

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 8 March 2024

DOCKET NUMBER: AR20230006345

APPLICANT REQUESTS: in effect:

- approval of a line of duty (LOD) determination for an injury sustained in 2005 while serving in Iraq
- referral of his medical records to the Army Disability Evaluation System (DES) for a medical retirement

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

- DD Form 149 (Application for Correction of Military Record)
- DA Form 2173 (Statement of Medical examination and Duty Status)
- Two DA Form s3349 (Physical Profile), dated 3 November 2007 and 3 February 2008
- Army National Guard (ARNG) medical disqualification separation proceedings
- 55 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 after returning from Iraq, he was found unfit for duty due to a fractured back sustained in LOD. His records were sent to his State's National Guard medical headquarters, and he received orders placing him in the Retired Reserve. He was involuntarily retired due to an injury sustained during war, but he was not designated as medically retired. He was found unfit for duty and involuntarily retired, but it should have been a medical retirement. He and his family are missing out on many benefits due to not having the "medically retired" designation.
3. Having had prior service in the Regular Army, ARNG, and U.S. Naval Reserve, the applicant enlisted in the Tennessee ARNG (TNARNG) on 5 March 2002. He served in Kuwait/Iraq from 21 November 2004 to 27 October 2005.

4. A DA Form 2173 (Statement of Medical examination and Duty Status) shows the applicant injured his back on 9 January 2005 while loading a 50 caliber machine gun. The form also shows the injury was considered to have been incurred in LOD.
5. A DA Form 3349, dated 3 November 2007, shows the applicant was issued a temporary physical profile based on low back pain due to bulging discs. A second DA Form 3349, dated 3 February 2008, shows the applicant was issued a permanent (P) physical profile due to herniated lumbar discs. Section 5 of the form shows the profiling physician indicated the applicant required a Medical Evaluation Board (MEB)/Physical Evaluation Board (PEB).
6. On 6 February 2008, the applicant was notified that the State Medical Review Board determined he failed to meet the medical retention standards for continued service in the TNARNG in accordance with Army Regulation 40-501 (Standards of Medical Fitness). He was also informed that if he wished to appeal the decision, he had 30 days from receipt of the notification to submit a written request for referral to a non-duty related PEB for a determination of fitness.
7. There is no evidence in the applicant's available records showing he submitted a request for referral to a non-duty related PEB.
8. On 19 February 2008, the applicant was issued a Notification of Eligibility for Retired Pay at Age 60 (15 Year Letter). This letter informed him that as a Selected Reserve member with at least 15 years of qualifying service, he is eligible to apply for retired pay upon attaining age 60.
9. Orders issued on 26 February 2008 directed the applicant's discharge from the ARNG and his assignment to the Retired Reserve effective 6 February 2008.
10. During the processing of this case, an advisory opinion was obtained from the National Guard Bureau, Special Actions Branch. It states:
  - a. The applicant was deployed in support of Operation Iraqi Freedom from 2004-2005, where he was hospitalized for back injuries. He is requesting to be medically retired based on his service-related injury. He is currently on the Retired Reserve list.
  - b. The applicant's records show that he was on active duty from 22 June 2004 to 26 November 2005 when he was deployed to Iraq. According to medical records, he suffered from back pain which worsened while deployed, and he was hospitalized in Iraq on 31 January 2005. He did not receive an LOD determination for this incident. However, he suffered from further back pain, and according to his P3 physical profile, dated 3 February 2008, he had herniated lumbar discs. Section 5 of the profile shows the medical professional indicated that he needed an MEB/PEB evaluation of at least

three different functional activities. The applicant received a notification of medical disqualification for retention in the TNARNG on 6 February 2008 and was discharged from the ARNG effective 6 February 2008.

c. Per Army Regulation 40-501, paragraph 3-39, published in 2017, “the causes for referral to the MEB are as follows: herniation of nucleus pulposus, more than mild symptoms following appropriate treatment or remedial measures, with sufficient objective findings to meet the definition of a disqualifying medical condition or physical defects.”

d. Based on the applicant’s claims and the available documents, he does not have an LOD injury. However, because the injury occurred while he was on active duty orders, it should have been considered in LOD. Because his injury was determined to be not in LOD, he did not get referred to DES and was only referred to the medical disqualification process.

