

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 8 December 2023

DOCKET NUMBER: AR20230004559

APPLICANT REQUESTS: in effect, correction of her spouse's record, a former service member (FSM) to amend his record to show he was medically retired/discharged in lieu of his release from active duty by reason of completion or required active service. She wants his narrative reason for separation changed.

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 293 (Application for the Review of Discharge)
- DD Form 214 (Certificate of Release or Discharge from Active Duty) for the period ending 27 July 2002
- Certificate of Death for FSM
- Department of Veterans Affairs (VA) letter to FSM's spouse, dated 3 April 2020

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 her spouse's record should be corrected to show a medical reason due to his diagnosis of cancer. The Texas Army National Guard (TSARNG) did not attend to his medical needs and took the less easy and painful action to release him. The VA has granted her dependent indemnity compensation (DIC) and recognized her husband's cancer and that it did occur while he was in the ARNG.
3. The applicant provides the following documents on behalf of the FSM:
  - a. Certificate of Death, issued by the State of Texas, shows the FSM passed away on 4 May 2008 of pancreatic cancer.
  - b. VA letter to the spouse of the FSM, dated 3 April 2020, states they decided, on appeal, that the applicant was granted service-connected death benefits, called DIC, effective 1 May 2008.

4. The FSM's service record shows the following information:

a. He had the following military service:

- 1 May 1985 to 10 January 19924 – he served in the Regular Army
- 11 January 1992 to 18 November 1994 – he served in the U.S. Army Reserve Control Group (Reinforcements)
- 19 November 1994 to 3 April 1997 – he served as an ARNG member
- 4 April 1997 to 31 July 1997 – he was in an Inactive National Guard status
- 1 August 1997 to 3 March 2002 – he served as an ARNG member
- 4 March 2002 to 27 July 2002 – he served as an ARNG mobilized member
- 28 July 2002 to 31 May 2003, he served as an ARNG member
- 1 June 2003 to 6 April 2004 - he had a break in service
- 7 April 2004 – date to be determined – he was ARNG member

b. DD Form 214 for the period ending 27 July 2002, shows he completed 4 months and 24 days of active duty service while in the ARNG.

c. He received an Honorable Discharge Certificate from the TXARNG, on 31 May 2003.

d. DD Form 4 (Enlistment/Reenlistment Document) shows he reenlisted in the ARNG as an E-5 for a period of two years on 7 April 2004.

e. National Guard Bureau Form 23 (ARNG Retirement Points History Statement), prepared on 28 April 2004, shows he completed 10 years, 8 months, and 10 days of creditable service for retired pay for his service from 1 May 1985 to a date to be determined.

f. DA Form 4836 (Oath of Extension) shows he extended his enlistment on 27 September 2007 for one additional year.

5. There is no indication or evidence in the applicant's record that shows he was determined to be medically unfit or that show he was referred for processing through the Army's Physical Disability Evaluation System (PDES) prior to his death or that he received a medical evaluation board (MEB) or a physical evaluation board (PEB).

6. The FSM's ARNG Retirement Points History Statement, prepared on 20 October 2023 reflects he had 12 years, 8 months, and 10 days of creditable service for retired pay, with six years, 8 months, and 10 days of active-duty service.

## 7. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor reviewed the supporting documents, the Record of Proceedings (ROP), and the applicant's available records in the Interactive Personnel Electronic Records Management System (iPERMS), the Health Artifacts Image Management Solutions (HAIMS) and the VA's Joint Legacy Viewer (JLV). The applicant is the deceased veteran's widow. She requests on behalf of the veteran for change in the narrative reason for discharge to medical discharge. She essentially contends that her husband's (the veteran) pancreatic cancer occurred while he was in the Texas Army National Guard (TXARNG). She stated that the VA has granted her Dependency and Indemnity Compensation (DIC). The death certificate indicated the veteran's cause of death on 04May2008 was Generalized Carcinomatosis and Metastatic Carcinoid of the Pancreas.

b. The veteran's records were summarized in the ABCMR ROP. His service years were carefully noted in the ROP. He served in the Regular Army from 01May1985 until 10Jan1992. Then he served in the US Army Reserve Control Group (Reinforcement) from 11Jan1992 to 18Nov1994. He began serving in the National Guard 19Nov1994. Of note, he was in an inactive National Guard status from 04Apr1997 to 31Jul1997 and there was a (civilian) break in service from 01Jun2003 to 06Apr2004. Also of note, he served as a mobilized member in the ARNG from 04Mar2002 until 27Jul2002. His MOS during this time was 95B20 Military Police. He was released from this period of active service under provisions of AR 635-200 chapter 4 upon completion of the period of required active service.

