

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 5 March 2024

DOCKET NUMBER: AR20230004594

APPLICANT REQUESTS:

- correction of his records to show he was discharged from the U.S. Army Reserve (USAR) due to medical unfitness for retention
- issuance of a Notification of Eligibility for Retired Pay at Age 60 (15-Year Letter)
- personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- USAR discharge orders
- Department of Veterans Affairs (VA) Rating Decision

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:

a. He was diagnosed with radiculopathy in both legs on 29 January 2016 and with bilateral pes planus on 1 October 2016. Due to these conditions, he was unable to take the Army Physical Fitness Test (APFT). After he received his second diagnosis, he informed his chain of command that he was unable to take the APFT due to his conditions. He was then informed by his chain of command that there was nothing they could do to help him and that he would be imposed a bar to reenlistment if he could not pass the APFT. He then requested transfer to the Individual Ready Reserve (IRR) so that at least he could attain 20 years of creditable service. However, he was told that he must still pass the APFT because transfer to the IRR required a reenlistment. He was then released from the USAR on 23 April 2017.

b. A year later, he learned from another Soldier that there was more his unit could do and after further research, he found out that he could have received a 15-Year Letter per Title 10, U.S. Code, section 12731b (Special Rule for Members with Physical Disabilities Not Incurred in the Line of Duty) and request reassignment to the Retired Reserve due to medical disqualification. He then contacted the U.S. Army Human Resources Command and was informed that because he is out of the military, he needed to apply to this Board.

c. This was an injustice based on commanders not knowing every avenue when it comes to Soldiers begin release from the Army. He understands that commanders or first sergeants do not always know all the policies and regulations regarding Soldiers being separated from the military. In the USAR, separation is processed at the unit level and sent to the regional command for processing. When you are on active duty, you go through a transition center to process your DD Form 214 (Certificate of Release or Discharge from Active Duty) and you know what your status will be once you get out.

d. Within the transition center, there are experts that can process your transition correctly and can ensure you get the correct discharge or retirement according to Army regulations. The ABCMR can correct this injustice by understanding commanders disconnect regarding rules and regulations governing the types of avenues units can take when it comes to a Soldier's retirement. He wants to retire from the Army. When he joined the Army, he intended to do that, but sometimes Soldiers cannot achieve this due to health and other reasons. He was four years shy from retiring and would have had 20 years of service. He would like to know that he gave the Army his all, and to be eligible to receive a 15-year retirement will help to achieve that.

3. The applicant enlisted in the Regular Army on 8 June 2000. He was honorably released from active duty and transferred to the USAR on 3 July 2006. His DD Form 214 for this period of service shows he completed 6 years of active service.

4. The applicant was assigned to a troop program unit of the USAR, 319th Signal Battalion. The applicant's Noncommissioned Officer Evaluation Reports (NCOER) shows the following:

a. NCOER covering the period 7 April 2012 through 6 April 2013 shows he did not take the APFT due to a physical profile. The NCOER also shows that the physical profile did not hinder duty performance.

b. NCOER covering the period 2 April 2013 through 1 April 2014 shows he passed the APFT on 26 August 2013. The NCOER also shows he did not meet height/weight standards.

c. NCOER covering the period 2 April 2014 through 27 September 2014 shows he did not take the APFT due to a physical profile. The NCOER also shows:

- he did not meet body fat standards in accordance with Army Regulation 600-9 (The Army Body Composition Program)
- he failed a diagnostic APFT prior to physical profile
- despite having limiting profile inhibiting from taking a record APFT, he attempted to maintain physical fitness

d. NCOER covering the period 28 September 2014 through 27 September 2015 shows he failed the APFT and that he was not within Army body fat standards.

e. NCOER covering the period 27 September 2015 through 13 February 2016, his last NCOER on record, does not show he was unable to perform his military duties due to a medical disability.

