

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 26 July 2024

DOCKET NUMBER: AR20230013849

APPLICANT REQUESTS: in effect, reconsideration of his previous request for:

- an upgrade of his uncharacterized discharge to honorable
- narrative reason for separation be changed to physical disability
- a video/telephonic appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- diagnostic imaging report, 25 February 2013
- magnetic resonance imaging (MRI) report, 10 January 2013
- physical therapy initial evaluation and daily note, 5 December 2013, and 12 December 2013
- back surgery operative report, 23 October 2014
- medical records from his neurological surgeon, 23 October 2014, and 27 October 2014
- other medical imaging records, 19 August 2019, and 21 October 2021
- two self-authored statements and table of medical conditions, 23 August 2023 and undated
- Department of Veterans Affairs (VA) disability review, benefits, and rating documents, 21 March 2023, 31 March 2023, 7 April 2023, and 10 April 2023

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Dockets Number AR20050011182 on 26 January 2006, AR20110008227 on 18 January 2012, and AR20150014615 on 19 January 2017.

2. The applicant states:

a. He was medically fit to serve at the time of his enlistment and was unaware of any pre-existing medical issues. The fact is he was the subject of a physical hazing gone bad, during which he was beaten down, sexually harassed, and assaulted in the

showers of the barracks. Fearing retribution from fellow trainees and cadre, he did not disclose the assault but was treated for several injuries and placed on a continuous profile. He is currently being treated at the VA for depression, post-traumatic stress disorder (PTSD), and other physical ailments and has recurring nightmares due to what happened to him.

b. While in service, a heart condition and right and left foot and ankle injuries that were pre-existing but unknown to him were discovered, and he believes he is entitled to benefits for the service aggravation of these conditions as well as those relating to his physical and mental health. During the discharge process, he claims the Army did not allow him to present his case to the discharge board, and he lost potential benefits for home loans, education, and other areas that he would otherwise be entitled to because of his uncharacterized discharge.

c. He wants his record to reflect that he is receiving VA compensation of 90 percent (%) service-connected disability with total disability individual unemployability (TDIU) benefits because he cannot work due to his service-related conditions. His claims with the VA for lumbosacral or cervical strain, bilateral shoulder impingement, impairment of arm motion, bilateral impairment of his right knee are conditions that are 100% supplemental to his exiting service connection for the lumbar section of his spine, degenerative disc disease, and correlate directly to his TDIU status.

d. These injuries occurred in service during an established hazing incident that he was a victim of that also included a military sexual trauma during which he was tackled while showering, dog piled, beaten head to toe with and without instrumentation, stabbed in the midline of his cervical spine region and right upper thigh with a diner fork, assaulted anally with a mop handle, snapped in the genitals with a wet towel and made to simulate oral sex on another male recruit.

e. Since his assault in June 2003, the applicant has experienced various mental health and physical issues, including depression, anxiety, hypervigilance, irritable bowel syndrome, vertigo, bilateral knee and shoulder pain, burning, stinging, radiating pain, numbness and tingling, has been prone to dropping items from his hands, stumbling, dizziness, headaches and migraines, chronic fatigue, joint pain, swelling, muscle spasms, blurred vision and the development of lazy left eye and him being incapacitation requiring bed rest for more than four days a week. He previously applied for relief; however, he believes he did not plead his case correctly, not knowing the system, lacking confidence, and feeling a great deal of personal shame due to the nature of the events that happened to him.

3. The applicant enlisted in the Regular Army on 1 May 2003, for 4 years. He did not complete training and was not awarded a military occupational specialty (MOS). The highest rank/grade he held was specialist/E-4.

4. A DA Form 4707 (Entrance Physical Standards Board [EPSBD] Proceedings), dated 5 June 2003, shows:

a. He was diagnosed with chronic right foot pain and swelling and had been placed on a permanent profile of no standing more than 30 minutes, no running, jumping or marching.

b. The EPSBD recommended the applicant be separated from service, under the provisions of Army Regulation 635-200 (Personnel-Separations –Enlisted Personnel), paragraph 5-11, for a condition that existed prior to service.

c. The applicant acknowledged the EPSBD findings on 24 June 2003. He further acknowledged:

(1) He had been advised that legal counsel from an Army attorney was available to him or he could consult civilian counsel at his own expense.

(2) He could request discharge from the Army without delay or request retention on active duty.

