

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 15 October 2024

DOCKET NUMBER: AR20240000867

APPLICANT REQUESTS:

- medical retirement vice voluntary resignation in lieu of elimination
- personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- personal statement
- Traumatic Brain Injury (TBI) Evaluation
- DD Form 2702-1 (Department of Defense Report of Result of Trial)
- DD Form 214 (Certificate of Release or Discharge from Active Duty) for the period 15 December 2002 to 27 March 2017
- Department of Veterans Affairs (VA) Rating Decision, dated 20 May 2020
- VA Summary of Benefits, 19 January 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:

a. He is requesting a medical retirement due to documented injuries received during his 15 years of military service. This correction should be made due to the nature of the injuries he suffered, as well as the mental health issues he had and still has. The attached statement and medical documentation will provide further details as to the nature of these issues, and how they affected his decisions at the time of his separation.

b. In March 2017, instead of seeking discharge through a medical evaluation board (MEB), he elected to submit a release from active duty request. As he will lay out below, certain events and his medical conditions affected his ability to assess the situation in

which he found himself and precluded him from making a more informed decision. In January of 2015, while assigned to the Command and General Staff College at Fort Leavenworth, KS, he was accused of actions that resulted in a court-martial trial. The court-martial trial ended in June of 2015 in his favor and did not warrant a discharge from service. Prior to these events, he had been taking medications for post-traumatic stress disorder (PTSD), depressive mood, and anxiety since December 2013, which certainly did not improve with all the stressors he endured through the court-martial.

c. In the months following the court-martial, he was exposed to many administrative actions from the command, some that he understood as necessary, while he felt that others were not. Between the court-martial proceedings and continuing to be subjected to discriminating behavior from the command, his anxiety, depression, and PTSD became overwhelming. He sought the easiest and fastest way to remove himself from a worsening situation. As a result of the situation, he did not seek additional help or research other options. Now that he has been out of service for long enough and taken the time to inquire about the options he could have used, he is submitting this request for a record review with the goal of changing his release from active to a medically retired status.

d. All documentation pertaining to his medical issues during service have been included with this request. In addition to his PTSD, anxiety, and depression, he has record of a TBI from an improvised explosive device blast, which also affected his sense of smell and caused him to suffer from back issues.

3. Following enlisted service in the Regular Army and in the Army National Guard, the applicant was appointed a Reserve commissioned officer on 15 December 2002 and entered active duty on the same date.

4. His record shows he served Iraq from 24 December 2003 to 23 September 2004 and from 10 August 2006 to 9 August 2007 and in Afghanistan from 23 July 2009 to 22 July 2010 and from 6 August to 5 September 2011.

5. A DD Form 2701-1 shows that on 4 June 2015, the applicant was found guilty, contrary to his plea, by a general court-martial, of providing intoxicating liquor to Ms. K.C., a person under the age of 21, on 8 March 2014 in violation of Chapter 311 , Section 311.310.1, of the Missouri Revised Statutes, and that said conduct was of a nature to bring discredit upon the armed forces. He was found not guilty of two charges and specifications and two additional charges were dismissed. The sentence consisted of a reprimand and forfeiture of pay.

5. On 12 June 2015, the applicant was issued a General Officer Memorandum of Reprimand for going to a club on 9 March 2014 with a group of friends, to include Ms. K.C., and drank an excessive amount of alcohol. When he arrived back to his

apartment, he engaged in sexual intercourse twice and attempted a third sexual encounter with Ms. K.C., a woman not his wife. He was a married man who was geographically separated from his wife and his actions were inappropriate.

6. The applicant's record shows:

a. On 28 August 2015, the Commanding General, U.S. Army Combined Arms Center and Fort Leavenworth, KA, initiated elimination against him under the provisions of Army Regulation 600-8-24 (Officer Transfers and Discharges), paragraph 4-2(b) (Misconduct, moral or professional dereliction, or in the interests of national security).

b. The applicant's case was referred to a Board of Inquiry (BOI) and on 5 February 2016, a BOI convened and found the allegations contained in the notification of proposed separation were supported by a preponderance of the evidence and the allegations warranted the applicant's separation from the with an honorable characterization of service. The Commanding General L TG Brown approved the findings and recommendations of the board on 10 March 2016.

c. On 22 December 2016, the BOI packet was returned to the command due to defective initiation. Those defects were corrected and on 18 January 2017, an elimination action was again initiated against the applicant due to the same misconduct and derogatory information. On 19 January 2017, the applicant submitted a resignation in lieu of elimination proceedings.

d. On 17 March 2017, the Deputy Assistant Secretary of the Army (Review Boards) accepted the applicant's resignation in lieu of elimination and directed the applicant's discharge from the Army with an honorable characterization of service.

