

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 28 October 2024

DOCKET NUMBER: AR20240001879

APPLICANT REQUESTS: His reason for discharge be shown as for medical reasons in lieu of marginal or non-productive performance.

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Report of Separation from Active Duty)

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 disabled due to a service-related appback injury. He was not able to perform his duties and was forced to take a trainee related discharge. He was 18 years old at the time and he was bullied into accepting the discharge.
3. On 17 August 1976, the applicant enlisted in the Regular Army, for 3 years. His record shows he was not awarded a military occupational specialty.
4. The applicant received formal counseling on 8 November 1976. His drill sergeant noted that the applicant requested permission to see the commander in reference to a discharge. When asked why, the applicant replied that he is not adjusting to military life and did not think he ever would adjust. Additionally, the applicant displayed a rebellious and careless attitude.
5. The applicant received additional counseling on 16 November 1976. A senior noncommissioned officer noted that the applicant strongly expressed his desire to discontinue training and terminate his military career. Additionally, the applicant had displayed an extremely negative attitude toward training and the Army.

6. The applicant received additional counseling on 17 November 1976. His first sergeant noted that the applicant still had a lack of motivation and poor attitude. Additionally, the applicant had no interest of remaining in the Army.

7. A Standard Form 600 (Chronological Record of Medical Care) shows that the applicant received treatment for lower back pain, on 22 November 1976.

8. The applicant's immediate commander notified the applicant on 22 November 1976, that he was initiating actions to discharge him from service under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), paragraph 5-39, Trainee Discharge Program (TDP). As the specific reason, the commander cited the applicant's lack of motivation, hostility towards the Army, inability to accept instructions or directions, and inability to adapt socially or emotionally to the military environment.

9. The applicant's commander formally recommended the applicant's discharge under the provisions of the TDP.

10. The applicant acknowledged receipt of the proposed discharge action on 22 November 1976. He indicated he understood that due to noncompletion of requisite active duty time, Veterans Affairs and other benefits normally associated with completion of honorable active service would be affected. Further, he understood that he would not be permitted to apply for reenlistment in the Army within 2 years of his separation. He declined to have counsel's assistance in explaining the discharge procedures. He declined to submit a statement in his own behalf. He declined a separation medical examination.

11. Consistent with the chain of command's recommendation, the separation authority approved the recommended action on 24 November 1976, and directed issuance of a DD Form 256A (Honorable Discharge Certificate).

12. The applicant was discharged on 2 December 1976. He was credited with 3 months and 16 days of net active service this period. His DD Form 214 contains the following entries in:

- item 9c (Authority and Reason) – AR [Army Regulation] 635-200, paragraph 5-39, Separation Program Designator: JEM
- Item 9e (Character of Service) – Honorable
- item 10 (Reenlistment Code) – 3
- item 27 (Remarks) – Marginal or Non-productive performance (TDP)

13. The Board should consider the applicant's statement in accordance with the published guidance.

14. 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 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 Agency (DES). He states:

“I would like a correction for a service-connected discharge based on the fact that I was disabled due to service-related circumstances. I was not able to perform my duties and I was forced to take a trainee related discharge verses taking a dishonorable discharge. I was 18 years old at the time and I was also bullied into taking the trainee discharge verses a dishonorable discharge. I choose the trainee discharge.

My discharge should be a service-connected discharge because I injured my back during my service of duty for the US Army.”

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. The applicant's DD 214 shows he entered the Regular Army on 17 August 1976 and was honorably discharged on 2 December 1976 under provision provided in paragraph 5-39 of AR 635-200, Personnel Separations – Enlisted Personnel (25 July 1973): Trainee Discharge Program (TDP), Marginal or Non-productive Performance. The separation program designator (SPD) JEM which denotes “Army Trainee Discharge.”

d. From an 8 November 1976 TDP Counseling (TRADOC Form 871-R):

“EM [enlisted member] approached me requesting permission to see the CO [Commanding Officer] in reference to a discharge. When asked why, his reply was that he is not adjusting to military life and does not think that he ever will adjust. EM also stated that there is too many nitty picky roles and regulations to contend with and too many bosses telling him what to do. Says that he was placed on extra training in BCT [basic combat training] for such minor offenses

as sloppy bunk and being late for formation. EM displays a rebellious and careless attitude.

