

IN THE CASE OF: [REDACTED]

BOARD DATE: 29 February 2024

DOCKET NUMBER: AR20230006230

APPLICANT REQUESTS: in effect, to receive retirement pay vice severance pay.

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

- DD Form 149 (Application for Correction of Military Record)
- 20 Year Letter
- Letter from U.S. Army Human Resources Command

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 his retirement pay was denied due to him receiving disability severance pay. It was explained to the applicant that before receiving retirement pay at age 60, his severance pay must be repaid. Monthly payment from his disability was taken from 2004 up until the present time with a balance of approximately \$3,500. In 2002, the applicant received his 20 year letter, which qualified him for retirement at the age of 60. After completing duty in Iraq in 2004, he was labeled medically unfit for duty and awarded 10 percent disability but should have been allowed to enter the retired reserve since the percentage was less than 30 percent when discharged. This is unjust knowing he already had over 20 years and was in good standing. He served his country with pride and at the end seemed to be let down because someone did not do their job properly. He is only asking for something he truly thinks he deserves and nothing more. He has never heard of someone receiving severance then pay it back, this is a loan, which is being repaid. The applicant was not given the right information when severance pay was offered, by being told he was to pay it back before he would receive his retirement. He did not find out until his retirement application was submitted.

3. The applicant's service record contains the following documents:

a. DD Forms 4 (Enlistment/Reenlistment Document Armed Forces of the United States) show the applicant enlisted in the U.S. Army Reserve (USAR) on 11 July 1987 and remained in the USAR through reenlistments.

b. DA Form 2808 (Report of Medical Examination), dated 27 November 2001 shows the applicant failed his over 40 cardiovascular screening.

c. Memorandum subject Results of Retention Physical Examination, dated 17 December 2001, shows the applicant was medically fit for retention. However, he had one or more abnormal findings. His intraocular pressure exceeded max weight.

d. Memorandum subject Notification of Eligibility for Retired Pay at Age 60 (20 Year Letter), dated 20 February 2002 notified the applicant he had completed the required years of qualifying reserve service and was eligible for retired pay, on application, at age 60.

e. Orders A-02-401166, published by U.S. Army Human Resources Command (AHRC), dated 9 February 2004 ordered the applicant to active duty for active duty medical extension with a report date of 7 February 2004 and an end date of 6 May 2004. These orders were amended on 13 April 2004 extending the end date to 20 June 2004 and on 29 April 2004 changing the end date to 16 June 2004.

f. On 17 December 2017, the Physical Disability Review Board (PDRB) reviewed the applicant's request, in ABCMR docket number AR20170019463. The applicant had been awarded a 10 percent disability rating. The PDRB unanimously recommended no change in the Physical Evaluation Proceeding adjudication. On 11 January 2018, the Deputy Assistant Secretary of the Army (Review Boards) accepted the PDRB's recommendation and denied the applicant's application.

g. Letter from AHRC, dated 28 December 2022 states:

(1) The letter was in reply to the applicant's DD Form 108 (Application for Retired Pay Benefits).

(2) To be eligible for retired pay at age 60, a Reserve Soldier must not have elected to receive disability severance pay in lieu of non-regular retired pay.

(3) An audit of the applicant's military records showed he received severance pay in 2004 thus severing all ties with the military. Accordingly, the applicant was ineligible to receive retired pay. Therefore, AHRC, denied the applicant's application for retired pay.

(4) If the applicant found the record to be incorrect, he could reapply by providing appropriate documentation to substantiate qualifying service for retirement eligibility.

h. DA Form 5016 (Chronological Statement of Retirement Points), dated 5 February 2024 shows the applicant had 22 years, 11 months, and 2 days qualifying for retirement.

i. The applicant's service record was void of Physical Evaluation Board Proceedings documentation, which shows he received severance pay in lieu of nonregular retirement and separation documentation.

