

IN THE CASE OF: [REDACTED]

BOARD DATE: 19 December 2024

DOCKET NUMBER: AR20240002423

APPLICANT REQUESTS: honorable physical disability discharge in lieu of general administrative discharge under honorable conditions due to misconduct (drug abuse).

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)
- DD Form 214, Certificate of Release or Discharge from Active Duty, 12 May 2023

FACTS:

1. The applicant states:

a. He was injured in September 2021, when he went to the National Training Center (NTC). Since that day, his career and health began to spiral and his overall health began to deteriorate, making his day-to-day life difficult.

b. While trying to receive treatment for his physical and mental health, he was sent to Korea, against his doctor's orders. After 3 months in Korea, he was informed there were no specialty doctors for him on the peninsula in order to continue his treatment. The lack of medical help led to another incident, which resulted in him being rushed and admitted to the hospital. This series of events contributed to his actions and wrongdoings, which led up to his administrative separation during his Medical Evaluation Board (MEB) process.

c. He has marked on his application form he is requesting a change to his character of service, separation code, and narrative reason for separation and indicated that post-traumatic stress disorder (PTSD), traumatic brain injury (TBI) and other mental health conditions are related to his request.

2. The applicant enlisted in the Regular Army on 8 January 2019, and was awarded the Military Occupational Specialty (MOS) 13M (Multiple Launch Rocket System (MLRS)/ High Mobility Artillery Rocket System (HIMARS) Crewmember).

3. A physical profile is used to classify a Soldier's physical disabilities. PULHES is the acronym used in the Military Physical Profile Serial System to classify a Soldier's physical abilities 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. The applicant's Enlisted Record Brief (ERB), 22 November 2022, shows:

a. He was assigned to a unit at Camp Casey, Korea, from 18 June 2019 through 24 August 2020.

b. He was reassigned to a unit at Fort Sill, OK, on 10 September 2020.

c. His PULHES was 211111 at the time of his last physical exam on 2 May 2022.

5. A U.S. Army Installation Management Command memorandum for the applicant's company commander, 12 December 2022, confirmed the applicant's positive urinalysis specimen for tetrahydrocannabinol (TCH9) (cannabis), tested on 29 November 2022. It also confirmed the applicant had two positive urinalysis tests reported by the Army drug testing laboratory.

6. A DA Form 4856 (Developmental Counseling Form) shows:

a. On 14 December 2022, the applicant was counseled by his company commander to inform him he was being flagged for drug abuse and involuntary separation due to a positive urinalysis test for TCH9 on 29 November 2022. This was his second positive urinalysis reported by the Army drug testing lab.

b. He would be command-referred to the Substance Use Disorder Clinical Care (SUDCC) in accordance with regulatory guidance for a service member who tests positive as well as initiation of involuntary separation.

7. A DA Form 2627 (Record of Proceedings Under Article 15, Uniform Code of Military Justice (UCMJ)) shows the applicant accepted nonjudicial punishment (NJP) under Article 15 of the UCMJ on 14 February 2022, for wrongfully using marijuana at or near Fort Sill, OK, between on or about 29 October and 29 November 2022. The imposed punishment included reduction from sergeant (SGT)/E-5 to specialist (SPC)/E-4.

8. A DD Form 2697 (Report of Medical Assessment) shows:

a. On 21 February 2023, for the purpose of separation assessment, the applicant indicated that since his last medical assessment/physical examination:

- His overall health was worse due to headaches and migraines.
- He missed duty for longer than 3 days due to having surgery.
- He was treated by a healthcare provider, admitted to a hospital, or had surgery for a deviated septum.
- While on active duty he suffered from injury to his left knee, lower back, and left back shoulder for which he did not seek medical care.
- He was currently taking the medications topiramate, clonidine, divalproex sodium, er.
- The conditions he had which currently limited his ability to work in his MOS or required geographic/assignment limitations were headaches, migraines, and heat category illness.
- He had the dental problems of grinding teeth and jaw pain.
- His other concerns about his health pertained to mental health.
- He did intend to seek Department of Veterans Affairs (VA) disability for mental health, headaches, and migraines.

b. The health care provider comments show:

- The applicant was evaluated for migraine headaches, left knee, lower back and left back shoulder, medication list was reviewed, and he was evaluated by dental.
- There was no record of deviated septum surgery or hospitalization since his last physical health assessment in May 2022.
- He would be evaluated by behavioral health and his primary care physician for his mental health concerns. He not referred for further evaluation.

