

IN THE CASE OF: [REDACTED]

BOARD DATE: 31 January 2024

DOCKET NUMBER: AR20230006780

APPLICANT REQUESTS: in effect -

- a physical disability retirement in lieu of a discharge for medical disqualification
- Tri-Care for Life
- issuance of a DD Form 214 (Certificate of Release or Discharge from Active Duty)

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States)
- Statement of Service, 27 June 2003
- Department of Veterans Affairs (VA) summary of benefits letter, 10 March 2022
- applicant letter to The Veterans Consortium Pro Bono Program, 23 May 2023
- Medic Rescue/Medicare Cards
- Medical Bills (35 pages)

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. A review of the applicant's record shows she submitted prior applications to the Army Board for Correction of Military Records (ABCMR). However, the decision documents are not available for review.
3. The applicant states she was injured on active duty and in the line of duty on 17 September 1987 when she slipped on a wet fire escape falling from the second story

to the first story. she suffered bulging and compressed discs in her back. She believes her discharge was handled incorrectly and she has suffered for it.

4. The applicant enlisted in the Army Reserve on 4 May 1974. She was honorably discharged on 19 April 1979. She reenlisted in the Army Reserve on 27 May 1983 and 27 March 1985.

5. A DA Form 2173 (Statement of Medical Examination and Duty Status) shows the applicant was injured on 17 September 1987.

a. The applicant reported for duty to perform her annual training on 17 September 1987. Shortly afterwards she was walking down the outside steps from the second floor of Building 021 when about halfway down she fell injuring the right shoulder and right hip. The cause of her falling was due to the steps being wet.

b. No formal Line of Duty investigation was required as the injury was considered to have been incurred in the Line of Duty.

6. A memorandum, subjected: Request for Active Duty in Excess of 29 Consecutive Days, dated 25 May 1988, shows a request for the applicant for a tour of active duty from 11 July 1988 to 30 September 1988.

a. On 9 June 1988, the request was returned without action because the applicant was undergoing follow-up treatment for an injury received on active duty.

b. On 29 June 1988, the request was disapproved as she had undergone treatment for a back injury and had not been medically cleared to return to duty. She was recommended to be re-examined by the orthopedic surgeon (military) at the earliest opportunity.

7. The applicant was excused from participating in her unit's annual training scheduled 13-27 May 1989.

8. The applicant was notified on 28 November 1989 of action to discharge her because she was found not medically qualified for retention. She was required to provide her acknowledgement within 15 days.

9. A letter, subject: Discharge Due to Medical Disqualification for Retention, dated 16 January 1990, shows the applicant elected to be discharged from the Army Reserve due to a medical condition which rendered her medically disqualified for retention.

10. The applicant was honorably discharged on 30 January 1990.

11. The applicant did not provide nor do her records contain evidence she completed the 90 days or more of continuous active duty required for the issuance of a DD Form 214.

12. The applicant provided a VA summary of benefits letter, dated 10 March 2022, stating she has a combined service-connected evaluation of 80 percent and is considered to be totally and permanently disabled due to her service-connected disabilities. She did not provide the condition(s) for which she is rated.

13. 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, the Army Aeromedical Resource Office (AERO), and/or 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 in essence requesting a referral to the Disability Evaluation System (DES) and a medical retirement. She states:

"Injured on active duty in the line of duty! Sept 17, 1987 – reported for duty – I fell from the second story to the first floor on wet fire escape steps ... I suffered bulging discs and compressed discs in by back. I am entitled to a medical discharge."

c. The Record of Proceedings details the applicant's military service and the circumstances of the case.

d. Because of the period of Service under consideration, there are no encounters in AHLTA or documents in iPERMS.

e. A Statement of Medial Examination and Duty Status (DA Form 4187) dated 17 September 1987 shows the applicant injured her right shoulder and hip when she slipped on some wet steps:

"SP4 [Applicant] reported for duty to perform her annua training on 17 SPE 87. Shortly afterwards, SP4 [Applicant] was walking down the outside steps from the second floor of Bldg. 021 when about halfway down she fell injuring the right shoulder and right hip. The cause of her falling was due to the steps being wet."

f. These injuries were determined to have been incurred in the line of duty as seen in the accompanying 7 November 1987 approval memorandum.

g. A 29 June 1988 memorandum from the Deputy Chief of Staff for Personnel for the 99<sup>th</sup> US Army Reserve Command shows the applicant was not cleared to return to duty following a back injury because the clearing document lacked a date:

1. Request for active duty pertaining to SP4 [Applicant], [SSN], is disapproved.
2. This packet was reviewed by the 99TH ARCOM Surgeon and the following discrepancies were found:
3. VA Form 10-2577d, Statement from the Veterans Administration stating that Ms. [Applicant] is able to return to duty, is undated.
4. Soldier has undergone treatment for a back injury and has not been medically cleared to return to duty.”

