

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 25 June 2024

DOCKET NUMBER: AR20230012611

APPLICANT REQUESTS: in effect, correction of his military records to show he was retired due to physical disability vice being honorably discharged under Secretarial Authority) (upgraded from a general discharge, for misconduct).

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

FACTS:

1. The applicant states, in effect, he was tortured while serving in the military. He is currently receiving disability compensation from the Department of Veterans Affairs (VA) at the 100% rate due to his combat injuries.
2. Having had prior active service, the applicant's official records show he enlisted in the Army National Guard for a period of six years. On 13 October 2006. He held military occupational specialty (MOS) 25U, signal support system specialist.
3. He entered active duty on 18 August 2008. He served in Iraq from 2 October 2008 to 8 March 2009.
4. On 15 November 2008, the Commander, 81st Brigade Special Troops Battalion (BSTB), Iraq, appointed an investigating officer (IO) to conduct an investigation into the applicant's illegal negligent discharge of a weapon. Upon completion of the investigation the IO recommended the applicant be counseled and administer remedial training on proper use of his assigned weapon and qualified on any weapon systems his unit may want him to use.
5. On 9 January 2009, he accepted nonjudicial punishment under the provisions of Article 15 of the Uniform Code of Military Justice for –
 - failing to go at the time prescribed to his appointed place of duty (work call) on or about 26 December 2008

- being disrespectful in language and deportment to a superior commissioned officer by failing to render a salute and responding to an uniform correction by saying “Yeah, I know”
6. On 19 January 2009, court-martial charges were preferred against the applicant. He was charged with the following offenses:
- failing to go at the time prescribed to his appointed place of duty on or about 26 December 2008
 - failing to go at the time prescribed to his appointed place of duty on or about 10 January 2009
 - willfully disobeying a lawful command from a superior commissioned officer
 - willfully disobeying a lawful order from a superior noncommissioned officer (two specifications)
7. Before a Summary Court-Martial on 26 January 2009 in Iraq, the applicant was found guilty of two specifications of failing to go at the time prescribed to his appointed place of duty, disobeying a lawful command from a commissioned officer and two specifications of disobeying a lawful order from a superior noncommissioned officer. His punishment include confinement for 30 days, forfeiture of pay (\$933.00) for one month.
8. On 14 February 2009, he completed a DD Form 2697, Report of Medical Assessment, wherein he reported that since his last assessment/physical examination his overall health was the same. He further indicated that he suffered with back pain, and he had conditions that limited his ability to work in his primary MOS. He did not identify the specific condition/s.
9. He completed a mental health evaluation on 18 February 2009 while assigned to the Theater Field Confinement Facility, Kuwait. The applicant denied experiencing any traumatic stressor and stated that since being deployed he had not been exposed to any extreme traumatic stressor. The mental health officer diagnosed the applicant with adjustment disorder with disturbance of conduct, acute and antisocial personality disorder traits. The applicant was found fit for duty with a recommendation for referral for individual therapy. He was returned to his unit for a final decision regarding his military career.
10. On 18 February 2009, the company commander informed the applicant that he was initiating action to separate him service under the provisions of Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations), paragraph 14-12c, for commission of a serious offense with a recommendation for an under honorable conditions, general characterization of service. The reasons cited (1) two incidents of failing to go to his appointed place of duty, (2) willfully disobeying a lawful command

from a commissioned officer, and (3) two incidents of willfully disobeying the lawful orders of two noncommissioned officers.

11. The applicant acknowledged receipt of notification of the basis for the contemplated action to separate him and of the rights available to him, including his right to consult with counsel prior to submitting his election of rights. The applicant elected to consult with counsel and consideration of his case by an administrative separation board.

12. Subsequent to the applicant's acknowledgement, his commander formally recommended the applicant for separation with an under honorable conditions, general characterization of service.

13. On 6 March 2009, the separation authority approved the recommended discharge and directed the applicant's service be characterized as under honorable conditions, general.

14. The applicant was discharged from active duty on 23 March 2009. His DD Form 214 shows the applicant served in Iraq from 2 October 2008 to 8 March 2009. This form further confirms he was discharged under the provisions of AR 635-200, paragraph 14-12c, by reason of misconduct (serious offense). His service was characterized as under honorable conditions (general). He was assigned Separation Code JKQ and Reentry Code 4. He completed 6 months and 13 days of active service and he had lost time from 26 January 2009 to 18 February 2009.

15. He was discharged from the Washington ARNG on 23 March 2009, in accordance with National Guard Regulation (NGR) 600-200, Personnel-General-Enlisted Personnel Management paragraph 8-26e(2), acts or patterns of misconduct with an under honorable conditions, general characterization of service.

