

IN THE CASE OF: [REDACTED]

BOARD DATE: 24 April 2025

DOCKET NUMBER: AR20240004242

APPLICANT REQUESTS:

- an upgrade of his under honorable conditions (General) discharge
- a medical retirement of at least 30 percent
- amendment of his DD Form 214 (Certificate of Release or Discharge from Active Duty) to reflect medical retirement with corresponding codes
- removal of the court-martial proceedings from his Army Military Human Resource Record (AMHRR) based on the U.S. Army Court of Criminal Appeals disposition to set-aside the finding of guilty and the sentence
- reimbursement of the \$1,000 fine as payment for the sentence of guilty
- back pay and allowances, effective the date of his medical retirement
- a personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Counsel Brief in Support of Application
- DD Form 214, for the period ending 24 January 2024
- Orders 011-0151, 11 January 2024
- Urinalysis Results
- DA Form 2627 (Record of Proceedings Under Article 15, Uniform Code of Military Justice (UCMJ), 17 February 2022
- DD Form 458 (Charge Sheet), 7 April 2022
- U.S. Court-Martial Judgment of the Court
- Statement of Trial Results
- Staff Judge Advocate Clemency Advice
- Convening Authority Action
- Headquarters, 1st Cavalry Division Memorandum, subject: Punitive Reprimand issued Pursuant to Court-Martial Sentence, 13 December 2022
- Headquarters, 1st Cavalry Division Memorandum, subject: Initiation of Elimination (Non-Probationary), 14 December 2022
- Headquarters, 1st Cavalry Division Memorandum, subject: Acknowledgement of Receipt of Notification of Initiation of Elimination [Applicant], 10 January 2024
- Board of Inquiry Summarized Transcript

- DA Form 199 (Informal Physical Evaluation Board (PEB) Proceedings), 10 August 2023
- DD Form 214 Worksheet
- Army Review Boards Agency (ARBA) Memorandum, subject: Physical Evaluation Board/Officer Elimination Case [Applicant], 5 January 2024
- Headquarters and Headquarters Troop, 3d Armored Brigade Combat Team, 1st Cavalry Division Memorandum, subject: Acknowledgement of Receipt of Elimination of [Applicant], 6 January 2024
- U.S. Army Court of Criminal Appeals Summary Disposition, 6 February 2024
- Board of Inquiry Rebuttal with Applicant's "Good Soldier Book" consisting of:
  - Six letters of support
  - Five officer evaluation reports (OER)
  - Two service school academic evaluation reports
  - Nine awards and decorations
  - Two diplomas
  - Two records of promotion
  - Three training certificates
  - An additional skill identifier order
  - his oath of office
  - U.S. Military Academy Transcript
  - 10 Photographs
  - Officer Record Brief

FACTS:

1. The applicant, through counsel, states the applicant was separated on 24 January 2024. In a decision dated 6 February 2024, the U.S. Army Court of Criminal Appeals issued its opinion after agreeing to review the applicant's court-martial findings. The appellate court conducted a legal sufficiency review of the court-martial findings. Upon review, the appellate court found the finding of guilty was legally and factually insufficient. As a result, the court-martial findings were set-aside and the charge and its specification were dismissed without prejudice.

a. Given the decision by the U.S. Army Court of Criminal Appeals, there is no debate whatsoever that the evidence presented at the court-martial was legally and factually insufficient to find the applicant wrongfully used cocaine. As the records stands now, his court-martial was set aside and dismissed with prejudice. This means the applicant's criminal conviction is entirely null and void – it never happened. The applicant stands today an innocent man.

b. All we are left with is the board of inquiry results. The evidence introduced at the board of inquiry was insufficient to prove the applicant wrongfully used cocaine. The government introduced the court-martial results and essentially argued that the applicant had been convicted by proof beyond a reasonable [doubt] at court-martial, which is a higher burden of proof than preponderance of evidence standard used by the board of inquiry and thus the board had no choice but to conclude the applicant had wrongfully used cocaine. The underlying allegation, that the applicant wrongfully used cocaine, was the same at both the court-martial and the board of inquiry.

c. The board of inquiry found the applicant did wrongfully use cocaine and that he was convicted at a court-martial. The board of inquiry's finding the applicant was convicted by a court-martial is null and void. This was one of the two reasons the board of inquiry voted to eliminate the applicant.

