

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 23 April 2024

DOCKET NUMBER: AR20230009531

APPLICANT REQUESTS:

- an upgrade of his character of service to under honorable conditions (general)
- a personal appearance before the Board via video/telephone

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

- DD Form 149 (Application for Correction of Military Record)
- Department of Veterans Affairs (VA) statement of service-connected disabilities, 1 June 2023

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 needs his character of service upgraded in order for he and his family to be enrolled in DEERS. His discharge was over 20 years ago, and he is trying to obtain on-post privileges. He is currently rated at 100 percent total and permanently disabled by the VA since 3 January 2019.

3. The applicant enlisted in the Regular Army on 4 May 1976. He remained on active duty through a series of reenlistments on 31 January 1979, 30 November 1981, 3 March 1986, and 21 August 1991. On the date of his last enlistment, he held the rank/grade of staff sergeant (SSG)/E-6.

4. A Military Police Report, dated 20 December 1993, shows the applicant was arrested, processed, and charged with rape, sodomy, and incest. He was released to his unit.

5. A DD Form 457 (Investigating Officer's Report), dated 2 March 1994, shows the investigator determined the allegation against the applicant warranted recommendation he be tried in a General Court-Martial.

6. The applicant was referred for a mental status evaluation. He was evaluated on 8 March 1994 and found to have the mental capacity to understand and participate in the proceedings, was mentally responsible and met retention requirements.

7. On 11 March 1994, the applicant's commanding officer notified him action to separate him would be initiated for commission of a serious offense; on 17 December 1993, he was arrested by the Military Police for rape, sodomy, and incest. He was advised of: his right to consult with counsel; his right to obtain copies of supporting documents sent to the separation authority; his right to request a hearing before an administrative board; his right to present written statements; his right to request appointment of military counsel; and his right to waive his rights in writing and withdraw such a waiver.

8. The applicant acknowledged receipt of the notification on 11 March 1994.

9. After consulting with counsel, the applicant acknowledged he understood the basis for the action to separate him for commission of a serious offense under Army Regulation (AR) 635-200 (Personnel Separations - Enlisted Personnel), Chapter 14, its effects and of the rights available to him. On 15 March 1994, he requested consideration of his case by an administrative separation board with a personal appearance. He declined to submit statements on his own behalf. He requested consulting counsel and indicated he would be represented by CPT JC.

10. The applicant underwent a medical examination as required for separation purposes on 24 March 1994. His Standard Form (SF) 93 (Report of Medical History) shows the applicant reported the following defects:

- been a sleepwalker
- eye irritation
- seasonal hay fever
- pain or pressure in chest
- venereal disease
- foot trouble
- depression or excessive worry
- swollen or painful joints
- ear, nose or throat trouble
- head injury
- cramps in legs
- trick or locked knee
- frequent trouble sleeping

11. The corresponding SF 88 (Report of Medical Examination) shows he was qualified for separation and assigned a physical profile of 111111. [Note: A physical profile, as reflected on a DA Form 3349 (Physical Profile) or SF 88, is derived using six body systems: "P" = physical capacity or stamina; "U" = upper extremities; "L" = lower

extremities; "H" = hearing; "E" = eyes; and "S" = psychiatric (abbreviated as PULHES). Each body system has a numerical designation: 1 meaning a high level of fitness; 2 indicates some activity limitations are warranted, 3 reflects significant limitations, and 4 reflects one or more medical conditions of such a severity that performance of military duties must be drastically limited. Physical profile ratings can be either permanent or temporary.

12. The applicant underwent a second mental status evaluation on 24 March 1994 and was again found to have the mental capacity to understand and participate in the proceedings, was mentally responsible and met retention requirements.

13. On 20 April 1994, the applicant accepted non-judicial punishment (NJP) for making an official statement with the intent to deceive, in that on 15 March 1994 and 31 March 1994, he submitted a falsified transcript and two training certificates for inclusion in his official military personnel file and he willfully and unlawfully altered a college transcript and two training certificates. His punishment consisted of, in part, a reduction to the rank/grade from SSG/E-6 to sergeant (SGT)/E-5.

14. On 22 April 1994, the applicant was notified that an additional reason for separation exists; the notification references the applicant's NJP for making a false statement and altering a college transcript and two training certificates. He was advised this additional evidence will be considered at his administrative separation board. He acknowledged receipt of this notification the same day and resubmitted his election of rights mirroring what he previously elected.

15. On 12 May 1994, the applicant was notified to appear before a Board of Officers at 1000 hours on 26 May 1994.

16. The administrative separation board found the applicant to be undesirable for further retention because of rape, sodomy, and incest; and altering public records. The board recommended he be discharged from the service for commission of a serious offense and that he receives an under other honorable conditions character of service.

