

IN THE CASE OF: [REDACTED]

BOARD DATE: 12 December 2024

DOCKET NUMBER: AR20230009657

APPLICANT REQUESTS: reconsideration of his previous request for upgrade of his under honorable conditions (general) discharge to honorable and a medical discharge.

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

- DD Form 149 (Application for Correction of Military Record)
- Medical Documents

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 AR20180013430 on 10 November 2020.

2. The applicant states he recently found the included document that said his right elbow is not healed on x-rays dated 17 January 1982 and 5 May 1982. His service medical records are at [REDACTED] Department of Veterans Affairs (VA).

3. The applicant provides the following:

a. Medical documents.

b. Information regarding the 17 January 1982 x-ray and a note on 5 May 1982. The Report of Medical History, undated shows the applicant stated he broke his arm on 4 January 1981 while on authorized leave.

c. VA letter, 4 October 1982, shows a claim for compensation received on 14 June 1982. Service connection for shattered right elbow. The applicant was scheduled for a VA physical examination and failed to report. The evidence of record is insufficient to establish the present severity of the applicant's condition and action is taken to grant service condition as shown by the evidence of record.

4. The applicant service record shows the following information:

a. DD Form 4 (Enlistment/Reenlistment Document-Armed Forces of the United States) reflects he enlisted in the Regular Army on 24 January 1980.

b. DA Form 2-1 (Personnel Qualification Record) shows in item 5 (Oversea Service) service in Germany from 19 December 1981 through 27 May 1982; item 21 (Time Lost) 24 June 1980 to 26 June 1980 absent without leave (AWOL) and 22 July 1980 to 28 July 1980 AWOL.

c. DA Forms 2627 (record of Proceedings Under Article 15, Uniform Code of Military Justice (UCMJ)) show the applicant accepted nonjudicial punishment under Article 15 of the UCMJ on:

- 10 July 1980 for being AWOL on or about 24 June 1980 to on and about 27 June 1980; his punishment consisted of forfeiture of \$60.00 pay (suspended for one month); he did not appeal
- 21 November 1980 for being AWOL on or about 22 July 1980 to on or about 29 July 1980; his punishment consisted of confinement to correctional facility (CCF) for 7 days (suspended for three months), forfeiture of 7 days' pay \$116.97 (suspended for three months); he did not appeal
- undated, on or about 22 April 1982 the applicant failed to be at his appointed place of duty, on or about 24 April 1982 willfully disobeyed a lawful order and was drunk and disorderly in command, on or about 24 April 1982, wrongfully communicate a threat to a sergeant; his punishment consisted of reduction to private/E-1 and restriction for 45 days; he did not appeal

d. DA Form 2627 shows on 26 March 1982 the previous punishment imposed was withdrawn and substituted therefor: to be reduced to the private 2/E-2, forfeit \$200.00 pay per month for two months, suspended until 24 June 1982 and serve 14 days CCF as space becomes available.

e. The Record of Informal Counseling, 1 April 1982 shows the applicant desired to be discharged from the military. The applicant explained he had been unhappy with the military because he was not able to get the military occupational specialty he wanted. He discussed his drinking problem and although he does not feel it is bad, the applicant does acknowledge having a problem.

f. The applicant's immediate commander notified him on 5 May 1982 of his intent to recommend him for separation under the provisions of Army Regulation (AR) 635-200 (Enlisted Personnel-Personnel Separations), Chapter 13, for unsuitability. He was advised of the rights available to him.

g. The applicant consulted with legal counsel and was advised of the basis for the contemplated action to accomplish his separation under the provisions of AR 635-200,

Chapter 13, for unsuitability, he understood the rights available to him, and the possible effects of a less than fully honorable discharge and the procedures and rights that were available to him. He further acknowledged he understood that if his discharge request was approved, he could be deprived of many or all Army benefits, he could be ineligible for many or all benefits administered by the Department of Veterans Affairs, and he could be deprived of his rights and benefits as a veteran under both Federal and State Laws.

(1) He understood that he may expect to encounter substantial prejudice in civilian life if a general discharge under honorable condition was issued to him.

(2) He elected to submit a statement in his own behalf. In his statement he stated he understood he was recommended for separation for the reason of unsuitability and was not entitled to have his case heard by a board of officers.

h. The applicant's formally commander recommended the applicant for elimination from military service under the provisions of AR 635-200, Chapter 13, for unsuitability on 6 May 1982. The applicant lacks apathy (lack of interest) and has a defective attitude and inability to expand constructively. The chain of command recommended approval.

i. The separation authority approved the recommendation for elimination under the provisions of Chapter 13, AR 635-200 on 7 May 1982 and directed the applicant be discharged and issued a under honorable conditions (general) discharge certificate.

j. The applicant was discharged 28 May 1982. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged under the provisions of AR 635-200, paragraph 13-4C by reason of unsuitability-apaty defective attitude or inability to expend effort constructively. His service was characterized as under honorable conditions, (general). He completed 2 years, 3 months, and 25 days of net active service. He had lost time from 24 June 1980 to 26 June 1980 and 22 July 1980 to 28 July 1980.

