

IN THE CASE OF: [REDACTED]

BOARD DATE: 26 January 2024

DOCKET NUMBER: AR20230006243

APPLICANT REQUESTS:

- reconsideration of his previous requests for a medical retirement instead of transfer to the Retired Reserve upon completion of 20 qualifying years for non-regular retirement
- back pay
- promotion to the rank and grade of staff sergeant (SSG)/E-6
- personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- 5 pages of military medical records
- two DA Forms 3349 (Physical Profile), dated 8 August 2009
- Department of Veterans Affairs (VA) medical records
- VA service-connected compensation decision letter
- Letter from the applicant to his U.S. Senator
- Army Board for Correction of Military Records (ABCMR) Record of Proceedings Docket Number AR20180008455

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's cases by the ABCMR in Docket Number AR20160002183 on 17 October 2017 and in Docket Number AR20180008455 on 5 June 2020.
2. The applicant states his discharge was unfair at the time and remains so now. The application is both, procedurally and substantially defective.
3. Counsel provides a 9-page statement, which is briefly summarized below; however, the statement is provided to the Board to review in full:

a. The applicant was unjustly and erroneously separated from the Army without a medical retirement; he should have been medically evaluated and separated as service connected and unfit for duty.

b. The applicant believes there is additional evidence the Board should consider; at the time of his retirement, he had a permanent (P) 3 profile and clearly, he should have been separated based on medical disability.

c. The applicant indicated that after returning from his last deployment to Iraq in December 2006, the medical unit did not put their unit through a post-traumatic stress disorder (PTSD) evaluation, during demobilization. Three years later, he attempted to reenlist with [REDACTED] Army National Guard [REDACTED] ARNG). The retention officer denied his request to reenlist because the [REDACTED] ARNG knew of his disability claim with the VA for chronic PTSD; the VA diagnosed him on 3 November 2009. The [REDACTED] ARNG did not request a Medical Board Evaluation (MEB) despite knowing of his PTSD diagnosis. He retired honorably on 28 November 2009.

d. On 8 November 2009, the applicant requested discharge from the [REDACTED] ARNG based on completion of 20 years of service. His request was approved and on 23 November 2009, he was honorably discharged from the ARNG and transferred to the Retired Reserve. Changing his discharge from an honorable retirement discharge to a medical retirement will make him eligible to receive his retirement pay\benefits effective 28 November 2009.

e. The applicant also stated, "I was informed by letter from the Army Board of Corrections of Military Records that if I was evaluated and awarded with at least a 20% PTSD diagnosis and other disabilities before my retirement date, I would have received a medical retirement discharge and be eligible to receive my retirement pay/benefits as of the date of my retirement. I then applied (with supporting documentation) on March of 2015 for my military records to be corrected from honorable retirement discharge effective 28 November 2009 to medical retirement discharge effective 28 November 2009 due to my chronic PTSD diagnosis on 3 November 2009."

f. The applicant further stated "Unfortunately, the Board has denied my request. I feel the Board is not recognizing the process or duration after filing a claim with the Veterans Affairs however, my documentation and evaluations determined my initial diagnoses met the criteria and was dated 3 November 2009 (30% PTSD, 20% back injury and 10% hearing loss) which were received during the 20 years of my military service and have only increased in percentage and additional illnesses. This was before my honorable retirement discharge date of 28 November 2009."

g. On 3 September 2014, the Secretary of Defense issued a memorandum providing guidance to the Board for Correction of Records (Secretary Hagel Memo) as it

considers petitions brought by veterans claiming PTSD with other than honorable conditions discharge. This includes a comprehensive review of all materials and evidence provided by the Applicant. A memorandum providing further clarifying guidance was issued on 25 August 2017 by the Undersecretary of Defense for Personnel and Readiness. This policy guidance is intended to ease the application process for veterans who are seeking redress and assists the Board in reaching fair and consistent results in these cases. The guidance also mandates liberal waivers of time limits, ensures timely consideration of petitions, and allows for increased involvement of medical personnel in Board determinations.

