

IN THE CASE OF: [REDACTED]

BOARD DATE: 20 March 2024

DOCKET NUMBER: AR20230008804

APPLICANT REQUESTS: in effect –

- reconsideration of his previous request to change the narrative reason for his separation to show he was discharged due to a disability
- a personal appearance before the Board via video or telephone

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:
DD Form 149, Application for Correction of Military Record.

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR2007007816 on 23 October 2007 and AR20130006639 on 2 January 2014.
2. The applicant states, in effect, the U.S. Army was aware that he had spina bifida and they still allowed him to enlist and to also participate in Airborne Training. He contends that he hurt his back during training and as a result he was placed on a permanent physical profile. He was subsequently “run out” of the 82nd Airborne Division. He further contends that his back injury is service connected.
3. On 22 January 1969, the applicant underwent an entrance physical. The applicant indicated “NO” in response to having back trouble of any kind. The examining military physician found the applicant was qualified for entry into the Regular Army (RA) and he was qualified for Airborne Training.
4. The applicant enlisted in the RA on 14 February 1969. He completed Airborne Training on 18 July 1969. During his period of service, the applicant held the following military occupational specialties: medical corpsman, medical specialist, and light weapons infantryman.

5. His record of misconduct includes accepting nonjudicial punishment under the provisions of Article 15 of the Uniform Code of Military Justice:

- for failing to obey a lawful order to get a haircut on or about 19 December 1969 and failing to be at his appointed place of duty at the time prescribed on or about 28 December 1969
- failing to be at his appointed place of duty at the time prescribed on or about 12 April 1970
- being disrespectful (language) to a noncommissioned officer on or about 25 November 1970 and disobeying a lawful order from a noncommissioned officer to get a haircut on or about 2 December 1970
- failing to go at the time prescribed to his appointed place of duty on or about 13 June 1971

6. He appeared before a Summary Court Martial on 1 October 1970 for disobeying a lawful command from his superior commissioned officer to get a haircut and report back to him by 1400 hours on 18 September 1970. The applicant pled guilty and was found guilty of this offense. His sentence included restriction for 14 days and forfeiture of \$25.00 for one month. The sentence was adjudged on 8 October 1970 and approved on 16 October 1970.

7. A review of the applicant's medical records shows that on 13 November 1970 he complained of lower back pain that had been present for 18 months and that the pain had increased in the last 6 months. The Standard Form 600, Health Record-Chronological Record of Medical Care, shows that the examining physician noted the applicant had spina bifida and that his back pain centered in the area of the defect.

8. On 13 November 1970, the applicant was issued a temporary physical profile for aggravation of a congenital defect. He was treated for ongoing back pain on 24 November 1970, 25 November 1970, and 28 January 1971.

9. On 3 February 1971, the applicant was issued a second temporary physical profile for a defect of the spine (spina bifida).

10. Neurology notes, 25 February 1971, show the applicant reported that his lower back pain began while in "Jump School." The military physician stated that the applicant reported "no history of back pain prior to entering service although defect was obviously there."

11. On 15 March 1971, the applicant was issued a permanent profile for his condition of spina bifida.

12. The record contains a DA Form 2496, Disposition Form, 14 May 1971, Subject: Termination of Airborne Status. This form shows the applicant's airborne status was terminated effective 24 April 1971 due to his permanent physical disqualification. It further shows that the applicant was retained in the unit due to being a disciplinary case.

13. On 12 August 1971 –

a. The applicant completed a mental status evaluation which found no significant mental illness. He was found to be mentally responsible, able to distinguish right from wrong, able to adhere to the right, and had the mental capacity to understand and participate in Board proceedings.

b. The applicant underwent a physical examination for the purpose of separation under Army Regulation 635-212, Personnel Separations-Discharge-Unfitness and Unsuitability. The military physician noted the applicant's spina bifida and permanent physical profile as defects/diagnoses. The applicant was found qualified for separation.

14. On 19 October 1971, he was issued a temporary physical profile for a partial shoulder separation.

15. His record contains a DA Form 458, Charge Sheet, 13 November 1971, which shows the applicant was charged with the following offenses:

- wrongful possession of .24 grams, more or less, of cocaine on or about 5 October 1971
- wrongful possession of a brass pipe containing marijuana on or about 5 October 1971

16. On 22 November 1971, the applicant requested a discharge for the good of the service. His chain of command concurred with his request. On 27 December 1971, his request was approved, and the approval authority directed that the applicant receive an undesirable discharge certificate.

17. The applicant was discharged on 6 January 1972. His DD Form 214, Report of Separation from Active Duty, shows he completed 2 years, 10 months, and 22 days of net service for the period. His service was characterized as under conditions other than honorable.

18. In May 1977, the Army Discharge Review Board reviewed the applicant's discharge under the provisions of Public Law 95-126 and determined his characterization of service warranted upgrading in accordance with the Department of Defense (DOD) Special Discharge Review Program (SDRP). On 21 July 1978, the applicant was issued a new DD Form 214, which shows the reason and authority for his discharge as "DOD

DISCHARGE REVIEW PROGRAM (SPECIAL) SPD KCR” and his service was characterized as under honorable conditions (general).

19. Regulatory guidance, in effect at the time, stated a member who is charged with an offense for which he could be dismissed or given a punitive discharge may not be referred for disability processing. However, if the officer exercising appropriate court-martial jurisdiction dismisses the charge or refers it for trial to a court-martial which cannot adjudge such a sentence, the case may be referred for disability processing.

