

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: ██████████

BOARD DATE: 10 May 2024

DOCKET NUMBER: AR20230011095

APPLICANT REQUESTS: This case comes before the Army Board for Correction of Military Records (ABCMR) on a remand from the United States Court of Federal Claims (hereinafter referred to as the Court). The Court orders the ABCMR to:

a. Consider the merits of the claims asserted by Plaintiff (hereinafter referred to as the applicant) related to his entitlement to have his military record corrected based on mental illness, as documented in his motion for judgment on the administrative record and attached exhibits, along with any further evidence or argument that the applicant may submit during remand related to his alleged service-connected mental illness in accordance with any procedures that the ABCMR may establish for that purpose and any further evidence that the ABCMR may wish to obtain to further develop the factual record in this matter.

b. To the extent that the ABCMR determines no correction of the applicant's military record is warranted on remand, the ABCMR shall explain the relationship between the Department of Veterans Affairs (VA) disability determination and its determination that the applicant is not entitled to relief.

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

- Court Remand Order
- Applicant's Motion for Judgement on the Administrative Record, filed in the United States Court of Federal Claims on 23 September 2022
- Applicant's Original Complaint, filed in the United States Court of Federal Claims on 29 January 2016
- Exhibit A: ABCMR Record of Proceedings in Docket Number AR20090009517
- Exhibit B: ABCMR Record of Proceedings in Docket Number AR20100028381
- Exhibit C: Letter from the National Personnel Records Center (NPRC) and 16 pages of military medical records
- Exhibit D: DA Form 3180 (Personnel Screening and Evaluation Record) and DA Form 2-1 (Personnel Qualification Record – Part II)
- Exhibit E: Excerpt of Army Regulation (AR) 40-501 (Standards of Medical Fitness)
- Exhibit F: Department of Veterans Affairs (VA) Rating Decision, dated

29 February 2012 and eight pages of military medical records

- VA Medical Opinion Disability Benefits Questionnaire
- VA Initial Post-Traumatic Stress Disorder (PTSD) Disability Benefits Questionnaire
- VA Rating Decision, dated 22 August 2022
- VA Form 21-6789 (Deferred Rating Decision)
- 191-page packet received by the Army Review Boards Agency (ARBA) on 5 February 2024 (documents identified in supporting documents)

FACTS:

1. The Court Remand Order states, in part:

a. On 11 August 2021, the Court dismissed the applicant's complaint for lack of subject matter jurisdiction. The Court determined that under timeliness rules established in *Real v. United States*, 906 F.2d 1557 (Fed. Cir. 1990), and *Chambers v. United States*, 417 F.3d 1218, 1223 (Fed. Cir. 2005), the applicant's complaint was filed after the 6-year statute of limitations had elapsed. In addition, the Court determined that it lacked jurisdiction over the applicant's complaint under the jurisdictional bar set forth in *Sammt v. United States*, 780 F.2d 31 (Fed. Cir. 1985), and *Moyer v. United States*, 190 F.3d 1314 (Fed. Cir. 1999). The Court based its ruling on the allegations contained in the applicant's complaint.

b. The Federal Circuit, however, reversed and vacated the Court's ruling. The circuit essentially held that the Court did not make sufficient factual determinations to support its factual findings regarding the two grounds for dismissal. On remand from the circuit, the parties renewed their motions for judgment on the administrative record and the United States dropped its objections to the Court's jurisdiction. Moreover, the applicant obtained counsel to represent him.

c. In renewing his motion for judgment on the administrative record, the applicant, now aided by the assistance of counsel, pressed a different medical condition to support his argument that his military record should be corrected to reflect that he was discharged due to physical disability rather than as a result of his voluntary resignation for the "good of the service." This basis for disability was only mentioned in passing in his initial motion for judgment on the administrative record and opposition to the government's motion to dismiss. In the initial motions for judgment on the administrative record and the government's motion to dismiss, the briefing focused on an ulcer that the applicant was diagnosed with while serving on active duty in the U.S. Army. This ulcer was also the focus of the Court's opinion dismissing his complaint and the Federal Circuit's opinion on appeal.