7. The applicant's DD Form 214 shows he was discharged on 27 March 2017 under the provisions of Army Regulation 600-8-24, paragraph 4-2b and paragraph 4-24a(1) (resignation in lieu of elimination), by reason of unacceptable conduct, Separation Code BNC, with an honorable characterization of service. The DD Form 214 also shows he was credited with 16 years, 8 months, and 7 days of active service.

8. The applicant provided VA documents showing he was granted service-connected disability compensation for various conditions that include PTSD and TBI with a combined 100% disability rating.

9. 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.

10. 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 prior ABCMR denial (2 September 2014, AR20140000761), 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, the Army Aeromedical Resource Office (AERO), 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 in essence requesting a referral to the Disability Evaluation System (DES). He states:

"I am requesting that my honorable discharge be adjusted to a medical retirement due to documented injuries received during my 15-year of military service.

This correction should be made due to the nature of the injuries I suffered, as well as the mental health issues I had, and still have. The attached statement and medical documentation will provide further details as to the nature of these issues, and how they affected my decisions at the time of my separation."

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. His DD 214 for the period of Service under consideration shows the former Officer entered the regular Army 15 December 2002 and received an honorable conditions discharge on 27 March 2017 under the provisions paragraphs 4-2b and 4-24a(a) of AR 600-8-24, Officer Transfers and Discharges: Unacceptable Conduct. The military separation code BNC denotes "Unacceptable Conduct."

d. In his self-authored letter, the applicant asserts mental health conditions and a history of a mild traumatic brain injury contributed to the misconduct for which he was court-martialed and received a General Officer Memorandum of Reprimand (GOMOR). He states in part:

"In the months following the court martial, I was exposed to many administrative actions from the command, some that I understood as necessary, while I felt that others were not. Between the court martial proceedings and continuing to be subjected to discriminating behavior from the command, my anxiety, depression, and PTSD became overwhelming; I sought the easiest, fastest way to remove myself from a worsening situation.

As a result of the situation, I did not seek additional help or research other options. Now that I have been out of service for long enough and taken the time to inquire about the options I could have used, I am submitting this request for a record review, with the goal of changing my release from active to a medically retired status.”

e. Military medical documentation shows the applicant was exposed to an improvised explosive device (IED) which resulted in headaches for which he was evaluated on 8 December 2006, or 5 days after the IED blast. He had no other complaints and was treated conservatively with Tylenol and Motrin. He was feeling better on 11 December 2006. At his next follow-up on 22 January 2007, he was having headaches on and off relieved with Tylenol and Motrin. He denied any other symptoms.

f. At a general court-martial on 4 June 2015, the then Major was found guilty of providing an intoxicating liquor to a female under age 21.

g. He received a GOMOR for this incident on 12 June 2015:

“On 9 March 2014, you went to Club Neon Wild with a group of friends, to include Ms. K.C., and drank an excessive amount of alcohol. When you arrived back to your apartment, you engaged in sexual intercourse twice and attempted a third sexual encounter with Ms. K.C., a woman not your wife.

You are a married man who is geographically separated from your wife, also an Army Officer, and your actions are inappropriate. In accordance with Army Regulation 27-10, paragraph 3-3b, you are hereby reprimanded.”

h. On 3 August 2016, LTG M.D.L, the Commanding General of the United States Army Combined Arms Center and Fort Leavenworth, initiated action to eliminate the applicant under paragraph 4-2b “for misconduct, moral or professional.”

i. The former officer subsequently voluntarily tendered his resignation from the Army in lieu of elimination.

j. The DASA-RB approved his request on 17 March 2017.

k. His pre-investigation / pre-court-martial Officer Evaluation Report with a thru date of 1 July 2013 shows he had been an exceptional officer. He passed his Army Physical Fitness Test in April 2013 and met Army height and weight standards. His rater top-blocked him with “Outstanding Performance, Must Promote” opining:

“MAJ [Applicant] is my best Major in the Directorate and in the top 2% of all officers that I have served with in 20 years of military service. Absolutely phenomenal performance by one of the Army's best! Extremely professional, articulate, and proactive, Jay was by name selected to be the first ever Army Special Operations G4 Supply Division Chief.”

l. His senior rater top blocked him as “Best Qualified” opining:

“MAJ [Applicant] is #2 of 8 Majors I senior rate and among the top 5% of all officers I served with in 25 years. Jay's performance was absolutely stellar and he is the epitome of a special operations logistics officer. He played a critical role in ensuring that the 160th SOAR (A) was rapidly equipped and prepared for combat.

