

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 30 April 2024

DOCKET NUMBER: AR20230010011

APPLICANT REQUESTS: in effect, upgrade his uncharacterized discharge to an honorable and change the narrative reason for separation to a medical condition.

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Certificate of Release or Discharge from Active Duty)

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.
2. The applicant states, in effect, he is requesting to update his discharge status.
3. A review of the applicant's service record shows:
 - a. DD Form 2807-1 (Report of Medical History) dated 19 June 2009, which shows he answered no to recurrent back pain or any back problem and answered yes to currently in good health.
 - b. DD Form 2808 (Report of Medical Examination), dated 19 June 2009, shows the applicant was not qualified for service due to the following medical conditions/diagnosis: tachycardia and heart murmur. The examining physician recommended further specialist examinations. The applicant underwent a cardiology evaluation by his private physician and his enlistment medical examination was forwarded for a waiver.
 - c. A document dated 6 August 2009, which shows the request for medical waiver was approved.

d. DD Form 4 (Enlistment/Reenlistment Document) shows he enlisted in the Regular Army on 5 January 2010. He was assigned to Fort Sill, OK for completion of basic combat training (BCT).

e. DD Form 2870 (Authorization for Disclosure of Medical or Dental Information) dated 20 January 2010, which shows the applicant authorized the medical clinic to release his patient information. The medical treatment records show on:

(1) 31 December 2006 – he had a history of back spasms. Radiology exam showed there was mild levoscoliosis of the lumbar spine. The lumbar vertebral bodies were normal in height and alignment. No fracture or subluxation was seen. There was minimal disk space narrowing at L5-S1; the lumbar disks were otherwise normal in height throughout.

(2) 3 January 2007 – Medical Resonance Imaging (MRI) showed L5-S1: central and right central intervertebral disc protrusion was identified.

(3) 9 August 2007 – Radiology exam showed three views of his lumbar spine compared to a prior exam that was performed on 31 December 2006. It showed normal vertebral body height and alignment. No fractures were identified. The pedicles of the lumbar spine were intact. Paraspinal soft tissues demonstrated no significant abnormality.

(4) 27 February 2008 – X-ray of his cervical spine due to pain and numbness showed no significant abnormality. The alignment was normal, and there were no fractures or focal bony lesions, no significant abnormality three vertebral soft tissues, and no evidence of spondylolysis.

(5) 11 August 2008 – Magnetic Resonance Imaging (MRI) of the lumbar spine due to low back pain, right-sided radiculitis showed at L5-S1, there was a small right paracentral/central disc protrusion. Linear increased T2 signal was seen within the posterior disc margin at this level compatible with focal annular tear versus degeneration. Overall, disc protrusion measured up to 5mm in maximal AP dimension. No significant neural foraminal narrowing was seen at this level. No significant central canal stenosis seen. Disc material was in proximity to but did not signify displace the descending right S1 nerve root. Overall, no significant interval changes had occurred since the prior study dated 3 January 2007.

f. DA Form 4707 (Entrance Physical Standards Board (EPSBD)) Proceedings), dated 2 February 2010, shows he was evaluated at Reynolds Army Hospital, Fort Sill, OK, during week four of BCT for acute on chronic low back pain and identified as having a condition that existed prior to service (EPTS). It also shows:

(1) The applicant was evaluated on 13 January 2010 at the emergency room for severe mid-lower back pain after doing three butterfly kicks on day 2 of BCT. L-spine was obtained which was negative. He was given a shot of Toradol and sent to quarters with motrin, tylox, flexeril. He was reevaluated the following day with continued pain in his lower back and placed back on quarters. He reported a history of two herniated discs in the past four years in his lower back and neck, and prior addiction to narcotics following "MVA" in 2006. He did not report this to the Military Entrance Processing Station (MEPS).

(2) After one week of no improvement with rest, he was referred to physical therapy (PT). He endorsed poor motivation to continue training. He was given light "ROM" activities and his civilian medical records were requested. He was seen again by PT on 22 January 2010, 25 January 2010, and 27 January 2010, with no improvement with exercises. His civilian medical records were remarkable for multiple studies on his lumbosacral spine and showed central/right paracentral disc protrusion at L5-S1 which abutted but did not significantly displace the descending right S1 nerve root. The applicant reported a prior lumbar injection for his pain and stated he had no desire to continue training. EPTS was recommended.

