

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 17 July 2024

DOCKET NUMBER: AR20230014589

APPLICANT REQUESTS: In effect, medical retirement and back pay since his discharge. Also, a personal appearance before the Board.

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

- DD Form 149 (Application for Correction of Military Record)
- Self-authored statement
- DD Form 214 (Certificate of Release or Discharge from Active Duty), 2 March 1989
- Credit Union withdrawal slip
- DVA payment verification, 24 August 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 a self-authored statement explaining what happened to him since he joined the Army from 1 March 1987 to 1 March 1989.
 - a. He got introduced to cocaine in the Army at Fort Bragg, NC. His roommate introduced him to cocaine. He was one of the best basketball player Fort Bragg had. One of his Non-Commissioned Officers (NCO) in Charge was the leader of this addiction. It started with one sergeant who introduced him to another staff sergeant, who would have cocaine parties.
 - b. The applicant started out using as a recreational drug. The staff sergeant would have all kinds of women with no clothes on. Everyday after their regular duties were over. It took about a whole year to get hooked. He described how he got hooked.

c. His entire life has been over since his addiction from being introduced to cocaine by the U.S. Army. He has a lot of mental problems because of his joining the U.S. Army. The doctors in St. Louis, MO said he is Schizophrenia. This is what happens when he put his trust in the U.S. Army. He feels the Army owes his at least 75% disability. He got out in March 1989 times 12 months times 33 years. He believes that is what the Army owes him.

3. The applicant enlisted in the Regular Army on 28 January 1987. He was awarded military occupational specialty 73E (Finance Specialist).

4. He was advanced to private first class/E-3 on 1 November 1987.

5. On 17 August 1988, a Bar to Reenlistment Certificate was initiated against the applicant for frequent traffic violations on Fort Bragg, NC. The bar was approved on 14 August 1988.

6. The applicant had a positive urinalysis resulting from a test sample collected on 18 January 1989.

7. On 27 January 1989, the immediate commander notified the applicant of his intent to separate him from the service under the provisions of Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), paragraph 14-12c, for misconduct – abuse of illegal drugs. The specific reason was he tested positive on a urinalysis test taken on 18 January 1989. He acknowledged receipt of the notification on 30 January 1989.

8. On 2 February 1989, after consulting with legal counsel of the basis for the contemplated action to separate him for misconduct – abuse of illegal drugs, its effects, the rights available to him; and the effect of any action taken by him in waiving said rights. He acknowledged:

- he may expect to encounter substantial prejudice in civilian life if a general discharge under honorable conditions is issued to him
- he may apply to the Army Discharge Review Board (ADRB) or ABCMR for upgrading
- he will be ineligible for enlistment in the Army for a period of 2 years after discharge

9. On 19 February 1989, his bar to reenlistment was reviewed and removal was not recommended.

10. His immediate commander recommended approval of discharge and that he be issued a general under honorable conditions discharge.

11. On 13 February 1989, the separation authority approved separation under the provisions of AR 635-200, for positive testing on urinalysis test given on 18 January 1989. He was to be issued a General Discharge Certificate.

12. On 16 February 1989, a mental status evaluation was conducted. It showed he had the mental capacity to understand and participate in the proceedings, he was mentally responsible, and he met the retention requirements of chapter 3, AR 40-501 (Standards of Medical Fitness).

13. Accordingly, he was discharged under honorable conditions on 2 March 1989. His DD Form 214 shows he completed 2 years, 1 month, and 4 days net active service this period. He was awarded or authorized the Army Service Ribbon, Marksman Marksmanship Qualification Badge (M-16), and Sharpshooter Marksmanship Qualification Badge (Hand Grenade). His DD Form 214 also shows:

- Item 24 (Character of Service): General (Under Honorable Conditions)
- Item 25 (Separation Authority): AR 635-200, paragraph 14-12c (2) Section III
- Item 26 (Separation Code): JKK
- Item 27 (Reenlistment Code): 3, 3C
- Item 28 (Narrative Reason for Separation): Misconduct – Abuse of Illegal Drugs

14. The applicant provides:

- Credit Union withdrawal slip showing account withdrawals and remaining balance
- DVA payment verification, 24 August 2023, showing he receives \$165.92 per month

15. There is no available evidence indicating he was issued a permanent profile or was diagnosed with a condition that did not meet medical fitness standards in accordance with AR 40-501 (Standards of Medical Fitness) during his period of service.