5. Orders issued on 23 April 2017 ordered the applicant's discharge from the USAR effective, 23 April 2017, under the authority of Army Regulation 135-178 (Army National Guard and Reserve Enlisted Administrative Separations). His Chronological Statement of Retirement Points shows he was credited with 16 years of qualifying service for non-regular retirement.

6. The applicant provided a VA Rating Decision, dated 24 January 2017, showing he was granted service-connected disability compensation for:

- post-traumatic stress disorder (previously denied as insomnia, and claimed as due to combat and personal trauma)
- radiculopathy, left lower extremity, sciatic nerve (common peroneal)
- radiculopathy, right lower extremity, sciatic nerve (common peroneal)
- back strain

7. 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.

#### 8. 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 (AHLTA), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the

Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and 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 15-year Notice of Eligibility for a non-regular retirement. He states several medical conditions prevented him from performing a for-record Army Physical Fitness Tests (APFT) in order to reenlist or be transferred to the Individual Ready Reserve (IRR). He states:

“I am writing to request that the Army Review board grant my request to be eligible to retire from the Army with 15 years of service under Title 10 USC 12731S. (Special Rule for Members with Physical Disabilities not incurred in the line of Duty).

I was told by my 1SG and Commander that there was nothing they could do to help me and that I would be Flagged and barred from being reenlisted if I could not pass a PT test. I then requested that to be transferred to IRR; at least there, I could still have 20 years of creditable service; however, the answer I was given was that I must pass a PT test first because it would still count as reenlistment. I was then released from the Army Reserves on April 23, 2017.”

c. The Record of Proceedings details the applicant’s military service and the circumstances of the case. Orders published by the 63<sup>rd</sup> Regional Support Command show the applicant was honorably discharged from the USAR on 23 April 2017 under authority of AR 135-178, Enlisted Administrative Separations (18 March 2014). The orders do not cite an authorizing paragraph or chapter.

d. A 26 September Post-Deployment Health Assessment shows the applicant was without complaints:

“He reported: No generalized pain that impacts ability to function or to perform military duties. No dizziness and no memory lapses or loss. No high irritability, no insomnia, no nightmares, no anhedonia, no loss of interest in friends and family, not thinking about suicide, no homicidal thoughts, no violent behavior, not feeling emotionally detached, no change in personality, no interpersonal relationship problems, and no social isolation.”

e. The provider listed no diagnoses and released him without limitations.

f. On 23 November 2015, the applicant underwent a pre-employment examination to become a supply management specialist. The applicant reported: “Working full time, happy with job, job requires prolonged sitting, prolonged standing, prolonged kneeling, repeated lifting, repeated twisting, and prolonged ambulation.” The provider

documented a normal examination, no diagnoses were listed, and he was cleared for employment: "Patient meets functional requirement for this position."

g. He completed his final Periodic Health Assessment (PHA) in January 2016. The nine-page behavioral health screening was negative for behavioral health concerns, issues, and diagnoses.

h. On the physical examination form, he noted that he had a back injury in 2011 when asked "Are you on a profile or do you have a medical condition that keeps you from taking any part of the APFT, requires you to take alternate APFT event, or keeps you from doing your military job duties?" However, when asked twenty-three questions in the review of symptoms, he answered "No" to all questions of "Do you have or have you ever had ...?" These questions included "Back Pain," "Joint Pain," and "Chronic Pain." The only item noted by the provider on the last page of the PHA was "Hypertension treated with HCTZ [hydrochlorothiazide]- poorly controlled. Advised to return to see PMD [primary physician]." He had no limitations in his physical profile and was declared fully deployable to an austere environment within the next 6 months.

i. His final NCO Evaluation Report (SGT) was for a change of rater and covered 28 September 2015 thru 13 February 2016. It shows he passed his APFT on 14 November 2015 and met height/weight standards. His senior rater blocked him "Highly Qualified" (second on a scale of 1-4) opining: "SGT [Applicant] is a dedicated and earnest NCO and his demonstrated willingness for greater responsibility combined with his exhibited knowledge and desire to serve will be a boon to his next unit. Continued application of his depth of knowledge should lead to continued success."

