

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 14 January 2025

DOCKET NUMBER: AR20230011449

APPLICANT REQUESTS: in effect,

- an upgrade of his under other than honorable conditions discharge to honorable
- a video/telephonic appearance before the Board

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

- Two DD Forms 149 (Application for Correction of Military Record)
- Self-Authored Statement
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- Memorandum for Record (MFR), Subject: Approval of Disability Retirement Application
- MFR, Subject: Notification of Annual Training and Soldier Readiness Processing
- MFR, Subject: Warning Notice of Annual Training and Soldier Readiness Processing
- MFR, Subject: Request for Conditional Waiver
- 77th Regional Readiness Command Orders 011019, 22 March 2006
- Service Documents: Notification, Commander' Report and Recommendation
- Headquarters, 77th U.S. Army Regional Readiness Command Orders 06-206-0025, 25 July 2006
- National Personnel Records Center (NPRC) Letter
- Five Character Letters
- Department of Veterans Affairs (VA) Letter
- Medical Documents

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. He requests a correction to his military record. He believes there are errors and inaccuracies that need to be addressed in order to accurately reflect his service history. He was not able to complete service due to suffering from migraines every day then being involve in a motorcycle accident and becoming disabled and going back and forth in and out the hospital for over a year. He looks forward to a prompt resolution and an accurate representation of his military service. If there are errors or omissions in the record, it can lead to individuals being denied the benefits they rightfully deserve.

b. During his service, specifically while engaging in training, e.g., combat readiness training, he suffered a significant injury that ultimately led to his medical disability. Despite his strong desire to continue serving and his commitment to his duties, his resulting physical limitations necessitated an early end to his military career. Given the nature of his disability, which was incurred in the line of duty and is directly related to his military service, he kindly requests that his discharge status be reconsidered and upgraded to honorable. An honorable discharge would not only more accurately reflect his service and sacrifice but would also enable him to fully access the benefits.

3. The applicant provides:

a. A self-authored statement, dated 18 July 2023 reflects he has been suffering from debilitating migraines on a daily basis. These migraines have caused extreme discomfort and have severely impacted his ability to effectively carry out his reserve duties. Despite his efforts, the migraines persisted, rendering him physically unable to meet the demands of his military responsibilities. Furthermore, in a distressing turn of events, Brian Murray was involved in a motorcycle accident. This incident exacerbated his existing health difficulties and added to the limitations he faced in performing his assigned duties. The accident resulted in physical injuries that required comprehensive medical attention and ongoing rehabilitation. As a result, he has been unable to actively participate in his reserve duty since the time of the accident. He has consistently displayed unwavering commitment and dedication to his military service. He had shown great enthusiasm in his training and has always strived to meet and exceed the expectations set before him. It is with deep regret that he finds himself unable to contribute actively due to circumstances beyond his control.

b. MFR, Subject: Approval of Disability Retirement Application, July 21, 2004, State of New Jersey shows approval of his application for Ordinary Disability Retirement.

c. MFR, Subject: Warning Notice of Annual Training and Soldier Readiness Processing, 12 January 2006 shows the applicant would receive certified mail orders to report to the unit on 3 February 2006 to 5 February 2006 to attend 3 days of Annual Training. Failure to report as ordered to complete this annual training may lead to

involuntary separation action under Army Regulation 135-178 (Enlisted Administrative Separations).

d. MFR, Subject: Notification of Annual Training and Soldier Readiness Processing, 25 January 2006 shows the applicant had not reported for drill in at least the past seven months, his qualifications for continued service will be assessed and he will be counseled regarding his service options. Failure to report as ordered to complete this AT may lead to involuntary separation action under AR 135-178

e. MFR, Subject: Request for Conditional Waiver, 2 March 2006 shows the applicant submitted for conditional waiver and voluntarily waived his right to a hearing before an administration separation board on the condition that upon his separation his service will be characterized as honorable.

f. The notification of separation proceedings under Army Regulation 135-178, Chapter 13.

g. 77th Regional Readiness Command Orders 011019, 22 March 2006 revoked Orders 005354, dated 18 January 2006 pertaining to a tour of the applicant.

h. The Commander's Report, 24 March 2006 shows his commander recommended that the applicant not be retained and discharged under other than honorable conditions. He had 18 unexcused absences in a 1-year period. He refused to come to Battle Assembly.

