

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 18 June 2024

DOCKET NUMBER: AR20230009517

APPLICANT REQUESTS:

- upgrade of his under honorable conditions (general) discharge
- completion of the Integrated Disability Evaluation System process
- reinstatement of his rank to specialist/E-4

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

- DD Form 293 (Application for the Review of Discharge or Dismissal)
- DA Form 7652 (Disability Evaluation System) Commander's Performance and Functional Statement
- Veterans Affairs (VA) Disability Evaluation System Proposed Rating
- Physical Evaluation Board (PEB) documents

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 his discharge was inequitable due to one incident in his 44 months of service. He wants the opportunity to finalize the Medical Evaluation Board (MEB) process.
3. On 25 January 2016, the applicant enlisted in the Regular Army. Upon completion of training, he was awarded military occupational specialty 12N (Horizontal Construction Engineer). The highest grade he attained was E-4.
4. On 11 February 2019, the applicant tested positive for marijuana on a urinalysis test.
5. The applicant received formal counseling on 14 February 2019, notifying him that he was flagged and being recommended for involuntary separation.

6. A MEB convened on 27 February 2019, to determine whether the applicant's medical conditions met medical retention standards. The Board determined that the applicant did not meet retention standards, under Army Regulation 40-501 (Standards of Medical Fitness) for status post right bunionectomy with residual pain. Further, the Board recommended the applicant's referral to a PEB.
7. On 7 March 2019, the applicant acknowledged he had been informed of the Board's findings and recommendations. He concurred with the results, he did not request an Impartial Medical Review, nor did he wish to submit a written rebuttal.
8. On 29 March 2019, the applicant accepted non-judicial punishment under Article 15 of the Uniform Code of Military Justice, for wrongfully using marijuana, between on or about 11 January 2019 and 11 February 2019. His punishment included reduction to private first class/E-3, and 45 days restriction and extra duty.
9. A VA memorandum, dated 5 April 2019, shows the severity of the applicant's disability most closely approximates the criteria for a 30% disability evaluation.
10. A PEB convened on 16 April 2019, the Board determined the applicant was physically unfit and recommended his medical separation with a disability rating of 10% with entitlement to severance pay.
11. On 25 April 2019, the applicant acknowledged he had been advised of the Board's findings and recommendations. He concurred with the results, waived his right to a formal hearing, and did not request reconsideration of his VA ratings.
12. On 2 May 2019, the applicant underwent a mental status evaluation. The attending physician diagnosed him with a specified depressive disorder, and an unspecified cannabis-related disorder and an alcohol disorder. However, he was psychiatrically cleared to participate in any administrative action deemed appropriate by the command.
13. On 15 May 2019, in Fort Bragg, NC, the applicant was arrested and charged with impaired driving. He was issued a citation with a mandatory court appearance, and a one year suspension of his post driving privileges.
14. On 28 May 2019, the applicant's commander notified him that he was initiating actions to separate him under the provisions of Army Regulation 635-200 (Personnel Separations – Active Duty Enlisted Administrative Separations), Chapter 14-12c(2), for misconduct – abuse of illegal drugs. As the specific reasons, his commander cited the applicant's use of marijuana and his arrest for operating a vehicle while under the influence of marijuana.

15. On 12 June 2019, the applicant acknowledged that he had been advised by counsel of the contemplated separation action, the possible effects of the discharge, and the rights available to him.

a. He indicated he understood he could expect to encounter substantial prejudice in civilian life if a character of service that is less than honorable was issued to him.

b. He declined to submit a statement in his own behalf.

16. On 13 June 2019, the applicant's commander formally recommended his separation under the provisions of Army Regulation 635-200, paragraph 14-12c(2), for misconduct – abuse of illegal drugs.

17. On 9 July 2019, the applicant's commander again recommended his separation under the provisions of Army Regulation 635-200, paragraph 14-12c(2), opposed to allowing him to remain on active duty for completion of the medical evaluation process.

18. Consistent with the chain of command's recommendation, the separation authority approved the applicant's administrative separation action on 23 July 2019, and directed his discharge with a characterization of service of under honorable conditions (general).

