

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 30 July 2024

DOCKET NUMBER: AR20230012389

APPLICANT REQUESTS:

- medical retirement for physical disability vice separation for entry-level performance and conduct
- a video/telephonic appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Certificate of Release or Discharge from Active Duty), for the period ending 16 December 1994
- Department of Veterans Affairs (VA) Benefits Letter

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 was kicked behind a shed, which led to a broken right foot.
3. The applicant provides a VA benefits letter that shows as of 1 December 2018, he has a combined service-connected evaluation of 90 percent, and that he is being paid at the 100 percent rate due to being unemployable due to his service-connected disabilities. He annotates post-traumatic stress disorder, other mental health, and sexual assault/harassment as issues/conditions related to his request.
4. A review of the applicant's service record shows:
 - a. He enlisted in the Regular Army on 2 November 1994.
 - b. DA Form 3822-R (Report of Mental Status Evaluation), dated 2 December 1994, states in the remarks section that the applicant claimed to be "intellectually slow with

poor motor skills,” that he “made a mistake enlisting,” and that he “wants out of the military.” The Psychology Technician who conducted the evaluation states that he “seems to be dramatizing his claimed learning problems in an effort to gain a discharge,” and recommended that the applicant be considered for administrative separation.

c. DA Form 4856 (General Counseling Form), dated 5 December 1994, shows he was counseled in reference to the additional time it takes to provide directions for the applicant to understand and missing numerous hours of training due to appointments. Additionally, it mentions that it is in his best interest and the good of the Army for the applicant to be separated from service. In the applicant’s response to the counseling he agrees that he should be let out of the Army because he has missed training and finds things very difficult.

d. On 9 December 1994, the applicant was notified by his immediate commander that he was being recommended for administrative separation in accordance with Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), Chapter 11, with an entry-level characterization of service. The commander’s proposed reason was: “Soldier lacks the mental aptitude needed to complete Basic Training or to become a productive Soldier. Every effort has been made to train him, but he consistently performs far below standards. Further training would be pointless.”

e. Also on 9 December 1994, the applicant acknowledged his notification of proposed separation, and waived his rights in writing.

f. On 13 December 1994, the separation authority approved the immediate commander’s recommendation and directed discharge of the applicant with an uncharacterized characterization of service.

g. He was discharged under the provisions of Army Regulation 635-200, Chapter 11, for Entry-Level Performance and Conduct with an uncharacterized characterization of service on 16 December 1994. He completed 1 month and 15 days of active service. He was awarded or authorized the National Defense Service Medal.

h. On 14 May 1997, the Army Board for Correction of Military Records (ABCMR) denied his request for physical disability retirement or separation. The Board found his discharge proceedings were conducted in accordance with applicable law and regulations. His entry-level separation and the characterization of his discharge as uncharacterized were warranted based on the circumstances of his discharge.

5. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. Documentation reviewed included the applicant's ABCMR application and accompanying documentation, an ABCMR denial (28 January 1998, AC96-10784A), the military electronic medical record (AHLTA), 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 a referral to the Disability Evaluation System (DES). ON his DD 149, he had indicated that PTSD, other mental health concerns, and sexual assault/harassment are issues related to his claim. He asserts he was physically assaulted.

c. The Record of Proceedings and previous denial detail the applicant's military service and the circumstances of the case. The applicant's DD 214 shows he entered the regular Army on 2 November 1994 and was discharged with an uncharacterized characterization of service on 16 December 1994 under provisions provided in chapter 11 of AR 635-200, Personnel Separations – Enlisted Personnel (17 September 1990), for falling below entry level performance and conduct standards.

d. The applicant underwent a mental status evaluation on 2 December 1994. The provider documented a normal examination going on to opine he had the mental capacity to understand and participated in the proceedings and was mentally responsible. He informed the provider he was "intellectually slow:"

"Pvt [Applicant] is a 26-year-old single regular army/active-duty male in his 4th week of BT [basic training] who states he wants out of the military. Pvt [Applicant] was interviewed by CMHS [Community Mental Health Services] on 14 Nov 94 in the 4th day of his 1st week of BT.

He was claiming he was intellectually slow with poor motor skills. He claimed he felt he made a mistake in enlisting and felt he was a risk because of his slow learning history and felt he should go home ... Today soldier states he wants out of the military. He claims he has been "trying my hardest. I feel like I am wasting my time. I don't to be new started. I want out of the military. Pvt [Applicant] states he graduated high school in 1987 with special education classes 1st thru 12th grades. He claims he has Dyslexia and has always been a slow learner. Soldier seems to be dramatizing his claimed learning problems in an effort to gain a discharge. Suggest unit consider soldier for his industrial potential and eliminate him under administrative separation."

e. On 9 December 1994, his company commander notified him of his initiation of separation action under chapter 11 of AR 635-200: "The reasons for my proposed action are: You lack the mental aptitude needed to complete Basic Training or to become a productive soldier. Every effort has been made to train you, but consistently you perform far below standards. Further training would be pointless."

f. 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.

g. JLV shows he has been awarded multiple VA service-connected disability ratings, one of which is for dysthymic disorder. However, the DES compensates an individual only for service incurred medical condition(s) which have been determined to disqualify him or her from further military service. 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. An uncharacterized discharge is given to individuals who separate prior to completing 180 days of military service, or when the discharge action was initiated prior to 180 days of service. This type of discharge does not attempt to characterize service as good or bad.

i. It is the opinion of the Agency Medical Advisor that a referral of his case to the Disability Evaluation System is not warranted.

BOARD DISCUSSION:

1. The Board determined the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

2. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. The evidence of record shows the applicant was separated while in initial entry training because his chain of command determined he lacked the mental aptitude needed to complete basic training or to become a productive Soldier, and despite efforts made to train him, he consistently performed far below standards. He completed 1 month and 15 days of active service. He did not complete initial entry training and was not awarded an

MOS. As a result, he was appropriately given an uncharacterized discharge. The Board found no error or injustice in his separation processing. Additionally, the Board reviewed and agreed with the medical reviewer's finding no evidence the applicant had any duty incurred medical condition which would have failed the medical retention standards of AR 40-501, Standards of Medical Fitness, prior to his discharge. Thus, there was no cause for referral to the Disability Evaluation System. Although he has been awarded multiple VA service-connected disability ratings, the disability evaluation system compensates an individual only for service incurred medical condition(s) which have been determined to disqualify him or her from further military service, which the evidence of record does not support. Therefore, the Board determined his referral of his case to the Disability Evaluation System 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 1556 provides the Secretary of the Army shall ensure that an applicant seeking corrective action by the ARBA is provided a copy of all correspondence and communications, including summaries of verbal communications, with any agencies or persons external to agency or board, or a member of the staff of the agency or Board, that directly pertains to or has material effect on the applicant's case, except as authorized by statute.

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. It states the ABCMR begins its consideration of each case with the presumption of administrative regularity. The ABCMR is not an investigative body and decides cases based on the evidence presented in the military records provided and the independent evidence submitted with the application. 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. 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 (DES) 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 Army Regulation 635-40 (Physical 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.

3. 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.

c. The percentage assigned to a medical defect or condition is the disability rating. A rating is not assigned until the PEB determines the Soldier is physically unfit for duty. Ratings are assigned from the Department of Veterans Affairs (VA) Schedule for Rating Disabilities (VASRD). 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.

4. 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.

5. 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.

//NOTHING FOLLOWS//