EM's attitude and motivation has worsened. EM says he just cannot adapt to military life. EM has no respect for military authority and is bordering on being disrespectful. Recommend EM be considered for possible TDP."

e. From a 16 November 1976 Student Counseling Report:

"He strongly expressed his desire to discontinue training in the 72E Course and also to terminate his military career."

f. A 22 November 1976 clinical note states the applicant had a two-day history of low back pain after falling in the shower. His exam revealed some mild tenderness to palpation of the mid-thoracic spine and he was treated conservatively.

g. On 22 November 1976, his company commander informed him to his initiation of action to separate the applicant under paragraph 5-59 of AR 635-200:

"The specific reasons for my proposed action are:

a. Lack of motivation.

b. Hostility towards the army.

c. Inability to accept instructions or directions.

d. Cannot adapt socially or emotionally to military environment."

h. That same day, the applicant acknowledged the notification while declining the opportunities to make a statement/rebuttal on his own behalf and to undergo a separation medical examination.

i. His separation was approved by the brigade commander on 24 November 1976.

j. There is no evidence the applicant had any duty incurred medical 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. 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.

k. JLV shows he has been awarded three VA service-connected disability ratings, including ratings for lumbosacral strain and bilateral lower extremity radiculopathies. 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.

l. It is the opinion of the ARBA medical advisor that a referral of his case to the DES is unwarranted.

BOARD DISCUSSION:

1. 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 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 medical review, the Board concurred with the advising official finding that referral of the applicant's case to the DES is unwarranted. The opine noted no evidence the applicant had any duty incurred medical condition which would have failed the medical retention standards.

2. The Board determined there is insufficient evidence to support the applicant's contentions to amend his reason for discharge as medical reasons in lieu of marginal or non-productive performance. The Board found the applicant completed 3 months and 16 days with an honorable discharge. The Board agreed 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. Based on the medical opine and evidence found in the applicant's record, the Board found no error or injustice and denied relief.

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. Title 10, U.S. Code, Section 1556, requires the Secretary of the Army to ensure that an applicant seeking corrective action by 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.

3. Army Regulation 635-5-1 (Separation Program Designator (SPD) Codes) provides the specific authorities (regulatory or directive), reasons for separating Soldiers from active duty, and the separation codes to be entered on the DD Form 214. At the time, this regulation prescribed the separation code "JEM" is the appropriate code to assign Soldiers separated under the provisions of Army Regulation 635-200, for TDP, marginal or nonproductive performance.

4. Army Regulation 635-200 (Personnel Separations – Enlisted Personnel) sets forth the basic authority for the separation of enlisted personnel. The version in effect at the time provided that:

a. An honorable discharge is a separation with honor and entitles the recipient to benefits provided by law. The honorable characterization is appropriate when the quality of the member's service generally has met the standards of acceptable conduct and performance of duty for Army personnel or is otherwise so meritorious that any other characterization would be clearly inappropriate.

b. Paragraph 5-39, the TDP provided that commanders may expeditiously discharge individuals who lack the necessary motivation, discipline, ability, or aptitude to become a productive Soldier. Additionally, Members separated under this program would be awarded an honorable character of service.

5. The Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Naval Records (BCM/NR), on 3 September 2014, to carefully consider the revised post-traumatic stress disorder (PTSD) criteria, detailed medical considerations, and mitigating factors when taking action on applications from former service members administratively discharged under other than honorable conditions and who have been diagnosed with PTSD by a competent mental health professional representing a civilian healthcare provider in order to determine if it would be appropriate to upgrade the characterization of the applicant's service.

6. The Under Secretary of Defense for Personnel and Readiness provided clarifying guidance to Service DRBs and Service BCM/NRs on 25 August 2017. The memorandum directed them to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters relating to mental health conditions, including PTSD, Traumatic Brain Injury, sexual assault, or sexual harassment. Standards for review should rightly consider the unique

nature of these cases and afford each veteran a reasonable opportunity for relief even if the mental health condition was not diagnosed until years later. 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.

7. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military DRBs and BCM/NRs regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. BCM/NRs may grant clemency regardless of the type of court-martial. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to other corrections, including changes in a discharge, which may be warranted based on equity or relief from injustice.

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.

//NOTHING FOLLOWS//