

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 11 October 2024

DOCKET NUMBER: AR20240001034

APPLICANT REQUESTS: in effect,

- correction of his records to show he was discharged from the Army National Guard (ARNG) due to a service-incurred medical disability instead of discharged for being medically unfit for retention
- personal appearance before the Board

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

DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States) in lieu of DD Form 149 (Application for Correction of Military Record)

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.
2. The applicant states he was separated from the Army due to medical reasons (irritable bowel syndrome, GERD, and mental health) which is not shown on his DD Form 214 (Certificate of Release or Discharge from Active Duty) as the cause of his separation. He has a disability rating of 30%.
3. The applicant enlisted in the Army National Guard (ARNG) on 21 March 2014.
4. Orders published on 27 March 2014 ordered the applicant to initial active duty for training (IADT) with a reporting date of 15 September 2014.
5. The applicant's DD Form 214 shows he entered IADT on 15 September 2014 and was honorably released from IADT on 11 March 2015 under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), chapter, for completion of required active service (Separation Code MBK, Reentry Code 1)

6. Orders published on 2 January 2018 ordered the applicant's discharge from the ARNG and as Reserve of the Army effective 2 January 2018 due to being found medically unfit by a Medical Evaluation Board (MEB). His MEB proceedings are not available.

7. The applicant's National Guard Bureau Form 22 (National Guard Report of Separation and Record of Service) shows he was discharged from the ARNG on 2 January 2018 under the provisions of National Guard Regulation 600-200 (Enlisted Personnel Management), paragraph 6-35l(8) (medically unfit for retention per Army Regulation 40- 501 (Standards of Medical Fitness)).

8. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. Documentation reviewed included the applicant's ABCMR application and accompanying documentation, the military electronic medical record (AHLTA), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and/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 a reversal of the physical evaluation board's finding that his bilateral hearing loss was not duty related, and that his disability discharge disposition be changed from separated for medical unfitness to a compensated duty related disability. He states:

"I was medically pushed out to the military and have issued supporting documentation to the VA with no response at this time I need my medical discharge recognized for my benefits to be eligible. I have supporting documents and correspondence with my higher ups from when I was in that I was being medically discharged from a medical board. I was told the entire time I was getting out that I would still get my benefits since I was medically discharge due to hearing loss and injuries I received in the military."

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. The applicant's Report of Separation and Record of Service (NGB Form 22) shows he entered the Army National Guard on 10 October 2014 and was honorably discharged from the Texas Army National Guard (TXARNG) on 11 December 2018 under authority provided of paragraph 6-36u of NGR 600-200, Enlisted

Personnel Management (31 July 2009): Failure to obtain required physical per AR 40-501.

d. The applicant had a normal audiogram on his 10 October 2014 per-entrance Report of Medical Examination. He had a significant threshold shift (decrease in hearing ability) on his 2 December 2017 audiogram. On his Audiology Evaluation Form, the sources of his noise exposure for this drilling guard member were noted to be the military, his civilian occupation, and recreational activities. He failed a subsequent Speech Recognition In Noise Test (SPRINT) performed on 2 December 2017 with the result being a recommendation that he be separated from service.

e. He was placed on a duty limiting permanent physical profile for non-duty related hearing loss on 20 December 2017. The profile states:

“Based on SPRINT 12/2/2017, SM [service member] recommended for separation from service. This Soldier has significant permanent hearing loss in both ears and will experience significant difficulty detecting, identifying, and responding to mission-critical sounds; this may include speech, radio communication, and other important auditory cues, especially when operating in difficult listening conditions (i.e., background noise, distant speech, etc.), even when using amplification.

Continued military service is NOT recommended. If retained in service, Soldier should not be assigned to tactical assignments requiring communication in noise, exposure to hazardous noise is likely, and places the Soldier or others at risk.”

f. The applicant desired to remain in the TXARNG and a Military Occupational Specialty (MOS) Administrative Retention Review (MAR2) was scheduled. Chapter 3 of AR 635–40, Physical Evaluation for Retention, Retirement, or Separation (19 January 2017) is devoted to the MAR2. From paragraph 3-1:

“... The MAR2 is an administrative process for Soldiers who meet the medical retention standards of AR 40–501, but who nonetheless may not be able to satisfactorily perform the duties of their PMOS [primary MOS] or AOC [area of concentration] in a worldwide field or austere environment because of medical limitations. 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. Soldiers who do not meet PMOS or AOC standards and who do not qualify for reclassification will be referred into the DES [Disability Evaluation System].”

g. On 7 September 2018, the applicant's MAR2 determined he should be separated from the military:

"MAR2 board was conducted on 7 September 2018. The board reviewed all supporting medical and administrative documents pertaining to your disqualifying medical condition. Upon further review, it has been determined that you should be recommended for the Medical Evaluation Board."