(3) He was diagnosed with acute flare of chronic low back pain. The applicant did not meet medical fitness standards for enlistment or induction under the provisions of Army Regulation (AR) 40-501 (Standards of Medical Fitness). He was given a permanent profile.

g. On 10 February 2010, the medical approving authority approved the findings and recommendations of the EPSBD proceedings.

h. On 11 February 2010, the applicant's EPSBD proceedings were forwarded to the applicant's unit for appropriate action in accordance with AR 635-200, paragraph 5-11.

i. On 26 February 2010, the applicant acknowledged that he was informed of the medical findings. He also acknowledged he understood that legal advice of an attorney employed by the Army was available to him and that he could consult with civilian counsel at his own expense. He further acknowledged he understood he could request a discharge from the Army without delay or request retention on active duty, and if retained he could be involuntarily reclassified into another military occupational specialty (MOS). After counseling, the applicant concurred with the proceedings and requested a discharge from the Army without delay.

j. On 26 February 2010, the applicant's immediate commander recommended approval of the discharge.

k. On 1 March 2010, the separation authority approved the recommended discharge.

l. The applicant was discharged on 8 March 2010. His DD Form 214 shows he was discharged under the provisions of AR 635-200 (Personnel Separations – Active Duty Enlisted Administrative Separations), paragraph 5-11, by reason of failed medical/physical/procurement standards (Separation Code JFW, Reentry Code 3). His service was uncharacterized. This form shows in:

- Item 11 (Primary Specialty): None
- Item 12c (Net Active Service This Period): 2 months and 4 days
- Item 13 (Decorations, Medals, Badges, Citations and Campaign Ribbons Awarded or Authorized): None
- Item 14 (Military Education): None
- Item 18 (Remarks): Member has not completed first full term of service.

4. The Board should consider the applicant's argument and/or evidence in accordance with the published equity, injustice, or clemency determination guidance.

5. 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/or 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 an upgrade of his 8 March 2010 uncharacterized and, in essence, a 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 for basic combat training on 5 January 2010 and was discharged on 8 March 2010 under provisions provided by paragraph 5-11 of AR 635-200, Active Duty Enlisted Administrative Separations (17 December 2009): Separation of personnel who did not meet procurement medical fitness standards.

d. Paragraph 5-11a and 5-11b of AR 635-200:

“a. Soldiers who were not medically qualified under procurement medical fitness standards when accepted for enlistment or who became medically disqualified under these standards prior to entry on AD [active duty] or ADT [active duty for training] for initial entry training, may be separated. Such conditions must be discovered during the first 6 months of AD. Such findings will result in an entrance physical standards board [EPSBD]. This board, which must be convened within the soldier’s first 6 months of AD, takes the place of the notification procedure (para 2–2) required for separation under this chapter.

b. Medical proceedings, regardless of the date completed, must establish that a medical condition was identified by an appropriate military medical authority within 6 months of the soldier’s initial entrance on AD for RA or during ADT for initial entry training for ARNGUS and USAR that—

(1) Would have permanently or temporarily disqualified the soldier for entry into the military service or entry on AD or ADT for initial entry training had it been detected at that time.

(2) Does not disqualify the soldier for retention in the military service per AR 40–501 [Standards of Medical Fitness], chapter 3. As an exception, soldiers with existed prior to service (EPTS) conditions of pregnancy or HIV infection (AR 600–110) will be separated.”

e. The applicant’s pre-entrance Report of Medical History and Report of Medical Examination show he was found to tachycardia. It was evaluated by cardiology and he was granted a waiver for enlistment.

f. The EMR shows the applicant was first seen for low back pain on 16 January 2010 after having been seen for before in the emergency department:

“The Chief Complaint is: Back pain since he first started basic training on Monday. Seen in ER for this, treated with ibuprofen, Flexeril and oxycodone. He has reported a previous addiction to narcotics when he had herniated discs in his back about four years ago ...

Assessment/Plan: Midback pain: SM [Service Member] wants to get out of the Army because he feels he can't continue training with a weak back. I will put him on quarters and have him follow up on Tuesday to be re-evaluated and possibly referred for MRI of thoracic and lumbar spine ...”

g. Conservative treatment, to include physical therapy, was initiated for his back pain. His symptoms did not significantly improve and he was referred to an Entry Physical Standards Board (EPSBD) for this preexisting condition under provisions provided in paragraph 5-11 of AR 635-200.

h. EPSBDs are convened IAW paragraph 7-12 of AR 40-400, Patient Administration. This process is for enlisted Soldiers who within their first 6 months of active service are found to have a preexisting condition which does not meet the enlistment standard in chapter 2 of AR 40-501, Standards of Medical Fitness, but does meet the chapter 3 retention standard of the same regulation. The fourth criterion for this process is that the preexisting condition was not permanently service aggravated.

i. From the applicant's 25 February 2009 Entry Physical Standards Board (EPSBD) Proceedings (DA Form 4707):

"HISTORY OF PRESENT CONDITION: PVT [Applicant] is a 29-year-old male who was evaluated on 1/13/2010 at the ER for c/o severe mid-lower back pain after doing three butterfly kicks on day 2 of BCT. L-spine [radiographs] were obtained which were negative ... Re-evaluated the following day with continued pain in his lower back and placed back on quarters.

Patient reported a history of two herniated discs in the past four years in his lower back and neck and prior addiction to narcotics following MVA [motor vehicle accident] in 2006.

He did not report this to MEPS ... Patient endorsed poor motivation to continue training.

