

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 23 July 2024

DOCKET NUMBER: AR20230013133

APPLICANT REQUESTS: physical disability separation in lieu of honorable administrative discharge from the Army National Guard.

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States)
- self-authored statement
- DD Form 214 (Certificate of Release or Discharge from Active Duty) covering the period ending 22 April 2005
- Army Achievement Medal (AAM) Certificate, dated 16 November 2008
- Texas Army National Guard (TXARNG) Orders 165-1008, dated 14 June 2009
- National Guard Bureau (NGB) Form 22 (Report of Separation and Record of Service) covering the period ending 19 June 2009
- Department of Veterans Affairs (VA) Form 21-0781 (Statement in Support of Claim for Service Connection for Post-Traumatic Stress Disorder (PTSD)), dated 21 April 2017
- VA Form 21-0960P-3 (Review PTSD Disability Benefits Questionnaire), dated 4 February 2020
- VA Rated Disabilities printout, undated
- VA letter, dated 31 August 2021

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 enlisted in the Washington ARNG (WAARNG) on 16 September 2004, in the Military Occupational Specialty (MOS) 11B (Infantryman). He attended basic combat

training (BCT) and Infantryman advanced individual training (AIT) at Fort Benning, GA, from 4 January 2005 through 22 April 2005. During AIT, he severely injured his knee. He was able to complete all the training and reported to his WAARNG unit, but his knee was never the same again and later he would be awarded a VA service-connected disability rating of 40 percent for each knee

b. In 2008, he completed an interstate transfer to the Texas ARNG (TXARNG). While assigned to the TXARNG, he was on hurricane duty when he experienced an event that would later result in a VA service-connected PTSD award of 70 percent. His service obligation date was 15 September 2012; however, on 19 June 2009, while on drill in Austin, TX, he was approached by his chain of command and asked if he wanted to be discharged that day. Not knowing what was going on, he agreed and was led to a building where he was out-processed and received an honorable discharge.

c. He never received any type of disciplinary or negative counseling during his entire enlistment. It was his belief that he had been discharged early because of his then not yet diagnosed service-connected disabilities, with which he as later diagnosed and for which he now receives a VA service-connected disability rating of 100 percent.

d. Along with his VA service-connected disability rating of 40 percent for each knee, incurred while on active-duty training (ADT) at Fort Benning, GA, he also received a VA service-connected disability rating of 70 percent for PTSD, related to another event. As it stands, he is not eligible for certain veteran's benefits such as a VA Home Loan because he does not meet the length of service requirements. However, he believes that he would be eligible to receive such benefits if his narrative reason for separation and separation code were amended to reflect medical separation.

3. The applicant enlisted in the ARNG on 16 September 2004.

4. His DD Form 214 shows the applicant entered ADT on 4 January 2005 and was honorably released from ADT and transferred back to the WAARNG on 22 April 2005, due to completion of required active service with corresponding separation code MBK. He was awarded the MOS 11B and credited with 3 months and 19 days of net active service this period.

5. An AAM Certificate shows the applicant was awarded the AAM on 16 November 2008, for meritorious service during Operation Ike.

6. The applicant has not provided any medical documentation pertaining to his injuries incurred during ADT in 2005, or during his activated service in support of Operation Ike in 2008, and his available service records are void of such records.

7. The complete facts and circumstances surrounding the applicant's discharge from the ARNG are unknown, as his discharge packet, to include the notification of his discharge, any applicable medical documentation, and the discharge approval, are not in his available records for review and have not been provided by the applicant.

8. TX ARNG Orders 165-1008, dated 14 June 2009, honorably discharged the applicant from the ARNG effective 14 June 2009, under the provisions of National Guard Regulation 600-200 (Enlisted Personnel Management), paragraph 8-35, with assignment loss reason code SE (Separation, Administrative) and transferred him to the U.S. Army Reserve (USAR) Control Group (Annual Training).

9. TXARNG Orders 169-1094, dated 18 June 2009, amended the above ARNG discharge orders to reflect the applicant's discharge date of 19 June 2009 in lieu of 14 June 2009.

10. The applicant's NGB Form 22 shows he was honorably discharged from the ARNG and transferred to the USAR Control Group (Annual Training) on 19 June 2009, under the provisions of National Guard Regulation 600-200, paragraph 8-35, separation/discharge from the State ARNG and/or Reserve of the Army. His reenlistment eligibility (RE code) is RE-1 (fully eligible for reenlistment) and he was credited with 4 years, 9 months, and 4 days of total service.

