

IN THE CASE OF: [REDACTED]

BOARD DATE: 8 February 2024

DOCKET NUMBER: AR20230006926

APPLICANT REQUESTS:

- in effect, physical disability retirement in lieu of honorable administrative discharge from the U.S. Army Reserve (USAR) due to expiration term of service (ETS)
- personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Privacy Act Release
- DD Form 214 (Certificate of Release or Discharge from Active Duty), ending 30 September 1987
- U.S. Army Reserve Personnel Command Orders D-08-328983, 7 August 2003
- DD Form Number 255A (Honorable Discharge Certificate, 7 August 2003)
- Department of Veterans Affairs (VA) letter, 2 October 2023
- VA Rated Disabilities printout, undated

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:

a. He served 4 years on active duty in the Regular Army then transitioned to the USAR in 1987. He intended to complete enough time in the military to retire, but his service-connected disabilities prevented him from doing as he intended.

b. He received his initial disability rating from the VA when he was in the USAR in 1993, based on injuries he incurred while on active duty in the Regular Army and while on active duty for training (ADT) in the USAR. He was then transferred to the Inactive

Reserve by his USAR unit, but proper procedures were not followed. He should have instead been medically boarded by his USAR unit and medically retired from the service. His 100 percent permanent VA disability rating prevented him from completing his service.

3. The applicant enlisted in the Regular Army on 19 August 1983.

4. A DA Form 2173 (Statement of Medical Examination and Duty Status) shows:

a. The applicant was admitted to the Frankfurt Army Regional Medical Center on 21 January 1985, for an ankle fracture he sustained on 19 January 1985, performing an airborne assault at a drop zone at the REFORGER site at Grafenwoehr, Germany. He was medically evacuated from the site and treated by local Army medical personnel, then transported to the Frankfurt Army Regional Medical Center. He was released to his unit on 4 February 1985 and was present for duty.

b. On 16 February 1985, his unit commander or adviser signed the form indicating a formal line of duty (LOD) investigation was not required and the injury was considered to have been incurred in the LOD.

5. A Headquarters and Headquarters Command, Hunter Army Airfield memorandum, dated 25 February 1985, shows the DA Form 2173 was reviewed for completeness and the injury was found in the LOD.

6. A physical profile is used to classify a Soldier's physical disabilities in terms of six factors or body systems, as follows: "P" (Physical capacity or stamina), "U" (Upper extremities), "L" (Lower extremities), "H" (Hearing), "E" (Eyes), and "S" (Psychiatric) and is abbreviated as PULHES. Each factor has a numerical designation: 1 indicates a high level of fitness, 2 indicates some activity limitations are warranted, 3 reflects significant limitations, and 4 reflects one or more medical conditions of such a severity that performance of military duties must be drastically limited. Physical profile ratings can be either permanent or temporary.

7. The applicant's available Regular Army service records do not contain a DA Form 3349 (Physical Profile), nor do they show:

- he was issued a permanent physical profile rating
- he suffered from a medical condition, physical or mental, that affected his ability to perform the duties required by his Military Occupational Specialty (MOS) and/or grade or rendered him unfit for military service
- he was diagnosed with a medical condition that warranted his entry into the Army Physical Disability Evaluation System (PDES)

