

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 27 November 2024

DOCKET NUMBER: AR20240002900

APPLICANT REQUESTS: in effect,

- change his narrative reason for separation to a medical discharge
- change his separation code
- a 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)
- Department of Veterans Affairs (VA) Letter
- Character Letter

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 in effect, change his narrative reason for separation to a medical discharge. The applicant lists other mental health as related to his request.

3. The applicant provides:

a. VA letter, 22 January 2024, shows a summary of benefits regarding the applicant and that he was honorably discharged he has one or more service-connected disabilities with a combined evaluation of 100 percent (%).

b. Character letter, undated, shows AD\_\_\_ is wiring on behalf of the applicant whom he served with from 2010 to 2013 and they have maintained an active friendship. AD\_\_\_ witnessed injustices regarding the applicant's medical situations while on active duty and the improper treatment by medical professions. The medial damage the applicant suffered while in serve has resulted in him recently being awarded 100% permanent

and total disability rating by the VA. The applicant originally injured his ankle after tripping into a sinkhole, tripping and falling and promptly got up, immediately limping severely. He could not put any pressure on his foot.

(1) The applicant was concerned with the shot he had been given and his ankle swelled to the size of a mango. His injury was not properly healed or treated due to time constraints, and he was sent to his next unit without further assistance. The applicant was accused of malingering. He was able to handle the situation since those closest to him all knew he was truly in bad shape. While in Korea, the applicant injured his back, which led to lifelong flare ups. The applicant was forced to take a physical test shortly after his profile ended and the doctor refused to give him another profile. The applicant was still severely injured so he could not pass the physical test. He was sent through remedial training where he was furthered injured his foot. He saw a podiatrist on post who helped him treat the underlying issues.

(2) His chain of command informed him, regardless of his impending surgeries that he had 2 weeks to get out of the Army. He was being chaptered and he would receive no assistance from the Army in this regard. His chain of command forced him to sign his paperwork under duress without the presence of an attorney for the chapter proceedings and otherwise acted in an unprofessional manner. He should have been medically discharged due to his abysmal medical situation.

4. A review of the applicant's service records show the following information:

a. DD Form 4 (Enlistment/Reenlistment Document) reflects he enlisted in the Regular Army on 14 June 2010.

b. The applicant's available record is void of medical documents, a separation packet and separation authority memorandum containing the specific facts and circumstances surrounding his separation for unsatisfactory performance.

c. He was honorably discharged on 3 May 2013. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was honorably discharged under the provisions of AR 635-200 (Active Duty Enlisted Administrative Separations), Chapter 13, for unsatisfactory performance. He received separation code JHJ and reentry code 3. He completed 2 years, 10 months, and 20 days of net active service. Item 28 (Narrative Reason for Separation): Unsatisfactory Performance.

5. Chapter 13, provides for separation due to unsatisfactory performance when in the commander's judgment the individual will not become a satisfactory Soldier; retention will have an adverse impact on military discipline, good order, and morale. Service of Soldiers separated because of unsatisfactory performance under this regulation will be characterized as honorable or under honorable conditions.

6. By regulation, (AR 15-185), the ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. 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.

7. 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 has applied to the ADRB in essence requesting a referral to the Disability Evaluation System (DES). He has indicated on his DD 149 that other mental health condition(s) is an issue related to his request. He states:

“Service-connected disabilities rated at 60%

Physical limitations

Mental health impacts

Changes in the law such as PACT [Honoring our Promise to Address Comprehensive Toxics (PACT) Act]"

c. The Record of Proceedings outlines 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 14 June 2010 and was honorably discharged on 3 May 2013 under the provisions in chapter 13 of AR 635-200, Active Duty Enlisted Administrative Separations (17 December 2009): Unsatisfactory Performance.

d. Neither the applicant's separation packet nor documentation addressing his involuntary administrative separation was submitted with the application or uploaded into iPERMS. Clinical encounters in the EMR show it was due to multiple failed Army physical fitness test (APFT) and the failure to take one in more than 2 years. A

character letter submitted by Mr. A.D. stated it was due to a left ankle injury and subsequent onset of low back pain.

e. No medical documentation was submitted with the application.

