

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 29 January 2025

DOCKET NUMBER: AR20240004420

APPLICANT REQUESTS:

- an upgrade of his under other than honorable conditions discharge to honorable
- restoration of his rank to sergeant first class (SFC)/E-7
- back pay
- a medical retirement

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

- DD Form 149 (Application for Correction of Military Record)
- Counsel Brief in Support of Application
- Four DD Forms 214 (Certificate of Release or Discharge from Active Duty)
- Basic Allowance for Housing (BAH) Pay Documents
- Excerpts from Separation Proceedings
- DA Form 2627 (Record of Proceedings Under Article 15, Uniform Code of Military Justice)
- U.S. Army Recruiting Command Memorandum, subject: Fit for Duty Evaluation for [Applicant], a Member of the U.S. Army Active Guard/Reserve (AGR), 27 April 2015
- DA Form 2808 (Report of Medical Examination), 8 June 2015
- Medical Records (54 pages)
- Department of Veterans Affairs (VA)/Department of Defense (DOD) Joint Disability Evaluation Board Claim
- Headquarters, U.S. Army Medical Department Activity Memorandum, subject: Noncommissioned Officer Reports (NCOER) reference: [Applicant], 20 August 2015
- VA Disability Evaluation System (DES) Proposed Rating, 3 November 2015
- Headquarters, U.S. Army Training and Doctrine Command Memorandum, subject: Notification of Suspension and Intent to Permanently Remove from Position of Significant Trust and Authority Due to Disqualification, 7 March 2016
- Statement of Options, Qualitative Management Program (QMP)
- Response from the Office of the Inspector General to the Applicant's Congressional Representative, 31 May 2016

- U.S. Army Criminal Investigation Command (CID) Memorandum, subject: Polygraph Examination Report
- DA Form 2A (Personnel Qualification Record)
- Enlisted Record Brief (ERB)
- Application for U.S. Army Reserve (USAR) AGR Duty
- U.S. Army Human Resources Command Orders R-11-089962, 19 November 2010
- Self-Authored Statement
- Sergeant Audie Murphy Club Certificate of Achievement

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, through counsel, states his service began on 2 January 1992 and during his service he earned various awards and decorations. He has 18 years, 4 months, and 25 days of active service and 5 years, 11 months, and 16 days of inactive service.

a. On 26 July 2013, following transfer from FL to OH and a change of on-base to off-base housing, he sent an e-mail inquiring about his BAH and his concern about not being entitled to BAH-differential payments. On 8 August 2013, he submitted an official pay inquiry. It was determined he was not entitled to BAH-differential because he had been living in government housing and not provided proof of child support of custody. He attempted to clarify why he had been authorized to receive the allowance while in FL (he was paying child support). He received notice of a debt on 8 October 2013 and the matter was reported to CID to initiate an investigation.

b. On 3 September 2014, CID issued its investigative summary establishing probable cause the applicant committed the offense of larceny of government funds, fraud, and false official statement when he did not submit his original divorce decree and knowingly presented false divorce documentation in order to keep the BAH and other services originally obtained. The applicant contends the report does not make mention of his shared custody agreement or his communication with his command. The applicant received a General Officer Memorandum of Reprimand (GOMOR) based on the findings of the CID investigation and it was permanently filed in his Army Military Human Resource Record (AMHRR). Additionally, on the same date, he was notified of the command's intent to relieve him from his recruiting position.

c. The applicant submitted a rebuttal to the GOMOR and took responsibility for the altered divorce decree but failed to take responsibility for the BAH-differential payments because he did not believe he did anything wrong.

d. On 30 October 2014, the applicant was notified his chain of command was initiating action to separate him based on wrongfully collecting BAH. On 7 November 2014, he received nonjudicial punishment for altering his divorce decree with the intent to deceive and wrongfully appropriating BAH. He submitted matters in mitigation and accepted full responsibility for altering the divorce decree but reiterated he was not guilty of larceny because he did not intent to take money from the Government that he was not entitled to.

e. A fit for duty evaluation was requested by the applicant's command on 27 April 2015 based on a back injury from 2007 and 2009 during deployments to Afghanistan and Iraq. On 26 May 2015, the fitness for duty evaluation was performed and determined that the applicant was unfit for duty. He was referred to a Medical Evaluation Board (MEB). A MEB convened on 14 August 2015 and determined some conditions were not compatible with continued service; however, other conditions were medically acceptable. The MEB was forwarded to the PEB and the applicant appealed the findings of the MEB; however, they were denied.