e. For these reasons, it is the recommendation of this office that the applicant’s request be partially approved. It is the opinion of this office that the applicant should have had an LOD determination for his injury while deployed on active duty orders. Additionally, he had a P3 profile that clearly says he needed an MEB/PEB for some functional activities. Army Regulation 40-501, that the TNARNG State Medical Review Board references, even outlines his condition as a condition needing a review by the MEB process. Because servicemembers cannot self-refer to the DES process, he would have needed a medical provider’s referral from his medical history, but he did not get referred to an evaluation board even with a P3 profile because his injury was determined to not be in LOD. While the applicant cannot receive a medical retirement, he should be referred to an MEB.

f. The ARNG Medical Administrative Actions Branch and the TNARNG concur with this recommendation.

11. The NGB advisory opinion was provided to the applicant and given the opportunity to provide additional evidence or comments. No response was received.

12. 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 requesting his lumbar spine injury incurred while serving in Iraq and for which he was discharged from the ARNG be determined to have been incurred in the line of duty and, in essence, a referral to the Disability Evaluation System (DES). He states:

“After returning from Iraq (04-05), I was found unfit for duty, due to a fractured back, sustained in the line of duty. My records were sent to my state NG medical headquarters and I received orders placing me in the retired reserves. I was involuntarily retired due to an injury sustained in war and was not designated as ‘medically retired’.”

c. The Record of Proceedings outlines the applicant’s military service and the circumstances of the case. His Report of Separation and Record of Service (NGB Form 22) for the period of Service under consideration shows he entered the Army National Guard on 05 March 2002 and was honorably discharged from the Tennessee Army National Guard (TNARNG) on 6 February 2008 under the authority provided in paragraph 8-36o of NGR 600-200, Enlisted Personnel Management: Discharge and transfer to the Retired.

d. ARBA requested and received an Advisory from the TNARNG. The 13 December 2023 email response from the TNARNG Deputy G1 states the Office of the State Surgeon found his lumbar injury was incurred in the line of duty (LOD) and the applicant should have been referred to the DES:

“HSS [Health Service Support] conducted a medical records review and LOD search for [Applicant]. This search produced the Fitness for Duty Evaluation Findings from 2 FEB 2008. Included in the FFD packet was DD Form 689s [Individual Sick Slip], SF 600s [Chronological Record of Medical Care], DA Form 2173 [Statement of Medical Examination and Duty Status], and DA Form 3349s [Physical Profile]. All medical documentation supports the Lumbar Condition was IN LINE OF DUTY due to an injury that occurred while loading a 50-caliber machine gun ...

Based on a review of all available medical documentation, it is the opinion of the State Surgeon’s Office, that Brian Osborne’s medically disqualifying condition is service connected and therefore should have been referred to the MEB for medical separation.”

e. The referenced documentation is in the supporting documentation. This advisory agrees the TNARNG’s finding that his lumbar spine condition was IN LINE OF DUTY

and the applicant should have been referred to the DES instead of discharged for a non-service-connected condition.

f. JLV shows he has a 20% VA service-connected disability rating for “Vertebral Fracture or Dislocation”, and two 10% ratings for lower extremity nerve conditions.

g. It is the opinion of the ARBA medical advisor the applicant’s lumbar spine condition was incurred in the line of duty and he should now be referred to the DES.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered.
2. The Board reviewed and concurred with the National Guard Bureau's advisory and the medical advisor's review finding the applicant's line of duty should be amended to reflect in the line of duty investigation completed was in the line of duty and therefore, the applicant be referred to DES.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

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:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined that the evidence presented was sufficient to warrant a recommendation for relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by amending the line of duty investigation to "in line of duty" and by directing the applicant be entered into the Disability Evaluation System (DES) and a Medical Evaluation Board (MEB) convened to determine whether the applicant's condition(s), to include lumbar condition, met medical retention standards at the time of service separation.

a. In the event that a formal physical evaluation board (PEB) becomes necessary, the individual concerned will be issued invitational travel orders to prepare for and participate in consideration of their case by a formal PEB. All required reviews and approvals will be made subsequent to completion of the formal PEB.

b. Should a determination be made that the applicant should have been separated or retired under the DES, these proceedings will serve as the authority to void their administrative separation and to issue them the appropriate separation retroactive to their original separation date, with entitlement to all back pay and allowances and/or retired pay, less any entitlements already received.