16. There is no evidence the applicant applied to the ADRB within the boards 15-year statute of limitations.

17. 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.

18. 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.

19. 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.

20. By regulation, AR 15-185 (ABCMR) 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.

21. AR 37-104-4 (Military Pay and Allowances Policy) states, only the Director, DFAS–IN may make settlement actions affecting the military pay accounts of Soldiers as a result of correction of records by the ABCMR per provisions of AR 15–185 (ABCMR).

22. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting medical retirement and back pay since his discharge. He contends he experienced Other Mental Health Issues that mitigates his misconduct. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Pertinent to this advisory are the following: 1) the applicant enlisted in the Regular Army on 28 January 1987 as a finance specialist, 2) a bar to reenlistment was initiated against the applicant on 17 August 1988 for frequent traffic violations on Ft. Bragg, NC (now known as Ft. Liberty), 3) the applicant had a positive urinalysis from a test sample collected on 18 January 1989, 4) on 27 January 1989 the applicant was notified of his commanders intent to separate him under the provisions of Army Regulation (AR) 635-200, paragraph 14-12c for misconduct-abuse of illegal drugs, 5) the applicant was discharged on 2 March 1989 under AR 635-200, paragraph 14-12c (s) Section III, with a narrative reason for separation as misconduct-abuse of illegal drugs.

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the ROP and casefiles, supporting documents and the applicant's military service and available medical records. The VA's Joint Legacy Viewer (JLV) was also examined. The electronic military medical record (AHLTA) was not reviewed as it was not in use during the applicant's time in service. Lack of citation or discussion in this section should not be interpreted as lack of consideration.

c. A Report of Mental Status Evaluation dated 16 February 1989 was provided for review. It was documented that the applicant had the mental capacity to participate in proceedings, was mentally responsible, and met the retention requirements of Chapter 3, AR 40-501.

d. VA records were available for review in JLV from 27 November 1992 through 2 July 2024. The applicant is 10% service connected through the VA for Tinnitus. He is not service connected for any BH conditions. There were numerous VA behavioral health notes in the record and the relevant details will be summarized below. The applicant appeared to initiate BH care through the VA on 21 May 2015 due to problems with stable housing and reported feeling depressed due to situational factors. A mental health note dated 27 April 2017 documented the applicant's report as to the reason he was discharged from the military. Per the note, the applicant reported his child was being mistreated by the child's mother when he was in the military and the applicant elected to use cocaine and marijuana to "test dirty." It was further documented that the applicant was given the choice of an Article 15 or honorable discharge and elected to take the honorable discharge. At the time of the visit the applicant was psychiatrically hospitalized and diagnosed with Mania with Psychosis. He has also been diagnosed with Substance induced psychotic disorder, cannabis induced psychotic disorder, cannabis use disorder, moderate, Alcohol Use Disorder, and Schizotypal Personality Disorder through the VA. It was documented in a psychiatry note on 28 April 2017 that the applicant's wife, who had known him for 2.5 years at the time, had no knowledge of the applicant having any previous manic episodes. Per review of JLV, the applicant has been psychiatrically hospitalized several times since his initial psychiatric hospitalization through the VA in 2017. Reasons for hospitalization include mania with psychosis, marital discord with homicidal ideation, and medication adjustment. There is no documentation in the record associating the applicant's diagnosis of mania with psychosis with his time in the military and there is no documentation available for review that the applicant experienced mania prior to 2017.

e. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence the applicant had a condition or experience during his time in service that mitigated his misconduct. However, he contends his misconduct was related to Other Mental Health Issues, and, per liberal guidance, his assertion is sufficient to warrant the Board's consideration.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant contends his misconduct was related to Other Mental Health Issues.

(2) Did the condition exist or experience occur during military service? Yes, per the applicant's assertion.

(3) Does the condition experience actually excuse or mitigate the discharge? No. However, he contends his misconduct was related to Other Mental Health Issues, and, per liberal guidance, his assertion is sufficient to warrant the Board's consideration. The applicant's military service record was void of any BH diagnosis or treatment history.

