

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 23 August 2024

DOCKET NUMBER: AR20230013190

APPLICANT REQUESTS:

- physical disability retirement in lieu of honorable administrative discharge due to completion of required active service
- a personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- DA Form 2823 (Sworn Statement), dated 28 November 1990
- U.S. Army Criminal Investigative Division (CID) Form 28-R (Summary of Investigative Activities), dated 26 December 1990
- DA Form 4833 (Commander's Report of Disciplinary or Administrative Action), dated 25 January 1991
- DD Form 214 (Certificate of Release or Discharge from Active Duty) (Member Copy 1) covering the period ending 6 April 1995
- Board of Veterans Appeals Order, dated 11 January 2024
- Board of Veterans' Appeals letter, dated 11 January 2024
- 1,406 pages of Department of Veterans Affairs (VA) medical records, to include Problem Lists, Medications, Radiology Reports, Lab Results, Immunizations, Discharge Summaries, Consult Requests, and Progress Notes dated between 2011- 2024

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 notes his request is related to "Other Mental Health," and states he was offered a 30 percent disability rating on 7 June 1990. On 29 November 1990, he received a physical evaluation at 1300 hours, but he was severely injured hours after

receiving his physical evaluation exam. He was never informed his 30 percent disability rating could be upgraded.

a. He contends his request for correction should be granted because his injuries were caused by the excessive use of force by the Military Police (MP).

b. On 1 September 2023, he went before a Federal Judge; and his Disabled American Veterans counselor mentioned his injuries were caused by the excessive use of force by the MP(s). He is now rated 100 percent permanent and totally disabled by the VA.

3. The applicant enlisted in the Regular Army on 23 January 1984.

4. A DA Form 2823, dated 28 November 1990, provides a lengthy MP investigator's statement, which has been provided in full to the Board for review, wherein he summarizes the applicant's provided verbal statement, showing in pertinent part:

a. The applicant was in the car with his wife in the passenger's side and he made a left turn at the hospital entrance when he noticed an MP vehicle with blue lights on behind him. He stated he pulled over and was approached by MP W_____ on the driver's side and MP M_____ on the passenger's side.

b. He said he did not know why he was being pulled over and attempted to exit the vehicle, when MP W_____ told him to stay inside the vehicle and give him his military identification (ID) card, license, and proof of insurance. He handed over the ID card and license, but his proof of insurance was stuck to the inside of his wallet. He told MP W_____ it was stuck and to look at it through the wallet.

c. MP W_____ responded that he would have to place the applicant under arrest for not showing his insurance card, at which point the applicant exited the car to show him the insurance card inside the wallet and MP W_____ hit his right arm. The applicant told MP W_____ he was not supposed to put his hands on him and MP W_____ responded he was going to "kick you're a** boy" and struck him on the arm again, grabbed him by the arms and put handcuffs on him. The applicant repeatedly told MP M_____ to tell MP W_____ to not move him, but MP W_____ lifted the applicant's arms behind his back until his shoulder popped and he felt severe pain in his lower back and was dropped to the ground. MP M_____ was going to take the applicant's handcuffs off, but MP W_____ told him not to then placed his hand over the applicant's face and told him he was going to mace him.

d. At this time, another MP vehicle arrived and MP W_____ walked around to the front of the applicant to his back area and kicked him on the lower left leg. The ambulance then arrived and the applicant told them about is back, having been kicked

in the leg by MP W____ and was then taken to the Dwight D. Eisenhower Army Medical Center Emergency Room (EAMC-ER).

5. A CID Form 28-R provides a summary of MP agent investigative activity, and in pertinent part shows:

a. On 27 November 1990, the MP investigator L____, received a report of assault/damage to Government property and went to the scene as the applicant was being transported to the EAMC-ER, where he was subsequently evaluated with x-ray and treated for back pain.

b. At the scene of the incident, the investigating MP agent L____ received a briefing on the incident from the MP involved in the altercation, MP W____, who related he had made a traffic stop involving the applicant and the applicant became physically combative and he had to subdue the applicant.

c. The applicant was unable to be interviewed until later after his released from the EAMC-ER, at which point he provided a verbal statement and the name of a witness who heard MP M____ say that MP W____ was out of control at the traffic stop. Telephonic conversation with the witness revealed she heard someone next to her say, "it was nothing that I could do; he was in charge out there."

d. MP M____ was interviewed and reinterviewed. The applicant was reinterviewed. The vehicle [unclear which vehicle] was taken to the motor pool where the estimated damage to the vehicle was assessed as in excess of \$100.00. The applicant was taken to CID for polygraph examination, where he remained consistent with the same story of the incident. The results showed he had a problem with "who made contact first" though and it appeared that the applicant made contact first. There was sufficient evidence to charge the applicant with disorderly conduct only.

6. A DA Form 4833, dated 25 January 1991, provides the report of the commander's disciplinary or administrative action taken, and shows:

a. The applicant's offense on 20 December 1990, is listed as misconduct (other than drunk and disorderly).

b. The commander took no action.

c. The partially legible remarks section shows the applicant's actions were taken due to conflicting evidence and the use of excessive force.

7. The applicant's DA Form 2-1 (Personnel Qualification Record – Part II) shows:

- a. In item 4 (Assignment Considerations) not recommended for further service.
- b. In item 21 (Time Lost) 14 days of lost time from 29 May 1994 through 13 June 1994, due to imprisonment.
- c. In item 27 (Remarks) confined by civilian authorities.
- d. In item 35 (Record of Assignments) imprisonment/confinement at the hands of civil authorities from 29 May 1994 through 14 June 1994.