9. A DD Form 2828 (Report of Medical Examination) shows:

a. The applicant underwent medical examination on 28 February 2023, for the purpose of separation. The applicant was found not medically qualified for separation with a PULHES profile rating of 311111 effective 6 January 2023, for migraines.

b. The summary of medical diagnoses shows migraine headaches with a profile rating of P3 did not meet retention standards per Army Regulation 40-501 (Standards of Medical Fitness and the applicant was referred to an MEB for migraine headaches by a neurologist. An MEB was initiated on 6 January 2023.

10. A DA Form 3349 (Physical Profile Record) shows:

a. The applicant was given a permanent physical profile rating of 2 in factor P for shaving profile on 5 January 2020 and a permanent physical profile rating of 3 in factor P for headaches on 6 January 2023.

b. He was given a temporary physical profile (rating unlisted) for depressive disorder on 1 December 2022 with an expiration date of 1 March 2023 and a temporary physical profile (rating unlisted) for alcohol use disorder on 15 December 2022, with an expiration date of 15 March 2023.

c. As of 28 February 2023, he was on temporary profile for 470 days in the last 24 months.

d. His limitations included multiple functional activities, no alcohol use, no deployment to an austere environment for 1 year, no temporary duty, and to train at own pace and tolerance. Temporary conditions show to support Soldier safety it was recommended his risk level for suicide was elevated to intermediate from low. Increased treatment intervention was recommended, to include duty limitations of requiring 8 hours of sleep per night and he should remain stationed near a medical treatment facility where behavioral health care is available.

11. Department of the Army Orders 0004129230.00, 3 March 2023, reduced the applicant in rank/grade from SGT/E-5 to SPC/E-4, effective 1 March 2023.due to misconduct,

12. A DA Form 3822 (Report of Mental Status Evaluation) shows:

a. The applicant underwent mental status evaluation on 9 March 2023, for the purpose of separation under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), chapter 14, for misconduct.

b. The applicant had no duty limitations due to behavioral health reasons; he currently met behavioral health medical retention standards in accordance with Army Regulation 40-501. His behavioral health condition meets retention standards but may require a waiver for deployability within specific areas of operation. He had a physical profile with an expiration date of 5 May 2023.

c. Screenings were performed for PTSD, depression, TBI, substance misuse, and sexual trauma. His cognition was not impaired; behavior normal; perceptions not impaired impulsivity normal; behavioral health risk for harm to self was intermediate; behavioral health risk for harm to others was low. He had a history of suicidal ideations with plan and intent. He was deemed not at immediate risk for suicide.

d. His behavioral health diagnosis was other problems related to employment. Follow-up with SUDCC and embedded behavioral health were recommended.

e. Section VI (Recommendations and Comments for Commander) shows:

- the applicant can understand and participate in administrative proceedings and appreciate the difference between right and wrong
- his behavioral health condition was likely not a mitigating factor in the alleged behavior leading to his administrative separation
- ensure he attends all follow-up appointments
- prohibit the use of alcohol
- restrict access to or disarm all military weapons and ammunition, no range duties

f. Further Comments shows the applicant was cleared for administrative action in accordance with Army Regulation 635-200. This opinion is based solely on the clinical judgment of the provider and does not constitute a forensic opinion as it pertains to criminal responsibility, state of mind at the time of the alleged behavior that is the basis for the separation, competency, or other determinations typically required by the courts.

