

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 12 July 2024

DOCKET NUMBER: AR20230003915

APPLICANT REQUESTS: reconsideration of his previous request for:

- correction of his DD Form 214 (Certificate of Release or Discharge from Active Duty) to show in item 23 (Type of Separation): release from active duty (REFRAD) vice discharge
- amendment of Headquarters III Corps and Fort Hood Orders 313-0106 to show REFRAD vice discharged

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214, for the period ending 28 November 2006
- 20-Year Notification of Eligibility (NOE) Letter, 11 February 2010
- DA Form 199 (Physical Evaluation Board (PEB) Proceedings), 24 October 2006
- Separation Orders 313-0106, 9 November 2006
- 99th Readiness Division (RD) Response, 22 February 2021
- Office of Personnel Management Division (OPMD) – Active Guard Reserve (AGR) Officer Retirements Response, 11 March 2021
- Ask HRC Request for Assistance Email, 11 March 2021
- The Adjutant General Directorate (TAGD) Army Retirement Packet Email, 20 April 2021
- TAGD Gray Area Retiree (GAR) Army Retirement Packet Email, 21 April 2021
- Fort Hood Transition Center Response Email (M.J.R.), 21 April 2021
- Fort Hood Transition Center Response Email (J.T.W.), 22 April 2021
- U.S. Army Physical Disability Agency (USPDA) Advisory AR20210010873 15 November 2021

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 AR20210010873 on 24 February 2022.

2. The applicant request separation Orders 313-0106 and DD Form 214 be amended to state type of separation be changed from discharged to REFRAD back to individual ready reserve (IRR) in accordance with 10 U.S. Code § 1209 - Transfer to inactive status list instead of separation. "Any member of the armed forces who has at least 20 years of service computed under section 12732 of this title, and who would be qualified for retirement under this chapter but for the fact that his disability is less than 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs at the time of the determination, may elect, instead of being separated under this chapter, to be transferred to the inactive status list under section 12735 of this title and, if otherwise eligible, to receive retired pay under section 12739 of this title upon becoming 60 years of age."

a. On 6 October 2006, he was found to be unfit for duty, due to his bilateral hips and left foot conditions. The PEB recommended he be medically separated with severance pay (combined rating of 20%). On 30 October 2008, he reviewed and accepted the findings and recommendations. In November 2006, he was discharged as a result of a PEB, for reason of "disability severance pay." At the time, he was unaware that he had 20 qualifying years of military service. Yes, he signed the PEB findings to be medically separated. However, he was not given the option to transfer to the inactive status list instead of separation. It was February 2010, before he received the NOE for Retired Pay at Age 60 (Twenty Year Letter), from HRC, which means he should have been given a choice at the PEB, in November 2006. He did not elect to accept the disability severance pay, nor was he counseled in writing DA Form 4856 (Counseling Form), on the forfeiture of non-regular retired pay and the loss of entitlement to benefits.

b. According to U.S. Army Human Resource Command (HRC) records, at the time of his separation, he had 20 years, 5 months, and 9 days of qualifying service with a total of 5,450 points. Had he known about USC 1209 and the 20-yr NOE, back in October 2006, he would have elected to be transferred to the IRR and waited for his retirement at age 60. He never got a chance to respond to the legal opinion rendered, during his previous application, due to major neck surgery/recovery. However, he learned in the legal opinion that his DD Form 199 omitted the fact that bilateral hip conditions were a direct result of service in combat (Iraq) 2003-04 and 2005-06. The legal opinion was uploaded for the Board's review and consideration. He believes that he provided sufficient information for the Board to reconsider his application to update his discharge, allowing him to retire from the military.

3. The applicant was born in August 1962.

4. Having had prior enlisted service in the U.S. Navy and Army National Guard (ARNG), the applicant was appointed a Reserve warrant officer in the ARNG on 13 August 1999.

