

IN THE CASE OF: [REDACTED]

BOARD DATE: 41 January 2024

DOCKET NUMBER: AR20230005887

APPLICANT REQUESTS:

- referral of his medical records to the Army Disability Evaluation System (DES)
- promotion to the rank and grade of staff sergeant (SSG)/E-6

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- promotion orders to the rank and grade of SSG/E-6
- three Enlisted Record Briefs (ERB)
- Department of Veterans Affairs (VA) Rating Decision
- 525 pages of medical records

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a. His promotion was rescinded, and he still does not know how this took place. He was issued promotion orders, but the orders were revoked. He was not afforded a Medical Evaluation Board (MEB) after suffering a stroke while taking the Army Physical Fitness Test (APFT). His recruiting command told him he was ineligible for an MEB, and he did not know how pursue it. He was imposed a bar to reenlistment after suffering the stroke and the bar was still in place at the time of his discharge.

b. Prior to his discharge, he was serving as a recruiter in the rank and grade of sergeant (SGT)/E-5. In 2013, his health began to decline, and he did not know the complications associated with said decline. He started to gain weight rapidly, but for full transparency, he was never a small person even from his first day as a Soldier. Being

initiative taking, he did seek out medical help with zero support and only knowing what to do as a person who rarely visited the doctor. He was informed he had contracted *Helicobacter pylori*, which was diagnosed and treated at the medical center on Fort Meade, MD. He was on a physical profile, but he still passed the performance portion of the APFT because he was told he had to do so. This was a highly controversial time and because he was classified as an APFT failure for height/weight. He made the SSG promotion list on the same day and he was issued promotion orders.

c. His promotion was overturned without any merit or counsel and when he found out, he just gave up in order to finishing the time he had left in the service, but also ensuring he did what he always did in the Army, which was perform. He was under massive stress due to medical issues and concerns that contributed to the steady decline of his health. The same year, he suffered a transient ischemic attack while taking the APFT. At the time, he was 33 years old and prior to that, he had very few medical issues. He was told it was completely about the weight gain. He is not contesting the Army policy for physical fitness, only that these rules were imposed on him by his chain of command without regard to his medical status. He never used medical situations to not comply, since he completed 12 years, 11 months, and 8 days of active military service, including four deployments.

d. After learning of his medical status, he was met with hostility and received very little help figuring out the next steps. He performed effectively despite what he had going on as a recruiter. By the time he had new leadership that did take a second look, he only had 48 days left in the service. He did not learn he could get help seeking an MEB until he was approximately 11 days from his final out. At that point, he gave up because he was at least leaving the United States Army with an honorable discharge.

e. In conclusion, the reason for not submitting this request earlier is because he simply did not know any of this existed and also due to being tired of going through the issues he had in his final years of service. He tried to forget all of this until his wife attended a two-day course sponsored by the VA in which she was informed this could be an option. He is currently rated at 90% by the VA and this was the rating he received right after his separation.

3. Following service in the U.S. Army Reserve, the applicant enlisted in the Regular Army on 28 February 2002. He was promoted to the rank and grade of SGT/E-5 effective 1 October 2004.

4. The applicant reenlisted on 6 November 2007 for a period of six years. On 5 October 2011, he extended his enlistment for an additional 15 months to meet the service remaining requirements for recruiter. The extension established his new expiration term of service as 5 February 2015.

5. The applicant successfully completed the Army Recruiting Course, which he attended from 17 October to 2 December 2011.
6. Orders Number 174-0360, dated 22 June 2012, promoted the applicant to the rank and grade of SSG/E-6 effective 1 July 2012. The orders contain the following entry: "The promotion is not valid and this order will be revoked if he is not in a promotable status on effective date of promotion."
7. Orders Number 192-0351, dated 10 July 2012, revoked Orders Number 174-0360, dated 22 June 2012, pertaining to the applicant's promotion to SSG.
8. The applicant's Noncommissioned Officer Evaluation Report (NCOER), covering the period 1 October 2012 through 30 September 2013, shows he passed the APFT on 25 September 2013 but failed to meet body fat standards in accordance with Army Regulation 600-9 (The Army Body Composition Program (formerly The Army Weight Control Program)).
9. The applicant's ERB, dated 21 October 2014, shows a suspension of favorable personnel actions (Flag), code "KA" (non-compliance with Army Body Composition Program), was imposed against him starting on 16 September 2013.
10. The applicant's NCOER covering the period 1 June to 22 December 2014, his last NCOER on record, shows he did not take an APFT during the rated period due to multiple physical profiles. The NCOER also shows he failed the Army body fat standards in accordance with Army Regulation 600-9.
11. The applicant's DD Form 214 shows he was honorably discharged on 5 February 2015, in the rank and grade of SGT/E-5, by reason of non-retention on active duty. The DD Form 214 also shows he was credited with 12 years, 11 months, and 8 days of active service. He received a separation code of JHG, an reentry code of 3.
12. The applicant provided a VA Rating Decision, dated 20 May 2015, showing he was granted service-connected disability compensation for various conditions effective 6 February 2015.
13. 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.

14. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. Documentation reviewed included the applicant's ABCMR application and accompanying documentation, the military electronic medical record (EMR – AHLTA and/or MHS Genesis), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant is applying to the ABCMR requesting a referral to the Disability Evaluation System. He states in part:

“During my time and late 2013, my health began to decline in which I did not know the complications associated with said decline. I started to gain weight rapidly but for full transparency I was never a small person even from my first day as a Soldier. Being initiative taking, I did seek out medical help with zero support and only knowing what to do as a person who rarely visited the doctor.

I was duly informed that I had contracted H-Pylori, which was diagnosed and treated at Kimbrough Medical Center at Fort Meade. I was on a profile and still passed the performance portion of the APFT, because I was told I had to do so. This was a highly controversial time and because I was classified as an APFT failure for height/weight, and I made the Staff Sergeant promotion list on the same day with official orders cut ...

The same year, I would experience a TIA [transient ischemic attack]/stroke while taking the APFT [Army Physical Fitness Test] and further increasing my difficulty to maintain myself.

I had been told it was completely about the weight gain and I am not contesting Army policy of physical fitness but only that these rules had been imposed on me by my chain of command without any regard to my medical status, ...

Upon learning of my medical status, I was met with hostility and very little help figuring out the next steps and I performed effectively despite what I personally had going on as a Recruiter. By the time I had new leadership that did take a second look I only had forty-eight days left in my service. I did not learn that I could get help seeking a MEB [medical evaluation board] until I was approximately eleven days from my final out. At that point I gave up because I was at least leaving the United States Army with an Honorable Discharge as I had earned that at the very least.”

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. His DD 214 for the period of Service under consideration shows he entered the regular Army on 28 February 2002 and was honorably discharged on 5 February 2015 under provisions in chapter 4 of AR 635-200, Active Duty Enlisted Administrative Separations (17 December 2009): Non-retention on active duty.

d. Neither the applicant's separation packet nor documents addressing the reason(s) for his non-retention on active duty and involuntary administrative separation were submitted with the application nor uploaded into iPERMS.

e. Review of the applicant's EMR shows that until 2012 he was infrequently seen in the clinics for either administrative or clinical encounters. He was seen for common conditions associated with the Army: Knee pain, back pain, viral illnesses, etc.

f. He was evaluated for obesity in May 2012 which he related to his knee and back pain. These conditions were addressed. The provider then provided guidance for treating his obesity:

"OVERWEIGHT: Long conversation on proper eating. Increasing intensity of exercise, and 160 min/week. In order to increase HDL, promote weight loss (240 pounds and obese by BMI), reduce FBS [fasting blood sugar] in prediabetes, improve hypertension, pre-hypertension, and metabolic syndrome. It was recommended to exercise 160 minutes per week at 80% of the Max heart rate minimum, this does not count warm up and cool down. Include cycling for weight loss (intense)."

g. Paragraph 3-2d(1) of AR 600-9, The Army Weight Control Program (27 November 2006):

"The medical professional will conduct a thorough medical evaluation to rule out any underlying medical condition (for example, a metabolic disorder) that may be a cause for significant weight gain. If an underlying medical condition cannot be controlled with medication or other medical treatment, the medical professional will refer the Soldier to a medical evaluation board (MEB)."

h. Paragraph 3-2d(4) of AR 600-9:

"The use of certain medications to treat an underlying medical disorder or the inability to perform all aerobic events may contribute to weight gain but are not considered sufficient justification for noncompliance with this regulation."

i. In July 2012, the applicant was evaluated by gastroenterology for a nearly 15-year history of gastroesophageal reflux disease (GERD). Evaluation showed he was

affected with *Helicobacter pylori* and he was started on oral antibiotic treatment. From the WebMD website:

“*Helicobacter pylori* (*H. pylori*) is a type of bacteria that infects your stomach. It can cause sores and inflammation in the lining of your stomach or the upper part of your small intestine (the duodenum). For some people, an infection can lead to stomach cancer.

Infection with *H. pylori* is common. About two-thirds of the world’s population has it in their bodies. For most people, it never causes any symptoms. But it’s the most common cause of peptic ulcers.”