i. Character letters that attest to the applicant's exceptional qualifies and unwavering commitment to his family, faith, and integrity. He is a devoted husband, loving father and Christian. His parenting style is characterized by patience, understanding, and a strong moral compass, which he instills in his children through leading by example. He is a positive influence on those around him. He is a minister. He is a shining example of what it means to be present, nurturing, and involved. An Army buddy states it was a privilege serving with the applicant. During their time in the military, the applicant consistently displayed outstanding leadership, professionalism, and unwavering dedication to his duties. His commitment to his responsibilities and his fellow Soldiers was unmatched, and he exemplified the Army values with integrity and honor. His exceptional work ethic and ability to handle high pressure situations made him an invaluable asset to their unit.

j. VA letter, 13 March 2024 shows the applicant's has service-connection for tinnitus with an evaluation of 10%. Service connection for hearing loss and chronic migraines is denied. His combined rating evaluation is 10%.

k. The applicant's medical documents, which will be reviewed and discussed by the medical staff at the Army Review Boards Agency (ARBA).

4. The applicant's records contain sufficient evidence to support amendment of his DD Form 214 for the period ending 24 March 1999 by amending Block 24 (Character of Service) to honorable.

5. A review of the applicant's service record shows:

a. The applicant enlisted in the U. S. Army Reserve (USAR) on 4 September 1998.

b. Orders 49-624, 18 February 1999 directed the award of military occupational specialty (MOS) 62E (Heavy Construction Equipment Operator).

c. The applicant entered active duty for training on 29 October 1998. He was released from active duty for training on 24 March 1999 and transferred to the USAR. His DD Form 214 shows he completed 4 months and 26 days of active service. His service was uncharacterized. He was awarded military occupational specialty 62E (Heavy Construction Equipment Operator).

d. Headquarters, 77th U.S. Army Regional Readiness Command Orders 06-206-00025, 25 July 2006:

- reduced the applicant to private/E-1 with an effective date of 19 July 2006
- discharged the applicant from the USAR under other than honorable conditions with an effective date of 19 July 2006 under the provisions of AR 135-178

e. The applicant's available record is void of any documentation to show he received a Medical Evaluation Board, or Physical Evaluation Board, IDES processing.

6. By regulation, (AR 15-185), the ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. 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.

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

8. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. Documentation reviewed included the applicant's ABCMR application and

accompanying documentation, the military electronic medical record (EMR – AHLTA and/or MHS Genesis), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and/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 in essence requesting an upgrade of his 16 July 2006 discharge characterized as under other than honorable conditions and referral to the Disability Evaluation System (DES). He states in part:

“I was not able to complete service due to suffering from Migraines every day then being involve in a Motorcycle Accident and becoming disabled and going back in forth in and out the hospital for over a year.”

c. The Record of Proceedings details the applicant’s military service and the circumstances of the case. Orders published by the 77th Regional Readiness Command show the applicant was reduced in grade from private second class (PV2 – E02) to private (PV1 – E01) under provisions provided in paragraph 7-12a of AR 140-158, Enlisted Personnel Classification, Promotion, and Reduction (15 November 2005); and the applicant was discharged from the USAR under provisions in AR 135-178, Enlisted Administrative Separations (27 July 2004). No chapter, paragraph, or narrative reason is given for his discharge. Both actions were effective 19 July 2006.

d. A 9 June 2003 civilian clinical encounter shows the applicant had a 10-year history of headaches which had increased since April 2003. He was diagnosed with migraine headaches with aura.

e. Administrative documentation shows the applicant sustained a right humerus fracture on 26 July 2003. No other injuries were noted and later documentation shows the mechanism of injury was a motorcycle accident. The circumstances of the accident are unknown. A 17 February 2004 civilian clinical encounter shows the applicant had been treated with an intramedullary nail. He was complaining of shoulder pain and radiographs showed he may have been developing a fracture non-union.

f. A 21 July 2004 benefits letter from the New Jersey Division of Pensions and Benefits states: “The Public Employees’ Retirement System Board of Trustees at its meeting on July 21, 2004, approved your application for Ordinary Disability Retirement effective May 1, 2004, under Maximum.” A disabling condition was not noted.

g. A 13 March 2024 VA Benefits letter shows the applicant was awarded one VA service-connected 10% disability rating for tinnitus originally effective 18 August 2023. It also shows service connection for chronic migraines was denied.

h. A 12 January 2006 memorandum from his unit states the applicant had “not reported for Battel Assembly in at least the past five months” and informed the applicant:

“Failure to report as ordered or complete this AT [annual training] may lead to involuntary separation action under AR 135-175, Separation of Officers; or AR 135-178, Enlisted Administrative Separations; being initiated against you.”

i. A 27 February 2006 memorandum from his commander informed the applicant he had failed to attend annual training despite having been ordered to do so and his commander was initiating action so separate him for the USAR:

“I have determined that you, without proper authority, failed to attend a period of Annual Training (AT) to which you were ordered. I further have determined that you were notified of the AT in enough time to comply with the order and that there were no compelling or emergency reasons for you being absent.

