

IN THE CASE OF: ██████████

BOARD DATE: 1 November 2023

DOCKET NUMBER: AR20230004038

APPLICANT REQUESTS: in effect, correction of his records to reflect regular retirement due to length of service in lieu of retirement due to disability, permanent.

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Certificate of Release or Discharge from Active Duty)

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 he want his retirement changed to a regular retirement in lieu of a medical retirement. According to the Defense Finance and Accounting Service (DFAS) he is medically retired, and he is losing a lot of money each month. He wants a regular retirement that would give him full retirement benefits. He served 20 years on active duty.
3. Having had prior enlisted service of 3 months and 22 days. He enlisted in the Regular Army on 21 March 1989. He held military occupational specialty 88N (Traffic Management Coordinator).
4. He served in Kuwait from 1 September 1998 to 9 November 1999 and in Qatar from 4 January 2007 to 4 January 2008.
5. On 26 September 2008, a Physical Evaluation Board (PEB) convened and recommended a disability rating of:
 - a. 10 percent (%) for degenerative arthritis, right knee. This limited his ability to perform impact activities. Range of motion was 0-128 degrees. Rated as limitation of motion of one joint and that his disposition be permanent physical disability retirement.

b. 10% for metatarsalgia. He had chronic foot pain with a history of non-union of a 5th metatarsal fracture. On right foot x-ray March 2008, there was no evidence of non-union. This limited his ability to perform impact activities.

c. Based on a review of the objective medical evidence of record, the findings of the PEB are his medical and physical impairment(s) prevents reasonable performance of duties required by his grade and military specialty.

d. Per Title 10 United States Code (USC) 1201 Soldiers determined unfit with 20 years of service are retired for disability regardless of the percentage rating. Soldier will reach the 20-years point by the time he would otherwise be separating with severance pay, therefore, the finding and recommendation listed at block 9 is "20%," "permanent disability retirement." This disposition is listed with the understanding that the Soldier will not be separated or retired short of obtaining 20 years of active service.

e. The board found the applicant physically unfit and recommended a combined rating of 20% and that his disposition be permanent disability retirement.

f. His retirement is not based on disability from injury or disease received in the line of duty as a direct result of armed conflict or caused by an instrumentality of war and incurring in line of duty during a period of war as defined by law.

g. The disability did not result from a combat related injury as defined in 26 USC, 104.

6. He concurred with the PEB and waived a formal hearing of his case by annotating and signing the DA Form 199 (PEB Proceedings) on 6 October 2008.

7. Headquarters, United States Army Garrison, Fort Stewart/Hunter Army Airfield Army Personnel Processing Center, MacDill Air Force Base, FL, published Orders 302-0001, amending Orders 298-0003, this Headquarters, dated 24 October 2008 pertaining to retirement of the applicant, "3rd 348th CS CSS," as reads: 20 years, 1 month, 17 days. How changed: "IATR: 20 years, 9 months, 23 days." Authorization: Army Regulation (AR) 635-40 (Physical Evaluation for Retention, Retirements, or Separation).

8. His DD Form 214 covering the period 21 March 1989 through 15 January 2009, shows:

a. He was honorably released from active duty on 15 January 2009, under the provisions of AR 635-40, paragraph 4-24B (1), due to disability, permanent and was assigned to the United States Army Reserve Control Group (Retired).

b. He was credited with 19 years, 9 months, and 25 days of net active service this period and 3 months and 22 days of prior active service, amounting to 20 years,

1 month, and 17 days of net active service. He also had 5 years, 2 months, and 13 days of total prior inactive service.

9. On 20 November 2023, Headquarters US Army Physical Disability Agency provided an advisory opinion finding the applicant's request for his retirement to be converted from a Permanent Disability Retirement (PDR) to a regular Length of Service (LOS) retirement legally insufficient.

