

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 20 February 2024

DOCKET NUMBER: AR20230005122

APPLICANT REQUESTS: initiation and approval of a line of duty (LOD) investigation for a condition incurred while at annual training.

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 2807-2 (Accessions Medical Prescreen Report), 15 May 2017
- DD Form 2808 (Report of Medical Examination), 22 May 2017
- DA Form 3349-SG (Physical Profile Record), 21 April 2020
- Department of Military and Veterans Affairs, Commonwealth of Pennsylvania Orders 40-154-0082, 3 June 2022
- Pennsylvania Army National Guard (PAARNG) Orders 0002042433.00, 16 September 2022
- National Guard Bureau (NGB) Form 22 (Report of Separation and Record of Service), 8 October 2022
- Department of Veterans Affairs (VA) Form 21-4138 (Statement in Support of Claim), blank aside from applicant's signature and social security number (SSN)

FACTS:

1. The applicant states:

a. He submitted an LOD request to his Medical Readiness Noncommissioned Officer (NCO) and his response was that he was not able to request an LOD for someone not currently in service. He was unsure but thought the applicant might be able to take this information to the VA to see if he qualified for treatment or disability rating. He was sorry he couldn't further assist him and hoped he was doing well since his discharge. He was discharged in October 2022 for a mental condition and is trying to get an approved LOD for the event that happened at the National Training Center (NTC) in 2022. He is currently seeking treatment for depression.

b. He suffered symptoms of depression, including anxiety, lack of motivation, suicidal ideation and irritability during NTC training from 26 June 2022 through 20 July 2022. While at NTC, he notified his first line leader that his grandmother was not doing

well and was close to passing away. A few days later, his grandmother passed away and he was depressed he didn't get to see her to say goodbye in her final moments. He remained at NTC until the conclusion of the training orders.

c. Through no fault of the applicant, administrative issues and lack of training related to the LOD process caused a delay in submitting his LOD paperwork. He was discharged in October 2022 for a depressive disorder, for which he had a permanent physical profile.

2. DD Form 2807-2, dated 15 May 2017, shows the applicant provided his medical history for an accessions medical prescreen for the purpose of ARNG enlistment. He did not indicate he had any medical conditions.

3. A physical profile is used to classify a Soldier's physical disabilities in terms of six factors or body systems, as follows: "P" (Physical capacity or stamina), "U" (Upper extremities), "L" (Lower extremities), "H" (Hearing), "E" (Eyes), and "S" (Psychiatric) and is abbreviated as PULHES. Each factor has a numerical designation: 1 indicates a high level of fitness, 2 indicates some activity limitations are warranted, 3 reflects significant limitations, and 4 reflects one or more medical conditions of such a severity that performance of military duties must be drastically limited. Physical profile ratings can be either permanent or temporary.

4. A DD Form 2808 (Report of Medical Examination) shows the applicant underwent medical examination on 22 May 2017, for the purpose of ARNG enlistment and was found qualified for service with a PULHES of 111111.

5. The applicant enlisted in the PAARNG on 22 May 2017.

6. A DA Form 3349-SG shows on 21 April 2020, the applicant was given a permanent physical profile rating of 3 in factor S for depressive disorder, with a rating of 1 in all other factors. He was limited in the functional activities of physically and/or mentally being able to carry and fire his individual assigned weapon and living and functioning without restrictions in any geographic or climatic area without worsening his condition.

7. A Joint Force Headquarters, Office of the Adjutant General memorandum, dated 23 April 2020, notified the applicant of intent to separate him for failure to meet medical retention standards for a non-duty related medical disqualifying condition. It shows:

a. The State Surgeon reviewed his medical records in accordance with Army Regulation (AR) 40-501 (Standards of Medical Fitness), chapter 3, and he has been identified as failing to meet the medical retention standards for continuation of military service. A copy of the permanent Physical Profile DA Form 3349, dated 21 April 2020,

referring him for administrative review and processing for a medically disqualifying condition is provided for his information.

b. He was required to complete and take appropriate action on the enclosed Soldier's Counseling and Election of Option form and submit form to his commander within the notification period of 45 days from the date of this memorandum. Failure to respond would constitute a waiver of his rights and may result in separation from the service without additional notification.

c. If he concurs with the separation for medically disqualifying condition(s), his commander will submit his election of options and proceed with discharge from the ARNG and as a Reserve of the Army in accordance with AR 135-178 (Army National Guard and Reserve Enlisted Administrative Separations) paragraph 14-1k.

d. If he intended to non-concur with separation, he had the right to request his case be sent to the U.S. Army Physical Evaluation Board (PEB), in accordance with Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation). He was required to submit a letter requesting PEB in addition to the required documents as described above. It was his responsibility to request and prepare his non-duty related packet for submission to the Department of the Army PEB for a final determination if he had reason to believe he should be found fit for duty.

e. He was advised on this right to consult with an appointed counsel for consultation.