5. By regulation Soldiers are recommended for separation due to unsuitability under the provisions of this chapter 13 for inaptitude. Applicable to persons who are best described as inept, due to lack of general adaptability, want of readiness of skill, unhandiness, or ability to learn, personality disorder and apathy (lack of appropriate interest), defective attitudes, and inability to expend effort constructively.

6. On 12 April 1985, the Army Discharge Review Board determined the applicant was properly and equitable discharge and denied his request for a change in the character and/or reason of his discharge.

7. In a prior ABCMR Docket Number AR20180013430, boarded on 10 November 2020, the ABCMR determined 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 applicant's records. In conjunction with the applicant's previous case the Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents. No records were found in the Interactive Personnel Electronic Records Management System (iPERMS), the Armed Forces Health Longitudinal Technology Application (AHLTA), Health Artifacts Image Management Solutions (HAIMS), nor in the VA's Joint Legacy Viewer (JLV).

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

9. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. Documentation reviewed included the applicant's ABCMR application and accompanying documentation, his previous denial by the Army Board for the Correction of Military Records (ABCMR), 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 28 May 1982 discharge characterized as under honorable conditions (general) and, in essence, referral to the Disability Evaluation System (DES).

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. The applicant's DD 214 for the period of service under consideration shows he entered the regular Army on 24 January 1980 and was discharged on 28 May 1982 under the provisions provided in paragraph 13-4c of AR 635-200, Discharge – Unfitness and Unsuitability (1 May 1982): Apathy, defective attitude, or inability to expend effort constructively.

d. The applicant's request was previously denied by the ABCMR on 10 November 2020 (AR20180013430). Rather than repeat their findings here, the board is referred to the record of proceedings and medical advisory opinion for that case. This review will concentrate on the new evidence submitted by the applicant.

e. A discharge summary from [REDACTED], shows the applicant was admitted on 4 January 1981, underwent open reduction with internal fixation of a displaced right olecranon fracture on 5 January 1981, had an “uneventful hospital stay,” and was discharged on 9 January 1981.

f. The applicant’s pre-separation physical examination was completed on 5 May 1982. The provider wrote: “Fracture olecranon process of right elbow, January 1981, with evidence of scar from open reduction with insertion of two (2) pins – no present deformity ... Fracture line was still visible and not yet completely healed (X-ray 1# [illegible] January 1982. The applicant wrote “I’m in good health to my knowledge except 2 pins in right arm. Broke arm on 4 JAN 81 while on leave. Need them taken out if arm is healed.” The applicant was found qualified for separation.

h. g. On 4 October 1982, the VA awarded him a 0% disability rating for “Fracture of Olecranon Process of Right Elbow” effective 29 May 1982. An 8 October 1982 memorandum from the VA states: “The disability listed below is service connected but is less than 10% disabling and compensation is not payable. ELBOW CONDITION, RIGHT.”

i. There is no probative evidence the applicant had any medical condition which would have failed the medical retention standards of chapter 3, AR 40-501 prior to his discharge; or that contributed to his poor performance as a Soldier. Thus, there was no cause for referral to the Disability Evaluation System. Furthermore, there is no evidence that any medical condition prevented the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his discharge. There are no encounters in JLV shows and the applicant has no VA service-connected disabilities.

j. It is the opinion of the ARBA medical advisor that neither a discharge upgrade nor a referral of his case to the DES is warranted.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, the evidence found within the military record, and published Department of Defense Policy for consideration of discharge upgrade requests, the Board found that relief was not warranted.

2. The Board carefully considered the applicant’s contentions, his record of service, the frequency and nature of his misconduct, the commander’s reason for separation and the character of service he received upon discharge. The Board considered his

statement regarding an injury, the review and conclusions of the Agency medical advisor and his VA disability rating. The Board found insufficient evidence of mitigating factors for his misconduct. The Board found insufficient evidence that the applicant had any medical condition which would have failed the medical retention standards of chapter 3, AR 40-501 prior to his discharge; or that contributed to his poor performance as a Soldier. The applicant did not provide evidence of post-service achievements or reference letters for the Board to consider in support of a clemency determination. Based on a preponderance of evidence, the Board determined that a referral to the Disability Evaluation System was not warranted and that the character of service he received upon discharge was not in error or unjust. The Board found insufficient evidence of a condition or experience that would support an upgrade as a matter of liberal consideration.

