

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 24 September 2024

DOCKET NUMBER: AR20240001259

APPLICANT REQUESTS: honorable physical disability discharge in lieu of administrative discharge under other than honorable conditions for misconduct-commission of a serious offense

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:
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 wrongfully accused at his court-martial. They were invited to a house party and given a key to the home to get in. When the husband came home, minds were changed and they were accused of breaking in. He wasn't guilty of said offense; therefore, he should be able to continue to get an honorable medical discharge. The applicant has marked the block on his application indicating post-traumatic stress disorder (PTSD) is a condition related to his request.
3. A physical profile is used to classify a Soldier's physical disabilities in terms of six factors, as follows: "P" (Physical capacity or stamina), "U" (Upper extremities), "L" (Lower extremities), "H" (Hearing), "E" (Eyes), and "S" (Psychiatric) and is abbreviated as PULHES. Each factor has a numerical designation: 1 indicates a high level of fitness, 2 indicates some activity limitations are warranted, 3 reflects significant limitations, and 4 reflects one or more medical conditions of such a severity that performance of military duties must be drastically limited. Physical profile ratings can be either permanent (P) or temporary (T).
4. A Standard Form 88 (Report of Medical Examination), dated 7 September 1988, shows the applicant underwent medical examination on the date of the form for the purpose of Regular Army enlistment and was found qualified for enlistment with a PULHES of 1-1-1-1-1-1.

5. A DD Form 4 (Enlistment/Reenlistment Document) shows the applicant enlisted in the U.S. Army Reserve (USAR) Delayed Entry Program (DEP) on 7 September 1988. He was discharged from the DEP and enlisted in the Regular Army on 8 November 1988.

6. A DA Form 3349 (Physical Profile) show on 29 November 1990, the applicant was given a permanent physical profile rating of 3 in factor L for chronic mechanical low back pain – grade I spondylolisthesis, which prevented him from participating in all Army Physical Fitness Test (APFT) events and multiple functional activities. A Medical Evaluation Board (MEB) was recommended.

7. Multiple electronic DA Forms 4187-E (Personnel Action) reflect the applicant's following duty status changes:

- from present for duty (PDY) to confined in the hands of civilian authorities, effective 7 July 1991
- from confined in the hands of civilian authorities to PDY, effective 17 July 1991
- from PDY to confined in the hands of civilian authorities, effective 31 October 1991
- from PDY to absent without leave (AWOL) effective 9 December 1991
- from AWOL to PDY effective 12 December 1991

8. The complete facts and circumstances surrounding the applicant's discharge, to include any court-marital orders, are not in his available records for review.

9. Headquarters, 10th Mountain Division (Light Infantry) and Fort Drum Orders 064-211, dated 4 March 1992, reassigned the applicant to the Fort Drum U.S. Army Transition Point for transition processing on 3 March 1992, and discharged him under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel) effective 4 March 1992.

10. The applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) shows was discharged on 4 March 1992 under the provisions of Army Regulation 635-200, chapter 14, due to misconduct – commission of a serious offense. He was given an under other than honorable conditions discharge on 4 March 1992, with corresponding separation code JKQ and Reenlistment Code 3. He was credited with 2 years, 11 months, and 24 days of active service with the following periods of lost time:

- 9 July 1991 – 17 July 1991
- 27 January 1991 – 8 September 1991
- 31 October 1991 – 9 December 1991
- 9 December 1991 – 13 December 1991
- 30 January 1991 – 27 February 1992

11. A letter from the Army Review Boards Agency (ARBA), dated 16 May 2024, shows the applicant was requested to provide a copy of the medical documents support his claim of PTSD, in order for the ABCMR to consider his application. The applicant did not respond.

12. 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 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 an upgrade of his 4 March 1992 discharge characterized as under other than honorable conditions and in essence, a referral to the Disability Evaluation System. He states:

"Was wrongfully accused on my court martial. We were invited to a house party and given key to get in. When husband came home, minds were changed and we were accused of breaking in."

c. The Record of Proceedings and prior denial detail the applicant's military service and the circumstances of the case. The applicant's DD 214 for the period of Service under consideration shows he entered the regular Army on 8 November 1988 and was discharged under other than honorable conditions on 4 March under the separation authority provided by paragraph 14-12c of AR 635-200, Personnel Separations – Enlisted Personnel (26 May 1989): Commission of a serious offense.

d. On 9 January 1991, the applicant was placed on a permanent duty limiting physical profile for "Chronic mechanical low back pain" and a medical evaluation board (MEB) was recommended.

The applicant was AWOL from 7-17 July 1991 during which it appears he had been confined by civilian authorities. He was again confined by civilian authorities on 31 October 1991. He was absent without leave (AWOL) again from 9-12 December 1991.

e. The applicant's pending separation under paragraph 14-12c of AR 635-200 with an under other than honorable conditions characterization of service precluded his entrance into the Physical Disability Evaluation System. Paragraph 4-1a of AR 635-40,

Physical Evaluation for Retention, Retirement, or Separation (1 September 1990) states:

Uniform Code of Military Justice (UCMJ) action. The case of a soldier charged with an offense under the UCMJ or who is under investigation for an offense chargeable under the UCMJ which could result in dismissal or punitive discharge, may not be referred for, or continue, disability processing unless

(1) The investigation ends without charges.

