

IN THE CASE OF: ██████████

BOARD DATE: 14 December 2023

DOCKET NUMBER: AR20230005384

APPLICANT REQUESTS: medical retirement instead of discharge from the Army National Guard (ARNG) due to medical unfitness for retention.

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

- DD Form 149 (Application for Correction of Military Record)
- Summarized Hospital Course Narrative
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- DA Form 2173 (Statement of Medical Examination and Duty Status)
- memorandum, subject: State Surgeon Medical Review for (the applicant), dated 4 November 2015
- memorandum, subject: Notification of Medical Discharge, dated 21 December 2015
- National Guard Bureau (NGB) Form 22 (Report of Separation and Record of Service)
- Department of Veterans Affairs (VA) summary of benefits

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.
2. The applicant states he was made aware that he should have received a medical retirement instead of discharge based on his disability, which developed during his service in Afghanistan. He was discharged due to a lung condition that developed in 2014 while in Afghanistan. He had breathing issues then and he will continue to have breathing issues. He is 100 percent totally and permanently disabled by the VA due to his service-connected disability. He is being seen at the VA for chronic sinusitis, primary ciliary dyskinesia, tinnitus, post-traumatic stress disorder (PTSD), and anxiety/depression.

3. The applicant enlisted in the [REDACTED] Army National Guard ([REDACTED] ARNG) on 7 December 2011. He held military occupational specialty 12W (Carpentry and Masonry).
4. His DD Form 214 shows he entered active duty in support of Operation Enduring Freedom on 1 April 2014 and he served in Afghanistan from 1 June to 13 August 2014. He was released from active duty on 22 September 2014.
5. A Summarized Hospital Course Narrative shows, among other entries, the following entry:

MEDEVAC [medical evacuation] transfer from LPMC [Landstuhl Regional Medical Center, Germany]. Per report, the patient arrived to WRNMMC [Walter Reed National Military Medical Center] intubated and sedated on 15 August 2014. Prior to that, the patient underwent left video assisted thoracic surgery at Bagram AFB [Air Force Base] Afghanistan with successful mobilization and irrigation of the lung due to pneumonia, but thick rind was reported, and the patient was referred to WRNMMC for full decortication. (The full narrative is available for the Board's review).
6. A DA Form 2173 shows the applicant suffered extreme complications from pneumonia. The condition initially developed in May 2014 and continued through August 2014 until the condition required his removal from Afghanistan. The form also shows the condition was considered to have been incurred in the line of duty.
7. A memorandum, subject: State Surgeon Medical Review for (the applicant), dated 4 November 2015, addressed to the applicant's unit commander, shows the applicant's medical records were reviewed by the State Surgeon to determine his medical retention status. The State Surgeon determined he did not meet retention standards in accordance with Army Regulation 40-501 (Standards of Medical Fitness), paragraph 3-27(5)(c) (bronchiectasis or bronchiolectasis) and paragraph 3-41(e) (general and miscellaneous conditions and defects) (non-active duty and/or no LOD). The State Surgeon recommended the applicant's medical discharge from the ARNG. The State Surgeon also indicated the applicant could request in writing a Physical Evaluation Board (PEB) as a recourse to the State Surgeon's retention determination or he could waive his right to a PEB.
8. A second memorandum from the State Surgeon, dated 19 November 2015, shows the applicant's unfitting condition(s) were incurred while on active duty and/or in LOD (Referred to Medical Evaluation Board (MEB)). As a result of the determination, the applicant was to be scheduled for a medical evaluation at a VA medical center. The State Surgeon also stated that, although not advisable, the applicant could waive his right to a MEB and request a medical discharge.

9. On 6 December 2015, the applicant signed an Acceptance/Declination of MEB and waived his right to a MEB. By signing this document waiving the MEB, he acknowledged he understood that by doing so, he was waiving the right to an active-duty board that may determine that he is/was eligible for a physical disability rating through the military. He also acknowledged he understood that by waiving this right, he would be discharged from the ARNG and no longer be eligible to receive Tricare Reserve Select coverage but could continue to receive medical care from the VA for his service-related injury/illness, which is documented by an LOD investigation.