10. The advisory opinion stated on 26 September 2008, the Physical Evaluation Board (PEB) found the applicant unfit for his right knee and foot conditions. The applicant was awarded a combined rating of 20% (10% for each condition). He reviewed and accepted the findings of the PEB on 6 October 2008. Normally, a 20% rating would result in a recommendation of separation with severance pay, however, since the applicant had 20 years of active federal service, he was awarded PDR. The presented record does not reveal if the applicant applied for voluntary retirement. Thus, it does not appear that the Presumption of Fitness rule under AR 635-40 applies here. It may be the applicant is eligible for Concurrent Retirement and Disability Pay (CRDP). CRDP became effective on 1 January 2004. It was designed to allow military retirees to draw both their military retirement pay and their full VA benefits without an offset. CRDP was phased in over 10 years and became fully effective in January 2014. A retiree does not need to apply to have CRDP applied to his /her retirement.

11. In the case of the applicant, he would need to demonstrate that he was a LOS retiree with a minimum combined from the VA and if so, when was he awarded 50% or greater VA rating of 50% or greater. The applicant is not eligible for CRDP until he meets both prongs. According to the records the applicant provided he only claimed 8 conditions at his Medical Evaluation Board (MEB). The records only reveal the rating for two of those conditions. In either event, the applicant has made no claims that the findings of the PEB were somehow in error or that new evidence exists indicating that he was not unfit for his right knee and foot conditions. Given the applicant was placed into PDR on 15 January 2009, he would have fallen into the phase in period for CRDP. However, that phase in period would not have started until he was awarded a combined VA rating of 50%. In either event, the phase in period is now over and he should be receiving both of his full military retirement pay and full VA benefits – If he is even eligible for CRDP. Regardless, after reviewing the entire case file, there appears to be no error or omission in his Disability Evaluation System (DES) case.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on public law, policy and regulation. Upon review of the applicant's petition, available military records and Headquarters U.S. Army Physical Disability Agency advisory opinion, the Board concurred with the advising official finding the applicant's request for correction of his records to reflect regular retirement due to length of service in lieu of retirement due to disability, permanent. Is legally insufficient. The Board determined based on the advisory opine there is insufficient evidence to support an error or injustice occurred.

2. The Board noted that Soldiers found to be unfit with 20 years of service are retired for disability regardless of the percentage rating. Evidence shows on 26 September 2008 a PEB board found the applicant physically unfit and recommend a combined rating of 20% and that his disposition be permanent disability retirement. His disability did not result from a combat related injury. The applicant concurred with the PEB and waived a formal hearing of his case. Furthermore, a DFAS advisory opine stated the applicant is being paid based off his years of service of 20 years, 9 months, and 23 days as it is more beneficial than his disability of 20%. The Board determined based on the preponderance of evidence the applicant has not demonstrated the existence of an error or injustice warranting relief. Therefore, the Board denied relief.

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 for correction of the records of the individual concerned.

4/3/2024

X

CHAIRPERSON

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

REFERENCES:

1. Title 10, U.S. Code, section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.
2. Title 10, U.S. Code, 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 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).
3. Army Regulation 635-40 establishes the Army Physical Disability Evaluation System (PDES) 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.
4. Section 12738, Title 10, United States Code (formerly Section 1406, Title 10, United States Code) places limitations on revocation of retired pay. Specifically, the law states: "(a) After a person is granted retired pay under this chapter, or notified in accordance with sections 12731(d) of this title that the person has completed the years of service

required for eligibility for retired pay under this chapter, the person'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 as required by section 12731(a)(2) of this title unless it resulted directly from the fraud or misrepresentation of the person. (b) The number of years of creditable service upon which is retired pay is computed may be adjusted to correct any error, miscalculation, misinformation or administrative determination and when such correction is made the person is entitled to retired pay in accordance with the number of years of creditable service, as corrected, from the date the person is granted retired pay.

5. Title 10 USC 1201. Regulars and members on active duty for more than 30 days: retirement

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

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

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

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

(3) either—

(a) the member has at least 20 years of service computed under section 1208 of this title; or

(b) the disability is at least 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs at the time of the determination

//NOTHING FOLLOWS//