8. The applicant's DD Form 214 shows:

- a. The applicant's rank/grade is shown as sergeant (SGT)/E-5.
- b. His immediate reenlistments this period were 19841123-19871103 and 19871104-19890406 and he completed his first full term of service.
- c. He was honorably discharged on 6 April 1995, under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), chapter 4, due to completion of required active service, with corresponding separation code JBK (Expiration Term of Service (ETS)) and reentry code 3 (Ineligible for reentry without waiver).
- d. He completed 10 years, 3 months, and 28 days of active service this period, including lost time from 29 May 1994 through 14 June 1994.
- e. He was awarded separation pay, unrelated to physical disability, in the amount of \$5,562.62, and he was transferred to the U.S. Army Reserve (USAR) Control Group (Reinforcement) despite completion of his mandatory service obligation, which is indicative of separation due to reaching retention control point and/or bar to reenlistment.

9. The applicant's available service records do not contain a DA Form 3349 (Physical Profile) or 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 Military Occupational Specialty (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

10. A physical profile is used to classify a Soldier's physical disabilities in terms of six factors, 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).

11. A DA Form 2A (USAR – Personnel Qualification Record (Enlisted) printed on 27 December 1995, shows the applicant was past the expiration of his statutory service obligation, and he was fully deployable with a PULHES of 111111, based on his last physical examination dated April 1995.

12. A Board of Veterans' Appeals Order, dated 11 January 2024, shows

- entitlement to service-connection for a cervical spine condition was granted
- entitlement to an earlier effective date of 11 August 2000, for the grant of service-connected for right hip degenerative changes was granted
- entitlement to an earlier effective date of 11 August 2000, for the grant of service-connection for left hip degenerative changes was granted
- entitlement to an earlier effective date for service-connection of right knee osteoarthritis was denied
- entitlement to an earlier effective date for service-connection of bilateral pes planus (flat foot) was denied
- entitlement to an earlier effective date for service-connection of right shoulder impingement syndrome was denied

13. The applicant provided 1,406 pages of VA medical records, to include Problem Lists, Medications, Radiology Reports, Lab Results, Immunizations, Discharge Summaries, Consult Requests, and Progress Notes dated between 2011 - 2024, all of which have been provided in full to the Board for review.

14. A VA Consult Request, printed on 26 April 2024, shows the applicant has a combined service-connected disability rating of 100 percent for the following conditions:

- sleep apnea, 50 percent
- mood disorder, 50 percent
- lumbosacral or cervical strain, 40 percent

- flat foot condition, 30 percent
- degenerative arthritis of the spine, 20 percent
- limited motion of arm, 20 percent
- limited flexion of knee, 10 percent
- limited flexion of knee, 10 percent
- limited flexion of thigh, 10 percent
- tinnitus, 10 percent
- limited flexion of thigh, 10 percent
- paralysis of sciatic nerve, 10 percent
- hypertensive vascular disease, 10 percent

15. 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.

16. 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 a referral to the Disability Evaluation System (DES). He has indicated on his DD 149 that other mental health concerns are related to his request. He states:

"I am requesting to have my military discharge upgraded to a medical retirement. I was physically evaluated on 29 November 1990 at 1300 hours. I was then severely injured hours after taking the physical exam. I was never counseled that I could have my 30% rating that was offered to me on 7 June 1990 upgraded."

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. His DD 214 shows he entered the regular Army on 23 November 1984 and was honorably discharged on 6 April 1995 after having completed

his required active service under provisions provided in chapter 4 of AR 635-200, Active Duty Enlisted Administrative Separations (26 May 1989).

d. A 28 November 1990 Sworn Statement completed by a military police investigator reveals the applicant was arrested after a slight struggle during which he was taken to the ground, felt his shoulder pop, had an acute onset of low back pain, and the military police officer kicked him in the leg.

e. No contemporaneous medical documentation was submitted with the application. The supporting documents contain over 1,400 pages of non-probative VA medical documentation from approximately 2011 – 2024. His period of Service predates the EMR.

f. There is no probative evidence the applicant had a permanent medical condition failed the medical retention standards of chapter 3 of AR 40-501, Standards of Medical Fitness, prior to his voluntary discharge; or which prevented him from reenlisting prior to his voluntary 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 her office, grade, rank, or rating prior to her discharge.

g. Review of his records in JLV shows he has been awarded multiple VA service-connected disability ratings, including sleep apnea awarded December 2011, mood disorder awarded November 2011, and lumbosacral or cervical strain awarded August 2000. 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. It is the opinion of the ARBA Medical Advisor that that a referral to his case to the DES is not warranted.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board

carefully considered the applicant's record of service, documents submitted in support of the petition, and executed a comprehensive review based on law, policy, and regulation. Upon review of the applicant's petition and available military records, the evidence of record shows the applicant served for a period of over 10 years and was honorably discharged for completion of honorable service. The Board noted the applicant's contention he was injured on active duty; however, the Board reviewed and concurred with the medical advisor's review finding no evidence the applicant had a permanent medical condition that failed medical retention standards prior to his voluntary discharge and referral of his case to the Disability Evaluation System (DES) is not warranted.

2. The applicant's request for a personal appearance hearing was carefully considered. In this case, 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.

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 (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 (Discharge Review Board (DRB) Procedures and Standards) 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 (MMRB); 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 their 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 their 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.

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.

d. When a Soldier is being processed for separation or retirement for reasons other than physical disability, continued performance of assigned duty commensurate with their rank or grade until the Soldier is scheduled for separation or retirement, creates a presumption that the Soldier is fit.

5. 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.

6. 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.

7. 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.

8. 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.

9. 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. Paragraph 2-11 states applicants do not have a right to a formal hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

//NOTHING FOLLOWS//