17. The Separation approval authority approved the applicant's administrative discharge on 30 September 1994, directed his reduction to the lowest enlisted rank/grade of private (PVT)/E-1, and directed his receipt of an under other than honorable character of service.

18. An administrative review of the applicant's recommendation for separation under AR 635-200, Chapter 14-12c, was completed and found to be administratively correct on 19 October 1994.

19. The applicant's DD Form 214 (Certificate of Discharge or Release from Active Duty) shows he was discharged from active duty on 28 October 1994, under the provisions of chapter 14-12c of AR 635-200 with an under other than honorable conditions for misconduct, in the rank/grade of PVT/E-1. He received a separation code of "JKQ" and a reentry code of "4." He was credited 18 years 4 months 6 days net active service this period. His DD Form 214 contains the following additional entries and information:

a. He was awarded or authorized the:

- Army Commendation Medal
- Army Achievement Medal (2nd Award)
- Army Good Conduct Medal (5th Award)
- National Defense Service Medal
- Humanitarian Service Medal
- Noncommissioned Officer Professional Development Ribbon with Numeral 3
- Army Service Ribbon
- Overseas Service Ribbon (3rd Award)
- Expert Marksmanship Qualification Badge with Rifle Bar

b. block 18 (Remarks) - records his periods of immediate reenlistments but does not include an entry showing his period of continuous honorable service from 23 June 1976 to 21 August 1991.

20. The applicant provided a VA statement of service-connected disabilities, dated 1 June 2023, showing the following service-connected ratings:

- 70 percent - posttraumatic stress disorder (PTSD)
- 40 percent - lumbar strain with intervertebral disc syndrome and degenerative joint disease
- 20 percent - right lower extremity radiculopathy
- 10 percent - tinnitus
- 10 percent - left lower extremity radiculopathy
- 0 percent - corneal scar, right eye (below line of sight)
- 0 percent - hearing loss

21. 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.

22. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his character of service to under honorable conditions (general). He contends he experienced PTSD that mitigates his misconduct. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Pertinent to this advisory are the following: 1) The applicant enlisted in the Regular Army on 4 May 1976; 2) The Administrative Separation Board found the applicant to be undesirable for further retention because of rape, sodomy, and incest; and altering public records. The board recommended he be discharged from the service for commission of a serious offense and that he receives an under other honorable conditions character of service; 3) The applicant was discharged on The applicant's DD Form 214 (Certificate of Discharge or Release from Active Duty) shows he was discharged 30 September 1994 under other than honorable conditions for misconduct, in the rank/grade of PVT/E-1; he received a separation code of "JKQ" and a reentry code of "4."

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's military service and available medical records. The VA electronic medical record (JLV) and hardcopy VA medical records provided by the applicant were also examined.

c. The applicant asserts he was experiencing PTSD while on active service, which mitigates his misconduct. The applicant completed two Mental Status Evaluations in 1994 while on active service. He was not diagnosed with a mental health condition, and he was found to have the mental capacity to understand and participate in the proceedings, was mentally responsible and met retention requirements. During his medical examination as part of his separation also in 1994, the applicant reported depression or excessive worry. A review of JLV provided evidence the applicant has been diagnosed with service-connected PTSD (70%) since 2017 due to being hit by a Jeep early in his military career.

d. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support the applicant had condition or experience that partially mitigates his misconduct.

Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, there is sufficient evidence the applicant was diagnosed with service-connected PTSD by the VA.

(2) Did the condition exist or experience occur during military service? Yes, the applicant reports experiencing PTSD during active service, and he has been diagnosed with service-connected PTSD since 2017.

(3) Does the condition experience actually excuse or mitigate the discharge? No, there is sufficient evidence beyond self-report the applicant was experiencing PTSD while on active service. However, there is no nexus between his PTSD and the applicant's misconduct of rape, sodomy, and incest; and altering public records in that: 1) these types of misconduct are not a part of the natural history or sequelae of PTSD; 2) PTSD does not affect one's ability to distinguish right from wrong and act in accordance with the right. However, the applicant contends PTSD resulted in his misconduct, and per the Liberal Consideration Policy, his contention is sufficient for consideration.