h. The applicant should have been medically discharged from the military due to his chronic PTSD diagnosis and other disabilities. Despite being diagnosed with PTSD on 3 November 2009, the medical unit did not put his unit through a PTSD evaluation during their demobilization. This oversight resulted in him continuing for three more years with the [REDACTED] ARNG without receiving proper treatment and support for his condition. Even though the [REDACTED] ARNG was aware of his diagnosis, they did not request an MEB before his retirement discharge, which led to an honorable retirement discharge instead of a medical retirement discharge that would have made him eligible to receive retirement pay/benefits as of the date of his retirement.

i. Furthermore, he completed 20 years of service and requested discharge from the ARNG based on that fact alone. However, he was on a permanent profile at the time of his discharge, and he should have been evaluated for fitness to proceed in the service. If he had been evaluated and awarded at least a 20% PTSD diagnosis before his retirement date, he would have received a medical retirement discharge and been eligible for retirement pay/benefits effective 28 November 2009. Unfortunately, despite having supporting documentation and evaluations that determined his initial diagnoses met the criteria, the Board denied his request.

j. The applicant's case highlights the importance of properly evaluating Soldiers for PTSD and other disabilities before their discharge from active duty or Reserve status. It is crucial that our military takes care of its Soldiers who sacrifice so much for our country by providing them with appropriate medical attention and support when needed. *The complete counsel's statement was provided to the Board for their review and consideration.*

4. Having had prior service in the U.S. Navy, the applicant enlisted in the ARNG on 24 November 2003. He served on active duty in support of Operation Iraqi Freedom from 10 August 2005 to 17 December 2006, which includes service in Kuwait/Qatar from 20 November 2005 to 14 November 2006.

5. Two DA Forms 3349, both forms dated 8 August 2009, show the applicant was issued temporary physical profiles due to hearing loss and lower back pain. These

forms also show the profiling medical officer indicated the applicant was able to perform all functional activities (section 5) and that he was healthy without any medical condition that prevented deployment.

6. The applicant's Notification of Eligibility for Retired Pay at Age 60 (20-Year Letter) is dated 4 November 2009. This letter notified him that having completed the required years of service, he is eligible for retired pay upon application at age 60.

7. On 8 November 2009, the applicant submitted a voluntary request for discharge from the [REDACTED] ARNG based on completion of 20 years of service.

8. The applicant's National Guard Bureau Form 22 shows he was discharged from the [REDACTED] ARNG and transferred to the U.S. Army Reserve Control Group (Retired Reserve), in the rank and grade of sergeant/E-5, effective 23 November 2009.

9. The applicant's Noncommissioned Officer Evaluation Report (NCOER) covering the period 1 December 2008 through 30 November 2009, his last NCOER on record, shows his rater rated his overall potential for promotion and/or service in positions of greater responsibility as "fully capable." The NCOER does not show he was unable to perform his military duties due to a medical disability.

10. The applicant is requesting promotion to the rank and grade of SSG/E-6, however, he did not provide a reason for his request nor identify the error or injustice that precluded his promotion.

11. The applicant provided a VA service connected compensation decision letter showing he was granted service-connected disability compensation for the following conditions:

- PTSD
- degenerative disc disease, strain lumbar spine
- left/right extremities, radiculitis associated with degenerative disc disease, strain lumbar spine
- erectile dysfunction associated with PTSD
- bilateral hearing loss
- sleep apnea

12. During the processing of the applicant's previous case (AR20160002183), the Army Review Boards Agency (ARBA) Medical Advisor provided a medical advisory opinion stating the following:

a. The available record does not reasonably support PTSD or another boardable behavioral health condition existed at the time of the applicant's military service. Per VA documentation, he was service connected for PTSD in 2010.

b. He met medical retention standards for hearing loss, low back pain (with or without radicular symptoms), tinnitus (unclear if present at that time), erectile dysfunction (unclear if present at that time) and history of snoring.

c. His medical conditions were duly considered during medical separation processing.

d. A review of the available documentation found no evidence of a medical disability or condition which would support a change to the reason for his discharge. *The complete medical advisory opinion was provided to the Board for their review and consideration.*

13. During the processing of the applicant's previous case (AR20180008455), the Board determined, After reviewing the application and all supporting documents, the Board found that relief was not warranted. The Board carefully considered the applicant's request, supporting documents, evidence in the record and medical advisory opinion (from AR20160002183). The Board considered the applicant's statement, military medical records and the review and conclusion of the advising official. The Board concurred with the medical advisory opinion findings insufficient evidence of a medical disability or condition which would support a change to the character or reason for the discharge in this case. Therefore, the Board denied relief.

