

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 12 December 2023

DOCKET NUMBER: AR20230003271

APPLICANT REQUESTS:

- reconsideration of his prior request for physical disability retirement in lieu of honorable discharge due to promotion non-selection
- personal appearance before the Board

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

- DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States)
- self-authored statement
- DD Form 214 (Certificate of Release or Discharge from Active Duty), covering the period ending 25 July 2006
- Queen's Sleep Center, Polysomnographic Report, dated 8 September 2010
- DA Form 4186 (Medical Recommendation for Flying Duty), dated 3 February 2011
- DA Form 4186, dated 5 April 2012
- DA Form 2142 (Pay Inquiry), dated 3 May 2012
- DD Form 214, covering the period ending 2 January 2015
- Department of Veterans Affairs (VA) letter, dated 10 July 2022
- VA Disability Ratings printout, undated

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 AR20170001923 on 28 May 2020.

2. The applicant states:

a. He is seeking reconsideration of his prior request for placement on the Permanent Disability Retired List (PDRL) based on newly available supporting evidence. He was never assessed by a Medical Evaluation Board (MEB) or Physical

Evaluation Board (PEB), although he was diagnosed with sleep apnea nearly 4 years prior to his discharge.

b. As a result of his sleep apnea, he also suffered from severe migraine headaches, for which a special and expensive medication was required. These diagnoses are well documented in his military medical files as he was the subject of a sleep study and was prescribed a continuous positive airway pressure (CPAP) machine through the Department of Defense (DOD) health care system. He should be placed on the PDRL, as his service-connected disabilities caused the loss of his military career.

c. The applicant takes issue with multiple portions of his prior Record of Proceedings in Docket Number AR20170001923. The Board states in that Record of Proceedings that he did not file within the three-year time frame provided in Title 10, U.S. Code, section 1552(b). This is incorrect. He was discharged on 2 January 2015 and discovered the error on or around 2 January 2017. His original application to the Board for relief was submitted on or around 18 January 2017.

d. The Board also states his record is void of any indication he was diagnosed with and treated for sleep apnea during his period of service or that this condition was the basis for his discharge for being twice non-selected for promotion. The applicant contends the Army's failure to retain complete and accurate medical records for duty personnel is not grounds for denying him relief.

e. Additionally, he received a referral from military medical personnel to a local civilian facility, where his diagnosis was ultimately made, as the military installation did not have the ability to conduct a sleep study. The referral was given in the summer of 2010, shortly after his return from a tour of duty in Iraq, where his symptoms began manifesting. Following his official diagnosis, he received a medical recommendation form stating he was indefinitely not fit for flying duty. This was subsequently followed by a request to terminate flight pay.

f. Despite these steps, the military never moved to change his Military Occupational Specialty (MOS) and continued to evaluate him as a pilot. Since he was unable to fly for an extended period of time, it is his belief that his inability to perform the basic duties of an Army aviator was the primary, if not the sole factor, in his non-selection for promotion.

g. The Board states in his prior Record of Proceedings that 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. The applicant separated from the Army with a VA disability rating of 70 percent. He was evaluated by the VA prior to his discharge and a significant portion of that rating is due to the sleep apnea, which had been established as being present long before his separation.

Although the Army failed to separate him through the proper medical channels of an MEB/PEB, the Board still has the ability to determine his eligibility for disability retirement based on both the dates of his diagnosis and the DOD's rating for sleep apnea and its related symptoms, independent of the VA rating.

h. The issuance of the medical recommendation forms stating he was not fit for duty for an indefinite period of time demonstrates that the Army erred in their decision to not medically retire him. In the wake of the Army's failure, the Board should consider remedy to cure the injustice. These medical records have now been recovered and included in his appeal.

i. The Board states in the prior Record of Proceedings that the VA does not have the authority or responsibility for determining physical fitness for military service and the VA awards disability ratings to veterans for service-connected conditions, including those conditions detected after discharge, to compensate the individual for loss of civilian employability. The applicant does not purport that the VA has the authority to disqualify him from further military service; however, in the interest of justice, the Board should consider the timing of the initial VA evaluation and the VA's rating within the appropriate context to make their decision.

