

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 4 November 2024

DOCKET NUMBER: AR20230006493

APPLICANT REQUESTS: in effect,

- Informal Physical Evaluation Board (PEB) Proceedings
- Medical Evaluation Board (MEB)
- A referral to Disability Evaluation System (DES)
- A permanent disability retirement instead of a voluntary separation
- Correction of his record to reflect all awards previously awarded and all education he had previously completed
- An update to his federal status

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

- DD Form 149 (Application for Correction of Military Record)
- Three DD Forms 214 (Certificate of Release or Discharge from Active Duty)
- DA Form 3283 (Statements of Member Removed from the Temporary Disability Retired List), 20 April 2013
- NGB Form 22 (National Guard Report of Separation and Record of Service)

FACTS:

1. The applicant states, in effect, he requests a permanent disability retirement instead of a voluntary separation. He was medically retired and during 2013, he decided to rejoin the Pennsylvania Army National Guard (PAARNG), so he can deploy with the unit that is located in his hometown. Upon completion of his deployment, he underwent an MEB, so that he may be placed back on the permanent disability retirement list (PDRL), this statement was also validated by the Physical Evaluation Board Liaison Officer (PEBLO), at Fort Gordon, Georgia. He informed his command, and even explained that his situation was unique, but they failed to extend his contract, and did not process his MEB packet. He further asks for a correction of his DD Form 214 for the period ending 18 June 2009, to reflect all awards previously awarded, all education he had previously completed and an update to his federal status. The applicant's full statement is available in its entirety for the Boards review.

2. It is not clear what the applicant is referring to as it pertains to his request for update to his federal status. Therefore, this issue will no longer be discussed in these proceedings.

3. The applicant is authorized the Overseas Service Ribbon and the Army Achievement Medal. Additionally, he is authorized military education and primary specialties not currently listed on his DD Form 214. These changes will be administratively corrected in the "Administrative Notes" section of this document without Board action.

4. The applicant's service record reflects the following:

a. He enlisted in the U.S. Army Reserve (USAR) on 27 April 1998.

b. Orders 225-138, 12 August 2008, show he was ordered to active duty in support of Operation Iraqi Freedom (OIF), with a report date of 19 September 2008.

c. Orders 132-0901, 12 May 2009, show he was released from assignment and duty because of physical disability incurred while entitled to basic pay and under conditions that permit his placement on the Temporary Disability Retired List (TDRL), with an effective date of 18 June 2009.

d. A DA Form 199 (Physical Evaluation Board (PEB) Proceedings), shows a PEB was convened on 22 April 2009 wherein the applicant was found physically unfit with a recommended disability rating of 40%, and that the disposition be temporary disability retirement with reexamination during September 2010, for Intervertebral Disk Syndrome, L4-L5 and L5-S1, which began while on active duty with the PAARNG. This interferes with his ability to perform 11B (Infantryman) duties. The applicant concurred with the findings and waived a formal hearing of his case. This document further shows the PEB made the following administrative determinations:

(1) The Soldier's retirement is not based on disability disease from injury or disease received in the line of duty as a direct result of armed conflict or caused by an instrumentality of war and incurring in the line of duty during a period of war as defined by law.

(2) Evidence of record reflects the Soldier was not a member or obligated to become a member of an armed Force or Reserve thereof, or the NOAA or the USPHS on 24 September 1975.

(3) The disability did not result from a combat-related injury as defined in Title 26, U.S. Code, section 104.

e. DD Form 214 shows he was ordered to active duty on 19 September 2008, in support of OIF. He was honorably retired from active duty due to a temporary disability, on 18 June 2009, and transferred to USAR Control Group (Retired), St. Louis, Missouri. He completed 9 months of active service. His grade at the time of release was sergeant (E-5).

f. NGB Form 22 shows he was honorably retired from the PAARNG, after 1 year and 3 months of service due to a temporary disability, on 18 June 2009.