14. 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.

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, 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 again requesting they reconsider their prior denials of his request for a medical retirement. He states:

"I was informed by letter from the Army Board of Corrections of Military Records that if I was evaluated and awarded with at least a 20% PTSD diagnosis and other disabilities before my retirement date, I would have received a medical retirement discharge and be eligible to receive my retirement pay/benefits as of the date of my retirement ... "

"Unfortunately, the Board has denied my request. I feel that the Board is not recognizing the process or duration after filing a claim with the Veterans Affairs however, my documentation and evaluations determined my initial diagnoses met the criteria and was dated November 03, 2009. (30% PTSD, 20% Back Injury and 10% Hearing Loss) which were received during the 20 years of my military service and have only increased in percentage and additional illnesses. This was before my honorable retirement discharge date of November 28, 2009."

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. His National Guard Report of Separation and Record of Service (NGB Form 22) shows he entered the Army National Guard on 24 November 2003 was honorably separated from the [REDACTED] Army National Guard ([REDACTED] ARNG) with transfer to The Retired Reserve effective 23 November 2009 under paragraph 6-360 of NGR 600-200, Enlisted Personnel Management (31 July 2009): Discharge and transfer to the Retired Reserve. It shows the applicant had 20 years, 2 months, and 0 days of total service for retired pay.

d. This request was previously denied by the ABCMR on 17 October 2017 (AR20160002183). A subsequent request for a reconsideration of the prior request was denied by the ABCMR on 5 June 2020 (AR20180008455). Rather than repeat their findings here, the board is referred to the record of proceedings for those cases and medical advisory opinion for AR20160002183. This review will concentrate on the new evidence submitted by the applicant.

e. The former Guardsman received his Notification of Eligibility for Retired Pay at Age 60 (20-year letter) on 4 November 2009. On 8 November, he voluntarily requested to resign from the [REDACTED] Army National Guard ([REDACTED] ARNG). This request was support by CPT [REDACTED], the Administrative Officer for the 717th Brigade Support Battalion:

"SGT [Applicant] has successfully and honorably served the [REDACTED] Army National Guard while fulfilling all of the obligations of his service. He should be proud of his service which has been characterized by professionalism and dedication to his unit and follow Soldiers.

My recommendation is that SGT [Applicant] be discharged from the [REDACTED] Army National Guard IAW NGR 600-200 para 6-36o, effective 23 November 2009.”

f. The applicant’s final NCO Evaluation Report (DA Form 2166-8) shows he was a successful noncommissioned officer. It shows he met height/weight standards and had passed his most recent Army Physical Fitness Test. His rater marked him a successful for Values/NCO Responsibilities and rated his overall potential as “Fully Capable”. His senior rater blocked him with 2’s on a scale of 1-5 for both overall performance and overall potential, opining:

- “demonstrates the potential for higher degrees of responsibility
- utilizes common sense and courtesy while performing duties in a professional
- manner
- continue to place in tough, demanding leadership jobs”

g. 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.”

h. Because the applicant voluntarily requested to resign from the [REDACTED] ARNG and his career was not terminated due to a medical condition, he was fit by presumption. Paragraph 3-2b of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (8 February 2006):

“(1) 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 they can no longer continue to reasonably perform because of a physical disability incurred or aggravated in service.

