

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 7 August 2024

DOCKET NUMBER: AR20230004507

APPLICANT REQUESTS: in effect, a medical retirement.

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 293 (Application for the Army Discharge Review Board)
- Four Department of Veterans Affairs (VA) Rating Decisions
- Two VA letters
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- California Army National Guard (CAARNG) order

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, in effect, he served for over 16 years in the U.S. Navy (USN), and then enlisted into the ARNG; his sleep apnea should qualify him for a medical retirement.
 - a. Prior to his USN discharge, military doctors diagnosed him with sleep apnea and issued him a continuous positive airway pressure (CPAP).
 - b. The military informed him his medical records had been lost and his claim for sleep apnea was deferred. His records were later found but not before he had been discharged.
 - c. He was told by the ARNG doctor that with sleep apnea and requiring a CPAP machine, he could not deploy and, therefore, he was not fit for duty. He had almost completed his 4 years in the ARNG and received an honorable discharge. He believes he should be eligible for a medical discharge as he was initially diagnosed while serving; additionally, he was awarded during his ARNG duty and told he could not

continue duty. He had approximately 17 years in the USN and 4 years in the ARNG, therefore, he is requesting a medical discharge.

d. In support of his request, the applicant provides four VA Rating Decisions, two VA letters, and a copy of his USN DD 214 and CAARNG separation orders.

(1) The VA Rating Decisions respectively show the following with regard to sleep apnea:

- 27 September 2006 – VA denied the applicant's claim for disability benefits due to the lack of service treatment records (STR) but noted service connection could later be granted if the STR were obtained
- 21 March 2011 –VA verified the applicant's 1 September 2001 sleep apnea diagnosis and the issuance of a CPAP device; it deferred its service-connection decision pending receipt of an independent medical opinion
- 18 September 2012 – VA assigned a 50 percent disability rating to sleep apnea because he required the use of a CPAP device
- 30 November 2023 – VA awarded a 100 percent disability rating for post-traumatic stress disorder, effective 17 July 2023, and continued the applicant's 50 percent rating for sleep apnea

(2) A VA letter, dated 24 September 2012, announces VA's decision to award a 50 percent disability rating for obstructive sleep apnea. A second VA letter, dated 4 December 2023, states the applicant's combined disability rating is 100 percent, effective 17 July 2023.

3. A review of the applicant's service records shows the following:

a. On 31 August 2007, after completing 16 years, 8 months, and 14 days in the USN, the applicant enlisted into the New York ARNG (NYARNG) for 4 years. On 6 February 2008, he transferred from the NYARNG to the CAARNG.

b. On or about 7 February 2009, the applicant's rating chain prepared the applicant's Noncommissioned Officer Evaluation Report (DA Form 2166-8 (NCOER)). The report covered the rating period from 20080208 through 20090207, identified his principle duty title as "Firefinder Radar Operator," and stated the applicant had not signed the NCOER due to "medical condition restrictions." The report offered no further details as to the nature of the applicant's medical condition(s), and neither the rater nor senior rater comments mentioned negative impacts that the applicant's medical condition(s) may have had on the applicant's duty performance. The report shows the applicant passed his Army Physical Fitness Test.

c. Effective 12 January 2010, CAARNG orders transferred the applicant to the Inactive National Guard (ING), due to personal reasons. On 30 August 2011, CAARNG orders relieved the applicant from the ING and honorably discharged him because he had reached his expiration term of service.

4. The VA and the Army (under the Department of Defense) operate under separate provisions of U.S. Code (respectively Title 38 (Veterans' Benefits) and Title 10 (Armed Forces)). As such, each makes independent determinations, based upon the requirements set forth within their respective parts of the law and their own internal regulations. Decisions made by the VA are not binding on the Army and do not show an error on the Army's part. Additionally, the VA, unlike the Army, can adjust a Veteran's disability rating over the course of his/her lifetime, based on changes in the severity of the service-connected disabilities.

5, 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/or 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 a referral to the Disability Evaluation System (DES) for sleep apnea. He states in part:

"I was told by the Army National Guard doctor that with sleep apnea and requiring a CPAP machine, I could not be deployed and therefore, not fit for duty. I had almost completed my 4 years in the Army National Guard and received an honorable discharge (See attachment 2). I believe that I should be eligible for a medical discharge as I was initially diagnosed while serving, additionally, I was awarded during my National Guard duty and told I could not continue duty.

c. The Record of Proceedings details the applicant's military service and the circumstances of the case.

d. JLV shows the applicant was granted a VA service-connected disability rating of 50% for sleep apnea effective 27 October 2005. This is the standard rating for uncomplicated sleep apnea which "Requires use of breathing assistance device such as continuous airway pressure (CPAP) machine."

e. The applicant states he was diagnosed with sleep apnea while in the Navy and before he joined the Army National Guard. His pre-entrance Report of Medical History completed on 27 August 2007 is devoid of any admission to or reference to this pre-existing condition.

f. The applicant was not placed on either a duty or non-duty permanent physical profile while in the Army National Guard. Soldiers with uncomplicated sleep apnea are placed on non-duty limiting permanent physical profiles IAW paragraph 3-41c of AR 40-501, Standards of Medical Fitness. The profiles typically inform the commander the Soldier has a CPAP machine and requires regular access to electricity in order to charge the battery. These Soldiers are deployable.

g. The applicant's final NCO Evaluation Report was an annual covering 8 February 2008 thru 7 February 2009 and shows he was an "marginal" Soldier. The rater marked boxes indicating he possessed none of the seven Army Values. He did pass his Army Physical Fitness Test on 7 September 2008 and met the Army height and weight standards. His rater bottom blocked him as "Marginal." His senior rater likewise bottom blocked him as "Poor" for both Overall Performance and Overall Potential opening:

- does not set the example; frequently absent without leave and left unit early without prior approval
- counseled multiple times for substandard performance
- consistently makes excuses as to why he cannot attend military occupational skill schools
- unmotivated and displays lack of interest in unit
- Soldier does not possess the necessary skills to be considered for the next higher grade

h. Paragraph 3-41c of AR 40-501, Standards of Medical Fitness (14 December 2007) states that sleep apnea is a cause for referral to the DES only when it "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."

i. Paragraph 3-1 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (8 February 2006) 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.”

j. There is no insufficient probative evidence his sleep apnea failed the medical retention standards of chapter 3, AR 40-501 prior to his transfer to the Inactive Army Nation Guard; or that it prevented him from extending his contract. Thus, there was no cause for referral to the Disability Evaluation System. Furthermore, there is no evidence that any medical condition prevented the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his discharge.

k. It is the opinion of the Agency Medical Advisor that a referral of his case to the DES is not warranted.

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 law, policy and regulation. Upon review of the applicant's petition, available military records and medical review, the Board concurred with the advising official finding that a referral of his case to the DES is not warranted. The opine noted the applicant's record is absent sufficient evidence this his sleep apnea failed the medical retention standards in accordance with regulatory guidance.

2. The Board determined there is insufficient evidence to support the applicant's contentions for a medical retirement. The Board agreed with the advising opine that stated sleep apnea is a cause for referral to the DES only when it “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. As that is not the case here, the Board denied relief.

3. The Board determined DES compensates an individual only for service incurred condition(s) which have been determined to disqualify him or her from further military service. 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.

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.



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 (AR) 40-501 (Standards of Medical Fitness), in effect at the time, provided guidance for determining when Soldiers fail medical retention standards and must be referred to a medical evaluation board (MEB). Concerning obstructive sleep

apnea, medical authority were required to refer Soldiers to a MEB when the sleep apnea could not be corrected by medical therapy, CPAP, surgery or an oral appliance.

3. AR 635-40 (Physical Evaluation for Retention, Retirement, or Separation), in effect at the time, established the Physical Disability Evaluation System (PDES), and implemented chapter 61 (Retirement or Separation for Physical Disability), Title 10, U.S. Code. The regulation set forth policies, responsibilities, and procedures that governed the evaluation for physical fitness of Soldiers who may be unfit to perform their military duties because of physical disability. Chapter 8 (Reserve Components) provided additional guidance specifically for USAR and ARNG members who were not on extended active duty for more than 30 days.

a. Paragraph 8-2a (Eligibility – Disability from Injury). Reserve Component Soldiers eligible for processing under this paragraph were those who had incurred a disability from an injury determined to be the proximate result of performing:

- Annual Training (AT), active-duty special work (ADSW), active duty for training (ADT) with or without pay, or temporary tour of active duty (TTAD) under a call or order that specifies a period of 30 days or less, to include full time training duty (FTTD) under Title 32 (National Guard), U.S. Code
- Inactive duty training (IDT) including IDT without pay under competent orders
- ADT under Title 10 U.S. Code 10148(a) (Ready Reserve: Failure to Satisfactorily Perform Prescribed Training); (this was usually a 45-day tour required by law because of failure on the part of the Reserve Component Soldier to perform other required training duty)

b. Paragraph 8-2b (Eligibility – Disability from Disease Incurred while Performing Duty on or after 15 November 1986). Section 604, Public Law 99-661, 14 November 1986, revised provisions in Title 10, U.S. Code to provide for disability processing of Soldiers who, while performing inactive or active-duty training, incurred an injury or disease or aggravated that injury or disease in the line of duty. Referral for processing did not mean an automatic entitlement to disability compensation. Once referred, a determination had to be made whether the disease was the proximate result of performing duty.

c. Paragraph 8-3 (Proximate Result).

(1) In order for a Reserve Component Soldier of the RC to be compensated for disabilities incurred while performing duty for 30 days or less, there had to be a determination by a physical evaluation board (PEB) that the unfitting condition was the proximate result of performing duty. This determination was different from a line of duty determination, which established whether the Soldier was in an authorized duty status at the time the disability was incurred and whether misconduct or gross negligence was

involved. Proximate result established a causal relationship between the disability and the required military duty.

(2) An injury incurred in the line of duty while the Soldier was hospitalized could be determined to be proximate result of performing active duty. The injury had to be incurred before the termination date of the Soldier's initial period of active duty for 30 days or less as reflected by official orders unless a direct causal relationship existed between the original proximate result injury and the subsequent injury. In cases where the proximate cause was not certain, any decisions had to be submitted to the U.S. Army Physical Disability Agency for review.

4. National Guard Regulation (NGR) 614-1 (Inactive Army National Guard (ING)), in effect at the time, prescribed the rules for the use of ING.

a. Paragraph 1-7 (Inactive Status). Soldiers transferred to the ING are in an inactive status and are not a part of the Selected Reserve of the Army. Credit for services in the ING does not accrue towards any service computation except credit for basic pay purposes. Time served in the ING is considered non-creditable service toward retirement.

b. Paragraph 2-1 (Transfer between Active Status Soldiers and the ING). The reasons for Soldiers in active status requesting transfer to the ING can include the following: change of residence; incompatibility with civilian employment; temporary medical disqualification, not due to line of duty injury, that can be corrected in less than one year; as an alternative for serving in the Individual Ready Reserve after the completion of an initial period of active status with the ARNG.

//NOTHING FOLLOWS//