f. On 16 September 2015, the applicant submitted a condition waiver and waived his right to an administrative separation board hearing contingent upon allowing him to continue with his medical board.

g. The PEB convened on 23 November 2015 and determined the applicant was unfit for duty. The VA proposed a rating of 60 percent. The applicant appealed the PEB findings.

h. On 8 December 2015, an administrative board convened and determined the applicant should be separated from the U.S. Army with an under other than honorable conditions characterization of service. The separation authority found the applicant's medical condition not to be the direct or substantial contributing cause of the conduct that led to the recommendation for administrative separation and directed his separation and reduction to the lowest grade. He was discharged on 6 May 2016.

i. The applicant states he was a remarkable Soldier whose sole mistake was an error in judgement when it came to his divorce decree and he completed repaid the amount he received. The command abused its discretion when it directed his separation instead of allowing him to continue with his medical board. The facts show he never intended to defraud the Government.

3. The applicant provides his Sergeant Audie Murphy Club Certificate of Achievement for demonstrating dedicated leadership and exemplary professionalism as a NCO meeting all standards of excellence by being inducted in September 1996.
4. Additionally, the applicant provides various service medical documents, VA rating documents, VA claims, and medical examinations. Due to the applicant's request for a medical retirement, these documents will be reviewed by the Army Review Boards Agency's medical staff in the Medical Review below.
5. A review of the applicant's service record shows:
 - a. Having prior active enlisted service in the Regular Army and USAR, he was ordered to AGR and entered active duty on 18 January 2011.
 - b. On 9 October 2013, a CID investigation was initiated regarding BAH differential and Government housing submitting by the applicant. The investigation established probable cause to believe the applicant committed the offenses of larceny of Government funds, fraud, and false official statement when he did not submit his original divorce decree and knowingly presented false divorce documentation in order to keep the BAH and other services originally obtained.
 - c. On 15 September 2014, the applicant received a GOMOR from the commanding general of Headquarters, U.S. Army Recruiting Command:

Between on or about January 2011 and on or about August 2013, you collected approximately \$9,230.00 in BAH overpayments by not submitting your divorce documents to the Army for approximately 2 years. On 17 January 2011, you moved into government-leased housing and began receiving BAH-Diff as a geographic bachelor. You were divorced on 5 June 2008, but you did not remove your ex-wife as your dependent in DEERS until 24 July 2013. You presented a divorce decree with fraudulently altered dates showing that you divorced in 2013. Your actions are in violation of Articles 92 and 121, UCMJ. In accordance with Army Regulation 27-10 (Military Justice), paragraph 3-3b, you are hereby reprimanded."

As a noncommissioned officer, you are charged with the responsibility of setting the example for Soldier to emulate. Clearly, your actions fell below the standards expected of a noncommissioned officer in the U.S. Army. There is no excuse for your irresponsible and improper behavior, and further incident of this nature may result in more serious action being taken against you. I trust that your future duty performance will reflect the degree of professionalism expected of every NCO assigned to this command.

This is an administrative reprimand imposed under the provisions of Army Regulation 600-37 (Unfavorable Information) and not as punishment under Article 15, UCMJ. You are advised that in accordance with Army Regulation 600-37, paragraph 3-4b, I am considering whether to direct this reprimand be filed permanently in your AMHRR. Prior to making my filing decision I will consider any matters you submit in extenuation, mitigation, or rebuttal. You will be provided, by separate cover, a copy of the evidence which forms the basis of this reprimand. You will immediately acknowledge receipt of this reprimand in writing. You will forward any matters you wish me to consider through your chain of command within seven calendar days, using the format prescribed in Army Regulation 600-37, paragraph 3-6.

d. On 22 October 2014, the applicant submitted a rebuttal to the GOMOR. He took responsibility for the altered divorce decree; however, did not take responsibility for the payments he received. He felt as though he did nothing wrong and would always feel that way regardless of what any investigation states. He requested the GOMOR be placed in his local file and he be allowed to continue as an Army recruiter.