5. The applicant was released from the ARNG on 31 March 2000 and assigned to the USAR Ready Reserve Control Group.
6. On 4 October 2000, Orders Number C-10-028711, issued by the U.S. Army Reserve Personnel Command (ARPERSCOM), assigned the applicant to the USAR Control Group (Reinforcement).
7. On 4 October 2001, Orders Number C-10-128202, issued by the U.S. ARPERSCOM, assigned the applicant to the U.S. Army Training and Doctrine Command, U.S. Army Signal Center on 4 October 2001 for active duty.
8. On 7 December 2001, Orders Number M-12-101355, issued by the U.S. ARPERSCOM, ordered the applicant to active duty in support of Operation Noble Eagle, effective 8 January 2002.
9. The applicant was honorably released from active duty on 11 January 2003. The DD Form 214 shows the applicant completed 1 year and 2 days of active service.
10. On 3 October 2006, a Medical Evaluation Board (MEB) convened and referred the applicant to a PEB as a Regular Army officer due to bilateral hip osteoarthritis and left foot planter fasciitis which were medically unacceptable. The applicant did not desire to continue on active duty and agreed with the MEB findings and recommendations.
11. On 24 October 2006, a PEB convened and found the applicant physically unfit and recommended a combined rating of 20 percent and that he be separated with severance pay. The following medical conditions found unfitting were:
  - a. Bilateral hip osteoarthritis secondary to congenital dysplasia, 2 years status post right osteotomy, hip abduction bilaterally 45 degrees. Internal rotation: right – neutral; left – 10 degrees; external rotation: 35 degrees bilaterally rated for 10 percent each joint due to limitation of motion. Rated at 20 percent.
  - b. Left foot planter fasciitis with persistent pain. Rated as slight. Rated at 0 percent.
  - c. The applicant concurred and waived a formal hearing.
12. On 9 November 2006, Orders Number 313-0106, issued by HQs, III Corps and Fort Hood, discharged the applicant effective 28 November 2006 with a 20 percent disability rating with severance pay based on 14 years, 10 months, and 29 days of service.
13. On 28 November 2006, the applicant was discharged in accordance with Army Regulation (AR) 635-40 (Physical Evaluation for Retention, Retirement, or Separation), paragraph 4-24b (3), due to disability, severance pay. His DD Form 214 shows he

completed 3 years, 10 months, and 17 days of active service; 10 years and 22 days of total prior active service; and 7 years, 5 months, and 27 days of total prior inactive service. He received \$111,578.40 in disability severance pay.

14. On 11 February 2010, HRC notified the applicant of his eligibility for retired pay at age 60 due to completion of required years of Reserve service in accordance with Title 10 United States Code (USC), section 1223.

15. DA Form 5016 (Chronological Statement of Retirement Points) dated 17 February 2022, shows he completed 20 years, 5 months, and 9 days of qualifying service for retirement as of 28 November 2006 (last day qualifying points earned).

16. The applicant provides:

a. E-mail from the 99th Readiness Division to HRC, dated 22 February 2021, requesting assistance for the applicant as the U.S. Army Reserve Command does not have access to RA systems or his records. The applicant was recalled to active duty from a mobilized IMA assignment in 2002 while at Fort Gordon, GA. He was then REFRAD on 11 January 2003 and placed on the active duty rolls on 12 January 2003 and was later separated on 28 November 2006 due to a medical disability. The applicant was approaching age 60 and was attempting to apply for retired pay; however, he was unable to make contact with anyone to obtain a retirement order.

b. On 11 March 2021, a representative from HRC's AGR Retirements and Separations Branch informed the applicant via e-mail that he must contact HRC's Retired Reserve Pay Branch.

c. On 11 March 2021, the applicant e-mailed HRC's Retired Reserve Pay Branch requesting assistance with obtaining a retirement order in order to apply for non-regular retired pay when he reached age 60.

d. On 20 April 2021, the applicant e-mailed Chief Warrant Officer Five (CW5) E.M.R. HRC requesting assistance in making contact with someone in the GAR Branch.

e. On 21 April 2021, HRC's GAR Branch e-mailed the applicant and informed him that he could apply for retired pay with discharge orders, but would not be eligible for cost of living adjustment raises. Being the applicant was given a 20 percent disability rating he should have been afforded the opportunity to decline the severance pay, be released from active duty, and be placed back into the Reserves. The Reserves would then have transferred him to the USAR Control Group (Retired Reserve) until he was eligible to receive his retired pay. HRC cannot amend his discharge order, which must be amended at Fort Hood.

f. On 21 April 2021, Mr. M.J.R., Chief of the Transition Center informed the applicant via e-mail his office did not deal with medical separations and was referred to Mr. J.T.W.

g. On 22 April 2021, Mr. J.T.W. informed the applicant via e-mail that in order for his separation order to be amended he must submit a request to the Army Review Boards Agency (ARBA) because they do not have the authority to amend or revoke any approved medical separations by the U.S. Army Physical Disability Agency (USAPDA) unless directed by the Department of Defense Physical Disability Board of Review.

17. AR20210010873 USAPDA advisory 15 November 2021, stating in conclusion the USAPDA cannot effectuate the retroactive changes to his military separation that he was seeking.

