

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 4 October 2024

DOCKET NUMBER: AR20230014650

APPLICANT REQUESTS: in effect, correction of his narrative reason for separation and separation program designator (SPD) code, and reentry (RE) code to show he was retired due to disability.

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

- DD Form 149, Application for Correction of Military Record
- DD Form 214 (Certificate of Release or Discharge from Active Duty), 22 December 2005
- DD Form 214, 7 October 2010
- DA Form 2173 (Statement of Medical Examination and Duty Status), 23 January 2011
- Line of Duty (LD) investigation memorandum, 3 February 2011
- DA Form 3349 (Physical Profile), 5 June 2011
- Medical Evaluation Board (MEB) document checklist, 6 June 2011
- Request for Fitness for Duty Appointment, 20 June 2011
- Standard Form 600 (Health-Chronological Record of Medical Care), 12 July 2011
- DD Form 214, 8 August 2011
- Department of Veterans Affairs (VA) rating decision, 3 February 2021

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 indicates that his request is related to Post-Traumatic Stress Disorder (PTSD). He states, in summary, in 2011, he was honorably discharged and told the narrative reason for his discharge would be changed to "due to a disability" when the paperwork was completed. The VA determined his PTSD symptoms listed as "other specified trauma and stressor related disorder" are service connected and awarded his condition a 70 percent (%) disability rating. His limited motion of arm is also service

connected and rated at 20%. These conditions existed at the time of his discharge from the Army National Guard (ARNG). He further states:

a. On 10 July 2010, while serving as an Active Guard Reserve (AGR) recruiter for the New York Army National Guard (NYARNG); he fractured his right shoulder while he was assisting with putting up the rock-climbing wall. While setting up the wall, he fell, hit his right shoulder on the wall, causing his shoulder fracture. Over the next few months, he reported to duty and reported for medical appointments. He contends, on 8 October 2010, he was called into the sergeant major's office and told his contract was over and he needed to outprocess because his injury made him unretainable. He pointed out that he should be on a medical hold and not out-processed since he was scheduled for bone repair and rotator cuff surgery on the shoulder. He was told this was not the case with the ARNG Soldiers, he would be out processed, and all his medical expenses for the injury would be taken care.

b. On 26 October 2010, he reported to the local medical facility the surgery. When the surgery was done, he was told that the military would not pay for it since he was no longer in the ARNG. At the same time, he was told his spouse packed the house and left him while he was in surgery. He had to move back in with his parents who lived over two hours away south of the unit.

c. He submitted a congressional inquiry after his unit declined to pay for his medical expenses. He contends the inquiry was found in his favor and his recruiting unit brought him back on active duty for medical processing. During this time, he had to commute one day a week to the Headquarters which was over two hours from his residence. He further contends that Major (MAJ) DRT would not let him report to the local office even though it was less than 15 minutes from his residence. He reported for medical and physical therapy on the other days of the duty week. On the days he reported to Headquarters, he had to work with MAJ DRT; this consisted mostly of traveling to different offices and meeting with different recruiters. While traveling with him on separate occasions, MAJ DRT made statements about wanting to punch him in his shoulder to see if it was actually broken or telling him that he was going to make him carry all of his bags with just his right arm. MAJ DRT would make comments like "real Soldiers don't get hurt" or "I am going to make sure that you are as unhappy as possible." When the applicant asked to be assigned to a local office like other Soldiers going through MEB/Medical MOS Retention Board so he could be closer to home, MAJ DRT responded with, "We did not tell you to move back home, if you are smart enough to file a congressional you are smart enough to commute."

d. On 12 July 2011, he was finally sent to Fort Drum, NY for an MEB physical. At the end of July 2011, it was decided his physical therapy was complete and he was not going to get any better.

e. On 5 August 2011, he was called into the AGR office and told he was being discharged. When he asked about his discharge, he was told he would receive an honorable characterization of service, with a RE Code of "1" and an SPD code of "LND-miscellaneous/general reasons," until the MEB caught up and; then it would be changed to medical retirement.

f. Over the course of the past several years, he tried unsuccessfully to get his records from the NYARNG. He was finally able to get copies of most of his information from a lawyer dealing with the VA. Due to his treatment in the Recruiting Command, he was diagnosed with other specified trauma and stressor-related disorders that were service connected. He also has a copy of his MEB checklist that was never completed.