Review of the applicant's VA records post-discharge demonstrate the applicant is not service connected for any BH conditions. Although the applicant has been diagnosed with Mania with Psychosis through the VA, which would be consistent with a diagnosis of Bipolar Disorder which is a mitigating BH condition, the applicant is not service connected for this condition and there is no documentation available associating the applicant's condition with his military service. As such, there is insufficient evidence that his misconduct was related to or mitigated by Other Mental Health Issues and insufficient evidence to support an upgrade based on BH medical mitigation.

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 and standard 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 had a condition or experience during his time in service that mitigated his misconduct.
2. The Board determined there is insufficient evidence of in-service mitigating factors to overcome the misconduct of illegal drug use. The Board found no documentation in the record associating the applicant's diagnosis of mania with psychosis with his time in the military and there is no documentation available for review that the applicant experienced mania. The applicant provided no post service achievements or character letters of support for the Board to weigh a clemency determination. The Board determined the applicant has not demonstrated by a preponderance of evidence an error or injustice warranting the requested relief of a medical retirement and back pay since his discharge. The Board denied relief.
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

:	:	:	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 (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, which is that what the Army did was correct.

a. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

b. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 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.

3. AR 635-200 (Personnel Separations – Enlisted Personnel) sets forth the basic authority for the separation of enlisted personnel. Chapter 14 of the regulation deals with separation for various types of misconduct, which includes drug abuse, and provides that individuals identified as drug abusers may be separated prior to their normal expiration of term of service. Individuals in pay grades E-5 and above must be processed for separation upon discovery of a drug offense. Those in pay grades below E-5 may also be processed after a first drug offense and must be processed for separation after a second offense. The issuance of a discharge under other than honorable conditions is normally considered appropriate.

a. Paragraph 3-7a provides that an honorable discharge is a separation with honor and entitles the recipient to benefits provided by law. The honorable characterization is appropriate when the quality of the member'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.

b. Paragraph 3-7b provides that a general discharge is a separation from the Army under honorable conditions. When authorized, it is issued to a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Paragraph 14-12c (2) (Commission of a serious offense), abuse of illegal drugs is serious misconduct.

4. AR 635-8 (Separation Processing and Documents), prescribes policy and procedural guidance relating to transition management. For Block 28, enter the reason for separation (shown in AR 635-5-1) based on the regulatory or statutory authority.

5. AR 635-5-1 (Separation Program Designators (SPD)) implements Department of Defense policy for standardization of certain entries on DD Form 214 and has been revised to update the separation program designator codes to be used and the authorities and reasons for their use and control. Appendix shows JKK is the correct Separation Code assigned to Soldiers discharged under chapter 9 of AR 635-200 due to drug abuse rehabilitation failure. For Soldiers separated under AR 635-200,

paragraph 14-12c due to misconduct – commission of a serious offense has a code of JKQ (JKH).

6. AR 40-501 (Standards of Medical Fitness) governs medical fitness standards for enlistment; induction; appointment, including officer procurement programs; retention; and separation, including retirement. Once a determination of physical unfitness is made, the VA/DOD jointly rate all disabilities using the Veteran's Administration Schedule for Rating Disabilities (VASRD). Ratings can range from 0 to 100 percent, rising in increments of 10 percent.

7. AR 635-40 (Physical Evaluation for Retention, Retirement, or Separation) governs the evaluation of physical fitness of Soldiers who may be unfit to perform their military duties because of physical disability. It states that according to accepted medical principles, certain abnormalities and residual conditions exist that, when discovered, lead to the conclusion that they must have existed or have started before the individual entered the military service. Examples are manifestation of lesions or symptoms of chronic disease from date of entry on active military service (or so close to that date of entry that the disease could not have started in so short a period) will be accepted as proof that the disease existed prior to entrance into active military service.

8. AR 37-104-4 (Military Pay and Allowances Policy) states, only the Director, DFAS–IN may make settlement actions affecting the military pay accounts of Soldiers as a result of correction of records by the ABCMR per provisions of AR 15–185 (ABCMR).

9. Title 38 USC 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.

10. Title 38 USC 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.

11. Section 1556 of Title 10, U.S. Code, requires the Secretary of the Army to ensure that an applicant seeking corrective action by 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.

12. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records (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. 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 based on 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. 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//