

IN THE CASE OF: [REDACTED]

BOARD DATE: 12 December 2024

DOCKET NUMBER: AR20230007908

APPLICANT REQUESTS:

- Referral to a Medical Evaluation Board (MEB)
- Personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Orders 006-306 Order to Active Duty
- DD Form 220 (Active Duty Report)
- Medical Records
- NGB Form 22 (National Guard Report of Separation and Record of Service)
- Orders 309-013 Army National Guard (ARNG) Discharge

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 was medically unfit and discharged on 5 October 2005 from [REDACTED] ARNG after release from Title 10 U.S. Code Section 12302(a) orders. He was assigned a P3 profile by the State Surgeon on 5 February 2005.

b. He was not assigned a Physical Evaluation Board (PEB) Liaison Officer (PEBLO) and did not go through the MEB process because he was homeless and unable to be contacted. Therefore, he did not get Department of Veterans Affairs (VA) compensation, during the time and he did not accept a severance package, but he was separated. How could a severance package be recommended to him without his consent? He did agree to a severance package. He is currently applying for VA disability compensation for his discharge injury.

c. He was not assigned a PEBLO and did not go through the MEB or Physical Evaluation Board (PEB) process to have an option on his separation in 2005. There was not an MEB packet submitted for him so how was he medically unfit for retention per his NGB Form 22?

d. After doing research and talking to veterans regarding the VA disability compensation process is when he discovered he should have been assigned a PEBLO to assist with the MEB process.

3. The applicant provides the following documents:

a. Orders 006-306, published by [REDACTED] Department of Defense, Military Division, 6 January 2005 ordered him to active duty not to exceed 545 days in support of Operation Iraqi Freedom with a report date of 3 January 2005.

b. Medical documentation.

c. Orders 309-013, published by the Adjutant General [REDACTED], 5 November 2005, honorably discharged him from the ARNG effective 5 October 2005. He was discharge in accordance with National Guard Regulation 600-200 (Enlisted Personnel Management), paragraph 8--26j1(a) (Medically unfit for Retention).

4. The applicant's service record contains the following documents:

a. DD Form 4 (Enlistment/Reenlistment Document Armed Forces of the United States) shows he enlisted in the ARNG on 20 April 2002.

b. DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was ordered to active duty, as a member of the ARNG, on 13 January 2003 and was honorably released on 18 July 2003. He completed 6 months and 6 days of active-duty service.

c. DD Form 220 (Active Duty Report), 24 January 2005, shows he entered active duty on 3 January 2005 and departed from his duty station to his home station on 26 January 2005. His tour length was 24 days. He was deemed nondeployable by his care provider.

d. NGB Form 22 (Report of Separation and Record of Service) shows he was honorably discharged from the ARNG on 5 October 2005. He had completed 3 years, 5 months, and 16 days of net service. He had 3 years, 5 months, and 16 days of service for pay and 3 years of service for retired pay. The authority and reason for discharge was medically unfit for retention standards.

e. His records were void of medical documentation and information showing why he was found medically unfit for retention standards.

5. On 5 February 2024, the Chief, Special Actions Branch, National Guard Bureau (NGB), provided an advisory opinion, which states:

a. The applicant requests that he be allowed to be examined by the MEB and PEB due to his medical discharge from [REDACTED] ARNG. NGB recommended disapproval of his request.

b. He states he was medically discharged from the ARNG without being allowed to be seen by the MEB and the PEB. He was discharged from the ARNG under the authority of National Guard Regulation 600-200 paragraph 8-26j which states if "Commanders suspect that a Soldier may not be medically qualified for retention, they will direct the Soldier to report for a complete medical examination per Army Regulation 40-501 (Standards of Medical Fitness). Commanders who do not recommend retention will request the Soldier's discharge. When the medical condition was in the line of duty, the procedures of Army Regulation 600-8-4 (Line of Duty Policy, Procedures, and Investigations) will apply."

c. A review of his claim by [REDACTED] ARNG concluded he had never been medically boarded or that he had never been issued a permanent profile (P3). He was released from active duty from the mobilization station at Fort Stewart for having shoulder pain in January 2005.

d. Medical records provided by [REDACTED] ARNG show he was experiencing pain to his left shoulder and therefore was issued a P2 profile on 13 January 2005. A follow-up appointment occurred on 18 January 2005, which identified the pain as ongoing for several months which was aggravated by walking, extension of arm, and lifting. Another follow-up appointment occurred on 21 January 2005 for reevaluation of his profile, which showed no change from the previous appointment, and recommendation for relief from active duty was provided, for further evaluation at home station.