e. The applicant's fit for duty evaluation, MEB and PEB are not contained in his AMHRR.

f. The applicant's immediate commander-initiated action to separate the applicant for commission of a serious offense. The reasons for his proposed action were (1) between January 2011 and August 2013, he collected approximately \$9,230 in BAH overpayments by not submitting his divorce decree documents to the Army for approximately 2 years; and (2) he divorced his wife on 5 June 2008 but presented a divorce decree with fraudulently altered dates showing he divorced in 2013. He was recommending the applicant receive an under other than honorable conditions discharge.

g. The applicant acknowledged receipt of the separation notification on 30 October 2014. His election of rights and conditional waiver (as stated was completed by the applicant) are unavailable for the Board's review.

h. On 17 December 2014:

(1) The applicant accepted nonjudicial punishment under Article 15, UCMJ for the following misconduct:

- at or near Columbus, OH, on or about 24 July 2013, with intent to deceive, present an altered document, to wit: a divorce decree, which document was false in that he altered the date of the divorce from 5 June 2008 to 12

May 2013 and was then known by him to be so false in violation of Article 107

- at or near Columbus, OH, on or about 5 June 2008 and on or about 1 August 2013, wrongfully appropriate BAH, of a value of about \$9,230.52, the property of the U.S. Army in violation of Article 121

(2) His punishment consisted of forfeiture of \$2,266.00 pay per month for 2 months, extra duty for 45 days, and restriction for 45 days.

(3) His commander direct the nonjudicial punishment be filed in the performance section of the official military personnel file.

i. On 25 April 2015, after carefully considering the reprimand, the circumstances of the misconduct, and all matters submitted by the applicant, the approval authority directed the reprimand be placed in the applicant's permanent AMHRR.

j. An administrative separation board convened on 8 December 2015 to determine whether the applicant should be discharged from the Army under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), Chapter 14-12c, for commission of a serious offense.

(1) The board found:

- the allegation that the applicant, between January 2011 and August 2013, did collect approximately \$9,230.00 in BAH overpayments by not submitting his divorce documents to the Army for approximately 2 years; this allegation does warrant separation
- the allegation that the applicant divorced his wife on 5 June 2008, but he did present a divorce decree with fraudulently altered dates showing that he divorced in 2013; this allegation does warrant separation

(2) The board recommended the applicant be separated from the U.S. Army and that his service be characterized as other than honorable conditions.

k. On 13 March 2016, the applicant completed a medical assessment for the purpose of separation. The applicant was not referred for further evaluation.

l. On 18 March 2016, the separation authority reviewed the PEB proceedings and the administrative separation board proceedings pertaining to the applicant.

(1) He approved the board's recommendation that he be separated under the provisions of Army Regulation 635-200, Chapter 14, paragraph 12c, for commission of a serious offense.

(2) He did not find that the applicant's medical condition was the direct or substantial contributing cause of the conduct that led to the recommendation for administrative separation. In addition, he did not find that other circumstances of the individual case warrant disability processing instead of further processing for administrative separation.

(3) He directed the applicant be issued an Under Other Than Honorable Conditions Discharge Certificate. Under the provisions of Army Regulation 635-200, paragraph 1-13, the applicant would be immediately reduced to the lowest enlisted grade.

m. On 6 May 2016, the applicant was discharged accordingly. His DD Form 214 shows he completed 5 years, 3 months, and 19 days of active service this period with 13 years and 1 month of total prior active service and 5 years, 11 months, and 16 days of total prior inactive service. He was awarded or authorized:

- Afghanistan Campaign Medal with campaign star
- Armed Forces Reserve Medal with "M" Device and 10-year bronze hourglass
- Iraq Campaign Medal with two campaign stars
- Bronze Star Medal
- Meritorious Service Medal (2nd Award)
- Army Commendation Medal (4th Award)
- Army Achievement Medal (3rd Award)
- Meritorious Unit Commendation
- Army Good Conduct Medal (3rd Award)
- National Defense Service Medal (2nd Award)
- Global War on Terrorism Service Medal
- Noncommissioned Officer Professional Development Ribbon (3rd Award)
- Army Service Ribbon
- Overseas Service Ribbon (4th Award)
- Silver Basic Recruiter Badge
- Combat Action Badge
- Driver and Mechanic Badge with Driver-Wheeled Vehicle Clasp

6. The Army rates only conditions determined to be physically unfitting at the time of discharge, which disqualify the Soldier from further military service. The Army disability rating is to compensate the individual for the loss of a military career. The VA does not have authority or responsibility for determining physical fitness for military service. The VA may compensate the individual for loss of civilian employability.