g. Orders 181-1025, 30 June 2009, show he was honorably discharged from the ARNG, placed on the TDRL, and transferred to the USAR Control Group (Retired).

h. A DA Form 199 shows a PEB was convened on 9 August 2012 wherein the findings show, since being placed on the TDRL the applicant's condition has improved to the point that currently there is no functional impairment which would preclude satisfactory performance of duty. The PEB considered him fit for duty, and that he return to duty in his present grade and primary MOS. The applicant concurred with the findings.

i. DA Form 3283 (Statements of Member Removed from the Temporary Disability Retired List), 20 April 2013, shows the applicant has agreed to the following:

- The entitlement to be permanently retired/separated upon removal from the TDRL
- He waived his entitlement to disability retirement/separation compensation for the purpose of continuing on USAR duty despite his physical disability
- At the time of his ultimate retirement/separation his disqualifying defect will be reevaluated under the physical standards in effect at the time
- His separation/retirement will proceed under standards which are most advantageous to him
- In voluntarily enlisting, he is aware that depending upon retention qualifications and the requirements of the service, it may be necessary to affect his retirement/separation prior to the completion of the period for which he enlisted

j. He reenlisted in the PAARNG, on 20 April 2013, followed by multiple extensions.

k. Order D114-04, 24 April 2013, shows he was found fit for duty and effective 19 April 2013, he was removed from the TDRL.

l. DA Forms 4836 (Oath of Extension of Enlistment or Reenlistment), show the applicant extended his current enlistment in the PAARNG, 20 April 2013 on four separate occasions as follows:

- On 3 April 2019, he extended for one year
- On 14 April 2020, he extended for one year
- On 10 April 2021, he extended for one year
- On 23 January 2022, he extended for one year

m. In an action memorandum subject: Separation, 24 April 2023, shows the reason for his separation as: Discharge – Voluntary, with an effective date of 19 April 2023.

n. NGB Form 22 shows he was honorably released from the PAARNG, after 10 years, on 19 April 2023.

5. The service record does not reflect a medical evaluation and/or statement, placing the applicant on the PDRL.

6. Due to the applicant's request of a permanent disability retirement, the case is being forwarded to the Medical 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 (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 to be reinstated into the Pennsylvania Army National Guard (PAARNG) are then referred to the Disability Evaluation System (DES).

c. The Record of Proceedings details the applicant's service and the circumstances of the case. His DD 214 for the period of Service under consideration shows the former Army National Guard Soldier entered active duty in support of Operation Iraqi Freedom on 19 September 2008 and was placed on the Temporary Disability Retirement List (TDRL) on 18 June 2009 under provisions in chapter 4 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (8 February 2006). His Physical Evaluation Board (PEB) Proceedings (DA Form 199) shows his percentage of disability for his sole unfitting condition of Intervertebral Disc Syndrome was 40%.

d. The DA 199 for his TDRL reevaluation dated 9 August 2012 shows he was found fit for duty:

“Since being placed on the TDRL, your condition has improved to the point that currently there is no functional impairment which would preclude satisfactory performance of duty. The PEB considers you fit for duty in your present grade and primary MOS.”

e. Orders published by the United States Army Physical Disability Agency on 24 April 2024 show he had been found fit for duty and was removed from the TDRL effective 19 April 2013.

f. His National Guard Report of Separation and Record of Service (NGB Form 22) shows he enlisted in the Army National Guard on 20 April 2013 and separated from the PAARNG on 19 April 2023 under provisions provided in paragraph 6-35a of NGR 600-200, Enlisted Personnel Management (31 July 2009): Expiration of term of service. It shows 12 years, 05 months, and 23 days of total service for retired pay.

g. No medical documentation was submitted with the application and the applicant did not identify which condition(s) he believes warrant referral to the DES.

h. The applicant has no permanent physical profile in MEDCHART, the document which identifies a Soldier's conditions which fail medical retention standards and initiates a referral to the DES.

i. There is no evidence the applicant had a duty incurred medical condition which would have failed the medical retention standards of chapter 3 of AR 40-501, Standards of Medical Fitness, prior to his voluntary separation; or which prevented him from reenlisting and 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.

j. JLV shows he has been awarded multiple VA service-connected disability ratings, including ratings for PTSD, Degenerative Arthritis of the Spine, and Migraine Headaches. However, the DES only compensates an individual for service incurred medical condition(s) which have been determined to disqualify him or her from further military service and consequently prematurely ends their career. 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.

k. It is the opinion of the ARBA medical advisor that a referral of his case to the DES is unwarranted.