10. Orders issued on 30 December 2015 directed the applicant's discharge from the ARNG and as Reserve of the Army effective 22 January 2016.

10. The applicant's NGB Form 22 confirms he was discharged from the ARNG on 22 January 2016 under the authority of National Guard Regulation 600-200 (Enlisted Personnel Management), paragraph 6-35I(8), by reason of medically unfit for retention per Army Regulation 40-501.

11. The applicant provided a VA summary of benefits showing he has one or more (undisclosed) service-connected disabilities and that the effective date when he became totally and permanently disabled due to his service-connected disabilities is 7 December 2022.

12. 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.

13. 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.

14. 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.

#### 15. 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, the Army Aeromedical Resource Office (AERO), 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 in essence requesting a referral to the Disability Evaluation System (DES). He states:

“I've been made aware I should have been receiving a medical retirement at the time of being medically discharged due to a disability that happened during my time in Afghanistan.”

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. The applicant's Report of Separation and Record of Service (NGB Form 22) for the period of Service under consideration shows the former Guardsman enlisted in the Army National Guard on 7 December 2011 and was discharged from the [REDACTED] Army National Guard ([REDACTED] ARNG) on 22 January 2016 under the provisions of paragraph 6-35l(8) of NGR 600-200, Enlisted Personnel Management (31 July 2009): Medically unfit for retention per AR 40-501. It shows he received had 4 years, 0 months, and 0 days for pay.

d. Paragraph 6-35l(8) of NGR 600-200:

“Commanders, who suspect that a Soldier may not be medically qualified for retention, will direct the Soldier to report for a complete medical examination per AR 40-501. If the Soldier refuses to report as directed, see paragraph 6-36u below. Commanders who do not recommend retention will request the Soldier's discharge. When medical condition was incurred in line of duty, the procedures of AR 600-8-4 will apply. Discharge will not be ordered while the case is pending final disposition. This paragraph also includes those Soldiers who refuse or ineligible to reclassify into a new MOS. RE 3.”

e. A Statement of Medical Examination and Duty Status (DA Form 4187) completed 9 December 2015 states:

“Soldier suffered extreme complications from pneumonia. See attached medical documents. Condition initially developed May 2014 and continued through Aug 2014 until condition required the SM to be removed from Afghanistan.”

f. On 4 November 2015, the applicant was informed that he had a non-duty related medical condition which failed medical retention standards.

g. The applicant had been placed on a permanent duty limiting physical profile for “Pulmonary dyskinesia” on 2 November 2015.

h. From the American Lung Association’s website:

“Primary ciliary dyskinesia (PCD) is a rare genetic condition that can lead to chronic lung, ear, and sinus infections, along with other disorders in children and adults. People with this condition have mutations in genes that control the structure and function of cilia, making them fail to clear inhaled particles and bacteria from the lung.

Cilia are tiny hair-like structures on the surface of cells in many parts of the body, including the lungs. When they are functioning correctly, cilia beat together in a wave-like motion to move mucus, germs, and other foreign particles up toward the mouth where they can be coughed or sneezed out. People with PCD are born with genetic mutations that cause defects in the cilia so that they are unable to beat properly.

When cilia do not work properly, the affected person is prone to infections in the ears, sinuses, and the lungs. PCD is often under-recognized unless it is relatively severe. It may be first diagnosed as asthma, bronchitis, or bronchiectasis of unknown cause.” [REDACTED]

[REDACTED]

i. The Military Services view genetic diseases, conditions which are solely attributed to genetic defects, as having existed prior to service (EPTS): The Service Member had the genetic disease before they entered the Service, and it is not a matter of if they will manifest the disease but only a matter of when they will manifest the disease.

j. Paragraph 4-8e(1) of AR 600-8-4, Line of Duty Policy, Procedures, and Investigations (15 April 2004) states:

“(1) The term "EPTS" is added to a medical diagnosis. It shows that there is substantial evidence that the disease or injury, or underlying condition existed before military service or it happened between periods of active service. Included in this category are chronic diseases with an incubation period that

clearly precludes a determination that it started during short tours of authorized training or duty.”