(2) The officer exercising proper court-martial jurisdiction dismisses the charges:

(3) The officer exercising proper court-martial jurisdiction refers the charge for trial to a court-martial that cannot adjudge such sentence.

f. Review of his records in JLV shows he does not receive care through the VA and does not have a diagnosed mental health condition.

g. It is the opinion of the Agency medical advisor that neither an upgrade of his discharge nor 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 relief was not warranted. The Board carefully considered the applicant's request, supporting documents, evidence in the records, and published DoD guidance for liberal consideration of discharge upgrade requests.

a. The applicant's separation packet is not available for review. However, other evidence shows the applicant committed serious misconduct. As a result, his chain of command would have initiated separation action against him. He was discharged for misconduct, and he was given an under other than honorable conditions discharge. The Board found no error or injustice in his available 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. The Board found no probative evidence the applicant had a mental or physical health condition 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 (DES). 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. Therefore,

the Board determined that neither an upgrade of his discharge nor a referral of his case to the disability evaluation system is 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.

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I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

REFERENCES:

1. Title 10, U.S. Code, section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.
2. On 25 August 2017, the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to

Discharge Review Boards (DRBs) and Boards for Correction of Military/Naval Records (BCM/NRs) when considering requests by veterans for modification of their discharges due in whole or in part to: mental health conditions, including post-traumatic stress disorder (PTSD), traumatic brain injury (TBI), sexual assault, or sexual harassment. Boards are to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based, in whole or in part, on those conditions or experiences.

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 physical disability evaluation system (DES) and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with DOD Directive 1332.18 (Discharge Review Board (DRB) Procedures and Standards) and Army Regulation 635-40 (Physical 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 an Military Occupational Specialty (MOS) Medical Retention Board (MMRB); 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. 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.

c. 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 his or her office, grade, rank, or rating. Reasonable performance of the preponderance of duties will invariably result in a

finding of fitness for continued duty. A Soldier is physically unfit when a medical impairment prevents reasonable performance of the duties required of the Soldier's office, grade, rank, or rating.

4. 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. Only the unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability.

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:

- 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.
- 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.

c. The percentage assigned to a medical defect or condition is the disability rating. A rating is not assigned until the PEB determines the Soldier is physically unfit for duty. Ratings are assigned from the Department of VA Schedule for Rating Disabilities (VASRD). The fact that a Soldier has a condition listed in the VASRD does not equate to a finding of physical unfitness. An unfitting, or ratable condition, is one which renders the Soldier unable to perform the duties of their office, grade, rank, or rating in such a way as to reasonably fulfill the purpose of their employment on active duty. There is no legal requirement in arriving at the rated degree of incapacity to rate a physical condition which is not in itself considered disqualifying for military service when a Soldier is found unfit because of another condition that is disqualifying. Only the unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability.

d. The case of a Soldier charged with an offense under the Uniform Code of Military Justice (UCMJ) or who is under investigation for an offense chargeable under the UCMJ

which could result in dismissal or punitive discharge, may not be referred for, or continue, disability processing unless:

- the investigation ends without charges
- the officer exercising proper court-martial jurisdiction dismisses the charges
- the officer exercising proper court-martial jurisdiction refers the charge for trial to a court-martial that cannot adjudge such a sentence

e. An enlisted Soldier may not be referred for, or continue, physical disability processing action when action has been started under any regulatory provision which authorizes a character of service of under other than honorable conditions. If the case comes within these limitations, the commander exercising general court-martial jurisdiction over the Soldier may abate the administrative separation. This authority may not be delegated. A case file may be so referred if the general court-martial convening authority finds the following:

- the disability is the cause, or a substantial contributing cause, of the misconduct that might result in a discharge under other than honorable conditions
- other circumstances warrant disability processing instead of alternate administrative separation

5. 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%. 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%.

6. Army Regulation 635-200 (Personnel Separations – Enlisted Personnel) sets forth the basic authority for the separation of enlisted personnel.

a. Chapter 14 (Separation for Misconduct) establishes policy and prescribes procedures for separating members for misconduct. Specific categories include minor disciplinary infractions, a pattern of misconduct, commission of a serious offense, use of illegal drugs, and convictions by civil authorities. Action will be taken to separate a member for misconduct when it is clearly established that rehabilitation is impracticable or is unlikely to succeed. A discharge under other than honorable conditions is normally considered appropriate for a Soldier discharged under this chapter.

b. Chapter 3 (Character of Service and Description of Separation) provides:

(1) An honorable discharge is a separation with honor. The honorable characterization is appropriate when the quality of the Soldier's service generally has met the standards of acceptable conduct.

(2) A general discharge is a separation from the Army under honorable conditions. When authorized, it is issued to a Soldier whose military record is satisfactory, but not sufficiently meritorious to warrant an honorable discharge.

(3) A discharge under other than honorable conditions is an administrative separation from the service under conditions other than honorable. It may be issued for misconduct, fraudulent entry, security reasons, or in lieu of trial by court-martial when the reason for separation is based upon a pattern of behavior that constitutes a significant departure from the conduct expected of Soldiers of the Army or when the reason for separation is based upon one or more acts or omissions that constitutes a significant departure from the conduct expected of Soldiers of the Army. Examples of factors that may be considered include the following:

- use of force or violence to produce serious bodily injury or death
- abuse of a special position of trust
- disregard by a superior of customary superior-subordinate relationships
- acts or omissions that endanger the security of the United States or the health and welfare of other Servicemembers
- deliberate acts or omissions that seriously endanger the health and safety of other persons

7. 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.

8. Army Regulation 15-185 (Army Board for Correction of Military Records (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//