### c. Medical records and related

- 13Mar1992 VA lumbosacral spine film was normal.
- 19Apr1994 VA lumbosacral spine film showed degenerative disc at L5-S1 level.
- 14Dec1999 VA Primary Care Note. The veteran was status post carcinoid tumor resection in 1997, and he was being followed in the private sector. He reported continued post-surgical abdominal pain. He had been recently hospitalized 23Nov1999 and the abdominal CT did not reveal the etiology of abdominal pain.
- 13Oct2000 VA Primary Care Note. The veteran reported having been hospitalized 23Sep2000 for abdominal pain. He was placed on Prilosec with remission of the abdominal pain. No source for the pain was found—an abdominal CT had been completed in August 2000.
- 29Nov2006 VA Primary Care Initial Evaluation Note. The history was provided that on 30Oct1997, appendicitis was suspected. *Appendicitis is generally suspected when there is sudden onset of right lower quadrant abdominal pain.* During the intended surgery to remove the appendix, a carcinoid tumor was discovered near the appendix the removal of which necessitated resection of approximately 4 inches of his small intestine. He still had abdominal pain on and

off for the next 9 years. During that period, he was seen at several hospitals, but nothing was found until an abdominal CT revealed pancreatic cancer in 2006. A CT scan 5 months prior had not revealed a lesion. Also of note, the applicant reported having back pain off and on since he twisted his back in service. His back pain was treated with Ibuprofen only which was effective. The back exam was essentially normal except the veteran experienced back pain with squatting and with bending forward to 90 degrees. *Normal back flexion is to 90 degrees.* At the time of the visit, he was using Fentanyl patch and morphine tablets for his pancreatic cancer and was undergoing chemotherapy through a porta cath. His pain was 9 out of 10. Diagnosis: Pancreatic Cancer, Carcinoid Cancer, and Degenerative Joint Disease (Lumbar).

- 08Mar2007 VA Primary Care Note. At this visit he was continuing to be seen in the private sector for the pancreatic cancer. He reported abdominal pain with biliary vomiting at times. Weight loss was noted with temporal muscle wasting and change in skin coloring. Liver enzymes were elevated. He was still on narcotics for pain control.
- 06Apr2007 VA Primary Care Note. Recent CT of the abdomen showed widespread metastasis from the lungs down to the abdomen. He had been reportedly declared by his oncologist to be totally disabled and had advised him to be off work. He was undergoing palliative and supportive treatment only. *Chemotherapy had been unsuccessful, and he was not a surgical candidate.*
- 04Sep2007. He was referred for and he consented to hospice intervention.
- 30Oct2007 VA C&P Medical Opinion. The VA reviewer opined that the veteran's pancreatic cancer that was diagnosed in August 2006 was at least as likely as not (50% probability) related to the carcinoid tumor that was discovered in October 1997. This was based on evidence that the veteran had abdominal pain during his service in 2000 (while in the National Guard), and his oncologist reportedly endorsed that the abdominal pain at that time was a symptom of the veteran's slow growing carcinoid tumor (which was ultimately found to have metastasized to the pancreas).
- 09Apr2008 VA consult request to the El Paso Cancer Treatment Center concerning the Carcinoid Tumor Metastasis, showed for the question "Is this referral for service-connected condition or adjunct?" answer "No".
- 31Mar2020 BVA (Board of Veteran's Appeal) C&P Medical Opinion DBQ. The BVA reviewer opined that the veteran's "cause of death Generalized Carcinomatosis from Carcinoid Tumor is at least as likely as not due to or related to or attributable to in-service...". The BVA examiner reasoned that even though the veteran did not have symptoms during his active military service, carcinoid tumors have vague symptoms therefore diagnosis was delayed and not found until after his military service.

d. The ARBA Medical reviewer did not find active duty service treatment records. While he was a member of TXARNG, VA treatment records indicated that he was being

followed in the private sector for ongoing abdominal pain; however, the records available for this review did not show that any treatment records were related to TXARNG events or training. Available treatment records showed that the veteran's symptoms began in October 1997 at which time his provider was suspicious of appendicitis—there was no indication that the veteran had any symptoms prior to that time. Notwithstanding the 31Mar2020 BVA reviewer endorsed that the veteran's cancer was due to his military service, JLV search today showed that the veteran was service connected by the VA at 10% for Back Strain only— he has not been service connected by the VA for the carcinoid tumor or the pancreatic cancer.

e. The veteran's widow contends that the veteran had pancreatic cancer while he was a member of the TXARNG. It is worth noting that in her 21Sep2018 VA claim for benefits, she proposed for consideration that the veteran's cancer was due to in-service exposure to radioactive materials while guarding nuclear weapons in Germany or due to chemical weapons or other hazardous materials while serving in Panama.