d. The government placed such emphasis on the court-martial conviction, the board of inquiry undoubtedly relied upon the court-martial conviction to find the applicant had indeed wrongfully used cocaine. Given the board of inquiry used the court-martial conviction to find against the applicant, the board of inquiry's findings should be voided now that the U.S. Army Court of Criminal Appeals has found the court-martial legally and factually insufficient. The board of inquiry would not have found the applicant wrongfully used cocaine but for the evidence of the court-martial conviction, recognizing the burden of proof at a board of inquiry is a lower standard than at a court-martial. Therefore, although the U.S. Army Court of Criminal Appeals set aside the court-martial findings, the board of inquiry may be tempted to conclude the evidence was still sufficient to conclude the applicant wrongfully used cocaine by a preponderance of the evidence. They strongly urge this Board to reject that line of thinking, submitting the same evidentiary deficiencies that existed in the government's case at court-martial existed at the board of inquiry.

e. The brief in support of the applicant is available in its entirety for the Board's review.

2. The applicant provides his "Good Soldier Book" for consideration by this Board as provided in his board of inquiry rebuttal. This includes, letters of support, officer evaluation reports, service school academic reports, awards and decorations, diplomas, promotion recognition, training certificates, an additional skill identifier order, his U.S. Military Academy transcript, photographs presented by the applicant, and his officer record brief. These supporting documents are available in their entirety for the Board's review. The remaining documents for consideration by the applicant will be discussed throughout his service record below.

3. A review of the applicant's service record shows:

- a. The applicant commissioned as a member of the Regular Army and entered active duty on 21 May 2016. He was promoted to the rank of captain (CPT)/O-3 on 1 May 2020.
- b. He served in Poland from 14 September 2017 to 10 June 2018.
- c. He was assigned to Headquarters and Headquarters Troop, 3d Armored Brigade Combat Team, 1st Cavalry Division, Fort Cavazos, TX.
- d. His record contains and the applicant provides positive urinalysis results, reported 18 October 2021, wherein the applicant's Department of Defense Identification Number is listed as having screened positive for cocaine.
- e. On 10 December 2021, U.S. Army Criminal Investigation Command (CID) by memorandum, subject: Law Enforcement Report – Initial-Final-[Number], through legal coordination with the military justice advisory at Fort Hood [now Fort Cavazos], TX opined probable cause existed to believe [Applicant] committed the offense of wrongful use of controlled substance. No additional investigative efforts are required. There is sufficient evidence to provide to the commander for consideration of action.
- f. On 17 February 2022, the applicant's brigade commander initiated nonjudicial punishment on the applicant for at or near Fort Hood [now Fort Cavazos], TX, between on or about 10 September 2021 and on or about 13 September 2021, wrongfully use cocaine, a schedule II controlled substance in violation of Article 112a, UCMJ.
  - the commander authenticated the proceedings with his signature on 17 February 2022
  - the applicant demanded trial by court-martial and authenticated the proceedings with his signature on 17 February 2022
- g. On 7 April 2022, court-martial charges were preferred on the applicant for at or near Fort Hood [now Fort Cavazos], TX, between on or about 10 September 2021 and on or about 13 September 2021, wrongfully use cocaine.
- h. On 31 May 2022, the applicant was referred for trial to the General court-martial convened by Court-Martial Convening Order Number 23, dated 1 September 2021.
- i. On 10 November 2022, the applicant was convicted by General Court-Martial for wrongfully using cocaine. The military judge sentenced the applicant to forfeiture of \$1,000 pay per month for one month, a written reprimand, and 30 days restriction.
- j. On 13 December 2022, the convening authority approved the sentence. Note: reduced the portion of the sentence of restriction by restricting the applicant to Fort

Hood [now Fort Cavazos] and Bell Country due to the availability of quarters for the applicant.

k. Also on 13 December 2022, the applicant was issued a punitive reprimand for unlawfully using cocaine between on or about 10 September 2021 and on or about 13 September 2021.

I. On 14 December 2022, the commanding general initiating a show cause action for retention on active duty under the provisions of Army Regulation 600-8-24 (Officer Transfers and Discharges), paragraphs 4-2b(6) misconduct, moral or professional dereliction to include alcohol and drug-related misconduct as specified in Army Regulation 600-85 (The Army Substance Abuse Program), paragraph 4-2c(2), derogatory information to include conviction by court-martial. His actions were based on the following specific reasons for elimination:

- between on or about 10 September 2021 and 13 September 2021, wrongfully use cocaine, a schedule II controlled substance
- on 10 November 2022, conviction at a court-martial

m. The applicant acknowledged receipt of notification of initiation of elimination on 4 January 2023.

n. On 22 May 2023, a board of inquiry convened to determine whether [Applicant] should be eliminated from the Army, under the provisions of Army Regulation 600-8-24, paragraphs 4-2b and c, because of misconduct and moral or professional dereliction. The board, in a closed session and upon secret ballot with a majority vote taken, made the following findings and recommendations.