8. Department of Military and Veterans Affairs, Commonwealth of Pennsylvania Orders 40-154-0082, dated 3 June 2022, ordered the applicant to annual training at the NTC, Fort Irwin, CA, from 26 June 2022 through 10 July 2022.

9. On 7 September 2022, the applicant acknowledged receipt of the Notification of Failure to Meet Medical Retention Standards.

10. A DA Form 4856 shows:

a. The applicant was counseled by his unit commander on 7 September 2022, regarding his non-duty related medical condition and that his case was being processed as non-duty related.

b. If the condition that is being reviewed in duty-related, the applicant understood he must provide medical documentation from the date of the injury to substantiate an LOD being completed. He understood he would not receive any for of severance pay or disability ratings for this condition.

c. He was advised the PEB process is to provide Soldiers to have the opportunity to have their case reviewed by the PEB for a retention ruling only. The Soldier elected not to have his case reviewed by the PEB and therefore, is pending separation for medical disqualification of a non-duty related condition.

d. He was advised of all documentation required for submission.

11. A Department of Military and Veterans Affairs, Commonwealth of Pennsylvania memorandum, shows the applicant provided the following notification of intent/Soldier election on 8 September 2022:

a. He indicated he understood he did not meet retention standards in accordance with AR 40-501, chapter 3 and was no longer physically qualified to remain in the ARNG.

b. He elected discharge without Joint Base San Antonio PEB review and understood he would clear his unit and no longer attend any form of military duty while awaiting the receipt of his discharge orders.

c. Based on his current years of service as indicated on his Retirement Points History Statement, he elected discharge from the ARNG and as a Reserve of the Army for medical retention disqualification in accordance with National Guard Regulation (NGR) 600-200 (Enlisted Personnel Management), paragraph 6-35. He has completed less than 15 qualifying years of service.

12. Pennsylvania Army National Guard (PAARNG) Orders 0002042433.00, dated 16 September 2022, honorably discharged the applicant effective 8 October 2022, under the provisions of NGR 600-200 due to his physical or mental condition failing to meet medical retention standards.

13. The applicant's NGB Form 22 shows he was honorably discharged on 8 October 2022, under the provisions of NGR 600-200, paragraph 6-35, due to medical unfitness for retention per AR 40-501. He was credited with 5 years, 4 months, and 17 days of net service this period.

14. The applicant's NGB Form 23B (ARNG Retirement Points History Statement) dated 23 November 2022, shows the applicant was credited with 5 years, 4 months, and 17 days of creditable service for retired pay.

15. In the adjudication of this case, an advisory opinion was provided by the NGB on 30 August 2023, which shows:

a. The applicant enlisted on 22 May 2017 and served for about 5 years and 4 months before being discharged from the PAARNG in 2022. He was not found medically qualified for retention related to his non-duty related medical condition. The applicant is requesting his "incident" from NTC to be found in the LOD.

b. The applicant claims that symptoms of depression first began during annual training in 2019. In 2020, he was diagnosed with major depressive disorder and was prescribed medication by a non-military provider.

(1) He received a P3 profile on 21 April 2020 when was undergoing the non-duty related PEB process. His profile states that he should have 8 hours of consecutive sleep every 24 hours, that he should not deploy to an austere environment, he should not participate in any live fire drills, ranges, or combat simulation events, and that he should remain stationed near a medical facility where definitive behavioral health care is available.

(2) On 23 April 2020, the applicant was notified of PAARNG's intent to separate for failure to meet medical retention standards for non-duty related medical disqualifying condition(s). According to the applicant, he submitted an election form in June 2020 to his Readiness NCO to have his case reviewed by the Joint Base San Antonio JBSA PEB so that he could have the opportunity to finish his current enlistment contract. In July 2020, he submitted a DA Form 4856 to his Readiness NCO who notified him that a packet would be put together for a PEB by the JBSA. However, in February 2022, the applicant was notified by a new Readiness NCO that there was an issue with the prior packet and that he had to submit a new one, which he did.