13. On 16 March 2023, the applicant's immediate commander provided him with a memorandum advising of his intent to involuntarily separate him prior to his expiration term of service under the provisions of Army Regulation 635-200, chapter 14, due to abuse of illegal drugs. The applicant signed the memorandum on 16 March 2023, acknowledging receiving this notification from his batter commander.

14. On 23 March 2023, the applicant was notified by his immediate commander of his initiation of action to separate him with a general discharge under the provisions of Army Regulation 635-200, chapter 14, due to misconduct - abuse of illegal drugs, based on his use of marijuana between 29 October 2022 and 29 November 2022. He was advised of his right to consult with counsel and present written statements to the separation authority for consideration.

15. On 23 March 2023, the applicant acknowledged receipt of the notice from his commander informing him of the basis for the contemplated action to separate him under the provisions of Army Regulation 635-200, chapter 14, due to misconduct - abuse of illegal drugs and the rights available to him, including the right to consult with counsel prior to submitting his election of rights.

16. On 28 March 2023, the applicant acknowledged having been advised by consulting counsel of the basis for the contemplated action to separate him under the provisions of Army Regulation 635-200, chapter 14, due to misconduct - abuse of illegal drugs and the rights available to him. He indicated he was submitting statements in his own behalf

and retained representation by military counsel. The applicant's self-authored statement submitted in his own behalf is not in his available records for review.

17. The applicant's Noncommissioned Officer (NCO) Support Channel and Chain of Command recommendations show:

a. On 29 March 2023, his battery first sergeant recommended his separation prior to his expiration term of service (ETS) date because utilizing illegal substances results in toxic effects on the force. He also made it known he wishes to be out of the Army.

b. On 29 March 2023, his battery commander recommended his separation prior to ETS, because the consumption of prohibited substances is detrimental to the Army and the applicant expressed a strong desire to be out of the Army.

c. On 30 March 2023, his battalion command sergeant major recommended his separation prior to his ETS as the use of illegal substances degrades the readiness of the Army.

d. On 3 April 2023, his battalion commander recommended his immediate separation under the provisions of Army Regulation 635-200, chapter 14, due to misconduct-abuse of illegal drugs, with a general characterization of service.

e. On an unspecified date, his brigade commander recommended his immediate separation under the provisions of Army Regulation 635-200, chapter 14, due to misconduct-abuse of illegal drugs, with a general characterization of service.

18. On 8 May 2023, the separation approval authority indicated he reviewed the enclosed administrative separation packet, approved MEB proceedings, chain of command recommendations, and any matters submitted by the Soldier. After reviewing the applicant's case, the approval authority directed the applicant's general discharge under the provisions of Army Regulation 635-200, chapter 14, due to misconduct-abuse of illegal drugs. His medical condition is not a direct or substantial contributing cause of the conduct that led to the recommendation for administrative separation.

19. The applicant's DA Form 7652 (Disability Evaluation System (DES) Commander's Performance and Functional Statement), Medical Evaluation Board (MEB) Narrative Summary (NARSUM), and DA Form 3947 (MEB Proceedings) are not in his available records for review.

20. The applicant's DD Form 214 shows he was given a general discharge under honorable conditions on 12 May 2023, under the provisions of Army Regulation

635-200, chapter 14, due to misconduct (drug abuse) with corresponding separation code JKK and Reentry Code 3. He completed 4 years, 4 months, and 5 days of active service.

MEDICAL REVIEW:

1. The Army Review Boards Agency (ARBA) Medical Advisor reviewed the supporting documents, the Record of Proceedings (ROP), and the applicant's available records in the Interactive Personnel Electronic Records Management System (iPERMS), the Health Artifacts Image Management Solutions (HAIMS) and the VA's Joint Legacy Viewer (JLV). The applicant requests change in character of service, separation code, and narrative reason for separation. He stated that PTSD, TBI and Other Mental Health were related to his requests. The ABCMR ROP summarized the applicant's record and circumstances surrounding the case. The applicant entered this period of service 08Jan2019. His MOS was 13M10 Multiple Launch Rocket System (MLRS)/High Mobility Artillery Rocket System (HIMARS) Crewmember. He did not have combat deployment. He was stationed in Korea from 20190618 to 20200824 and then again, a few months from May to July 2022. He was discharged 12May2023 under provisions of AR 635-200, chapter 14-12c(2) for Misconduct Drug (Abuse) for 2 positive urine tests for THC 29Nov2022 and 29Oct2022. His service was characterized as Under Honorable Conditions General).