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.

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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. Army Regulation 635-200 (Enlisted Personnel-Personnel Separations) governs the separation of enlisted personnel, sets forth the basic authority for the separation of enlisted personnel.

a. 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 13 provides that action will be taken to separate a member for unsuitability when it is clearly established that (1) In the judgment of his commander, he will not develop sufficiently to participate satisfactorily in further military training and/or become a satisfactory soldier, and (2) He meets retention medical standards. A member is subject to separation for unsuitability under the provisions of this chapter when one or more of the following conditions exist-inaptitude, applicable to persons who are best described as inept, due to lack of general adaptability, want of readiness of skill, unhandiness, or ability to learn; personality disorder; apathy (lack of appropriate interest), defective attitudes, and inability to expend effort constructively. Service was characterized as honorable or under honorable conditions.

2. Section 1556 of Title 10, USC, 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.

3. Army Regulation 635-5 (Separation Documents), states, the DD Form 214 is a summary of the Soldier's most recent period of continuous active duty. It provides a brief, clear-cut record of all current active, prior active, and prior inactive duty service at the time of release from active duty, retirement, or discharge. The information entered thereon reflects the conditions as they existed at the time of separation.

4. Army Regulation 635-5-1 (Separation Program Designator (SPD) Codes) provides the specific authorities and reasons for separating Soldiers from active duty, and the

SPD codes to be entered on the DD Form 214 (Certificate of Release or Discharge from Active Duty). The SPD code JMJ (is to be used for RA Soldiers discharged for unsuitability-apathy defective attitude or inability to expend effort constructively.

5. The SPD/RE Code Cross Reference Table provides instructions for determining the RE Code for Active Army Soldiers and Reserve Component Soldiers. This cross reference table shows the SPD code and a corresponding RE Code. The table in effect at the time of his discharge shows the SPD code JMJ has a corresponding RE Code of "3 and 3B."

6. Army Regulation 601-210 (Active and Reserve Components Enlistment Program) covers eligibility criteria, policies, and procedures for enlistment and processing into the Regular Army, U.S. Army Reserve, and Army National Guard. Table 3-1 provides a list of RE codes:

- RE-1 Applies to persons immediately eligible for reenlistment at time of separation
- RE-2 Applies to persons not eligible for immediate reenlistment
- RE-3 Applies to persons who may be eligible with waiver-check reason for separation
- RE-4 Applies to persons who are definitely not eligible for reenlistment

7. Army Regulation (AR) 40-501 (Standards of Medical Fitness) governs medical fitness standards for retention and separation, including retirement. Chapter 3 of the regulation gives the various medical conditions and physical defects which may render a Soldier unfit for further military service.

11. Army Regulation 635-40, in effect at the time, 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. Once a determination of physical unfitness is made, all disabilities are rated using the Department of Veterans Affairs Schedule for Rating Disabilities (VASRD).

a. Chapter 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.

b. Chapter 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.

c. The percentage assigned to a medical defect or condition is the disability rating. The fact that a Soldier has a condition listed in the VASRD does not equate to a finding of physical unfitness. An unfitting, or ratable condition, is one, which renders the Soldier unable to perform the duties of their office, grade, rank, or rating in such a way as to reasonably fulfill the purpose of their employment on active duty. There is no legal requirement in arriving at the rated degree of incapacity to rate a physical condition which is not in itself considered disqualifying for military service when a Soldier is found unfit because of another condition that is disqualifying. 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.

12. Title 38 USC, section 1110 (General-Basic Entitlement) states for disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

13. Title 38 USC, section 1131 (Peacetime Disability Compensation - Basic Entitlement) states for disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during other than a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

14. Title 10, USC, 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.

a. Soldiers are referred to the disability system when they no longer meet medical retention standards in accordance with AR 40-501 (Standards of Medical Fitness), chapter 3, as evidenced in an MEB; when they receive a permanent medical profile rating of 3 or 4 in any factor and are referred by a 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 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.

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.

15. Title 38, USC, permits the VA to award compensation for a medical condition which was incurred in or aggravated by active military service. The VA, however, is not required 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's medical condition, although not considered medically unfitting for military service at the time of processing for separation, discharge or retirement, may be sufficient to qualify the individual for VA benefits based on an evaluation by that agency. The VA can evaluate a veteran throughout his or her lifetime, adjusting the percentage of disability based upon that agency's examinations and findings.

3. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records (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. 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 based on 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. 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//