(3) He concurred with the proceedings and requested discharge from the Army without delay.

d. The applicant's commander recommended the applicant's separation from service on 24 June 2003.

e. The separation authority approved the recommendation on 25 June 2003 and directed the applicant be discharged from the Army.

5. The applicant was discharged on 15 July 2003 under the provisions of Army Regulation 635-200, paragraph 5-11, by reason of failure to meet procurement medical fitness standards. His service was uncharacterized, with separation code "JFW" and reenlistment code "3." He was credited with 2 months and 15 days of active service.

6. As new evidence, the applicant provides the following documents:

a. Various medical documents to include a health conditions table, medical imaging reports, a surgery report, and physical therapy evaluation, and note showing the applicant has been seen and treated for several physical and mental health conditions from 25 February 2013 to 21 October 2021.

b. VA disability review, benefits, and rating documents showing the applicant applied for, appealed, and was eventually granted service-connection disability with TDIU for:

- bilateral hearing loss
- PTSD
- degenerative disc disease lumbar spine status post fusion with intervertebral disc syndrome
- tinnitus
- posterial residual scar
- left lower extremity radiculopathy
- residual deep non-linear scan (front)
- sciatic radiculopathy right lower extremity
- painful stable scar back
- thoracic strain

7. The applicant petitioned the Army Discharge Review Board for an upgrade of his service characterization. On 8 April 2005, he was informed that, after careful consideration, the Board determined he was properly and equitably discharged.

8. The ABCMR considered the applicant's request for an upgrade of his uncharacterized discharge on 26 January 2006, 18 January 2012, and 19 January 2017. After reviewing the application and all supporting documents, the Board determined relief was not warranted. The Board found the evidence presented did not demonstrate the existence of a probable error or injustice as a basis for correction of the applicant's records.

9. Regulatory guidance in effect at the time provided that Soldiers are considered to be in an entry-level status when they are within their first 180 days of active-duty service. The evidence of record shows the applicant was in an entry-level status at the time of his separation. An uncharacterized discharge is not meant to be a negative reflection of a Soldier's military service. It simply means the Soldier was not in the Army long enough for his or her character of service to be rated as honorable or otherwise.

10. The Board should consider the applicant's argument and evidence, along with the record, in accordance with the published equity, injustice, or clemency determination guidance.

#### 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 (AHLTA), the VA

electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and/or the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant is applying to the ABCMR requesting an upgrade of his 15 July 2003 uncharacterized discharge and, in essence, a referral to the Disability Evaluation System (DES). On his DD 149 he has indicated that PTSD and Sexual Assault/Harassment are issues related to his request. He states:

“My discharge narrative states that "Failure to meet procurement medical fitness standards" (JFW/RE3) as my reason for discharge. I would allege (and have proven via VA system) that I was medically fit to serve at the time of my enlistment.

I was unaware of any prior-existing medical issues and in fact was the subject of a physical hazing gone bad, during which I was beat down and sexually harassed and assaulted in the showers of the barracks. Fearing retribution from fellow trainees and cadre, I did not disclose the assault but was treated for a number of injuries and placed on a continuous profile. I am currently being treated at the VA for Depression/PTSD/and other physical ailments.”

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. The applicant's DD 214 shows he entered the Regular Army on 1 May 2003 and was discharged on 15 July 2003 under provisions provided by paragraph 5-11 of AR 635-200, Active Duty Enlisted Administrative Separations (1 November 2000): Separation of personnel who did not meet procurement medical fitness standards.

d. Paragraph 5-11a of AR 635-200:

“Soldiers who were not medically qualified under procurement medical fitness standards when accepted for enlistment or who became medically disqualified under these standards prior to entry on AD [active duty] or ADT [active duty for training] for initial entry training, may be separated. Such conditions must be discovered during the first 6 months of AD. Such findings will result in an entrance physical standards board. This board must also be convened within the soldier's first 6 months of AD.”

e. No contemporaneous medical documentation was submitted with the application. The only entry in the EMR is a radiologist's report of radiographs of the applicant's right foot. He opined “Sort tissue swelling. No fracture seen.”

f. The applicant was referred to an Entry Physical Standards Board (EPSBD) for chronic right foot pain under provisions provided in paragraph 5-11 of AR 635-200.