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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. Army Regulation 600-8-4 (Line of Duty Policy, Procedures, and Investigations) prescribes policies and procedures for investigating the circumstances of disease, injury, or death of a Soldier providing standards and considerations used in determining LOD status.

a. The Army LOD Program is a commander's program which essentially protects the interest of both the Soldier and the U.S. Government where service is interrupted by injury, illness, disease, or death. LOD investigations determine duty status at the time of incident and whether misconduct was involved and, if so, to what degree. Additionally, LOD investigations may be required to determine an existed prior to service condition, and, if so, determine service aggravation.

b. An LOD investigation will be conducted for all Soldiers, regardless of component, if the Soldier experiences a loss of duty time for a period of more than 24 hours and:

(1) The injury, illness, or disease is of lasting significance (to be determined by a physician, physician assistant, or nurse practitioner).

(2) There is a likelihood that the injury, illness, or disease will result in a permanent disability.

(3) If a Reserve Component Soldier requires follow-on care for an injury, illness, or disease incurred during a period of active duty.

c. A formal LOD investigation is a detailed investigation that normally begins with a DA Form 2173 completed by the medical treatment facility and annotated by the unit commander as requiring a formal LOD investigation. The appointing authority, on receipt of the DA Form 2173, appoints an investigating officer who completes the DD Form 261 (Report of Investigation LOD and Misconduct Status) and appends appropriate statements and other documentation to support the determination, which is submitted to the General Court Martial Convening Authority for approval.

d. An injury, disease, or death is presumed to be in LOD unless refuted by substantial evidence contained in the investigation. LOD determinations must be supported by substantial evidence and by a greater weight of evidence than supports



any different conclusion. The evidence contained in the investigation must establish a degree of certainty so that a reasonable person is convinced of the truth or falseness of a fact.

3. Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation), dated 19 January 2017, prescribes 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 office, grade, rank, or rating. It implements the requirements of Title 10, U.S. Code, chapter 61; Department of Defense Instructions (DoDI) 1332.18 (Disability Evaluation System); DoD Manual 1332.18 (DES Volumes 1 through 3) and Army Directive 2012-22 (Changes to Integrated Disability Evaluation System Procedures) as modified by DoDI 1332.18.

a. The objectives are to maintain an effective and fit military organization with maximum use of available manpower; provide benefits to eligible Soldiers whose military service is terminated because of a service-connected disability; provide prompt disability evaluation processing ensuring the rights and interests of the Government and Soldier are protected; and, establish the Military Occupational Specialty Administrative Retention Review (MAR2) as an Army pre-DES evaluation process for Soldiers who require a P3 or P4 (permanent profile) for a medical condition.

b. Public Law 110-181 defines the term, physical DES, 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 composed of MEBs, PEBs, counseling of Soldiers, and mechanisms for the final disposition of disability evaluations by appropriate personnel.

c. The DES begins for a Soldier when either of the events below occurs:

(1) The Soldier is issued a permanent profile approved in accordance with the provisions of Army Regulation 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 Army Regulation 40-501.

(2) The Soldier is referred to the DES as the outcome of MAR2 evaluation.

d. An MEB is convened to determine whether a Soldier's medical condition(s) meets medical retention standards per Army Regulation 40-501. This board may determine a Soldier's condition(s) meet medical retention standards and recommend the Soldier be returned to duty. This board must not provide conclusions or recommendations regarding fitness determinations.

e. The PEB determines fitness for purposes of Soldiers' retention, separation, or retirement for disability under Title 10, U.S. Code, chapter 61, or separation for disability without entitlement to disability benefits under other than Title 10, U.S. Code, chapter 61. The PEB also makes certain administrative determinations that may benefit implications under other provisions of law.

f. Unless reserved for higher authority, the U.S. Army Physical Disability Agency approves disability cases for the Secretary of the Army and issues disposition instructions for Soldiers separated or retired for physical disability.

g. Unit commanders will ensure medical profiles containing a P3/P4 or temporary (T) 3/T4 in one of the serial profile factors are reviewed according to the standards of Army Regulation 40-501. Among the duties required, a unit commander will provide a non-medical assessment by completing DA Form 7652 (DES Commander's Performance and Functional Statement).

4. National Guard Regulation 600-200, paragraph 6-35l(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 LOD, the procedures of Army Regulation 600-8-4 will apply. Discharge will not be ordered while the case is pending final disposition.

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

//NOTHING FOLLOWS//