18. In his previous request (AR20210010873) on 24 February 2022, the Board found insufficient evidence that the applicant was not advised of all of his options during his disability discharge processing. He accepted the findings of the PEB and accepted severance pay, which precluded receipt of retired pay at age 60. Based on a preponderance of evidence, the Board determined the applicant's discharge for disability with severance pay was not in error or unjust. The Board denied his request.

19. 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 (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/or the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant has applied to the ABCMR requesting a change of his separation disposition for Separated with Severance Pay to Transfer to the Retired Reserve, a much more beneficial option. He correctly states 10 U.S. Code § 1209 - Transfer to inactive status list instead of separation.:

"Any member of the armed forces who has at least 20 years of service computed under section 12732 of this title, and who would be qualified for retirement under this chapter but for the fact that his disability is less than 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs at the time of the determination, may elect, instead of being separated under this chapter,

to be transferred to the inactive status list under section 12735 of this title and, if otherwise eligible, to receive retired pay under section 12739 of this title upon becoming 60 years of age ...

In November 2006, I was discharged as a result of a PEB, for reason of "disability severance pay". At the time, I was unaware that I had 20 qualifying years of military service. Yes, I signed the PEB findings to be medically separated. However, I was not given the option to transfer to the inactive status list instead of separation. It was February 2010, before I received the Notification of Eligibility for Retired Pay at Age 60 (Twenty Year Letter), from HRC, which means I should have been given a choice at the PEB, in November 2006."

c. This review of the evidence supports the applicant's case and request.

d. The Record of Proceedings and prior denial detail the applicant's service and the circumstances of the case. The DD 214 for the period of Service under consideration shows he entered the Regular Arm on 12 January 2003 and was separated with \$111,5 of disability severance pay on 28 November 2006 under provisions provided in paragraph 4-24b(3) of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (8 February 2006). It shows service in Iraq from 6 April 2003 thru 9 January 2004 and again from 2 August 2005 thru 22 July 2006.

e. On 3 October 2006, a medical evaluation board (MEB) found his bilateral hip osteoarthritis and left foot plantar fasciitis to fail medical retention standards and warranted referral to the physical evaluation board (PEB). The applicant concurred with the MEB findings and recommendation on 23 October 2006 and his case was forwarded to a PEB for adjudication.

f. On 24 October 2006, the applicant's informal PEB found these two conditions were unfitting medical conditions for continued service. Using the VA Schedule for Rating Disabilities (VASRF), the PEB derived applied ratings of 20% and 0% respectively to these conditions. Because the applicant's combined military disability rating was less than 30%, the PEB recommended the applicant be separated with disability severance pay (SWSP). On 30 October 2006, after being counseled on the informal PEB's findings by her PEB Liaison Officer (PEBLO), the applicant concurred with the informal PEB's findings waived his right to a formal hearing,

g. Review of his Physical Evaluation Board (PEB) Proceedings (DA form 199) shows that he was not offered, as required, the option to elect for transfer into the retired reserve for the length of service non-regular retirement (having earned by having more than 20 qualifying years of Service for retirement) in lieu of SWSP.

h. Paragraph E3.P7.5.3 of part 3 to enclosure 7 of Department of Defense Instruction of Department of Defense Instruction 1332.38 Subject: Physical Disability Evaluation (14 November 1996) lists the criteria for SWSP eligibility:

“E3.P7.5.3. Separation with disability severance pay.

E3.P7.5.3.1. Criteria. Separation is directed under Section 1203 or 1206 of reference (b) when the member is unfit for a compensable physical disability determined under the standards of this Instruction, and the requirements listed in subparagraphs E3.P7.5.3.1.1. and E3.P7.5.3.1.2., below, are met. Stability is not a factor for this disposition.

E3.P7.5.3.1.1. The member has less than 20 years of service computed under Section 1208 of reference (b); and

E3.P7.5.3.1.2. The disability is rated at less than 30 percent, to include 0 percent.”

i. Paragraph E3.P7.5.3.3 of DODI 1332.38 (14 November 1996) addresses the situation this applicant was in:

“E3.P7.5.3.3. Transfer to Retired Reserve. Under Section 1209 of reference (b), Ready Reserve members who have completed at least 20 qualifying years of Reserve service and who would otherwise be qualified for retirement may forfeit disability severance pay and request transfer to an Inactive Status List for the purpose of receiving non-disability retired pay at age 60. When disability severance pay is accepted, the member forfeits all rights to receive retired pay under Chapter 1223 of reference (b) at age 60. There are no provisions under reference (b) to repay disability severance pay for the purpose of receiving retired pay.

