

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 12 January 2024

DOCKET NUMBER: AR20230006876

APPLICANT REQUESTS: medical retirement instead of discharge from the U.S. Army Reserve (USAR) due to medical unfitness for retention.

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Certificate of Release or Discharge from Active Duty) for the period 7 December 2003 to 26 November 2004
- Noncommissioned Officer Evaluation Report (NCOER) for the period July-November 2004
- USAR Case Management Tracking Record (Demobilization)
- Department of Veterans Affairs (VA) summary of benefits letter
- VA Progress Notes (103 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. The applicant states he was a USAR Individual Mobilization Augmentee (IMA) Soldier at the time of his discharge and he had medical issues during out-processing from active duty after returning from a combat zone. Because he was an IMA Soldier, no one explained the discharge process. Years have gone by, and he should had been receiving Combat-Related Special Compensation because most of his disabilities occurred during active service in Southwest Asia. He just slipped through the system because it was a period of combat.
3. The applicant enlisted in the Regular Army on 19 August 1987. He was released from active duty and transferred to the USAR on 16 August 1990. He reenlisted in the USAR on 25 May 1995 and on 19 May 2001.

4. The applicant provided a DD Form 214 showing he served on active duty in support of Operation Enduring Freedom from 7 December 2003 to 26 November 2004. His active service includes service in Qatar, Bahrain, Kuwait, and Iraq.

5. On 25 October 2006, the applicant was issued a permanent physical profile due to chronic obstructive pulmonary disease (COPD) and chronic knee pain.

6. On 26 October 2006, the applicant was informed that a recent review of his medical records revealed one or more medical conditions that disqualified him for retention in the USAR. The conditions under consideration were COPD and internal derangement of knees with degenerative changes. The applicant was also advised of the following three options for disposition of his case:

- elect transfer to the Retired Reserve (if otherwise eligible for retirement based on qualifying years of service)
- elect to be discharge from the USAR
- elect consideration by a Non-Duty Related Physical Evaluation Board (NDR-PEB) for fitness determination only, it cannot award disability compensation

7. On 24 November 2006, the applicant provided a Disposition Election for Medical Disqualification memorandum electing consideration by an NDR-PEB.

8. The applicant's NDR-PEB proceedings are not available.

9. Orders issued on 22 May 2007 directed the applicant's honorable discharge from the USAR effective 22 March 2007. His Chronological Statement of Retirement Points shows he was credited with 12 years, 11 months, and 29 days of qualifying service for retirement.

10. The applicant provided a USAR Case Management Tracking Record, dated 9 November 2004, and stated the following:

This was at Fort Bliss out processing they wanted to hold me for an additional 6 months after serving 1 year overseas. At the time my wife was home alone with 4 children. I elected outside source the (Veterans Administration). This is the point my command should had been notified and followed up. They didn't; I returned to my civilian employment and continued the process of my disabilities until reaching 100% [disability rating]. Based on dates provided [one can] clearly see the VA approved service connection for COPD dated [27 November 2004] the day after discharge from active duty. This is also the day I should had been medically discharged.

11. The applicant also provided a VA summary of benefits letter showing he has service-connected disabilities, which includes asthma (rated 30% disabling and previously diagnosed as COPD), with a combined 100% disability rating.

12. 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.

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, 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 in essence requesting a referral to the Disability Evaluation System (DES) for two medical conditions which resulted in his medical disqualification for continued military service and subsequent discharge from the USAR. He states through counsel:

“Discharge needs to be changed to a medical discharge. I was an individual augmentee at time of discharge and had medical issues during out-processing from active-duty combat zone. HRC [Human Resources Command] notified me to go through this process to get a TDRL [Temporary Disability Retirement List].

Being an individual augmentee no one explained discharge scenario. Years have gone by and I should had been receiving CSRS [CRSC – Combat Related Special Compensation] since most of my disabilities occurred in during active service in SWA [Southwest Asia] theater. I just slipped through the system and it was a period of combat. Mistakes happen.”