Jay possesses all of the attributes and skills necessary to excel in any Joint, Interagency, and Multi-National environment. Already operating at the LTC level now, continue to assign to tough, career enhancing positions. Jay is a future support battalion commander and SSC graduate. Promote BZ [below the zone] to LTC.”

m. The EMR shows the applicant presented for treatment of alcohol abuse on 28 April 2014. He was discharged from treatment on 8 September 2014 at which time the provider wrote: “He was discharged as a success per his command's decision no further services are required at this time.”

n. The applicant underwent a command directed mental status evaluation (MSE) on 21 November 2014 at which time no significant mental health condition was found and he was released without limitations:

“SM [service member] was seen in the Behavioral Health walk-in clinic for a command-directed MSE to assess safety. SM reported that he is involved in an investigation. SM denied SI/HI [suicidal ideation / homicidal ideation]. Review of the EMR indicates that the SM does not have any previous contact with Behavioral Health.

Mood was euthymic. Affect was mood congruent. Thought processes were linear and logical. SM was provided a behavioral health business card (which includes after hours and crisis counseling hotlines) and reminded of BH's duty hours walk-in service if needed. SM declined the need for services at this time.”

o. The applicant completed his pre-separation medical examination in June 2016. On his Report of Medical History, he noted surgery for a right elbow fracture in 2006, his

TBI in 2006 with chronic headaches, a history of low back pain, sleep apnea treated with “machine” since 2014, left knee pain treated with an injection in 2015, elevated blood pressure identified in 2015 and right thigh numbness/tingling in 2016.

p. On the accompanying Report of Medical Examination, the provider documented a normal examination and listed four “Defects and Diagnoses:”

“1) Elevated blood pressure. Patient has been advised low salt diet, ... monitor blood pressure.

2) Sleep apnea. Continue to use machine.

3) Headaches, chronic. Follow-up with primary care manager for further evaluation.

4) Chronic low back pain. Follow-up with primary care manager for further evaluation.”

q. Neither the Report of Medical History nor Report of Medical Examination mention mental health symptom(s) or condition(s).

r. There is no probative evidence the applicant had one or more behavioral health or physical medical conditions which negatively affected his performance or his ability to differentiate right from wrong and adhere to the right; or which would have failed the medical retention standards of chapter 3 of AR 40-501, Standards of Medical Fitness, 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.

s. JLV shows he has been awarded numerous VA service-connected disability ratings, including ratings for sleep apnea, PTSD, and lumbosacral or cervical strain. 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.

t. The applicant's actions which resulted in his discharge made him ineligible for entrance into the Disability Evaluation System (DES). Paragraph 4-3g(1) of AR 635–40, Physical Evaluation for Retention, Retirement, or Separation (19 January 2017):

“Generally, officers approved to resign for the good of the Service in lieu of trial by court-martial are ineligible for referral to the MEB and PEB. However, if the officer was referred to the MEB prior to approval of the resignation, the MEB and/or PEB must be completed and the case dual processed as described in paragraph 4–3g(2).”

u. It is the opinion of the ARBA Medical Advisor that a referral to the DES is not warranted.

#### BOARD DISCUSSION:

1. The Board determined 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.

2. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered.

a. The evidence shows the applicant was convicted by a general court-martial of providing intoxicating liquor to Ms. K.C., a person under the age of 21. His sentence consisted of a reprimand and forfeiture of pay. As a result of the derogatory information, a board of inquiry convened and found the allegations contained in the notification of proposed separation were supported by a preponderance of the evidence and the allegations warranted the applicant's separation from the with an honorable characterization of service. The applicant tendered his resignation in lieu of the elimination action and the DASA (RB) accepted the applicant's resignation in lieu of elimination and directed the applicant's honorable discharge. The Board found no error or injustice in his separation processing.

b. The Board considered the medical records, any VA documents provided by the applicant and the review and conclusions of the medical reviewing official, and agreed with the medical reviewer's determination that there is no probative evidence the applicant had one or more behavioral health or physical medical conditions which negatively affected his performance or his ability to differentiate right from wrong and adhere to the right; or which would have failed the medical retention standards of chapter 3 of AR 40-501, Standards of Medical Fitness, prior to his discharge. Thus,



there was no cause for referral to the Disability Evaluation System. Furthermore, the Board also agreed that 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. Therefore, the Board determined referral to the disability system is not warranted.

