

IN THE CASE OF: [REDACTED]

BOARD DATE: 16 November 2023

DOCKET NUMBER: AR20230001259

APPLICANT REQUESTS: correction of his disability retirement order (D108-25), issued by the U.S. Army Physical Disability Agency on 18 January 2013 to amend the statute authorizing his retirement from 10 USC section 1204 to 10 USC section 1201.

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

- DD Form 149 (Application for Correction of Military Record)
- Order D 108-25, 18 January 2013 (disability retirement)
- Order 079-753, 20 March 2009, order to active duty
- Order A-06-916941, 11 June 2009, retention on active duty
- DA Form 199 (Informal Physical Evaluation Board (PEB) Proceedings)

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.

2. The applicant states the U.S. Army Physical Disability Agency (USAPDA) retirement Order D108-25, dated 18 January 2013, needs a minor change. Currently the section entitled "Statute authorizing retirement" is listed in error as [Title 10, U.S. Code] section 1204. It needs to read section 1201, reflecting the fact that the disabling conditions occurred while on active duty orders in accordance with 10 USC§ 1201.

a. He contracted permanent nerve damage while mobilized for Operation Iraqi Freedom (OIF) in 2009. His DA Form 199 (Informal PEB Proceedings) states that his condition developed "a few days after mobilization," referencing 400-day OIF orders of 20 March 2009 and precluding 10 USC §1206a. On advice from the Warrior Transition Unit (WTU), he chose to be released from active duty instead of waiting on active duty for the Integrated Disability Evaluation System (IDES) to finish, so the order status defaulted to §1204 when USAPDA's retirement orders came 2 years later. Army Regulation (AR) 635-40 (Physical Disability for Retention, Retirement, or Separation), paragraph 8-5, Para c. covers this exact situation.

b. The USAPDA retirement orders defaulted to section 1204 because that was his then-current duty status in January 2013, after being released from active duty. But the statutes and regulations are concerned with his status at the time of the disabling conditions (Active Duty mobilization), not when the retirement orders were eventually cut (Reserve Component hold). AR 635-40, 5-8, Para. c and 5-10, Para. b. describes the applicability of 10 US Code § 1201. His attached OIF orders (10 USC § 12302) meet these criteria, while his DA Form 199 connects the timing of his disabling conditions to his orders.

c. Also, the language in the DA Form 199 confirms these conditions weren't pre-existing, so 10 US Code § 1206a doesn't apply (also ref. Para. "o" in OIF Order 079-753 and Orders A-06-916941 of 2009 06 11, attached). The opposite case can be found in AR 635-40, 5-12, the regulation on the applicability of 10 US Code § 1204. That section is for Reserve Component soldiers disabled while on a reserve, IDT (inactive duty training), or ADT (active duty training) status. The language in his DA Form 199 states that his disabilities occurred during his tour of active duty, not as a reservist. Section 1201 is the appropriate designation.

c. He has exhausted administrative remedies. He has contacted the U.S. Army Human Resources Command at Fort Knox, KY, and the USAPDA. This error makes him ineligible for the GI Bill Yellow Ribbon Program. He left active duty because of permanent physical disability. This fixes that record and his eligibility.

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

a. Having had prior enlisted service, he executed an oath of office and was appointed a Reserve commissioned officer of [REDACTED] Army National Guard ([REDACTED] ARNG) on 18 December 2003.

b. On 20 March 2009, Department of Military Affairs, Military Division, [REDACTED] ARNG published Orders 079-753, ordering him to active duty as a member of his Reserve Component Unit not to exceed 400 days in support to OIF (10 USC section 12302). He would report to Fort Stewart, GA on 5 May 2009.

c. He entered active duty on 2 May 2009.

d. On 11 June 2009, the U.S. Army Human Resources Command published Order A-06-916941, retaining him on active duty under the provisions of 10 USC section 12301(B), effective 11 June 2009 to participate in the Reserve Component Warriors in Transition Medical Retention Processing Program (MRP), for completion of medical care and treatment. He was retained on active duty in MRP status to complete medical care and treatment in current Reserve grade.

e. He was honorably released from active duty on 29 July 2010 in accordance with paragraph 2-7 of Army Regulation (AR) 600-8-24 (Officer Transfers and Discharges) by reason of completion of his required active service (Separation Code MBK). He completed 1 year, 2 months, and 28 days of active service.

f. Following his release from active duty, the applicant returned to being a drilling member of the ARNG.

g. On 20 December 2012, an informal PEB convened and found the applicant's medical conditions, listed below, unfitting.

- Peripheral neuropathy right upper extremity associated with Guillain-Barre syndrome, 30%
- Peripheral neuropathy left upper extremity associated with Guillain-Barre Syndrome, 20%
- Peripheral neuropathy right lower extremity associated with Guillain-Barre Syndrome, 10%
- Peripheral neuropathy left lower extremity associated with Guillain-Barre Syndrome, 10%

(1). The PEB stated the applicant developed symptoms of weakness and paresthesias in his arms and on his feet on 8 May 2009, a few days after mobilization for active duty.