e. A review of his Medical Electronic Data Care History and Readiness Tracking shows no line of duty history, which would indicate he had a possible service-connected injury that would need to be examined by an MEB or PEB.

f. It is the recommendation of NGB that his request to have his records examined by the MEB and PEB be disapproved. He did not provide any evidence that a P3 profile was issued, nor could a P3 profile be found by [REDACTED] ARNG medical staff. Additionally, there was no record of a line of duty incident that would indicate that his shoulder injury was service-connected, and therefore needed to be reviewed by the MEB and possibly the PEB.

g. The opinion was coordinated with the assistance of [REDACTED] ARNG.

6. The advisory opinion was provided to the applicant to allow him the opportunity to respond. On 16 February 2024, the applicant responded stating he was providing documentation of his permanent profile that was issued to him on 9 July 2005. His injury happened while he was on active duty and complaints of the injury were made while he was on active duty. A line of duty was not required during this time. [REDACTED] ARNG does not have any records except for the documents he provided. He was on Title 10 orders when he was seen by medical doctors at [REDACTED] in January 2005. He has several more documents that support his case if needed. With the response he provided the following documents:

a. DA Form 3349 (Physical Profile), 13 January 2005, which shows he received a permanent P2 profile for left shoulder disability. The profile was signed by his provider.

b. Medical documents which are available for the Board's review and will be reviewed by the ARBA medical section who will provide an advisory.

c. DA Form 3349 (Physical Profile), 5 February 2005, which shows he received a temporary P3 profile for torn left rotator cuff. The expiration date of the profile was 5 May 2005. The profile was signed by his provider.

d. DA Form 3349 (Physical Profile), 9 July 2005, which shows he received a permanent P3 profile for left rotator cuff. The profile indicates he needs an MEB/PEB and he was unfit for duty. The profile was signed by his provider.

e. There is no indication on the physical profiles regarding how he injured his shoulder.

7. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

8. 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 (EMR – AHLTA and/or MHS Genesis), 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. He states:

“I was medically unfit and discharged on 10/5/2005 from the [REDACTED] Army National Guard after a release from 10 USC 12302(a) orders. I was assigned a P3 profile by the State Surgeon on 2/05/2005. I was never assigned a PEBLO [Physical Evaluation Board Liaison Officer] and did not do the MEB [Medical Evaluation Board] process because I was homeless and unable to contact.

Therefore, I did not get VA compensation during that time and I did not accept a severance package either but I was separated. How could a severance package be recommended to me without my consent? I did agree to a severance package. Currently applying for VA disability compensation for my discharge injury.”

c. The Record of Proceedings details the applicant’s military service and the circumstances of the case. His Report of Separation and Record of Service (NGB Form 22) shows he entered the Army National Guard on 20 April 2002 and received an honorable discharge form [REDACTED] Army National Guard ([REDACTED] ARNG) 16 May 2005 under authority provided in paragraph 8-26j (1) of NGR 600-200, Enlisted Personnel Management (1 March 1997): Medically unfit for retention per AR 40-501 (Standards of Medical Fitness).

d. Orders published by the [REDACTED] ARNG show the applicant was mobilized in support of Operation Iraqi Freedom and was to report to his mobilization center on 6 January 2005.

e. On 13 January, the applicant was evaluated by orthopedics for left shoulder pain and instability. The applicant stated he had fractured his left clavicle 2-3 years earlier and was having pain with overhead activity. Conservative care including physical therapy was initiated along with a trial of duty, and he was cleared to mobilize.

f. Unfortunately, he remained significantly symptomatic and was unable to perform all required Soldier tasks. On 21 January 2005, a medical screening evaluation determined the applicant had a pre-existing medical condition which precluded deployment and it was recommended he be released from active duty (REFRAD) and returned to the [REDACTED] ARNG. From the accompanying AHLTA encounter:

“Chronic [left shoulder] pain >1yr. Complain of "loose" and fatigues easily when carrying/holding objects. Patient denies history of dislocation. Patient reports no specific mechanism of injury or trauma. Pending deployment in March.