j. In other words, the election to receive severance pay is irrevocable. However, in this case, it is highly unlikely the applicant made this irrevocable election because there is no evidence it was offered likely because there was no evidence personnel were aware of his 20+ years of Service: No contemporaneous points statement or length of service calculation sheets were found in the supporting documentation or iPERMS. This was an apparent oversight in the DES processing of his case.

k. Paragraph 4-24b(5) of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (8 February 2006) states this is an option for disposition:

(5) Transfer of a Soldier who has completed at least 20 qualifying years of Reserve service, and otherwise qualifies for transfer as described in paragraph 8–9, to the Inactive Reserve on the Soldier’s request (section 1209, title 10, United States Code (10 USC 1209)).

l. This option is to be discussed with the Soldier and the Soldier must elect to either be transferred to the Retired Reserve after which they will receive their non-regular retirement when eligible or choose to separate with disability severance pay. Because the severance pay is recouped by the VA unless one or more of the disabilities is combat related, and because years or even decades of non-regular retirement pay along with other benefits like Tricare far outweigh the value of a single payment, the vast majority of Soldiers in this position opt for transfer to the Retired Reserves.

m. Furthermore, he did not receive his Notification of Eligibility for Retired Pay at Age 60 (Twenty Year Letter) until 11 February 2010. Though this was several years after his separation, a 17 February 2022 Chronological Statement of Retirements Points (DA Form 5016) shows that as of 28 November 2006, the date he was separated with severance pay, he had 20 years, 5 months, and 9 days of qualifying service for retirement and a total of 5450 points.

n. Paragraph 4-24b(5) of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (8 February 2006) states this is an option for disposition:

(5) Transfer of a Soldier who has completed at least 20 qualifying years of Reserve service, and otherwise qualifies for transfer as described in paragraph 8–9, to the Inactive Reserve on the Soldier's request (section 1209, title 10, United States Code (10 USC 1209)).

o. His DD 199 does not show that he was provided this very valuable option, typically an addition of the first page or in the elections section (Block 13).

p. There is no evidence the applicant was provided the option to transfer into the Retired Reserve in lieu of SWSP. Even though he did receive SWSP, the DA 199 shows this disability was not combat related and therefore the money he received has likely already been recouped by the VA.

#### BOARD DISCUSSION:

1. After reviewing the application and all supporting documents, 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 review based on law, policy, regulation. The evidence shows the applicant served on active duty as a member of the U.S. Navy from 13 June 1980 to 24 September 1984, a period of 4 years, 3 months, and 11 days; from 25 September 1984 to 15 July 1988, a period of 3 years, 10 months, and 21 days; on active duty as a member of the Army National Guard (ARNG) from 13 July 1999 to 12 August 1999, a period of 1 month; on active duty as a member of the U.S. Army Reserve (USAR) from 10 January 2002 to



11 January 2003; and finally as a member of the Regular Army from 12 January 2003 to 28 November 2006, a period of 3 years, 10 months, and 17 days. His record reflects as of 28 November 2006, he completed 20 years, 5 months, and 9 days of qualifying service for retirement. The Board noted the applicant received his Notification of Eligibility for Retired Pay at Age 60 (Twenty Year Letter) on 11 February 2010, over 3 years after his qualifying service date.

2. The Board reviewed and concurred with the medical reviewer's opinion finding the applicant was not offered, as required, the option to elect for transfer into the retired reserve for the length of service non-regular retirement (having earned by having more than 20 qualifying years of service for retirement) in lieu of separation with severance pay. Based on the foregoing, the Board concluded the applicant's DD Form 214 and separation orders should reflect he was released from active duty vice discharged.

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 relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by:

- amending the applicant's DD Form 214, for the period ending 28 November 2006 to show in item 23 (Type of Separation): released from active duty
- amending Orders 313-0106, issued by Headquarters III Corps and Fort Hood on 9 November 2006 to reflect he was released from active duty vice discharged

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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. Army Regulation (AR) 635-40 (Physical Evaluation for Retention, Retirement, or Separation) in effect at the time, establishes the Army Physical Disability Evaluation System according to the provisions of Title 10 USC, 61 and Department of Defense Directive (DODD) 1332.18. It 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 or her office, grade, rank, or rating. If a Soldier is found unfit because of physical disability, this regulation provides for disposition of the Soldier according to applicable laws and regulations.