Conditions which existed prior to service are not related to the Service Member’s military service and are therefore non-compensable and ineligible for referral to the duty related DES.

k. In a 21 December 2015 memorandum to the applicant, the Deputy Chief of Staff, Personnel/G1 informed the applicant that he was to be discharged:

“Reference attached memorandum from WIAR-G1 -HSS, the State Surgeon found that you do not meet retention standards in accordance with AR 40-501.

As a result of this finding, you will be discharged from the [REDACTED] Army National Guard and as a Reserve of the Army effective 22 January 2016. For your safety, you are no longer authorized to perform Annual Training or any type of active duty. You need to attend your next regularly scheduled IDT weekend to clear the unit as long as drill is prior to the effective date of discharge.”

l. Review of his records in JLV show though he has been awarded several VA service-connected disabilities, two of which are likely related to his genetic disease. However, the requirements for an affirmative Army line of duty determination versus a Veterans Benefits Administration (VBA) service connection, though similar, are different in several respects and neither entity is required to observe the findings of the other, this being one of those. While the Military Services view genetic diseases as having existed prior to service, the VA will service connect a genetic disease if the onset of symptoms was during military service.

m. 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. These roles and authorities are granted by Congress to the Department of Veterans Affairs and executed under a different set of laws.

n. It is the opinion of the Agency Medical Advisor that a referral of his case to the DES is unwarranted.

BOARD DISCUSSION:

The Board carefully considered the applicant's request, supporting documents, evidence in the records, a medical review, and published Department of Defense guidance for liberal consideration of requests for changes to discharges. The Board concurred with the conclusion of the ARBA Medical Advisor that the evidence does not support a conclusion that the applicant should have been referred to the Disability Evaluation System instead of being discharged for being medically unfit for retention. Based on a preponderance of the evidence, the Board determined the applicant's discharge for being medically unfit for retention was not in error or unjust.

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.

2/15/2024

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CHAIRPERSON

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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. 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, chapter 3, as determined by a MEB.

b. The disability evaluation assessment process involves two distinct stages: the MEB and 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.

c. 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.

3. 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. The regulation in effect at the time states in:

a. Paragraph 3-2, 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. Paragraph 3-4, 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.

4. Army Regulation 635-40, dated 19 January 2017 and currently in effect, states in paragraph 4-4 (Waiver of Disability Evaluation System (DES)), in certain circumstances, Soldiers may waive referral to the DES process. The PEB Liaison Officer must inform the Soldier about the DES process, their right to a PEB, and the potential benefits of remaining in an active duty or active Reserve status for purposes of completing the DES process. The Soldier will be advised that they have the right to consult with a Soldier's MEB Counsel prior to waiving referral to the MEB or informal PEB. The Soldier must request a waiver in writing and such request, or an affidavit, must attest that the Soldier has received the information described above and declines referral to the PEB. The waiver must be filed in the Soldier's health records and official personnel record. Waiver requests are authorized in the circumstances listed below.

a. The Soldier's conditions existed prior to service (EPTS). The Soldier must be on continuous active duty for more than 30 days. The MEB must provide clear and unmistakable evidence that the Soldier's medical condition(s) that do not meet medical retention standards are EPTS and did not permanently worsen or progress beyond natural progression while on active duty (specifically, were not service aggravated).

b. The DES process would likely require extension past the date of the Soldier's separation date and the Soldier does not consent to retention.

5. National Guard Regulation 600-200, paragraph 6-35I (8), of the regulation in effect at the time, states commanders who suspect that a Soldier may not be medically qualified for retention, will direct the Soldier to report for a complete medical examination per Army Regulation 40-501. Commanders who do not recommend retention will request the Soldier's discharge. When medical condition was incurred in line of duty, the procedures of Army Regulation 600-8-4 (Line of Duty Policy, Procedures, and Investigations) will apply.

6. Section 1556 of Title 10, U.S. Code, requires the Secretary of the Army to ensure that an applicant seeking corrective action by 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 applicants (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//