(3) From 26 June to 10 July 2022, the applicant went to Fort Irwin, CA for annual training. He claims the lack of sleep, weather, and living conditions induced more serious symptoms of his medical condition. During annual training, his grandmother passed away and he did not return home.

(4) On 8 September 2022, the medical Readiness NCO sent the applicant an Email with another election form, which the applicant filled out again this time electing to discharge without a review by JBSA. His discharge was processed and finalized a month later on 8 October 2022.

c. Per Army Regulation 40-501, "Not in the Line of Duty (NILOD). DODI 1332.38 states that members with non-duty related impairments are eligible to be referred to the PEB solely for a fitness determination, but not a determination of eligibility for disability benefits."

d. The PAARNG State Surgeon states that the applicant was not signed in on any sick-call logs for the duration of NTC cycle from May 2022 to July 2022 that were

captured by the white cell medical team nor was there a Standard Form 600 (Chronological Record of Medical Care) from that time in the applicant's medical file. The Deputy State Surgeon was unable to find any clinical documents for that time the applicant mentions.

e. Based on the applicant's claims and the available documents, the applicant does not have a line-of-duty injury. There was no recorded "incident" that could be labeled as a medical injury for a LOD determination. Since there was no medical incident, the applicant does not have a record of LOD and only had the option for a retention determination by the JBSA PEB.

f. For these reasons, it is the recommendation of this office that the applicant's request be disapproved. There is no evidence of an error or injustice in the applicant's case. While it is noted that there was a significant delay in processing his election for PEB, which the applicant ultimately did not elect for, the applicant does not request any action from the Army Review Boards Agency (ARBA) in relation to this. Additionally, the annual training at NTC may not have been within the limitations of his permanent profile, but again, there is no medical incident that he reported or sought medical attention for during his annual training in 2022.

g. The ARNG Medical Administrative Actions Branch and the PAARNG concur with this recommendation

16. On 30 August 2023, the applicant was provided a copy of the NGB advisory opinion and given an opportunity to submit comments, but he did not respond.

17. The applicant provided a VA Form 21-4138, used to provide a statement in support of a VA claim, which is blank aside from applicant's signature and SSN.

BOARD DISCUSSION:

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 shows the applicant served in the ARNG from 22 May 2017 to 8 October 2022, completing 5 years and 4 months before being discharged. He was not found medically qualified for retention related to his non-duty related medical condition. He is requesting his "incident" from NTC to be found in the line of duty (LOD).

b. According to the NGB's review of the applicant's case, in April 2020, the PAARNG notified him of the intent to separate him for failure to meet medical retention standards for non-duty related medical disqualifying condition(s). The PAARNG State

Surgeon states that the applicant was not signed in on any sick-call logs for the duration of NTC cycle from May 2022 to July 2022 that were captured by the white cell medical team nor was there an SF 600, Chronological Record of Medical Care, from that time in the applicant’s medical file. The Deputy State Surgeon was unable to find any clinical documents for that time the applicant mentions.

c. The Board agreed with the NGB’s advisory official’s finding that based on the applicant’s claims and the available documents, the applicant does not have a line-of-duty injury. There was no recorded “incident” that could be labeled as a medical injury for a LOD determination. For these reasons, the Board found no evidence of an error or injustice in the applicant’s case.

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.

