

IN THE CASE OF: [REDACTED]

BOARD DATE: 19 December 2024

DOCKET NUMBER: AR20240003894

APPLICANT REQUESTS, through counsel, in effect:

- a Medical Evaluation Board (MEB) consider his service-connected disabilities
- a medical retirement due to disability, or to be placed on the temporary disability retirement list (TDRL), or a regular retirement
- back pay and allowances as a result of this correction
- a personal appearance before the board

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

- DD Form 149, Application for Correction of Military Record
- 9 page legal brief
- medical records
- Department of Veterans 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. Counsel states, in effect:

a. This is a case involving a U.S. Army member who while serving in the military was unjustly and erroneously separated prior to being referred disability processing by a medical board. The member was seriously injured during military service. He should have been medically evaluated and his service-connected injuries found to be unfitting. The applicant seeks to remedy this injustice through the ABCMR. He became aware of the existence of the error upon consultation over the years and has tried to correct the problem. The applicant has exhausted all administrative remedies under existing law and regulation and requests relief. The Applicant wishes this petition to be reviewed and in the interest of equity, fairness, and justice, and that the requested relief be granted.

b. The applicant respectfully requests this Board to assess him for a medical retirement, placement on the TDRL, or a regular retirement as the applicant was wrongfully separated from the military without proper medical disability system processing. The applicant's discharge is inequitable and has served its purpose.

c. The appeal is based on three errors: (1) the underlying basis of the separation was procedurally defective at the time of the discharge; (2) the adverse action, to include the administrative discharge, was unfair at the time; and (3) the discharge, is inequitable now.

d. The legal standards, which are contained in counsel's legal brief in pages 3-6, are available to the Board to review in full.

e. The applicant's personal narrative is included in counsel's legal brief. The applicant states, in effect:

(1) During this time in medical hold at Fort Stewart, Georgia, he was informed about a potential 30% disability, although the exact amount remained unclear. He was scheduled to attend a medical review board in October, but unfortunately, he missed it due to a lack of knowledge. Subsequently, he was discharged in March. However, in February, prior to his discharge, his command determined he was fit for duty with certain limitations on physical activities. He was assigned to the 91st Chemical Company, Fort Stewart, Georgia, where he had a profile that prohibited him from running and shaving. As a result, he spent the final month of his service performing administrative duties. It appeared the leadership was eager to expedite his departure, despite his intentions to reenlist in the Medical Corps. The applicant's frequent trips to Florida and being in a medical hold status prevented him from pursuing a personal life. During this period, there were no significant changes in his routine, as he continued reporting for work early in the morning without any physical training sessions. As for the driving under the influence (DUI) incident, no Article 15 was pursued, however he did receive a Bar to Reenlistment, which he accepted without much resistance, knowing he could not continue to serve in the military. This decision was made by [REDACTED] who was in charge of the 91st Chemical Company, right before he was about to be discharged.

(2) He moved [REDACTED] in 2000 and bought a house there in 2005. He and his daughter moved again in 2010. During that time, they went down [REDACTED], [REDACTED] and he wanted to find out why he was still experiencing pain. Unfortunately, when he approached the [VA Medical Center] receptionist, he was not able to see anyone. They told him that since his pain was not service-related and he made too much money, he did not qualify for any assistance. He trusted their judgment, even though they did not conduct any X-rays or tests. It was not until 2019, when he was getting his Department of Transportation physical [REDACTED] that he

finally got an X-ray. To his surprise, it revealed the cause of his pain, some 32 years later. Within eight months, his condition had deteriorated to 30%.

(3) Reflecting on his case, he can identify several mistakes. For instance, the paperwork mentioned "'T three' which he did not understand. Additionally, on the medical review for the board, it stated that Soldiers were involved, deployable, and then he talked to several people. It was a three or four, you are not rid deployable [sic]." So, unless the standards changed, there should have been something saying that since this happened while he was on active duty, the military would get him physical therapy and try to assist him in any way.

f. There is a procedural defect in this case. The request for administrative separation can be both command-initiated and initiated by the service-member. In this case, there was a hasty command-initiated request for separation when the applicant should have been accurately diagnosed with a service-connected injury. During a command-initiated discharge request, under Army regulations, disposition through medical channels takes precedence over administrative separation processing. In this case there was a rush to judgment that the applicant should be discharged for reasons other than a finding of unfitness by a Physical Evaluation Board (PEB). He was never referred to the MEB/PEB, nor considered for the placement on the TDRL, or a regular retirement.

