

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 10 March 2024

DOCKET NUMBER: AR20230010409

APPLICANT REQUESTS: physical disability discharge in lieu of honorable administrative discharge due to twice non-selection for promotion to the next higher grade.

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

- DD Form 149 (Application for Correction of Military Record)
- 807th Medical Command (Deployment Support) Memorandum for Record, 7 April 2015
- Headquarters, U.S. Army Reserve Command Orders 19-291-00006, 18 October 2019
- Department of Veterans Affairs (VA) Rating Decision, dated 15 November 2022
- VA Letter, dated 17 November 2022

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:

a. After his deployment in 2011, he reported his injury at the demobilization site at Fort Dix, NJ and in every medical event they had in their unit. According to the VA doctor and the orthopedist, he had a torn meniscus and surgery was recommended. This condition prevented him from passing his Army Physical Fitness Test (APFT) in severe cold weather, like the weather in South Carolina.

b. No matter how many times he requested medical help at the unit, it was neither available nor provided. Through his last 7 years in the military, he experienced additional symptoms and was diagnosed with post-traumatic stress disorder (PTSD) and depressive disorder by the VA. For the past 11 years he has been under the medical care of the VA.

c. The U.S. military is one of the best institutions in the whole world and the best experience he ever had. He was under the impression that he deserved to be medically discharged due to his injury sustained while deployed to Iraq. The injuries to his left leg and ankle made it very difficult to perform in severe cold weather in the schoolhouse during the Captain Career Course. It is the only fair and just thing to do to correct his record.

3. The applicant enlisted in the U.S. Army Reserve (USAR) on 26 August 2002.

4. On 28 November 2006, the applicant was appointed as a Reserve commissioned officer of the Army.

5. A DA Form 1059 (Service School Academic Evaluation Report), dated 5 September 2008, shows the applicant marginally achieved course standards at the Chaplain, Basic Officer Leader Course (CH-BOLC), Phases I, and II from 9 June 2008 through 5 September 2008. The comments show the applicant completed all academic requirements for CH-BOLC but failed to pass the APFT during the course.

6. A DD Form 214 (Certificate of Release or Discharge from Active Duty) shows the applicant was ordered to active duty in support of Operation New Dawn on 22 January 2011, with service in Iraq from 16 March 2011 through 13 November 2011. He was honorably released from active duty on 22 December 2011, due to completion of required active service, and transferred back to his USAR unit.

7. Multiple DA Forms 67-9 (Officer Evaluation Report (OER)) show:

a. The applicant's OER covering the period from 7 November 2012 through 6 November 2013, shows the applicant was evaluated in his principal duty as battalion chaplain. Part IV b.1.(Leader Attributes) shows he was rated "No" in Physical for maintaining appropriate level of physical fitness and military bearing. IV c (APFT) shows "Fail" on 13 April 2013 and he did not meet height/weight standards. Part V (Performance and Potential Evaluation (Rater)) shows "Satisfactory Performance, Promote."

b. His OER covering the period from 7 November 2013 through 6 November 2014, shows he was rated in his principal duty as chaplain. Part IV (Performance Evaluation – Professionalism, Competencies, and Attributes) shows "Profile" with the date 7 June 2014, in the block pertaining to the APFT, that he was within height/weight standards, and was working on improving fitness outcomes, actively preparing to take a record APFT in February 2015. Page two reflecting Part V is not in his available records for review.

8. An 807th Medical Command (Deployment Support) Memorandum for Record, dated 7 April 2015, shows the applicant's left knee patellar ligament and left lateral collateral ligament sprains incurred on 15 September 2011, have been determined to be in the Line of Duty (LOD).
9. The applicant's DA Form 67-10-1 (Company Grade Plate (O1-O3; WO1-CW2) OER) covering the period from 7 November 2014 through 6 November 2015, shows the applicant was rated in his principal duty as chaplain. Part IV (Performance Evaluation – Professionalism, Competencies, and Attributes) shows he passed his APFT on 11 July 2015 and was within the height/weight standards. Part VI (Senior Rater) shows he was rated "Highly Qualified."
10. A DA Form 1059, dated 2 February 2016, shows the applicant failed to achieve course standards at the Chaplain Captains Career Course from 25 January 2016 through 5 February 2016 and this was a referred report. The comments show the applicant succeeded in the classroom environment but failed to meet the physical fitness and height/weight standards. He failed the APFT on 25 January 2016 and on 2 February 2016.
11. Multiple additional DA Forms 67-10-1 show:
  - a. The applicant's OER covering the period from 6 November 2015 through 4 November 2016, shows he was rated in his principal duty as battalion chaplain. Part IV shows he passed his APFT on 15 October 2016 and met the height/weight standards. Part VI shows he was rated as "Highly Qualified."
  - b. The applicant's OER covering the period from 22 May 2016 through 21 May 2017 (which overlaps with the dates of his prior OER) shows he was rated in his principal duty of battalion chaplain. Part IV shows he passed the APFT on 15 October 2016 and met height/weight standards, with the comment he worked at being with in standards on height/weight compared to previous APFT. Part VI shows he was rated as "Highly Qualified."
12. A DA Form 1059, dated 25 August 2017, shows the applicant failed to achieve course standards at the Chaplain Captains Career Course from 14 August 2017 through 25 August 2017. The comments show he performed adequately in the classroom, but failed to achieve APFT standards, failing the APFT on 16 August 2017 and 23 August 2017. He needed additional coaching, counseling, and mentoring in the areas of physical fitness and Army writing before he should be considered for re-enrollment in professional military education or promotion to major.

