

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 6 February 2024

DOCKET NUMBER: AR20230008217

APPLICANT REQUESTS: in effect, correction of his Army National Guard records to show he was permanently medically retired and should be receiving medical retired pay instead of being labeled as a Retired Reservist which would allow him to start receiving retirement pay at the age of 60.

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)
- Physical Profile, 6 February 2003, and 8 February 2005
- Non-Duty Related (NDR) Physical Evaluation Board, 13 September 2005
- PEB Recommendation for NDR, 16 September 2005
- Non-concurrence with NDR PEB and appeal, 14 October 2005
- State Army National Guard Finding – Failed Medical Retention Standards, 27 October 2005
- NGB Form 22 (Report of Separation and Record of Service), 26 November 2005
- NGB Form 22A (Correction to NGB Form 22)
- Florida Army National Guard (FLARNG), The Adjutant General, Response to applicant's Member of Congress
- FLARNG State Surgeon Response to applicant's chain of command
- ARNG Retirement Points History Statement, 1 December 2005

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 believes he was medically retired on 26 November 2005. But, somehow, he is labelled as Retired Reserve in both DEERS and for TRICARE purposes, as if he had a regular retirement. This is preventing him from getting retired pay and [illegible word]. The correction should be made so that he can get his benefits for being medically retired.

3. Review of the applicant's service records shows:

a. The applicant was born in M___ 1971 and will turn 60 in M___ 2031. He had prior ARNG service from November 1988 to July 1989.

b. He enlisted in the ALARNG on 30 March 1990. He initially held military occupational specialty (MOS) 39E, Special Electronic Device Repairer.

c. He served through several extensions in the ARNG, attaining the rank of sergeant (SGT)/E-5. He also transferred to the FLARNG.

d. He entered active duty on 10 February 2003 in support of Operation Noble Eagle. He held MOS 63J, Quartermaster and Chemical Equipment Repairer. He was honorably released from active duty on 24 July 2004.

e. On 16 February 2005, by memorandum, Subject: Medical Standards, the FLARNG Deputy Chief of Staff for Personnel (DCSPER) informed the applicant's chain of command that:

(1) The State Surgeons Medical Review (SSMR) has determined that the applicant does not meet medical retention standards in accordance with Chapter 3, paragraphs 3-27a(2)(c), AR 40-501, Standards of Medical Fitness. The individual does have the right to appeal to the Physical Evaluation Board (PEB). Soldier must reply by memorandum, so as to arrive at DCSPER no later than five (5) days prior to the effective date of discharge. Accordingly, the soldier will be retired from the Florida Army National Guard effective 17 April 2005.

(2) The soldier should be notified in writing of this action and will be afforded the opportunity to request a waiver for retention in accordance with paragraph 17-4e, National Guard Regulation (NGR) 40-501, or to provide additional information from his civilian doctor. As a part of this appeal process, the soldier can have PEB review this action. Soldier must indicate whether he wants to appeal.

f. On 13 September 2005, a Non-Duty Related Physical Evaluation Board (NDR-PEB) convened and determine the applicant was unfit. His Asthma prevented him from wearing a protective mask, running, wearing a backpack, and lifting greater than 20 pounds. The NDR PEB determined his disposition would be "Referred under Reserve Component regulations." His case was adjudicated as a nonduty related case under the provisions of DOD Directive 1332.18, para 3.5 (page 3) and DOD Instruction 1332.38, Part II, para E3.P2.3 (page 27).

g. On 16 September 2005, by memorandum to the applicant, Subject: PEB Recommendation for Non-Duty Related Case, the PEB has-completed its fitness for

duty evaluation of the applicant's case. The board's findings and recommendations are annotated on the enclosed DA Form 199, Physical Evaluation Board Proceedings. [An NDR PEB is a non-line of duty PEB that reviews the Soldier's condition solely for a determination of fitness for continued service in the RC].

(1) In accordance with Army Regulation (AR) 635-40 (Disability Evaluation for Retention, Retirement, or Separation), he had ten days from receipt to return the enclosed election form. Upon receipt of his election form by this office, or his failure to respond within the ten-day period, his case will be forwarded to the U.S. Army Physical Disability Agency (PDA) for final processing. The PDA has final approving authority and will notify him and his unit of its decision in writing.