g. Under Army regulations, when a U.S. Army member is injured and the command becomes aware of that injury, they are required to initiate a Line of Duty (LD) investigation regardless of the servicemember's status at the time of the injury. This investigation should be initiated within seven days of the command becoming aware the injury has taken place. In this case the severity of the injury, which ultimately resulted in the member being unfit for duty, would have required a finding of unfit and a determination of whether or not the applicant was injured in the LD. This was never done.

h. Without a LD, there is a presumption that the servicemember was injured in the LOD regardless of their present status. The command in this case ignored this fact and did not properly initiate an MEB to determine whether applicant was "unfit" for duty. Instead, they ignored the underlying medical condition, which caused further injury, depression, and anxiety, due to their inaction and negligence. The medical record in this case needs to be assessed and reviewed.

i. Although the command was authorized to administratively separate the applicant, the fundamental reason for the discharge was substantially deficient. The applicant should have been referred to the MEB/PEB, considered for placement on the TDRL, or considered for a regular retirement. The command in this case did not have the proper authority to administratively separate the applicant in this manner.

j. This appeal should consider the following: (1) The entirety of the applicant's military career as reflected in military personnel records, medical records, and statements. The applicant gave much to the U.S. Army (2) His compelling narrative should also be considered.

3. On 6 April 1983, the applicant enlisted in the Regular Army. He held military occupational specialty (MOS) 54B, chemical operations specialist.

4. The record contains Emergency Care and Treatment records which show the applicant was involved in a motorcycle accident on 9 March 1986. He was treated for large abrasions to his left forearm, hip, chest, and leg.

5. On 10 October 1986, the applicant received a permanent physical profile for his ipsilateral left femur and tibia/fibular fracture close without neurovascular compromise. The medical provider indicated that the applicant was able to run at his own pace (if at all), could take an alternative Army Physical Fitness Test, he was worldwide deployable in his current MOS, and he had been found fit for duty in his current MOS.

6. On 9 January 1987, the applicant received a temporary physical profile for a recovering left leg fracture.

7. The complete facts and circumstances of his discharge are not available for review. However, the record shows the applicant:

- waived his separation medical examination
- was barred from reenlistment on 5 March 1987, the enclosures cited were multiple traffic citations, an intoxication test, receipt of prisoner or detained person, and a suspension of installation driving privileges

8. The applicant was honorably released from active duty on 9 March 1987 by reason of reduction in force, in accordance with AR 635-200, chapter 16-8; he received a separation code of "LCC" and a reenlistment code of "3.". He completed 3 years, 11 months, and 4 days of net active service for the period.

9. Counsel provides:

a. Medical records showing the applicant was involved in a motor vehicle accident and sustained a fracture femur and tibia while on active duty. His VA medical records show a working diagnosis for generalized anxiety disorder, major depressive disorder, moderate, traumatic brain injury (TBI), and alcohol use disorder. There is also a report of roentgenographic examination-ventilation perfusion lung scan.

b. VA documents requesting records and medical release information.

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

11. By regulation:

a. 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 member reasonably may be expected to perform because of their office, grade, rank, or rating, given due consideration to their availability for worldwide deployment under field conditions.

b. Commanders will refer members to the servicing Medical Treatment Facility for medical evaluation when the member is believed to be unable to perform the duties of his office, grade, rank, or rating.

c. 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.

12. 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 through counsel seeks physical disability retirement or military retirement.

2. The ABCMR ROP summarized the applicant's record and circumstances surrounding the case. The applicant entered service 06Apr1983. His MOS was 54E Chemical Operations Specialist. He had foreign service. He was released from active duty on 09Mar1987 under provisions of AR 635-200 para 16-8 due to reduction in authorized strength with code RE-3. His service was characterized as honorable.

3. JLV search revealed that the applicant has been total service-connected by the VA at 90% for the following (of pertinence): Major Depressive Disorder 70%; Migraine Headaches 50%; Limited Flexion of the Knee 10%; Limited Flexion of the Thigh 10%; Limited Flexion of the Thigh 0%; Thigh Condition 0%; Shortening of Bone in Lower Leg 0%.