EPSBDs are convened IAW paragraph 7-12 of AR 40-400, Patient Administration. This process is for enlisted Soldiers who within their first 6 months of active service are found to have a preexisting condition which does not meet the enlistment standard in chapter 2 of AR 40-501, Standards of Medical Fitness, but does meet the chapter 3 retention standard of the same regulation. The fourth criterion for this process is that the preexisting condition was not permanently service aggravated.

g. The applicant's Entrance Physical Evaluation Board (EPSBD) Proceedings (DA Form 4707) shows he had a long history of right foot pain prior to entering the Army:

"This 25-year-old male in his 4th week of his initial enlistment training. RECEPTION STATION was identified as possibly having an EPTS [Existed Prior to Service] on 05 Jun 03 ...

SUBJECTIVE. FINDINGS: Soldier with 20-year history of right foot pain and swelling.

OBJECTIVE FINDINGS: Tenderness along base of 1st - 3rd metatarsals.

DIAGNOSIS: Chronic right foot pain and swelling.

DISPOSITION: It is recommended that the patient be separated. This soldier does not meet medical fitness standards for enlistment UP of paragraph 2-10d(1) Chapter 2 AR 40-501.

EPTS: Yes.

Service aggravated: No.

Soldier does meet retention standards UP chapter 3 of AR 40-501. It is recommended that he be separated from the military service UP Paragraph 5-11, AR 635-200.

h. Paragraph 2-10d(1) of AR 40-501 (30 September 2002) states a causes for rejection for enlistment include:

"Deformities, disease or chronic pain of one or both lower extremities that have interfered with function to such a degree as to prevent the individual from following a physically active vocation in civilian life or that would interfere with walking, running, or weight bearing, or the satisfactory completion of prescribed training or military duty."

i. On 19 June 2003, the Board determined his medical condition had existed prior to service, had not been permanently aggravated by his military service, did not meet one or more medical enlistment/induction standards, and was not compatible with continued military service. On 24 June 2003, the applicant concurred with the board marking the election: "I concur with these proceedings and request to be discharged from the US Army without delay."

j. JLV shows he has a VA service-connected disability ratings for PTSD and several conditions related to his lumbar spine. In a 30 May 2024 psychiatry encounter, the applicant states he was sexually assaulted in 2003.

k. 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. These roles and authorities are granted by Congress to the Department of Veterans Affairs and executed under a different set of laws.

l. An uncharacterized discharge is given to individuals who separate prior to completing 180 days of military service, or when the discharge action was initiated prior to 180 days of service. This type of discharge does not attempt to characterize service as good or bad. Through no fault of his own, he simply had a medical condition which was, unfortunately, not within enlistment standards.

m. It is the opinion of the ARBA Medical Advisor that a referral of his case to the DES is not warranted.

n. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Applicant asserts sexual assault and has VA service-connected PTSD and a history of MST.

(2) Did the condition exist or experience occur during military service? Applicant asserts the sexual assault which was the cause of her PTSD occurred due to MST while in the Army.

(3) Does the condition or experience actually excuse or mitigate the discharge? Applicant asserts sexual assault and has VA service-connected PTSD due to MST which is a mitigating condition under liberal consideration policies.

**BOARD DISCUSSION:**

1. After reviewing the application and all supporting documents, 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. The governing regulation provides that a separation will be described as an entry-level separation, with service uncharacterized, if the separation action is initiated while a Soldier is in entry-level status. The applicant served for a period of 2 months and 15 days and was discharged from the Regular Army for failure to meet procurement medical standards for chronic right foot pain that existed prior to service. The Board reviewed and concurred with the medical advisor's review finding a referral of his case to the Disability Evaluation System is not warranted. The Board noted the applicant's contention of military sexual trauma; however found by a preponderance of the evidence his separation was not in error or unjust and denied relief. Additionally, the Board determined the narrative reason for separation the applicant received upon discharge was appropriate.

2. An uncharacterized discharge is not meant to be a negative reflection of a Soldier's military service. It merely means the Soldier has not been in the Army long enough for his or her character of service to be rated as honorable or otherwise. As a result, there is no basis for granting the applicant's request.

3. 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

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|---|---|---|----------------------|
| : | : | : | 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 amendment of the ABCMR decision rendered in Docket Numbers AR20050011182 on 26 January 2006, AR20110008227 on 18 January 2012, and AR20150014615 on 19 January 2017.

