

IN THE CASE OF: [REDACTED]

BOARD DATE: 30 November 2022

DOCKET NUMBER: AR20220005439

APPLICANT REQUESTS: reconsideration of his previous request to be granted an exception to policy (ETP) to be issued a Notification of Eligibility for Retired Pay at Age 60 (Twenty Year Letter) and retired pay at age 60.

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

- DD Form 149 (Application for Correction of Military Record)
- U.S. Navy DD Form 214 (Certificate of Release or Discharge from Active Duty)
- Statement of Service for Naval Reserve Retirement
- National Guard Bureau (NGB) Form 22 (Report of Separation and Record of Service)
- NGB Form 55 (Honorable Discharge Certificate)
- Headquarters (HQs) HQs Battery (HHB), 3rd Battalion (BN), 111th Air Defense Artillery (ADA) Memorandum, Subject: Request for Expiration of Term of Service (ETS) Discharge of Staff Sergeant (SSG) [REDACTED] (the applicant)
- HQs, 3rd BN, 111th ADA Memorandum, Subject: Request for Discharge
- NGB Form 23B (Army National Guard (ARNG) Retirement Points History Statement)
- Office of the Adjutant General [REDACTED] Orders Number 165-306
- Adjutant General [REDACTED] letter
- Department of Veterans Affairs (VA) letter
- Letter to Congressional Liaison
- Army Review Boards Agency (ARBA) Docket Number AR20180015120
- Letter to the VA
- Two medical documents

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20180015120 on 7 May 2020 the Board denied the applicant's request. After the review of the applicant's request and supporting documents, the Board determined relief was not warranted. Based on the requirements of Title 10 United States Code (USC), section 12731, the Board

concluded it did not have authority to grant an ETP, as one is not outlined in the law. As a result, the Board concluded there was insufficient evidence of an error or injustice which would warrant a change to the applicant's records.

2. The applicant states he requests a reconsideration for an ETP to Army Regulation (AR) 135-180 (Retirement for Non-Regular Service), paragraph 2-3a(2) (For Soldiers who completed the years of qualifying service on or after 5 October 1994, but before 25 April 2005, the last 6 years of qualifying service must have been in a component other than a regular component, the Fleet Reserve, or the Fleet Marine Corps Reserve) and be allowed to received retirement pay for his 21 years of qualifying service in the Armed Forces of the United States.

a. Pursuant to AR 135-180, paragraph 2-3a(2), he is being denied retirement pay because he only completed 5 years of qualifying service in the reserve component, rather than 6 years, before being honorably discharged and transferred to the Retired Reserve. He received his retirement discharge certificate and was discharged into the Retired Reserve, however, he never received his 20 Year Letter due to this requirement.

b. He has a total of 21 years of qualifying service for retirement pay purpose. He is being denied retirement because he is a year short for qualifying service in the Reserve Component. This requirement of 6 years was only the minimum requirement during the period 5 October 1994 to 25 April 2005. Had he been properly advised of this requirement; he would have completed the final necessary year in the Reserve Component. He only left the Reserve Component early because of the medical condition he contracted while on active service, despite VA (Department of Veterans Affairs) claims. He received treatment at the VA Hospital [REDACTED] for Hepatitis C. During the treatment period, he was unable to attend drill weekends because of the treatment and was retired as a result. However, he was never informed of the requirement to complete one more year for retirement pay. He has been treated as a retired member of the Armed Forces, but he is now being denied his full benefits for lack of 20-Year letter despite all treatment as a retired member.

