

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 12 March 2024

DOCKET NUMBER: AR20230008286

APPLICANT REQUESTS: in effect, to be paid his retirement pay.

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

- DD Form 149 (Application for Correction of Military Record)
- DA Form 199 (Informal Physical Evaluation Board (PEB) Proceedings), 15 November 2014
- Orders Number 008-1109, 8 January 2015
- DD Form 214 (Certificate of Release or Discharge from Active Duty), ending on 25 February 2015
- Defense Finance and Accounting Service (DFAS) gross monthly rate certification letter, 13 January 2023
- DFAS qualifying for a disability retirement and eligibility for military retirement pay extracts
- Miscellaneous screenshot

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code (USC), 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 is inquiring about his retirement pay because he has not received any amount since he retired in February 2015. His attempts to speak with someone at DFAS has resulted in no information or clarification. He has attached supporting documents from multiple sources showing a retirement pay amount that he is not getting paid although he meets the qualifications based on a disability rating of 30 percent or higher (40 percent). He came across retirement pay information when he stumbled across information on myPay. He then looked at other Department of Defense sites which provided further information (all attached).

3. A review of the applicant's official records show the following:

a. Having prior U.S. Army Reserve enlisted service, he enlisted in the Regular Army on 29 January 2008 and reenlisted on 11 January 2012.

b. On 15 November 2014, an Informal PEB found the applicant physically unfit and recommended a rating of 40% and that his disposition be permanent disability retirement. He concurred and waived a formal hearing of his case.

c. On 8 January 2015, Headquarters, U.S. Army North (Fifth Army), Joint Base San Antonio Military Personnel Division, published Orders Number 008-1109, which retired the applicant, effective 25 February 2015, and placed him on the Permanent Disability Retired List in rank/grade of sergeant/E-5, effective 26 February 2015. In pertinent part, the orders show:

- Statute authorizing retirement: 1372 [Title 10, USC, section 1372]
- Other eligible laws: 1201 [Title 10, USC, section 1201]
- Retirement type and allotment code: Perm Disability/10
- Percentage of disability: 40

d. On 25 February 2015, he was medically retired. DD Form 214 shows he completed 7 years and 27 days net active service and was retired by reason of "Disability, Permanent (enhanced)."

4. In support of his case, the applicant provides:

a. DFAS certification letter dated 13 January 2023, which certified he is on the Retired rolls and entitled to pay at the gross monthly rate of \$1,191.00.

b. DFAS extracts showing information pertaining to qualifying for a disability retirement and eligibility for military retirement pay.

c. Miscellaneous screenshot showing information related to his Retired pay.

5. In an email dated 7 September 2023, the DFAS Supervisor Military Pay Specialist responded to a request for information related to the applicant's petition to the Board and stated, the applicant retired under the law of Title 10, USC, section 1201, which provides that a disability member with less than 20 years of service and has Department of Veterans Affairs (VA) benefits are full VA Waiver. The applicant will not be entitled to receive both VA and Retired pay. Attached is a copy of members DD Form 2656 (Data for Payment of Retired Personnel). DD Form 2656 shows he indicated that he was not receiving VA compensation on the date of retirement.

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. The evidence shows the applicant was found unfit with his disposition as permanent disability retirement. He retired due to disability. He elected to collect the VA disability pay vice his military retired pay. By law, since the applicant has less than 20 years and since he elected a disability member with less than 20 years of service and has VA benefits, he is subject to full VA waiver. "VA waiver" prohibits him from collecting both VA disability and military retirement payments. This meant that the applicant, as a retiree who applied for disability payments from the VA, had to give up ("waive") military retirement, dollar for dollar, in order to receive VA disability benefits

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.

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

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, USC, 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, USC, section 12731: Age and service requirements, provides that a person is entitled, upon application, to retired pay computed under section 12739 (Computation of retired pay) of this title, if the person — (1) has attained the eligibility age applicable under subsection (f) to that person; (2) has performed at least 20 years of service computed under section 12732 of this title.
3. Title 10, USC, section 1201: Regulars and members on active duty for more than 30 days: retirement, provides that upon a determination by the Secretary concerned that a member, is unfit to perform the duties of the member's office, grade, rank, or rating because of physical disability incurred while entitled to basic pay or while absent, the Secretary may retire the member, with retired pay computed under section 1401 (Computation of retired pay) of this title, if the Secretary also makes the determinations with respect to the member and that disability based upon accepted medical principles is of a permanent nature and stable.
4. Title 38, Code of Federal Regulation 3.750(c)(1)(i), (when a waiver is necessary) provides that, a waiver of military retired pay is necessary in order to receive disability compensation when a veteran is eligible for both military retired pay and disability compensation but is not eligible under paragraphs (b)(1) or (b)(2) of this section to receive both benefits at the same time.
5. Army Regulation 15-85 (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. In pertinent part, it states that the ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence. The ABCMR will decide cases based on the evidence of record. It is not an investigative agency.

//NOTHING FOLLOWS//