(1) Findings. The board, having carefully considered the evidence before it, finds:

- between on or about 10 September 2021 and 13 September 2021, [Applicant] wrongfully used cocaine, a schedule II controlled substance is supported by a preponderance of the evidence and does warrant separation
- on 10 November 2022, [Applicant] was convicted at a court-martial is supported by a preponderance of the evidence and does warrant separation

(2) Recommendations. In view of the above findings, the board recommends [Applicant] be separated from the U.S. Army with an under honorable conditions (General) characterization of service.

o. On 13 July 2023, the commanding general, having carefully considered [Applicant's] enclosed officer elimination packet with the board's finding and

recommendations that [Applicant] be separated from the U.S. Army under the provisions of Army Regulation 600-8-24, Chapter 4 recommend [Applicant] be discharged with an under honorable conditions (General) characterization of service.

p. On 10 August 2023, a PEB convened and found the applicant physically unfit and recommended a rating of 40 percent and the applicant's disposition be permanent disability retirement for the following medical conditions determined to be unfitting:

- left shoulder strain with impingement syndrome, 20 percent
- atrial fibrillation, intermittent, requiring anti-coagulation therapy, 10 percent
- small infarct of left anterior superior cerebellum, requiring anticoagulation therapy, 10 percent
- heterozygous prothrombin gene mutation, requiring anticoagulation therapy, no rating

q. The applicant's elimination packet and disability evaluation system (DES) packet were forwarded to the Deputy Assistant Secretary of the Army for Review Boards (DASA(RB)) for determination. On 5 January 2024, the DASA(RB) determined [Applicant] would be involuntarily eliminated from the U.S. Army with an under honorable conditions (General) characterization of service. The elimination was based on misconduct and moral or professional dereliction and derogatory information.

r. On 10 January 2024, the applicant acknowledged receipt of his involuntary elimination from the U.S. Army.

s. On 16 January 2024, by memorandum, the U.S. Army Physical Disability Agency terminated the DES proceedings for [Applicant] based on administrative separation.

t. On 24 January 2024, the applicant was discharged. His DD Form 214 shows he completed 7 years, 8 months, and 4 days of active service. It also shows in:

- item 24 (Character of Service): under honorable conditions (General)
- item 25 (Separation Authority): Army Regulation 600-8-24
- item 26 (Separation Code): JNC
- item 27 (Reentry Code): NA
- item 28 (Narrative Reason for Separation): unacceptable conduct

4. On 6 February 2024, the U.S. Army Court of Criminal Appeals after reviewing all the evidence, concluded the finding of guilty was legally and factually insufficient. The finding of guilty and sentence are set aside. The charge and its specification are dismissed with prejudice.

5. Commanders exercising general court-martial authority will ensure that the foregoing actions processed together are properly identified and cross-referenced. The administrative separation will be forwarded to Commander, U.S. Army Human Resources Command (AHRC). The Commander, USAHRC, will refer the entire file, including both courses of action, to the Office of the Secretary of the Army, for necessary review. The Secretary of the Army will decide the proper disposition of the case.

**BOARD DISCUSSION:**

1. After reviewing the application, all supporting documents, and the evidence found within the applicant's military records, 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 review based on law, policy, and regulation.

a. An upgrade of his under honorable conditions (General) discharge. Deny. The Board acknowledged that after the applicant was separated from the Army, the Army Court of Criminal Appeals (ACCA) set aside the guilty verdict and dismissed the wrongful use of cocaine charge with prejudice. The basis for the decision was the government's failure to introduce the results of the positive drug test into evidence at trial. However, the Board determined that the basis for the applicant's elimination was twofold; the positive urinalysis and the court-martial conviction; based on a preponderance of the evidence, the Board determined the applicant was appropriately separated with an under honorable conditions (General) discharge.

b. Medical Retirement of at least 30 percent. Deny. Based on the foregoing, the Board determined the applicant was appropriately separated under the administrative separation procedures and a medical retirement of at least 30 percent was unwarranted.

c. Amendment of his DD Form 214 (Certificate of Release or Discharge from Active Duty) to reflect medical retirement with corresponding codes. Deny. Based on the decision of the Board that there was no error or injustice in his administrative separation proceeding, there is no basis to amend his DD Form 214 to reflect medical retirement or to amend the corresponding blocks.