(2) The PEB rated his conditions at a combined disability rating of 70% and his disposition as permanent disability retirement. The applicant concurred and waived his right to a formal hearing of his case.

h. On 18 January 2013, the USAPDA published Orders D 018-25, releasing him from assignment and duty because of physical disability incurred while entitled to basic pay and under conditions that permit your retirement for permanent physical disability, and placing him on the retired list, in the grade of captain effective 18 January 2013. The Additional Instructions read:

- Percentage of disability: 70%
- Component: ARNGUS
- Authority: AR 635-40
- Statute authorizing retirement: 1204
- Disability is based on injury or disease received in LOD as a direct result of Armed Conflict or caused by an instrumentality of war and incurred in the LOD during a war period as defined by law: NO
- Disability resulted from a combat related injury as defined in 26 USC 104: NO

4. On 6 June 2023, the USAPDA provided an advisory opinion in the processing of this case. An advisory official stated:

a. This memorandum is in response for a request for advisory opinion regarding [Applicant] request that the referenced statute authorizing his retirement be amended from 10 USC section 1204 to 10 USC section 1201. For the reasons below, the USAPDA finds his request legally insufficient.

b. On 2 May 2009, the applicant mobilized in support of OIF. On 8 May 2009, he injured his bilateral upper and lower extremity nerves. This resulted in him being transferred to the Warrior Transition Unit on 11 June 2009. He was to process through the Disability Evaluation System. However, and admittedly, he volunteered to leave active duty and return to drilling status in accordance with AR 600-8-24. Paragraph 207 (Voluntary Release from Active Duty due to hardship). On 29 July 2010, he was released from active duty and returned to the [REDACTED] ARNG.

c. Almost 15 months later, on 20 December 2012, the informal PEB found his referred conditions unfitting and recommended a disposition of permanent disability retirement with a combined rating of 70%. It was noted on the DA Form 199 that his component/duty status was ARNG drilling member. He reviewed and accepted these findings and recommendations on 4 January 2013. On 18 January 2013, his case was finalized, and he was placed on the permanent disability retired list in accordance with 10 USC section 1204.

d. 10 USC section 1204 is titled, "Member on active duty for 30 days or less or on inactive duty training, retirement." 10 USC section 1201 is titled "Regulars and members on active duty for more than 30 days, retirement." 10 USC section 1201 (c)(2) also provided who is an eligible member. "Any other member of the armed forces entitled to basic pay who has been called or ordered to active duty for a period of more than 30 days . The applicant's Officer Record Brief indicates he was never an active duty member. Between 2 May 2009 and 29 July 2010, he was a mobilized [REDACTED] ARNG member on active duty orders for more than 30 days. After 29 July 2010, and prior to his retirement on 18 January 2013, he was not on active duty for a period of more than 30 days. More specifically, he was not on active duty orders for a period of more than 30 days prior to 18 January 2013. Thus, 10 USC section 1201 would not have been the appropriate statutory authority to retire him. In accordance with 10 USC section 1204, "upon a determination by the Secretary concerned that a member of the armed forces not covered by section 1201the Secretary may retire the member with retired pay." Since the applicant was not eligible for a section 1201 retirement, section 1204 applied because he was a drilling member of the ARNG and was not on active duty orders greater than 30 days at the time of his retirement.

d. In conclusion, based upon the above, the USAPDA finds his request to change the authority for his retirement from 10 USC section 1204 to 10 USC section 1201 is legally insufficient.

5. The applicant was provided with a copy of this advisory opinion. He responded on 25 August 2023 and stated:

a. While he fully agrees with their background facts, he believes the analysis misses the core legal issue from his request: his career-ending disabilities occurred on deployment orders. Their analysis focuses instead on what his status was when the retirement orders were issued, and so arrives at the wrong conclusion. In determining the applicability of 10 U.S. Code§ 1201, Paragraph (b) (3) (B) contains four categorizing paragraphs:

- the disability was not noted at the time of the member's entrance on active duty
- the disability is the proximate result of performing active duty
- the disability was incurred in line of duty in time of war or national emergency; or
- the disability was incurred in line of duty after September 14, 1978.

a. As noted in his DA Form 199, his disabilities fit these criteria. In contrast, the Advisory Opinion argues that, because he wasn't on active duty when his retirement orders were issued (Memorandum, pg. 2), § 1204 is the appropriate designation. But 10 U.S. Code§§ 1201 and 1204 make these designations based on when the disabilities occur, not on what the status of the soldier is when retirement orders are processed. § 1204 is appropriate when reservists are injured on active duty for training purposes (annual training, military schooling, or state operational support) fewer than 30 days or on weekend drills. But his disabilities didn't occur "while performing active duty or inactive-duty training" (ref: § 1204, Para. 2), they occurred while he was on 400-day orders under 10 U.S. Code§ 12302. Because these statutes focus on the military member's status at the time of the disabling condition, the appropriate designation is §1201.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, a majority of the Board found relief is warranted.

