

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 2 February 2024

DOCKET NUMBER: AR20230008056

APPLICANT REQUESTS: in effect, to be advanced from staff sergeant (SSG)/E-6 to sergeant first class (SFC)/E-7 on the Permanent Disability Retired List (PDRL).

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

- DD Form 149 (Application for Correction of Military Record)
- Enlisted Record Brief (ERB)
- Department of the Army (DA) Official Photograph
- DA Form 2166-8 (Noncommissioned Officer (NCO) Evaluation Report), for the period 1 December 2013 to 30 November 2014
- DA Form 705 (Army Physical Fitness Test Scorecard)
- Army Promotion Eligibility Roster E-7
- Military Personnel (MILPER) Message 13-106 (Enlisted Promotion Clarification for Soldiers in the Disability Evaluation System (DES))
- Orders 203-603, dated 21 July 2016 (Retired Reserve)
- National Guard Bureau (NGB) Form 23B (Army National Guard (ARNG) Retirement Points History Statement)
- NGB Form 22 (National Guard Report of Separation and Record of Service), for the period ending 21 July 2016

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 became eligible for SFC/E-7 promotion and was asked by his commanding officer to withdrawal from the promotion board due to his pending physical evaluation board (PEB). He would like to be reconsidered for SFC/E-7 promotion.
3. Having prior service in the U.S. Marine Corps, he enlisted in the ARNG on 3 December 1994.

4. He was promoted to SSG/E-6 on 15 August 2010.
5. His Army Physical Fitness Test Scorecard shows:
 - 3 August 2010, sergeant (SGT), scoring 293 points – PASS
 - 15 October 2011, SSG, scoring 289 points – RECORD GO
6. His DA Official Photograph, dated 17 April 2012, shows him in a service uniform with SSG rank and indicates his military occupational specialty (MOS) as 12H (Construction Engineer).
7. The applicant provides, MILPER Message Number 13-106, dated 18 April 2013, which states Soldiers in the DES who are pending a medical fitness determination referral to a medical evaluation board (MEB) under Army Regulation (AR) 40-400 (Patient Administration) or PEB under AR 635-40 (Physical Evaluation for Retention, Retirement, or Separation) remain otherwise eligible for promotion consideration, selection, and pin-on.
8. A NCO Evaluation Report, for the period 1 December 2013 through 30 November 2014 shows his rank as SSG and that he was serving as an engineer supervisor. The senior rater bullet comments reflect the applicant as being, “fully capable NCO, promote with peers,” and “SLC [Senior Leader Course] complete.”
9. A Promotion Eligibility Roster E-7, which shows:
 - Date of Board: 3 April 2015
 - Packet/PERMS Suspense: 28 February 2015
 - Criteria Eligibility: Time in Grade = 24 Months/Time in Service = 9 Years/Cumulative Enlisted Service = 6 Years/BNCOC Complete
 - Soldier’s Name: [Applicant]
 - Grade: SSG
 - PMOS: 12H30
 - SMOS: 92Y30
 - NCO Ed: 3
10. On 17 May 2016, a PEB convened, and the board found the applicant physically unfit and recommended a rating of 90% and that the applicant’s disposition be permanent disability retirement. On 1 June 2016, the applicant concurred with the findings and recommendations and waived a formal hearing of his case. Additionally, he did not request reconsideration of his Department of Veteran’s Affairs (VA) ratings. He authenticated the DA Form 199 (Informal PEB Proceedings) with his signature.

11. Order D 168-02 dated 16 June 2016, from the U.S. Army Physical Disability Agency released the applicant from assignment and duty because of physical disability incurred while entitled to basic pay and under conditions that permit his retirement for permanent physical disability. The order reflects his retired grade of rank as E-6.

12. Orders 203-603 dated 21 July 2016 discharged the applicant from the ARNG and assigned him to the Retired Reserve in the grade of SSG for placement on the permanent disability retired list (PDRL).

13. NGB Form 22, for the period ending 21 July 2016, shows he completed 7 years, 10 months, and 15 days of service this period with 13 years, 9 months, and 2 days of prior active service, and 20 years, 9 months, and 4 days of total service for retired pay. It also shows his rank as SSG/E-6, with a date of rank of 15 August 2010.

14. His ARNG Retirement Points History Statement, dated 14 May 2018 shows the applicant had 20 years, 9 months, and 4 days of creditable service for retired pay.

