

IN THE CASE OF: [REDACTED]

BOARD DATE: 10 April 2024

DOCKET NUMBER: AR20230009998

APPLICANT REQUESTS:

- retirement due to physical disability based on traumatic brain injury (TBI) and post-traumatic stress disorder (PTSD)
- personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- three Department of Veterans Affairs (VA) Health Care System medical statements
- VA summary of benefits letter
- U.S. Office of Personnel Management letter
- third-party memorandum, subject: (Applicant's) Injury During Combat Operations
- medical statement regarding migraine headaches for social security disability claim

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 is having many issues related to an explosion he was involved in 2005 during Operation Iraqi Freedom (OIF).
3. The applicant enlisted in the Regular Army on 1 March 2005. The applicant extended his enlistment on 2 August 2010 for a period of three month. The extension established his new expiration term of service (ETS) as 25 February 2011.
4. His record shows he served three tours of duty in Iraq.
 - 4 January 2006-14 April 2006

- 18 March 2007 - 6 June 2008
- 13 September 2009 - 1 September 2010

5. The applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was honorably released from active duty, under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), Chapter 4 (Separation for Expiration of Service Obligation), by reason of completion of required active service, and transferred to the U.S. Army Reserve (USAR) Control Group (Reinforcement), on 25 February 2011. He was discharged from the USAR on 19 February 2013.

6. The applicant provided:

a. Three VA Health Care System medical statements showing he was diagnosed with PTSD, adjustment disorder with mixed anxious and depressed mood, and a tic disorder. The statements further show he reported a history of multiple combat traumas (particularly explosion by improvised explosive device (IED)) that has resulted in intrusive thoughts, avoidance of memories of combat, hypervigilance, negative alterations in mood, and difficulty with cognitive functioning.

b. A VA summary of benefits letter showing he is receiving service-connected disability compensation with a combined evaluation of 100%.

c. A letter from the U.S. Office of Personnel Management, dated 27 February 2020, showing he was approved for disability retirement under the Federal Employees Retirement System based on PTSD.

d. A third-party memorandum, subject: (Applicant's) Injury During Combat Operations, issued by his former platoon leader, stating the following:

I can attest that our unit was operating at a very high operational tempo and that we were utilizing Stryker vehicles for mounted operations during raids against the Al-Qaeda in Iraq (AQIZ) network. During one operation, our Stryker convoy was struck with an IED. [The applicant] was in the Stryker, along with me, during the IED strike, and while he did not demonstrate any visible wounds at the time, he did begin to show signs of a concussion and had a nosebleed some time afterward. Considering this, he was pulled from conducting operations for a short period of time.

e. A medical statement regarding migraine headaches for social security disability claim showing he has been receiving treatment for chronic migraine.

7. 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.

8. 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 (EMR – AHLTA and/or MHS Genesis), 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, in essence, referral to the Disability Evaluation System and a medical retirement for PTSD and TBI (traumatic brain injury)

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. His DD 214 shows the former infantryman entered the regular Army on 1 March 2005 and was honorably discharged after completing his required active service on 25 February 2011 under the separation authority provided in chapter 4 of AR 635-200, Active Duty Enlisted Administrative Separations (17 December 2009). The reenlistment code of 1 means he was fully qualified to reenter the Army. The DD 214 shows he served in Iraq from 4 January 6 thru 13 April 2006, 18 March 2007 thru 6 June 2008, and again from 13 September 2009 thru 1 September 2010. He was awarded a Combat Infantryman Badge.

d. The only NCO Evaluation Report shows he was relieved for cause during his third Iraq deployment. Form this NCOER:

- relieved of team leader duties as a result of a chronic pattern of bad judgment,
- incompetence, and poor attitude
- does not set the example of what an NCO should be, know, or do; disrespected
- platoon chain of command and other senior NCOs in front of his Soldiers
- created a climate that caused his Soldiers to lose faith and trust in their immediate supervisor due to his lack of respect for chain of command
- jeopardized the safety and well-being of his Soldiers by leaving them unsupervised on the battlefield

e. The EMR shows his first behavioral health related encounter occurred on 13 July 2010 when he presented for “evaluation and treatment for possible anxiety symptoms and/or sleep apnea. The provider did not find the applicant to have mental health issue at that time:

“HISTORY OF PRESENT ILLNESS: The pt [patient] stated that he came to clinic to ensure that the following history is documented in AHLTA. He is ETS’ing the Army in November and wants to make sure he receives all the treatment he deserves. He stated he has been having sleeping problems since his last deployment. He reported ruminations that keep him up at night. These worries are regarding his fears about employment after the Army. He also has some worries about his spouse who is having some medical problems.