2. Chronology of TBI, Headaches/Migraines and Heat Exhaustion records and related

a. 10Sep2021 Weed Emergency Department ACH. A report from the field medic stated the applicant had been unconscious and seizing. His diagnosis was Heat Exhaustion and Hypokalemia (low potassium). He was treated with ice sheets and hydration and quarters 48 hours. Of note, he reported a significant nosebleed the night prior. Of note, his hemoglobin was low (<14 g/dL). He reported a history of nosebleeds since childhood.

b. 05Oct2021 Reynolds-Ft Sill ACH Diamonds Clinic. He reported a second heat related event. Since the heat related injury, he reported experiencing nonstop headaches. The nosebleeds may have contributed to heat exhaustion. Diagnoses: Headaches; and Epistaxis.

c. 13Dec2021 BH Concussion Evaluation. The applicant reported the following symptoms since the heat exhaustion events: Memory problems, word finding problems, feeling dizzy, fatigued, daily headaches, sensitivity to loud noises and bright lights, and hearing issues in loud environments.

d. 15Dec2021 Reynolds-Ft Sill ACH Diamonds Clinic. The applicant stated that he

hit his head and sustained a head injury 3 months prior when he passed out. He also reported a near syncopal episode 04Dec. His continued headaches, episodic now were controlled by Tylenol and naproxen. Neurology was consulted.

e. 16 and 17Dec2021 Neurology Clinic. Neurology evaluated the headaches and reported cognitive dysfunction. The neurologic exam was normal except for the possible presence of a mild essential tremor. Diagnoses: Migraine without Aura, not intractable, without status migrainosus. Possible Mild Essential Tremor. The neurologist started Maxalt (rizatriptan) as an abortive agent.

f. 07Mar2022 Neurology Clinic. He was having daily headaches, the most severe occurred 3 times weekly. Maxalt decreased headache intensity but did not completely resolve it. Eletriptan was exchanged with Maxalt and Imipramine was added daily to decrease headache intensity.

g. 26Feb2022 brain MRI was negative.

h. 10Mar2022 BH TBI Clinic. Neuropsychological testing was completed. The results were reported in May.

i. 27Apr2022 Neurology Outpatient Note Reynolds-Ft-Sill. Diagnosis: Migraine Headaches. Imipramine was replaced with Elavil at bedtime, and Imitrex nasal spray was added. Diagnosis: Probable superimposed tension type headaches; and Insomnia. He was scheduled to deploy to Korea in May. The neurologist indicated in their note that they didn't think the applicant was deployable—his medications were being adjusted.

j. 19May2022 Mental Health Outpatient Note Reynolds-Sill ACH. This note detailed the results of the 10Mar2022 Neuropsychological Testing. The results obtained were NOT considered to be an accurate reflection of the applicant's current neurocognitive functioning based on apparent response bias. Since the embedded assessments for validity were invalid, there could be no meaningful interpretation of the neurocognitive findings. It was noted that symptoms were elevated on the depression scale, and the specialist recommended treatment. It was opined that his pending deployment was playing a factor in his BH presentation and endorsement of cognitive issues. "There do not appear to be limitations which warrant initiation of a psychological profile at this time". Diagnosis: Other signs and symptoms of cognitive issues.

k. 07Jun2022, 08Jul2022 and 18Jul2022 07Jun2022 clinic visits took place in Korea. He reported that the nasal spray helped to relieve the migraines; however, he had a third "heat cat" incident in Jun 2022 with LOC and body cramps. Since then, he has had headaches/migraine; issue with memory, concentration, and confusion; difficulty falling and staying asleep; and nightmares. He had headache almost daily,



and migraines 4-5 times per month with visual aura, light and sound sensitivity, and dizziness. The medications provided minimal relief.

