IN THE CASE OF: [redacted]

BOARD DATE: 25 January 2024

DOCKET NUMBER: AR20230006668

APPLICANT REQUESTS:

a. a medical retirement based on service-incurred disabilities instead of transfer to the Retired Reserve due to medical disqualification for retention in the U.S. Army Reserve (USAR).

b. a personal appearance before the Board via video or telephone.

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

- DD Forms 149 (Application for Correction of Military Record)
- Three DD Forms 214 (Certificate of Release or Discharge from Active Duty), 13 May 1988, 2 January 2000, 5 April 2008
- Memorandum, subject: Burn Pit Health Hazards, 20 December 2006
- Department of Veterans Affairs (VA) Summary of Benefits letter, 3 November 2021
- VA/Department of Defense *e*Benefits disabilities summary, printed 3 November 2021
- DA Form 2823 (Sworn Statement), 23 November 2021
- memorandum from the U.S. Army Human Resources Command (AHRC), subject: Line of Duty (LOD) Advisory Opinion (for applicant), 17 January 2022
- DA Form 199-1 (Formal Physical Evaluation Board (PEB) Proceedings), 19 February 2022
- memorandum from the U.S. Army Physical Disability Agency (USAPDA), subject: Rebuttal to PEB Findings (for applicant), 9 February 2022
- Orders 22-087-00043, Retired Reserve, 28 March 2022
- 9-pages of medical records

FACTS:

1. The applicant states:

a. His request is based on changes related to exposure to burn pit health hazards. During his service in the USAR, he served a tour in Balad, Iraq, from July 2007 to March 2008. On 2 April 2017, he was attending weekend drill and while walking back to his car at the end of the day, he had trouble breathing. The next morning, he went to the hospital because he was still having problems breathing. After nine days of tests with no diagnosis, he was accepted at the University of Maryland Medical Center for further evaluation. While there, his lungs kept deteriorating and they said he would need a lung transplant.

b. He was on extracorporeal membrane oxygenation because his lungs stopped working. He underwent lung transplant on 27 April 2017. In 2020, he submitted a claim with the VA and was awarded a 100% disability rating for constrictive bronchiolitis due to environmental hazards in the Gulf War. In 2021, the USAR started the process for a Medical Evaluation Board (MEB). In January 2022, the MEB found him unfit for further military service, non-duty related (NDR), and sent him retirement orders. He still believes his lung transplant was due, in some part, to exposure to the burn pits in Balad, Iraq.

2. Following over 14 years of active service in the Regular Army, the applicant entered service in the USAR on 3 January 2000. He served in Iraq from 15 July 2007 to 21 March 2008.

3. The applicant's Notification of Eligibility for Retired Pay at Age 60 (20-Year Letter) is dated 6 December 2007. This letter notified him that having completed the required years of qualifying Reserve service, he is eligible for retired pay upon application at age 60.

4. On 17 January 2022, AHRC provided an LOD advisory opinion, requested by the U.S. Army PEB, Joint Base San Antonio-Fort Sam Houston, TX, pertaining to the applicant's bilateral lung transplant and fungal skin residuals conditions. The advisory opinion states:

a. After a thorough review and a medical opinion obtained by the AHRC Surgeon General's office, the applicant's bilateral lung transplant and fungal skin residuals were not incurred or aggravated by military service. Continue processing this claim as NDR.

b. A review of Armed Forces Health Longitudinal Technology Application (AHLTA) records shows the applicant was seen during deployment on 25 December 2007 for an upper respiratory viral infection but no follow-on requirements for care. On 5 October

2007, he was seen for a right index finger verruca wart and onychomycosis of multiple toenails. There was no indication of any fungal infection of the skin. There were no additional notes in AHLTA regarding either of the above medical concerns. On 15 April 2021, Dr. A saw the applicant and in the clinical note documented an assessment of environmental exposure. He said it is more probable than not that exposure in the military from burn pit smoke in Iraq has contributed to his lung disease that went on to require a lung transplant.

c. Two comprehensive studies have examined the long-term health effects of burn pit exposure in Iraq and Afghanistan on Soldiers' health since 2002. The first study is from the Institutes of Medicine, which is currently the most comprehensive assessment of health consequences of exposure to burn pits and the second is the Armed Forces Health Surveillance Center, The Naval Health Research Center and The U.S. Army Public Health Command Center. Both documents conclude that there is not enough medical or scientific information to determine the potential for long-term health effects in service members exposed to smoke and fumes from burn pits and environment conditions, thus far, there is not a definitive link between the exposures from burn pits, environmental conditions, or chronic illnesses of any kind in service members.