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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. On 25 August 2017, the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to Discharge Review Boards (DRBs) and Boards for Correction of Military/Naval Records (BCM/NRs) when considering requests by veterans for modification of their discharges due in whole or in part to: mental health conditions, including PTSD, traumatic brain injury, sexual assault, or sexual harassment. Boards are to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based, in whole or in part, on those conditions or experiences.
2. Army Regulation 600-8-4 (Line of Duty (LOD) Policy, Procedures, and Investigations) prescribes policies and procedures for investigating the circumstances of disease, injury, or death of a Soldier providing standards and considerations used in determining LOD status.
 - a. A formal LOD investigation is a detailed investigation that normally begins with DA Form 2173 (Statement of Medical Examination and Duty Status) completed by the medical treatment facility and annotated by the unit commander as requiring a formal LOD investigation. The appointing authority, on receipt of the DA Form 2173, appoints an investigating officer who completes the DD Form 261 (Report of Investigation LOD and Misconduct Status) and appends appropriate statements and other documentation to support the determination, which is submitted to the General Court Martial Convening Authority for approval.
 - b. The worsening of a pre-existing medical condition over and above the natural progression of the condition as a direct result of military duty is considered an aggravated condition. Commanders must initiate and complete LOD investigations, despite a presumption of Not In the Line of Duty, which can only be determined with a formal LOD investigation.
 - c. An injury, disease, or death is presumed to be in LOD unless refuted by substantial evidence contained in the investigation. LOD determinations must be supported by substantial evidence and by a greater weight of evidence than supports any different conclusion. The evidence contained in the investigation must establish a degree of certainty so that a reasonable person is convinced of the truth or falseness of a fact.
3. National Guard Regulation 600-200 (Enlisted Personnel Management) prescribes the criteria, policies, processes, procedures and responsibilities to classify, assign utilize, transfer within and between States, provides special duty assignment pay, separate and

appoint to and from Command Sergeant Major Army National Guard (ARNG) and Army National Guard of the United States enlisted Soldiers. Paragraph 6-35, in effect at the time, provides for the separation of Soldiers found medically unfit for retention per Army Regulation 40-501 (Standards of Medical Fitness).

4. 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 (Disability Evaluation for Retention, Retirement, or Separation).

a. Soldiers are referred to the disability system 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 (MEB); when they receive a permanent medical profile rating of 3 or 4 in any factor and are referred by an Military Occupational Specialty (MOS) Medical Retention Board; and/or they are command-referred for a fitness-for-duty medical examination.

b. The disability evaluation assessment process involves two distinct stages: the MEB and Physical Evaluation Board (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 either are 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 retired pay and have access to all other benefits afforded to military retirees.

c. 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.

5. Army Regulation 635-40 establishes the Army Disability Evaluation System 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. Only the unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability.

a. 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 military service.

b. Soldiers who sustain or aggravate physically-unfitting disabilities must meet the following line-of-duty criteria to be eligible to receive retirement and severance pay benefits:

(1) The disability must have been incurred or aggravated while the Soldier was entitled to basic pay or as the proximate cause of performing active duty or inactive duty training.

(2) The disability must not have resulted from the Soldier's intentional misconduct or willful neglect and must not have been incurred during a period of unauthorized absence.

6. Army Regulation 40-501 provides information on medical fitness standards for induction, enlistment, appointment, retention, and related policies and procedures. Soldiers with conditions listed in chapter 3 who do not meet the required medical standards will be evaluated by an MEB and will be referred to a PEB as defined in Army Regulation 635-40 with the following caveats:

a. U.S. Army Reserve (USAR) or Army National Guard (ARNG) Soldiers not on active duty, whose medical condition was not incurred or aggravated during an active duty period, will be processed in accordance with chapter 9 and chapter 10 of this regulation.

b. Reserve Component Soldiers pending separation for In the Line of Duty injuries or illnesses will be processed in accordance with Army Regulation 40-400 (Patient Administration) and Army Regulation 635-40.

c. Normally, Reserve Component Soldiers who do not meet the fitness standards set by chapter 3 will be transferred to the Retired Reserve per Army Regulation 140-10 (USAR Assignments, Attachments, Details, and Transfers) or discharged from the Reserve Component per Army Regulation 135-175 (Separation of Officers), Army

Regulation 135–178 (ARNG and Reserve Enlisted Administrative Separations), or other applicable Reserve Component regulation. They will be transferred to the Retired Reserve only if eligible and if they apply for it.

d. Reserve Component Soldiers who do not meet medical retention standards may request continuance in an active USAR status. In such cases, a medical impairment incurred in either military or civilian status will be acceptable; it need not have been incurred only in the line of duty. Reserve Component Soldiers with non-duty related medical conditions who are pending separation for not meeting the medical retention standards of chapter 3 may request referral to a PEB for a determination of fitness in accordance with paragraph 9–12.

6. Title 10, U.S. Code, section 1201, provides for the physical disability retirement of a member who has at least 20 years of service or a disability rating of at least 30 percent. Title 10, U.S. Code, section 1203, provides for the physical disability separation of a member who has less than 20 years of service and a disability rating of less than 30 percent.

//NOTHING FOLLOWS//