

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 9 August 2024

DOCKET NUMBER: AR20230013576

APPLICANT REQUESTS: correction of his records to show he was discharged due to physical disability.

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

- DD Form 149 (Application for Correction of Military Record)
- Department of Veterans Affairs (VA) benefits and rating decisions

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 believes he should have been retired from active service due to his disabilities and his inability to continue being a Soldier. He was wounded in Afghanistan in 2012 and many issues presented after the fact. He is unable to run due to neuropathy on both legs. His traumatic brain injuries (TBI) migraines were misdiagnosed when he separated and he suffers from post-traumatic stress disorder (PTSD), which affects his ability to make good decisions. He also suffers from degenerative arthritis.
3. After having had prior service in the U.S. Marine Corps, the applicant enlisted in the Regular Army on 25 February 2009. He served in Afghanistan from 24 April to 30 October 2011. He reenlisted on 3 May 2013 for a period of three years which established his new expiration term of service (ETS) as 2 May 2016.
4. On 22 September 2015, the applicant submitted a DA Form 4187 (Personnel Action) requesting early separation to accept civilian employment under the provisions of All Army Activities (ALARACT) Message 340/2013 and Military Personnel (MILPER) Message 14-002 (Enlisted Voluntary Early Separation Program). He requested a new ETS date of 3 January 2016 and also requested to begin his transition leave on 9 November 2015.

5. On 2 October 2015, the separation authority approved his request for early separation under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), paragraph 16-7 (Early separation due to reduction in force, strength limitations, or budgetary constraints) and established his new ETS as 3 January 2016.

6. The applicant's Noncommissioned Officer Evaluation Report (NCOER) covering the period 25 April 2015 through 9 November 2015, his last NCOER on record, shows he passed the Army Physical Fitness Test on 5 October 2015.

7. The applicant's Enlisted Record Brief shows his last physical exam was on 30 October 2015 and that he was assigned a physical profile serial system (PULHES) code of "112111" and a medical readiness classification (MRC) code of 1.

8. The applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was honorably discharged on 3 January 2016 under the provisions of Army Regulation 635-200, paragraph 16-7, by reason of reduction in force. He completed 6 years, 10 months, and 9 days of active service.- His DD Form 214 also shows he was assigned a separation code of KCC and a reentry code of 1 (fully eligible for reenlistment).

9. The applicant provided VA documents showing he was granted service-connected disability compensation for various conditions that include TBI, PTSD (also claimed as adjustment disorder), and surgical scars, gunshot wound scars of the torso.

10. 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.

#### 11. 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 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 DD 149, he has indicated that PTSD and TBI [traumatic brain injury] are conditions related to his request. He states:

“I was wounded in AF [Afghanistan] in 2012 and many issues presented themselves after the fact. My inability to run due to neuropathy in both legs and feet. TBI migraines which was misdiagnosed when I separated and PTSD which affects my ability to make good decisions.

Also, I have a lot of degenerative arthritis throughout my joints which also precluded me from being physically to the standard. Also, a social worker told me to apply for this correction based on the number of injuries I have.

c. The Record of Proceedings details the applicant’s military service and the circumstances of the case. The applicant’s DD 214 for the period of Service under consideration shows he entered the Regular Army 25 February 2009 and received an honorable discharge on 3 January 2016 under the separation authority provided in paragraph 16-7 of AR 635-200, Active Duty Enlisted Administrative Separations (17 December 2009): Early separation due to reduction in force, strength limitations, or budgetary constraints. It shows Service in Afghanistan from 28 April 2011 through 30 October 2011 and that he earned a Combat Action Badge.

d. A 22 September 2015 Personnel Action (DA Form 4187) shows the applicant requested “Early separation for employment.” The remarks section:

“Soldier is requesting early separation to accept employment in accordance with ALARACT 340/2013, Milper message 14-002.

Service members current ETS date is 02 May 2016 and is requesting to change ETS date to 03 January 2016 (this date falls within 180 days of SM's original ETS date). SM has completed ACAP and the 12-month post transition budget plan and meets all requirements for this action.

Soldier has been offered a full-time position as a Military Talent Acquisition Specialists at FDM Group INC. Starting annual salary will be \$45,000.

Start date will be 09 November 2015. With an early separation approval SM will be able to begin terminal leave on 09 November 2015 to accept employment for this position.”

e. His request was approved on 2 October 2015.

f. Review of the EMR for his final year of service shows he was being treated for bilateral carpal tunnel syndrome, olecranon bursitis of the right elbow, right knee pain, and adjustment disorder related to his marriage.

g. His final NCO Evaluation Report covered 26 April 2015 thru 9 November 2015 and shows he was a successful Soldier. He had passed his Army Physical Fitness Test 5 October 2015, met army height and weight standards, and his rater top-blocked him as "Among the Best." His senior rater blocked him with a 2 on a scale of 1 to 5 for overall performance and top-blocked him with a 1 for overall protentional, opining:

- promote to Staff Sergeant now
- send to advanced schooling to further enhance his capabilities
- rated 1 of 7 sergeants whom I supervise within the PMO [Provost Marshall's Office]
- unlimited potential; continue to place in leadership positions and roles of increased responsibility

h. Paragraph 3-1 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (20 March 2012) states:

"The mere presence of an impairment does not, of itself, justify a finding of unfitness because of physical disability. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier reasonably may be expected to perform because of their office, grade, rank, or rating."