3. The applicant, having prior service in the U.S. Army Reserve, enlisted in the NYARNG on 9 February 2007. He was subsequently ordered to active duty in the AGR for the period 29 January 2008 through 28 January 2011 to serve as a Recruiting and Retention Noncommissioned Officer with the Recruiting and Retention Command.

4. The record contains and the applicant provides, a DA Form 2173 , dated 23 January 2011, which shows, while instructing a course on an indoor rock wall, he dropped 32 feet to 3 feet and collided with the rock wall. He injured his right shoulder and was evaluated at "Medical Arts" and placed in a sling with a recommendation for further evaluation. On 2 February 2011, the commander found the incident was incurred in the LD.

5. The applicant provided:

a. A DA Form 3349, dated 5 June 2011, shows he received a permanent physical profile for a fracture of his humerus with delayed healing and scarring. This form further states "SM has had 9 mos of rehab and PT; Delayed healing fracture has reached maximum medical retention determination point. SM does not meet retention standards." This form indicates the applicant required an MEB.

b. An MEB document checklist, dated 6 June 2011, lists the required documents needed for medical processing. This form is not complete and void of signatures.

c. A memorandum for record, subject, request for fitness for duty appointment, dated 20 June 2011, submitted by the Commander, Bravo Company Headquarters, Recruiting and Retention Battalion, NY, requests the applicant be scheduled for a fit for duty appointment to evaluate his shoulder injury.

d. An SF 600 shows the applicant was seen by a medical provider, on 12 July 2011, to receive a Fit for Duty examination. The medical notes state the applicant's "closed fracture of humerus greater tuberosity right still had limited range of motion and unable

to lift higher than 90 degree above shoulder without pain. Decrease strength lifting over 90 degree on right arm. Patient currently undergoing physical therapy and will complete his requirement in 2 and half weeks. As per patient, his ortho surgeon will stop his physical therapy and further treatment with no further improvement in his symptoms. The applicant already had profile stating for MEB. At this time agreed for MEB process."

6. The complete facts of his discharge are not available for review. A DD Form 214 shows he was released from active duty on 8 August 2011. This form further shows he completed 10 months, and 1 day of active service for the period. This form shows in:

- Block 18, Remarks – the entry "BLOCK 25 SEPARATED UNDER AUTHORITY OF NGR (AR) 600-5, CHP 5 AND AR 135-18, TABLE 2-3 RULE E (D), FAILURE OF SELECTION BY A TOUR CONTINUATION BOARD//SERVICE MEMBER IS INELIGIBLE FOR REENTRY INTO THE AGR PROGRAM
- Block 25, Separation Authority – TO BE DETERMINED
- Block 26, Separation Code – LND
- Block 27, Reentry Code – 1
- Block 28, Narrative Reason for Separation – MISCELLANEOUS/GENERAL REASONS

7. Orders 221-1003, 9 August 2011, published by the Office of the Adjutant General, Joint Force Headquarters, NY, honorably discharged the applicant from the ARNG and as a Reserve of the Army, effective 8 August 2011.

8. His National Guard Bureau (NGB) Form 22 (Report of Separation and Record of Service) shows the applicant was discharged on 8 August 2011. This form further shows in:

- block 23 (Authority and Reason) - "NGR 600-200, Chap 6, para 6-35, section a./Army Regulation 135-178 Chap 4, para 4-2, section b. sub-section (3)"
- block 26 (Reenlistment Eligibility) - "RE-1 ER"

9. He provides a VA Rating Decision, dated 3 March 2021, showing he receives compensation for the following service connected conditions:

- Other specified trauma and stressor related disorder, 70%
- Rotator cuff tendonitis, right shoulder, 20%
- Internal derangement of the left knee, with ACL strain, and chondromalacia patella, 10%
- Tinnitus, 10%
- Bilateral hearing loss, 0%
- Residual scar of the right upper extremity (Shoulder) anterior and posterior region of the shoulder associated with rotator cuff tendonitis, right shoulder, 0%

10. Regulatory guidance provides, a decision is made as to the Soldier's medical qualification for retention based on the criteria in Army Regulation 40–501 (Medical Services-Standards of Medical Fitness), chapter 3. If the MEB determines the Soldier does not meet retention standards, the board will recommend referral of the Soldier to a PEB. The MEB will recommend referral to a PEB those Soldiers who do not meet medical retention standards. A Soldier being processed for nondisability separation will not be referred to a PEB unless the Soldier has medical impairments that raise substantial doubt as to their ability to continue to perform the duties of their office, grade, rank, or rating.