3. Review of the applicant's service records shows:

a. The applicant turned age 60 in December 2018.

b. The applicant enlisted in the U. S. Navy (USN) on 23 January 1985. The applicant was honorably discharged from active duty on 1 October 1993. DD Form 214 shows the applicant completed 8-years, 8-months, and 9-days of active service. It also shows he had 7-years, 4-months, and 1-day of prior active service. He was voluntarily discharged under the 1993 Voluntary Separation Incentive (VSI) or Special Separation Bonus (SSB) with a lump sum SSB payment of \$52,686.35.

c. He also served in the Naval Reserve from 2 October 1993 to 30 June 1997, enlisted in the Naval Reserve on 1 July 1997 and extended on 30 June 2001.

d. He enlisted in the ARNG on 25 July 2001.

e. The applicant was honorably discharged from the ARNG and transferred to the U. S. Army Reserve (USAR) Control Group (Retired Reserve) on 30 June 2004. NGB Form 22 shows he completed 2 years, 11 months, and 6 days of service.

f. NGB Form 23B shows he completed 21 qualifying years of service toward non-regular retirement. However, he only completed 3 qualifying years of service during his Naval Reserve service and 2 qualifying years of service during his ARNG service between 2001 and 2004.

g. On 14 June 2006, Orders Number 165-306, issued by the Office of the Adjutant General [REDACTED], the applicant was discharged from the ARNG, effective 30 June 2004 and assigned to the USAR Control Group (Retired Reserve).

h. On 7 May 2020 the Board denied the applicant's request. After the review of the applicant's request and supporting documents, the Board determined relief was not warranted. Based on the requirements of Title 10 USC, section 12731, the Board concluded it did not have authority to grant an ETP, as one is not outlined in the law. As a result, the Board concluded there was insufficient evidence of an error or injustice which would warrant a change to the applicant's records.

4. The applicant provides:

a. Statement of Service for Naval Reserve Retirement shows the applicant had 16-years of active qualifying service and 2-years of reserve qualifying service.

b. NGB Form 55 shows the applicant was honorably discharged from the ARNG, effective 30 June 2004.

c. On 11 August 2004, by memorandum through the applicant's commander, he requested discharge. His commander stated the applicant has chosen to ETS due to a medical condition incurred while in the USN that did not become apparent until after his enlistment in the [REDACTED] ARNG. He was placed in the Inactive National Guard for a year so that he would have time to treat and recover from his bout with Hepatitis. He is currently working with the VA to facilitate his recovery. The packet is late due to the fact that the unit worked to try to get him a physical so he would have the option to extend if permitted, however he was advised by VA that it would not affect his claim if he was to ETS from the [REDACTED] ARNG.

d. On 16 November 2004, the [REDACTED] ARNG adjutant of the 3rd BN, 111th ADA recommended approval of the applicant's request for discharge for ETS and the applicant did not have a remaining service obligation.

e. On 29 August 2006, the Adjutant General [REDACTED] forwarded a flag of honor for the applicant's retirement from the [REDACTED] ARNG and thanked him for his service.

f. VA letter dated 23 October 2018, notified the applicant of an adjustment to his end date of recoupment on his Special Separation Benefit as a result of an audit of his VA compensation award to correct the withholding to an after tax amount as he paid federal tax on the SSB.

g. Letter to Congressional Liaison dated 4 February 2021, which stated he requested his case be reviewed, he thought he was eligible for retirement, but found out he needed to have one more qualifying year.

h. Letter, dated 15 April 2008, from the applicant to the VA, wherein he stated that he had been trying to get disability coverage for his illness through the VA since October 2003. He asked for his claim to be reviewed.

i. Letter, dated 3 January 2003, from a Digestive and Liver Disease Specialist, who states the applicant is a patient currently under his control for a chronic medical condition and is currently receiving active medical therapy that requires him to have frequent laboratory checks as often as every 30 days. It would be to his best medical interest to stay locally so that he can have these important laboratory evaluations maintained.