19. The applicant was discharged on 15 August 2019, in the rank/grade of private first class/E-3. He was credited with 3 years, 6 months, and 21 days of net active service this period. His DD Form 214 (Certificate of Release or Discharge from Active Duty) contains the following entries in:

- Item 24 (Character of Service) – Under Honorable Conditions (General)
- item 25 (Separation Authority) – AR [Army Regulation] 635-200, PARA 14-12c(2)
- item 26 (Separation Code) – JKK
- item 27 (Reentry Code) – 4
- item 28 (Narrative Reason for Separation) – Misconduct (Drug Abuse)

20. Additionally his DD Form 214 shows he was awarded or authorized the:

- Army Achievement Medal (3rd Award)
- Army Good Conduct Medal
- National Defense Service Medal
- Global War on Terrorism Service Medal
- Army Service Ribbon
- Overseas Service Ribbon
- Parachutist Badge

21. In reaching its determination, the Board can consider the applicant's petition, arguments and assertions, and service record in accordance with the published equity, injustice, or clemency guidance.

22. 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, the Army Aeromedical Resource Office (AERO), 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 reversal of his general court martial convening authority's (GCMCA) decision that he be administratively discharged rather than separated with disability severance pay.

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 25 January 2016 and was discharged under honorable conditions (general) on 15 August 2019 under provisions provided in paragraph 14-12c(2) of AR 635-200 Active Duty Enlisted Administrative Separations (19 December 2016): Commission of a serious offense – Illegal drug use.

d. On 30 January 2019, the applicant was referred to the IDES for "S/P right unionectomy with residuals." The applicant claimed six additional conditions on his Application for Disability Compensation and Related Compensation Benefits (VA Form 21-526EZ), including depression.

e. A medical evaluation board (MEB) determined his referred condition failed the medical retention standards of AR 40-501, Standards of Medical Fitness. They determined seven additional conditions met the medical retention standards of AR 40-501, including depression. From the MEB narrative summary for this condition:

"Major depressive disorder, recurrent, moderate (depression). This condition meets retention standards IAW AR 40-501, para 3-32. Per review of AHLTA, SM had a single visit with BH (Behavioral Health), in Dec 2018, when he was evaluated and was released without limitations. He has never required limitations of duty for management of his BH symptoms. He has recently been started on

Zoloff for his symptoms by his PCM. He stated to me that he takes this medication, with improvement of his symptoms.

The condition has not resulted in extended/recurrent hospitalization, interference with duty, or required duty in a protected environment. VA Psychology stated that the psychiatric symptoms cause occupational and social impairment with only occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks although generally the Soldier is functioning satisfactorily with normal routine behavior, self-care and conversation.

On the day the DA Form 3947 was signed, MEB Psychology reviewed the Army and VA Behavioral Health consultations and concurred that the condition meets behavioral health retention standards.”

f. On 9 March 2019, the applicant concurred with the board's decision and declined both an independent medical review and the opportunity to submit a written appeal. His case then was forwarded to a physical evaluation board (PEB) for adjudication.

g. When the informal PEB convened on 16 April 2019, they determined his referred condition was unfitting conditions for continued military service. They found the remaining seven medical conditions to not be unfitting for continued military service. The PEB applied the Veterans Benefits Administration's (VBA) derived rating of 10% and recommended the applicant be separated with disability severance pay. On 25 April 2019, after being counseled on the informal PEB's findings by his PEB Liaison Officer, the applicant concurred with the informal PEB's findings, waived his right to a formal hearing, and declined to request a VA reconsideration of his disability ratings.

h. The applicant tested positive for tetrahydrocannabinol (THC) in a urine sample obtained on 2 January 2019.

i. On 15 May 2019, the applicant was arrested for driving under the influence of and possession of marijuana. He was also found to be driving under the influence of alcohol.

j. On 28 May 2019, his commander informed him that he was initiating separation action for these two incidents with the recommendation he receive a under than honorable conditions discharge under paragraph 14-12c of AR 635-200.

k. This pending administrative discharge halted his IDES processing. From paragraph 4-3f(2) of AR 635–40, Physical Evaluation for Retention, Retirement, or Separation (19 January 2017):