j. MEDCHART contains no temporary or permanent physical profiles, and no documentation supporting a non-duty related condition was the cause for his separation was submitted or found in the EMR. The applicant is therefore ineligible to retire under 10 U.S. Code § 12731b, Special rule for members with physical disabilities not incurred in line of duty (15-year notice of eligibility).

k. Passed in 1999, this statute authorizes the Secretary concerned to treat a member of the Selected Reserve who no longer meets the qualifications for membership in the Selected Reserve solely because the member is unfit due to physical disability not incurred in the line of duty as having met the service requirements for years of service computed under 10 U.S. Code § 12732. The Secretary can then provide the member with a notification that the member has completed at least 15, and less than 20 of service. This "15-year Notice of Eligibility" authorizes a non-regular retirement.

l. Review of his records in JLV shows he has been awarded multiple VA service-connected disability ratings, including PTSD, flat foot condition, and intervertebral disc syndrome. However, the DES compensates an individual only for service incurred

medical 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.

m. It is the opinion of the Agency Medical Advisor that neither a referral of his case to the DES nor issuance of a 15-year Notice of Eligibility for a non-regular Retirement is warranted.

#### BOARD DISCUSSION:

1. 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.

a. The evidence of record shows the applicant was issued orders ordering his discharge from the USAR effective, 23 April 2017, under the authority of AR 135-178. His Chronological Statement of Retirement Points shows he was credited with 16 years of qualifying service for non-regular retirement. The orders do not cite an authorizing paragraph or chapter.

b. 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.

c. The Board reviewed and agreed with the medical reviewer's since the applicant's records do not contain temporary or permanent physical profiles, and no documentation supporting a non-duty related condition was the cause for his separation was submitted or found in the medical record, he is ineligible to retire under 10 U.S. Code § 12731b, Special rule for members with physical disabilities not incurred in line of duty (15-year notice of eligibility). The Board determined that neither a referral of his case to the disability evaluation system nor issuance of a 15-year Notice of Eligibility for a non-regular Retirement is warranted.

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.

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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, 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 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.

3. Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation), dated 19 January 2017, prescribes the Army Disability Evaluation System (DES) 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. It implements the requirements of Title 10, U.S. Code, chapter 61; Department of Defense Instructions (DoDI) 1332.18 (Disability Evaluation System); DoD Manual 1332.18 (DES Volumes 1 through 3) and Army Directive 2012-22 (Changes to Integrated Disability Evaluation System Procedures) as modified by DoDI 1332.18.

a. The objectives are to maintain an effective and fit military organization with maximum use of available manpower; provide benefits to eligible Soldiers whose military service is terminated because of a service-connected disability; provide prompt disability evaluation processing ensuring the rights and interests of the Government and Soldier are protected; and, establish the Military Occupational Specialty Administrative Retention Review (MAR2) as an Army pre-DES evaluation process for Soldiers who require a P3 or P4 (permanent profile) for a medical condition.

b. Public Law 110-181 defines the term physical DES as a system or process of the DoD for evaluating the nature and extent of disabilities affecting members of the Armed Forces that is operated by the Secretaries of the military departments and is composed of medical evaluation boards (MEB), physical evaluation boards (PEB), counseling of Soldiers, and mechanisms for the final disposition of disability evaluations by appropriate personnel.

c. The DES begins for a Soldier when either of the events below occurs:

(1) The Soldier is issued a permanent profile approved in accordance with the provisions of Army Regulation 40-501 and the profile contains a numerical designator of P3/P4 in any of the serial profile factors for a condition that appears not to meet medical retention standards in accordance with Army Regulation. Within (but not later than) 1 year of diagnosis, the Soldier must be assigned a P3/P4 profile to refer the Soldier to the DES.