l. 15Sep2022 Mental Health Outpatient Note Reynolds-Sill AHC. He was seen for Insomnia. He reported a difficult time in Korea. He stated that he was sent back after 2 months due to continued problems falling out and because neurology was not available for his headache management.

m. 09Aug2022 Neurology Outpatient Note Reynolds-Sill ACH. Imitrex nasal spray helped but took about an hour for relief and was associated with an unpleasant taste. Elavil was never effective, and he was currently taking Topamax 50 mg daily and had been on that dose for about 1 month. He was also taking Lexapro daily and said the combination made him somewhat groggy. Headache frequency was about 5 or 6 times per month. Topamax dose was increased to 100 mg and then to 125mg on 07Nov2022.

n. 05Jan2023 Physical Profile Record (DA Form 3349) showed permanent P3 for Headaches which restricted his wearing helmet, body armor and load bearing equipment without worsening the condition; and live and function without restriction in any geographic area without worsening the condition.

o. 24Jan2023 Initial TBI DBQ. The VA examiner endorsed TBI from heat exhaustion based on the following reported symptoms: Headaches (migraines), worsened with stress loud sounds and/or bright lights; difficulty with sustained concentration, dizziness, trouble reading and trouble organizing.

p. 28Feb2023 Report of Medical Assessment (for separation). The applicant identified headaches/migraines and heat cats as conditions which interfered with performance of duty in his MOS or required geographic or assignment limitations.

### 3. Chronology of BH records and related

a. The applicant first accessed BH in March 2021 when he reported depression symptoms (sadness, reduced motivation, and energy) and nightmares. This began shortly after arrival in Korea and with intermittent suicide ideation and had persisted since returning stateside. He was 21 years old and married without children. He denied a prior history of depression. His father has bipolar disorder. The applicant was seen several times from March to August 2021. His diagnosis was Adjustment Disorder with Depressed Mood.

b. 05Nov2021 EBH Team Ft Sill. His recent stressor was 2 heat related events and concerns about resultant cognitive impact. He reported problems with memory, headaches, dizziness, fatigue, sensitivity to loud sounds and fear of dying related to the

heat injury. He also disclosed ongoing mood issues related to being in the Army off and on since joining; worse since being in the current unit. Diagnosis: Adjustment Disorder with Depressed Mood.

c. 30Nov2021 EBH Reynolds-Ft Sill AHC. He returned to BH services for increased stress in relation to a positive urine test for THC (26Oct2021). His BH screening was positive for PTSD, anxiety, depression insomnia, and TBI. His diagnosis was Acute Stress Reaction.

d. 08Dec2021 he was command referred to SUDCC for positive urine. The applicant denied any use of any alcohol or drug use. He attributed the positive test to (unnamed) medication he was taking. The applicant did attend several visits; however, this ended after 17Feb2022 when the applicant reported he was found NOT guilty on his positive THC test. He stated: "There was not enough reasonable doubt that the combination of medication I was on did not cause the positive UA."

e. 28Feb2022 Report of Medical Examination (DD Form 2808). This document indicated that he had a P3 for Migraine Headaches dated 20230106, and that he did not meet retention standards of AR 40-501 chapter 3-31g. He had been referred for a MEB by neurology on 06Jan2023 for the migraines. The applicant remained closely engaged with BH services through April 2022.

f. 01May2022 he was promoted to SGT.

g. 15Sep2022 Mental Health Outpatient Note Reynolds-Sill AHC. He returned in September for help with insomnia. He agreed to complete a sleep diary for the following week. Anticipated session 9-12 sessions. Target symptoms were insomnia and depression. Diagnosis: Insomnia, unspecified. Disposition Comment: Member is on medical profile, there were no conditions from BH standpoint that required a profile.