h. It is not known if this back injury was related to her fall in September 1987 or to some other injury. However, it is notable that no back injury was listed on her DA 4187 for the September 1987 accident.

i. On 28 November 1989, the applicant's company commander informed her of his initiation of separation actions for an unidentified disqualifying medical condition. She was subsequently offered three options: Discharge from the USAR, transfer to the USAR Control Group (Retired), and request a waiver for the medically disqualifying condition. She elected to be discharged from the USAR.

j. The condition which resulted in her medical disqualification is unknown, and there is insufficient probative evidence the applicant had any duty incurred medical condition which would have failed the medical retention standards of chapter 3 of AR 40-501, Standards of Medical Fitness. Thus, there was no cause for referral to the Disability Evaluation System.

k. JLV shows the applicant was awarded several VA service-connected disability ratings, including ratings for depression, limited motion on right upper extremity, spinal stenosis, and degenerative arthritis of the lumbar spine. However, the DES compensates an individual only for service incurred medical 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. These roles and authorities are granted by Congress to the Department of Veterans Affairs and executed under a different set of laws.

I. It is the opinion of the Agency Medical Advisor that a referral of her 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 partial relief was 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 review of the applicant's petition, available military records and medical review, the Board considered the advising official finding insufficient probative evidence the applicant had any duty incurred medical condition which would have failed the medical retention standards. The opine found referral of the applicant's case to DES unwarranted. However, the Board notwithstanding the medical opine determined based on the extent of the injury suffered by the applicant when she slipped on a wet fire escape falling from the second story to the first story and suffered bulging and compressed discs in her back, agreed there is sufficient evidence to support the applicant's case being referred to DES.

2. The Board found no evidence to support the applicant being on active duty for a period greater than 90 days to receive a DD Form 214. The Board noted, the applicant was disqualified for continued service due to her injury. The Board agreed to error on the side of the applicant is appropriate due to the injury which based on the evidence in the record was considered in the line of duty. Furthermore, the ABCMR, on behalf of the Secretary of the Army, does not have the authority to offer Tricare for Life. Such a remedy is outside the purview of the ABCMR. Based on this, the Board granted partial relief for the referral of the applicant's case to DES.

BOARD VOTE:

Mbr 1	Mbr 2	Mbr 3
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:	:	:	GRANT FULL RELIEF
■	■	■	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined the evidence presented is sufficient to warrant a recommendation for partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by directing the applicant be entered into the Disability Evaluation System (DES) and a Medical Evaluation Board concerned to determine whether the applicant's conditions(s), met medical retention standard at the time-of-service separation.

a. In the event that a formal physical evaluation board (PEB) becomes necessary, the individual concerned may be issued invitational travel orders to prepare for and participate in consideration of her case by a formal PEB if requested by or agreed to by the PEB president. 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 under the DES, these proceedings will serve as the authority to void her administrative separation and to issue her the appropriate separation retroactive to her original separation date, with entitlement to all back pay and allowances and/or retired pay, less any entitlements already received.

2. The Board further determined the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to Tri-Care for Life and issuance of a DD Form 214.

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CHAIRPERSON

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. AR 635-8 (Personnel Separations - Separation Processing and Documents) provides principles of support, standards of service, policies, tasks, rules, and steps governing required actions in the field to support processing personnel for separation and preparation of separation documents. Paragraph 5-1 (When to prepare the DD Form 214) states a DD Form 214 will be prepared for Reserve component Soldiers

completing 90 days or more days of continuous active duty. For example, such periods may consist of ADOS, contingency operations-ADOS, active-duty operational support-RC, AGR, or full-time National Guard duty for operational support.

2. Title 10, 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 Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation). 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 an 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.

3. Army Regulation 635-40 establishes the Army Disability Evaluation System 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. Only the unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability.

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 military service.

b. Soldiers who sustain or aggravate physically unfitting disabilities must meet the following line of duty (LOD) criteria to be eligible to receive retirement and severance pay benefits:

(1) The disability must have been incurred or aggravated while the Soldier was entitled to basic pay or as the proximate cause of performing active duty or inactive duty training.

(2) The disability was incurred in the LOD in a time of war or national emergency or was incurred in the LOD after 14 September 1978.

(3) The disability must not have resulted from the Soldier's intentional misconduct or willful neglect and must not have been incurred during a period of unauthorized absence.

4. Army Regulation 40-501 (Standards of Medical Fitness) 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.

5. Title 38 USC, 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.



6. Title 38 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.

7. Section 1556 of Title 10, USC, 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 applicants (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//