4. On 13 October 2023, the Chief, Personnel Services Division, AHRC provided an advisory opinion, which states:

a. AHRC had reviewed the applicant's military records and to be eligible for retired pay at age 60, under Title 10 U.S. Code (USC) sections 12731-12737, a Reserve Soldier must not have elected to receive disability severance pay in lieu of nonregular retired pay.

b. It is the opinion of AHRC that the applicant was not entitled to a nonregular retirement at the age of 60.

5. On 20 October 2023, the advisory opinion was provided to the applicant to allow him the opportunity to respond. On 27 October 2023, the applicant responded stating:

a. After reviewing Title 10 USC sections 12731-12737 and Defense Finance Accounting Service (DFAS) disability severance pay, he has the following facts to provide.

b. U.S. Code, Title 10 states, "the Secretary concerned shall notify each person who has completed the years of service for eligibility for retired pay under this chapter." The applicant received this notification letter on 20 February 2002. Meaning he met 20 years time in service.

c. After returning from the Iraq War in February 2004, the applicant was offered disability severance pay. In 2004, as a Reserve member, he started out processing and once his medical issue came up, he was given paperwork about disability severance pay. Per the applicant's DA Form 5016 (Chronological Statement of Retirement Points), he had 22 years of service in June 2004. He did not meet the eligibility criteria for disability severance pay, as he was already past 20 years of service and he was not unfit for duty. Those are two criteria for disability severance pay for DFAS and the applicant does not feel he met those criteria.

d. The applicant was unable to find where it states in Title 10 USC that a servicemember must not have elected disability severance pay. He did see where it states on the DFAS website the criteria for severance pay and again, he acknowledges that he did not meet two of the three criteria.

e. The applicant understands disability severance pay was given to him, but he did not fully understand the documents he was signing. He was already at 20 years of service and if he understood he was giving up his right to retirement pay, he would not have chosen to sign the rights of his retirement away. The severance pay per the Department of Veterans Affairs is required to be taken from disability once a Soldier is rated over 30 percent, but he was rated at 10 percent and the pay was taken from day one.

f. The applicant is now 64 years old and has a disability rating of 100% (Permanent and Total). He is asking to have his retirement pay to help with his cost of living. He served his country, which includes deploying in support of Iraqi Freedom alongside his active duty brothers and sisters.

g. He humbly beseeches the Board to reject the recommendation from the advisory board to allow him to receive his retirement pay.

BOARD DISCUSSION:

After reviewing the application and all supporting documents, the Board determined relief was not warranted. The applicant’s contentions, the military record, and regulatory guidance were carefully considered. Based upon the findings of the HRC advisory opinion, and the applicant’s own statement stating he elected to receive severance pay, the Board concluded there was insufficient evidence of an error or injustice warranting a change to the applicant’s military record.

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.

5/20/2024

X [REDACTED]

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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. Army Regulation (AR) 635-40 (Physical Evaluation for Retention, Retirement, or Separation), , establishes the Army Physical Disability Evaluation System in accordance with the provisions of chapter 61, title 10, USC and DOD Directive 1332.18 and procedures in this regulation provide for the retention, retirement or separation of a member who is determined to be unfit to perform the duties of his office, grade, rank or rating because of physical disability. The provisions of this regulation apply to all members of the Army who are undergoing physical evaluation for retention, retirement or separation.

a. Chapter 5 (Expeditious Discharge), provides for the expeditious discharge of enlisted personnel who, in accordance with chapter 3, AR 40-501, are not qualified for retention on active duty by reason of physical disability which was neither incurred nor aggravated during any period in which the member was entitled to basic pay.

b. Paragraph 4-19e, Based upon review in HQDA of the findings and recommendations of the Physical Evaluation Board, CG, MILPERCEN, will take final action as shown below for the disposition of the member, by direction of the Secretary of the Army:

- direct permanent retirement for physical disability
- direct placement on the Temporary "Disability Retired List
- direct separation for physical disability with severance pay
- direct separation for physical disability without severance pay
- direct separation for physical disability without severance pay or transfer to the retired reserve because of a condition which was neither incurred nor aggravated during any period of service
- direct separation for physical disability without severance pay when the disability was incurred as a result of intentional misconduct, willful neglect, or during a period of unauthorized absence
- direct return to duty when it has been determined that the member is physically fit to perform the duties of his office, grade, rank, or rating

c. Paragraph 4-5 (Documentation of disability evaluation cases), it is emphasized that the medical report is the heart of the disability evaluation system. Incomplete, inaccurate, misleading, or delayed reports may result in an injustice to the member or to the government. Describing a member's condition is not sufficient that a diagnosed condition may render the individual unfit for further military service.

c. Paragraph 8-9 (Disposition), a Soldier not on extended active duty who is unfit because of physical disability:

(1) May be permanently retired or have his or her name placed on the TDRL, if:

- has at least 20 years of service as defined in 10 USC 1208 (RC Soldiers not on extended AD use under 10 USC 12733 for computations)
- disability is rated at 30 percent or more
- disability occurred in the line of duty, and is the proximate result of performing active duty or IDT

(2) May be separated with severance pay if:

- disability is rated at less than 30 percent
- has less than 20 years of service as defined in 10 USC 1208 (RC Soldiers not on extended AD under 10 USC 12733 for computations)
- disability occurred in the line of duty, and is the proximate result of performing active duty or IDT

(3) May forfeit severance pay; be transferred to the Retired Reserve; and receive under the provisions of 10 USC 12731 non-disability retired pay at age 60, if at least 20 qualifying years of service for retirement have been completed and transfer to the retired Reserve is requested. According to the provisions of 10 USC 1209 and 1213 all rights to receive retired pay at age 60 are forfeited if disability severance pay is

accepted instead of transfer to the Retired Reserve. Disability severance pay (unlike readjustment and separation pay) cannot be repaid for the purposes of receiving retired pay.

(4) Will be separated without benefits in the following situations:

- unfitting condition results from injury which is due to intentional misconduct or willful neglect
- disability was incurred during a period of unauthorized absence
- disability was not incurred or aggravated as the proximate result of performing duty

3. AR 635-40 (Personnel Separations - Physical Evaluation for Retention, Retirement, or Separation) governs the evaluation for physical fitness of Soldiers who may be unfit to perform their military duties because of physical disability. It provides the rules governing the PEB process. It states, in pertinent part, a PEB will include an advisory statement on the DA Form 199 informing the Soldier of legal or administrative requirements that impact on the Soldier's disability benefits in certain situations. When a Soldier has a rating of less than 30 percent and has at least 20 qualifying years for retirement for nonregular service, the following statement will be entered on the DA Form 199: "You have the option of accepting discharge with disability severance pay and forfeiting retirement for non-regular service; or you may request transfer to the Retired Reserve and receive retired pay at age 60. According to Title 10, United States Codes, Sections 1209 and 1213, (10 USC 1209 and 1213), you will forfeit all rights to retired pay if you accept severance pay instead of transfer to the Retired Reserve."

4. Title 10 USC, states in section:

a. 1209 (Transfer to inactive status list instead of separation) any member of the Armed Forces who has at least 20 years of service computed under section 12732 of this title, and who would be qualified for retirement under this chapter but for the fact that his disability is less than 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs at the time of the determination, may elect, instead of being separated under this chapter, to be transferred to the inactive status list under section 12735 of this title and, if otherwise eligible, to receive retired pay under section 12739 of this title upon becoming 60 years of age.

b. 1213 (Effect of separation benefits on claims) Unless a person who has received disability severance pay again becomes a member of an armed force, the National Oceanic and Atmospheric Administration, or the Public Health Service, he is not entitled to any payment from the armed force from which he was separated for, or arising out of, his service before separation, under any law administered by one of those services or for it by another of those services. However, this section does not prohibit the payment

of money to a person who has received disability severance pay, if the money was due him on the date of his separation or if a claim by him is allowed under any law.

//NOTHING FOLLOWS//