11. The applicant's available service records do not contain a DA Form 3349 (Physical Profile) nor do they show:

- he was issued a permanent physical profile rating
- he suffered from a medical condition, physical or mental, that affected his ability to perform the duties required by his MOS and/or grade or rendered him unfit for military service
- he was diagnosed with a medical condition that warranted his entry into the Army Physical Disability Evaluation System (PDES)
- he was diagnosed with a condition that failed retention standards and/or was unfitting

12. A physical profile is used to classify a Soldier's physical disabilities in terms of six factors or body systems, as follows: "P" (Physical capacity or stamina), "U" (Upper extremities), "L" (Lower extremities), "H" (Hearing), "E" (Eyes), and "S" (Psychiatric) and is abbreviated as PULHES. Each factor has a numerical designation: 1 indicates a high level of fitness, 2 indicates some activity limitations are warranted, 3 reflects significant limitations, and 4 reflects one or more medical conditions of such a severity that performance of military duties must be drastically limited. Physical profile ratings can be either permanent (P) or temporary (T).

13. A review of the U.S. Army Human Resources Command (AHRC) Soldier Management System (SMS) shows:

a. The applicant had a PULHES of 111121, with a rating of 2 in factor E for vision and had no limitations in any factors aside from E, where he had no significant limitations. The date of his last physical examination is 1 September 2004.

b. A transaction was completed on 14 June 2009, then the same transaction was again completed on 19 June 2009, to involuntarily discharge the applicant from the ARNG due to physical condition, not a disability and to archive his record. There is no evidence of a completed transaction to transfer him from the ARNG to the USAR Control Group (Annual Training).

14. A VA Form 21-0781, dated 21 April 2017, provides the applicant's statement in support of his claim for service-connection for PTSD and shows:

a. He stated he was activated with the TXARNG in September 2008, to assist in the cleanup of Hurricane Ike in Houston and Galveston, TX. In the beginning of the operation, he was assigned as the driver for the Chaplain and took him through the neighborhoods, assisting with handing out water and meals ready to eat.

b. On one of these trips through the neighborhood he stopped to assist an elderly man who was waving for help. He had been without power since the storm hit, so the applicant supplied him with a small generator and helped him set it up on his balcony. The next day he went to check on the elderly man and found him unresponsive on his bed, with the generator inside his house, and attempted CPR without success. The elderly man had apparently moved the generator inside the house to power his air conditioner and died in his sleep from carbon monoxide poisoning.

c. Since the incident, he suffers from flashbacks, bad dreams, and depression and has been seeing a psychologist.

15. A VA Form 21-0960P-3, dated 4 February 2020, shows:

a. A psychologist signed the form on 4 February 2020, indicating the applicant has the following diagnoses:

(1) PTSD

(2) somatic symptom disorder with depressive and anxious features

b. The nexus statement shows the applicant's PTSD is more likely than not due to the in-service stressors he experienced. His somatic symptom disorder, primarily pain,

severe, is proximately due to or aggravated by his current service-connected disabilities or injuries.

16. An undated VA Rated Disabilities printout, presumably pertaining to the applicant although his name is not on the printout, shows the applicant was awarded the following service-connected disability ratings for the following conditions:

- tinnitus, 10 percent, effective 19 January 2020
- left knee sprain, 40 percent, effective 25 March 2013
- left foot pes planus and plantar fasciitis, 30 percent, effective 27 March 2020
- right knee sprain, 40 percent, effective 25 March 2013
- PTSD, non-combat, 70 percent, effective 19 January 2020
- hypothyroidism, 0 percent, effective 22 January 2020
- hypogonadism, 0 percent, effective 22 January 2020

17. A VA letter, dated 31 August 2021, shows the applicant has one or more service-connected disabilities with a combined evaluation of 100 percent and is considered to be totally and permanently disabled solely due to his service-connected disabilities effective 27 March 2020.

18. The Army rates only conditions determined to be physically unfitting at the time of discharge, which disqualify the Soldier from further military service. The Army disability rating is to compensate the individual for the loss of a military career. The VA does not have authority or responsibility for determining physical fitness for military service. The VA may compensate the individual for loss of civilian employability.