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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 1556, provides the Secretary of the Army shall ensure that an applicant seeking corrective action by ARBA is provided a copy of all correspondence and communications, including summaries of verbal communications, with any agencies or persons external to agency or board, or a member of the staff of the agency or Board, that directly pertains to or has material effect on the applicant's case, except as authorized by statute.
2. 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.
3. Title 38, U.S. 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.
4. Title 38, Code of Federal Regulations, Part IV is the VA's 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.
5. Army Regulation 15-185 (ABCMR) states applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.
6. Army Regulation 635-200, in effect at the time, set policies, standards, and procedures to ensure the readiness and competency of the force while providing for the orderly administrative separation of Soldiers for a variety of reasons. Readiness is promoted by maintaining high standards of conduct and performance.
  - a. Paragraph 3-4(2) Entry-Level status. Service will be uncharacterized, and so indicated in block 24 of DD Form 214, except as provided in paragraph 3-9a.
  - b. Paragraph 3-7 states an honorable discharge is a separation with honor. The honorable characterization is appropriate when the quality of the soldier's service generally has met the standards of acceptable conduct and performance of duty for

Army personnel or is otherwise so meritorious that any other characterization would be clearly inappropriate.

c. Paragraph 3-9a Entry-level status separation. A separation will be described as entry-level with service uncharacterized if processing is initiated while a Soldier is in entry-level status, except when—

(1) Characterization under other than honorable conditions is authorized under the reason for separation and is warranted by the circumstances of the case.

(2) Headquarters Department of the Army, on a case-by-case basis, determines that characterization of service as honorable is clearly warranted by the presence of unusual circumstances involving personal conduct and performance of duty. This characterization is authorized when the Soldier is separated by reason of selected changes in service obligation, convenience of the Government, and Secretarial plenary authority.

(3) The Soldier has less than 181 days of continuous active military service, has completed Initial Entry Training, has been awarded an MOS, and has reported for duty at a follow-on unit of assignment.

d. Paragraph 5-11 states Soldiers who were not medically qualified under procurement medical fitness standards when accepted for enlistment or who became medically disqualified under these standards prior to entry on active duty may be separated. Such conditions must be discovered during the first 6 months of active duty. Such findings will result in an Entrance Physical Standards Board (EPSBD). This board, which must be convened within the Soldier's first 6 months of active duty, takes the place of the notification procedure required for separation under this chapter.

(1) Medical proceedings, regardless of the date completed, must establish that a medical condition, which was identified by an appropriate military medical authority within 6 months of the Soldier's initial entry on active duty would have permanently or temporarily disqualified the Soldier for entry into military service had it been detected at that time or the medical condition does not disqualify the Soldier for retention in military service per Army Regulation 40-501 (Medical Services - Standards of Medical Fitness), chapter 3.

(2) A Soldier who is found not to have been qualified under procurement medical fitness standards at the time of enlistment after entry on active duty may request to be retained on active duty if, after considering the proceedings of an EPSBD, the separation authority determines the Soldier's disqualifying condition will not prevent the Soldier from performing satisfactorily throughout his/her period of enlistment in the MOS for which he/she is being trained or in another MOS based on the Soldier's medical

condition and the Soldier, after being counseled and given the opportunity to obtain legal advice, signs a statement requesting to complete the period of service for which enlisted. Soldiers not retained will be processed for separation.

e. Section II (Terms): Character of service for administrative separation - A determination reflecting a Soldier's military behavior and performance of duty during a specific period of service. The three characterizations are honorable, general (under honorable conditions), and under other than honorable conditions. The service of Soldiers in entry-level status is normally described as uncharacterized.

7. 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 (DRB) and Boards for Correction of Military/Naval Records (BCM/NR) when considering requests by Veterans for modification of their discharges due in whole or in part to: mental health conditions, including PTSD; Traumatic Brain Injury; sexual assault; or sexual harassment. Standards for review should rightly consider the unique nature of these cases and afford each veteran a reasonable opportunity for relief even if the sexual assault or sexual harassment was unreported, or the mental health condition was not diagnosed until years later. 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.

8. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military DRBs and BCM/NRs regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. BCM/NRs may grant clemency regardless of the type of court-martial. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to other corrections, including changes in a discharge, which may be warranted based on equity or relief from injustice.

a. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. In determining whether to grant relief on the basis of equity, injustice, or clemency grounds, BCM/NRs shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment.

b. Changes to the narrative reason for discharge and/or an upgraded character of service granted solely on equity, injustice, or clemency grounds normally should not result in separation pay, retroactive promotions, and payment of past medical expenses

or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded service characterization.

//NOTHING FOLLOWS//