

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 25 September 2024

DOCKET NUMBER: AR20240000520

APPLICANT REQUESTS: in effect, a discharge or retirement due to disability vice being separated due to expiration of his term of service.

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

- DD Form 149, Application for Correction of Military Record
- DA Forms 3349, Physical Profile (5)
- Standard Form (SF) 539, Medical-Abbreviated Medical Record
- SF 509, Progress Notes
- Aeromedical Evacuation Patient Record
- Automated Version of SF 600 (5)
- SF 600, Chronological Record of Medical Care (2)
- DD Form 2795, Pre-Deployment-Health Assessment
- DD Form 689, Individual Sick Call Slip
- DA Form 2823, Sworn Statement
- Medical Record-Post Deployment Medical Assessment
- Memorandum for Record

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, that he should have had the many injuries he sustained before and after his combat deployment reviewed by a medical board prior to leaving the Army.

a. He contends that he was unfit due to injuries he sustained prior to combat and in combat. He was experiencing seizures from a Traumatic Brain Injury (TBI), he had his shoulder surgery cancelled the same month he deployed, he was suffering tooth pain from bad dentistry while deployed, migraine headaches, dizziness, and weakness. He

was in unbelievable pain, and he was told to suck it up and take his medication. He was even placed as a gate guard on the battlefield while on a restricted profile.

b. The Operation Iraqi Freedom (OIF) medical doctors stated that he should be evaluated by a medical board upon returning from deployment. Instead, he was placed on barracks clean up duty outside the unit. He further contends that he saved two pilots from a downed helicopter and suffered heat stroke. He was sent to a Mobile Army Surgical Hospital (MASH) unit to recover. The MASH unit near Camp Cadari was hit by a scud missile so he was sent to Spain to recover. In Spain he could not perform his shoulder surgery or deal with his many health issues.

c. He later sent to Landstuhl Medical Center in Germany. His wife never knew what happened to him. They did not have the decency to notify her. She was on active duty in the Army but was with their newborn son. He was sent to OIF injured and waiting for shoulder surgery on 27 January 2003. Documents provided will show the blatant improper care for his well-being and disregard for the many health issues he suffered from prior to deployment and after.

3. The applicant's record shows he enlisted in the Regular Army on 27 September 1999. He held military occupational specialty 92G, cook.

4. He was honorably released from active duty on 20 December 2003 in accordance with chapter 4 of Army Regulation 635-200 (Personnel Separations) by reason of completion of required service. He completed 4 years, 2 months, and 24 days of net active service. His DD Form 214 shows in Item 18, Remarks, that he was deployed to Iraq/Afghanistan/Kuwait from 26 January 2003 to 11 April 2003.

5. The applicant provides:

a. Numerous Physical profiles for –

- Left shoulder strain, temporary, 6 February 2001
- Left rotator cuff injury, temporary, 9 March 2001
- Left shoulder strain, temporary, 10 April 2001
- Left shoulder pain, temporary, 4 May 2001
- Left shoulder pain, thoracic dysfunction, temporary, 6 July 2001

b. Treatment records, November 2002, which show the applicant complained of a closed head injury with occasional light headiness. He reported that his noncommissioned officer was not following the profile and he was being forced to lift boxes, load and unload trucks.

c. Temporary Physical Profile, 7 November 2002, for the recovery from subarachnoid hemorrhage.

d. A Pre-deployment checklist, 12 December 2002, wherein he indicated that he needed surgery. The medical official entered a handwritten note stating the applicant had scheduled surgery and needed further evaluation of subarachnoid hemorrhage.

e. Temporary Physical Profile, 16 December 2002, for disequilibrium and blurred vision after head trauma.

f. Pre-deployment Health Assessment, 16 January 2003, wherein he indicated he was in poor health. He was found to be deployable.

f. Medical notes showing the applicant complained of headaches and chest pain on 31 March 2003 and was subsequently medically evacuated on 2 April 2003. His diagnosis included chronic migraines, rotator cuff injury (chronic), post-surgical (root canal) and acute stress reaction. He was seen in Neurology and it was recommended he be returned to the rear detachment for further evaluation and treatment. This was not a problem that could be resolved in two weeks. His condition was stable. There was no need for neurology or orthopedic consult."

g. Temporary Physical Profile for a torn ligament, 14 August 2003.

h. Multiple medical and dental records that show the applicant -

- had follow up care for his head injury
- was treated for a decaying tooth, advised that he should be nondeployable
- reported multiple symptoms upon returning from deployment
- was treated for migraines
- returned from OIF for inability to perform mission
- requested his wife not be deployed in order to care for him
- reported various medical conditions on his separation physical but after examination no significant medical findings were noted

6. Regulatory guidance states 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 their office, grade, rank, or rating.

7. 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 has applied to the ABCMR requesting in essence a referral to the Disability Evaluation System (DES). He states in part:

"I should have had a medical Board prior to leaving the army due to the many injuries I sustained before and after my combat deployment. I was unfit, injured prior to combat and injured in combat. I was experiencing seizures from a TBI [traumatic brain injury], shoulder surgery cancelled the same month I deployed, tooth pain from bad dentistry while deployed, migraine headaches, dizziness, weakness, unbelievable pain and I was told to suck it up and take my meds!

