

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 4 November 2024

DOCKET NUMBER: AR20230006160

APPLICANT REQUESTS: in effect,

- A permanent disability retirement
- A disability rating of 100 percent (%)

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

- DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States)
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- A letter issued by the Department of Veterans Affairs (VA), 17 June 2020

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.
2. The applicant states, in effect, he is requesting a disability rating of 100%, and a permanent disability retirement. He wishes to receive full benefits, he believes that he is currently found to be 50% disabled from the Army, but he should be rated at 100% due to disability that he incurred during his service.
3. The applicant provides a letter issued by the VA, 17 June 2020, which shows a summary of benefits he is currently receiving. This document further shows, he is not totally and permanently disabled, and his combined service-connected evaluation is rated at 70%.
4. The applicant's service record reflects the following:
 - a. He enlisted in the Army National Guard of the United States (ARNGUS) on 14 November 2007, followed by an extension.

b. DD Form 214 shows he was ordered to active duty on 21 July 2008, for active-duty training. He was honorably released from active duty due to completion of required active service, on 11 December 2008, and transferred to B Company, 795th Military Police Battalion, Fort Leonard Wood, Missouri. He completed 4 months and 21 days of active service. His grade at the time of release was private first class (E-3).

c. Orders 099-083, 09 April 2013, reflect he was ordered to active duty in support of Operation Enduring Freedom (OEF), with a report date of 5 May 2013.

d. Orders 027-0009, 27 January 2014, show he was released from active duty, not by reason of physical disability, effective 16 February 2014.

e. DD Form 214 shows he was ordered to active duty on 5 May 2013, in support of OEF. He was honorably released from active duty due to completion of required active service, on 16 February 2014, and transferred to 1103rd Military Police Detachment - Law & Order, Fort Dix, New Jersey. He completed 9 months and 12 days of active service, and 6 months, 18 days of foreign service. His grade at the time of release was sergeant (E-5). This document further shows, service in Afghanistan from 28 June 2013 to 15 January 2014.

f. Orders 229-806, 17 August 2015, show he was discharged from the Army National Guard and assigned to U.S. Army Reserve Control Group (Annual Training), Fort Knox, Kentucky.

g. NGB Form 22 (National Guard Report of Separation and Record of Service), shows he was honorably separated from the Kentucky Army National Guard (KYARNG), after 7 years and 9 months of service due to expiration of active status commitment in the Selected Reserve, on 13 August 2015.

5. The service record does not reflect any medical evaluations, referrals to the Disability Evaluation System (DES), and/or other documents to substantiate the applicant's claim of a service-connected disability.

6. Due to the applicant's request of a permanent disability retirement, and notation of other mental health issues, the case is being forwarded to the Medical and Behavioral Staff at the ARBA.

7. 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 ADRB in essence requesting a referral to the Disability Evaluation System (DES). He has indicated on his DD 293 that Other Mental Health condition(s) is an issue related to his request. He states:

“Due to not receiving full benefits. Applied and received 50%, believe I should have received 100% due to service-connected disability.”

c. The Record of Proceedings outlines the applicant’s military service and the circumstances of the case. His NGB Form 22 shows he entered the Army National Guard on 14 November 2007 and was honorably discharged from the Kentucky Army National Guard (KYARNG) on 13 August 2015 under provisions in paragraph 6-36n of NGR 600-200, Enlisted Personnel Management (31 July 2009), Expiration of active status commitment in the Selected Reserve. A DD 214 shows the applicant was mobilized in support of Operation Enduring Freedom from 5 May 2013 thru 16 February 2014 during which he Served in Afghanistan from 28 June 2013 thru 15 January 2014.

d. No medical documentation was submitted with the application and there are only eight (8) encounters in the EMR, the majority of which are administrative in nature and none are for behavioral health condition(s).

e. Review of the applicant’s records in MEDCHART found only one temporary non-duty limiting physical profile for pseudofolliculitis barbae (aka shaving bumps) and no permanent physical profiles. The permanent physical profile is the document which identifies a Soldier’s condition(s) which fail medical retention standards and initiates a referral to the DES.

f. There is no probative evidence the applicant had a duty incurred behavioral health or other medical condition which would have failed the medical retention standards of chapter 3, AR 40-501 prior to his voluntary separation; or which prevented him from continuing his military career. Thus, there was no cause for referral to the Disability Evaluation System. Furthermore, there is no evidence that any medical condition prevented the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his voluntary separation.

g. Review of his records in JLV shows he has been awarded multiple VA service-connected disability ratings. This includes a rating for neurosis originally effective 12 July 2017 (his earliest rating) which was increased to 50% effective 12 November 2019, and one for migraine headaches originally effective 12 November 2019. 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.

h. Paragraph 3-1 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (20 March 2012) states:

“The mere presence of an impairment does not, of itself, justify a finding of unfitness because of physical disability. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier reasonably may be expected to perform because of their office, grade, rank, or rating.”

i. Paragraph E3.P3.5.1 of Department of Defense Instruction 1332.38 Subject: Physical Disability Evaluation (14 November 1996) states: “The DES compensates disabilities when they cause or contribute to career termination.”

j. 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 accompanying medical review, the Board concurred with the advising official's determination that referral of the case to the Disability Evaluation System (DES) is not warranted. The advisory opinion found no probative evidence that the applicant had a

duty-incurred behavioral health or other medical condition that would have failed to meet medical retention standards.