h. The memorandum's conclusion was incorrect and should have stated "be recommended for the DES." The DES contains both the duty related and non-duty related disability evaluation processes.

i. There is no evidence the applicant's disqualifying hearing loss between October 2014 and December 2017 was due to an acoustic injury(s) incurred while he was in a qualified duty status. As such, the applicant was not eligible for referral to the duty-related side of the DES.

j. The applicant's NGB 22 states the applicant was discharged under paragraph 6-36u of NGR 600-200:

"Failure to obtain required physical per AR 40-501. Soldier will be notified in writing of the requirement to obtain a physical and given 90 days after the letter is mailed to comply with this requirement. Commander can authorize an extension of up to 60 days for extenuating circumstances: RE 3."

k. Neither a separation packet or information addressing a discharge for failure to obtain a required physical was submitted with the application or uploaded into iPERMS. This is likely an error as the applicant's 2 December Audiogram was likely obtained as part of his annual Periodic Health Assessment. Given his apparent discharge for hearing loss, a more appropriate separation authority would be 6-35l(8) of NGR 600-200: Medically unfit for retention per AR 40-501 [Standards of Medical Fitness].

l. It is the opinion of the Agency Medical Advisor that a referral of his case to the DES is not warranted. However, it is recommended his current separation authority 6-36u, which shows his separation from the Army was due to a failure on his part, be changed to 6-35l(8) to more appropriately reflect the reason for his separation from the Army. In addition to removing this negative connotation for his separation, this change may also have other benefits to the applicant.

BOARD DISCUSSION:

1. 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 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 that a referral of his case to the DES is not warranted. However, the opine recommended the applicant's current separation authority 6-36u, which shows his separation from the Army was due to a failure on his part, be changed to 6-35l(8) to more appropriately reflect the reason for his separation from the Army. Based on this, the Board granted partial relief

2. The applicant's request for a personal appearance hearing was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

:	:	:	GRANT FULL RELIEF
■	■	■	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined the evidence presented is 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 to show the applicant's separation from the Army was changed to 6-351(8) which is more appropriately reflecting the reason for his separation from the Army.
2. The Board further determined 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 correction of the applicant's records to show he was discharged from the Army National Guard (ARNG) due to a service-incurred medical disability instead of discharged for being medically unfit for retention.



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. 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 physical disability evaluation system and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with DOD Directive 1332.18 and Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation).

a. Soldiers are referred to the disability system when they no longer meet medical retention standards in accordance with Army Regulation 40-501 (Standards of Medical Fitness), chapter 3, as evidenced in a Medical Evaluation Board (MEB); when they receive a permanent medical profile rating of 3 or 4 in any factor and are referred by a military occupational specialty medical retention board; and/or they are command-referred for a fitness-for-duty medical examination.

b. The disability evaluation assessment process involves two distinct stages: the MEB and Physical Evaluation Board (PEB). The purpose of the MEB is to determine whether the service member's injury or illness is severe enough to compromise his/her ability to return to full duty based on the job specialty designation of the branch of service. A PEB is an administrative body possessing the authority to determine whether or not a service member is fit for duty. A designation of "unfit for duty" is required before an individual can be separated from the military because of an injury or medical condition.

c. Service members who are determined to be unfit for duty due to disability either are separated from the military or are permanently retired, depending on the severity of the disability and length of military service. Individuals who are "separated" receive a one-time severance payment, while veterans who retire based upon disability receive monthly military retired pay and have access to all other benefits afforded to military retirees.

3. Army Regulation 635-40 establishes the Army Disability Evaluation System 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. Disability compensation is not an entitlement acquired by reason of service-incurred illness or injury; rather, it is provided to Soldiers whose service is interrupted and who can no longer continue to reasonably perform because of a physical disability incurred or aggravated in military service.

b. Soldiers who sustain or aggravate physically-unfitting disabilities must meet the following line-of-duty criteria to be eligible to receive retirement and severance pay benefits:

(1) The disability must have been incurred or aggravated while the Soldier was entitled to basic pay or as the proximate cause of performing active duty or inactive duty training.

(2) The disability must not have resulted from the Soldier's intentional misconduct or willful neglect and must not have been incurred during a period of unauthorized absence.

4. National Guard Regulation 600-200 (Enlisted Personnel Management), paragraph 6-35I(8) states commanders, who suspect that a Soldier may not be medically qualified for retention, will direct the Soldier to report for a complete medical examination per Army Regulation 40-501. Commanders who do not recommend retention will request the Soldier's discharge. When medical condition was incurred in line of duty, the procedures of Army Regulation 600-8-4 (Line of Duty Policy, Procedures, and Investigations) will apply. Discharge will not be ordered while the case is pending final disposition.

5. 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.

6. Section 1556 of Title 10, U.S. 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 ABCMR applicants (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//