

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 2 January 2024

DOCKET NUMBER: AR20230002023

APPLICANT REQUESTS: disability retirement vice non-regular retirement at age 60 from the Army National Guard.

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

- DD Form 149 (Application for Correction of Military Record)
- Department of Veterans Affairs (VA) Rating Decision

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 prior to retiring from the Army National Guard, he transferred his GI Bill benefits to his wife. He retired without completing the required four years after transferring the benefits due to his deteriorating physical condition, VA disability of 80%. The VA recently has asked for all the monetary benefits back. They list several scenarios where this would not apply, but do not address retirement in any of their scenarios. He thinks a medical retirement might be an option. He was not authorized retirement physical, due to his status as a traditional guardsman; so, this was never discussed with the Medical Command in his State.
3. Review of the applicant's service records shows:
 - a. He was born on XX M___ 1960 and turned 60 years of age in M___ 2020
 - b. Having had prior enlisted and commissioned officer service in the Kentucky Army National Guard, the applicant enlisted in the Arizona Army National Guard (AZARNG) on 28 October 1996. He held an infantry specialty.
 - c. He served through multiple extensions or reenlistments, in a variety of assignments, including active duty mobilizations (June 1999 to February 2000,

December 2004 to December 2004, and January 2007 to June 2008) with service in Iraq and Afghanistan, and he attained the rank of sergeant major (SGM)/E-9.

d. On 2 November 2007, Joint Forces Headquarters, AZARNG issued the applicant a Notification of Eligibility or Retired Pay at Age 60 (20-Year Letter).

e. On 29 February 2016, AZARNG published orders discharging him from the Army National Guard and assigning him to the Retired Reserve effective 29 February 2016, in accordance with National Guard Regulation 600-200, Enlisted Personnel Management.

f. He was discharged from the ARNG on 29 February 2016. His NGB Form 22 (Report of Separation and Record of Service) shows he completed 19 years, 4 months, and 3 days of ARNG service during this period (in addition to his prior active and inactive service).

g. His NGB Form 23A, ARNG Current Annual Statement, shows he completed 29 qualifying years of service towards non-regular retirement.

h. As he approached age 60, he submitted a DD Form 108, Application for Retired Pay Benefits. His request was approved.

i. On 20 April 2020, the U.S. Army Human Resources Command published Orders C04-093653 placing him on the retired list in his retired grade of first sergeant (amended to SGM, and again to captain) effective XX M___ 2020 (his 60th birthday).

4. 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.

5. 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.

6. Title 38, CFR, Part IV is the VA's schedule for rating disabilities. The VA awards disability ratings to veterans for service-connected conditions, including those conditions detected after discharge. As a result, the VA, operating under different policies, may award a disability rating where the Army did not find the member to be unfit to perform his duties. Unlike the Army, the VA can evaluate a veteran throughout his or her lifetime, adjusting the percentage of disability based upon that agency's examinations and findings.

7. 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, the military electronic medical record (EMR) (AHLTA and/or MHS Genesis), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant is applying to the ABCMR requesting his nonregular length of service retirement be revoked and, in essence, that he be referred to the Disability Evaluation System (DES) and subsequently granted a permanent retirement for physical disability. He states:

“Prior to retiring from the Army National Guard, I transferred my GI Bill benefits to my wife. I retired without completing the required four years after transferring the benefits due to my deteriorating physical condition, VA disability of 80%. The VA recently has asked for all the monetary benefits back. They list several scenarios where this would not apply, but do not address retirement in any of their scenarios. I think a medical retirement might be an option.”

I was not authorized retirement physical, due to my status as a traditional guardsman; so this was never discussed with the Medical command in my state.”

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. The applicant's Report of Separation and Record of Service (NGB Form 22) for the period of Service under consideration shows he enlisted in the Army National Guard on 28 October 1996 and was transferred from the Arizona Army National Guard (AZARNG) to the Retired Reserve on 29 February 2016 under the provisions of paragraph 6-36o of NGR 600-200, Enlisted Personnel Management (31 July 2009). It shows and 29 years, 0 months, and 0 days for retired pay.

d. The applicant had received his Notification of Eligibility for Retired Pay at Age 60 (Twenty Year Letter) from the AZARNG on 2 November. Orders published by the United States Arm Human Resources Command on 27 May 2020 show the applicant was placed on the AUS Retired List effective 24 May 2020.

e. No medical documentation was submitted with the application and the applicant did not identify a condition or condition(s) which he believes was/were unfitting for continued military service. There are no encounters in the EMR.

f. MEDCHART contains no duty limiting permanent physical profiles. His last temporary profile was in 2007. It was in place while the applicant completed cardiovascular screening to rule out significant cardiovascular disease IAW paragraph 8-26 of AR 40-501, Standards of Medical Fitness (4 August 2011): Cardiovascular Screening Program (CVSP).

g. The applicant completed his final Periodic Health Assessment on 12 April 2015. He noted he had seen a pulmonologist and a neurologist in the past year with the provider annotating "No Limitations." He listed his only medication as "Vitamins;" marked that he was not receiving any VA disability, workman's compensation, or other type of compensation for health or physical reason; and marked that he was not a profile or had a medical condition that prevented him from taking any part of the Army Physical Fitness Test (APFT), required him to take alternate APFT event, or prevented him from doing his military duties.

h. He noted that he had a history or currently had headaches, 2 herniated lumbar discs, a persistent rash, musculoskeletal joint pains, and gall stones. The provider documented no limitations. His behavioral health screening was negative. The provider concluded the application had no limitations.

i. Soldiers retiring from active duty, to include Soldiers in the Active Guard Reserve (AGR), are required to undergo a medical examination prior to retirement. However, as stated in paragraph 8-24b of AR 40-501:

"Soldiers separating from the Army will receive a separation medical examination if the Soldier requests it, or if, on review of the medical records or the DD Form 2697, a physician, a physician assistant, or a nurse practitioner feels an examination is appropriate (with exception noted in c, below)."

j. His final NCO Evaluation Report was an annual with a thru date of 30 August 2015. It shows he passed his APFT in April 2015 with the rater commenting "consistently scores above 270 on the APFT". His senior rated blocked him with 2's on a scale of 1 to 5 stating:

- "solid performance as Battalion Operations Sergeant Major
- excellent potential for positions of increasing responsibility; select with peers for Command Sergeant Major
- currently enrolled in USASMA [United States Army Sergeant Major Academy]

k. Paragraph 5a in appendix 2 to enclosure 3 of Department of Defense Instruction (DODI) 1332.18 SUBJECT: Disability Evaluation System (DES), 5 August 2014 states:

"The Disability Evaluation System (DES) compensates disabilities when they cause or contribute to career termination."

l. This concept is incorporated in paragraph 4-1c(2) of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (19 January 2017), which states that one of the objectives of the DES is to “Provide benefits for eligible Soldiers whose military Service is terminated because of a disability incurred in the LOD.”

m. There is no evidence the applicant had a medical condition which would have failed the medical retention standards of chapter 3, AR 40-501, Standards of Medical Fitness, and been a cause for referral to the DES prior to his transfer to the retired reserve after 29 years of Service. Furthermore, there is no evidence that any medical condition prevented the applicant from being able to reasonably perform the duties of her office, grade, rank, or rating prior to his transfer to the Retired Reserve.

n. JLV shows he has been awarded multiple VA service-connected disability ratings. However, the DES only compensates an individual for service incurred medical condition(s) which have been determined to disqualify him or her from further military service and consequently prematurely ends their career. The DES has neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions which were incurred or permanently aggravated during their military service; or which did not cause or contribute to the termination of their military career. These roles and authorities are granted by Congress to the Department of Veterans Affairs and executed under a different set of laws.

o. Paragraph 3-1 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (20 March 2012) states:

“The mere presence of an impairment does not, of itself, justify a finding of unfitness because of physical disability. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier reasonably may be expected to perform because of their office, grade, rank, or rating.”

p. It is the opinion of the ARBA medical advisor that a referral of his case to the DES is not warranted.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The applicant’s contentions, the military record, and regulatory guidance were carefully considered. The applicant served in the ARNG from October 1996 until he was transferred to the Retired Reserve on 29 February 2016, completing 29 years for retired pay. He was issued a 20-Year Letter and was ultimately placed on the retired list on his 60th birthday. The Board reviewed the medical advisor’s finding and agreed that there is no evidence the

applicant had a medical condition which would have failed the medical retention standards of chapter 3, AR 40-501, Standards of Medical Fitness, and been a cause for referral to the disability evaluation system (DES) prior to his transfer to the retired reserve after 29 years of Service. Furthermore, there is no evidence that any medical condition prevented the applicant from being able to reasonably perform the duties of her office, grade, rank, or rating prior to his transfer to the Retired Reserve. The Board determined that a referral of his case to the DES is not warranted.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	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.

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I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

REFERENCES:

1. Title 10, U.S. Code, section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to

timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.

2. Army Regulation 40-501 provides information on medical fitness standards for induction, enlistment, appointment, retention, and related policies and procedures. Soldiers with conditions listed in chapter 3 who do not meet the required medical standards will be evaluated by an MEB and will be referred to a PEB as defined in Army Regulation 635–40 with the following caveats:

a. USAR or ARNG Soldiers not on active duty, whose medical condition was not incurred or aggravated during an active duty period, will be processed in accordance with chapter 9 and chapter 10 of this regulation.

b. Reserve Component Soldiers pending separation for In the Line of Duty injuries or illnesses will be processed in accordance with Army Regulation 40-400 (Patient Administration) and Army Regulation 635-40.

c. Normally, Reserve Component Soldiers who do not meet the fitness standards set by chapter 3 will be transferred to the Retired Reserve per Army Regulation 140–10 or discharged from the Reserve Component per Army Regulation 135–175 (Separation of Officers), Army Regulation 135–178 (ARNG and Reserve Enlisted Administrative Separations), National Guard Regulation 600-200, or other applicable Reserve Component regulation. They will be transferred to the Retired Reserve only if eligible and if they apply for it.

d. Reserve Component Soldiers who do not meet medical retention standards may request continuance in active USAR status. In such cases, a medical impairment incurred in either military or civilian status will be acceptable; it need not have been incurred only in the line of duty. Reserve Component Soldiers with non-duty related medical conditions who are pending separation for not meeting the medical retention standards of chapter 3 may request referral to a PEB for a determination of fitness in accordance with paragraph 9–12.

3 National Guard Regulation 600-200 (Enlisted Personnel Management) prescribes the criteria, policies, processes, procedures, and responsibilities to classify, assign, utilize, transfer, separate and appoint ARNG and Army National Guard of the United States enlisted Soldiers. Paragraph 6-35 (Separation/Discharge from State ARNG and/or Reserve of the Army) section I, provides for the separation of Soldiers found medically unfit for retention per Army Regulation 40-501.

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. Soldiers are referred to the disability system when they no longer meet medical retention standards in accordance with Army Regulation 40-501, chapter 3, as evidenced in a medical evaluation board (MEB); when they receive a permanent physical profile rating of "3" or "4" in any functional capacity factor and are referred by a Military Occupational Specialty Medical Retention Board; 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 or 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 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 are either 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 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 medical impairment prevents reasonable performance of the duties required of the Soldier's office, grade, rank, or rating.

d. 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.

e. 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.

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.

7. 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//