j. The applicant was evaluated on or around November 2014 (prior to his discharge) and the VA's assessment of 70 percent shows the severity of the conditions. The evidence shows the applicant first sought care at the VA before officially completing his military service and the most significant medical condition impacting the rating was sleep apnea, rated at 50 percent. The evidence also shows that the condition in question began manifesting during an overseas tour of duty. The applicant was subsequently diagnosed and began receiving treatment for the condition several years prior to discharge. The condition and its related symptoms also resulted in the issuance of not fit for duty recommendations while in service. The information from the VA is only meant to further support the point that this condition is severe enough to warrant a higher rating and was pre-existing. The medical forms already show the Army's position that the applicant was not fit for duty.

k. The applicant believes the medical form proves that he was already deemed not fit for duty. The rated degree of incapacity was not determined due to a lack of MEB/PEB evaluation. That is an institutional failure if not remedied only serves to perpetuate the injustice. It is the applicant's position that the medical records from the summer and fall of 2010, as well as the medical recommendation forms dated 2011 and 2012, and the interruption in flight pay dated 2012, should all be considered in determining what the appropriate course of action should have been at the time of separation. The Army's failure to take appropriate action in 2014 and 2015 despite documented evidence that it should have acted otherwise does not relieve the Board of its duty to remedy the injustice.

l. Although the Board previously stated the evidence of record shows the applicant's service record is void of any indication he was diagnosed with and treated for sleep apnea during his period of service or that the claimed conditions are the basis for his discharge, this is incorrect. He has now been able to recover the medical records demonstrating the dates of the diagnosis and treatment.

m. The Board further noted the applicant was discharged by reason of non-selection and advised him his DD Form 214 shows the circumstances as they were on the date prepared. The applicant states despite his medical forms showing he was not fit to fly indefinitely, and the subsequent interruption of his flight pay, his MOS was never formally reconsidered, as evidenced by his final DD Form 214. He continued to be assessed in part as an Army aviator through multiple review cycles, despite his inability to perform a key function of the role, which is flying. He believes that being assigned duties in an aviation unit that had little to do with the primary expectations of his role is the main cause for his non-selection. Prior to the manifestation of his medical condition, the applicant was by all documented accounts an exemplary officer. Based on the fact that he had not flown in more than 2 years at the time of his non-selection, the applicant argues that his DD Form 214 does not accurately reflect the material circumstances behind his non-selection.

n. The applicant understands that the VA operates under different laws and regulations than the DOD, will compensate for all service-connected disabilities, and a variance in ratings does not indicate an error on the part of either entity. However, he requests that the Board consider the fact that no attempt was made on the part of the DOD to evaluate him and assign him any ratings, despite some known and well-documented severe medical conditions impacting his ability to service in his chosen and assigned MOS. Based on the evidence, he believes the DOD would have ruled in his favor had the proper steps been undertaken. Since the opportunity to be physically evaluated at the time of discharge has passed, the Board should decide based on the provided documented evidence what the medical condition of the applicant was at the time of his separation.

3. A DD Form 2807-1 (Report of Medical History) shows on 4 November 2005, the applicant provided his medical history for the purpose of Regular Army enlistment. He indicated his only conditions were childhood chicken pox and appendectomy.

4. A DD Form 2808 (Report of Medical Examination) shows on 4 November 2005, the applicant underwent medical examination for the purpose of Regular Army enlistment. He was found fully qualified for enlistment with a physical profile rating of "1" in all factors.

5. A second DD Form 2808 shows on 8 December 2005, the applicant again underwent medical examination for the purpose of flight duty determination and was

found qualified for flying duty on 28 December 2005, with a physical profile rating of "1" in all factors and no medical conditions listed.

6. After a brief period in the U.S. Army Reserve (USAR) Delayed Entry Program (DEP), his DD Form 4 (Enlistment/Reenlistment Document) shows the applicant enlisted in the Regular Army on 23 March 2006.

7. The applicant provided a DD Form 214 which shows he entered active duty on 23 March 2006 as a warrant officer (WO) candidate and was separated on 25 July 2006. He was credited with 4 months and 3 days of net active service this period.

8. A DA Form 71 (Oath of Office) shows the applicant was appointed as a Reserve WO One (WO1) on 26 July 2006.

9. The applicant's DA Form 4031 (Officer Record Brief (ORB)) shows he was promoted to Chief Warrant Officer two (CW2) on 26 July 2008.