5. On 19 January 2022, a Formal PEB (FPEB) found the applicant physically unfit due to bilateral lung transplant (non-compensable). The FPEB indicated the following:

a. NDR Case: The Soldier was initially seen on 11 January 2017 for a productive cough, fever, and sore throat along with shortness of breath and chest tightness. He had a bilateral lung transplant on 27 April 2017. The condition is not compensable because at the time the Soldier was diagnosed with this condition, the Soldier was not in an active duty status more than 30 days or entitled to base pay, and there is no LOD investigation for this condition.

b. Additionally, there is no evidence within the Soldier's available case file that indicates military service has aggravated the condition. In accordance with Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation), this Soldier is unfit because the DA Form 3349, Physical Profile Record, Section 4, functional activity limitations associated with this condition, make this Soldier unable to reasonably perform required duties.

6. On 2 February 2022, the applicant indicated he did not concur with the FPEB findings and recommendations and submitted a written appeal. His written appeal is not available.

7. On 9 February 2022, the USAPDA responded to the applicant's appeal and stated the following:

a. The USAPDA notes the applicant's disagreement with the findings of the FPEB and have reviewed the entire case, wherein the Soldier concurs with the PEB finding that his condition of bilateral lung transplant and fungal skin residuals is unfitting, but he non-concurs with the AHRC NDR finding and requests that we seek clarification from AHRC. The Soldier asserts his bilateral lung transplant was necessitated by the scarring from amyopathic dermatomyositis that he contends resulted from his exposure to the burn pit in Balad, Iraq, during his 2007-2008 Operation Iraqi Freedom deployment. He states he received treatment in theater for the fungal skin condition as well as a respiratory infection. At the FPEB, he testified that the lung condition appeared during a drill weekend on 1-2 April 2017. He also cites the opinion of a treating pulmonologist that it is more probable than not that exposure in the military from burn pit smoke in Iraq has contributed to his lung disease that ultimately required lung transplant. On 7 May 2020, the VA awarded the Soldier 100% service connection for constrictive bronchiolitis related to "Environmental Hazard in Gulf War.

b. The NDR referral memorandum prepared by the Army Reserve Medical Management Center (AR-MMC) shows the applicant was treated for acute bronchitis in January 2017. However, in April 2017, he returned to the emergency department with symptoms of shortness of breath and with a recent diagnosis of sarcoid on chest CT. He was admitted to the hospital, and his condition rapidly deteriorated into bronchiolitis obliterans organizing pneumonia (BOOP)/amyopathic dermatomyositis, and he underwent a bilateral lung transplant on 27 April 2017. AR-MMC determined that the Soldier's condition is NDR because he was not on active duty for greater than 30 days and was not in a qualified duty status at the time of diagnosis.

c. The PEB requested an LOD advisory opinion from AHRC and on 17 January 2022, AHRC responded that after a thorough review and a medical opinion obtained from the AHRC Surgeon General's office, the applicant's bilateral lung transplant and fungal skin residuals were not incurred or aggravated by military service. Therefore, the claim should continue to be processed as NDR. AHRC cited two comprehensive studies that examined the long-term health effects of burn pit exposure in Iraq and Afghanistan on Soldiers' health since 2002. Both studies concluded that there is insufficient medical and scientific information at this time to determine the potential for long-term health effects from such exposures. In view of the available medical evidence and the AHRC LOD advisory opinion, the PEB determined that the Soldier's bilateral lung transplant and fungal skin residuals were not incurred during or aggravated by military service. We concur with the PEB findings and note that we are not the avenue for appeal of LOD determinations.

d. The USAPDA conclusion is that this case was properly adjudicated by the FPEB, which correctly applied the rules that govern the Physical Disability Evaluation System in making its determination. The findings and recommendations of the FPEB are supported by a preponderance of evidence and are therefore affirmed. The issues

raised in the applicant's 7 February 2022 appeal were adequately addressed by the FPEB in its board proceedings and we concur with the findings.

8. Orders issued on 28 March 2022 directed the applicant's reassignment to the Retired Reserve effective 1 May 2022 by reason of medically disqualified – not result of own misconduct. His Chronological Statement of Retirement Points shows he was credited with 38 years, 5months, and 12 days of qualifying service for non-regular retirement.

9. During the processing of this case, an advisory opinion was obtained from the USAPDA Legal Advisor regarding the applicant's request to have his unfitting bilateral lung transplant condition and fungal skin residuals found duty-related and to be granted a permanent disability retirement. The USAPDA found the applicant's request legally insufficient and stated the following:

a. The applicant was present for a NDR PEB on 22 November 2021 and provided sworn testimony after having undergone a major medical health procedure requiring a bilateral lung transplant in 2017. The PEB maintained the initial findings as an unfitting condition and sent an LOD advisory request to AHRC on 3 December 2021. AHRC determined the bilateral lung transplant and fungal skin residuals were not incurred or aggravated by military service. On 19 January 2022, the FPEB found the applicant unfit for continued service due to his NDR bilateral lung transplant and referred the case for disposition under Reserve Components regulations. The applicant again contends the bilateral lung transplant condition should be found duty related.

b. Upon review of the available case record, it appears the USAPDA correctly applied the rules that govern the Physical Disability Evaluation System in making its determination that his condition was unfitting. However, the USAPDA is not the authority for LOD determinations. That authority, including any appellate authority, lies with AHRC under the governance of Army Regulation 600-8-4 (LOD Policy, Procedures, and Determinations). Should the applicant maintain the contention that his conditions are duty related, AHRC is the office to respond.