13. The applicant's final DA Forms 67-10-1 show:

a. He was rated in his principal duty as battalion chaplain. Part IV shows he passed his APFT on 20 October 2017 and met the height/weight standards. Part V (Intermediate Rater) comments include, "he has shown desire to continue his improvement in military education, physical fitness, and accessibility to the unit." Part VI shows he was rated "Highly Qualified."

b. His OER covering the period from 2 November 2017 through 1 November 2018 shows he was rated in his principal duty as battalion chaplain. Part IV shows he passed his APFT on 20 October 2017 and met the height/weight standards. Part VI shows he was rated "Highly Qualified" with comments including, "[he] has the potential to operate at the highest levels of the Chaplain Corps. Once CCC complete, promote immediately and continue to assign to the most demanding positions."

14. A physical profile is used to classify a Soldier's physical disabilities in terms of six factors or body systems, as follows: "P" (Physical capacity or stamina), "U" (Upper extremities), "L" (Lower extremities), "H" (Hearing), "E" (Eyes), and "S" (Psychiatric) and is abbreviated as PULHES. Each factor has a numerical designation: 1 indicates 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 (P) or temporary (T).

15. A review of the U.S. Army Human Resources Command (HRC), Soldier Management System (SMS) shows:

- the date of the applicant's last physical was 23 January 2019, and his last profile was December 2018
- his PULHES was 112111, with no limitations in any factors aside from factor L, where there were no significant limitations
- he passed the APFT in December 2018 and met body fat standards

16. Headquarters, U.S. Army Reserve Command Orders 19-291-00006, dated 18 October 2019, honorably discharged the applicant from the USAR effective 1 December 2019, under the authority of Army Regulation 135-175 (Separation of Officers), with the applicable paragraph unlisted. Additional instructions show officer twice non-selected from promotion to next higher grade, major, and not selectively continued.

17. The applicant's available service records do not contain a DA Form 3349 (Physical Profile) and they do not show:

- he was issued a permanent physical profile rating
- he suffered from a medical condition, physical or mental, that affected his ability to perform the duties required by his MOS and/or grade or rendered him unfit for military service
- he was diagnosed with a medical condition that warranted his entry into the Army Physical Disability Evaluation System (PDES)
- he was diagnosed with a condition that failed retention standards and/or was unfitting

18. The applicant's DA Form 5016 (Chronological Statement of Retirement Points) shows he completed 13 years, 6 months, and 1 day of qualifying service for retirement.

19. A VA Rating Decision, dated 15 November 2022, shows the applicant was granted a service-connected disability rating of 100 percent for PTSD and unspecified depressive disorder effective 17 May 2022.

20. A VA letter, dated 17 November 2022, shows the applicant had the following combined service-connected disability ratings:

- 10 percent, effective 5 December 2019
- 30 percent, effective 23 January 2020
- 100 percent, effective 17 May 2022

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 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, the Army Aeromedical Resource Office (AERO), and the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant is applying to the ABCMR in essence requesting a referral to the Disability Evaluation System (DES). He states that he had a torn meniscus from a 2011 deployment and "Through my last seven years in the military I experienced other

symptoms which I was diagnosed with post-traumatic stress disorder (PTSD) and depressive disorder by the VA. For the past 11 years till this day, I been under the medical care of the VA.”

c. The Record of Proceedings details the applicant’s military service and the circumstances of the case. Orders published by the Headquarters of the U.S. Army Reserve Command show the applicant was to be separated effective 1 December 2019. The reason for separation:

“Officer twice non-selected for promotion to next higher grade, Major, and not selectively continued under U.S. Code, Title 10, Section 14505. Has not attained sufficient years to qualify for retired pay or for retention under U.S. Code, Title 10, Section 12646.”

d. On 7 February 2015, the applicant was placed on a non-duty limiting permanent physical profile for “Chronic left knee and ankle pain”. No other conditions were listed on the profile. The applicant was marked as fully capable of performing all the functional activities required of all Soldiers, including live in an austere environment. The profile simply allowed the applicant to perform an alternate aerobic event (the bike or 2.5-mile walk) in lieu of the 2-mile run event for his Army Physical Fitness Test (APFT). No further permanent profiles were issued.

e. No medical documentation was submitted with the application. The EMR shows that during his 2011 deployment he was evaluated for an upper respiratory infections and left knee/leg pain. There are no additional contemporaneous records.

f. There is no evidence the drilling USAR Officer had any duty incurred medical condition which would have failed the medical retention standards of chapter 3 of AR 40-501, Standards of Medical Fitness, 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.

g. JLV shows he has been awarded multiple VA service-connected disability ratings, including PTSD (100% effective 5/17/2022), Limited flexion of the left ankle (10% effective 1/23/2020), and Limited flexion of left knee (10% effective 1/23/2020). 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.

h. It is the opinion of the ARBA Medical Advisor that a referral to the DES is unwarranted.

#### BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive review based on law, policy, and regulation. Upon review of the applicant's petition, available military records, and the medical review, the Board concurred with the advising official finding that the applicant's Department of Veterans Affairs rating determinations are based on the roles and authorities granted by Congress to the Department of Veterans Affairs and executed under a different set of laws. Based on this, the Board determined referral of his case to the Disability Evaluation System (DES) is not warranted.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

:            :            :            GRANT FULL RELIEF

:            :            :            GRANT PARTIAL RELIEF

:            :            :            GRANT FORMAL HEARING

■           ■           ■            DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.

[Redacted signature block]

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. On 25 August 2017, the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to Discharge Review Boards (DRBs) and Boards for Correction of Military/Naval Records (BCM/NRs) when considering requests by veterans for modification of their discharges due in whole or in part to: mental health conditions, including post-traumatic stress disorder (PTSD), traumatic brain injury (TBI), sexual assault, or sexual harassment. Boards are to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based, in whole or in part, on those conditions or experiences.

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 is responsible for administering the Army physical disability evaluation system and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with DOD Directive 1332.18 (Discharge Review Board (DRB) Procedures and Standards) and Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation).

a. Soldiers are referred to the disability system 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 (MEB); when they receive a permanent medical profile rating of 3 or 4 in any factor and are referred by an Military Occupational Specialty (MOS) 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 Physical Evaluation Board (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. Individuals who are "separated" receive a one-time severance payment, while veterans who retire based upon disability receive monthly military retired pay 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 635-40 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.

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 military service.

b. 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.

5. Army Regulation 40-501 provides information on medical fitness standards for induction, enlistment, appointment, retention, and related policies and procedures. Soldiers with conditions listed in chapter 3 who do not meet the required medical standards will be evaluated by an MEB and will be referred to a PEB as defined in Army Regulation 635-40 with the following caveats:

a. U.S. Army Reserve (USAR) or Army National Guard (ARNG) Soldiers not on active duty, whose medical condition was not incurred or aggravated during an active duty period, will be processed in accordance with chapter 9 and chapter 10 of this regulation.

b. Reserve Component Soldiers pending separation for In the Line of Duty injuries or illnesses will be processed in accordance with Army Regulation 40-400 (Patient Administration) and Army Regulation 635-40.

c. Normally, Reserve Component Soldiers who do not meet the fitness standards set by chapter 3 will be transferred to the Retired Reserve per Army Regulation 140-10 (USAR Assignments, Attachments, Details, and Transfers) or discharged from the Reserve Component per Army Regulation 135-175 (Separation of Officers), Army Regulation 135-178 (ARNG and Reserve Enlisted Administrative Separations), or other applicable Reserve Component regulation. They will be transferred to the Retired Reserve only if eligible and if they apply for it.

d. Reserve Component Soldiers who do not meet medical retention standards may request continuance in an active USAR status. In such cases, a medical impairment incurred in either military or civilian status will be acceptable; it need not have been incurred only in the line of duty. Reserve Component Soldiers with non-duty related medical conditions who are pending separation for not meeting the medical retention standards of chapter 3 may request referral to a PEB for a determination of fitness in accordance with paragraph 9-12.

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. Army Regulation 135-175 provides policy, criteria, and procedures for the separation of officers from the ARNG of the United States and the USAR, except for officers serving on active duty or active duty for training exceeding 30 days.

a. Chapter 4 (Discharge or Removal from an Active Status of USAR Officers) describes conditions under which USAR officers may be discharged from their status as Reserves of the Army and prescribes criteria for discharging them.

b. Paragraph 4-3 (Removal from an active status) provides that members of the USAR will be removed from an active status for any of the reasons in 4-3a(1) through 4-3a(17), with or without the officer's consent, regardless of the length of commissioned service. Removal will be by discharge characterized as honorable, transfer to the

Retired Reserve (if eligible and the member applies) or, if eligible, transfer to the Standby Reserve (Inactive Status List).

c. Paragraph 4-3a(5) (Non-selection for promotion after second consideration) states an officer in the grades specified below who has completed his or her statutory mandatory service obligation (MSO) will be discharged for failure to be selected for promotion after second consideration by a Department of the Army Reserve Component selection board not later than the first day of the seventh month after the month in which the report of the board which considered the officer for the second time is approved, unless the officer is retained for selective continuation. An officer will be transferred to the Retired Reserve if qualified, in lieu of discharge, unless the officer requests not to be transferred. Among the listed ranks are captain and major.

8. Title 38, U.S. Code, 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.

9. Title 38, U.S. Code, 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.

10. Title 10, U.S. Code, section 1556 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.

//NOTHING FOLLOWS//