10. The applicant provided a Queen's Sleep Center Polysomnographic Report, Sleep Apnea Study with/without CPAP, dated 8 September 2010. The presenting diagnosis was observed apnea, snoring, memory impairment, enlarged tonsils, nasal obstruction, and long soft palate.

a. The clinical history shows the applicant reported excessive daytime sleepiness, loud snoring, witnessed apneas, gasping arousals and unrefreshing sleep.

b. The conclusion shows this study, along with the clinical history, is positive for mild obstructive sleep apnea/hypopnea syndrome with mild oxygen desaturations. Although CPAP was attempted, a fully effective pressure that corrected the sleep-disordered breathing was not demonstrated during this study because of the significantly reduced sleep time.

c. The management options/recommendations show therapies aimed at reducing upper airway resistance during sleep, including promoting sleep in non-supine positions, weight loss, and the identification of potential anatomic contributions at the naso-, oro-, or hypopharyngeal levels may be beneficial. The avoidance of pharmacologic causes of increased upper airway collapsibility (benzodiazepines, alcohol, sedative-hypnotics, etc.) may also be beneficial, in addition to excluding hypothyroidism. A trial of CPAP may be indicated if these therapies are insufficient or not clinically relevant.

11. The applicant deployed to Iraq from 7 September 2009 through 17 July 2010.

12. A DA Form 4186, provided a medical recommendation for flying duty as follows:

a. On 3 February 2011, the applicant was given a temporary medical suspension from flying. The estimated duration of his incapacity to fly is listed as indefinite.

b. The remarks show he was given temporary duty not including flying (DNIF) pending a medical evaluation.

c. The applicant signed the form on 3 February 2011, indicating he was notified of the recommendation and understood he may not perform aviation duties as of that date.

13. A DA Form 67-9 (Officer Evaluation Report (OER)), covering the period from 16 January 2011 through 23 September 2011, shows the applicant was rated in his principal duty title of OH-58D(R) Kiowa Warrior Pilot, in the position Area of Concentration (AOC) 152D (Rotary Wing Attack/Scout) and Branch of Aviation. He was rated "Outstanding Performance, Must Promote" by his Rater, and "Best Qualified" by his Senior Rater.

14. A second DA Form 4186, provided a medical recommendation for flying duty as follows:

a. On 5 April 2012, the applicant was given a permanent medical disqualification from flying duties. The estimated duration of his incapacity to fly is listed as indefinite.

b. The remarks show DNIF (duty not including flying). Temporary medical disqualification has been in effect for more than 365 days. The applicant's signature below confirms he understands he must be cleared by a flight surgeon prior to resuming flight duties after being treated in an emergency room, specialty clinic, or after an aircraft mishap. He certified he had not participated in activities or received treatment for which flying restrictions may be appropriate based on exogenous factors.

c. While in a DNIF status, he was not allowed simulator duties and not allowed ground runup duties.

d. The applicant signed the form on 5 April 2012, indicating he had been notified of the recommendations and understood he may not perform aviation duties as of this date.

e. The applicant's commander approved the medical recommendation on 25 April 2012.

15. A DA Form 2142 shows on 3 May 2012, the applicant's unit commander requested the applicant's flight pay be stopped effective 5 April 2012.

16. The applicant's service records contain two additional DA Forms 67-9, showing the following:

a. His OER covering the period from 10 October 2011 through 9 October 2012, shows the applicant was rated in his principal duty title of Kiowa Warrior Aviator, in the position AOC 152D and Branch of Aviation. He was rated "Outstanding Performance, Must Promote" by his Rater, and "Best Qualified" by his Senior Rater.

b. His OER covering the period from 12 October 2012 through 11 October 2013, shows the applicant was rated in his principal duty title of Assistant S2, in the position AOC 35D (Military Intelligence (MI)), and the branch MI. A portion of the OER covers his deployment to Afghanistan. He was rated "Outstanding Performance, Must Promote" by his Rater, and "Best Qualified" by his Senior Rater.

17. The applicant deployed to Afghanistan from 24 April 2013 through 7 January 2014.

18. A U.S. Army Human Resources Command (AHRC) memorandum, dated 19 August 2014, advised of the applicant's involuntary discharge effective 2 January 2015, as the result of Fiscal Year (FY) 2014 CW 3/4/5 Promotion Selection Boards in accordance with Army Regulation (AR) 600-8-24 (Officer Transfers and Discharges), paragraph 5-9 (Rules for processing separation of commissioned officers and chief warrant officers who are twice non-selected for active duty list promotion by a Headquarters Department of the Army (HQDA) centralized board). The memorandum shows the applicant intended to continue service in the USAR and must have an approved non-select waiver prior to separation.

