

IN THE CASE OF: [REDACTED]

BOARD DATE: 27 June 2024

DOCKET NUMBER: AR20230011713

APPLICANT REQUESTS:

- In effect, an upgrade of his uncharacterized discharged to honorable
- a personal appearance before the Board

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:  
DD Form 149 (Application for Correction of Military Record)

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.
2. The applicant states he is requesting an upgrade of his uncharacterized discharge. His medical records show that he suffered from a left foot injury, left knee injury, a heart condition, and sliding hiatal hernia. He was told that he should have received benefits due to these conditions upon his discharge, almost 27 years ago, but due to the characterization of service, he has been unable able to do so.
3. The applicant's service record shows:
  - a. He enlisted in the Regular Army on 19 August 1996.
  - b. The service record included nine DA Forms 4856 (General Counseling Form) dated from 16 September 1996 through 3 October 1996, which confirmed the applicant was counseled for missing mandatory training as a result of going to sick call and being on profile.
  - c. The applicant's immediate commander notified the applicant of his intent to initiate separation actions against him under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 11, for entry level separation.

The reasons for his proposed action were the applicant was scheduled to be restarted due to missing mandatory training but refused to be restarted, and had not successfully completed the road march nor the physical training run. He did not believe the applicant was physically capable of performing physical training. The applicant acknowledged receipt on 5 November 1996.

d. After declining consulting with legal counsel, he acknowledged:

- if a statement was not submitted, the Army would determine separation or retention based on the available information
- he did not desire to make a statement on his own behalf
- he did not desire a separation medical examination
- he did not desire civilian legal counsel, in addition to military legal counsel
- he did not desire copies of the documents supporting the separation action
- he would not be permitted to apply for enlistment for a period of 2 years after discharge

e. The immediate commander initiated separation action against the applicant for entry level separation. The intermediate commander recommended approval.

f. The separation authority approved the discharge recommendation for separation under the provisions of AR 635-200, Chapter 11, for entry level separation.

g. On 19 November 1996, he was discharged from active duty with uncharacterized service. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 3 months and 1 day of active service with no lost time. The narrative reason for separation is listed as "Entry Level Performance and Conduct."

5. By regulation (AR 15-185), 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. By regulation (AR 635-200), service will be described as uncharacterized under the provisions of Chapter 11. Separation of a Soldier in entry level status may be warranted on the grounds of unsatisfactory performance and/or unsatisfactory conduct as evidenced by:

- inability
- lack of reasonable effort
- failure to adapt to the military environment
- minor disciplinary infractions

7. In reaching its determination, the Board can consider the applicants petition and his service record in accordance with the published equity, injustice, or clemency determination 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 requesting a discharge upgrade and, in essence, a referral to the Disability Evaluation System. He states:

“I am requesting an upgrade on my DD 214 from uncharacterized. My medical records even show that I suffered from a left foot injury, heart condition and sliding hiatal hernia.”

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. The applicant's DD 214 for the period of Service under consideration shows he entered the Regular Army on 19 August 1996 and received an uncharacterized discharge on 19 November 1996 under provisions provided in chapter 11 of AR 635-200, Personnel Separations – Enlisted Personnel (26 June 1996), for falling below entry level performance and conduct standards.

d. No medical documentation was submitted with the application. There are no encounters in the EMR except for the results of three radiographic studies. These included normal left ankle radiographs, a normal chest radiograph, and a barium swallow which revealed a small sliding hiatal hernia with reflux. It was almost certainly a pre-existing condition not caused by his military service.

e. On 16 September 1996, the applicant was counseled for missing training. He appears to have been on a temporary physical profile for a possible ankle sprain:

“Soldier was counseled on the impact of missing training on his ability to perform and graduate. Soldier understands that he has the right to go on sick call, however, if he continues to miss training, he could be restarted to another unit. Soldier also understands that abuse of the sick call system is considered malingering and is punishable under the Uniform Code of Military Justice (UCMJ) and he can be

separated under an Entry Level Separation (ELS), AR 635-200. If separated, the soldier is not entitled to any benefits.”

f. The applicant was similarly counseled on 29 September, 1 October, and 3 October 1996. When he was again counseled on 18 October 1996, he was informed he was being recommended for an entry level separation:

“Soldier has been counseled that he is being recommended for understands an ELS Soldier that this recommendation is based on the above listed behavior Soldier understands that the Battalion Commander is the final approving authority Soldier understands that an ELS is an uncharacterized discharge that prevents him from reenlisting for 2 years and that he will not be eligible for any benefits Soldier has been counseled on the possible negative effects on his ability to seek employment and on his self-esteem.”

g. In a 19 October 1996 counseling, the applicant stated:

“I, [Applicant], do not wish to continue to train. I do not wish to serve I the U>S> Army. I have stated the above for the following reasons: I feel that I have missed to much training due to medical problems. I feel that I am not physically capable, at this time, to meet my objective & that it would be best for me to leave until I am physically fit to do so.”

h. His company commander wrote in his recommendation for the ELS:

“The specific reason(s) for my proposed action is/are: Soldier was scheduled to be restated due to missing mandatory training, but refused to be restarted. Soldier has not successfully completed any road march nor PT run. Soldier is not physically capable of performing the physical training.

i. On his elections memorandum, the applicant declined all options, including a separation medical examination.

j. 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. 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.

k. JLV shows he is not registered with the VA.

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

BOARD DISCUSSION:

1. The Board found the available evidence sufficient to consider this case fully and fairly without a personal appearance by the applicant.
  
2. The Board carefully considered the applicant's request, evidence in the records, a medical review, and published Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement, his record of service, the frequency and nature of his misconduct, and the reason for his separation. The Board considered the applicant's health claim and the review and conclusions of the ARBA Medical Advisor. The applicant provided no evidence of post-service achievements or letters of reference in support of a clemency determination. The Board found insufficient evidence of in-service mitigating factors and concurred with the conclusion of the medical advising official regarding the evidence not showing the applicant had any medical conditions that affected his ability to perform his duties as a trainee. The Board noted the evidence confirms the applicant was an entry-level Soldier, and therefore his service was uncharacterized in accordance with the governing regulation. Based on a preponderance of the evidence, the Board determined the applicant's uncharacterized service is not in error or unjust.

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.

12/19/2024

X

CHAIRPERSON

I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

REFERENCES:

1. Title 10, U.S. Code, section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.
2. Army Regulation 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.
3. Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), in effect at the time, sets forth the basic authority for the separation of enlisted personnel.
  - a. An honorable discharge is a separation with honor. 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. Chapter 11 of the regulation states service will be described as uncharacterized under the provisions of this chapter. Separation of a Soldier in entry level status may be warranted on the grounds of unsatisfactory performance and/or unsatisfactory conduct as evidenced by:

- inability
- lack of reasonable effort
- failure to adapt to the military environment
- minor disciplinary infractions

4. The Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records on 25 July 2018, regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. Boards for Correction of Military/Naval Records may grant clemency regardless of the court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice 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.

5. Section 1556 of Title 10, United States Code, requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by

ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//