f. Currently, the cause of carcinoid tumors (or neuroendocrine tumors) is unknown. The veteran's pancreatic cancer is considered to be metastatic from the original carcinoid tumor. Neuroendocrine tumors often grow slowly, and associated symptoms can be vague. This can contribute to a delay in diagnosis. One medical source indicated individuals can experience symptoms for an average of five to seven years before finally receiving a neuroendocrine tumor diagnosis. Other sources indicated the tumors can be growing 3-5 years or up to 10 years or more before discovery.

g. The veteran's cancer was diagnosed on 30Oct1997 when the veteran was not on active orders for greater than 30 days. He was in an inactive National Guard status from 04Apr1997 to 31Jul1997. He was a TXARNG member at the time of diagnosis. He had been released from active service 5 years prior, after having served almost 7 years in the Regular Army from May 1985 until January 1992.

h. Carcinoid tumors are largely slow growing; however, without speculation, it cannot be determined when the veteran's carcinoid tumor began growing. It was noted that there were no medical visits or other documentation available for review showing onset of symptoms or aggravation of the carcinoid tumor or pancreatic tumor while the veteran was on active orders for greater than 30 days, or during training or other events related to his membership in the TXARNG. In addition, there was no evidence showing that the veteran had abdominal pain (the symptom attributable to his carcinoid tumor by the oncologist) prior to the immediate period surrounding the surgery on 30Oct1997. And finally, there was insufficient documentation in the record, that the veteran had any conditions to include a malignant condition or back condition, which failed medical retention standards of AR 40-501 chapter 3 at the time of discharge from the Regular Army in January 1992 or at the time of release from active duty in July 2002. Based on records available at this time, evidence is insufficient to support changing the narrative

reason for discharge for the active duty periods ending 10Jan1992 and 27Jul2002, to 'medical discharge'.

i. Concerning the veteran's final years as a member in the TXARNG, medical records are silent for why he was not referred for a non-duty related PEB for the Metastatic Carcinoid of the Pancreas condition after the chemotherapy was unsuccessful because at that point, in the ARBA Medical Reviewer's opinion, the condition no longer met retention standards per 40-501 chapter 3-42a (malignant neoplasms that are unresponsive to therapy, or when the residuals of treatment are in themselves unfitting under other provisions of this chapter). In addition, his chronic requirement of narcotics for pain control likely made him non-deployable for certain geographic areas (AR 40-501 chapter 5-14). Moreover, his NCO ER covering the period 20051201 thru 20061130 indicated that he was on profile 20060104, he was involved in an MRB, and he had missed 8 MUTAs during the fiscal year. In addition, his MOS was 95B20 Military police during active duty years 04Mar2002 until 27Jul2002; however, during the most recent performance evaluation period available for review, his assigned duty was MOS 92G20, (less physically demanding). Presumably, there was benefit to the veteran to remain a member of the TXARNG, because it was noted that an oath of extension was approved 27Sep2007 after the veteran had consented to hospice intervention.

#### BOARD DISCUSSION:

After reviewing the application and all supporting documents, the Board found that a portion of the requested relief is warranted. The Board carefully considered the applicant's request, evidence in the record and available medical documentation. The Board noted the applicant's statement regarding the VA having granted her dependent indemnity compensation (DIC), recognized her husband's cancer and that it did occur while he was in the ARNG. The Board recognize that the VA and the Department of the Army operate under different authorities; however, in this case due to the complexity of former service member's medical condition, the Board determined a recommendation for further consideration of the case is warranted.



Title 10, United States Code (USC), Section 12731b (Special rule for members with physical disabilities not incurred in line of duty) provides, in pertinent part, that in the case of a member of the Selected Reserve of a reserve component who no longer meets the qualifications for membership in the Selected Reserve solely because the member is unfit because of physical disability, the Secretary concerned may, for purposes of entitlement to retirement pay, determine to treat the member as having met the required 20 years of qualifying service. The Secretary concerned shall notify each person who has completed the years of service required for eligibility for retired pay if the member has completed at least 15 years, and less than 20 years of qualifying service.

3. 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, under the operational control of the Commander, U.S. Army Human Resources Command (HRC), is responsible for administering the PDES and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with Department of Defense Directive 1332.18 and Army Regulation 635-40.

a. The objectives of the system are to:

- maintain an effective and fit military organization with maximum use of available manpower
- provide benefits for eligible Soldiers whose military service is terminated because of service-connected disability
- provide prompt disability processing while ensuring that the rights and interests of the government and the Soldier are protected

b. Soldiers are referred to the PDES:

- 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
- receive a permanent medical profile, P3 or P4, and are referred by an MOS Medical Retention Board
- are command-referred for a fitness-for-duty medical examination
- are referred by the Commander, Human Resources Command

c. The PDES assessment process involves two distinct stages: the MEB and the 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 are either separated from the military or are permanently retired, depending on the severity of the disability and length of military service. Individuals who are “separated” receive a one-time severance payment, while veterans who retire based upon disability receive monthly military retirement payments and have access to all other benefits afforded to military retirees.

d. 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.