d. Although only mentioned in passing in the initial briefing in this case, the applicant's alleged service-connected mental illness was presented to the ABCMR in his application for correction of military records, wherein he states, inter alia, that Army doctors "failed to take [his]... complaints of emotional and mental disturbances seriously." His corrections application also mentions "emotional stress." Despite this, it is clear that the Board's decision regarding the applicant's application only addressed his allegations regarding the ulcer. While this is understandable given the presentation of the issues by the applicant to the Board, he is nonetheless entitled to be heard on his allegation that his records should be corrected based on service-connected mental illnesses. Indeed, it appears that the VA, on 22 August 2022, determined that he has a service connection for PTSD with unspecified schizophrenia spectrum and other psychotic disorder, that has been established as directly related to military service. Moreover, the VA determined that he meets the criteria for a "100 percent disability evaluation" as a result of his mental illness."

e. Therefore, as there is nothing in the ABCMR's decision to indicate that it considered the applicant's mental illness-related claims, the proper course of action at this juncture is to remand these claims to the ABCMR so that it can consider whether the applicant is entitled to have his record corrected based on his service-connected mental illness. Indeed, as the Board's decision is silent as to his mental conditions, the proper course is to remand to the agency for additional investigation or explanation because "[t]he reviewing court is not generally empowered to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry."

2. In the applicant's Motion for Judgement on the Administrative Record, filed in the United States Court of Federal Claims on 23 September 2022, counsel states, in part:

a. The applicant joined the U.S. Army in 1981. While serving, he was diagnosed with ulcers. In 1986, after initiation of court-martial proceedings against him, he requested a "discharge for the good of the service" in lieu of continuation of the court-martial proceedings. The Army granted his request and discharged him. Two decades later, in 2009, he filed a petition with the ABCMR, arguing that he should have been given a retirement for physical disability under Title 10, U.S. Code § 1201. The Board rejected the contention and denied the petition.

b. In 2016, the applicant brought the present action against the U.S. in the Court of Federal Claims (Claims Court) under the Tucker Act, 28 U.S.C. §1491, arguing that the ABCMR had erred and that he was entitled to disability retirement pay starting in 1983, when he allegedly should have been given a disability retirement because of his ulcers. The Claims Court dismissed the case. The dismissal was reversed by the U.S. Court of Appeals for the Federal Circuit.

c. The applicant was unfit for duty in 1983. He complained of depression and excessive worry. Defendant (hereinafter referred to as the U.S. Army) has deprived the applicant of disability retirement from 1983 to the present. He and his family have also been deprived of all of the disability retirement benefits located in Army Regulation (AR) 215-1 (Military Morale, Welfare, and Recreation Programs and Nonappropriated Fund Instrumentalities), including membership to exclusive military golf clubs. It would cost a fortune to replace the AR 215-1 benefits alone that the applicant and his family have been deprived of for the past 39 years from 1983 until the present day.

d. Attached is the applicant's VA disability rating decision from 22 August 2022. The decision granted service connection for PTSD with unspecified schizophrenia spectrum and other psychotic disorder (previously rated as any psychiatric disorder to include PTSD) with an evaluation of 100 percent effective 11 February 2021. The VA rating decision takes into consideration: 1) the applicant's 1982 quarantine and 2) 1983 psychiatric complaint of depression and excessive worry. The VA has granted all of his claims based exclusively on his first period of service. According to the VA, the second period of his service is barred due to the other than honorable discharge.

e. *Kahana v. Shinseki*, 24 Vet. App. 428 (2011) states that the Board must make two findings. First, the Board must find that the service member's records appear to be complete, at least in relevant part. If the service member's records are not complete in relevant part, then silence in the service member's records is merely the absence of evidence and not substantive negative evidence. The Board may not consider the absence of evidence as substantive negative evidence. See *McLendon v. Nicholson*, 20 Vet. App., 79, 85 (2006). The U.S. Army's position is that the applicant's records are administratively lost. The absence of evidence cannot be used as substantive negative evidence against him. This means that service connection has been established by applicant because the agency (Army) cannot make a negative inference in his case because VA admits that service member's records are incomplete. The administrative record has established, by a preponderance of evidence, that the applicant's schizophrenia is service connected, as well as other injury and disease, ulcer, arthritis, back, knees, hives, hearing loss, tinnitus, ankles, and painful feet.

f. Conclusion: In 1983, because of government error, regulatory violations, and having his medical records destroyed by the U.S. Army, the applicant was erroneously denied full disability retirement. The administrative record has established by a preponderance of evidence that his schizophrenia is service connected to 1983, as well as other injury and disease, duodenal ulcer, arthritis, back, knees, hives, hearing loss, tinnitus, ankles, and painful feet. The applicant is entitled to Judgment in his favor in this matter based on the administrative record. *The complete Motion for Judgement on the Administrative Record was provided to the Board for their review and consideration.*

3. Incorporated herein by reference are military records which were summarized in the previous considerations of the applicant's case by the ABCMR in Docket Numbers AR20090009517 on 4 February 2010, AR201000028381 on 2 June 2011, AR20170015837 on 20 September 2020, AR20210010400 on 3 February 2022, and AR20220011343 on 16 June 2023.