4. Thigh and Lower Leg Conditions

a. 02Jul1986 Orthopedic Clinic Winn ACH. The applicant sustained a closed

fractured left femur and left tibia without neurovascular compromise on 01Sep1985. External fixation was placed 7-8 weeks then traction and cast brace for 6 weeks which resulted in the union of both fractures in acceptable alignment. This was followed by 3 more months of a fracture brace for the tibia. Of note, the applicant's gait was fluid but minimally antalgic. He was still using a cane. Muscle strength was normal (5/5) but he could not hop on the left leg. Sensation was intact. Leg length was in acceptable limits. Hip, knee, ankle ROM was nearly full. X-rays confirmed well healed fractures. He was 10 months out from the event. He could not run (50% recovery per applicant rating).

b. 07Oct1986 Physical Profile Board Proceedings (DA Form 3349) for a Medical Board (Fort Stewart, GA) showed an approved permanent L3 physical profile for Ipsilateral Left Femur and Tibia/Fibular Fractures, Closed. He could run at own pace (if at all); perform alternate APRT as allowed; and he was worldwide deployable. He was found fit for duty in his current MOS.

c. 09Jan1987 Orthopedic Clinic Winn ACH. He was 16 months out from the car accident with multiple closed fractures and without significant problems. He was returned to full duty. It was noted that he had problems with some exercises. He was placed on a temporary L3 profile at the time.

d. 25Oct2019 outside lower left leg film showed no acute fracture or dislocation. Old healed distal tibia and fibular diaphyseal fractures were noted, as well as an old ligament injury.

e. 06Dec2019 outside femur film. The film revealed chronic fracture of the left femur in the mid shaft (significant displacement)

f. 23Oct2020 femur film, the VA sports medicine physician interpreted the film as follows: "His femur from 10/23/2020 does show a remote healed fracture deformity through the proximal mid left femur diaphysis. Nothing acute. His deformity is notable on the lateral aspect; however, his AP image does show good alignment of the femur". The specialist did not think that the applicant was a surgical candidate this far out from the event (it had healed so much). They recommended another round of physical therapy and consultation with orthopedics.

5. Behavioral health

a. 02Aug2019 Psychiatry Consult. Working Diagnoses: Generalized Anxiety Disorder; Major Depressive Disorder, Moderate; TBA (status post MVA); and Alcohol Use Disorder. PTSD screen was negative. His symptoms included: Easily irritated, depression, anxiety, poor sleep, and others. There was no psychosis, mania, violence, or current suicide ideation. There was no history of psychiatric hospitalization. The plan was to pursue medication management, psychotherapy, or both.

b. 09Jun2023 Mental Disorders DBQ. The applicant was working full time driving a truck. He had undergone limited mental health treatment and was currently not in treatment. Diagnoses: Major Depression and TBI. The VA BH examiner opined that the occupational and social impairment caused by his BH condition was with deficiencies in most areas, such as work, school, family relations, judgment, thinking and/or mood (70% disability level).

6. TBI and Headaches

a. TBI. There were no in-service treatment records for traumatic brain injury. Records after military service concerning the TBI condition were sparse. During the 02Aug2019 Psychiatry Consult, the applicant reported the [September 1985] car accident. There was loss of consciousness at the time with length of time being unconscious unknown/not reported. He was hospitalized 92 days due to the severity of his injuries. He had no recall of the car accident, no associated intrusive thoughts, nightmares, or hypervigilance. He denied residual headaches and dizziness. He also did not endorse any cognitive complaints. The 09Aug2024 brain MRI was normal.

b. Headaches/Migraines. There were no in-service treatment records for headaches. During the 01Aug2024 Neurology Consult VAMC, the applicant reported chronic daily headaches for about 10 years. He was taking ibuprofen for them.

7. Summary/Opinion

a. There was no record of TBI, Headaches or mental health conditions requiring treatment while in service. Concerning the orthopedic residuals from left lower extremity fractures status post the September 1985 car accident: The applicant's injuries required a prolonged hospital stay complicated by the development of a pulmonary embolism (per 08Sep1985 ventilation perfusion lung scan). After a series of corrective measures and rehab noted above, in October 1986 orthopedics assessed that the applicant had recovered sufficiently to be found 'fit for duty in his MOS' and he was deemed fully deployable. He was given a permanent L3 at the time. In January 1987 (at 16 months post-accident), he was assessed again and had progressed to allow 'return to full duty'. It was acknowledged that he had problems with some exercises; therefore, the profile was changed to a temporary L3 physical profile.

b. There were no records of treatment immediately following discharge that were available for this review. JLV records began in 2019, more than 30 years after discharge. During discharge processing, the applicant waived a separation exam. A 03Mar1987 Bar to Reenlistment Certificate was noted—a medical reason was not found on the list. Based on available records, there is insufficient medical evidence to support that the applicant had a condition (including an orthopedic condition) which failed

medical retention standards of AR 40-501 chapter 3—referral for DES processing is not warranted in the undersign' s opinion.