Having made the above determinations, I hereby declare you to be an Unsatisfactory Participant in accordance with Army regulation (AR) 135-91, Chapter 4, Section III. I further declare that you have no potential for useful service under mobilization, and I am initiating action to process you for discharge from the U.S. Army Reserve under the provision of AR 135-175, Separation of Officers; or AR 135-178, Enlisted Administrative Separations.”

j. There are no encounters in the EMR or JLV.

k. There is no evidence the applicant 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; or any medical condition which would have either prevented him from attending battle assemblies and AT or maintaining contact with his chain of command. Thus, there is no cause for referral to the Disability Evaluation System.

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

BOARD DISCUSSION:

After reviewing the application and all supporting documents, to include the DoD guidance on liberal consideration when reviewing discharge upgrade requests, the Board determined relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. Based upon the misconduct in the record and the lack of mitigation for that misconduct found in the medical review, the Board concluded there was insufficient evidence of an error or injustice warranting a change to the applicant's characterization of service and/or narrative reason for separation.

BOARD VOTE:

Mbr 1    Mbr 2    Mbr 3

:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
█	█	█	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

1. 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.
2. Prior to closing the case, the Board did note the administrative note below from the analyst of record and recommended that change be completed to more accurately reflect the military service of the applicant.

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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.

ADMINISTRATIVE NOTE(S):

A review of the applicant's records shows his DD Form 214 omitted administrative entries. As a result, amend the DD Form 214 period ending 24 March 1999 by amending Block 24 (Character of Service) to Honorable.

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

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

4. Title 38 USC, section 1131 (Peacetime Disability Compensation - Basic Entitlement) states for disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during other than a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury

or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

5. 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.

6. Army Regulation 135-178 (Enlisted Administrative Separations) this regulation sets policies, standards, and procedures to ensure the readiness and competency of the U.S. Army while providing for the orderly administrative separation of Army National Guard of the United States (ARNGUS) and U.S. Army Reserve (USAR) enlisted soldiers for a variety of reasons. Readiness is promoted by maintaining high standards of conduct and performance.

a. An honorable discharge is a separation with honor and entitles the recipient to benefits provided by law. The honorable characterization is appropriate when the quality of the member's service generally has met the standards of acceptable conduct, and performance of duty for Army personnel or is otherwise so meritorious that any other characterization would be clearly inappropriate.

b. A general discharge is a separation from the Army under honorable conditions. When authorized, it is issued to Soldiers whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Chapter 13 reflects Unsatisfactory Participation in the Ready Reserve a Soldier is subject to discharge for unsatisfactory participation when it is determined that the Soldier is unqualified for further military service because: (1) The soldier is an unsatisfactory participant as prescribed by AR 135-91, chapter 4; and (2) Attempts to have the soldier respond or comply with orders or correspondence have resulted in

(1) The soldier's verbal or written refusal to comply with the orders or correspondence; or (b) A second notice, sent by certified mail, was refused, unclaimed, or otherwise undelivered; or (c) Verification that the soldier has failed to notify the command of a change of address and reasonable attempts to contact the soldier have failed.

(2) Discharge action may be taken when the soldier cannot be located or is absent in the hands of civil authorities in accordance with the provisions of paragraph 2-18 and chapter 3, section IV.

7. Army Regulation 635-40 (Personnel Separations Disability Evaluation for Retention, Retirement, or Separation), in effect at the time, establishes the Army Disability Evaluation System and sets forth policies, responsibilities, and procedures that apply in determining whether a Soldier is unfit because of physical disability to reasonably perform the duties of his office, grade, rank, or rating. Only the unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability. Once a determination of physical unfitness is made, all disabilities are rated using the Department of Veterans Affairs Schedule for Rating Disabilities (VASRD).

a. Chapter 3-2 states disability compensation is not an entitlement acquired by reason of service-incurred illness or injury; rather, it is provided to Soldiers whose service is interrupted and who can no longer continue to reasonably perform because of a physical disability incurred or aggravated in military service.

b. Chapter 3-4 states Soldiers who sustain or aggravate physically unfitting disabilities must meet the following line-of-duty criteria to be eligible to receive retirement and severance pay benefits:

(1) The disability must have been incurred or aggravated while the Soldier was entitled to basic pay or as the proximate cause of performing active duty or inactive duty training.