a. Paragraph 3–8 (Counseling provided to Soldier), Physical Evaluation Board Liaison Officer (PEBLO) counseling. The appointed PEBLO at the Military Treatment Facility (MTF) is responsible for counseling Soldiers concerning their rights and privileges at each step in disability evaluation, beginning with the decision of the treating physician to refer the Soldier to a MEB and until final disposition is accomplished. PEBLOs will use the Disability Counseling Guide to assist them in providing thorough counseling. Counseling will be documented counseling will cover as a minimum, the following areas:

- Legal rights (including the sequence of and the nature of disability processing)
- Effects and recommendations of MEB and PEB findings
- Estimated disability retired or severance pay (after receipt of PEB findings and recommendations)
- Probable grade upon retirement
- Potential veteran's benefits
- Recourse to and preparation of rebuttals to PEB findings and recommendations
- Disabled Veterans Outreach Program
- Post-retirement insurance programs and the Survivor Benefit Plan

b. Paragraph 4-19I (2)(c), when a Soldier has a rating of less than 30 percent and has at least 20 qualifying years for retirement for non-regular service: "You have the option of accepting discharge with disability severance pay and forfeiting retirement for non-regular service; or you may request transfer to the Retired Reserve and receive retired pay at age 60. According to Title 10 USC, sections 1209 and 1213, you will forfeit all rights to retired pay if you accept severance pay instead of transfer to the Retired Reserve."

c. Paragraph 4-20c (Soldier's election), (1) DA Form 199, block 13, lists the election options available to the Soldier for informal determinations. These include the following:

- Concurrence with the findings and recommendations and waiver of a formal hearing
- Non-concurrence with the findings and recommendations; submission of a rebuttal explaining the Soldier's reasons for non-concurrence; and waiver of a formal hearing
- Demand for a formal hearing with or without personal appearance
- Choice of counsel if a hearing is demanded

d. PEBLO of the MTF having control of the Soldier will be the counselor for the Soldier. As such, the PEBLO is primarily concerned with the Soldier's interests. The PEBLO should consult with, and obtain advice as needed from the local legal office, the legal counsel at the nearest PEB, or the Agency Judge Advocate. Upon receipt of the informal proceedings, the PEBLO will counsel the Soldier. The Soldier will be made fully aware of the election options available to him or her, the processing procedures, and the benefits to which he will be entitled if separated or retired for physical disability. As needed, the PEBLO should consult with the local finance officer and the installation Retirement Services Officer (RSO) when counselling on benefits.

e. Paragraph 4-24b (Final disposition), based upon the final decision of USAPDA or APDAB, HRC will issue retirement orders or other disposition instructions as follows:

- Permanent retirement for physical disability
- Placement on the TDRL
- Separation for physical disability with severance pay
- Separation for physical disability without severance
- Transfer of a Soldier who has completed at least 20 qualifying years of Reserve service, and otherwise qualifies for transfer to the Inactive Reserve on the Soldier's request
- Separation for physical disability without severance pay when the disability was incurred as a result of intentional misconduct, willful neglect, or during a period of unauthorized absence
- Release from active duty and return to retired status of retired Soldiers serving on active duty who are found physically unfit
- Return of the Soldier to duty when he or she is determined physically fit

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

a. Paragraph 2-2 states 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:

- A minimum of 20 years of qualifying service computed under 10 USC 12732; or,
- Fifteen years of qualifying service, and less than 20, computed under 10 USC 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 10 USC 12731b(b) exist

b. Paragraph 2-4a states under 10 USC 12731a Reserve Component Soldiers who complete the eligibility requirements in section I will be notified in writing within 1 year after completion of the required service in accordance with AR 140–185 or NGR 680–2. The Notification of Eligibility for Retired Pay at Age 60 (20 Year Letter) will be issued to Soldiers credited with 20 years of qualifying service and should be issued prior to discharge or transfer to the Retired Reserve.

c. Paragraph 2-4b states after a Soldier has been notified of their eligibility for retired pay for non-regular service, the Soldier's eligibility for retired pay may not be denied or revoked on the basis of any error, miscalculation, misinformation, or administrative determination of years of service performed, unless it resulted directly from the fraud or misrepresentation of the individual concerned.

3. Title 10 U.S. Code § 1209 - Transfer to inactive status list instead of separation states any member of the armed forces who has at least 20 years of service computed under section 12732 of this title, and who would be qualified for retirement under this chapter but for the fact that his disability is less than 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs at the time of the determination, may elect, instead of being separated under this chapter, to be transferred to the inactive status list under section 12735 of this title and, if otherwise eligible, to receive retired pay under section 12739 of this title upon becoming 60 years of age.

//NOTHING FOLLOWS//