4. The applicant enlisted in the Regular Army on 6 October 1981.

5. A DA Form 2985 (Admission and Coding Information) shows the applicant was admitted for treatment of a duodenal ulcer on 2 May 1983 and that he was released on 5 May 1983.

6. A Standard Form 93 (Report of Medical History), dated 8 November 1983, shows the applicant indicated he was in very good health and not taking medication.

7. The applicant reenlisted on 20 September 1984 (Note: In order to be allowed to reenlist, Soldiers must be found medically fit for continued military service).

8. On 27 November 1985, the applicant voluntarily extended his enlistment for a period of 22 months for the purpose of acquiring the service remaining requirements for a with dependents overseas tour.

9. On 5 June 1986, the applicant received nonjudicial punishment under the provisions of Article 15, Uniform Code of Military Justice (UCMJ), for wrongful use of marijuana. His punishment included reduction from the rank/grade of specialist/E-4 to private first class/E-3.

10. A Report of Mental Status Evaluation shows the applicant underwent a mental status evaluation while serving in pay grade E-3. The report shows his behavior was found normal, he was fully alert and oriented, his mood or affect was unremarkable, thinking process clear, thought content was normal, and his memory was good. The evaluating physician opined the applicant had the mental capacity to understand and participate in the proceedings, he was mentally responsible, and he was deemed to meet the medical retention standards of AR 40-501.

11. The applicant's available military records do not contain his separation proceedings; therefore, the complete facts and circumstances surrounding his discharge from the service are unknown.

12. The applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged on 10 November 1986 under the provisions of AR 635-200 (Personnel Separations – Enlisted Personnel), Chapter 10, by reason of for the good of the service, in lieu of trial by court-martial, with an under conditions other than

honorable characterization of service. The DD Form 214 also shows he was credited with 5 years, 1 month, and 5 days of active service. (Note: A member who has committed an offense for which the authorized punishment includes a punitive discharge, may submit a request for discharge for the good of the service in lieu of trial by court-martial. The request may be submitted at any time after charges have been preferred and must include the individual's admission of guilt).

13. There is no evidence in the applicant's available records indicating he was unable to perform his military duties due to a medical disability.

14. In connection with the processing of the applicant's previous case (ABCMR Docket Number AR20220011343) the ARBA medical staff provided a medical advisory opinion. The advisory states, in part:

a. A review of the applicant's records did not reveal he was diagnosed or treated for a behavioral health condition while in service and although he reports that he was diagnosed with schizophrenia while he was hospitalized for an ulcer, in service, there is no documentation to support his contention of a schizophrenia diagnosis. Post-service records show he was granted 100 percent service-connected disability compensation for PTSD and unspecified schizophrenia spectrum disorder and other psychotic disorder, related to quarantine secondary to hepatitis A outbreak while stationed in Germany.

b. The applicant's records contain conflicting VA Compensation and Pension (C&P) evaluations, with first finding he did not meet diagnostic criteria for PTSD but did meet criteria for an unspecified schizophrenia spectrum disorder and other psychotic disorder, not likely related to military service. The most recent, however, found he met criteria for PTSD and unspecified schizophrenia spectrum disorder and other psychotic disorder and they were both related to his traumatic experience in Germany. Given his description of the traumatic exposure during his second evaluation, the ARBA's medical advisor concurs he met the criteria for PTSD and that he reported sufficient additional symptoms to meet full criteria for PTSD. As is related to the diagnosis of unspecified schizophrenia spectrum disorder and other psychotic disorder, there is insufficient evidence in the record indicating he met diagnostic criteria for the disorder during his time in service and there are no in-service markers of prodromal psychotic symptoms. In fact, the applicant was cleared both medically and psychiatrically for administrative separation.