Aggravating factors: reach overhead, holding/carrying weight, parade rest. Per previous exam, I subluxed (akin to a partial dislocation) patient's shoulder while examining him, the shoulder is unstable. The discussion was to give a trial of military training activity. Patient states he cannot carry his weapon or perform activities straining shoulder.

Assessment/Plan

1. Joint instability shoulder region

Comments: Recommend REFRAD with this new information and patient seek orthopedic consultation at home station. If patient denies surgical consultation, recommend military compatibility evaluation.”

g. Soldiers activated for deployment who are identified in the first 25-days as having a pre-existing medical condition, one not caused by or permanently aggravated by this period of service and that renders the individual non-deployable, may be released from active duty (REFRAD) immediately. Pre-existing conditions include temporary and permanent conditions that do not meet medical retention standards (Reference AR 40-501, Chapter 3) and/or the medical standards of the planned deployment theater. These medical conditions can be identified by authorized medical personnel at their home station or at the mobilization site. REFRAD'd Soldiers will complete out-processing and the return to their home of record no later than 30 days from Soldier's mobilization date.

h. Orders published by Headquarters, Fort Stewart and Hunter Army Airfield show the applicant was to be REFRAD effective 26 January 2005.

i. In a subsequent undated clinical encounter, the [REDACTED] ARNG state surgeon determined the applicant was medical unfit for continued service stating: “Chronic left shoulder problem precluding full performance of duty. Unfit IAW 40-501 [Standards of Medical Fitness] 3-12b (1). This paragraph from AR 40-501 (29 August 2003) states shoulder forward flexion or abduction of less than 90 degrees fails medical retention standards. The applicant was placed on a permanent duty limiting physical profile for this condition on 9 July 2005.

j. Additional documentation addressing the medical disqualifying condition was neither in the supporting documentation nor uploaded into iPERMS.

k. There is no probative evidence the applicant's clavicle fracture and/or left shoulder condition was incurred during or permanently aggravated by his military Service. Thus, there is no cause for a referral to the DES.

l. JLV shows the applicant is not registered with the VA.

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:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted.

2. The Board carefully considered the applicant's contentions, his record of service, and the reason for his separation. The Board considered his statement regarding his injury, the available medical records showing physical profiles, the NGB advisory opinion and his response, the statement regarding evidence of a pre-existing condition, and the review and conclusions of the Agency medical advising official. The Board found that the applicant is not service connected by the VA and found no line of duty investigation documenting an injury and no additional documentation addressing the medical disqualifying condition that resulted in his separation. Based on a preponderance of evidence, the Board found insufficient evidence of a condition that warranted referral to the Disability Evaluation System for further review. The Board determined there was no error or injustice that would warrant a correction to his records.

3. The applicant's request for a personal appearance hearing was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

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.

X [REDACTED]

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. Army Regulation 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

3. 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 Department of Defense Directive 1332.18 and Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation).

4. Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation) 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. Soldiers are referred to the disability system when they no longer meet medical retention standards in accordance with AR 40-501, chapter 3, as evidenced in a medical evaluation board (MEB); when they receive a permanent physical profile rating of "3" or "4" in any functional capacity factor and are referred by a Military Occupational Specialty 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 or 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

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 are either 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 onetime 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 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 medical impairment prevents reasonable performance of the duties required of the Soldier's office, grade, rank, or rating.

5. Title 10, USC, 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, USC, 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. Army Regulation 40-501 (Standards of Medical Fitness), provides policies and procedures on medical fitness standards for induction, enlistment, appointment, and retention. Paragraph 3-33 (anxiety, somatoform, or dissociative disorders) states the causes for referral to an MEB are as follows:

- persistence or recurrence of symptoms sufficient to require extended or recurrent hospitalization; or
- persistence or recurrence of symptoms necessitating limitations of duty or duty in protected environment; or
- persistence or recurrence of symptoms resulting in interference with effective military performance

7. Title 38, USC, sections 1110 and 1131, permits the VA to award compensation for disabilities that were incurred in or aggravated by active military service. However, an award of a higher VA rating does not establish error or injustice on the part of the Army. The Army rates only conditions determined to be physically unfitting at the time of discharge which disqualify the Soldier from further military service. The VA does not have the authority or responsibility for determining physical fitness for military service. The VA awards disability ratings to veterans for service-connected conditions, including

those conditions detected after discharge, to compensate the individual for loss of civilian employability. These two government agencies operate under different policies. 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. 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.

//NOTHING FOLLOWS//