19. The applicant's service records contain a DA Form 67-10-1 (Company Grade Plate (O1-O3; WO1-CW2) OER), covering the period from 11 October 2013 through 10 October 2014. Page one of the form shows the applicant was rated in his principal duty title of Assistant Intelligence Officer, in the position AOC/Branch of Aviation. His significant duties and responsibilities show he served as the assistant battalion intelligence officer for a multi-functional aviation battalion task force deployed to Afghanistan. Page two of the form, containing the ratings by his Rater and Senior Rater is blank on the version of the form uploaded to the applicant's electronic records in iPERMS (Interactive Personnel Electronic Records Management System).

20. The applicant's second DD Form 214 shows he was honorably discharged on 2 January 2015, under the provisions of AR 600-8-24, paragraph 5-9, due to non-selection, permanent promotion. He was credited with 8 years, 5 months, and 7 days of net active service this period and entitled to full involuntary separation pay of \$44,478.00.

21. The applicant has not provided a copy of a DA Form 3349 (Physical Profile) and his available service records do not contain one for the Board's review.

22. A physical profile is used to classify a Soldier's physical disabilities in terms of six factors or body systems, as follows: "P" (Physical capacity or stamina), "U" (Upper extremities), "L" (Lower extremities), "H" (Hearing), "E" (Eyes), and "S" (Psychiatric) and is abbreviated as PULHES. Each factor has a numerical designation: 1 indicates a high level of fitness, 2 indicates some activity limitations are warranted, 3 reflects significant limitations, and 4 reflects one or more medical conditions of such a severity that performance of military duties must be drastically limited. Physical profile ratings can be either permanent or temporary.

23. A review of the AHRC Soldier Management System (SMS) reflects the following pertaining to the applicant:

a. Physical Data shows the following:

- his PULHES effective May 2014 was 211111 with his last physical completed on 30 May 2014; factor P shows "No significant limitations" while all the remaining factors show "No limitations"
- his Post-Deployment Health Reassessment (PDHRA) status was C (current) with a date of 30 May 2014
- his Medical Readiness Classification Code (MRCC) was "2" (items that can be corrected in less than 72 hours)

b. Major Personnel Actions shows a transaction was completed on 2 January 2015 to transfer the applicant from the Regular Army to archiving his record as a result of involuntary discharge due to promotion non-selection.

c. Transaction History shows the following:

- the applicant was notified of his two-times non selection for promotion on 7 August 2014
- AHRC received the applicant's submitted two- times non-select waiver request for USAR continuation on 16 September 2014
- the applicant's waiver was approved on 16 September 2014, and he was being notified via email of the results; he was being submitted for scrolling in the rank of CW2
- the applicant's case was closed on 27 April 2015 as he had left active duty and did not submit the signed DA Form 71 as requested



24. An undated VA Disability Ratings printout shows the applicant's combined disability rating is 70 percent for the following service-connected disabilities, effective 3 January 2015:

- tinnitus, 10 percent
- migraine headaches, 30 percent
- obstructive sleep apnea, 50 percent
- lumbosacral strain, 10 percent
- left thumb ligament tear with surgical repair, 0 percent

25. The applicant previously applied to the Board in January 2017, requesting placement on the PDRL. On 28 May 2020, the Board denied his request, determining the evidence presented did not demonstrate the existence of a probable error or injustice and that the overall merits of the case were insufficient as a basis for correction of his records. The Board stated:

a. 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. Evidence of record shows the applicant's service record is void of any indication he was diagnosed and treated for sleep apnea during his period of service or that the claimed conditions were the basis for his discharge. The Board further noted the applicant was discharged by reason of non-selection. The applicant is advised the DD Form 214 shows circumstances as they were on the date prepared. Based upon a preponderance of the evidence, the Board determined there is insufficient evidence that shows a medical disability/retirement was warranted during his period of active service.

b. The Board agreed that the VA provides post-service support and benefits for service connected medical conditions. The VA operates under different laws and regulations than the Department of Defense (DOD). In essence, the VA will compensate for all service connected disabilities. Variance in ratings do not indicate an error on the part of either entity. If the applicant has yet to file a claim with the Veterans Administration for his OSA, he may consider doing so.