(2) When a soldier is being processed for separation or retirement for reasons other than physical disability, continued performance of assigned duty commensurate with his or her rank or grade until the soldier is scheduled for separation or retirement, creates a presumption that the soldier is fit.”

i. The Physical Profile (DA form 3349) in the supporting documentation is a temporary profile for hearing loss dated 8 August 2009 which simply stated the applicant needed a SPRINT (speech recognition in noise test) test for his hearing loss. He received a second non-duty limiting temporary profile that same day for low back pain. The applicant was marked as capable of performing all the functional activities

required of all Soldiers, including live in an austere environment. The profile simply allowed the applicant to perform an alternate aerobic event in lieu of the 2-mile run event for his Army Physical Fitness Test (APFT) and prevented him from having to perform upper and lower body weight training. No further profiles were issued.

j. Review of his electronic medical records in MEDCHART shows he did not have a duty limiting permanent profile prior to his voluntary separation. This document is the first step for referral to the DES.

k. The prior medical advisory goes into a good review of the conditions the applicant believes should have been referred to the DES and so does not need to be repeated here. The submitted medical documentation with this application shows he issues with low back pain in and sciatica in September 2005 and August 2009 and has been evaluated by the VET Center and found to have chronic PTSD. Both issues are addressed in the prior medical advisory.

l. JLV shows he had been awarded multiple VA service-connected disability ratings two months prior to his discharge. However, the applicant was already fit by presumption. In addition, paragraph 3-1 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (8 February 2006) 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.”

m. There is no evidence the applicant had any medical condition which would have failed the medical retention standards of chapter 3, AR 40-501 prior to his voluntary request to resign from the Army. 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 discharge.

n. The DES compensates an individual only for service incurred 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. That role and authority is granted

by Congress to the Department of Veterans Affairs and executed under a different set of laws.

o. It is the opinion of the ARBA Medical Advisor that referral of his case to the DES remains unwarranted.

BOARD DISCUSSION:

1. The applicant's request for a personal appearance hearing was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

2. 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 contentions, the military record, and regulatory guidance.

a. Medical retirement instead of transfer to the Retired Reserve upon completion of 20 qualifying years for non-regular retirement: Deny. The evidence shows the applicant voluntarily resigned from the [REDACTED] Army National Guard and the request supported by the appropriate authority. According to his NCO Evaluation Report, he was fully capable with no duty limitations. The Board found no error or injustice in his separation. The Board also considered the medical records, any VA documents provided by the applicant and the review and conclusions of the reviewing medical official's finding no evidence the applicant had any medical condition which would have failed the medical retention standards of chapter 3, AR 40-501 prior to his voluntary request to resign from the Army. Thus, there was no cause for referral to the Disability Evaluation System. Furthermore, the Board did not find 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 discharge. Based on the preponderance of the evidence, the Board determined his discharge from the ARNG is not in error or unjust.

b. The Board noted that the military's disability system compensates an individual only for service incurred condition(s) which have been determined to disqualify him or her from further military service. The applicant's service was not interrupted by a physical disability incurred or aggravated in service. The VA on the other hand compensates 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.

REFERENCES:

1. 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 Department of Defense 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.

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.

c. Service members whose medical condition did not exist prior to service who are determined to be unfit for duty due to disability are either separated from the military or are permanently retired, depending on the severity of the disability. 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.

2. Army Regulation 635-40 establishes the Disability Evaluation System (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. The regulation in effect at the time states:

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. The 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 present with the requirements of the duties the member reasonably may be expected to perform because of his or her office, rank, grade, or rating. The Army must find that a service member is physically unfit to reasonably perform his or her duties and assign an appropriate disability rating before he or she can be medically retired or separated.

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, 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.

3. Army Regulation 40-501 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 15-185 (ABCMR) provides Department of the Army policy, criteria, and administrative instructions regarding an applicant's request for the correction of a military record. Paragraph 2-11 states applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

5. On 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRBs) and Service Boards for Correction of Military/Naval Records (BCM/NRS) to carefully consider the revised PTSD criteria, detailed medical considerations and mitigating factors, when taking action on applications from former service members administratively discharged under other than honorable conditions and who have been diagnosed with PTSD by a competent mental health professional representing a civilian healthcare provider in order to determine if it would be appropriate to upgrade the characterization of their service.

6. 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 Service Discharge Review Boards and Service Boards for Correction of Military Records 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 to those conditions or experiences. The guidance further describes evidence sources and criteria and requires Boards to consider the conditions or experiences presented in evidence as potential mitigation for misconduct that led to the discharge.

7. 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//