- he was diagnosed with a condition that failed retention standards and/or was unfitting
8. The applicant's DD Form 214 shows he was honorably released from active duty on 30 September 1987, due to ETS, and transferred to a Troop Program Unit (TPU) in the USAR. He was credited with 4 years, 1 month, and 12 days of net active service.
 9. A DA Form 3540 (Certificate and Acknowledgement of Service Requirements for Individuals Enlisting, Reenlisting, or Transferring into TPUs of the USAR) shows the applicant signed the form on 28 September 1987, indicating his transfer or reassignment to a TPU of the USAR for the remaining period of service on his current statutory obligation.
 10. The applicant's DA Form 5016 (Chronological Statement of Retirement Points) reflects his USAR TPU transfer was effective 1 October 1987. A DD Form 4 (Enlistment/Reenlistment Document) shows he reenlisted in the USAR in a TPU status on 4 February 1989 for a period of 6 years.
 11. Headquarters, 108th Division (Training) Orders 7-11, dated 20 January 1993, reassigned the applicant from his USAR TPU to the USAR Control Group (Reinforcement), due to voluntary reassignment, effective 20 January 1993.
 12. A DA Form 4836 (Oath of Extension of Enlistment or Reenlistment) shows the applicant extended his USAR Control Group (Reinforcement) service by 1 year on 3 August 1995 rendering his new ETS as 3 August 1996.
 13. The applicant's records contain a partially legible Standard Form 88 (Report of Medical Examination), showing he underwent medical examination on 1 August 1996, and was found qualified for enlistment. The medical provider's comments on the form are not legible.
 14. A DD Form 4 (Enlistment/Reenlistment Document) shows the applicant reenlisted in the USAR on 17 September 1996.
 15. A DA Form 4187 (Personnel Action) shows on 9 December 1996, the applicant requested transfer to any Selected Reserve TPU for which he was qualified.
 16. U.S. Army Reserve Personnel Center Orders C-12-659906, dated 23 December 1996, voluntarily released the applicant from the USAR Control Group (Reinforcement) and reassigned him to a USAR TPU, effective 9 December 1996.
 17. Headquarters, 108th Division (Institutional Training) Orders A-172-6, dated 21 June 1997, voluntarily reassigned the applicant from his USAR TPU to the USAR Control

Group (Reinforcement) effective 17 March 1997. Records indicate the applicant remained in the USAR Control Group (Reinforcement) from this point in March 1997 forward, ultimately extending his USAR Individual Ready Reserve service for a final ETS of 3 April 2003.

18. The applicant underwent a periodic physical examination in April 2003. A Standard Form 507 (Clinical Record), dated 2 April 2003, provides a report on the applicant's functional capacity. It shows the applicant was limited in how far he could walk in combat boots and with field gear, lift and carry 100 feet, run or jog, remain on his feet, and perform physical training. It shows he was prescribed Vioxx and Accutane and was diagnosed with cervical radiculopathy and fibromyalgia, which limited his duty.

19. A DD Form 2807-1 (Report of Medical History), dated 2 April 2003, shows the applicant provided his relevant medical history on the date of the form in conjunction with a medical examination for the purpose of USAR retention. He indicated numerous conditions on the form, including bronchitis, keratoconus in both eyes, hearing loss and tinnitus, herniated discs in C4, C5, C6, loss of strength in arm shoulder and hand, back injury, fibromyalgia, broken ankle, knee, feet, and ankle injuries. He indicated he was receiving VA compensation for multiple service-connected injuries.

20. A DD Form 2808 (Report of Medical Examination), dated 2 April 2003, shows

a. The applicant underwent medical examination on 9 May 2003, for the purpose of USAR retention. He was found qualified for service with a PULHES of 214421.

b. His significant or disqualifying defects are listed as herniated discs C4, C5, C6, fibromyalgia, status post stress fracture in feet, bilateral, vision loss, and hearing loss.

c. His summary of defects and diagnoses shows he has cervical radiculopathy causing pain with range of motion and decreased strength; unable to perform functional capacity test due to this limitation; fibromyalgia.

21. A memorandum to the applicant's unit commander, dated 9 May 2003, shows the applicant is physically fit for retention, but also shows he has one or more abnormal findings as indicated on his DD Form 2808 requiring his commander to review and/or take appropriate action.

22. U.S. Army Reserve Personnel Command Orders D-08-328983, dated 7 August 2003, honorably discharged the applicant under the provisions of Army Regulation 135-178 (Army National Guard and Reserve Enlisted Administrative Separations), with the applicable paragraph not listed.

23. A review of the U.S. Army Human Resources Command (AHRC) Soldier Management System (SMS) shows a transaction was completed on 7 August 2003 to involuntarily discharge the applicant from the USAR Control Group (Reinforcement) due to ETS and archive his record.