7. Title 38, USC, Sections 1110 and 1131, permit the VA to award compensation for disabilities which were incurred in or aggravated by active military service. However, an award of a VA rating does not establish an error or injustice on the part of the Army.
8. By regulation, the authority to determine whether a case is to be processed through medical disability channels or under administrative separation provisions is the general court-martial convening authority.
9. By regulation, when a Soldier is to be discharged under other than honorable conditions, the separation authority will direct an immediate reduction to the lowest enlisted grade.

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, his previous denial by Army Discharge Review Board, the military electronic medical record (AHLTA), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and/or the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. Through counsel, the applicant is applying to the ABCMR requesting "that his characterization of service be upgraded to Honorable, that his rank of Sergeant First Class be reinstated, that he be awarded back pay, and that he be awarded permanent disability retirement in accordance with the findings of his Physical Evaluation Board."

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. The applicant's DD 214 shows the former USAR Soldier entered active duty on 18 January 2011 and was discharged under other than honorable conditions on 6 May 2016 under the separation authority provided by paragraph 14-12c of AR 635-200, Active Duty Enlisted Administrative Separations (17 December 2009): Misconduct – Serious Offense.

d. On 15 September 2014, the applicant received a General Officer Memorandum of Reprimand (GOMOR) for violations of the UCMJ:

"Between on or about January 2011 and on or about August 2013, you collected approximately \$9,230.00 in Basic Allowance for Housing (BAH) overpayments by not submitting your divorce documents to the Army for approximately 2 years. On

17 January 2011, you moved into government-leased housing and began receiving BAH-Diff as a geographic bachelor. You were divorced on 5 June 2008, but you did not remove your ex-wife as your dependent in DEERS until 24 July 2013. You presented a divorce decree with fraudulently altered dates showing that you divorced in 2013. Your actions are in violation of Articles 92 and 121, UCMJ. In accordance with Army Regulation 27-10, paragraph 3-3b, you are hereby reprimanded.”

e. The following month, his commander recommended he be separated from the Army under provisions in paragraph 14-12c of AR 635-200.

f. In May 2015, the applicant was found unfit for duty after a fitness for duty examination and it was recommended, he be entered into the Integrated Disability Evaluation System (IDES).

g. On 23 June 2015, the applicant was referred to the IDES for “Chronic Back Pain status post Lumbar Fusion.” The medical evaluation board determined his lumbar spine condition was the sole condition failing medical retention standards as documented on his Medical Evaluation Board Proceedings (DA Form 3947). The applicant non-concurred, maintaining that his post-concussive headaches and major depressive disorder should also have been found to fail medical retention standards.

h. The physician who addressed his appeal noted his behavioral health condition would be addressed by a mental health provider and that his post-concussive headaches did not fail medical retention standards:

“Regarding TBI Residual Post-Concussive Headaches. As stated in the NARSUM [MEB narrative summary], "This condition is manifested by infrequent incapacitating attacks and more frequent milder attacks." The rebuttal enclosures showing SM [service member] obtained relatively few refills of abortive medication, prescribed by family practice physician, over the past 4 years. The SM is on prophylactic medication which appears to be providing adequate control of the condition. Adequate control is not equivalent to complete cessation of painful events. There is no indication of need to change NARSUM [MEB Narrative summary], DA 3349 [Physical Profile], or DA 3947 with regard to this concern.”

i. The MEB psychiatrist stated that his “Major Depressive Episode” met medical retention standards:

“The goal of an MEB evaluation is to determine whether the diagnosis at issue interferes with a Soldier's ability to perform his military duties to standards. The ratings and comments reported on your Commander's Statement and most recent NCO ER indicate that symptoms of your Major Depressive Episode are not causing any impairment in your duty performance.

Your CO [Commanding Officer] described you as an "outstanding Soldier and NCO," whose inability to perform some duties was entirely attributable to physical limitations. You received the highest possible rating for promotion potential on your most recent NCO ER. The senior rater's comments were, "promote ahead of peers, continue to groom for positions of advanced responsibility and authority, send to advanced schooling ahead of peers, relentless drive with unlimited potential for continued mobility.”