j. Letter, dated 5 December 2007, from a Medical Center wherein a medical doctor states the applicant has chronic Hepatitis C. It is highly likely that he acquired this infection while serving in the military between 1978 and 1993. He was noted to have elevated liver enzymes while serving in the military on several occasions. In addition, he underwent a surgical procedure while in the military in the 1980s, prior to the discovery of Hepatitis C virus and before blood products could be screened for Hepatitis C. Other risk factors include participating in mass inoculation while in the service. He also reports receiving a tattoo while in the service. These are all possible risk factors for acquiring Hepatitis C. He has never utilized intravenous drugs. He has never received blood products outside of military service. It is therefore his opinion that the applicant acquired Hepatitis C virus while serving in the military. His Hepatitis C and all of its complications should be considered service connected.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation. Upon review of the applicant's +petition, available military records and U.S. Army Human Resources Command (AHRC) advisory opinion, the Board considered the advising official findings that the applicant's final six years of service were in a reserve component, and he still needed to meet the minimum requirement of earning 5 retirement points per year, which the applicant did not. However, the Board determined based on the preponderance of evidence, it appears the applicant received poor guidance/counseling/instructions regarding his time in service. The applicant's commander stated the applicant has chosen to ETS due to a medical condition incurred while in the USN that did not become apparent until after his enlistment in the [REDACTED] ARNG.

2. The Board agreed the applicant enlisted into the [REDACTED] ARNG without knowing there was a medical condition that would prevent him from completing his enlistment contract. The Board found having AHRC make point corrections to the applicant's DA Form 5016.is warranted. Based on the, the Board granted relief for an exception to policy (ETP) to the applicant and be issued a Notification of Eligibility for Retired Pay at Age 60 (Twenty Year Letter) and retired pay at age 60.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

[REDACTED]	[REDACTED]	[REDACTED]	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board determined the evidence presented is sufficient to warrant a recommendation for relief. As a result, the Board recommend that all Department of the Army record for the individual concerned be corrected to by Army Human Resources Command to make point corrections to the applicant's DA Form 5016 (Chronological Statement of Retirement Points) for exception to policy (ETP) to be issued a Notification of Eligibility for Retired Pay at Age 60 (Twenty Year Letter) and retired pay at age 60.

10/11/2023

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, USC, section 12731 (Age and Service Requirements) states (a), except as provided in subsection (c), a person is entitled, upon application, to retired pay computed under section 12739 of this title, if the person—

- a. (1) has attained the eligibility age applicable under subsection (f) to that person;
- b. (2) has performed at least 20 years of service computed under section 12732 of this title;
- c. (3) in the case of a person who completed the service requirements of paragraph (2) before 25 April 2005, performed the last six years of qualifying service while a member of any category named in section 12732(a)(1) of this title, but not while a member of a regular component, the Fleet Reserve, or the Fleet Marine Corps Reserve, except that in the case of a person who completed the service requirements of paragraph (2) before 5 October 1994, the number of years of such qualifying service under this paragraph shall be eight; and
- d. (4) is not entitled, under any other provision of law, to retired pay from an armed force or retainer pay as a member of the Fleet Reserve or the Fleet Marine Corps Reserve.

2. Army Regulation 135-180 (Reserve Retirement for Non-Regular Service) prescribes policies and procedures governing non-regular retirement.

a. Paragraph 2-2, the basic qualifying service requirements. To be eligible for retired pay at or after the age specified in paragraph 2-1, an individual need not have military status at the time of application, but must have completed one of the following:

(1) A minimum of 20 years of qualifying service computed under Title 10, USC, section 12732; or,

(2) 15 years of qualifying service, and less than 20, computed under Title 10, USC, section 12732, if the individual is to be separated because the Soldier has been determined unfit for continued Selected Reserve service, and none of the conditions in Title 10, USC, section 12731b(b) exist.

b. Paragraph 2-3. Other service requirements. The additional Reserve Component service requirements include

(1) For Soldiers who completed the years of qualifying service in paragraph 2-2 before 5 October 1994, the last 8 years of qualifying service must have been in a component other than a regular component, the Fleet Reserve, or the Fleet Marine Corps Reserve.

(2) For Soldiers who completed the years of qualifying service on or after 5 October 1994, but before 25 April 2005, the last 6 years of qualifying service must have been in a component other than a regular component, the Fleet Reserve, or the Fleet Marine Corps Reserve.

//NOTHING FOLLOWS/