4. Title 10, U.S. Code, section 1203, provides for the physical disability separation with severance pay of a member who has less than 20 years of service and a disability rated less than 30 percent.

5. Army Regulation 40-501 (Standards of Medical Fitness) provides that for an individual to be found unfit by reason of physical disability, he or she must be unable to perform the duties of his or her office, grade, rank or rating. Performance of duty despite impairment would be considered presumptive evidence of physical fitness.

6. Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation) establishes the 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 or her office, grade, rank, or rating. It provides that an MEB is convened to document a Soldier's medical status and duty limitations insofar as duty is affected by the Soldier's status. A decision is made as to the Soldier's medical qualifications for retention based on the criteria in Army Regulation 40-501. 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 service.

a. Chapter 2-1 provides that the mere presence of 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 member reasonably may be expected to perform because of his or her

office, rank, grade, or rating. The Army must find that a service member is physically unfit to reasonably perform his or her duties and assign an appropriate disability rating before he or she can be medically retired or separated.

b. Chapter 2-2b(1) provides that when a member is being processed for separation for reasons other than physical disability (e.g., retirement, resignation, reduction in force, relief from active duty, administrative separation, discharge, etc.), his or her continued performance of duty (until he or she is referred to the PDES for evaluation for separation for reasons indicated above) creates a presumption that the member is fit for duty. Except for a member who was previously found unfit and retained in a limited assignment duty status in accordance with chapter 6 of this regulation, such a member should not be referred to the PDES unless his or her physical defects raise substantial doubt that he or she is fit to continue to perform the duties of his or her office, grade, rank, or rating.

c. Chapter 2-2b(2) provides that when a member is being processed for separation for reasons other than physical disability, the presumption of fitness may be overcome if the evidence establishes that the member, in fact, was physically unable to adequately perform the duties of his or her office, grade, rank, or rating even though he or she was improperly retained in that office, grade, rank, or rating for a period of time and/or acute, grave illness or injury or other deterioration of physical condition that occurred immediately prior to or coincidentally with the member's separation for reasons other than physical disability rendered him or her unfit for further duty.

d. Chapter 4-10 provides that MEBs are convened to document a Soldier's medical status and duty limitations insofar as duty is affected by the Soldier's status. A decision is made as to the Soldier's medical qualification for retention based on criteria in Army Regulation 40-501, chapter 3. If the MEB determines the Soldier does not meet retention standards, the board will recommend referral of the Soldier to a PEB.

e. Chapter 4-12 provides that each case is first considered by an informal PEB. Informal procedures reduce the overall time required to process a case through the disability evaluation system. An informal board must ensure that each case considered is complete and correct. All evidence in the case file must be closely examined and additional evidence obtained, if required.

f. The regulation states that after the Soldier has been processed through the PDES and a PEB has made a determination that the Soldier is qualified for disability retirement but for the fact that his or her disability is determined not to be of a permanent nature and stable can be placed on the temporary disability retired list (TDRL). The TDRL is used in the nature of a "pending list." It provides a safeguard for the Government against permanently retiring a Soldier who can later fully recover, or nearly recover, from the disability causing him or her to be unfit. Conversely, the TDRL safeguards the

Soldier from being permanently retired with a condition that may reasonably be expected to develop into a more serious permanent disability.

7. Title 38, U.S. Code, sections 1110 and 1131, permits the VA to award compensation for a medical condition which was incurred in or aggravated by active military service. The VA, however, is not required by law to determine medical unfitness for further military service. The VA, in accordance with its own policies and regulations, awards compensation solely on the basis that a medical condition exists and that said medical condition reduces or impairs the social or industrial adaptability of the individual concerned. The VA can evaluate a veteran throughout his or her lifetime, adjusting the percentage of disability based upon that agency's examinations and findings. However, these changes do not call into question the application of the fitness standards and the disability ratings assigned by proper military medical authorities during the applicant's processing through the Army PDES.

8. Army Regulation 635-200 prescribes policies, standards, and procedures to ensure the readiness and competency of the force while providing for the orderly administrative separation of Soldiers for a variety of reasons. Chapter 4 states a Soldier will be discharged or released from active duty upon termination of enlistment and other periods of active duty or active duty for training.

//NOTHING FOLLOWS//