20. Applicants do not have a right to a formal hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

21. 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 an upgrade of his 6 January 1972 discharge characterized as under honorable conditions (general), and, in essence, a referral to the Disability Evaluation System (DES). He again states that because of his low back pain and occult spina bifida found during his period of service, he should have been disqualified enlisting but later discharged for a service incurred disability. He concludes with:

“A person with a spinal defect is automatically disqualified from military duty. So, knowing that and except {sic; accept} then they assume all responsibility for injuries.”

c. The Record of Proceedings details the applicant’s military service and the circumstances of the case. His DD 214 for the period of Service under consideration shows he entered the regular Army on 16 February 1971 and was discharged on 27 October 1972 under the provisions provided in chapter 10 of AR 635-200, Personnel Management – Enlisted Personnel: Discharge for the Good of the Service. The DD 214 states the applicant had 234 days lost under Title 10, United States Code, Section 972.

d. This request was previously denied by the ABCMR on 23 October 2007 (AR20070007816) and again on 2 February 2014 (AR20130006639). Rather than

repeat their findings here, the board is referred to the record of proceedings for those cases. Because these denials was before the institution of liberal consideration polices, this review will concentrate on evidence of a potentially mitigating mental health condition as well as new evidence submitted with this application.

e. No new documentation was submitted with the application. There are no encounters in JLV.

f. Paragraph 2-36 (a-h) of AR 40-501, Standards of Medical Fitness (10 November 1969) addresses the procurement medical fitness standards medical retention standards for spinal conditions does not state that any spinal deformity is a cause for rejection for enlistment. The applicant's occult spina bifida would have fallen under paragraph 2-36b:

“b. Complaint of disease or injury of the spine or sacroiliac joints either with or without objective signs which has prevented the individual from successfully following a physically active vocation in civilian life. Substantiation or documentation of the complaint without objective signs is required.

g. While the applicants accession examination is not available for review, there is no evidence the applicant was symptomatic or met the criteria for rejection.

h. JLV shows the applicant receives care at Veterans Hospital Administration facilities as a non-service-connected veteran and has no diagnosed mental health conditions. As such, there is no evidence he had a mental health or other medical condition which would have then contributed to or would now mitigate his multiple UCMJ violations.

i. The applicant's misconduct made him ineligible for referral to the DES for service aggravation of his preexisting lumbar spine condition. Paragraph 1-2c of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (17 August 1970) states:

“A member who is charged with an offense for which he could be dismissed or given a punitive discharge may not be referred for disability processing. However, if the officer exercising appropriate court-martial jurisdiction dismisses the charge or refers it for trial to a court-martial which cannot adjudge such a sentence, the case may be referred for disability processing.”

j. Paragraph 1-2e of AR 635-40 provides similar guidance:

“An enlisted member may not be referred for disability processing if he is the subject of action which may result in an undesirable discharge unless the officer exercising general court-martial jurisdiction has determined that the disability was the cause or substantial contributing cause of the misconduct which led to

administrative discharge proceedings or has otherwise made a determination that the member will be referred for disability processing.”

k. It is the opinion of the ARBA medical advisor that both a discharge upgrade and a referral of his case to the DES remain unwarranted.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation. Upon review of the applicant's petition, available military records and medical review, the Board concurred with the advising official finding insufficient evidence to support both a discharge upgrade and a referral of his case to brought before the DES board again. The Board determined the applicant's record is absent any evidence he had a mental health or other medical condition which would have then contributed to or would now mitigate his multiple UCMJ violations. The Board noted in accordance with regulatory guidance the applicant's misconduct made him ineligible for referral to the DES for service aggravation of his preexisting lumbar spine condition.

2. The Board found no evidence in the applicant's records to show the applicant was symptomatic or met the criteria for rejection. The Board recognize the applicant's contentions regarding his low back pain and occult spina bifida found during his period of service, he should have been disqualified enlisting but later discharged for a service incurred disability, however the Board determined under liberal consideration changes to the applicant's narrative reason are not warranted. The Board agreed based on the advising opine there is insufficient evidence to change the narrative reason for the applicant's separation to show he was discharged due to a disability or referral of this case to DES. Therefore, the Board determined reversal of the applicant's previous Board decision is without merit and relief is denied.

3. The applicant's request for a personal appearance hearing was carefully considered. In this case, 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.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

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

BOARD DETERMINATION/RECOMMENDATION:

The Board found 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 AR2007007816 on 23 October 2007 and AR20130006639 on 2 January 2014.

3/25/2024

X █

CHAIRPERSON

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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 Army Board of Correction of Military Records (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 (AR) 635-40, Physical Evaluation for Retention, Retirement, or Separation, in effect at the time, establishes policies and prescribed the procedures for the physical disability evaluation of members of the Army for retention, retirement, or separation.

a. A member who is charged with an offense for which he could be dismissed or given a punitive discharge may not be referred for disability processing. However, if the officer exercising appropriate court-martial jurisdiction dismisses the charge or refers it for trial to a court-martial which cannot adjudge such a sentence, the case may be referred for disability processing.

b. 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. Examples include congenital malformations and similar conditions in which medial 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.

c. The 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, including military occupational specialty and skill level.

3. Title 10, U.S. Code, section 1203, provides for the physical disability separation with severance pay of a member who has less than 20 years of service and a disability rated at less than 30 percent.

4. Section 1556 of Title 10, United States 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.

5. AR 15-185, ABCMR, prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR.

a. The ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

b. Applicants do not have a right to a formal hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

//NOTHING FOLLOWS//