

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 10 September 2024

DOCKET NUMBER: AR20230014063

APPLICANT REQUESTS: in effect, correction of his record to show he was discharged from the Army National Guard due to a disability.

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

- DD Form 149 (Application for Correction of Military Record)
- DA Form 2173 (Statement of Medical Examination and Duty Status), 5 September 2004
- Order 202-800, Office of the Adjutant General, Arkansas, 21 July 2005
- Orders D-09-825221, U.S. Army Human Resources Command, Missouri, 23 September 2008
- lay statement from the applicant's brother, 27 March 2023

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, in effect, he was discharged prior to his Line of Duty (LD) investigation being completed.

a. He contends his separation orders were published on 21 July 2005 with an effective date of discharge listed as 8 July 2005. His LD investigation concluded on 12 July 2005 and found that his injury occurred in the LD (ILD). He further contends that his military records were marked as "DEAD" which made his records unavailable.

b. His discharge should reflect that he was injured while in an active duty status and that his injury was determined to be ILD. This correction will allow him to receive full benefits from the Department of Veterans Affairs (VA).

c. His father died thinking he was a liar because there is no record of his injury with the VA. He went to prison for 10 years because the District Attorney was unable to obtain his military records and called his hands "deadly weapons."

3. The applicant enlisted in the Regular Army on 10 October 2000. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged on 13 March 2002 after completing 1 year, 3 months, and 8 days of net active service.

- His discharge was affected under the provisions of Army Regulation 635-200 (Personnel Separations - Enlisted Personnel), chapter 13, by reason of "Unsatisfactory Performance," with a separation code of "JHJ" and a reentry code of "3."
- This form also shows lost time during the following periods: 17 November 2000 - 28 November 2000, and 3 February 2001 - 6 March 2001.

4. On 29 August 2003, he enlisted Arkansas Army National Guard (ARARNG).

5. A DA Form 2173 shows, on 5 September 2004, while participating in active duty training at Fort Chaffee, AR, the applicant was climbing into the back of a pick-up truck when his foot slipped. He braced himself with his left leg and when the vehicle moved forward the tire caught his left foot and rolled up his left leg in the vicinity of the knee. His company commander indicated that a formal LD investigation was not required and found the applicant's injury was incurred ILD.

6. The applicant was honorably discharged on 8 July 2005 from the ARNG in accordance with National Guard Regulation (NGR) 600-200 (Enlisted Personnel Management), paragraph 8-27w, failing to report to the gaining State upon an interstate transfer. His NGB Form 22 (Report of Separation and Record of Service), shows he was transferred to the U.S. Army (USAR) Control Group (Annual Training). He completed 1 year, 10 months, and 10 days of ARNG service.

7. A memorandum, dated 12 July 2005, shows the Deputy Chief of Staff, Personnel, Office of the Adjutant General, Little Rock, Arkansas approved the applicant's LD investigation findings of ILD.

8. Orders 202-800, 21 July 2005, published by the Office of the Adjutant General, Camp Joseph T. Robinson, North Little Rock, Arkansas show the applicant was honorably discharged from the ARNG and assigned to the USAR Control Group (Annual Training), effective 8 July 2005.

9. Orders D-09-825221, dated 23 September 2008, honorably discharged the applicant from the USAR.

10. His record is void of documentation or entries showing he was classified as "Dead" or "Deceased."

11. The applicant provides a lay statement written by his older brother. His brother states that the applicant is a broken man due in part to the injustice he experienced while serving in the military. He contends that while serving in the ARNG the applicant sustained a serious injury to his leg and he was marked dead. He further contends that the applicant's military record was intentionally hidden from him so that he would be unable to qualify for medical benefits from the VA. He watched his brother slip into pill addiction and abuse alcohol. The applicant currently suffers from headaches, hearing loss, post-traumatic stress disorder (it is unclear the nexus of this condition but appears that this condition is related to his conviction for assault, and subsequent ten-year prison sentence), numbness in his legs, and buckling of his knees. The applicant has been unable to maintain employment. The applicant is a good and honorable man, and this injustice should be corrected. The VA has awarded the applicant a combined disability rating of 80 percent.

12. Regulatory guidance provides 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 his or her office, grade, rank, or rating.