2. A majority of the Board concurred with the applicant's conclusion that, because he was on orders for more than 30 days at the onset of the disabling conditions that led to his retirement, Title 10, U.S. Code, section 1201 is the appropriate statutory authority for

his retirement. A majority of the Board determined his retirement orders should be corrected to show this statutory authority.

3. The member in the minority concurred with the conclusion of the advisory official that Title 10, U.S. Code, section 1204, was the appropriate statutory authority for his retirement because of his status as a drilling member of the ARNG when he underwent processing through the Disability Evaluation System. The member in the minority determined the statutory authority on his retirement orders is not in error or unjust.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

■	:	■	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 recommends that all Department of the Army records of the individual concerned be corrected by amending U.S. Army Physical Disability Agency Orders D 018-25, 18 January 2013, to show the statute authorizing retirement is "1201."

2/16/2024

X [REDACTED]

CHAIRPERSON

[REDACTED]

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. Title 10, U.S. Code, § 1201 - Regulars and members on active duty for more than 30 days: retirement:

a. Retirement.— Upon a determination by the Secretary concerned that a member described in subsection (c) is unfit to perform the duties of the member's office, grade, rank, or rating because of physical disability incurred while entitled to basic pay or while absent as described in subsection (c)(3), the Secretary may retire the member, with retired pay computed under section 1401 of this title, if the Secretary also makes the determinations with respect to the member and that disability specified in subsection (b).

b. Required Determinations of Disability.—Determinations referred to in subsection (a) are determinations by the Secretary that—

(1) based upon accepted medical principles, the disability is of a permanent nature and stable;

(2) the disability is not the result of the member's intentional misconduct or willful neglect, and was not incurred during a period of unauthorized absence; and

(3) either—(A) the member has at least 20 years of service computed under section 1208 of this title; or (B) the disability is at least 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs at the time of the determination; and either—(i) the disability was not noted at the time of the member's entrance on active duty (unless clear and unmistakable evidence demonstrates that the disability existed before the member's entrance on active duty and was not aggravated by active military service); (ii) the disability is the proximate result of performing active duty; (iii) the disability was incurred in line of duty in time of war or national emergency; or (iv) the disability was incurred in line of duty after September 14, 1978.

c. Eligible Members.—This section and sections 1202 and 1203 of this title apply to the following members:

(1) A member of a regular component of the armed forces entitled to basic pay.

(2) Any other member of the armed forces entitled to basic pay who has been called or ordered to active duty (other than for training under section 10148(a) of this title) for a period of more than 30 days.

(3) Any other member of the armed forces who is on active duty but is not entitled to basic pay by reason of section 502(b) of title 37 due to authorized absence (A) to participate in an educational program, or (B) for an emergency purpose, as determined by the Secretary concerned

3 Title 10, U.S. Code, § 1204 - Members on active duty for 30 days or less or on inactive-duty training: retirement: Upon a determination by the Secretary concerned that a member of the armed forces not covered by section 1201, 1202, or 1203 of this title is unfit to perform the duties of his office, grade, rank, or rating because of physical disability, the Secretary may retire the member with retired pay computed under section 1401 of this title, if the Secretary also determines that—:

a. (1) based upon accepted medical principles, the disability is of a permanent nature and stable;

b. (2) the disability—

(A) was incurred before September 24, 1996, as the proximate result of—
(i)performing active duty or inactive-duty training; ii)traveling directly to or from the place at which such duty is performed; or (iii)an injury, illness, or disease incurred or aggravated while remaining overnight, immediately before the commencement of inactive-duty training, or while remaining overnight between successive periods of inactive-duty training, at or in the vicinity of the site of the inactive-duty training, if the site of the inactive-duty training is outside reasonable commuting distance of the member's residence;

(B) is a result of an injury, illness, or disease incurred or aggravated in line of duty after September 23, 1996— (i)while performing active duty or inactive-duty training; (ii)while traveling directly to or from the place at which such duty is performed; or (iii)while remaining overnight, immediately before the commencement of inactive-duty training, or while remaining overnight between successive periods of inactive-duty training, at or in the vicinity of the site of the inactive-duty training; or

(C) is a result of an injury, illness, or disease incurred or aggravated in line of duty— (i)while the member was serving on funeral honors duty under section 12503 of this title or section 115 of title 32; (ii)while the member was traveling to or from the place at which the member was to so serve; or (iii)while the member remained overnight at or

in the vicinity of that place immediately before so serving, if the place is outside reasonable commuting distance from the member's residence;

c. (3) the disability is not the result of the member's intentional misconduct or willful neglect, and was not incurred during a period of unauthorized absence; and

d. (4) either— (A) the member has at least 20 years of service computed under section 1208 of this title; or (B) the disability is at least 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs at the time of the determination.

4. Army Regulation 635-40, Disability Evaluation for Retention, Retirement, or Separation, paragraph 5-8 states that adjudication of compensability under the provisions of 10 U.S. Code §1201 applies to Reserve Component Soldiers in a REFRAD status who are referred to the Disability Evaluation System for a disability incurred or aggravated when the Soldier was on an order to active duty specifying a period of more than 30 days.

//NOTHING FOLLOWS//