I was even placed as a gate guard on the battlefield while on restricted profile and I have provided a signed document from the enlisted in charge. The OIF Doctors stated in my medical records that I should have been evaluated for a MEB upon my return from combat."

c. The Record of Proceedings outlines the applicant's military service and the circumstances of the case. A DD 214 shows he entered the regular Army on 27 September 1999 and received an honorable discharge on 20 December 2003 under the provisions in chapter 4 of AR 635-200, Active Duty Enlisted Administrative Separations, after having completed his required active service. The DD 214 shows service in Iraq/Afghanistan/ Kuwait from 26 January 2003 thru 11 April 2003. His reentry code of "1" signifies he was fully qualified to reenlist.

d. The EMR contains the radiology reports for several injuries/issues but there are no clinical encounters.

e. Submitted medical documentation includes a series temporary duty limiting physical profiles in 2001 for left shoulder pain/injury. A 6 November 2002 follow-up encounter at the aviation medicine clinic shows he had sustained a closed head injury with a subarachnoid hemorrhage the month before and was gradually improving. At this

point, he was having frequent headaches and occasional vertigo. His neurological examination was normal, he was on Fioricet for the headaches, was to remain on light duty, and was to follow-up with neurosurgery.

f. A pre-deployment health assessment completed on 12 December 2002 shows the applicant was being prepared for deployment. The provider noted the applicant was pending surgery for his left shoulder injury and the history of the closed injury and it appears the applicant was to receive clearance from both orthopedics and neurosurgery prior to deployment. A second pre-deployment health assessment was completed on 16 January 2003. For the question "Please list your current concerns," the applicant wrote "None at this time!" and he was cleared for deployment.

g. During his deployment, he reported chest pain and a headache occurred while he was running to the site of a helicopter mishap as part of a litter team. The headache was believed to be secondary to the exertion and situation he was in and treated with an injection of Imitrex. The chest pain was thought to be secondary to a stress reaction to the situation for which he was given a valium and rest.

h. His symptoms improved and he was evaluated by both neurology and neurosurgery on day 2 of his admission and diagnosed with migraine headaches.

i. The applicant was returned from Iraq early, in April 2003, due to the inability to perform his mission secondary to this left shoulder condition, dental issues, and migraine headaches. The applicant had shoulder surgery on 16 May 2003. His dental records show at least 4 separate treatments for dental issues following his return.

j. The applicant underwent a pre-separation medical examination on 10 November 2003. His history was noted in detail by the provider. The only abnormality annotated on the examination by the provider was mild bilateral knee crepitus and some right knee pain with flexion. He wrote "No significant medical findings on exam," directed the applicant to follow-up with his primary care provider for a right-sided posterior lymph node, and determined the applicant was qualified for separation.

k. Paragraph 3-1 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (1 September 1990) states:

"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.

l. There is insufficient probative evidence the applicant had any medical condition which would have failed the medical retention standards of chapter 3 of AR 40-501, Standards of Medical Fitness, prior to his voluntary separation; nor is there evidence a medical condition prevented the applicant from extending his period of enlistment. Thus, there was no cause for referral to the Disability Evaluation System.

m. JLV shows he has been awarded multiple VA service-connected disability ratings, including ratings for PTSD, migraine headaches, and traumatic brain disease. However, 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; 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.

n. It is the opinion of the ARBA medical advisor that a referral of his case to the DES is not warranted.

#### BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found relief is not warranted.

2. The Board concurred with the conclusion of the ARBA Medical Advisor that the applicant did not have any conditions prior to his discharge that would have been a basis for referring him to the Disability Evaluation System. Based on a preponderance of the evidence, the Board determined the applicant's release from active duty upon completion of required active service was not in error or unjust.

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.

■ [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 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) 635-40, Personnel Separations-Physical Evaluation for Retention, Retirement, or Separation) establishes the PDES and sets forth the 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.

a. 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.

b. 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.

c. When a commander believes that a Soldier of their command is unable to perform the duties of their office, grade, rank, or rating because of physical disability, the commander will refer the Soldier to the responsible MTF for evaluation.

d. All relevant evidence must be considered in evaluating the fitness of a Soldier. Findings with respect to fitness or unfitness for military service will be made on the basis of the preponderance of the evidence. Thus, if the preponderance of evidence indicates unfitness, a finding to that effect will be made. This is particularly true if medical evidence establishes the fact that continued service would be harmful to the Soldier's health or would prejudice the best interests of the Army. A Soldier may be referred for physical evaluation under other circumstances.

3. Title 10, U.S. Code, section 1203, provides for the physical disability separation with severance pay of a member who has less than 20 years of service and a disability rated at less than 30 percent.

4. 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.

5. 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.

6. 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.

7. Section 1556 of Title 10, United States 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.

8. AR 15-185, Army Board for Correction of Military Records, 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 ABCMR will decide cases on the evidence

of record. It is not an investigative body. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

//NOTHING FOLLOWS//