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 partially 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. The applicant was discharged from active duty due to misconduct, commission of a serious offense; after he was arrested by the Military Police for rape, sodomy, and incest. His case was considered by an administrative separation board that found him undesirable for further retention because of his serious offenses. The board recommended he be discharged from the service for commission of a serious offense and that he receives an under other honorable conditions character of service. The separation authority approved his discharge. The Board found no error or injustice in his separation processing.

b. The Board considered the medical records, any VA documents provided by the applicant and the review and conclusions of the advising official. The Board concurred with the medical reviewing official finding insufficient evidence of in-service mitigating factors to overcome the misconduct. Also, the applicant provided no evidence of post-service achievements or letters of reference of a persuasive nature in support of a clemency determination. Based on a preponderance of evidence, the Board determined that the character of service the applicant received upon separation was not in error or unjust.

c. The Board noted that the applicant's service from first date of enlistment to the date before his last reenlistment was honorable. For enlisted Soldiers with more than one enlistment period during the time covered by this DD Form 214, in addition to listing

immediate reenlistment(s), an entry is required for continuous honorable service from first day of service for which DD Form 214 was not issued until date before commencement of current enlistment.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

: : : GRANT FULL RELIEF

█ █ █ GRANT PARTIAL RELIEF

: : : GRANT FORMAL HEARING

: : : DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined the evidence presented is sufficient to warrant a recommendation for partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by amending the applicant's DD Form 214 ending on 28 October 1994, by adding to Remarks Block:

- SOLDIER HAS COMPLETED FIRST FULL TERM OF SERVICE
- CONTINUOUS HONORABLE SERVICE FROM 23 JUNE 1976 TO 20 AUGUST 1991

2. The Board further determined the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to upgrading the characterization of his discharge.

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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 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. AR 635-200 (Personnel Separations - Enlisted Personnel) sets policies, standards, and procedures to ensure the readiness and competency of the force while providing for the orderly administrative separation of soldiers for a variety of reasons. Readiness is promoted by maintaining high standards of conduct and performance.

a. Paragraph 3-7b states a general discharge is a separation from the Army under honorable conditions. When authorized, it is issued to a soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

b. Chapter 14 (Separation for Misconduct) establishes policy and prescribes procedures for separating personnel for misconduct because of minor disciplinary infractions, a pattern of misconduct, commission-of a serious offense, conviction by civil authorities, desertion, and absence without-leave.

c. Paragraph 14-12.c states commission of a serious military or civil offense if the specific circumstances of the offense warrant separation and a punitive discharge would be authorized for the same or a closely related offense under the MCM.

d. An under other than honorable conditions characterization of service is normally considered appropriate for Soldiers discharged under the provision of Army Regulation 635-200, paragraph 14-12c.

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, under the operational control of the Commander, U.S. Army Human Resources Command (HRC), is responsible for administering the PDES and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with Department of Defense Directive 1332.18 and Army Regulation 635-40.

a. Soldiers are referred to the PDES when they no longer meet medical retention standards in accordance with Army Regulation 40-501 (Standards of Medical Fitness), chapter 3, as evidenced in a medical evaluation board, when they receive a permanent medical profile, P3 or P4, and are referred by an MOS Medical Retention Board, when

they are command-referred for a fitness-for-duty medical examination, and when they are referred by the Commander, Human Resources Command.

b. The PDES assessment process involves two distinct stages: the MEB and the 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 are either 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 retirement payments 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 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.

5. 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 that an MEB 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. 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.

d. Paragraph 4-10 provides that MEBs are 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 qualification for retention based on criteria in Army Regulation 40-501, chapter 3. If the MEB determines the Soldier does not meet retention standards, the board will recommend referral of the Soldier to a PEB.

e. Paragraph 4-12 provides that each case is first considered by an informal PEB. Informal procedures reduce the overall time required to process a case through the disability evaluation system. An informal board must ensure that each case considered is complete and correct. All evidence in the case file must be closely examined and additional evidence obtained, if required.

6. Title 10, U.S. Code, section 1201, provides for the physical disability retirement of a member who has at least 20 years of service or a disability rating of at least 30 percent. 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 of less than 30 percent.

7. Title 38, U.S. Code, sections 1110 and 1131, permits the VA to award compensation for medical conditions incurred in or aggravated by active military service. The VA, however, is not empowered by law to determine medical unfitness for further military service. The VA, in accordance with its own policies and regulations, awards compensation solely on the basis that a medical condition exists and that said medical condition reduces or impairs the social or industrial adaptability of the individual concerned. Consequently, due to the two concepts involved, an individual may have a medical condition that is not considered medically unfitting for military service at the time of processing for separation, discharge, or retirement, but that same condition may be sufficient to qualify the individual for VA benefits based on an evaluation by that agency.

8. 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 Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

9. Army Regulation 15-185 (ABCMR) paragraph 2-11, states applicants do not have a right to a formal hearing before the ABCMR. The Director of the ABCMR may grant a formal hearing whenever justice requires.

//NOTHING FOLLOWS//