f. The EMR shows he was evaluated for left ankle pain on 10 January 2011 stating he had tripped in a hole during a physical training run one month ago and "it was still not getting better." The examination was consistent with an ankle sprain, radiographs were negative, and he was started on conservative treatment for this injury. The applicant remained symptomatic and a 20 June 2012 MRI was negative except for a "Chronic or partial tear of the anterior tibiofibular ligament of the ankle.

g. He was also evaluated for right foot pain in June 2012 which was provisionally diagnosed as posterior tibial tendon dysfunction (PTTD). From His 25 June 2012 follow-up encounter:

"This 21-year-old active-duty male presents to clinic cause pain localized to the foot. Patient has pain in his right foot which he has had for over a year. The patient states that over year ago he had an ankle injury which has never truly healed. The patient states he was in military training when he fell and had an inversion injury on the left ankle.

Since then, there has been continued pain. Patient has gone to physical therapy but this has not helped his pain. The patient would like an update for possible profiling and to have his MRI results read. The patient is currently being escorted by a SSG. The patient has no other complaints or concerns at this time.

Assessment/Plan:

Ankle joint pain: Patient with continued right joint ankle pain. Patient had an MRI of the foot and ankle region which showed no abnormalities. The patient was counseled on these results. Additionally plain films were obtained of the left foot. On cursory review no bony abnormalities are seen.

I could find no medical reason for his pain. The patient said his pain did go down somewhat and he was in physical therapy, however he stopped physical therapy exercises he was prescribed.

I did not give this patient an additional profile as of the time he has been on profile was adequate for healing of any bony or ligamentous pathology in the foot. The patient was given physical therapy exercises for movement.

The patient is PCS'ing [permanent change of station] to CONUS [continental United States], so a TRICARE consult will have to be placed for him by his new primary care provider when he gets there. The patient understood these instructions. The patient was asked if he had any questions and he did not."

h. His separation examination completed on 15 March 2013 revealed he had not taken AN APFT in two (2) years:

"22 -year-old male SM [service member] reports to SFCC for Phase II physical exam for chapter due to failed PT test. SM reports 'I was to have an appointment to discuss my foot injury and then was made to take a PT test and failed.' SM reports pain began 2 months ago while training for his PT test.

He localizes pain to the plantar aspect of the forefoot. He was seen 06 Mar 2013 and given temp profile, NSAIDS [non-steroidal anti-inflammatory drugs], and instructed to invest in shoe with better arch support and wider toe box. Radiographs were also negative. SM also has history of prior ankle injury suffered while in AIT [advanced individual training]. SM has not taken a PT test in two years. Since AIT. Pain localized to one or more joints."

i. The applicant underwent a pre-separation mental status evaluation after which no behavioral health condition was identified and the provider opined:

"Pt [patient] meets medical retention standards IAW AR 40-501 [Standards of Medical Fitness], Chapter 3, and is CLEARED for administrative separation under Chapter 13. DA form 3822 completed and returned to the Pt's unit commander."

j. No lumbar spine related clinical encounters identified in the EMR.

k. There is insufficient probative evidence the applicant had any medical condition which would have failed the medical retention standards of chapter 3, AR 40-501 prior to his discharge; or was a significant contributing factor or cause for his four consecutive for-record APFT failures. Thus, there was no cause for referral to the Disability Evaluation System.

l. JLV shows he has been awarded multiple VA service-connected disability ratings, including dysthymic disorder on 10 May 2019, sleep apnea on 6 January 2023, lumbosacral or cervical strain on 4 May 2013, and limited motion of the left ankle on 17 January 2017. However, the DES compensates an individual only for service incurred medical condition(s) which have been determined to disqualify him or her from further military service. 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. These roles and authorities are granted by Congress to the Department of Veterans Affairs and executed under a different set of laws.

m. It is the opinion of the Agency Medical Advisor that a referral to the DES is unwarranted.

BOARD DISCUSSION:

After reviewing the application and all supporting documents, the Board determined relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. Based upon the available documentation and the findings and recommendations of the medical advisor, the Board concluded there was insufficient evidence of an error or injustice warranting a change to the applicant's narrative reason for separation.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

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

BOARD DETERMINATION/RECOMMENDATION:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.