c. Additionally, as outlined in the first C&P, the applicant was incarcerated for 26 years, the year following his separation from service, and at no time during incarceration was he noted to have presented with psychotic symptoms or prescribed psychotropic medication. Given the normal course of psychotic disorders, one finds it atypical that he would not have presented with psychotic symptoms in such a stressful

environment, if he were in fact suffering from psychosis at the time of discharge from the military.

d. As it relates to mitigating factors, the applicant's misconduct characterized by marijuana use is mitigated by PTSD, as there is a nexus between PTSD and comorbid substance abuse to self-medicate symptoms. As it relates to medical disability, it is the opinion of the ARBA's medical advisor that there is insufficient evidence in the record indicating he met the criteria for a condition requiring separation through military medical channel at the time of discharge.

e. Based on the available information, it is the opinion of the ARBA's medical advisor that there is sufficient evidence in the records that the applicant had a condition or experience during his time in service that mitigates his misconduct. Does the condition or experience actually excuse or mitigate the discharge? Partial. Given the applicant's file is void of a separation packet detailing specific facts and circumstances, the medical advisor cannot render a fully informed opinion. *The complete medical advisory opinion was provided to the Board for their review and consideration.*

15. In the applicant's previous case (ABCMR Docket Number AR202200011343), the Board determined the following:

a. After reviewing the application and all supporting documents, the Board found that relief was not warranted. The Board carefully considered the applicant's request, supporting documents, evidence in the records, a medical advisory opinion, and published Department of Defense (DoD) guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement, his record of service, and the reason for his separation. The Board considered the medical records and conclusions of the advising official.

b. The Board noted there is insufficient evidence in the record indicating the applicant met criteria for a condition requiring separation through military medical channels at the time of discharge. The Board concurred with the advisory official finding insufficient evidence of in-service mitigating factors to overcome the misconduct. The applicant provided no evidence of a behavioral health diagnosis during his active service in support of a clemency determination.

c. Based upon a preponderance of evidence, the Board determined that the narrative reason for separation and characterization of service the applicant received upon separation were not in error or unjust.

d. The Board agreed that the VA provides post-service support and benefits for service-connected medical conditions. The VA operates under different laws and

regulations than the DoD. In essence, the VA will compensate for all service-connected disabilities.

16. The applicant's VA Rating Decision, dated 22 August 2022, shows he was granted service-connected disability compensation, with a combined disability rating of 100 percent, for the following conditions:

- PTSD with unspecified schizophrenia spectrum and other psychotic disorder (previously rated as any psychiatric disorder to include PTSD)
- left ankle degenerative arthritis
- left knee strain
- chronic urticaria

17. On or around 5 February 2024, the Army Review Boards Agency (ARBA) Case Management Division received from the applicant a 191-page packet containing several types of documents that include: a U.S. Court of Federal Claims filing, First Judicial District of Pennsylvania Court Summary, Court of Common Pleas of Philadelphia County Criminal Docket, his Certificate of Marriage and Divorce Decree, Social Security Administration documents, documents from the Commonwealth of Pennsylvania Board of Probation and Parole, VA medical progress notes, military medical records, and other types of documents. *The complete 191-page packet was provided to the Board for their review and consideration.*

18. In connection with the processing of the applicant's case, the ARBA medical staff provided a medical advisory opinion pertaining to his behavioral health during his military service. The advisory states, in part:

a. A Report of Mental Status Evaluation, shows the applicant underwent a mental status evaluation as part of his separation proceedings. The report shows his behavior was determined to be normal, and his mental status was within a normal range. The evaluating physician concluded the applicant had the mental capacity to understand and participate in the proceedings, was mentally responsible, and was deemed to meet the medical retention standards of AR 40-501.

b. The VA's Joint Legacy Viewer (JLV) search revealed that the applicant receives service-connected disability for PTSD (100%). Due to the applicant's extended incarceration of 27 years, he was not engaged in direct care at the VA for many years. There is evidence he reported anxiety symptoms while incarcerated, but there is insufficient evidence he required psychiatric medication or was presenting psychotic symptoms while incarcerated. He was initially evaluated for PTSD during his disability evaluation for the VA in 2015. He was not diagnosed with PTSD, but he was diagnosed with unspecified schizophrenia spectrum and other psychotic disorder. While he was not engaged in combat during his military service, he reported that being quarantined during

a hepatitis A outbreak was traumatic. He underwent a second disability examination in 2022. After this evaluation, he was found to meet the diagnostic criteria for service-connected PTSD and unspecified psychotic disorder. He has been intermittently engaged in behavioral health treatment and medication management for his mental health conditions at the VA since his parole date in 2014 until presently.