DIAGNOSIS: Acute flare of chronic low back pain

DISPOSITION: Member does not meet medical fitness standards of enlistment or induction under provision in paragraph 2-29b(3), Chapter 2, AR 40-501 [Standards of Medical Fitness].

EPTS [existed prior to service]: Yes Service Aggravated: No

Approximate date of origin: 2006

j. Paragraph 2-29b(3) of AR 40-501, (14 December 2007), states spine pain limiting activity is a cause for rejection for appointment, enlistment, and induction.

"b. Current or history of any condition, including, but not limited to the spine or sacroiliac joints, with or without objective signs that

(3) Requires limitation of physical activity or frequent treatment is disqualifying.

k. The board determined this condition had existed prior to service, had not been permanently service aggravated, failed the medical procurement standards in chapter 2 of AR 40-501, and so recommended he be discharge due to this preexisting condition. On 26 February 2010, the applicant concurred with the board's findings selecting and initialing the first of four options: "I concur with these proceedings and request to be discharged from the US Army without delay."

l. An uncharacterized discharge is given to individuals on active duty who separate prior to completing 180 days of military service, or when the discharge action was initiated prior to 180 days of service. This type of discharge does not attempt to characterize service as good or bad. Through no fault of his own, he simply had a medical condition which was, unfortunately, not within enlistment standards.

m. It is the opinion of the Agency Medical Advisor that neither discharge upgrade nor a referral of his case to the DES is warranted.

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 applicant's contentions, the military record, and regulatory guidance were carefully considered. The evidence shows the applicant was separated under the provisions of chapter 5 of AR 635-200, due to failing medical/physical/ procurement standards (pre-existing condition). He was credited with 2 months and 4 days of active service. He did not complete initial entry training and was not awarded an MOS. His service was uncharacterized. The Board found no error or injustice in his separation processing. An uncharacterized discharge is given to individuals who separate prior to completing 180 days of military service, or when the discharge action was initiated prior to 180 days of service. The Board reviewed and agreed with the medical reviewer's finding that there is no evidence the applicant had a medical condition or injury which 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. 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. The Board determined that a discharge upgrade is unwarranted.

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.

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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. Army Regulation 635-200 (Personnel Separations – Active Duty Enlisted Administrative Separations), in effect at the time, set forth the basic authority for the separation of enlisted personnel.

a. Paragraph 5-11 specifically provided that Soldiers who were not medically qualified under procurement medical fitness standards when accepted for enlistment or who became medically disqualified under these standards prior to entry on active duty or active duty for training for initial entry training, may be separated. Such conditions must have been discovered during the first 6 months of active duty. Such findings would result in an entrance physical standards board (EPSBD). A medical proceeding conducted by an EPSBD, regardless of the date completed, must have established that a medical condition was identified by appropriate medical authority within 6 months of the Soldier's initial entrance on active duty, the condition would have permanently or temporarily disqualified the Soldier for entry into the military service had it been detected at the time of enlistment, and the medical condition did not disqualify the Soldier from retention in the service under the provisions of Army Regulation 40-501 (Standards of Medical Fitness), chapter 3. The characterization of service for Soldiers separated under this provision will normally be honorable but will be uncharacterized if the Soldier has not completed more than 180 days of creditable continuous active-duty service prior to the initiation of separation action.

b. An uncharacterized separation is an entry-level separation. A separation will be described as an entry-level separation if processing is initiated while a member is in entry-level status, except:

(1) When characterization under other than honorable conditions is authorized by the reason for separation and is warranted by the circumstances of the case.

(2) When the Secretary of the Army, on a case-by-case basis, determines that characterization of service as honorable is clearly warranted by the presence of unusual circumstances involving personal conduct and performance of duty.

(3) The Soldier has less than 181 days of continuous active military service, has completed Initial Entry Training, has been awarded a military occupational specialty (MOS), and has reported for duty at a follow-on unit of assignment.

c. Paragraph 3-7a states 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.

2. Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation) governs the evaluation of physical fitness of Soldiers who may be unfit to perform their military duties because of physical disability. It states that according to

accepted medical principles, certain abnormalities and residual conditions exist that, when discovered, lead to the conclusion that they must have existed or have started before the individual entered the military service.

3. Army Regulation 40-501 (Standards of Medical Fitness) governs medical fitness standards for enlistment, induction, appointment, retention, and separation. Chapter 2 provides the physical standards for enlistment/induction and refers to conditions which may result in failure of procurement standards. It states an occurrence or history of any condition, including, but not limited to the spine or sacroiliac joints, with or without objective signs or findings that requires limitation of physical activity or frequent treatment is disqualifying.

4. 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 regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. Boards for Correction of Military/Naval Records may grant clemency regardless of the court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice. This guidance does not mandate relief but provides standards and principles to guide Boards in application of their equitable relief authority.

a. 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.

5. 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.

6. Army Regulation 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR begins its consideration of each case with the presumption of administrative regularity, which is that what the Army did was correct.

a. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

b. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that 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.

//NOTHING FOLLOWS//