13. 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 has reapplied to the ABCMR requesting, in essence, a referral to the Disability Evaluation System (DES). He states:

"I was discharged with pending LOD [line of duty determination or LODD]. My discharge was created on 07/21/2005, with an effective date of 07/08/2005. My LOD investigation concluded on 07/12/2005 that I was in fact injured in the Line Of Duty. I was then Marked DEAD. I would like my discharge corrected to reflect that I was injured while on duty and should have been discharged with full VA benefits."

c. 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 29 August 2003 and received an honorable discharge from the ARARNG on 8 July 2005 under authority provided in paragraph 8-27w of NGR 600-200, Enlisted Personnel Management (1 March 1997): Failure to report to the gaining state upon interstate transfer.

d. The applicant has submitted a Statement of Medical Examination and Duty Status (DA Form 2173 which shows he sustained a left leg injury 5 September 2004. The accompanying approval memorandum is dated 12 July 2005.

e. No medical documentation was submitted with the application and there are no encounters in the EMR.

f. There is no 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; or which prevented him from reporting to or contacting the command at his gaining state. Thus, there was no cause for referral to the Disability Evaluation System.

g. Paragraph 3-1 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (1 September 1990) states: "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 his or her office, grade, rank, or rating.

h. JLV shows he has been awarded multiple VA service-connected disability ratings, including several related to his left lower extremity. 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.

i. It is the opinion of the ARBA medical advisor that a referral of his case to the DES is unwarranted.



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 Army Board of Correction of Military Records (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. NGR 600-200, Personnel-General-Enlisted Personnel Management, in effect at the time, established standards, policies, and procedures for the management of Army National Guard (ARNG) enlisted Soldiers to include the functional areas of accession, retention, and discharge. Paragraph 8-27w permits for the discharge from the Inactive ARNG for failure to report to annual muster. This regulation further states -

a. If a commander suspects a Soldier may not be medically qualified for retention, he or she will direct a Soldier to present him or herself for a medical examination. A complete medical examination will be accomplished, and the results forwarded to the unit commander for disposition.

b. If retention is not recommended a request for discharge will be submitted to the State Adjutant General. When medical condition was incurred in line of duty, the procedures of NGR 40-3 will apply. Discharge action will not be effected pending final disposition of the case.

3. Army Regulation (AR) 600-8-4, Personnel-General-Line of Duty Policy, Procedures, and Investigations prescribes policies, procedures, and mandated tasks governing line of duty determinations of soldiers who die or sustain certain injuries, diseases, or illnesses.

a. For soldiers who sustain permanent disabilities while on active duty to be eligible to receive certain retirement and severance pay benefits, they must meet requirements of the applicable statutes. One of these requirements is that 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 (Title 10 USC 1201, 1203, 1204, 1206, and 1207). Physical Evaluation Board determinations are made independently and are not controlled by LD determinations. However, entitlement to disability compensation may depend on those facts that have been officially recorded and are on file within the Department of the Army (DA). This includes reports and investigations submitted in accordance with this regulation.

b. A favorable determination does not preclude separate disciplinary or administrative actions. An LD determination is not binding on the issue of guilt or

innocence of the Soldier in a separate disciplinary action, the issue of pecuniary liability in a report of survey, or any other administrative determination.

c. Documentation for an informal LD investigation typically consists of DA Form 2173 completed by the MTF and the unit commander and approved by the appointing authority, State AG, or higher authority. The final determination of an informal LD investigation can result in a determination of "in LD" only, except as provided in paragraph 4-10 (Intoxication and Drug Use).

d. Unit commanders will ensure the DA Form 2173, Statement of Medical Examination and Duty Status, is completed promptly, and forwarded through channels to the appointing authority. Promptness in conducting the investigation is of great importance. Delays often result in failure to secure important data and information, possibly resulting in an improper determination. The final approving Authority has 40 calendar days after incident to review the LD investigation for completeness and required documents.

4. AR 635-40, Personnel Separations-Physical Evaluation for the Retention, Retirement, or Separation, governs the evaluation for physical fitness of Soldiers who may be unfit to perform their military duties because of physical disability.

a. 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 his or her office, grade, rank, or rating.

b. When a member is being separated by reasons other than physical disability, his or her continued performance of assigned duty commensurate with his or her rank or grade until he or she is scheduled for separation or retirement creates a presumption that he or she is fit. This presumption may be overcome only by clear and convincing evidence that they are unable to perform their duties for a period of time or that acute grave illness or injury or other deterioration of physical condition, occurring immediately prior to or coincident with separation, renders the member unfit.

c. Under the laws governing the Army Physical Disability Evaluation System, 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. Title 38, U.S. Code, section 1110, General - Basic Entitlement: 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.

6. Title 38, U.S. Code, section 1131, Peacetime Disability Compensation - Basic Entitlement: 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.

7. The Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records on 25 July 2018, regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. Boards for Correction of Military/Naval Records may grant clemency regardless of the court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds.

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, Boards 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.

8. Section 1556 of Title 10, U.S. Code, requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

9. AR 15-185, 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//