24. The applicant's DA Form 5016 shows he was credited with 8 years, 11 months, and 29 days of qualifying service for retirement effective 7 August 2003.

25. A Standard form 507 (Medical Record), shows on 27 August 2003, the Command Surgeon signed the form indicating a Physical Review board determined the applicant was medically disqualified for retention with a PULHES of 214421.

a. The applicant's limitations in his records are significant and render him unfit for continued service. His diagnoses include hearing loss, radiculopathy C4,5,6, fibromyalgia, right ankle degenerative joint disease (DJD), bilateral knee pain (DJD), depression and post-traumatic stress disorder (PTSD), status unknown.

b. An additional note on the form, dated 4 September 2003, shows the applicant had an ETS of 3 April 2003. Case closed. The applicant was spoken with, and he stated that his injuries were incurred while on active duty and in the USAR TPU. The applicant was offered a non-duty related Physical Evaluation Board (PEB), but he opted to contact his Congressman. He refused to do anything until advised to do so by his Congressman. He was also offered the ABCMR's information.

26. A DA Form 3349 shows on 28 August 2003, the applicant was given a permanent physical profile rating PULHES of 214421 for the conditions of arthritis of the knees, right ankle, herniated discs L4, L5, L6, severe hearing loss, which limited multiple functional activities and assignments.

27. A VA letter, dated 2 October 2023, shows the applicant has one or more permanent and total service-connected disabilities rated at a combined 100 percent effective 1 December 2022.

28. A VA Rated Disabilities printout, presumably pertaining to the applicant although his name is not listed, shows numerous service-connected disabilities, their ratings, and their effective dates. This evidence is provided for the Board to review in full.

29. 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.

30. 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) and a subsequent permanent retirement for physical disability. He states he was injured in the Army and now that he is receiving disability compensation from the VA he should have been determined unfit for service prior to his discharge and medically retired.

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. A DD 214 show the applicant entered the regular Army on 19 August 1983 and was honorably discharged on 30 September 1987 after completing his required active service under chapter 4 of AR 635-200, Personnel Separations – Enlisted Personnel (1 November 2000),

d. Discharge orders published by the U.S. Army Reserve Personnel Command on 3 August 2003 show the former drilling USAR Soldier was honorably discharged from the USAR effective 7 August 2003 under provisions provided in AR 135-178, Separation of Enlisted Personnel. The orders do not cite a chapter or paragraph. His points statement shows 8 years, 11 months, and 29 days of qualifying time for retirement.

e. A Statement of Medical Examination and Duty Status show the applicant fractured his ankle on a bad parachute land fall (PLF) on 19 January 1985 while participating in REFORGER (Return of Forces to Germany). No further documents addressing this injury were identified.

f. When the applicant underwent his retention physical examination in April 2003, the provider noted he had non-duty limiting fibromyalgia and vision loss, and duty limiting cervical radiculopathy, s/p stress fractures in both feet, and hearing loss. Interestingly, he found the applicant qualified for service.

g. When the case was reviewed by his command surgeon, he was determined to have two medically disqualifying conditions: Post traumatic right ankle arthritis and symptomatic herniated lumbar discs. While noting the conditions were duty related, the physician wrote that he offered the applicant a Non-duty related physical evaluation

board (NDR PEB). The applicant wanted to first discuss his case with his congressman.

h. He was placed on a duty limiting permanent physical profile for “Arthritis of Knees, Right Ankle, Herniated Discs L4, L5, L6, Severe Hearing Loss” effective 27 August 2003.

i. The applicant injured his right ankle while in the Regular Army. Thus, it was incurred in the line of duty and the applicant was eligible for and should have been referred to the DES. Paragraph 4-8f(3) of AR 600-8-4, Line of Duty Policy, Procedures, and Investigations (15 April 2004) states:

“Any physical condition having its inception in line of duty during one period of Service or authorized training in any of the Armed Forces that recurs or is aggravated during later Service or authorized training, regardless of the time between, should be in line of duty. The aggravated condition must not be caused by misconduct or willful negligence.”

j. Paragraph 7-1 of AR 40-400, Patient Administration (8 July 2014), states in part: “If the Soldier does not meet retention standards, an MEB is mandatory and will be initiated by the physical evaluation board liaison officer (PEBLO).” Note there is no mention of component or duty status. Paragraph 7-5b(5) is more direct for this case, stating that one of the situations which requires MEB consideration is “an RC member not on AD who requires evaluation because of a condition that may render him or her unfit for further duty.”

k. Paragraph 2-9c of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (1 September 1990), identifies the errors made by his command:

“The unit commander will –

c. Refer a soldier to the servicing MTF for medical evaluation when the soldier is believed to be unable to perform the duties of his or her office, grade, rank, or rating.”

l. The applicant had at least one duty related injury (right ankle fracture) which led to his involuntary discharge from the Army.

m. Paragraph E3.P3.5.1 of Department of Defense Instruction 1332.38 Subject: Physical Disability Evaluation (14 November 1996) states: “The DES compensates disabilities when they cause or contribute to career termination.”

n. It is the opinion of the Agency Medical Advisor that a referral of his case to the Disability Evaluation System for the applicant’s career ending ankle fracture and potential other duty incurred issues clearly is warranted.

BOARD DISCUSSION:

The Board carefully considered the applicant's request, supporting documents, evidence in the records, a medical review, and published Department of Defense guidance for liberal consideration of requests for changes to discharges. The Board did not concur with the conclusion of the ARBA Medical Advisor. While the record clearly shows the applicant has several service-connected conditions rated by the VA, the Board did not find evidence that those conditions were aggravated by military service to a degree that warranted his referral to the Disability Evaluation System. Specifically, the Board noted the applicant's DA Form 5016 documents a nearly 10-year period prior to his final discharge during which he did not attend unit assemblies or perform any other active military service. The Board concluded that any worsening of his service-connected conditions during this nearly 10-year period cannot be attributed to military service and therefore such worsening does not form a basis for referral to the Disability Evaluation System. Based on a preponderance of the evidence, the Board determined the applicant's discharge based on completion of his USAR contract in 2003 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.

6/4/2024


 X
 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. 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. 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 (Discharge Review Board (DRB) Procedures and Standards) 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, 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 Military Occupational Specialty (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 Physical Evaluation Board (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 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. 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. U.S. Army Reserve (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 in accordance with chapter 9 and chapter 10 of this regulation.

b. Reserve Component Soldiers pending separation for In the Line of Duty injuries or illnesses will be processed in accordance with Army Regulation 40-400 (Patient Administration) and Army Regulation 635-40.

c. Normally, Reserve Component Soldiers who do not meet the fitness standards set by chapter 3 will be transferred to the Retired Reserve per Army Regulation 140–10 (USAR Assignments, Attachments, Details, and Transfers) or discharged from the Reserve Component per Army Regulation 135–175 (Separation of Officers), Army Regulation 135–178 (ARNG and Reserve Enlisted Administrative Separations), or other applicable Reserve Component regulation. They will be transferred to the Retired Reserve only if eligible and if they apply for it.

d. Reserve Component Soldiers 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. Reserve Component Soldiers 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 in accordance with paragraph 9–12.

5. Title 10, U.S. Code, section 1201, provides for the physical disability retirement of a member who has at least 20 years of service or a disability rating of at least 30 percent. Title 10, U.S. Code, section 1203, provides for the physical disability separation of a member who has less than 20 years of service and a disability rating of less than 30 percent.

6. Title 38, U.S. Code, 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.

7. Title 38, U.S. Code, 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.

8. Title 10, U.S. Code, section 1556 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.

9. Army Regulation 15-185 (Army Board for Correction of Military Records (ABCMR)) prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR. Paragraph 2-11 states applicants do not have a right to a formal hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

//NOTHING FOLLOWS//