

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 20 February 2025

DOCKET NUMBER: AR20230009490

APPLICANT REQUESTS: in effect, medical disability retirement with a rating of 100 percent with compensation effective 27 January 1966.

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

- DD Form 149 (Application for Correction of Military Record) with enclosures –
  - Enclosure A – Medical Records (4 pages)
  - Enclosure B – Sworn Statements
  - Enclosure C – Applicant's Statement of Facts, 21 February 2023
  - Enclosure D – Applicant's Memorandum, 11 July 2023
  - Enclosure E – DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge) for the period ending 27 January 1966
  - Enclosure F – Department of Veterans Affairs (VA), Ratings Decision, 20 December 2022

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, in effect, he was the victim of a racially motivated assault by military and civilian police on 3 December 1965. He was later discharged without medical care and suffers from post-traumatic stress disorder (PTSD), traumatic brain injury (TBI), memory loss of the entire event, depression, and loss of hearing due to this attack. He was unaware of the event until he filed a VA claim for hearing loss and received a copy of his medical records.
3. The applicant provides:
  - a. An excerpt of his service treatment records:

(1) Standard Form 88 (Heath Record) showing the applicant was treated on 3 and 5 December 1965, after being struck on the left side of his head with a fist or flashlight by the Monterey police. The applicant reported a loss of hearing in his left ear. The exam showed he had a traumatic tear of the left ear drum.

(2) DA Form 2173 (Statement of Medical Examination and Duty Status) showing the applicant was treated at military hospital for a perforated left ear drum that occurred on 3 December 1965. The medical officer noted in his opinion the applicant was under the influence of alcohol when he was injured. The applicant's commander noted he was on active duty and absent with authority when the incident occurred.

(3) DD Form 261 (Report of Investigation Line of Duty and Misconduct Status) shows the applicant suffered a traumatic perforation of his left tympanic membrane on 3 December 1965 during an altercation with the police and two civilians, The findings were in the line of duty.

b. Three DA Forms 19-24 (Statements) from the applicant and another Soldier with the applicant on 3 December 1965, detailing the events leading the applicant's injury.

c. The applicant's statement of facts shows he had the following issues:

- the inability to establish and maintain relationships
- a difficulty adopting to stressful situations including work and co workers
- depression affected his ability to function
- is receiving VA counseling
- attends weekly psychiatric session for PTSD and depression

d. The applicant's memorandum to his congressional representative 11 July 2023, stating he was discharged without a medical care, racially discriminated against, and detailing the events that led to his TBI, PTSD, depression, and memory loss.

e. VA Ratings Decision letter, 22 December 2022 showing he was granted 50 percent service-connected disability for other specified trauma and stressor related disorder with TBI claimed as PTSD and blow to side of head with imbalance.

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

a. On 28 January 1963, the applicant enlisted into the Regular Army for a 3-year commitment.

b. On 4 November 1965 the applicant completed his initial entry physical exam.

c. Special Orders Number 12 Extract, 12 January 1966 shows the applicant was being relieved from active duty and transferred to the U.S. Army Reserve Control Group on 27 January 1966, not by reason of physical disability.

d. On 27 January 1966, the applicant completed a statement showing there had been no changes in his medical condition since his last medical examination on 4 November 1965.

e. Also on 27 January 1966, DA Form 1811 (Physical and Mental Status on Release from Active Duty), noted the applicant was physically qualified for separation or for reenlistment.

f. On 27 January 1966, the applicant was honorably released from active duty and transferred to the U.S. Army Reserve by reason of expiration of term of service. His DD Form 214 shows he completed 3 years of total active service. The report also shows Item 26 (Decorations, Medals, Badges, Citations, and Campaign Ribbons Awarded or Authorized) – marksmanship (Rifle), Good Conduct Medal, and Letter of Commendation.

g. On 8 January 1968, the applicant was discharged from the U.S. Army Reserve (Annual Training) for enlistment into the Air Force Reserve.

5. On 15 March 2024, correspondence from CID noted a search of the Army criminal file indexes did not reveal any information pertaining to the applicant.

#### 6. 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 applying to the ABCMR requesting a referral to the Disability Evaluation System (DES). He has indicated on his DD 149 that PTSD, TBI, and other mental health concerns are issues related to his claim. He also indicates hearing loss is condition for consideration.

c. The Record of Proceedings outlines the applicant's military service and the circumstances of the case. His DD 214 shows he entered the regular Army 28 January 1963 and received an honorable discharge on 27 January under the provisions provided in AR 635-200, Personnel Management – Enlisted Personnel at the expiration of his term in service. The applicant's separation program number (SPN) was 201 for expiration term of service.

d. Submitted documentation shows the applicant sustained some kind of potential hearing loss with abrasions behind his left ear and on a ring finger sustained in some form of late-night altercation on 3 December 1965.

e. The applicant claims a loss of consciousness related to the event but none was found in the witness statements.