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. Discharge orders published by the U.S. Army Human Resources Command (USAHRC) on 22 May 2007 show the former drilling USAR Soldier was honorably discharged effective 22 May 2007 under authority in of AR 135-

178, Enlisted Administration Separations (13 March 2007). The orders so not cite a chapter, paragraph, or provide a reason for his separation.

d. A DD 214 shows the then Sergeant First Class (E07) with a military occupational specialty (MOS) of 42L – Administration Specialist - was mobilized in support of Operation Enduring Freedom from 7 December 2003 thru 26 November 2004 with service in Qatar, Bahrain, Kuwait, and Iraq from 23 December 2003 thru 11 November 2004.

e. The applicant's only available clinical encounter from this period of Service is his post-deployment health assessment completed 9 November 2004 (\*\* Note – This document was uploaded into ACTS). He marked that "compared to my last medical assessment/physical examination, my overall health is 'WORSE.'" He wrote the had a constant cough, lower back ache, muscle aches in his legs, and was sleeping more. He marked the "NO" box indicating he had not seen a provider since his last medical assessment/physical examination which appears to have been his pre-deployment health assessment. Finally, he marked the "NO" box to the question "Do you have any conditions which currently limit your ability to work in your primary military specialty or require geographic or assignment limitations?"

f. The provider wrote "Has LBP [low back pain] with lower extremity paresthesias, no bowel/bladder dysfunction. LBP began after running. Elects to be seen near home station."

g. This agrees with what the applicant wrote in his 25 August 2023 email to ARBA:

"Case Management Tracking Record dated November 9, 2004, this was at Ft. Bliss out processing they wanted to hold me for an additional 6 months after serving 1 year overseas. At the time my wife was home alone with 4 children. I elected outside source the (Veterans Administration)."

h. Reserve Component (RC) Soldiers noted to have developed or aggravated a medical condition during a period of mobilization are to be offered the option of either remaining on active duty in order to undergo further evaluation and/or treatment or to be released from active duty (REFRAD) and receive further evaluation and/or treatment.

i. During his 2004 demobilization processing, the applicant, then a senior noncommissioned officer and administrative specialist, indicated he had no duty limiting conditions at the time of separation and voluntarily elected to undergo further evaluation and/or treatment of his lumbar spine condition near his home of record.

j. The applicant underwent a retention medical examination in December 2005. He was noted to have mild non-duty affecting limitations due to knee pain. In October

2006, the applicant was placed on a duty limiting permanent physical profile for chronic obstructive pulmonary disease (COPD) and chronic knee pain.

k. On 26 October 2006, USAHRC notified the applicant these two conditions were medically disqualifying for retention in the U.S Army Reserve. Though not presented with this option, the applicant elected for a duty related physical evaluation board. There is no evidence this board was initiated. However, no probative medical evidence that either of these conditions was incurred during or permanently aggravated by his military service was submitted with the application or identified in the electronic records. As such, the applicant is ineligible for duty related DES processing.

l. JLV shows he has been awarded multiple VA service-connected disability ratings, including ratings for asthma and "lower leg condition." 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. These roles and authorities are granted by Congress to the Department of Veterans Affairs and executed under a different set of laws.

m. It is the opinion of the Agency Medical Advisor that a referral of his case to the Disability Evaluation System is not warranted.

#### BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. Documentation shows the applicant underwent a retention evaluation in late 2005 and noted to have mild, non-duty limiting knee pain. Approximately, one year later he was placed on duty limiting permanent physical profile for chronic obstructive pulmonary disease (COPD) and chronic knee pain. He was subsequently notified by HRC that both conditions were disqualifying for retention. The applicant elected evaluation by a physical evaluation board; however, neither documentation in his record nor that which he provided is sufficient to determine that either condition was severe enough to warrant a referral to the DES. After due consideration of the case, the Board determined the evidence presented insufficient to warrant a recommendation for relief.

BOARD VOTE:

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

BOARD DETERMINATION/RECOMMENDATION:

The Board determined 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:

- 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.
- 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 DOD 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 Medical Evaluation Board (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.

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.

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 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 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 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.

5. 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 who do not meet medical retention standards may request continuance in 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 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 and cases are not sent through the PEB liaison officers at the medical 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 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.

6. Title 38, U.S. Code, Sections 1110 and 1131, permit the VA to award compensation for disabilities which were incurred in or aggravated by active military service. However, an award of a VA rating does not establish an error or injustice on the part of the Army.

7. Title 38, Code of Federal Regulations, Part IV is the VA Schedule for Rating Disabilities. The VA awards disability ratings to veterans for service-connected conditions, including those conditions detected after discharge. As a result, the VA, operating under different policies, may award a disability rating where the Army did not find the member to be unfit to perform his/her duties. Unlike the Army, the VA can evaluate a veteran throughout his or her lifetime, adjusting the percentage of disability based upon that agency's examinations and findings.

8. 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//