2. The Board further noted that the applicant did not submit any medical documentation in support of the petition. A review of his medical records revealed only eight encounters, most of which were administrative in nature, with none indicating treatment for behavioral health conditions. Based on the preponderance of the evidence and the findings of the advisory opinion, the Board determined there was insufficient justification to support the applicant's request for a permanent disability retirement or a 100% disability rating. As such, 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.

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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 (Armed Forces), 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 15-185 (Army Board for Correction of Military Records), currently in effect, prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR. The ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

3. Title 10 (Armed Forces), USC, 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 AR 635-40 (Physical 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 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 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.

4. Army Regulation 40-501 (Standards of Medical Fitness), in effect at the time, 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. 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 as follows. Reservists who do not meet the fitness standards set by chapter 3 will be transferred to the Retired Reserve per Army Regulation 140-10 or discharged from the USAR per Army Regulation 135-175 (Separation of Officers) or Army Regulation 135-178 (ARNG and Reserve Enlisted Administrative Separations). They will be transferred to the Retired Reserve only if eligible and if they apply for it.

b. Reservists 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. Reservists with nonduty 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 this regulation.

c. Reserve Component Soldiers with nonduty related medical conditions who are pending separation for failing to meet the medical retention standards of chapter 3 of this regulation are eligible to request referral to a PEB for a determination of fitness. Because these are cases of Reserve Component Soldiers with nonduty related medical conditions, MEBs are not required, and cases are not sent through the PEBLOs (Physical Evaluation Board Liaison Officers) at the military treatment facilities. Once a Soldier requests in writing that his or her case be reviewed by a PEB for a fitness determination, the case will be forwarded to the PEB by the USARC Regional Support Command or the U.S. Army Human Resources Command Surgeon's office and will include the results of a medical evaluation that provides a clear description of the medical condition(s) that cause the Soldier not to meet medical retention standards.

5. Title 38 USC (Veterans' Benefits), section 1110 (General - Basic Entitlement) states for disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

6. Title 38 (Veterans' Benefits), USC, section 1131 (Peacetime Disability Compensation - Basic Entitlement) states for disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during other than a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

7. Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation) in effect at the time, prescribes Army policy and responsibilities for the disability evaluation and disposition of Soldiers who may be unfit to perform their military duties due to physical disability. As such, this regulation implements the requirements of Title 10 (Armed Forces), United States Code, Chapter 61; DODI 1332.18, DODM 1332.18 (Volumes 1 through 3), and DOD policy memorandums to these issuances; and Army Directive 2012-22 as modified by DODI 1332.18.

a. Chapter 4 provides, Public Law 110-181 defines the term, physical DES, in part, 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 comprised of MEBs, PEBs, counseling of Soldiers, and mechanisms for the final disposition of disability evaluations by appropriate personnel. (See the notes to 10 USC 1171 for the Title XVI provisions.)

b. A Soldier may not be discharged or released from active duty because of a disability until they have made a claim for compensation, pension, or hospitalization with the VA or have signed a statement that their right to make such a claim has been explained or have refused to sign such a statement.

c. The objectives of the DES are to:

(1) Maintain an effective and fit military organization with maximum use of available manpower.

(2) Provide benefits for eligible Soldiers whose military Service is terminated because of a disability incurred in the LOD.

(3) Provide prompt disability processing while ensuring that the rights and interests of the Government and the Soldier are protected.

d. The DES begins for a Soldier when the Soldier is issued a permanent profile approved in accordance with the provisions of AR 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 AR 40–501 (see glossary). Within (but not later than) one year of diagnosis, the Soldier must be assigned a P3/P4 profile to refer the Soldier to the DES. Any DA Form 3349 generated for a USAR Soldier in a drilling Troop Program Unit or AGR status must be validated by the U.S. Army Reserve Command's Medical Management Center before their referral into the DES.

e. The DES concludes for Soldiers as set forth below:

(1) For Soldiers determined by the MEB to meet medical retention standards and MAR2 did not refer the Soldier to the DES, the DES concludes the date the MEB returned the Soldier to duty. (If referral to MEB resulted from MAR2 evaluation, referral to the PEB may be mandatory.)

(2) For Soldiers referred to the PEB and determined fit, the DES concludes as of the date of USAPDA's memorandum approving the finding of fit.

(3) For Soldiers referred to the DES under a Legacy Disability Evaluation System (LDES) process and determined unfit, the DES concludes on the date of the Soldier's separation or retirement for disability.

(4) For Soldiers referred to the DES under the IDDES process and determined unfit, the DES concludes on the date of the Soldier's notification of the VA's benefits decision. However, the Soldier's military status as a member of the Active Army or RC, as applicable, ends on the date of the Soldier's disability separation or retirement.

g. Chapter 5 addresses the standards for unfitness due to disability. A Soldier will be considered unfit when the preponderance of evidence establishes that the Soldier, due to disability, is unable to reasonably perform the duties of their office, grade, rank, or rating (hereafter call duties) to include duties during a remaining period of Reserve obligation.

h. Any medical condition incurred or aggravated during one period of active Service or authorized training in any of the Armed Forces that recurs, is aggravated, or otherwise causes the Soldier to be unfit, should be considered incurred in the LOD, provided the origin of such impairment or its current state is not due to the Soldier's misconduct or willful negligence, or progressed to unfitness as the result of intervening events when the Soldier was not in a duty status.

8. Title 10 (Armed Forces), U.S. Code, section 1556 (Ex Parte Communications Prohibited) 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 Army Board for Correction of Military Records applicant's (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//