h. 2 positive urine tests for THC 29Oct2022 and 29Nov2022.

i. 03Nov2022 Psychiatry Services Reynolds-Sill AHC. The applicant had deferred medication in the past. After the 2 positive tests, psychiatry became involved (for potential medication management). The applicant acknowledged low mood and anhedonia but denied other acute changes. He also acknowledged a history of some symptoms suggestive of mania. The provider noted multiple symptoms of cluster b personality traits, namely, abandonment issues, impulsivity, difficulty maintaining relationships, extreme relationships (either love or hate, no in-between), and chronic feelings of emptiness. He did however display a good deal of insight and appeared to have learned some positive coping mechanisms in therapy. He agreed to a trial of mirtazapine. Diagnoses: Other specified depressive disorder and Cluster B personality

traits. Provisional diagnoses: Rule Out Borderline personality disorder and R/O Bipolar disorder II.

j. 01Dec2022 He became more open about his past which included being neglected growing up. His Mom was overwhelmed (there were several children), and his dad was in and out of prison.

k. 14Dec2022 Mental Health Outpatient Note Reynolds-Sill AHC. He was enrolled in IOP (intensive outpatient) therapy under diagnosis Depression, Unspecified. He was enrolled in SUDCC. He was given an S2 physical profile for Depressive Disorder and Alcohol Use Disorder with expiration in 01Mar2023 which temporarily prohibited carrying and firing his assigned weapon and deployment.

l. 09Mar2023 Report of Mental Status Evaluation (DA Form 3822). The mental status exam showed normal behavior and impulsivity; and his cognition and perception were not impaired. Screenings were performed for PTSD, Depression and TBI and if present did not fail retention standards. He was diagnosed with Other Problems Related to Employment. There were no limitations due to his BH condition. He had a history of suicide ideation with plan and intent; however, he was not deemed at immediate risk for suicide. He could understand and participate in administrative proceedings and appreciate the difference between right and wrong. The BH specialist indicated the applicant's BH condition was likely not a mitigating factor in the alleged behavior leading to administrative separation. It was advised that his access to weapons and ammunition should be restricted. He was cleared for administrative action.

#### 4. Other relevant medical conditions

11Nov2021 (Allergy ENT Institute PLLC) and 21Jan2022 Otolaryngology Consult. The applicant had a history of nosebleeds (either side) since childhood usually lasting about 10 minutes. When he arrived in CA for training, he had more frequent nosebleeds, lasting 20-25 minutes. The nosebleeds (chronic epistaxis) were believed to have contributed to his passing out at the National Training Center. Treatment with hydroxyzine (antihistamine), nasal flushing, topical gel hadn't been helpful. Flexible nasal endoscopy was performed. Diagnoses included Epistaxis; Deviated Septum; and Vascular Headaches. 15Dec2021 head CT revealed mild chronic nasal septal deviation. He underwent rigid nasal endoscopy 10Jan2022. On 25Mar2022 he underwent successful surgery with cauterization for Recurrent Epistaxis; and Deviated Septum (Lawton Surgery Center). In March 2023, his hemoglobin was normalized at HgB 14.7 (normal 14.0-18.0 g/dL).

#### 5. Summary/Opinion

a. Based on records available for review, the applicant's Headaches/Migraines did not meet medical retention standards of AR 40-501 chapter 3-31g when manifested by as well as the incapacitating attacks that interfere with duty or social activities three or more days per months. As per guidelines, neurology was involved in management of the Headaches/Migraine condition for greater than 6 months. It was already established that the Headache Condition warranted IDES processing. The applicant did not have other physical conditions which failed retention standards of AR 40-501 chapter 3.

b. While in service the applicant was diagnosed with several mental health conditions: Other Specified Depression; Insomnia; Acute Stress Reaction; Adjustment Disorder; Cannabis Use, Unspecified; Borderline Personality Disorder and TBI. His BH condition was responsive to medication and therapy. The condition was not associated with psychosis, mania, and did not require psychiatric hospitalization. Although the applicant reported suicide ideation intermittently, he always convincingly endorsed that he would never do it. He stated that he did not want to die, and he was future oriented. He did not have a permanent S3 physical profile. Liberal Consideration guidance was considered as below.