(2) If he concurred with the PEB recommendations, he should promptly return the election form to this office for continued processing of his case. If he does not concur with an "unfit for duty" finding and recommendation, he may submit a written rebuttal or demand a formal hearing; however, if he is found "fit for duty" and does not concur, he may not demand a formal hearing, but he may submit a written rebuttal. This is to give him the opportunity to make the PEB aware of facts that he believes may change the outcome of his case.

h. On 14 October 2005, by memorandum, Subject: Nonconcurrency/Rebuttal to PEB Findings, the United States Army Physical Disability Agency (USAPDA) informed the applicant that:

(1) They have noted his disagreement with the findings of the Physical Evaluation Board (PEB) and has reviewed your entire case. The Agency's conclusion is that his case was properly adjudicated by the PEB which correctly applied the rules that govern the Physical Disability Evaluation System (PDES) in making its determination. The findings and recommendations of the PEB are supported by substantial evidence and are therefore affirmed.

(2) He may be eligible for medical care through the Department of Veterans Affairs (DVA) if they determine that his illness or injury is service connected. Furthermore, he may apply for a disability rating through the DVA for any of these service-connected illnesses or injuries. The DOD PDES however, operating under a different set of laws than the DVA, may only compensate Soldiers for any service-connected or permanently aggravated condition(s) that caused their separation and only for the degree of impairment at the time of their separation.

i. On 27 October 2005, by memorandum, Subject: Medical Standards, the FLARNG Deputy Chief of Staff for Personnel informed the applicant's chain of command that the USAPDA has reviewed the applicant's appeal of the findings of the PEB. It is their determination that the applicant does not meet medical retention standards.

Accordingly, the Soldier will be retired from the FLARNG effective 26 November 2005. The Soldier should be notified in writing of this action. The unit needs to provide him a copy of letter from the USAPDA dated 14 October 2005. This letter explains that the Soldier needs to contact the Office of Veterans Affairs for determination of eligibility for continued medical care through that agency if eligible.

j. On 4 November 2005, the FLARNG published Orders P308-801 discharging the applicant from the ARNG and transferring him to the Retired Reserve effective 26 November 2005. The authority is NGR 600-200 (Enlisted Personnel Management), paragraph 8-16(1)(a).

k. The applicant was honorably discharged from the ARNG on 26 November 2005. His NGB Form 22, as amended by an NGB Form 22A, shows he was discharged in accordance with paragraph 8-27a, NGR 600-200, discharged due to not meeting medical retention standards. Soldier retired under medical conditions. He completed 15 years, 7 months, and 27 days of ARNG service.

l. On 7 March 2023, the U.S. Army Human Resources Command issued him a Notification of Eligibility for Retired Pay at Age 60 (15-Year Letter).

4. On 20 September 2023, the National Guard Bureau (NGB) provided an advisory opinion in the processing his case. An NGB official restated the applicant's request military retired pay due to retirement under medical conditions and that the FLARNG was consulted in the recommendation of this ABCMR. The NGB recommended disapproval:

a. Soldier claims he was permanently medically retired and should be receiving medical retired pay instead of being labeled as a retired reservist which would allow him to start receiving retirement pay at the age of 60.

b. On 16 February 2005, The State Surgeons Medical Review (SSMR) determined that [Applicant] did not meet medical retention standards. The Deputy Chief of Staff for Personnel [Name] informed [Applicant] of the decision of the board and his right to appeal to the PEB. Additionally, the Soldier was also informed that he would be processed for retirement from the FLARNG effective 17 April 2005.

(1) Records provided by the Soldier show that [Applicant] did appeal the decision of the SSMR and his case was reviewed by the PEB on 13 September 2005 which also concluded that he was unfit for service due to Asthma which prevented him from wearing a protective mask, running, wearing a backpack, and lifting greater than 20 pounds.

(2) The DA form 199 (record of physical evaluation (PEB) board proceedings show that [Applicant's] medical case was processed thru as a non-duty board suggesting his Asthma was not duty related, and therefore does not qualify for the integrated disability evaluation system, which could have granted him a permanent disability retirement or separation with severance pay based on his service-connected disability ratings.