16. Subsequent to his discharge, the applicant petitioned the Army Discharge Review Board (ADRB) for an upgrade of his discharge. On 9 June 2017, the ADRB conducted a records review and found that the applicant's discharge was both proper and equitable, thus denying his request.

17. On 15 April 2019, the ABCMR considered the applicant's request for an upgrade of the characterization of his discharge in Docket Number AR20160016680. After careful review of his application, military records, and all other available evidence the Board denied the applicant's request for an upgrade to the characterization of his service.

18. On 17 May 2023, the ADRB reviewed the applicant's request for an upgrade to the characterization of his service as part of a De Novo Project. The ADRB determined that his discharge was inequitable based on his schizoaffective disorder. This was a mitigating factor in the applicant's failure to report and disobeying multiple lawful orders

from superiors. The ADRB granted relief in the form of an upgrade of the characterization of service to honorable and changed the separation authority to AR 635-200, chapter 15, and the narrative reason for separation to Secretarial Authority, with a corresponding separation code to JFF. The Board determined the reentry eligibility (RE) code was proper and equitable. The applicant was issued a new DD Form 214 on 11 November 2023 reflecting the ADRB decision to grant relief.

19. The applicant did not provide medical evidence of a diagnosed physical or mental health condition related to being tortured.

19. Applicable regulatory guidance states a Soldier of the National Guard or U.S. Army Reserve is entitled to hospital benefits, pensions, and other compensation similar to that for Soldiers of the active Army for injury, illness, or disease incurred in the LOD, under the following conditions prescribed by law, Title 10, U.S. Code, section 1074a.

- while performing active duty for a period of 30 days or less
- while performing inactive duty training
- while traveling directly to or from the place at which that Soldier is to perform or has performed active duty for a period of 30 days or less
- inactive duty training

20. 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.

21. A Soldier of the National Guard or USAR is entitled to hospital benefits, pensions, and other compensation similar to that for Soldiers of the active Army for injury, illness, or disease incurred in the LD, under the following conditions prescribed by law, Title 10, USC, section 1074a.

- while performing active duty for a period of 30 days or less
- while performing inactive duty training
- while traveling directly to or from the place at which that Soldier is to perform or has performed active duty for a period of 30 days or less
- inactive duty training

22. By regulation, 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 the evidence.

23. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. Documentation reviewed included the applicant's ABCMR application and accompanying documentation, the military electronic medical record (EMR – AHLTA and/or MHS Genesis), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, the Army Aeromedical Resource Office (AERO), and/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 referral to the Disability Evaluation System (DES). He states:

"I'm rated as 100% Special Monthly Compensation permanent total by the United States Department of Veterans Affairs due to combat injuries ... Because I was tortured."

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. His ADRB directed new DD 214 shows the former Army National Guard Soldier entered active duty in support of Operation Iraqi Freedom on 18 August 2008, Served in Iraq from 2 October 2008 thru 8 March 2009, and was honorably discharged on 23 March 2009 under provisions provided in AR 635-200, Active Duty Enlisted Administrative Separations (28 June 2021): Secretarial Plenary Authority.

d. His Report of Separation and Record of Service (NGB Form 22) shows he entered the Army National Guard on 13 October 2006 and received a General (Under Honorable Conditions) discharge from the Washington Army National Guard on 23 March 2009 under paragraph 8-26e(2) of NGR 600-200, Enlisted Personnel Management: Acts or patterns of misconduct.

e. The applicant does not identify the condition(s) to be reviewed and which he claims failed medical retention standards prior to his separation.

f. On 18 February 2009, the applicant underwent a thorough mental health evaluation while incarcerated at the Theater Field Confinement Facility in Kuwait. He denied being exposed to or experiencing any traumatic stressors while in theater. The provider documented a normal examination except for poor judgement and fair insight. She diagnosed him with "Adjustment Disorder with Disturbance of Conduct, Acute" and "Antisocial Personality Disorder Traits." She stated he was fit for duty, should be referred for individual therapy, and should return to his parent command where a final decision will be made regarding his military career.

g. He was evaluated by two providers shortly before he was separated. On 17 March 2009, the provider's diagnosis was "Adjustment Disorder with Anxious Mood" and at his final behavioral health visit on 18 March 2009, a different provider diagnosed the applicant with "Bipolar Disorder NOS (Not Otherwise Specified) (Provisional [diagnosis])." He was discharged on 23 March 2009.

h. The EMR shows that other than being treated by behavioral health, the applicant's had only two additional encounters: One for the common cold and the other for constipation.

i. There is no probative 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.