#### 7. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant was diagnosed with Depression and TBI (among other diagnoses) which are mitigating diagnoses.

(2) Did the condition exist, or did the experience occur during military service? Yes. The applicant was diagnosed with Depression and TBI while in service. There was no documentation of Depression or TBI prior to service. The heat category injury in September 2021 caused TBI which also contributed to his depression.

(3) Does the condition or experience actually excuse or mitigate the discharge? Yes. Substance abuse (marijuana), the immediate cause of his discharge, is a common sequela of Depression and TBI. Therefore, the marijuana offenses are mitigated by the Depression and TBI conditions.

#### BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that partial relief was warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered.

a. The evidence shows the applicant, an NCO, wrongfully used marijuana. As a result, his chain of command initiated separation action against him. At the same time, the applicant had certain medical conditions that failed retention standards. The

separation authority reviewed the applicant's administrative separation packet, the approved MEB proceedings, the chain of command recommendations, and any matters submitted by the applicant. After reviewing the applicant's case, the separation authority directed the applicant's general discharge under the provisions of AR 635-200, chapter 14, due to misconduct-abuse of illegal drugs. The separation authority determined the applicant's medical condition is not a direct or substantial contributing cause of the conduct that led to the recommendation for administrative separation. The Board found no error or injustice in this separation processing.

b. The Board also reviewed and agreed with the medical reviewer's determination that the applicant was diagnosed with Depression and TBI while in service. There was no documentation of Depression or TBI prior to service. Substance abuse (marijuana), the immediate cause of his discharge, is a common sequela of Depression and TBI. Therefore, the marijuana offenses are mitigated by the Depression and TBI conditions. Based on this determination, the Board determined the applicant's disability separation could have taken priority over the administrative separation. Thus, the Board determined that while a disability discharge is premature, referral of the applicant's case to IDES is appropriate.

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 that the evidence presented was 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 by directing the applicant be entered into the Disability Evaluation System (DES) and a Medical Evaluation Board (MEB) convened to determine whether the applicant's condition(s) (Depression and TBI) met medical retention standards at the time of service separation.

a. In the event that a formal physical evaluation board (PEB) becomes necessary, the individual concerned will be issued invitational travel orders to prepare for and participate in consideration of their case by a formal PEB. All required reviews and approvals will be made subsequent to completion of the formal PEB.

b. Should a determination be made that the applicant should have been separated or retired under the IDES, these proceedings will serve as the authority to void their administrative separation and to issue them the appropriate separation retroactive to their original separation date, with entitlement to all back pay and allowances and/or retired pay, less any entitlements already received .

2. The Board further determined that 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 changing his type of discharge without evaluation under the IDES.

12/19/2024

XCHAIRPERSON  


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. 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.

2. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records (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 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. This guidance does not mandate relief, but rather provides standards and principles to guide BCM/NRs in application of their equitable relief authority. In determining whether to grant relief on the basis of equity, injustice, or clemency grounds, BCM/NRs 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. 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.

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 their 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 their 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:

(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.

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 Veterans Affairs (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 percent. 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 percent.

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

a. Paragraph 1-13 (Reduction in grade) provides that when a soldier is to be discharged under other than honorable conditions, the separation authority will direct an immediate reduction to the lowest enlisted grade.

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.

c. 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.

7. Army Regulation 635-5-1 (Separation Program Designator (SPD) Codes) provides the specific authorities and reasons for separating Soldiers from active duty, and the SPD codes to be entered on the DD Form 214 (Certificate of Release or Discharge from Active Duty). The SPD code JKK is to be used for Soldiers discharged under the provisions of Army Regulation 635-200, chapter 14, for Misconduct (Drug Abuse).

8. 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 Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//