i. There is no evidence the applicant had a duty incurred behavioral health and/or medical condition which would have failed the medical retention standards of chapter 3 of AR 40-501, Standards of Medical Fitness, prior to his discharge. Thus, there was no cause for referral to the Disability Evaluation System. Furthermore, there is no evidence that any medical condition prevented the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his discharge.

j. JLV shows he has been awarded multiple VA service-connected disability ratings, including for traumatic brain disease, degenerative arthritis of the spine and PTSD. 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 ARBA 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 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, available military records, and the medical review, the Board concurred with the advising official finding that the applicant's Department of Veterans Affairs rating determinations are based on the roles and authorities granted by Congress to the Department of Veterans Affairs and executed under a different set of laws. Based on this, the Board determined referral of his case to the Disability Evaluation System (DES) 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.

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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. Army Regulation 635-200 sets forth the basic authority for the separation of enlisted personnel. Paragraph 16-7 provides that Soldiers may be separated prior to expiration of enlistment or fulfillment of active duty obligation when specifically authorized. When authorization limitations, strength restrictions, or budgetary constraints require the Regular Army or Reserve Component (RC) active duty enlisted force to be reduced in number, the Secretary of the Army, or his/her designee, may authorize voluntary or involuntary early separation. Statutory authority for Secretarial separation direction is Title 10, U.S. Code, section 1169 or Title 10, U.S. Code, section 1171 for Regular Army Soldiers, and Title 10, U.S. Code, sections 12313(a) or 12681 for RC Soldiers.
  
3. MILPER Message 14-002, issued on 2 January 2014, authorized commanders exercising special court martial convening authority or higher to approve voluntary early separation prior to contractual ETS for Regular Army enlisted Soldiers who had chosen not to reenlist or extend. These Soldiers could submit a DA Form 4187 requesting voluntary early separation up to 180 days prior to contractual ETS for the purpose of accepting employment. Specific criteria regarding eligible employment and effective date of separation were provided in ALARACT Message 340/2013, dated 24 December 2013.
  
4. 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 disability evaluation system (DES) and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with Department of Defense Directive 1332.18 and Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation).
  
5. Army Regulation 40-501 (Standards of Medical Fitness) provides that for an individual to be found unfit by reason of physical disability, he or she must be unable to perform the duties of his or her office, grade, rank or rating. Performance of duty despite impairment would be considered presumptive evidence of physical fitness.
  
6. Army Regulation 635-40 establishes the DES 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 or her office, grade, rank, or rating. It

provides that a Medical Evaluation Board is convened to document a Soldier's medical status and duty limitations insofar as duty is affected by the Soldier's status. A decision is made as to the Soldier's medical qualifications for retention based on the criteria in Army Regulation 40-501. The regulation in effect at the time, dated 8 February 2006 (revised in March 2012), states in:

a. Paragraph 3-1, the mere presences of an impairment does not, of itself, justify a finding of unfitness because of physical disability. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier reasonably may be expected to perform because of their office, grade, rank, or rating.

b. Paragraph 3-2:

(1) 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 they can no longer continue to reasonably perform because of a physical disability incurred or aggravated in service.

(2) When a Soldier is being processed for separation or retirement for reasons other than physical disability (e.g., retirement, resignation, reduction in force, relief from active duty, administrative separation, discharge, etc.), continued performance of assigned duty commensurate with his or her rank or grade until the Soldier is scheduled for separation or retirement, creates a presumption that the Soldier is fit.

7. DA Pamphlet 40-502 (Medical Readiness Procedures) describes the processes and procedures for assessing, documenting, reporting, and administering medical readiness.

a. Paragraph 1-6 (MRC), states healthcare providers determine medical readiness. The MRC 1 is assigned to fully medically ready Soldiers without any deployment-limiting medical conditions or medications. This class includes Soldiers with temporary profiles up to 7 days in length.

b. Paragraph 4-3 (Physical Profile Serial System) states the basis for the physical profile serial system is the function of body systems and their relation to military duties. Profiling providers will use permanent profiles to describe and rate the function of the extremities, sensory organs, physical capacity, and mental health. The permanent physical profile has six functional areas "P-U-L-H-E-S" with four numerical designations used to reflect different levels of functional capacity. The determination of the numerical designation 1, 2, 3, or 4 evaluates the functional capacity of a particular organ or system of the body. The functional areas for consideration are: P – physical capacity or stamina, U – upper extremities, L – lower extremities, H – hearing and ears,



E – eyes, S – psychiatric. An individual having a numerical designation of “1” describes a high level of medical fitness, deployable. A physical profile designator of “2” under any factors indicates some medical condition or physical defect that requires some minor functional or activity limitations, but the Soldier is deployable.

8. Title 38, United States Code, Sections 1110 and 1131, permit the VA to award compensation for disabilities which were incurred in or aggravated by active military service. However, an award of a VA rating does not establish an error or injustice on the part of the Army.

9. Title 38, Code of Federal Regulations, Part IV is the VA Schedule for Rating Disabilities. The VA awards disability ratings to veterans for service-connected conditions, including those conditions detected after discharge. As a result, the VA, operating under different policies, may award a disability rating where the Army did not find the member to be unfit to perform his duties. Unlike the Army, the VA can evaluate a veteran throughout his or her lifetime, adjusting the percentage of disability based upon that agency's examinations and findings.

10. 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 ABCMR applicants (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//