(3) Soldier was later transferred to the retired reserved after receiving a notification of Eligibility for Retired Pay for Non-Regular Service (15 Years) from the ARNG.

c. Army Regulation (AR) 40-400, Patient Administration, states that when a physician identifies a Soldier with a medical condition not meeting fitness standards for retention, it will initiate a DA form 3349 referring them to the Physical Disability Evaluation System (PDES). If Soldier does not meet retentions standards, an MEB is mandatory and will be initiated by a Physical Evaluation Board Liaison Officer (PEBLO).

d. Military records show that [Applicant] was issued a 15-year notice of eligibility for retired pay due to him being found unfit by the SSMR and the PEB. Soldier was placed in the retired reserves per state order P308-001 dated 4 November 2005, as well as an NGB Form 22.

e. It is the opinion of this office that the Soldier's request to start receiving military retired pay due to retirement under medical condition be disapproved.

f. The Soldier claims that he should be receiving permanent disability retired pay, due to the unfit for service findings of Physical Evaluation Board. While the PEB did find [Applicant] unfit for service, the review of the PEB was only considered as a nonduty, since [Applicant's] Asthma condition was not service connected, and no LOD (Line of Duty) was present in his military records. Additionally, the Soldier was issued a Notification of Eligibility for Retired Pay for Non-Regular Service (15 Years) due to his medical review.

5. The applicant was provided with a copy of this advisory opinion to give him an opportunity to submit a rebuttal. He did not respond.

6. 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: The applicant is applying to the ABCMR in essence requesting a referral to the Disability Evaluation System (DES). He states:

“I was medically retired on 26 November 2005. Somehow, I’m labeled in DEERS for Tricare as a retired reservist as if I had a regular retirement, preventing me from getting retirement pay and Tricare.”

b. The Record of Proceedings details the applicant’s military service and the circumstances of the case. The applicant’s Report of Separation and Record of Service (NGB Form 22) for the period of Service under consideration shows the former Guardsman enlisted in the Army National Guard on 30 March 1990 and was honorably discharged from the Florida Army National Guard (FLARNG) on 26 November 2005 under the provisions of paragraph 8-27a of NGR 600-200, Enlisted Personnel Management: Discharged due to not meeting medical retention standards. Soldier retired under medical conditions. It shows he had 15 years, 7 months, and 27 days of total service for retired pay. The applicant received his notification of eligibility for retired pay at on-regular retirement (15-Year Letter) on 7 March 2023.

d. The applicant was placed on a duty limiting permanent physical profile for Asthma on 8 February 2005.

e. In a 16 February 2005 memorandum to the applicant, the FLARNG notified the applicant he did not meet the medical retention standards in paragraph 3-27a(2)(c) of AR 40-501, Standards of Medical Fitness, and he was given until 17 April 2005 to respond. His elections memorandum is not available for review, but there are four standard options in this situation: Transferring to the Retired Reserve if he had 20 qualifying years of service; receiving a 15 year notice of eligibility for a non-regular retirement due to being discharged for a non-duty related medical condition yet having between 15 and 20 years of qualifying service and subsequently transferred to the Retired Reserve; honorable discharge if he had less than 15 years of qualifying service; or to request a non-duty related physical evaluation board, or NDR PEB, for a determination of medical fitness.

f. The applicant opted for an NDR PEB. A non-duty related physical evaluation board (NDR PEB) allows Reserve Component (RC) Service Members who are not currently on a call to active duty of more than 30 days and who are pending separation for non-duty related medical conditions but desire to remain in their component to enter the Disability Evaluation System (DES) for a determination of fitness. The NDR PEB affords these Soldiers the opportunity to have their fitness for duty determined under the standards that apply to Soldiers who have the statutory right to be referred to the DES for a duty related medical condition. After 2014, these boards also look to see if the

referred condition(s) were duty related, and if so, return them to the sending organization for entrance into the duty related processes of the DES.

g. On 13 September 2005, his informal PEB determined this non-duty related condition was unfitting for continued military service and recommended the Soldier's case be referred to the FLARNG for disposition under Reserve Component (RC) regulations. The applicant non-concurred with the PEB's findings and appealed the decision to the United States Army Physical Disability Agency (USAPDA). While not available for review, it appears his contention was that his unfitting asthma was duty related and therefore he should be eligible for military disability compensation or retirement as this was addressed in USAPDA's 15 October 2005 response to the applicant:

"The Agency's conclusion is that your case was properly adjudicated by the PEB which correctly applied the rules that govern the Physical Disability Evaluation System (PDES) in making its determination. The findings and recommendations of the PEB are supported by substantial evidence and are therefore affirmed.