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

REFERENCES:

1. Title 10, U.S. Code (USC), section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.
2. Army Regulation 635-200 (Active Duty Enlisted Administrative Separations) sets forth the basic authority for the separation of enlisted personnel. The version in effect at the time provided that: Chapter 13 provides for separation due to unsatisfactory performance when in the commander's judgment the individual will not become a satisfactory Soldier; retention will have an adverse impact on military discipline, good order and morale; the service member will be a disruptive influence in the future; the basis for separation will continue or recur; and/or the ability of the service member to perform effectively in the future, including potential for advancement or leadership, is unlikely. Service of Soldiers separated because of unsatisfactory performance under this regulation will be characterized as honorable or under honorable conditions.
3. Title 10, USC, Section 1556, provides the Secretary of the Army shall ensure that an applicant seeking corrective action by ARBA is provided a copy of all correspondence and communications, including summaries of verbal communications, with any agencies or persons external to agency or board, or a member of the staff of the agency or Board, that directly pertains to or has material effect on the applicant's case, except as authorized by statute.

4. Title 38 USC, section 1110 (General-Basic Entitlement) states for disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

5. Title 38 USC, section 1131 (Peacetime Disability Compensation - Basic Entitlement) states for disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during other than a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

6. Army Regulation 635-40, in effect at the time, 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. Once a determination of physical unfitness is made, all disabilities are rated using the Department of Veterans Affairs Schedule for Rating Disabilities (VASRD).

a. Chapter 3-2 states 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. Chapter 3-4 states 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. 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.

7. Title 10, USC, 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.

a. Soldiers are referred to the disability system when they no longer meet medical retention standards in accordance with AR 40-501 (Standards of Medical Fitness), chapter 3, as evidenced in an 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 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.

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.

8. Title 38, USC, permits the VA to award compensation for a medical condition which was incurred in or aggravated by active military service. The VA, however, is not required by law to determine medical unfitness for further military service. The VA, in accordance with its own policies and regulations, awards compensation solely on the basis that a medical condition exists and that said medical condition reduces or impairs the social or industrial adaptability of the individual concerned. Consequently, due to the two concepts involved, an individual's medical condition, although not considered medically unfitting for military service at the time of processing for separation, discharge or retirement, may be sufficient to qualify the individual for VA benefits based on an evaluation by that agency. The VA can evaluate a veteran throughout his or her lifetime, adjusting the percentage of disability based upon that agency's examinations and findings.

9. Army Regulation 635-8 (Separation Processing and Documents), states, the DD Form 214 is a summary of the Soldier's most recent period of continuous active duty. It provides a brief, clear-cut record of all current active, prior active, and prior inactive duty service at the time of release from active duty, retirement, or discharge. The information entered thereon reflects the conditions as they existed at the time of separation. The DD Form 214 is a synopsis of the Soldier's most recent period of continuous active service. The general instructions stated all available records would be used as a basis for preparation of the DD Form 214. The information entered thereon reflects the conditions as they existed at the time of separation. It states item 28 (Narrative Reason for Separation) is based on regulatory or other authority and can be checked against the cross reference in Army Regulation 635-5-1.

10. 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 JHJ (is to be used for RA Soldiers discharged for unsatisfactory performance).

11. The SPD/RE Code Cross Reference Table provides instructions for determining the RE Code for Active Army Soldiers and Reserve Component Soldiers. This cross-reference table shows the SPD code and a corresponding RE Code. The table in effect at the time of his discharge shows the SPD code JHJ has a corresponding RE Code of 3.

12. Army Regulation 601-210 (Active and Reserve Components Enlistment Program) covers eligibility criteria, policies, and procedures for enlistment and processing into the Regular Army, U.S. Army Reserve, and Army National Guard. Table 3-1 provides a list

of RE codes:

- RE-1 Applies to persons immediately eligible for reenlistment at time of separation
- RE-2 Applies to persons not eligible for immediate reenlistment
- RE-3 Applies to persons who may be eligible with waiver-check reason for separation
- RE-4 Applies to persons who are definitely not eligible for reenlistment

13. Army Regulation 15-185 (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, which is that what the Army did was correct.

a. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

b. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that 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.

//NOTHING FOLLOWS//