f. The applicant had undergone a pre-separation medical examination of 4 November 1965 at which time no defects or diagnoses were detected and he was found qualified for separation. On 27 January 1966, the applicant signed a statement "There has been no change in my medical condition since my last medical examination on 4 November 1965 with the following exception – none."

g. There is insufficient probative evidence the applicant had any permanent medical condition which would have failed the medical retention standards of chapter 3, AR 40-501 prior to his voluntary separation. Thus, there was no cause for referral to the Disability Evaluation System.

h. JLV shows he has been awarded three VA service-connected disability ratings, including PTSD in 2022, and impaired hearing and tinnitus both in 2021. However, the DES only compensates an individual for service incurred 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; or which did not cause or contribute to the termination of their military career. These roles and authorities are granted by Congress to the Department of Veterans Affairs and executed under a different set of laws. It is the opinion of the ARBA Medical Advisor that a referral of his case to the Disability Evaluation System is unwarranted.

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 insufficient evidence the applicant had any permanent medical condition which would have failed the medical retention standards of prior to his voluntary separation. The Board noted 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 an increase in the applicant's rating decision at the time of separation was not appropriate and referral of his case to the Disability Evaluation System (DES) is not warranted.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:XX	:XX	:XX	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.



X //SIGNED//

CHAIRPERSON

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. Title 10, U.S. Code, 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).

a. Soldiers are referred to the disability system when they no longer meet medical retention standards in accordance with Army Regulation 40-501 (Standards of Medical Fitness), chapter 3, as evidenced in an Medical Evaluation Board (MEB); when they receive a permanent medical profile rating of 3 or 4 in any factor and are referred by an Military Occupational Specialty Medical Retention Board; and/or they are command-referred for a fitness-for-duty medical examination.

b. The disability evaluation assessment process involves two distinct stages: the MEB and Physical Evaluation Board (PEB). The purpose of the MEB is to determine whether the service member's injury or illness is severe enough to compromise his/her ability to return to full duty based on the job specialty designation of the branch of service. A PEB is an administrative body possessing the authority to determine whether or not a service member is fit for duty. A designation of "unfit for duty" is required before an individual can be separated from the military because of an injury or medical condition. Service members who are determined to be unfit for duty due to disability

either are separated from the military or are permanently retired, depending on the severity of the disability and length of military service. Individuals who are "separated" receive a one-time severance payment, while veterans who retire based upon disability receive monthly military retired pay and have access to all other benefits afforded to military retirees.

c. The mere presence of a medical impairment does not in and of itself justify a finding of unfitness. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier may reasonably be expected to perform because of his or her office, grade, rank, or rating. Reasonable performance of the preponderance of duties will invariably result in a finding of fitness for continued duty. A Soldier is physically unfit when a medical impairment prevents reasonable performance of the duties required of the Soldier's office, grade, rank, or rating.

4. Army Regulation 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.

a. Paragraph 3-1 states the mere presence of an 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 Soldier reasonably may be expected to perform because of their office, grade, rank, or rating. The overall effect of all disabilities present in a Soldier whose physical fitness is under evaluation must be considered. All relevant evidence must be considered in evaluating the fitness of a Soldier. Findings with respect to fitness or unfitness for military service will be made on the basis of the preponderance of the evidence.

b. 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.

c. 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.

d. Paragraph 4-1 states that a Soldier charged with an offense under the Uniform Code of Military Justice (UCMJ) or who is under investigation for an offense chargeable under the UCMJ, which could result in dismissal or punitive discharge, may not be referred for, or continue, disability processing unless – (1) the investigation ends without charges; (2) the officer exercising proper court-martial jurisdiction dismisses the charges; or, (3) the officer exercising proper court-martial jurisdiction refers the charges for trial to a court-martial that cannot adjudge such a sentence.

e. Paragraph 4-2 states that a Soldier may not be referred for, or continue, disability processing if under sentence of dismissal or punitive discharge. If the sentence is suspended, the Soldier's case may then be referred for disability processing. A copy of the order suspending the sentence must be included in the Soldier's records. If action to vacate the suspension is started after the case is forwarded for disability processing, the PEB serving the area must be promptly notified to stop disability processing. Disability processing may resume if the commander decides not to vacate the suspension.

5. Title 10, USC, Section 1201 provides for the physical disability retirement of a member who has either 20 years of service or a disability rating of 30 percent or greater.

6. Title 10, USC, Section 1203 provides for the physical disability separation of a member who has less than 20 years of service and a disability rating at less than 30 percent.

7. Title 38, USC, Sections 1110 and 1131, permits 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.

a. 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.

b. The VA does not have authority or responsibility for determining physical fitness for military service. The VA awards disability ratings to veterans for service-connected conditions, including those conditions detected after discharge, to compensate the

individual for loss of civilian employability. 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 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.

8. 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.

9. 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.

10. 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.

//NOTHING FOLLOWS//