(2) The Soldier is referred to the DES as the outcome of MAR2 evaluation.

d. An MEB is convened to determine whether a Soldier's medical condition(s) meets medical retention standards per Army Regulation 40-501. This board may determine a Soldier's condition(s) meet medical retention standards and recommend the Soldier be returned to duty. This board must not provide conclusions or recommendations regarding fitness determinations.



e. The PEB determines fitness for purposes of Soldiers' retention, separation or retirement for disability under Title 10, U.S. Code, chapter 61, or separation for disability without entitlement to disability benefits under other than Title 10, U.S. Code, chapter 61. The PEB also makes certain administrative determinations that may benefit implications under other provisions of law.

f. Unit commanders will ensure medical profiles containing a P3/P4 or temporary (T) 3/T4 in one of the serial profile factors are reviewed according to the standards of Army Regulation 40-501. Among the duties required, a unit commander will provide a non-medical assessment by completing DA Form 7652 (DES Commander's Performance and Functional Statement).

g. 10 United States Code 1209 election. Under the provisions of 10 USC 1209, Ready Reserve Soldiers who have completed at least 20 qualifying years of Reserve service and who would otherwise be qualified for retirement for non-regular service may forfeit disability severance pay and request transfer to the Inactive Status List for the purpose of receiving non-disability retired pay at age 60 or at the age otherwise authorized by law. The USAPDA extends this election to the Ready Reserve Soldier being separated without entitlement to severance pay with 20 qualifying years. The Soldier will be afforded the opportunity to make their election when making elections to PEB or USAPDA findings.

(a) The election will include the election to be transferred to the Retired Reserve in lieu of placement on the inactive status list. (Soldiers in the Retired Reserve receive continued service longevity.)

(b) The PEBLO (PEB Liaison Officer) will advise the Soldier that they— (1) Forfeit all rights to future non-regular retired pay and a retired status when disability severance pay is accepted, and (2) The election becomes irrevocable on the date of the Soldier's separation.

(c) Soldiers of the Regular Army who may have completed 20 good years or otherwise have a 20-year letter are not authorized an election under 10 USC 1209. The Soldier may be released from active duty to the IRR and request transfer to the Retired Reserve.

(2) Election for 15-year notice of eligibility. RC Soldiers who are members of the Selected Reserve and have a disability disposition of separate with or without disability severance pay will be afforded the opportunity to make an election to transfer to the Retired Reserve under the provisions of 10 USC 12731b as set forth below.

(a) A finding of unfit by the PEB or USAPDA is required for eligibility for the 15-year notice of eligibility when—(1) The RC Soldier's disability was incurred in the

LOD or is compensable under the provisions of 10 USC 1207a, and (b) The RC officer is an obligated RC participant in the Health Professions Scholarship Program Financial Assistance Program.

(b) The Selected Reserve Soldier is ineligible for the election if— (1) The disposition of separation without entitlement to disability severance pay is due to disability determined to be the result of the Soldier's intentional misconduct, willful negligence, or was incurred during a period of unauthorized absence, and/or (2) The U.S. Army Human Resources Command determines that the Soldier's disability was due to willful failure to comply with standards and qualifications for retention established by the Secretary of the Army or that the Soldier was not qualified to continue in the Ready Reserve for non-disability reasons.

4. Title 10, U.S. Code, section 12731b states 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 section 12731 of this title, determine to treat the member as having met the service requirements of subsection (a)(2) of that section and provide the member with the notification required by subsection (d) of that section if the member has completed at least 15, and less than 20, years of service computed under section 12732 of this title. Notification under subsection (a) may not be made if:

a. The disability was the result of the member's intentional misconduct, willful neglect, or willful failure to comply with standards and qualifications for retention established by the Secretary concerned.

b. The disability was incurred during a period of unauthorized absence.

5. Title 38, U.S. Code, 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.

6. Title 38, Code of Federal Regulations, Part IV is the VA 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/her 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.

7. Army Regulation 15-185 (ABCMR) provides Department of the Army policy, criteria, and administrative instructions regarding an applicant's request for the correction of a

military record. Paragraph 2-11 states applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

8. Section 1556 of Title 10, U.S. Code, 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 ABCMR (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//