. SM [Service Member] contacted PHC [primary health care?] stated he is currently transitioning from active duty. Currently being evaluated through the VA for PTSD and has more appointments to follow. SM is encouraged to follow-up with PHC if service needed through the PHP [Psychological Health Program] program.

k. The applicant received one NCOER while in the GAARNG. It was an annual covering 20 February 2016 thru 9 February 2017 and shows he was a successful Soldier. He passed his APFT and met height/weight standards. His rater opined:

- served as platoon sergeant during Hurricane Mathew relief operations, successfully managing multiple patrols and traffic control points simultaneously
- showed initiative in the absence of higher authority, quickly improvising solutions for equipment and personnel shortages during an emergency

l. His senior rater opined: SGT [Applicant] will be able to hit the ground running in any assignment at a higher level. He is fully capable of making sound decisions quickly when limited information is available. Promote with peers.” Again, neither the separation packet nor documents addressing this separation were submitted with the application or uploaded into iPERMS.

m. JLV shows he had a 30% VA service-connected disability rating for PTSD effective 10 February 2016 and this was increased to 50% effective 12 December 2018. The VA Schedule for Rating Disabilities shows the criteria for rating mental health conditions. For these two ratings, the 30% rating states “generally functioning satisfactorily, with routine behavior, self-care, and conversation normal” while the 50% rating concludes with “difficulty in establishing and maintaining effective work and social relationships:”

Occupational and social impairment with reduced reliability and productivity due to such symptoms as: flattened affect; circumstantial, circumlocutory, or stereotyped speech; panic attacks more than once a week; difficulty in understanding complex commands; impairment of short- and long-term memory (e.g., retention of only highly learned material, forgetting to complete tasks); impaired judgment; impaired abstract thinking; disturbances of motivation and mood; difficulty in establishing and maintaining effective work and social relationships50

Occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks (although generally functioning satisfactorily, with routine behavior, self-care, and

conversation normal), due to such symptoms as: depressed mood, anxiety, suspiciousness, panic attacks (weekly or less often), chronic sleep impairment, mild memory loss (such as forgetting names, directions, recent events)
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n. His only NCOER from the ARNG shows he was a successful Soldier thru February 2017. A Reserve Component Soldier is at risk of involuntary separation after accruing 9 or more unexcused absences within a one-year period. Given his separation from the GAARNG was effective in April 2018, he must have started accruing unexcused absences shortly after his first year in the GAARNG.

o. The cause for this drastic change in his performance is unknown. It is more likely than not that his worsening service-connected PTSD with its associated avoidant behaviors led to his involuntary separation for unsatisfactory participation. There is no other derogatory information in the record. The rating change seen above shows that while the applicant may have been performing relatively well when his PTSD symptoms were consistent with a 30% rating (as seen his NCOER), his symptoms increased so as to warrant a 50% rating in December 2018. However, there is insufficient probative evidence the applicant's PTSD or other medical conditions was of such severity as to have failed the medical retention standards of paragraph 3-33 of AR 40-501, Standards of Medical Fitness, prior to his discharge. Thus, there was no cause for referral to the Disability Evaluation System.

p. It is the opinion of the ARBA medical advisor his Under Other Than Honorable conditions characterization of Service was unduly harsh, and given the absence of other derogatory information, his PTSD fully mitigates his multiple unexcused absences and a discharge upgrade if fully warranted. However, a referral to the DES is not warranted.
 Kurta Questions:

- Did the applicant have a condition or experience that may excuse or mitigate the discharge? YES: PTSD
- Did the condition exist or experience occur during military service? YES
- Does the condition or experience actually excuse or mitigate the discharge? YES: As this condition is associated with avoidant behaviors, the condition fully mitigates the multiple unexcused absences for which he was administratively separated.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. The applicant requests in essence the Board refer him to Disability Evaluation System

(DES). He served on active duty from 23 January 2002 to 9 February 2016 and completed his required active service. He served in Iraq from 27 December 2007 to 22 March 2009. After is separation from active duty, he entered the ARNG but ended up being discharged from the GAARNG in April 2018 with an under other than honorable characterization of service on 18 April 2018 per NGR 600-200 due to unsatisfactory participation. His ARNG separation packet and/or the documents addressing this separation were neither submitted with the application nor uploaded into iPERMS. The Board reviewed and agreed with the medical reviewing official's finding insufficient probative evidence the applicant had any medical conditions of such severity as to have failed the medical retention standards of AR 40-501, Standards of Medical Fitness, prior to his discharge. Thus, the Board determined there was no cause for referral to the Disability Evaluation System.

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.

[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. Title 10, U.S. Code, section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.

2. Army Regulation 40-501 (Standards of Medical Fitness) provides that for an individual to be found unfit by reason of physical disability, he or she must be unable to perform the duties of his or her office, grade, rank, or rating. Performance of duty despite impairment would be considered presumptive evidence of physical fitness.

3. Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation) establishes the Army Disability Evaluation System (DES) 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 or her office, grade, rank, or rating. It provides that a Medical Evaluation Board is convened to document a Soldier's medical status and duty limitations insofar as duty is affected by the Soldier's status. A decision is made as to the Soldier's medical qualifications for retention based on the criteria in Army Regulation 40-501. The regulation in effect at the time of the applicant's release from active duty states:

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 service.

b. The mere presence of impairment does not of itself justify a finding of unfitness because of physical disability. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the member reasonably may be expected to perform because of his or her office, rank, grade, or rating. The Army must find that a service member is physically unfit to reasonably perform his or her duties and assign an appropriate disability rating before he or she can be medically retired or separated.

c. When a member is being processed for separation for reasons other than physical disability (e.g., retirement, resignation, relief from active duty, administrative separation, completion of required active service, etc.), his or her continued performance of duty, until he or she is referred to the DES for evaluation for separation for reasons indicated above, creates a presumption that the member is fit for duty.

4. Title 38, U.S. Code, Sections 1110 and 1131, permit the VA to award compensation for disabilities which were incurred in or aggravated by active military service. However, an award of a VA rating does not establish an error or injustice on the part of the Army.
5. Title 38, Code of Federal Regulations, Part IV is the VA Schedule for Rating Disabilities. The VA awards disability ratings to veterans for service-connected conditions, including those conditions detected after discharge. As a result, the VA, operating under different policies, may award a disability rating where the Army did not find the member to be unfit to perform his/her duties. Unlike the Army, the VA can evaluate a veteran throughout his or her lifetime, adjusting the percentage of disability based upon that agency's examinations and findings.
6. Section 1556 of Title 10, U.S. Code, 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 ABCMR applicants (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//