d. Removal of the court-martial proceedings from his AMHRR based on the U.S. Army Court of Criminal Appeals disposition to set-aside the finding of guilty and the sentence. Deny. The Board determined the court-martial proceedings are a matter of record and although the U.S. Army Court of Criminal Appeals dismissed with prejudice

the charge and its specification, the Board determined the proceeding should remain a part of the applicant's military record.

e. Reimbursement of the \$1,000 fine as payment for the sentence of guilty. Deny. The Board determined the applicant's punishment was appropriate and despite the decision by the Army Court of Criminal Appeals concluded reimbursing him was unwarranted.

f. Back pay and allowances, effective the date of his medical retirement. Deny. Based on the foregoing decision not to issue the applicant a medical retirement, the Board concluded entitlement to back pay and allowances was unwarranted.

2. The applicant's request for a personal appearance hearing was carefully considered. In this case, 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.

**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.

5/5/2025

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. Army Regulation 600-8-24 (Officer Transfers and Discharges) serves as the authority for the transfer and discharge of Army officer personnel. It provides that elimination action may be or will be initiated for misconduct, moral or professional dereliction, acts of personal misconduct, conduct unbecoming an officer, and adverse information filed in the Official Military Personnel File (OMPF).
  - a. Paragraph 1-22, in effect at the time, provides the authorized types of characterization of service or description of separation.
  - b. Paragraph 1-22a, states an officer will normally receive an honorable characterization of service when the quality of the officer's service has met the standards of acceptable conduct and performance of duty, or the final revocation of a security clearance under DODI 5200.02 and AR 380-67 for reasons that do not involve acts of misconduct for an officer.
  - c. Paragraph 1-22b, states an officer will normally receive a general (under honorable conditions) characterization of service when the officer's military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge. A separation under general (under honorable conditions) normally appropriate when an officer: Submits an unqualified resignation; Separated based on misconduct; discharged for physical disability resulting from intentional misconduct or neglect; and, for final revocation of a security clearance.
  - d. Paragraph 1-22c, states a discharge under other than honorable conditions is an administrative separation from the service. A discharge certificate will not be issued. An officer will normally receive an under other than honorable conditions when he or she: resigns for the good of the Service; is dropped from the rolls (DFR) of the Army in accordance with paragraph 5-9; (3) is involuntarily separated due to misconduct, moral or professional dereliction, or for the final revocation of a security clearance as a result of an act or acts of misconduct, including misconduct for which punishment was imposed; and, is discharged following conviction by civilian authorities.
  - e. Chapter 4 outlines the policy and procedure for the elimination of officers from the active Army for substandard performance of duty.

- f. Paragraph 4-2b, prescribes for the elimination of an officer for misconduct, moral or professional dereliction, or in the interests of national security.
- g. Paragraph 4-2c, prescribes for the elimination of officer for derogatory information.
- h. Paragraph 4-3a states an officer referred to recommended for elimination under this chapter who does not meet medical retention standards will be process through both the provisions of this regulation and through the Disability Evaluation System (DES) process as described in paragraph 1-22.
- i. Paragraph 4-3b states when it is determined the officer's mental condition contributed to military inefficiency or unsuitability, the medical evaluation will include a psychiatric study of the officer. This study will indicate whether the officer was able to distinguish right from wrong and whether the officer has the mental capacity to understand board and judicial proceedings and participate in defense. When applicable, the report will also indicate whether the incapacitating mental illness could have been the cause of the conduct under investigation.
- j. Paragraph 4-24a states an officer identified for elimination may, at any time during or prior to the final action in the elimination case elect one of the following options: (1) Submit a resignation in lieu of elimination; (2) request a discharge in lieu of elimination; and, Apply for retirement in lieu of elimination if otherwise eligible.

2. 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 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. 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 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.

3. 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. Paragraph 4-4 states a commissioned or warrant officer will not be referred for disability processing instead of elimination action (administrative separation) that could result in separation under other than honorable conditions. Officers in this category who are believed to be unfit because of physical disability will be processed simultaneously for administrative separation and physical disability evaluation.

e. Commanders exercising general court-martial authority will ensure that the foregoing actions processed together are properly identified and cross-referenced. The administrative separation will be forwarded to Commander, U.S. Army Human Resources Command (AHRC). The commander, USAHRC, will refer the entire file, including both courses of action, to the Office of the Secretary of the Army, for necessary review. The Secretary of the Army will decide the proper disposition of the case.

4. 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.

5. Title 38, U.S. Code, 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.

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

//NOTHING FOLLOWS//