j. JLV shows he has been awarded two VA service-connected disability ratings: Schizoaffective Disorder and tinnitus. However, the DES only compensates an individual for service incurred medical condition(s) which have been determined to disqualify him or her from further military service and consequently prematurely ends their career. The DES has neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions which were incurred or permanently aggravated during their military service; or which did not cause or contribute to the termination of their military career. These roles and authorities are granted by Congress to the Department of Veterans Affairs and executed under a different set of laws.

k. 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:

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.

a. The evidence of record shows the applicant committed a serious offense that led his chain of command to initiate separation action against him for misconduct. He received a general discharge. The ADRB re-reviewed his records and determined his discharge was inequitable based on mitigating circumstances. The ADRB granted relief in the form of an upgrade of the characterization of service to honorable and changed the separation authority to AR 635-200, and the narrative reason for separation to

Secretarial Authority, with a separation code to JFF. The applicant was issued a new DD Form 214 on 11 November 2023 reflecting the ADRB's decision to grant relief.

b. The Board noted that the applicant's available service records do not contain or show he was issued a permanent physical profile rating, or that he was diagnosed with a medical condition that warranted his entry into the Disability Evaluation System, or that he was diagnosed with a condition that failed retention standards and/or was unfitting. The Board considered the medical records, any VA documents provided by the applicant and the review and conclusions of the advising official. The Board concurred with the medical official's finding no probative 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. Therefore, the Board determined the applicant's referral 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]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

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, 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 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 AR 40-501, Medical Services-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 an 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 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 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.

2. Title 10, U.S. Code, section 1201, provides for the physical disability retirement of a member who has at least 20 years of service or a disability rating of at least 30 percent.

Title 10, U.S. Code, section 1203, provides for the physical disability separation of a member who has less than 20 years of service and a disability rating of less than 30 percent.

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

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

b. National Guard Soldiers with nonduty related medical conditions who are pending separation for failing to meet the medical retention standards of chapter 3 are eligible to request referral to a PEB for a determination of fitness.

4. AR 600-8-4, Line of Duty (LD) Policy, Procedures, and Investigations, prescribes policies, procedures, and mandated tasks governing LD determinations of Soldiers who die or sustain certain injuries, diseases, or illnesses. It states –

a. A Soldier of the National Guard or USAR is entitled to hospital benefits, pensions, and other compensation similar to that for Soldiers of the active Army for injury, illness, or disease incurred in the LD, under the following conditions prescribed by law, Title 10, USC, section 1074a.

- while performing active duty for a period of 30 days or less
- while performing inactive duty training
- while traveling directly to or from the place at which that Soldier is to perform or has performed active duty for a period of 30 days or less
- inactive duty training

b. The LD determination is presumed to be "LD YES" without an investigation in the case of disease, except when (1) the disease or medical condition occurs under strange or doubtful circumstances or is apparently due to misconduct or willful negligence or (2) when a U.S. Army Reserve or Army National Guard Soldier is serving on an active duty tour of 30 days or less is disabled due to disease.

5. AR 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. Chapter 8, Reserve Components, in effect at the time, provides guidance for Reserve component members eligible for physical disability processing in accordance with this regulation.

(1) When a commander or other appropriate authority believes a Reserve component member is unable to perform the duties of his office, grade, rank, or rating because of physical disability resulting from an injury determined to be the proximate result of performing active duty (30 days or less), inactive duty training, or active duty under the authority of Title 10, U.S. Code, he will refer the member for medical evaluation.

(2) If the result of the medical evaluation indicate the member is not qualified to perform his military duties he will be referred to an MEB.

(3) If the MEB finds the member's physical disability is the result of a disease not directly caused by an injury, he will be processed in accordance with the provisions of paragraph 6-8, where he might request continuance in the service in lieu of separation.

(4) If the MEB finds the member's physical disability is the result of an injury or disease directly caused by an injury the case will be referred to a PEB.

6. NGR 600-200, Enlisted Personnel Management, prescribes the following reasons, applicability, codes and board requirements for administrative separation or discharge from the Reserve of the Army, the State ARNG only or both.

a. All soldiers will be notified of a commander's recommendation for their involuntary discharge. Paragraph 6-35(l) states, in part, a Soldier found medically unfit for retention per AR 40-501, Medical Services-Standards of Medical Fitness, may be involuntarily separated. Commanders, who suspect that a Soldier may not be medically qualified for retention, will direct the Soldier to report for a complete medical examination per AR 40-501. Commanders who do not recommend retention will request the Soldier's discharge.

b. When medical condition was incurred in line of duty, the procedures of AR 600-8-4 will apply. Discharge will not be ordered while the case is pending final disposition. This paragraph also includes those Soldiers who refuse or ineligible to reclassify into a new military occupational specialty.

7. 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.

8. AR 15-185, ABCMR, 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 the evidence.

//NOTHING FOLLOWS//