“Approval and suspension of an AR 635–200 separation action is not authorized when the Soldier is pending both an AR 635–200 and AR 635–40 action. The GCMCA must decide which action to pursue (as described in AR 635–200). Soldiers continue to be eligible for these administrative separation actions up until the day of their separation or retirement for disability even though their PEB findings have been previously completed and approved by USAPDA for the SECARMY. In no case will a Soldier, being processed for an administrative separation for fraudulent enlistment or misconduct be discharged through the DES process without the approval of the GCMCA.”

l. Paragraph 4-9a of AR 635–40, Physical Evaluation for Retention, Retirement, or Separation (19 January 2017) states:

“Disenrollment from DES, or termination of the case for any other reason, will occur no earlier than prescribed below:

“Enlisted Soldiers with an initiated or approved administrative separation for misconduct or fraudulent enlistment will be disenrolled when the MEB is completed, the Soldier’s GCMCA has reviewed the MEB, and the GCMCA has directed in writing to proceed with the administrative separation. If the separation action was initiated after the Soldier’s MEB was forwarded to the PEB, the last level of approved PEB findings prior to initiation of separation will be provided to the GCMCA for consideration in their decision.”

m. In his 23 July 2019 memorandum, the Commanding General of Fort Bragg directed the applicant’s DES processing be terminated and he be separated for misconduct with a general under honorable conditions characterization of service:

“I find that:

a. The Soldier's medical condition is not the direct or substantial cause of the conduct that led to the recommendation for administrative elimination; and

b. Other circumstances of the individual case do not warrant disability processing instead of further processing for administrative separation.”

n. JLV shows the applicant has a VA service-connected disability rating of 50% for depression effective 16 August 2019.

o. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? YES: Depression

(2) Did the condition exist or experience occur during military service? YES

(3) Does the condition or experience actually excuse or mitigate the discharge?

YES: As this condition is associated with self-medication with alcohol and/or illicit drugs, the condition fully mitigates the use of marijuana 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 Board carefully considered the applicant's request, supporting documents, evidence in the records, and published DoD guidance for liberal consideration of discharge upgrade requests.

a. Grade: Deny. The evidence shows the applicant violated the UCMJ and received NJP on 29 March 2019, for wrongfully using marijuana, between on or about 11 January 2019 and 11 February 2019. The resultant punishment included reduction to PFC/E-3. He held this rank/grade at the time of separation. He elected not to appeal. There is no evidence he was promoted back to SPC/E-4 between the date of reduction and date of discharge.

b. Disability: Deny: The evidence shows the applicant was undergoing disability processing for his toes (Status Post Right Bunionectomy with Residual Pain) when he his serious offense (wrongfully using marijuana and operating vehicle while under the influence of marijuana). He tested positive for THC in a urine sample obtained on 2 January 2019 and he was arrested for driving under the influence of and possession of marijuana on 15 May 2019. He was also found to be driving under the influence of alcohol. His chain of command initiated separation action against him for misconduct. The separation authority directed the applicant's disability processing be terminated and he be separated for misconduct with a general under honorable conditions characterization of service after determining that the applicant's medical condition (S/P Right Bunionectomy with Residual Pain) is not the direct or substantial cause of the conduct (marijuana) that led to the recommendation for administrative elimination; and other circumstances of the applicant's case do not warrant disability processing instead of further processing for administrative separation. The Board agreed with such determination and determined there is neither an error nor an injustice in terminating his disability processing.

c. Discharge upgrade: Deny. The applicant was discharge for serious misconduct (wrongfully using marijuana and operating vehicle while under the influence of

marijuana). As a result, his chain of command initiated separation action against him. The Board reviewed the medical reviewer's finding that the applicant did have a condition (depression) or experience that may excuse or mitigate the discharge, and the condition existed during military service, and this condition is associated with self-medication with alcohol and/or illicit drugs, the condition fully mitigates the use of marijuana for which he was administratively separated. The Board is in full agreement with such determination. However, the Board also noted that the applicant committed a serious offense for which an under other than honorable conditions discharge was also appropriate. However, the separation authority ordered a general discharge. The Board agreed with the mitigation but also determined a general discharge is the appropriate characterization given the applicant's depression did not fail retention standards, and given the serious misconduct the applicant committed.

