

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 26 July 2024

DOCKET NUMBER: AR20230014418

APPLICANT REQUESTS:

- retirement due to physical disability
- personal appearance before the Board

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

- DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States) in lieu of DD Form 149 (Application for Correction of Military Record)
- Department of Veterans Affairs (VA) benefits decision letter
- medical records (69 pages)

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 completed his military service on 9 January 2009. He served two tours in Iraq and two tours in Afghanistan. He sustained a traumatic brain injury (TBI) during his service in Afghanistan and he received treatment for his TBI prior to his expiration term of service (ETS). He was told the VA would provide care after his separation from the Army. After his separation, he discovered some of his former unit members were medically retired by the Army. Based on these findings, he is requesting to be considered for a medical retirement.
3. The applicant enlisted in the Regular Army on 14 January 2002. He reenlisted on 10 January 2006. His records show service in Iraq and Afghanistan.
4. The applicant's Noncommissioned Officer Evaluation Report for the period 1 April 2007 through 31 March 2008 shows in Part IVc (Physical Fitness and Military Bearing) that although he was issued a physical profile during the rating period, and he was

unable to take the Army Physical Fitness Test, he was still able to perform all assigned duties.

5. The applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged on 9 January 2009 by reason of completion of required active service. The DD Form 214 also shows he was assigned a reentry code of "1" (fully eligible for reenlistment).

6. The applicant provided a VA benefits decision letter showing he was granted service-connected disability compensation for various conditions that include post-concussion syndrome with cognitive impairment, claimed as TBI.

7. 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.

8. 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 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 is requesting a referral to the Disability Evaluation System (DES) for residuals of traumatic brain injury (TBI). He states:

"I finished my military contract as an enlisted soldier on 09 January 2009. I served two tours of combat duty in Operation Iraqi Freedom and two tours of combat duty in Operation Enduring Freedom. I suffered a Traumatic Brain Injury in Operation Enduring Freedom. The Army did preliminary treatment for my TBI prior to my ETS. They told me that the Veterans Affairs would be providing care post- ETS. I finished my term of military service with an honorable discharge.

After my discharge I discovered that some of my comrades with whom I had served alongside had been medically retired by the US Army. Based on these findings I would like to be considered for a change of my discharge record to one of medical retirement."

c. The Record of Proceedings outlines the applicant's military service and the circumstances of the case. The applicant's DD 214 shows he entered the regular Army on 15 January 2000 and was honorably discharged on 9 January 2009 under authority provided in chapter 4 of AR 635-200, Active Duty Enlisted Administrative Separations (6 June 2005), having completed his required active service. His separation code of KBK denotes "Completion Of Required Active Service" and his reentry code of "1" signifies he was fully qualified for reenlistment.

d. The applicant was evaluated by neurology for memory issues on 19 September 2008:

"The patient was referred for a cognitive evaluation, following complaints of short-term memory loss, secondary to exposure to 2 IED [improvised explosive device] blasts while in Afghanistan. He states that he can't keep track of things throughout the day, he'll forget what he's talking about in the middle of a conversation, he'll forget tasks and misplace personal belongings. Additionally, he states that he's forgotten details of specific events and details of missions while in OIF/OEF ...

Formal assessment revealed an overall mild cognitive impairment, characterized by a moderate deficit in recall and borderline normal reasoning skills. Weaknesses in recall include: memory for graphic elements, immediate recall of word strings, delayed recall of word strings, cued recall of words, immediate recall of oral directions and recall of oral paragraphs. Informal assessment of other cognitive-communicative, language, oral-motor, motor speech and swallowing skills revealed no deficits.

Treatment Plan

Given the results of this evaluation, provider feels that the patient may benefit from cognitive therapy 1x/week for 4-6 weeks."

e. He did well with therapy and so was retested on 28 October 2008:

"The patient participated in testing to assess his progress since the initiation of cognitive therapy. Overall, he is currently performing well within the borderline normal range. Pt has demonstrated independent use of compensatory strategies to recall new information. Provider discussed test results with the patient. He expressed understanding as well as satisfaction with gains made. The patient has met therapy goals and has maximized functional gains in therapy. Joseph was encouraged to participate in mentally stimulating tasks to utilize cognitive reserve and maintain cognitive flexibility."

f. The other three significant issues the applicant was treated for during his final year of Service were an acquired nasal deformity, headaches, and PTSD. The EMR shows

the applicant had undergone repair of a septal perforating defect, the repair had failed, the applicant said the whistling noise it made was “driving him crazy”, and he wanted something done. His final encounter shows a septal button had been placed and he was doing well.

g. The applicant was being treated for headaches and his final encounter for this condition was a follow-up on 1 December 2008 while he was on terminal leave. He stated the headaches had recently been worse and the provider prescribed the applicant Midrin for the bad headaches.

h. The applicant self-referred to mental health and was initially evaluated on 21 August 2008 after which he was diagnosed with PTSD:

“Pt [patient] stated that he is here today to try and figure out why he feels emotionless. Pt stated that since he came back from Iraq 1.5 months ago, he has not felt any emotions not even towards his wife or children. Pt stated that he has no interest in doing things with his family, pt also reported not having any sexual interest.

Pt stated that while he was in Iraq, he had anger problems that were resolved with Prozac at mental health in Iraq. Pt reported that he has had two flashbacks of the helicopters from the med evacs since he's been back. Pt stated that one was caused by car backfire, and the other was completely random. Pt stated that he would like to get help for this before he gets out of the Army ...

SM [service member] is currently receiving medication management through his PCM [primary care manager] and is prescribed sertraline which is having favorable outcomes per the patient without any side effects. SM denies need for medication for sleep aid and received sleep hygiene hand out from writer of this note. SM mentioned desire to seek counseling through SW [social work] with his wife for communication difficulties and appointments made with SW front desk.”

i. His final encounter for PTSD was on 8 January 2009 at which time he reported doing better:

“Client reported increase in mood, increase interest in enjoyable activities, and positive interactions with spouse. Client was unable to identify root of change and continues to take Celexa.

j. There is insufficient probative evidence the applicant's TBI, a mental health condition, or any other condition would have failed the medical retention standards of chapter 3, AR 40-501 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.

k. JLV shows he has been awarded multiple VA service-connected disability ratings, including ratings for traumatic brain disease, lumbosacral or cervical strain, migraine headaches, 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. 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.

l. Paragraph 3-2b(1) of AR 635–40, Physical Evaluation for Retention, Retirement, or Separation (8 February 2006) states:

“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.”

m. It is the opinion of the Agency Medical Advisor that referral of his case to the DES 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 insufficient evidence the applicant's traumatic brain injury or any other condition would have failed medical retention standards and no evidence 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. The Board concluded a referral to the Disability Evaluation System 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. 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.
3. Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation) establishes the Army Disability Evaluation System (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 states:
 - 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 service.
 - b. The mere presence of 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 member reasonably may be expected to perform because of his or her office, rank, grade, or rating. The Army must find that a service member is physically unfit to reasonably perform his or her duties and assign an appropriate disability rating before he or she can be medically retired or separated.
 - c. When a member is being processed for separation for reasons other than physical disability (e.g., retirement, resignation, relief from active duty, administrative separation, ETS, etc.), his or her continued performance of duty, until he or she is referred to the DES for evaluation for separation for reasons indicated above, creates a presumption that the member is fit for duty.

4. 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.

5. 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.

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

//NOTHING FOLLOWS//