Information you provided to the psychiatric C&P [compensation and pension] evaluator indicated that you are currently experiencing a level of social functioning unimpaired by your psychiatric condition. You are engaged to be married. You and your fiancée enjoy socializing with good friends. You have not lost interest in recreational activities you used to enjoy. You are frustrated by your inability to engage in these activities because of your medical condition.

In short, your Major Depressive Episode has responded to treatment with individual therapy and the combination of Paxil and Trazodone, such that you are not experiencing any significant impairment in your social and/or occupational functioning at the present time. Thus, your Major Depressive Episode meets retention standards IA WAR 40-501 chap. 3-32.”

j. His case, along with his appeal, was then forwarded to a physical evaluation board (PEB) for adjudication.

k. On 23 November 2015, the PEB determined that his lumbar spine condition was the sole unfitting condition for continued military service. They determined the remaining eleven conditions were not unfitting for continued service. The applicant non-concurred, stating the incorrect rating of 10% had been applied to his disability. The PEB corrected this error and the correct 40% rating was applied. They recommended the applicant be permanently retired for physical disability. On 29 April 2016, after being counseled on the PEB's finding and recommendation by his PEB liaison officer, the applicant concurred with the board, waived his right to a formal hearing, and declined a VA reconsideration of his ratings.

l. The PEB was apparently unaware that on 8 December 2015, an Investigating Board of Officers substantiated the UCMJ violations previously noted and recommended the applicant “be separated from the US Army and that his service be characterized as Other Than Honorable Conditions.”

m. Paragraph 4a(3) of appendix 1 to enclosure 3 of Department of Defense Instruction 1332.18, SUBJECT: Disability Evaluation System (DES) (5 August 2014).

“Service members are ineligible for referral to the disability evaluation process when the Service member is pending separation under provisions that authorize a characterization of service of under other than honorable conditions, except as provided by Service regulations. This restriction is based on the provisions upon which the member is being separated and not on the actual characterization the member receives.”

n. The Army’s approach to this policy is in paragraphs 4-3a and 4-3b of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (20 March 2012) state:

“a. Except as provided below, an enlisted Soldier may not be referred for, or continue, physical disability processing when action has been started under any regulatory provision which authorizes a characterization of service of under other than honorable conditions.

b. If the case comes within the limitations above, the commander exercising general court-martial jurisdiction over the Soldier may abate the administrative separation. This authority may not be delegated. A copy of the decision, signed by the General Court Martial Convening Authority (GCMCA), must be forwarded with the disability case file to the PEB. A case file may be referred in this way if the GCMCA finds the following:

(1) The disability is the cause, or a substantial contributing cause, of the misconduct that might result in a discharge under other than honorable conditions.

(2) Other circumstances warrant disability processing instead of alternate administrative separation.”

o. On 18 March 2016, the applicant’s GCMCA directed the applicant would not continue processing under the IDES but be administratively discharged with an under other than honorable conditions characterization of service:

"I have reviewed the enclosed Physical Evaluation Board (PEB) proceedings and the administrative separation board proceedings pertaining to SFC [Applicant], USARB Columbus. I approve the board's recommendation that he be separated under the provisions of AR 635-200, Chapter 14, paragraph 12c, for commission of a serious offense.

I do not find that SFC [Applicant]'s medical condition is the direct or substantial contributing cause of the conduct that led to the recommendation for administrative separation. In addition, I do not find that other circumstances of the individual case warrant disability processing instead of further processing for administrative separation.

I direct that SFC Kowalski be issued an under Other Than Honorable conditions discharge certificate ...

In accordance with AR 635-200, paragraph 2-6c, SFC [Applicant]'s separation is based on moral dereliction. Request that this Soldier begin out-processing immediately and report to the nearest US Army Transition Point for final transition processing."

p. It is the opinion of the ARBA medical advisor there is insufficient medical evidence to warrant reversal of the GCMCA's decision.

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, and published Department of Defense guidance for liberal and clemency determinations requests for upgrade of his characterization of service. Upon review of the applicant's petition, available military records and the medical review, the Board concurred with the advising opinion of the ARBA medical advisor there is insufficient medical evidence to warrant reversal of the GCMCA's decision.