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.

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. Title 10, U.S. Code, chapter 61, provides the Secretaries of the Military Departments with authority to retire or discharge a member if they find the member unfit to perform military duties because of physical disability. The U.S. Army Physical Disability Agency is responsible for administering the Army's Disability Evaluation System (DES) and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with Department of Defense (DoD) Directive 1332.18 and Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation).

4. Army Regulation 635-40, dated 19 January 2017, superseded Army Directive 2012- 18 (Military Occupational Specialty (MOS) Administrative Retention Review (MAR2), dated 23 August 2012.

a. Chapter 3 (MAR2) implement and establishes policy for the MAR2. Soldiers must be of sufficient medical fitness to satisfactorily perform their primary MOS (PMOS) or area of concentration (AOC), as well as those functional activities listed on the DA Form 3349 (Physical Profile), which all Soldiers must perform regardless of PMOS or AOC. The MAR2 is an administrative process for Soldiers who meet the medical retention standards of Army Regulation 40-501 (Standards of Medical Fitness), but who nonetheless may not be able to satisfactorily perform the duties of their PMOS or AOC in a worldwide field or austere environment because of medical limitations.

b. The MAR2 process is used to determine whether a Soldier will be retained in their PMOS or AOC or reclassified into another PMOS or AOC. Soldier who do not meet PMOS or AOC standards and who do not qualify for reclassification will be referred into the DES. For referral to a MAR2, the Soldier must have been issued a DA Form 3349 with a permanent (P) 3 or 4 in at least one of the profile serial factors for a medical condition(s) that meet the medical retention standards of Army Regulation 40-501.

5. Army Regulation 635-40 prescribes the Army 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 office, grade, rank, or rating.

a. The objectives are to maintain an effective and fit military organization with maximum use of available manpower; provide benefits to eligible Soldiers whose military service is terminated because of a service-connected disability; provide prompt disability evaluation processing ensuring the rights and interests of the Government and Soldier are protected; and, establish the MAR2 as an Army pre-DES evaluation process

for Soldiers who require a permanent (P) 3 or P4 profile for a medical condition that meets the medical retention standards of Army Regulation 40-501.

b. Public Law 110-181 defines the term, physical DES, as a system or process of the DoD for evaluating the nature and extent of disabilities affecting members of the Armed Forces that is operated by the Secretaries of the military departments and is composed of Medical Evaluation Boards (MEB), Physical Evaluation Boards (PEB), counseling of Soldiers, and mechanisms for the final disposition of disability evaluations by appropriate personnel.

c. The DES begins for a Soldier when either of the events below occurs:

(1) The Soldier is issued a permanent profile approved in accordance with the provisions of Army Regulation 40–501 and the profile contains a numerical designator of P3/P4 in any of the serial profile factors for a condition that appears not to meet medical retention standards in accordance with Army Regulation 40–501. Within (but not later than) 1 year of diagnosis, the Soldier must be assigned a P3/P4 profile to refer the Soldier to the DES.

(2) The Soldier is referred to the DES as the outcome of MAR2 evaluation.

d. An MEB is convened to determine whether a Soldier’s medical condition(s) meets medical retention standards per Army Regulation 40-501. This board may determine a Soldier’s condition(s) meet medical retention standards and recommend the Soldier be returned to duty. This board must not provide conclusions or recommendations regarding fitness determinations.

e. The PEB determines fitness for purposes of Soldiers’ retention, separation or retirement for disability under Title 10, U.S. Code, chapter 61, or separation for disability without entitlement to disability benefits under other than Title 10, U.S. Code, chapter 61. The PEB also makes certain administrative determinations that may benefit implications under other provisions of law.

6. Army Regulation 635-40 states in paragraph 3-3f, a Soldier being processed for administrative separation pursuant to Army Regulation 600-8-24 (Officer Transfers and Discharges) is ineligible for referral for MAR2.

7. 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.

8. 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.

9. Army Regulation 15-185 (ABCMR) provides Department of the Army policy, criteria, and administrative instructions regarding an applicant's request for the correction of a military record. Paragraph 2-11 states 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.

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

//NOTHING FOLLOWS//