BOARD DISCUSSION:

1. The Board determined the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.
2. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. The applicant was honorably released from active duty on 9 March 1987 by reason of reduction in force, in accordance with AR 635-200, chapter 16-8. He completed 3 years, 11 months, and 4 days of net active service for the period. The Board found no error or injustice in his separation processing. The Board also reviewed and agreed with the medical reviewer's determination that:
 - a. There was no record of TBI, headaches or mental health conditions requiring treatment while in service. Concerning the orthopedic residuals from left lower extremity fractures status post the September 1985 car accident, the applicant's injuries required a prolonged hospital stay complicated by the development of a pulmonary embolism. After a series of corrective measures and rehab, in October 1986 orthopedics assessed that the applicant had recovered sufficiently to be found 'fit for duty in his MOS' and he was deemed fully deployable. He was given a permanent L3 at the time. In January 1987 (at 16 months post-accident), he was assessed again and had progressed to allow return to full duty. Although he may have had problems with some exercises; the profile was changed to a temporary L3 physical profile.
 - b. There were no records of treatment immediately following discharge that were available for review. Additionally, during discharge processing, the applicant waived a separation examination. Based on available records, the Board determined there is insufficient medical evidence to support that the applicant had a condition (including an orthopedic condition) which failed medical retention standards of AR 40-501 chapter 3 and thus his referral for disability evaluation system processing is not warranted

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

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

BOARD DETERMINATION/RECOMMENDATION:

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

12/20/2024

X

CHAIRPERSON

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, Personnel Separations-Physical Evaluation for Retention, Retirement, or Separation, in effect at the time, established the Army Physical Disability Evaluation System. It prescribed –
 - a. 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 member reasonably may be expected to perform because of their office, grade, rank, or rating, given due consideration to their availability for worldwide deployment under field conditions.

b. Commanders will refer members to the servicing Medical Treatment Facility for medical evaluation when the member is believed to be unable to perform the duties of his office, grade, rank, or rating.

c. Once a member has been enlisted, inducted, or commissioned, the fact that he may later fall below initial entry physical standards does not, in itself, authorize separation or retirement unless it is also established that he is unfit because of physical disability. A Soldier who is not physically qualified to perform their duties worldwide under field conditions is unfit because of physical disability.

d. The medical report is the heart of the disability evaluation system. Incomplete, inaccurate, misleading, or delayed reports may result in injustice to the member or to the Government. In describing a member's condition, a medical diagnosis alone is not sufficient to establish that the individual is unfit for further military service. The history of the member's illness, objective findings on examination, results of X-ray and laboratory tests, reports of consultations, and subjective conclusions with the reasons are pertinent evidence. These data are essential to support findings and recommendations.

e. Requirements for placement on the TDRL are the same as for "permanent" retirement. A member is also placed on the TDRL when his disability is decided not to be of a lasting nature. He must be unfit to perform the duties of his office, grade, rank, or rating at the time he is placed on the TDRL. Thus, a member who is fit for continued active duty at the time of his separation from active duty will not be placed on the TDRL. This is true no matter what the severity of his physical defects or the fact that they might become unfitting were the member to remain on active duty for a period of time. Place a Soldier's name on the TDRL when (a) his physical disability is not stable, and he may recover and be fit for duty or (b) his physical disability is not stable and the degree of severity may change within the next five years so as to change his disability rating.

f. A disability rated at 30 percent or more, or the individual has at least 20 years of service is entitled to a permanent retirement.

g. Chapter 5 provides for the expeditious discharge of an enlisted member who (a) Does not meet retention medical fitness standards. (b) Is unable to perform the duties of his office, grade, rank, or rating because of physical disability neither incurred nor aggravated during a period in which he was entitled to basic pay.

3. AR 635-40 further states that line of duty (LD) decisions are considered to be in two categories: (1) Whether the disability is the result of the member's intentional misconduct or willful neglect or was incurred during a period of unauthorized absence (2) Whether the disability was incurred or aggravated while the member was entitled to basic pay. The first category is a matter to be decided by the commander. In the second category, the medical officer concerned will make a professional opinion as to whether the disability was incurred or aggravated while the member was entitled to basic pay. The opinion is subject to review, change, or modification by the medical board, MTF commander, or adjudicative bodies in the physical disability evaluation system.

4. AR 635-200, Personnel Separations-Enlisted Personnel, in effect at the time, prescribed in paragraph 16-8 for discharge or release from active duty, as appropriate, prior to the expiration of a Soldier's term of service when budgetary or authorization limitation requires a reduction in enlisted strengths; the Secretary of the Army or his designee, would authorize such reduction. Personnel designated for separation per this paragraph would be discharged or released from active duty no later than three months after receipt of notification.

5. Title 38, U.S. Code 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.

6. Title 38, U.S. Code, 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.

7. 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.

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.

9. 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. 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. Additionally, applicants may be represented by counsel at their own expense.

//NOTHING FOLLOWS//