[REDACTED]

j. A follow-up stool test for *H. pylori* obtained a year later was negative.

k. The applicant was evaluated at Walter Reed National Military Medical Center on/about 9 November 2012 and referred to neurology for evaluation. From the Mayo Clinic’s website:

“A transient ischemic attack (TIA) is a temporary period of symptoms similar to those of a stroke. A TIA usually lasts only a few minutes and doesn’t cause permanent damage. Often called a ministroke, a TIA may be a warning. About 1 in 3 people who has a TIA will eventually have a stroke, with about half occurring within a year after the TIA. A TIA can serve as both a warning of a future stroke and an opportunity to prevent it.”

[REDACTED]

l. He was evaluated by neurology on 21 November 2012 and the provider was not sure the applicant had actually experienced a TIA:

“34-year-old man, SGT in US Army, who reports for follow up recent ER visit for possible TIA. Pt was unable to produce and documentation from his ER stay at this visit. It is unclear if this was truly an ischemic event, but with his history and risk factors, we will proceed to treat it as such.”

m. An MRI of his brain with and without contrast obtained 27 November 2012 was normal. There are no further encounters related to the possible TIA.

n. The applicant was diagnosed with and began treatment for obstructive sleep apnea in February 2013. In June 2013, the endocrinology found the applicant had a moderately low testosterone which the provider believe was due to Male Obesity Secondary Hypogonadism (MOSH).

o. There is no evidence the applicant had an injury or any other condition failed the medical retention standards of chapter 3, AR 40-501, Standards of Medical Fitness prior to his discharge.

p. Paragraph 3-2d(4)(e) of AR 600-9 requires the examiner to “Determine whether an individual’s condition is medically disqualifying for continued service. If the Soldier does not meet medical retention standards of AR 40-501, chapter 3, the Soldier will be referred to an MEB/physical evaluation board (PEB).” The applicant was evaluated for his obesity multiple times and never referred to an MEB, and so it must be assumed no such condition existed. Furthermore, there is no evidence that a medical condition prevented the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his discharge.

q. Review of his records in JLV shows he has been awarded multiple VA service-connected disability ratings. 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.

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

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation. Upon review of the applicant's petition, available military records and medical review, the Board concurred with the advising official finding a referral of the applicant's case to DES is not warranted. Additionally, the opine noted there is no evidence the applicant had an injury or any other condition failed the medical retention standards prior to his discharge. The Board found no evidence that a medical condition prevented the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his discharge.

2. Furthermore, the Board determined there is insufficient evidence to show that Orders Number 192-0351, dated 10 July 2012, revoking Orders Number 174-0360, dated 22 June 2012, pertaining to the applicant's promotion to SSG was rescinded. Based on the preponderance of evidence the Board denied relief.

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.

2/6/2024

X [REDACTED]

CHAIRPERSON
[REDACTED]

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

3. 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.

4. Army Regulation 635-40 establishes the Army 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 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.

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 service.

b. A 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 presents with the requirements of the duties the member reasonably may be expected to perform because of his or her office, rank, grade, or rating.

c. 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 DES for evaluation for separation for reasons indicated above) creates a presumption that the member is fit for duty.

5. Army Regulation 600-8-2 (Suspension of Favorable Personnel Actions (Flag)) prescribes policies, operating rules, and steps governing the suspension of favorable personnel actions, referred to as "Flag." The regulation states in:

a. Paragraph 2-3c. Flag code K (Noncompliance with Army Body Composition Program (ABCP)). The effective date of the Flag is the date that the Soldier was found to be in noncompliance with Army Regulation 600-9. The use of certain medication to treat an underlying medical disorder or the inability to perform all aerobic events may contribute to weight gain, but are not considered sufficient justification for noncompliance with Army Regulation 600-9 and the Soldier will be flagged. Soldiers will not be exempt because of chronic medical conditions unless an exception to enrollment in the ABCP is granted by the Deputy Chief of Staff, G-1.

b. Paragraph 2-4 (Effective Date) the effective date of a Flag, unless otherwise specified in this regulation, will be the date that the circumstance(s) requiring the Flag occurred, not the date the Flag was initiated (for example, if the circumstance occurred on the 25th of March, but the Flag was not initiated until the 3rd of April, the effective date of the Flag would still be the 25th of March). The Flag is considered to have been in effect and any favorable action previously approved between these dates would be considered void.

c. Paragraph 3-1 (Actions Prohibited by a Flag) a properly imposed Flag prohibits reenlistment, extension, and promotions in grade (among other favorable personnel actions).

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//