You may be eligible for medical care through the Department of Veterans Affairs (DVA) if they determine that your illness or injury is service-connected. Furthermore, you may apply for a disability rating through the DVA for any of these service-connected illnesses or injuries. The DOD PDES however, operating under a different set of laws than the DVA, may only compensate Soldiers for any service-connected or permanently aggravated condition(s) that caused their separation and only for the degree of impairment at the time of their separation."

h. There is no probative medical evidence the applicant's unfitting asthma was incurred during or permanently aggravated by his military service, i.e., was duty related. No affirmative line of duty determinations were submitted with the application and there were none in MEDCHART. There are no military health documents in MEDCHART and there are no encounters in AHLTA. While the applicant's low back pain may have been related to his military service, he did not elect for a PEB and was transferred to the Retired Reserve with a 15-year notice of eligibility. The applicant reached 60 years of age on 6 March 2022.

i. As noted above, applicant received for a 15-year notice of eligibility under 10 U.S. Code § 12731b, Special rule for members with physical disabilities not incurred in line of duty (15-year notice of eligibility) in March 2023. Passed in 1999, this statute authorizes the Secretary concerned to treat a member of the Selected Reserve who no longer meets the qualifications for membership in the Selected Reserve solely because the member is unfit due to physical disability not incurred in the line of duty as having met the service requirements for years of service computed under 10 U.S. Code §

12732. The Secretary can then provide the member with a notification that the member has completed at least 15, and less than 20 of service. This "15-year Notice of Eligibility" authorizes a non-regular retirement.

j. JLV shows he has been awarded multiple VA service-connected disability ratings. 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.

k. 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. The applicant's contentions, the military record, and regulatory guidance were carefully considered.

a. The evidence of record shows the applicant enlisted in the ARNG on 30 March 1990 and was honorably discharged from the ARNG on 26 November 2005 under the provisions of paragraph 8-27a of NGR 600-200, Enlisted Personnel Management, due to not meeting medical retention standards. Since the applicant completed 15 years, 7 months, and 27 days of total service for retired pay (more than 15 but less than 20 years) and he was separated due to medical reasons, he was issued a notification of eligibility for retired pay at on-regular retirement (15-Year Letter).

b. The Board reviewed and agreed with the advisory officials' finding that the applicant's Asthma, which was neither incurred on active duty nor aggravated by active service, was found not meeting medical retention standards. As such, the applicant had the option to have his case considered by a non-duty related PEB (NDR PEB). An NDR PEB is a non-line of duty PEB that reviews the Soldier's condition solely for a determination of fitness for continued service in the RC. An NDR PEB did convene and found the applicant did not meet medical retention standards, and since he had completed sufficient qualifying years for reduced retirement, he was transferred to the Retired Reserve. Based on the available evidence, the Board determined the applicant's transfer to the Retired Reserve is appropriate and is neither in error nor 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.

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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, 40-400, Patient Administration, prescribes policies and mandate tasks governing the management and administration of patients. This regulation states:
 - a. When a physician identifies a Soldier with a medical condition not meeting fitness standards for retention, it will initiate a DA form 3349 referring them to the Physical

Disability Evaluation System (PDES). If Soldier does not meet retentions standards, an MEB is mandatory and will be initiated by a Physical Evaluation Board Liaison Officer (PEBLO).

b. Paragraph 7–5. Use of medical evaluation boards: Those involving a Reserve Component (RC) member not on AD who require evaluation because of a condition that may render him or her unfit for further duty. If the condition is the result of injury incurred while on authorized duty for 30 days or less, the case may be referred to a PEB as provided in paragraph 7-21. RC members with a disabling condition incurred under other circumstances will be processed under provisions of AR 40-501. RC personnel with a nonduty related condition pending separation for medical disqualification are entitled to a PEB.

c. Paragraph 7-22, Soldiers in the following categories will be referred to a PEB: Regular and RC members with Line of Duty disabilities who fail to meet retention standards as outlined in AR 40-501, chapter 3. This includes those who apply for continuance on AD under AR 635-40. AR 635-40 contains instructions for commanders on the referral of persons to the PEB. RC members who do not meet medical retention standards for a condition incurred or aggravated while performing duty of 30 days or less or those pending separation for medical disqualification for nonduty related conditions that request a fitness determination by a PEB. (Also see National Guard Regulation (NGR) 40-400 and AR 135-381.)

3. National Guard Regulation 600-200, Enlisted Personnel Management, prescribes the criteria, policies, processes, procedures, and responsibilities to classify; assign; utilize; transfer within and between states; provides Special Duty Assignment Pay; separation; extension/reenlistment, and appoint to and from Command Sergeant Major, Army National Guard (ARNG) and Army National Guard of the United States (ARNGUS) enlisted Soldiers. Chapter 8 then (now chapter 6) sets the policies, standards, and procedures to separate enlisted Soldiers from the ARNG/ARNGUS. Paragraph 8-27a, authorized the discharge of ARNG Soldiers due to not meeting medical retention standards.

//NOTHING FOLLOWS//