

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 27 November 2024

DOCKET NUMBER: AR20240002969

APPLICANT REQUESTS, in effect, correction of his records to show he was retired due to disability vice being separated due to non-retention on active duty.

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

- 2-DD Forms 149, Application for Correction of Military Record
- DD Form 214, Certificate of Release or Discharge from Active Duty
- Department of Veteran Affairs (VA) documents

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, that during his military service he developed post-traumatic stress disorder (PTSD) and traumatic brain injury (TBI). He contends that these conditions should have been referred to a medical board for evaluation and led to him being medically retired. The VA had assigned him a disability rating of 100 percent (total and permanent). He received this rating immediately after being discharged.
3. On 21 January 1999, the applicant enlisted in the Regular Army. He held primary military occupational specialty 19D, cavalry scout. He was promoted to staff sergeant (SSG)/E-6 on 1 September 2004.
4. His Enlisted Record of Brief (ERB) shows he completed foreign service in:
 - Korea, 6 February 1001 to 5 February 2002
 - Iraq, 10 June 2002 to 13 May 2003
 - Iraq, 9 March 2007 to 4 June 2007
 - Afghanistan, 6 June 2011 to 23 May 2012

5. His ERB further shows his last physical examination was on 2 March 2016 and his physical profile does not indicate any limitations.

6. The applicant received a performance evaluation for the period 1 July 2016 through 10 October 2016 upon his discharge. His rater indicated that the applicant's overall performance "met standard." His senior rater rendered a "Qualified" rating in regard to the applicant's overall potential.

7. His record is void of a permanent physical profile or documentation showing he was referred to the Physical Disability Evaluation System (PDES) for a mental health condition.

8. The applicant's service record contains a referred NCO Evaluation Report covering the rating period October 2013 through October 2014. His rater rated his Physical Fitness and Military Bearing as Needs Improvement (failed to meet body fat standards in accordance with AR 600-9) and Needs Improvement in Responsibility and Accountability (had difficulty maintaining accountability of assigned property, failed to meet timelines, cannot accomplish tasks without supervision). His rater rated his overall potential as marginal and his senior rater rated his senior rater rated his overall performance as "Poor" and his Overall Potential as "Fair."

9. The applicant was not selected for retention on active duty. He was honorably released from active duty on 1 November 2016. He completed 17 years, 9 months, and 11 days of net active service for the period.

The form further shows:

- he was entitled to half separation pay \$39,614.81
- the separation authority as "AR 635-200, CHAP 4"
- the Separation Code JGH and Reentry Code 4
- the narrative reason for separation was "NON-RETENTION ON ACTIVE DUTY"

10. The applicant provides several VA documents which show he has numerous service-connected conditions to include PTSD (effective 10 March 2020). His combined disability rating is currently 100 percent.

11. Regulatory guidance states the mere presence of an impairment does not, of itself, justify a finding of unfitness because of physical disability. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of

the duties the Soldier reasonably may be expected to perform because of their office, grade, rank, or rating.

12. The Board should consider the applicant's overall record in accordance with the published equity, injustice, or clemency determination guidance.

13. 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.

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 DES for PTSD and TBI, and a change in his separation authority. He states:

“I believe the correction should be made because of my 17-year service in the military. During my time, I unfortunately developed PTSD and TBI, which should have led to a medical discharge. As a result, I am now 100 percent disabled and have been classified as total and permanent by the VA. This disability rating was determined immediately after my ETS date.”

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. His DD 214 for the period of Service under consideration shows he entered the regular Army on 28 February 2002 and was honorably discharged on 5 February 2015 under provisions in chapter 4 of AR 635-200, Active Duty Enlisted Administrative Separations (17 December 2009): Non-retention on active duty. Neither the applicant's separation packet nor documents addressing the reason(s) for his non-retention on active duty and involuntary administrative separation were submitted with the application nor uploaded into iPERMS.

d. Review of the applicant's EMR shows he was infrequently seen in the clinics for administrative or clinical encounters. He was seen for common conditions associated

with the Army: Knee pain, back pain, viral illnesses, tobacco addiction, etc. The behavioral health encounters appear to have been administrative in nature.

e. He underwent a complete neuropsychological assessment for TBI on 26 May 2016 but the results are not available for review. The provider concluded:

“Taken altogether, findings from this neuropsychological assessment indicated the presence of ongoing cognitive difficulties likely related to this SM’s reported developmental history of learning difficulties (F81.9) and attentional problems (F90.0). These results also indicated continuing difficulties with sleep disturbance (G47.00) and sleep apnea (G47.33), possibly associated with his history of Mild TBI/concussion (DOD0102). Finally, these assessment findings also indicated the presence of persistent symptoms of anxiety.”

f. The applicant was treated by physical, speech, and occupational therapy until his discharge.

g. The applicant’s final two NCO Evaluation Reports cover 6 October 2015 thru 10 October 2016 and show he was a qualified soldier. He passed both his Army Physical Fitness Tests (APFT), met the Army height/weight standards, and “Met Standard” for all performance, attributes, and competencies. His rater noted he was number 4 of the 6 NCOs rated in his grade and Met Standard overall. His Senior Rater marked him as qualified, opining:

“Staff Sergeant [Applicant] was a reliable and motivated NCO during this rating period. If not for his retirement, he should attend SLC [Senior Leader Course] as soon as possible. Promote with peers.”

h. There is insufficient probative evidence the applicant had any 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.

i. JLV shows the applicant has numerous VA service-connected disability ratings, including a rating for PTSD effective 2 November 2016 and increased to 70% effective 10 March 2020, 50% for sleep apnea effective 2 November 2016, 40% for breast surgery effective 2 November 2016, and 50% for sleep apnea effective 2 November 2016. 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.

j. It is the opinion of the ARBA Medical Advisor that neither a referral of his case to the DES nor a change in his separation authority is warranted.

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 the medical review the Board concurred with the advising official finding that neither a referral of his case to the DES nor a change in his separation authority is warranted. The opine noted insufficient probative evidence the applicant had any medical condition which would have failed the medical retention standards prior to his discharge.

2. The Board determined there is insufficient evidence to support the applicant's contentions for correction of his records to show he was retired due to disability vice being separated due to non-retention on active duty. The Board recognized the applicant has numerous VA service-connected disability ratings, including a rating for PTSD. However, the Board found the applicant case does not fall within the guidelines for referral to DES. Therefore, the Board 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.

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. Army Regulation (AR) 635-40, Physical Evaluation for Retention, Retirement, or Separation, establishes the PDES and sets forth the policies, responsibilities, and procedures that apply in determining whether a Soldier is unfit because of physical disability to reasonably perform the duties of his or her office, grade, rank, or rating. It states that after establishing the fact that a Soldier is unfit because of a physical disability, and that the Soldier is entitled to benefits, the PEB must decide the percentage rating for each unfitting disability. This regulation states:

a. The mere presence of impairment does not of itself justify a finding of unfitness because of physical disability. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the member reasonably may be expected to perform because of his or her office, rank, grade, or rating.

b. All relevant evidence must be considered in evaluating the fitness of a Soldier. Findings with respect to fitness or unfitness for military service will be made on the basis of the preponderance of the evidence. Thus, if the preponderance of evidence indicates

unfitness, a finding to that effect will be made. For example, when a referral for physical evaluation immediately follows acute, grave illness or injury, the medical evaluation may have the greater weight. This is particularly true if medical evidence establishes the fact that continued service would be harmful to the Soldier's health or would prejudice the best interests of the Army. This regulations states:

c. A Soldier may be referred for physical evaluation under other circumstances. If so, evaluations of the performance of duty by supervisors (letters, efficiency reports, or personal testimony) may provide better evidence than a clinical estimate by the Soldier's physician describing the physical ability to perform the duties of the office, grade, rank, or rating. Thus, if the evidence establishes the fact that the Soldier adequately performed the normal duties of his or her office, grade, rank, or rating until the time of referral for physical evaluation, the Soldier might be considered fit for duty. This is true even though medical evidence indicates the Soldier's physical ability to perform such duties may be questionable.

d. When a disability is rated at 30 percent or more under VASRD a permanent retirement is permitted, or the Solder has at least 20 years of active Federal service.

3. Title 10, U.S. Code, section 1203, provides for the physical disability separation with severance pay of a member who has less than 20 years of service and a disability rated at less than 30 percent.

4. Title 38, USC, section 1110, General - Basic Entitlement: 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: 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. The Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records on 25 July 2018, regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. Boards for Correction of Military/Naval Records 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.

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.

7. Section 1556 of Title 10, United States Code, requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

8. AR 15-185, Boards, Commissions, and Committees-ABCMR, prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR will decide cases on the evidence of record. It is not an investigative body.

//NOTHING FOLLOWS//