19. 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: The applicant is applying to the ABCMR requesting referral to the Disability Evaluation System (DES). He states that he has several VA service-connected disabilities and goes on to stated:

“... on June 19, 2009, while on drill in Austin, TX, I was approached by my chain of command as asked if I wanted to be discharged that day. Not knowing what was

going on, I agreed and was led to a building, processed, and received an Honorable Discharge in the form of an NGB22/NGB55.

I never received any type of discipline or negative counseling during my entire enlistment. It is my belief that I had been discharged early because of then non-diagnosed service-connected disabilities, of which I was later diagnosed with multiple service-connected disabilities and now receive a VA rating at 100%."

b. The Record of Proceedings details the applicant's military service and the circumstances of the case. His Report of Separation and Record of Service (NGB Form 22) shows he entered the Army National Guard on 16 September 2004 and was Honorably discharged from the Texas Army National Guard on 4 September 2009 under paragraph 8-35 of NGR 600-200, Enlisted Personnel Management.

c. No medical documentation was submitted with the application.

d. The only EMR entry shows the applicant's knee injury was improving. From this 23 March 2005 encounter:

The Chief Complaint is: 5 days after left knee pain. Patient injured his knee doing a buddy carry. Last evaluated 19 Feb 05. He states condition is improving.

e. He had been diagnosed with a left knee sprain and continued on conservative treatment. There are no more entries in the EMR.

f. The applicant has no permanent or temporary physical profiles in MEDCHART.

g. A Soldier Management System (SMS) screen shot shows the applicant had no duty limiting permanent profiles.

h. 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.

i. JLV shows he has been awarded several VA service-connected disability ratings including PTSD in April 2017, limited extension of both knees in May 2013, and flat foot condition in March 2020. 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.

j. 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. The evidence shows the applicant served in the ARNG from 16 September 2004 to 14 June 2009. He was honorably separated from the ARNG and transferred to the USAR. His NGB Form 22 show she was assigned RE-1, indicating he was fully eligible to reenlist. The Board found no error or injustice in his available separation processing. The Board also considered the medical records, any VA documents provided by the applicant and the review and conclusions of the medical reviewing official. The Board reviewed and agreed with the medical reviewer'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. Therefore, the Board determined there was no cause for referral to the Disability Evaluation System.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

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

BOARD DETERMINATION/RECOMMENDATION:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.

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

REFERENCES:

1. 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. 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 Discharge Review Boards (DRBs) and Boards for Correction of Military/Naval Records (BCM/NRs) when considering requests by veterans for modification of their discharges due in whole or in part to: mental health conditions, including post-traumatic stress



disorder (PTSD), traumatic brain injury (TBI), 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, on those conditions or experiences.

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 and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with DOD Directive 1332.18 (Discharge Review Board (DRB) Procedures and Standards) and Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation).

a. Soldiers are referred to the disability system when they no longer meet medical retention standards in accordance with 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.

4. 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.

5. Army Regulation 40-501 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 Army Regulation 635-40 with the following caveats:

a. U.S. Army Reserve (USAR) or Army National Guard (ARNG) Soldiers not on active duty, whose medical condition was not incurred or aggravated during an active duty period, will be processed in accordance with chapter 9 and chapter 10 of this regulation.

b. Reserve Component Soldiers pending separation for In the Line of Duty injuries or illnesses will be processed in accordance with Army Regulation 40-400 (Patient Administration) and Army Regulation 635-40.

c. 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.

d. Reserve Component Soldiers who do not meet medical retention standards may request continuance in an active USAR status. In such cases, a medical impairment incurred in either military or civilian status will be acceptable; it need not have been incurred only in the line of duty. Reserve Component Soldiers with non-duty related medical conditions who are pending separation for not meeting the medical retention standards of chapter 3 may request referral to a PEB for a determination of fitness in accordance with paragraph 9–12.

6. 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.

7. National Guard Regulation 600-200 (Enlisted Personnel Management) prescribes he criteria, policies, processes, procedures and responsibilities to classify, assign utilize, transfer within and between States, provides special duty assignment pay, separate and appoint to and from Command Sergeant Major ARNG and Army National Guard of the Unites States enlisted Soldiers. Chapter 8,in effect at the time, provides for the administrative separation of Soldiers under the appropriate provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations) for a number of reasons, to include being found medically unfit for retention per Army Regulation 40-501.

8. 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.

9. 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.

10. Title 10, U.S. Code, section 1556 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.

11. Army Regulation 15-185 (Army Board for Correction of Military Records (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. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

//NOTHING FOLLOWS//