2. The Board acknowledged the applicant underwent a Medical Evaluation Board (MEB) and was referred to a Physical Evaluation Board (PEB), which determined he was unfit for continued service. However, the separation authority reviewed both the PEB and administrative separation board findings and concluded that the applicant's medical condition was not a direct or substantial contributing factor to the misconduct that led to his separation. Evidence in the record showed the applicant waived his right

to an administrative board contingent upon continuation of the medical board, but ultimately, the administrative board convened and recommended separation for misconduct. The Board agreed with the separation authority's determination that the applicant's medical condition does not warrant disability retirement in lieu of administrative separation.

3. The Board determined there is insufficient evidence presented through counsel to support the contentions for upgrade of discharge, restoration of rank, back pay, or medical retirement. The Board found the applicant knowingly submitted altered divorce documentation and failed to report changes in dependent status, resulting in the wrongful appropriation of approximately \$9,230 in BAH payments. Despite his assertion that he did not intend to defraud the government, the record includes a CID investigation, a General Officer Memorandum of Reprimand (GOMOR), and nonjudicial punishment under Article 15, UCMJ. These actions reflect a pattern of misconduct inconsistent with honorable service. The Board found the characterization of service as "Under Other Than Honorable Conditions" to be appropriate and supported by the evidence.

4. The Board noted, the applicant was reduced to the lowest enlisted grade in accordance with AR 635-200, paragraph 1-13, upon separation. The applicant's reduction was a direct consequence of the misconduct and the characterization of discharge. Restoration of rank is not warranted, as the applicant's actions violated the standards expected of a senior noncommissioned officer and undermined the integrity of the Army's financial and personnel systems. Furthermore, applicant's request for back pay is without merit. The separation and reduction in rank were executed in accordance with regulatory guidance following substantiated misconduct. The applicant was not entitled to the BAH payments received during the period in question, and he was held accountable through financial recoupment and disciplinary action. There is no legal or equitable basis to award back pay.

5. The Board recognized the applicant's prior service and achievements, including induction into the Sergeant Audie Murphy Club, are noted and commendable, however, they do not outweigh the severity of the misconduct. The Board found the original decisions regarding discharge characterization, rank reduction, and denial of medical retirement to be proper and equitable. Therefore, relief is denied.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
XXX	XXX	XXX	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.

//SIGNED//
 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. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records (BCM/NRs) regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal

sentence. BCM/NRs may grant clemency regardless of the court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds. This guidance does not mandate relief, but rather provides standards and principles to guide BCM/NRs in application of their equitable relief authority. In determining whether to grant relief on the basis of equity, injustice, or clemency grounds, BCM/NRs shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment. Changes to the narrative reason for discharge and/or an upgraded character of service granted solely on equity, injustice, or clemency grounds normally should not result in separation pay, retroactive promotions, and payment of past medical expenses or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded service characterization.

3. Title 10, U.S. Code, chapter 61, provides the Secretaries of the Military Departments with authority to retire or discharge a member if they find the member unfit to perform military duties because of physical disability. The U.S. Army Physical Disability Agency is responsible for administering the Army physical disability evaluation system (DES) and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with DOD Directive 1332.18 (Discharge Review Board (DRB) Procedures and Standards) and Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation).

a. Soldiers are referred to the disability system when they no longer meet medical retention standards in accordance with Army Regulation 40-501 (Standards of Medical Fitness), chapter 3, as evidenced in a Medical Evaluation Board (MEB); when they receive a permanent medical profile rating of 3 or 4 in any factor and are referred by an Military Occupational Specialty (MOS) Medical Retention Board (MMRB); and/or they are command-referred for a fitness-for-duty medical examination.

b. The disability evaluation assessment process involves two distinct stages: the MEB and Physical Evaluation Board (PEB). The purpose of the MEB is to determine whether the service member's injury or illness is severe enough to compromise 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.