26. 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.

27. 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.

28. 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.

29. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review the case. Documentation reviewed included the applicant's ABCMR application and accompanying documentation, the military electronic medical record (AHLTA), the VA electronic medical record (JLV), the Army Aeromedical Resource Office (AERO), and the Interactive Personnel Electronic Records Management System (iPERMS).

b. The applicant has applied to the ABCMR requesting they reconsider their prior denial of his request to be evaluated in the Disability Evaluation System (DES) and subsequently receive a medical retirement. In that application, he claimed that his sleep apnea caused him to have migraines, and the medication required to treat his migraines caused him to be unable to fly.

c. He states in his request for reconsideration:

"This is an appeal of the decision that was made regarding Application Number: PB52162. A detailed narrative attached to the Supporting Documents Information section. Applicant is seeking reconsideration based on newly available supporting evidence in pursuit of Permanent Disability Retired status."

d. The Record of Proceedings details the applicant's military service and the circumstances of the case. His DD 214 for the period of service under consideration shows he entered the regular Army on 26 July 2006 and was honorably discharged on 2 January 2015 under the provisions of paragraph 5-9 of AR 600-8-24, Officer Transfers and Discharges (12 April 2006): "Rules for processing separation of commissioned officers and chief warrant officers who are twice non-selected for active-duty list promotion by an HQDA centralized board."

e. In this application, the applicant contends his sleep apnea and his migraines due to his sleep apnea diagnosed 4 years before his discharge should have been medically disqualifying. He states his subsequent VA disability ratings for these conditions as a reason for them to have been unfitting for continued military service. He also contends that his removal from flight status in 2012 should also have been cause for a referral to the DES.

f. The applicant was first evaluated for obstructive sleep apnea on 5 August 2010 and was subsequently prescribed a C-PAP machine for mild obstructive sleep apnea. He did one follow-up sleep study in September 2010 and a second on 26 October 2010 to assist with further titration of this CPAP machine. The October study shows the treatment was successful: "CONCLUSION: The application of CPAP effectively eliminates the sleep-disordered breathing."

g. At an 18 July 2011 appointment for his chronic headaches, the provider wrote:

"Pt reported having no history of headaches until 7 years ago. The headaches increased in frequency over time: once a year at the 7-year mark, 'steady increase' at about the 5-year mark, and starting about a year 'pretty much daily.' He said the headaches persisted after he was diagnosed with sleep apnea and started using the CPAP machine since the end of December 2010."

h. At some point during this period, he was placed on propranolol as a prophylactic medication for his headaches. He was treated for headaches by behavioral health during that summer, mostly with biofeedback which was helpful. In a 14 September 2011 follow-up encounter he told the provider the "he had approximately 2 headaches since his last session and reported that they were diminished in length (less than 30 min) and intensity (2-3/10)."

i. The applicant saw his flight surgeon for his annual flight physical on 1 March 2012. He told the flight surgeon that he was taking propranolol for his chronic headaches. The flight surgeon annotated in the encounter "Chronic HAs [headaches] currently taking propranolol which cannot be used while on flight status. Soldier needs to f/u [follow-up] with neurology to see if medication can be changed." There is no evidence the applicant followed through with this requested evaluation.

j. The next AHLTA encounter was with the flight surgeon on 6 August 2012. The applicant was aware the flight surgeon was recommending a permanent disqualification from aviation service because of his use of propranolol. In the AHLTA encounter, the flight surgeon noted the applicant did not appear concerned about this action. He wrote in his aeromedical summary:

"No history of TBI [traumatic brain injury]. Soldier reports insidious onset of frontal and temporal headaches associated with photophobia, no aura, over the last several years. No other associated symptoms. Seen by TBI clinic, neurology, neuropsych, ENT. Workup found no cause."