He also reported he has been having some facial tics which he claims began in this deployment. In addition, he reports that he has had episodes of heart palpitations during the day. The pt also reported that when sleeping he wakes up gasping for air. He reported he did receive a septoplasty in 2008. The pt reported he has a history of receiving Wellbutrin in the past but he reported he did not find that useful. He reported he recently received a 10 day supply of Lunesta and that this worked.”

f. His next and final behavioral health encounter was on 27 September 2010 as part of his post-deployment evaluation after which the provider did not diagnose the applicant with a behavioral health condition:

Discussed

Reviewed treatment options with patient, weighing both benefits and risks associated with treatment. He was encouraged to seek evaluation by his PCM [primary care manager] for erectile dysfunction. In addition, he was encouraged to consider treatment for sleep and stress management. SM [Service Member] did not feel the need for continuous mental health services at this time.

Plan

SM did not wish to follow up with this provider at this time. SM's case will be administratively closed at this time. He was informed of the procedures for making appointments and walking in for services. He was provided contact information for this service.

Regarding SRP [soldier Readiness Program], SM is S-1 profile [normal], world-wide qualified, with no duty limitations from a behavioral health perspective.”

g. There were no TBI related encounters.

h. There is no evidence the applicant had one or more medical conditions would have failed the medical retention standards of chapter 3, AR 40-501 prior to his discharge. Thus, there was no cause for referral to the Disability Evaluation System.

i. JLV shows the VA has awarded him multiple service-connected disability ratings, including one for PTSD (70%) and Traumatic Brain disease (0%). 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.

j. It is the opinion of the ARBA medical advisor that a referral to his case to the DES is not warranted.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation. One potential outcome was to grant relief based on the applicant's three deployments. However, upon review of the applicant's petition, available military records and the medical advisory the Board majority concurred with the advising official finding referral to his case to the DES is not warranted. The Board noted there is insufficient evidence the applicant had one or more medical conditions that would have failed the medical retention standards. The Board determined based on the advising opine the applicant's contentions for retirement due to physical disability based on traumatic brain injury (TBI) and port-traumatic stress disorder (PTSD) is without merit and relief was denied.

2. The applicant's request for a personal appearance hearing was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	█	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.

4/11/2024

X █

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. Army Regulation 635-200, Chapter 4, provided, a Soldier will be separated upon expiration of enlistment or fulfillment of service obligation. Subject to chapter 1 (General Provisions), section V (Effective Date of Discharge), a Soldier enlisted or ordered to AD normally will be discharged or released from AD on the date he/she completes the

period for which enlisted or ordered to AD. Personnel released from AD and transferred to the USAR upon completion of the term of service for which ordered into active Federal service, or released to their Reserve Component upon completion of AD will not be discharged until completion of their reserve obligation.

3. 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.

4. Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation) establishes the Army Disability Evaluation System (DES) 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 a Medical Evaluation Board 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. The regulation in effect at the time states:

a. 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.

b. 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.

c. When a member is being processed for separation for reasons other than physical disability (e.g., retirement, resignation, relief from active duty, administrative separation, ETS, etc.), his or her continued performance of duty, until he or she is referred to the DES for evaluation for separation for reasons indicated above, creates a presumption that the member is fit for duty.

5. Title 38, U.S. Code, Sections 1110 and 1131, permit 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.

6. Title 38, Code of Federal Regulations, Part IV is the VA Schedule for Rating Disabilities. The VA awards disability ratings to veterans for service-connected conditions, including those conditions detected after discharge. 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/her 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.

7. Army Regulation 15-185 (ABCMR) provides Department of the Army policy, criteria, and administrative instructions regarding an applicant's request for the correction of a military record. Paragraph 2-11 states applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

8. Section 1556 of Title 10, U.S. Code, requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to ABCMR applicants (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//