(2) The disability must not have resulted from the Soldier's intentional misconduct or willful neglect and must not have been incurred during a period of unauthorized absence.

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

which is not in itself considered disqualifying for military service when a Soldier is found unfit because of another condition that is disqualifying. Only the unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability.

8. Title 10, USC, Chapter 61, provides the Secretaries of the Military Departments with authority to retire or discharge a member if they find the member unfit to perform military duties because of physical disability.

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

b. The disability evaluation assessment process involves two distinct stages: the MEB and PEB. The purpose of the MEB is to determine whether the service member's injury or illness is severe enough to compromise his/her ability to return to full duty based on the job specialty designation of the branch of service. A PEB is an administrative body possessing the authority to determine whether or not a service member is fit for duty. A designation of "unfit for duty" is required before an individual can be separated from the military because of an injury or medical condition. Service members who are determined to be unfit for duty due to disability either are separated from the military or are permanently retired, depending on the severity of the disability and length of military service.

c. The mere presence of a medical impairment does not in and of itself justify a finding of unfitness. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier may reasonably be expected to perform because of his or her office, grade, rank, or rating. Reasonable performance of the preponderance of duties will invariably result in a finding of fitness for continued duty. A Soldier is physically unfit when a medical impairment prevents reasonable performance of the duties required of the Soldier's office, grade, rank, or rating.

9. Title 38, USC, permits the VA to award compensation for a medical condition which was incurred in or aggravated by active military service. The VA, however, is not required by law to determine medical unfitness for further military service. The VA, in accordance with its own policies and regulations, awards compensation solely on the basis that a medical condition exists and that said medical condition reduces or impairs the social or industrial adaptability of the individual concerned. Consequently, due to the two concepts involved, an individual's medical condition, although not considered

medically unfitting for military service at the time of processing for separation, discharge, or retirement, may be sufficient to qualify the individual for VA benefits based on an evaluation by that agency. The VA can evaluate a veteran throughout his or her lifetime, adjusting the percentage of disability based upon that agency's examinations and findings.

10. Army Regulation 600-8-4 (Line of Duty Policy, Procedures, and Investigations) prescribes policies and procedures for investigating the circumstances of disease, injury, or death of a Soldier providing standards and considerations used in determining LOD status.

a. A formal LOD investigation is a detailed investigation that normally begins with DA Form 2173 completed by the medical treatment facility and annotated by the unit commander as requiring a formal LOD investigation. The appointing authority, on receipt of the DA Form 2173, appoints an investigating officer who completes the DD Form 261 and appends appropriate statements and other documentation to support the determination, which is submitted to the General Court Martial Convening Authority for approval.

b. Paragraph 1-7a states the worsening of a pre-existing medical condition over and above the natural progression of the condition as a direct result of military duty was considered an aggravated condition. Commanders must initiate and complete LOD investigations, despite a presumption of Not In the Line of Duty, which can only be determined with a formal LOD investigation.

c. Paragraph 2-6 states an injury, disease, or death is presumed to be in LOD unless refuted by substantial evidence contained in the investigation. LOD determinations must be supported by substantial evidence and by a greater weight of evidence than supports any different conclusion. The evidence contained in the investigation must establish a degree of certainty so that a reasonable person is convinced of the truth or falseness of a fact.

11. On 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Naval Records (BCM/NR) to carefully consider the revised post-traumatic stress disorder (PTSD) criteria, detailed medical considerations and mitigating factors when taking action on applications from former service members administratively discharged UOTHC and who have been diagnosed with PTSD by a competent mental health professional representing a civilian healthcare provider in order to determine if it would be appropriate to upgrade the characterization of the applicant's service.

12. 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 DRBs and BCM/NRs when considering requests by veterans for modification of their

discharges due in whole or in part to: mental health conditions, including PTSD; Traumatic Brain Injury; 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 to those conditions or experiences. The guidance further describes evidence sources and criteria and requires Boards to consider the conditions or experiences presented in evidence as potential mitigation for misconduct that led to the discharge.

13. The Under Secretary of Defense (Personnel and Readiness) issued guidance to Service DRBs and Service BCM/NRs on 25 July 2018 [Wilkie Memorandum], regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. BCM/NRs may grant clemency regardless of the 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 grounds.

a. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. In determining whether to grant relief 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.

//NOTHING FOLLOWS//