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 reviewing the applicant's petition, available military records, and medical evaluation, the Board concurred with the advising official's determination that referral to the Disability Evaluation System (DES) is not warranted. The advisory opinion found no evidence indicating that the applicant had a duty-incurred medical condition that failed medical retention standards prior to his voluntary separation or that would have prevented him from reenlisting and continuing his military service..

2. The Board further noted that during the Physical Evaluation Board (PEB) proceedings, the applicant concurred with the findings and waived his right to a formal hearing. The PEB determined that the applicant's retirement was not based on a disability resulting from injury or disease incurred in the line of duty as a direct result of armed conflict or caused by an instrumentality of war, nor did it qualify under definitions of a period of war as established by law. Additionally, the Board agreed that the evidence of record reflected the applicant was neither a member of, nor obligated to become a member of, the Armed Forces, the National Oceanic and Atmospheric Administration (NOAA), or the U.S. Public Health Service (USPHS) as of 24 September 1975.

3. Furthermore, the applicant's disability was also not determined to be the result of a combat-related injury as defined under Title 26, U.S. Code, Section 104. Based on the preponderance of the evidence and consistent with the advisory opinion, the Board denied relief.

3. Prior to closing the case, the Board did note the analyst of record administrative notes below, and recommended the correction is completed to more accurately depict the military service of the applicant

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
XX	XXX	XXX	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

Except for the correction addressed in Administrative Note(s) below, the Board found 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.

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.

ADMINISTRATIVE NOTE(S):

A review of the SM's records shows he is authorized additional awards, additional primary specialties, and military education, not listed on his DD Form 214 for the period ending 18 June 2009. As a result, amend his DD Form 214 by adding to:

a. Item 11 (Primary Specialty):

- 51B (Carpentry and Masonry Specialist) 10 years, 6 months
- 88U (Railway Operations Crewmember) 8 years

b. Item 13 (Awards):

- Overseas Service Ribbon
- Army Achievement Medal

c. Item 18 (Remarks):

- Basic Combat Training
- Army Reserve Technician Entry Training
- Regional Level Application Software Course (US Army Reserve management)
- Information Assurance Security Officer Certification Course
- Combat Lifesaver Course

REFERENCES:

1. 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.

2. 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.

3. 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.

4. 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.

5. 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.

6. 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 IDES 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.

f. Temporary disability retired list (TDRL). In accordance with 10 USC 1376, the SECARMY is required to maintain a list of Soldiers placed on the TDRL. The USAPDA maintains this list and manages Army Soldiers on the TDRL for the SECARMY.

(1) Criteria for placement on the list: Under the provision of 10 USC 1202 and 10 USC 1205, Soldiers will be placed on the TDRL when they would be qualified for permanent disability retirement and the preponderance of evidence indicates one or more conditions will change within the next five years so as to result in a change in rating or a finding of fit.

(2) Statutory requirement for re-evaluation: In accordance with 10 USC 1210, the Army DES will re-evaluate each Soldier placed on the TDRL at least once every 18 months. Evaluation may be sooner. The SECARMY will make a final determination of the case of each Soldier whose name is on the TDRL upon the expiration of five years after the date when the Soldier's name was placed on that list. If, at the time of that determination, the physical disability for which the Soldier was placed on the TDRL still exists, it will be considered to be permanent and stable. Placement on the TDRL confers no right to remain on the TDRL for the entire five-year period authorized by 10 USC 1210.

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//