c. In conclusion, there is evidence the applicant has been diagnosed with service-connected mental health conditions several years following his discharge. However, based on records available for review, he was evaluated while on active service to determine if he was experiencing a mental health condition, which warranted a medical discharge. He was found to meet retention standards and there is insufficient evidence from his military or medical records at the time of his active service to suggest he was experiencing a mental health condition which failed to meet retention standards at that time. Therefore, there was insufficient evidence at this time to support that he had any psychiatric conditions which failed retention standards of AR 40-501, Chapter 3 at the time of discharge. *The complete medical advisory opinion was provided to the Board for their review and consideration.*

19. In connection with the processing of the applicant's case, the ARBA medical staff provided a second medical advisory opinion addressing his non-behavioral health related issues during his military service. The advisory states, in part:

a. A Chronological Record of Medical Care shows the applicant was hospitalized from 2-5 May 1983 for initiating treatment of a duodenal ulcer. A 4 May 1983 entry on an Abbreviated Medical Record states "No abdominal pain since admission. No abdominal tenderness. Pt. [patient] placed on intensive anti-ulcer regimen for 24 hours. Will start solid foods today and plan on discharge tomorrow." The applicant was discharged on oral medication, scheduled for a repeat upper gastrointestinal study in 3 weeks, and directed to return to the internal medicine clinic in one month.

b. Another SF 600 shows the applicant was evaluated on 11 June 1984 for a three-day history of abdominal cramps associated with standing and accompanied by a "pinching feeling that runs from his buttocks to his stomach area." The provider documented a normal examination, to include a soft and non-tender abdomen and normal digital rectal examination. The provider discussed his findings with the applicant and directed him to return to the clinic in one week for follow-up evaluation. The next medical document shows he was evaluated by the same provider for a 2-hour history of right sided abdominal pain and cramping on 5 September 1984. The exam was normal except for some mild abdominal tenderness to palpation over the "entire abdomen." He was treated for "Flatus" (intestinal gas) and directed to follow-up as needed.

c. The applicant underwent an esophagogastroduodenoscopy (EGD) on 4 August 1986 after having experienced peptic ulcer disease (PUD) symptoms for 2 weeks. The

study revealed a pre-pyloric peptic ulcer and mild duodenitis. He was placed on oral medication (Tagamet and Mylanta) and directed to have a follow-up EGD in 8 weeks. There is no additional non-behavioral health related medical documentation.

d. Paragraph 3-5l of AR 40-501 states the criteria for referral to a medical evaluation board for gastrointestinal ulcers failing medical retention standards: I. Ulcer, peptic, duodenal, or gastric. Repeated hospitalization or "sick in quarters" because of frequent recurrence of symptoms (pain, vomiting, or bleeding) in spite of good medical management, and supported by laboratory and X-ray evidence of activity." There is no probative evidence the applicant's PUD failed medical retention standards outlined in paragraph 3-5l of AR 50-501.

e. AR 635-40 (Disability Evaluation for Retention, Retirement, or Separation governs the Disability Evaluation System (DES)) for the Army and in particular, the workings of the physical evaluation boards. Paragraph 2-1 of AR 635-40 states:

The mere presence of an 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, grade, rank, or rating, given due consideration to his or her availability for worldwide deployment under field conditions.

f. There is no evidence the applicant had a non-behavioral health medical condition which would have failed the medical retention standards of Chapter 3 of AR 40-501 prior to his voluntary administrative separation. Thus, there was and remains no cause for referral to the DES for such a condition. Furthermore, there is no evidence that his PUD or any other non-behavioral health medical condition prevented him from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his discharge.