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. Title 10, U.S. Code, 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.

3. Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation) establishes the Physical Disability Evaluation System (PDES) 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 for a medical evaluation board that 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 (Standards of Medical Fitness), Chapter 3. 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.

a. Paragraph 2-1 provides that 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.

b. Paragraph 2-2b (1) provides that when a member is being processed for separation for reasons other than physical disability (e.g., retirement, resignation, reduction in force, relief from active duty, administrative separation, discharge, etc.), his or her continued performance of duty (until he or she is referred to the PDES for evaluation for separation for reasons indicated above) creates a presumption that the member is fit for duty. Except for a member who was previously found unfit and retained in a limited assignment duty status in accordance with chapter 6 of this regulation, such a member should not be referred to the PDES unless his or her physical defects raise substantial doubt that he or she is fit to continue to perform the duties of his or her office, grade, rank, or rating.

c. Paragraph 2-2b (2) provides that when a member is being processed for separation for reasons other than physical disability, the presumption of fitness may be overcome if the evidence establishes that the member, in fact, was physically unable to adequately perform the duties of his or her office, grade, rank, or rating even though he or she was improperly retained in that office, grade, rank, or rating for a period of time and/or acute, grave illness or injury or other deterioration of physical condition that occurred immediately prior to or coincidentally with the member's separation for reasons other than physical disability rendered him or her unfit for further duty.

4. Army Regulation 635-200 sets forth the basic authority for the separation of enlisted personnel.

a. Paragraph 1-33 (Disposition through medical channels) provides:

(1) Except in separation actions under chapter 10 and as provided in para 1–33b, disposition through medical channels takes precedence over administrative separation processing.

(2) When the medical treatment facility (MTF) commander or attending medical officer determines that a Soldier being processed for administrative separation under chapters 7, 14, or 15, does not meet the medical fitness standards for retention (see Army Regulation 40–501, chapter 3, he/she will refer the Soldier to a MEB in accordance with Army Regulation 40–400. The administrative separation proceedings will continue, but final action by the separation authority will not be taken, pending the results of MEB.

(a) If the MEB findings indicate that referral of the case to a physical evaluation board (PEB) is warranted for disability processing under the provisions of Army Regulation 635–40, the MTF commander will furnish copies of the approved MEB proceedings to the Soldier's General Court-Martial Convening Authority (GCMCA) and unit commander. The GCMCA may direct, in writing, that the Soldier be processed through the physical disability system when action under the UCMJ has not been initiated, and one of the following has been determined:

- The Soldier's medical condition is the direct or substantial contributing cause of the conduct that led to the recommendation for administrative elimination
- Other circumstances of the individual case warrant disability processing instead of further processing for administrative separation.

(b) The authority of the GCMCA to determine whether a case is to be processed through medical disability channels or under administrative separation provisions will not be delegated.

(3) Disability processing is inappropriate if the conditions in (2)(a) do not apply, if UCMJ action has been initiated, or if the Soldier has been medically diagnosed as drug dependent. (See paragraph 14–12c.) Accordingly, disability processing is inappropriate in separation actions under chapter 10.

b. Paragraph 3-7a provides that an honorable discharge is a separation with honor and entitles the recipient to benefits provided by law. The honorable characterization is appropriate when the quality of the member's service generally has met the standards of acceptable conduct and performance of duty for Army personnel or is otherwise so meritorious that any other characterization would be clearly inappropriate.

c. Chapter 14 establishes policy and prescribes procedures for separating members for misconduct. Specific categories include minor disciplinary infractions (a pattern of misconduct consisting solely of minor military disciplinary infractions), a pattern of misconduct (consisting of discreditable involvement with civil or military authorities or conduct prejudicial to good order and discipline). Action will be taken to separate a member for misconduct when it is clearly established that rehabilitation is impracticable or is unlikely to succeed. A discharge under other than honorable conditions is normally appropriate for a Soldier discharged under this chapter; however, the separation authority may direct a general discharge if merited by the Soldier's overall record.

5. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards (DRB) and Boards for Correction of Military/Naval Records (BCM/NR) 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, Boards 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//