15. On 12 December 2023, an advisory opinion was received from the NGB in the processing of this case. The advisory recommended approval of the applicant's request to be medically retired at the rank of SFC/E-7.

a. AR 600-8-19 (Enlisted Promotions and Reductions), paragraph 1-20(a) states the Soldiers in the DES process who are pending a medical fitness determination (referral to a MEB or PEB) remain otherwise eligible for promotion consideration, selection, and pin-on. No Reserve Component Soldier will lose his or her promotable status.

b. AR 635-40 (Physical Evaluation for Retention, Retirement, or Separation), paragraph 4-8(g) states the from the time a Soldier receives a P3/P4 profile referring them to a MEB until the time the DES process is completed, or the Soldier is returned to duty, the Soldier is eligible for awards and for promotion consideration, promotion selection, and promotion.

c. AR 635-40, paragraph 4-3(c) defines the rank and individual Soldier would have been promoted had it not been for the physical disability for which the Soldier was determined unfit. Active Army and RC enlisted Soldiers on a promotion list, will list the highest grade on their medical retirement orders.

d. The NVARNG did a review of the applicant's claim and did not find any evidence of the applicant's commander requesting he withdraw his promotion packet due to his ongoing PEB process at the time. However, the NVARNG did provide a personnel action form signed by someone else other than the applicant requesting to be self-declined from consideration of the FY15 enlisted promotion board.

e. Based on the evidence presented, and a thorough review of the documents presented by the NVARNG, they concluded that the applicant's request to medically retire at the rank of SFC be approved.

16. On 8 January 2024, the applicant had an opportunity to respond to the NGB advisory opinion. He provided an e-mail correspondence to the Army Review Boards Agency representative thanking them for their research on his case and providing the advisory opinion.

17. On 21 December 2023, an advisory opinion was received from the USAPDA in the processing of this case. The USAPDA determined the request was legally sufficient.

a. Although the current version of AR 635-40 authorizes promotion for Soldiers on a promotion list notwithstanding an unfit determination by the PEB, the applicant has not demonstrated error on the part of the PEB or U.S. Army.

b. In his own words, the applicant acknowledges that he was not on the promotion list to E-7 at the time of his discharge albeit purportedly due to the request of his command. Thus, the only information available to the USAPDA at the time of his discharge was that, as a matter of law, he did not qualify for retirement at a higher grade. Whether he should have been on the promotion list to E-7 is unfortunately a matter outside the jurisdiction of the USAPDA but is potentially a matter that could be corrected by ARBA if the applicant were able to demonstrate just cause for any such correction.

18. The applicant was given an opportunity to respond to the advisory opinion from USAPDA, but to date, has not provided a response.

19. By regulation (AR 600-8-19), Soldiers who are on a promotion list at the time of separation for disability with entitlement to disability severance pay will be paid such compensation at the time promotion list grade. The Soldier will be promoted effective on the Soldier's separation date.

BOARD DISCUSSION:

1. The Board carefully considered the applicant's request, supporting documents, evidence in the records, the advisory opinions.

2. The Board concurs with the advisory opinion from the NGB and recommends correcting his record to show he was advanced to the rank/grade of SFC/E-7 effective the date he was placed on the PDRL.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

█	█	█	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board determined the evidence presented is sufficient to warrant amendment of the ABCMR's decision in Docket Number AR20210007599, dated 8 July 2021. As a result, the Board recommends that all Department of the Army and Army National Guard records of the individual concerned be corrected by:

a. correcting the following blocks of his NGB Form 22 to show:

- block 5a (Rank) - SFC
- block 5b (Pay Grade) - E07
- block 6 (Date of Rank) - 21 July 2016

b. correcting Orders D 168-02, published by United States Army Physical Disability Agency, dated 16 June 2016 to show his Retired grade of rank as E-7.



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 (AR) 635-40 (Disability Evaluation for Retention, Retirement, or Separation) prescribes Army policy and responsibilities for the disability evaluation and disposition of Soldiers who may be unfit to perform their military duties due to physical disability. Paragraph 4-30 pertains to the grade on retirement or separation for physical disability. It states the grade at which a Soldier is retired or receives disability severance pay will be the highest of the options listed below in accordance with the provisions of Title 10, U.S. Code, section 1212 and section 1372 respectively:

a. Current grade. No time-in-grade is required.

b. Highest grade satisfactorily held. In accordance with Army Regulation 15-80 (Army Grade Determination Review Board and Grade Determinations) Soldiers determined unfit who are not currently serving in the highest grade served will be referred by the U.S. Army Physical Disability Agency to the Army Grade Determination Review Board, unless the Soldier is entitled to a higher or equal grade by operation of law or the Soldier, upon being advised of his entitlement to a review fails to submit matters.

c. Grade to which the Soldier would have been promoted had it not been for the physical disability for which the Soldier was determined unfit. In general, this provision pertains to Soldiers on a promotion list. For Active Army and Reserve Component enlisted disability cases, this option is implemented under the provisions of Army Regulation 600-8-19 (Enlisted Promotions and Reductions).

3. AR 600-8-19 (Enlisted Promotion and Reductions) prescribes policies and procedures governing promotions and reduction of Army enlisted personnel. Paragraph 1-21 pertains to promotion of Soldiers in the disability evaluation system. It states Soldiers who are on a promotion list at the time of separation for disability with entitlement to disability severance pay will be paid such compensation at the promotion list grade. Further, the Soldier will be promoted effective on the Soldier's separation date. The Noncommissioned Officer Professional Development System (NCOPDS) requirements in paragraph 1-29 are waived.

//NOTHING FOLLOWS//