20. The medical advisory opinions were provided to the applicant and given the opportunity to provide additional medical evidence or comments. He responded and provided a 131-page packet with the following documents:

- SF 600 (Chronological Record of Medical Care) with dates from 3 to 9 November 1983
- Two SF 93 Report of Medical History, dated 8 November 1983 and 15 July 1986
- SF 88 (Report of Medical Examination), dated 15 July 1986
- Letter from the U.S. Army Office of the Surgeon General, dated 29 December 2010, stating PTSD was not specifically identified in AR 40-501 in 1983
- DA Form 3349 (Physical Profile) (sample form-does not pertain to applicant)
- excerpt of AR 635-40

- Request for Regular Army Reenlistment or Extension (sample form)
- Request for Waiver of Disqualification for Enlistment/Reenlistment in the Regular Army (sample form)
- Bar to Reenlistment Certificate (sample form)
- Declination of Continued Service Statement (sample form)
- Record of Proceedings Under Article 15, UCMJ
- Report of Mental Status Evaluation
- Alcohol and Drug Abuse Prevention and Control Program Client Intake/Screening Record
- Health Record – Dental
- Letter from the U.S. Army Public Health Command, dated 9 December 2011 and report of an outbreak of hepatitis A in July 1982
- Commonwealth of Pennsylvania Department of Corrections Inmate Medical History
- VA Deferred Rating Decision
- VA Compensation and Pension Exam Inquiry
- VA Medical Progress Notes

21. In addition to the documents described above, the applicant's 131-page packet contains 86 pages of numerous statements/notes, in which he expresses his disagreement with the medical advisory opinions stating that the opinions are inadequate, incorrect, and have no probative value. *The complete 131-page packet was provided to the Board for their review and consideration.*

22. 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.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, advisory medical opinions, 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.

2. The Board found insufficient evidence to support the applicant's claim that he should have been found medically unfit for service in 1983 or at any other time that he was on active duty in the Army. The Board noted that the standard for fitness for duty is that of a Soldier in general, and not necessarily an individual's current position or MOS; it therefore noted that even if the applicant had been disqualified from service in the

nuclear program as he claimed he should have been, he would have been evaluated according to his ability to perform the duties of a Soldier in general. As to applicant's documented ulcer, the Board found that the applicant was not given any permanent profiles or significant, ongoing duty limitations, that the applicant appears to have sought treatment, obtained medication, and then returned to duty without further significant follow-up, and that the applicant himself did not allege in his application that the ulcer condition rendered him unable to fulfill his assigned duties or those of any other MOS. As to applicant's claim that he suffered from a mental health condition and that an undocumented diagnosis of schizophrenia was made, the record shows no further mention of follow-up, diagnosis, encounters with behavior health, or command referrals for evaluation. The applicant also makes no specific assertions about how his mental condition interfered with his ability to perform his assigned duties or those of a Soldier in general. Furthermore, the Board noted that the applicant was fully cleared for separation by both mental health and physical evaluations. Taking all of these factors together, the Board found that the far greater weight of evidence supports a finding that the applicant was fit for duty throughout his time in service.

3. In reaching its decision, the Board discussed the applicant's missing medical records. The Board did not infer any negative assumptions from the gap in applicant's medical record, but noted that, had significant diagnoses, permanent profiles, or referrals to the Disability Evaluation System been made, evidence of such would have been present in other records and/or evidence of continued treatment would have been apparent from the later available medical records.

4. The Board applied liberal consideration to any evidence that would have supported the applicant's claim of a mental health condition, and in particular to the VA's diagnoses of PTSD and schizophrenia. Aside from the VA's diagnoses, even construing all available information in the most favorable light, the Board found insufficient evidence to support the applicant's claim, as discussed above. In considering the VA's decision to grant the applicant a service-connected disability rating for his mental health condition, the Board took note of the differing standards between the VA and the Disability Evaluation System (DES). The Board noted that, while the DES and fitness for duty are concerned with a servicemember's ability to perform as a Soldier while in the service, the VA can and does connect conditions to service that worsen or emerge anew many years after a member's service was completed. This does not mean that a servicemember was not fit for duty in the past, when they served. In the applicant's case, given the lack of evidence of unfitting conditions during his years of service, his failure to allege any specific ways in which his VA-diagnosed conditions impacted his service, and the more than 20 years which lapsed between the end of applicant's service and the VA's diagnoses, the Board determined that - even with liberal

consideration - the VA's diagnoses do not serve to retroactively prove that applicant suffered from those mental health conditions from 1981-1986, or, if he did, that they were severe enough to warrant referral to the Disability Evaluation System.

5. Given all of the above factors and considerations, the Board determined that there is insufficient evidence to support the applicant's contention that he was not fit for duty during his term of Army service.