Possibly contributed to by chronic mild GAD [generalized anxiety disorder] and OSA [obstructive sleep apnea]. Soldier uses propranolol chronically and does not wish to discontinue use. Still has occasional headaches with propranolol, and uses OTC [over the counter] Tylenol PRN [as needed] for breakthrough headache.”

k. On 14 August 2012, the U.S. Army Aeromedical Activity (USAAMA) disqualified him from further aviation service for chronic headaches treated with propranolol.

l. His DD 214 shows that he was not discharged until on 2 January 2015 under the provisions of paragraph 5-9 of AR 600-8-24 for being twice non-selected for active-duty list promotion by an HQDA centralized board.

m. Paragraph 3-30g of AR 40-501 Standards of Medical Fitness (4 August 11) covers headaches and the limited indications for referral to a medical evaluation board when treatment fails: “Migraine, tension, or cluster headaches, when manifested by frequent incapacitating attacks. All such Soldiers will be referred to a neurologist, who will ascertain the cause of the headaches. If the neurologist feels a trial of prophylactic medicine is warranted, a 3-month trial of therapy can be initiated. If the headaches are not adequately controlled at the end of the 3 months, the Soldier will undergo an MEB for referral to a PEB. If the neurologist feels the Soldier is unlikely to respond to therapy, the Soldier can be referred directly to MEB.”

n. Paragraph 3-41c of AR 40-501 covers obstructive sleep apnea and the limited indications for referral to a medical evaluation board when treatment fails: “Sleep apnea. Obstructive sleep apnea or sleep-disordered breathing that causes daytime hypersomnolence or snoring that interferes with the sleep of others and that cannot be corrected with medical therapy, nasal continuous positive airway pressure (CPAP), surgery, or an oral appliance.”

o. No evidence was identified that either his chronic headaches or sleep apnea failed medical retention standards, or that these conditions were the basis for his discharge for being twice non-selected for promotion.

p. The applicant’s removal from flight status was due to his use of propranolol as a prophylactic medication for his headaches. His flight surgeon informed him this medication was not compatible with continued flight duties and recommended the applicant return to his provider and request to try a medication compatible with flight duties. There is no evidence the applicant took the recommended advice as noted in

the aeromedical summary when the flight surgeon noted the applicant did not appear affected by the potential permanent grounding due the use of propranolol.

q. Based on the information currently available, it is the opinion of the ARBA medical advisor that a referral of this case to the Disability Evaluation System remains unwarranted.

#### BOARD DISCUSSION:

1. The applicant's request for a personal appearance hearing was carefully considered. The Board determined the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

2. 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 evidence shows the applicant was honorably discharged on 2 January 2015, due to non-selection for promotion. The Board reviewed and agreed with the medical advisor's finding no evidence was identified that either his chronic headaches or sleep apnea failed medical retention standards, or that these conditions were the basis for his discharge for being twice non-selected for promotion. His removal from flight status was due to his use of propanol as a prophylactic medication for his headaches. His flight surgeon informed him this medication was not compatible with continued flight duties and recommended the applicant return to his provider and request to try a medication compatible with flight duties. There is no evidence the applicant took the recommended advice as noted in the aeromedical summary when the flight surgeon noted the applicant did not appear affected by the potential permanent grounding due the use of propranolol. Based on the available information, the Board agreed and determined that a referral of this case to the Disability Evaluation System remains unwarranted.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
█	█	█	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis to amend the decision of the ABCMR set forth in Docket Number AR20170001923 on 28 May 2020.

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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, 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 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; 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.

2. 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.

3. 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.

4. Army Regulation 600-8-24 (Officer Transfers and Discharges), prescribes policies and procedures governing transfer and discharge of Army officer personnel.

a. Paragraph 5-9 (Rules for processing separation of commissioned officers and chief warrant officers (CW) who are twice non-selected for active duty list promotion by a Headquarters Department of the Army (HQDA) centralized board), in effect at the time, states commissioned officers and chief warrant officers on the active duty list twice non-selected for promotion to the ranks of captain, major, or lieutenant colonel and CW3, CW4, or CW5 will be involuntarily released from or discharged unless they are:

- selectively continued
- within 2 years of retirement (completed 19 or more years of active Federal service on their scheduled release date)
- retired



- a health professions officer; these officers shall be retained on active duty until completion of their active duty service obligation prior to discharge, unless sooner or retired or discharged under another provision of law

b. Commissioned officers and chief warrant officers (except as stated in d and e below) will be separated on the 1st day of the 7th calendar month after approval of the promotion board's report, unless earlier release is voluntarily requested or retention on active duty in a Reserve status is approved by the Secretary of the Army or their designee.

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.

8. Army Regulation 15-185 (Army Board for Correction of Military Records (ABCMR)) prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR. Paragraph 2-11 states applicants do not have a right to a formal hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

//NOTHING FOLLOWS//