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/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, in essence, a referral to the Disability Evaluation System (DES). He states he had been evaluated for a medical evaluation board and was in DES at the time of his discharge.

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 the former Army National Guard Soldier entered active duty on 8 October 2010 and was honorably discharged on 8 August 2011 after failing to be selected by a continuation board. He received a reenlistment eligibility RE-1 – Fully Eligible to Reenlist.

d. His National Guard Report of Separation and Record of Service (NGB Form 22) for the period of Service under consideration shows he enlisted in the Army National Guard on 9 February 2007 and received an honorable discharge from the New York Army National Guard (NYARNG) on 8 August 2011. It shows a total service that period of 3 years, 0 months, and 0 days. He received a reenlistment eligibility RE-1 – Fully Eligible to Reenlist.

e. A Statement of Medical Examination and Duty Status (DA Form 2173) shows the applicant sustained a right shoulder greater tuberosity fracture while instructing on a rock-climbing wall on 10 July 2010. The commander wrote:

“SM [service member injured right shoulder while rock climbing. SM was instructing a course on an indoor rock wall when he dropped from 32 ft to 3 ft and then collided with the rock wall on his right side. He had an onset of shoulder pain and was evaluated at Medical Arts and placed in a sling and recommended for further evaluation.”

f. The 3 February 2011 line of duty approval memorandum was for “Right Shoulder Greater Tuberosity Nonunion Cuff Tear.”

g. On 5 June 2011, the applicant was placed on a duty limiting permanent physical profile for “Fracture of humerus with delayed healing and scarring. The provider marked the block indicating the Soldier should be referred to a medical evaluation board stating “SM has had 9 months of rehab and physical therapy. Delayed healing fracture has reached maximum medical retention determination point. SM does not meet retention standards.”

h. The EMR shows the applicant was evaluated for fitness for duty due to his chronic right shoulder pain on 12 July 2011. The provider wrote:

“Closed Fracture Of Humerus Greater Tuberosity, Right: Still limited range of motion and unable to lift higher than 90 degrees above shoulder without pain. Decreased strength lifting over 90 degrees on right arm. Patient currently undergoing physical therapy and will complete his requirement in 2 and half weeks.

As per patient, his ortho surgeon will stop his physical therapy and further treatment with no further improvement in his symptoms. Patient already have profile stating for MEB. At this time agreed for MEB process.”

i. Paragraph 3-12b(1) of AR 40-501, Standards of Medical Fitness (14 December 2007) states that the inability of forward elevate of abduct the shoulder above 90 degrees (the arm above parallel to the ground) fails medical retention standards and is therefore a cause for referral to an MEB.

j. It is unknown why the applicant was not continued in the DES as required by multiple Army regulations. Paragraph 7-1 of AR 40-400, Patient Administration, states in part: “If the Soldier does not meet retention standards, an MEB is mandatory and will be initiated by the physical evaluation board liaison officer (PEBLO).” Note there is no mention of component or duty status.

k. Paragraph 2-9c of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (8 February 2006), identifies the errors made by his command:

“The unit commander will –

c. Refer a soldier to the servicing MTF for medical evaluation when the soldier is believed to be unable to perform the duties of his or her office, grade, rank, or rating.”

l. Paragraph 1–33a of AR 635-200, Active Duty Enlisted Administrative Separations (17 December 2009), notes that disposition through medical channels takes precedence:

a. Except in separation actions under chapter 10 and as provided in para 1–34b, disposition through medical channels takes precedence over administrative separation processing.

m. Chapter 10 addresses separations in lieu of courts-martial. Paragraph 1-34b:

b. Regular Army soldiers will be transferred to the IRR to complete their statutory or contractual MSO {military service obligation}, whichever expires later.

n. A JLV shows the Veteran has a 20% VA service-connected disability rating for limited motion of his right arm.

o. The applicant was administratively discharged when he should have been referred to the DES for at least one duty related condition which failed the medical retention standards of chapter 3, AR 40-501, Standards of Medical Fitness.

p. It is the opinion of the ARBA medical advisor a referral of his case to the DES is warranted.

#### BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that partial relief was 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 was discharged vice being referred to the Disability Evaluation System (DES). Based on

this, the Board granted relief of referral of his case to the DES as recommended by the medical reviewer.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

:                :                :                GRANT FULL RELIEF

■                ■                ■                GRANT PARTIAL RELIEF

:                :                :                GRANT FORMAL HEARING

:                :                :                DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined that the evidence presented was sufficient to warrant a recommendation for partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by:

a. Directing the applicant be entered into the Disability Evaluation System (DES) and a medical evaluation board convened to determine whether the applicant's condition(s) met medical retention standards at the time of service separation.

b. In the event that a formal physical evaluation board (PEB) becomes necessary, the individual concerned may be issued invitational travel orders to prepare for and participate in consideration of his case by a formal PEB if requested by or agreed to by the PEB president. All required reviews and approvals will be made subsequent to completion of the formal PEB.

c. Should a determination be made that the applicant should have been separated under the DES, these proceedings will serve as the authority to void his administrative separation and to issue him the appropriate separation retroactive to his original separation date, with entitlement to all back pay and allowances and/or retired pay, less any entitlements already received.

2. The Board further determined that the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of



the application that pertains to changing his type of discharge without evaluation under the DES.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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 Army Board for 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. National Guard Regulation (NGR) 600-5, The Active Guard-Reserve (AGR) Program, Title 32, Full-Time National Guard Duty (FTNGD), states -

a. AGR Soldiers may be released from AGR service for failure to remain qualified for such service; or involuntarily, or as otherwise required or permitted by applicable law, policy, or regulation. The initial three year tour of FTNGD in an AGR status is a probationary period. During the third year of the initial tour, all AGR Soldiers will be evaluated for potential for continued active service and entry into a career program status.

b. AGR Soldiers being processed through the Disability Evaluation System (DES) or medical board proceedings will not be released from FTNGD or retired from an AGR status until final disposition by medical authorities.

3. Army Regulation 635-40, Physical Evaluation for Retention, Retirement, or Separation, in effect at the time, set forth the policies for the disposition of Soldiers found unfit because of physical disability to reasonably perform the duties of their office, grade, rank, or rating.

a. The mere presence of a medical impairment does not in and of itself justify a finding of unfitness. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier may reasonably be expected to perform because of their office, grade, rank, or rating. The Soldier will not be declared physically unfit for military service because of disabilities known to exist at the time of the Soldier's acceptance for military service that have remained essentially the same in degree since acceptance and have not interfered with the Soldier's performance of effective military service.

b. Disability compensation is not an entitlement acquired by reason of a 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.

c. The medical evaluation boards (MEB) are 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 qualification for retention based on the criteria in Army Regulation 40–501, chapter 3. If the MEB determines the Soldier does not meet retention standards, the board will recommend referral of the Soldier to a PEB. The MEB will recommend referral to a PEB those Soldiers who do not meet medical retention standards. A Soldier being processed for nondisability separation will not be referred to a PEB unless the Soldier has medical impairments that raise substantial doubt as to their ability to continue to perform the duties of their office, grade, rank, or rating.

d. An award of a VA rating does not establish entitlement to medical retirement or separation. The VA is not required to find unfitness for duty. Operating under its own policies and regulations, the VA awards ratings because a medical condition is related to service, i.e., service-connected. The VA can evaluate a veteran throughout their lifetime, adjusting the percentage of disability based upon that agency's examinations and findings.

4. Army Regulation 40-501, Medical Services-Standards of Medical Fitness, governs medical fitness standards for enlistment; induction; appointment, including officer procurement programs; retention; and separation, including retirement. If a physical profile is permanent, the profiling officer must assess if the Soldier meets the medical retention standards of chapter 3. Those Soldiers on active duty who do not meet the medical retention standards must be referred to a MEB.

5. Army Regulation 635-5-1, Personnel Separations-Separation Program Designator (SPD) Codes, in effect at the time, implements the SPD codes to be used, and the authorities and reasons for their use and control, on the DD Form 214, Certificate of Release or Discharge from Active Duty. The SPD code "LND" corresponds with a narrative reason "Miscellaneous/General Reasons." This SPD Code signifies voluntary or involuntary separation for miscellaneous or general reasons, but (except for involuntary discharge under Army Regulation 635-200, paragraph 5-14) they do not identify a specific existing reason for separation. They are included in the Army SPD inventory for possible future use should the need arise.

6. Title 10, U.S. Code, section 1201, provides for the physical disability retirement of a member who has at least 20 years of service or a disability rating of at least 30 percent. Title 10, U.S. Code, section 1203, provides for the physical disability separation of a member who has less than 20 years of service and a disability rating of less than 30 percent.

7. 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.

8. 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.

9. 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.

10. 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 Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

11. Army Regulation 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//