4. Army Regulation 635-40 establishes the Army Disability Evaluation System and sets forth policies, responsibilities, and procedures that apply in determining whether a Soldier is unfit because of physical disability to reasonably perform the duties of his office, grade, rank, or rating. Only the unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability.

a. Disability compensation is not an entitlement acquired by reason of service-incurred illness or injury; rather, it is provided to Soldiers whose service is interrupted and who can no longer continue to reasonably perform because of a physical disability incurred or aggravated in military service.

b. Soldiers who sustain or aggravate physically-unfitting disabilities must meet the following line-of-duty criteria to be eligible to receive retirement and severance pay benefits:

(1) The disability must have been incurred or aggravated while the Soldier was entitled to basic pay or as the proximate cause of performing active duty or inactive duty training.

(2) The disability must not have resulted from the Soldier's intentional misconduct or willful neglect and must not have been incurred during a period of unauthorized absence.

c. The percentage assigned to a medical defect or condition is the disability rating. A rating is not assigned until the PEB determines the Soldier is physically unfit for duty. Ratings are assigned from the Department of Veterans Affairs (VA) Schedule for Rating Disabilities (VASRD). The fact that a Soldier has a condition listed in the VASRD does not equate to a finding of physical unfitness. An unfitting, or ratable condition, is one which renders the Soldier unable to perform the duties of their office, grade, rank, or

rating in such a way as to reasonably fulfill the purpose of their employment on active duty. There is no legal requirement in arriving at the rated degree of incapacity to rate a physical condition which is not in itself considered disqualifying for military service when a Soldier is found unfit because of another condition that is disqualifying. Only the unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability.

d. The case of a Soldier charged with an offense under the Uniform Code of Military Justice (UCMJ) or who is under investigation for an offense chargeable under the UCMJ which could result in dismissal or punitive discharge, may not be referred for, or continue, disability processing unless:

- the investigation ends without charges
- the officer exercising proper court-martial jurisdiction dismisses the charges
- the officer exercising proper court-martial jurisdiction refers the charge for trial to a court-martial that cannot adjudge such a sentence

e. An enlisted Soldier may not be referred for, or continue, physical disability processing action when action has been started under any regulatory provision which authorizes a character of service of under other than honorable conditions. If the case comes within these limitations, the commander exercising general court-martial jurisdiction over the Soldier may abate the administrative separation. This authority may not be delegated. A case file may be so referred if the general court-martial convening authority finds the following:

- the disability is the cause, or a substantial contributing cause, of the misconduct that might result in a discharge under other than honorable conditions
- other circumstances warrant disability processing instead of alternate administrative separation

5. Title 10, U.S. Code, section 1201, provides for the physical disability retirement of a member who has at least 20 years of service or a disability rating of at least 30 percent. Title 10, U.S. Code, section 1203, provides for the physical disability separation of a member who has less than 20 years of service and a disability rating of less than 30 percent.

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

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

b. Chapter 3 (Character of Service and Description of Separation) provides:

(1) An honorable discharge is a separation with honor. The honorable characterization is appropriate when the quality of the Soldier's service generally has met the standards of acceptable conduct.

(2) A general discharge is a separation from the Army under honorable conditions. When authorized, it is issued to a Soldier whose military record is satisfactory, but not sufficiently meritorious to warrant an honorable discharge.

(3) A discharge under other than honorable conditions is an administrative separation from the service under conditions other than honorable. It may be issued for misconduct, fraudulent entry, security reasons, or in lieu of trial by court-martial when the reason for separation is based upon a pattern of behavior that constitutes a significant departure from the conduct expected of Soldiers of the Army or when the reason for separation is based upon one or more acts or omissions that constitutes a significant departure from the conduct expected of Soldiers of the Army. Examples of factors that may be considered include the following:

- use of force or violence to produce serious bodily injury or death
- abuse of a special position of trust
- disregard by a superior of customary superior-subordinate relationships
- acts or omissions that endanger the security of the United States or the health and welfare of other Servicemembers
- deliberate acts or omissions that seriously endanger the health and safety of other persons

c. Chapter 14 (Separation for Misconduct) establishes policy and prescribes procedures for separating members for misconduct. Specific categories include minor disciplinary infractions, a pattern of misconduct, commission of a serious offense, use of illegal drugs, and convictions by civil authorities. Action will be taken to separate a member for misconduct when it is clearly established that rehabilitation is impracticable or is unlikely to succeed. A discharge under other than honorable conditions is normally considered appropriate for a Soldier discharged under this chapter.

7. 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.

8. 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.

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

//NOTHING FOLLOWS//