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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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. AR 635-200 sets forth the basic authority for the separation of enlisted personnel. Chapter 10 provides that a member who has committed an offense for which the authorized punishment includes a punitive discharge, may submit a request for discharge for the good of the service in lieu of trial by court-martial. The request may be submitted at any time after charges have been preferred and must include the individual's admission of guilt. Commanders would ensure that an individual was not coerced into submitting a request for discharge for the good of the service. Consulting counsel would advise the member concerning the elements of the offense or offenses, the type of discharge normally given under the provisions of this chapter, the loss of VA benefits, and the possibility of prejudice in civilian life because of the characterization of such a discharge.

2. 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 and AR 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 AR 40-501, chapter 3.

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.

c. Service members whose medical condition did not exist prior to service who are determined to be unfit for duty due to disability are either separated from the military or are permanently retired, depending on the severity of the disability. 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.

3. AR 40-501 provides information on medical fitness standards for induction, enlistment, appointment, retention, and related policies and procedures. Chapter 3 lists the various disqualifying medical conditions and/or physical defects which may render a

Soldier unfit for further military service and which fall below the standards required. These medical conditions and/or physical defects, individually or in combination, are those that have met the clinical or administrative medical retention determination point (MRDP) and:

- a. Significantly limit or interfere with the Soldier's performance of their duties as substantiated by the Soldier's commander or supervisor.
- b. Require medication for control that requires frequent monitoring by a physician due to debilitating or serious side effects, medical care, or hospitalization with such frequency as to interfere with the satisfactory performance of duty.
- c. Restrict performance of any of the profile functional activities listed in the DA Form 3349 (Physical Profile); prevent the performance of all aerobic events of the Army Physical Fitness Test; have met a clinical MRDP; or have been temporarily profiled for more than 365 days, meeting the administrative MRDP.
- d. May compromise or aggravate the Soldier's health or well-being if they were to remain in the military Service. This may involve dependence on certain medications, appliances, severe dietary restrictions, frequent special treatments, or a requirement for frequent clinical monitoring.
- e. May compromise the health or well-being of other Soldiers (for example, a carrier of communicable disease who poses a health threat to others).
- f. May prejudice the best interests of the U.S. Government if the individual were to remain in the military Service.

4. AR 40-501 also provides that for an individual to be found unfit by reason of physical disability, he or she must be unable to perform the duties of his or her office, grade, rank or rating. Performance of duty despite impairment would be considered presumptive evidence of physical fitness.

5. AR 635-40 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 an MEB is convened to document a Soldier's medical status and duty limitations insofar as duty is affected by the Soldier's status. A decision is made as to the Soldier's medical qualifications for retention based on the criteria in AR 40-501.

- a. The mere presences of an 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 Soldier reasonably may be expected to perform because of their office, grade, rank, or rating.

b. 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 they can no longer continue to reasonably perform because of a physical disability incurred or aggravated in service.

c. When a member is being processed for separation for reasons other than physical disability (e.g., retirement, resignation, reduction in force, relief from active duty, administrative separation, 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. The presumption of fitness may be overcome if the evidence establishes that:

(1) The Soldier was, in fact, physically unable to perform adequately the duties of his or her office, grade, rank or rating for a period of time because of disability. There must be a causative relationship between the less than adequate duty performance and the unfitting medical condition or conditions.

(2) An acute, grave illness or injury or other significant deterioration of the Soldier's physical condition occurred immediately prior to, or coincident with processing for separation or retirement for reasons other than physical disability and which rendered the Soldier unfit for further duty.

6. AR 635-40, dated 13 December 1985, in effect at the time of the applicant's discharge, states in:

a. Paragraph 4-1 (Members charged with an offense) the case of a member charged with an offense, or is under investigation for an offense which could result in dismissal or punitive discharge, may not be referred for disability processing unless:

(1) The investigation ends without charges.

(2) The officer exercising proper court-martial jurisdiction dismisses the charge.

(3) The officer exercising proper court-martial jurisdiction refers the charge for trial to a court-martial that cannot adjudge such a sentence.

b. Paragraph 4-3 (Enlisted members who may be separated under other than honorable conditions) an enlisted member may not be referred for physical disability processing when action has been started that may result in his administrative

separation with an under other than honorable conditions character of service unless the general court-martial authority finds that:

(1) The disability is the cause, or substantial contributing cause, of the misconduct that might result in a discharge under other than honorable conditions.

(2) Other circumstances warrant disability processing instead of other administrative disposition.

7. 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.

8. 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 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.

9. AR 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 2-9 states the ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of evidence.

//NOTHING FOLLOWS//