10. The USAPDA advisory opinion was provided to the applicant, and he was given the opportunity to provide additional evidence or comments. No response was received.

11. The applicant provided VA documents showing he was granted service-connected disability compensation for constrictive bronchiolitis, rated 100% disabling, related to environmental hazards in the Gulf War.

12. Regulatory guidance provides Reserve Component Soldiers with non-duty 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.

BOARD DISCUSSION:

1. The Board found the available evidence sufficient to consider this case fully and fairly without a personal appearance by the applicant.

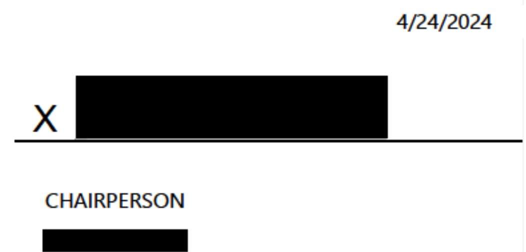
2. The Board carefully considered the applicant's request, supporting documents, evidence in the records, an advisory opinion, and published Department of Defense guidance for liberal consideration of changes to separations. The Board concurred with the conclusion of the advisory official that the evidence shows the USAPDA correctly applied the rules that govern the Physical Disability Evaluation System in making its determination that his condition was unfitting. The Board further concurred with AHRC's determination that he had a condition incurred in the line of duty. Based on a preponderance of the evidence, the Board determined the applicant's transfer to the Retired Reserve by reason of medical disqualification was not in error or unjust.

BOARD VOTE:

Mbr 1	Mbr 2	Mbr 3	
:	:	:	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.



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, 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 USAPDA is responsible for administering the Army Disability Evaluation System (DES) 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 Army Regulation 635-40.

2. Army Regulation 40-501 provides information on medical fitness standards for induction, enlistment, appointment, retention, and related policies and procedures. Chapter 3 gives the various medical conditions and physical defects which may render a Soldier unfit for further military service and which fall below the standards required. These medical conditions and physical defects, individually or in combination, are those that:

a. Significantly limit or interfere with the Soldier's performance of their duties.

b. May compromise or aggravate the Soldier's health or well-being if they were to remain in the military Service. This may involve dependence on certain medications, appliances, severe dietary restrictions, or frequent special treatments, or a requirement for frequent clinical monitoring.

c. May compromise the health or well-being of other Soldiers.

d. May prejudice the best interests of the Government if the individual were to remain in the military Service.

3. Army Regulation 40-501, also states in:

a. Paragraph 9-10, normally, Reservists who do not meet the fitness standards set by chapter 3 will be transferred to the Retired Reserve or discharged from the USAR. They will be transferred to the Retired Reserve only if eligible and if they apply for it. Reservists with non-duty 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.

b. Paragraph 9-12, Reserve Component (RC) Soldiers with non-duty 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 RC Soldiers with non-duty related medical conditions, MEBs are not required. 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 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. Army Regulation 635-40, paragraph 4-34 (RC non-duty related process) states the RC non-duty related process is established by policy. It affords RC Soldiers not on call to active duty of more than 30 days and who are pending separation by the RC for non-duty related medical conditions to enter the DES for a determination of fitness and whether the condition is duty related. An LOD investigation resulting in a finding of not in LOD is not required when it is clear that the disqualifying disability is non-duty related. Referral to the RC non-duty related process is upon the request of the RC Soldier. If the Soldier does not request referral, they are subject to separation for medical disqualification under RC regulations.

5. Army Regulation 600-8-4 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. A formal LOD investigation is a detailed investigation that normally begins with DA Form 2173 (Statement of Medical Examination and Duty Status) 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 Line of Duty 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.

b. 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.

c. The worsening of a pre-existing medical condition over and above the natural progression of the condition as a direct result of military duty is considered an aggravated condition. Commanders must initiate and complete LOD investigations, despite a presumption of Not In the Line of Duty, which can only be determined with a formal LOD investigation.

6. Army Regulation 15-185 (ABCMR) states applicants do not have a right to a formal hearing before the ABCMR. The Director of the ABCMR may grant a formal hearing whenever justice requires.

//NOTHING FOLLOWS//