

IN THE CASE OF: [REDACTED]

BOARD DATE: 12 December 2024

DOCKET NUMBER: AR20230008871

APPLICANT REQUESTS: payment of retired pay backdated to 27 December 2013

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

- DD Form 149 (Application for Correction of Military Record), 1 June 2023
- DD Form 149 (Application for Correction of Military Record) online application submitted by Sergeant First Class (SFC) [REDACTED] 12 June 2023
- Authorization to receive information, 6 June 2023
- Letter from U.S. Army Human Resources Command (AHRC), 8 June 2023
- Self-Authored Letter, 16 June 2023

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's states he was unaware that he had to physically submit forms for retired pay as no one advised him to do so prior to leaving the Army National Guard (ARNG). He was under the impression that he would automatically receive this pay. He moved [REDACTED], a neighbor [REDACTED], where he sought advice/guidance from the Veteran Center and the [REDACTED] Guard Armory but was unable to receive any guidance as to submission of documents for retired pay. During the time period that he first became eligible for pay, there were two significant life changing events that led to him not being in the best state of mind. He experienced the death of a close relative and a close friend, which significantly affected his mental state. This request is being humbly submitted for the Board's consideration and approval.
3. SFC [REDACTED] states, on behalf of the applicant, this falls under the category of pay and allowances as the retiree is requesting back pay. He had a non-regular retirement and was eligible for retired pay on 27 December 2013, which is his 60th birthday. He did not file for retired pay until 2023. Defense Finance and Accounting Service (DFAS) will only reimburse the retiree six years back. He is respectfully requesting for the other

back pay that will take him all the way to 27 December 2013. The retiree was unaware and uninformed about having to physically submit forms for retired pay as no one advised him to do so, prior to leaving the ARNG. He was under the impression that he would automatically receive this pay. At some point, he moved to the [REDACTED] and when he finally tried to seek guidance from the Vet Center and [REDACTED] National Guard Armory, he was unable to receive any advice as to submission of documents for retired pay. Also, during these years, there were two significant life changing events that contributed to him not being in the best state of mind. He experienced the death of a close relative and also a close friend, which significantly affected his mental state. The request is being humbly submitted for the Board's consideration and approval.

4. The applicant provides an authorization document for SFC [REDACTED] to send and receive information on the applicant's behalf.
5. 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 4 December 1980. The document indicates his date of birth is 27 December 1953. He remained in the ARNG through immediate reenlistments.
 - b. Memorandum Notification of Eligibility for Retired Pay at Age 60, 4 February 2001, notified him he had completed the required years of service. He would be eligible for retired pay, upon application, at age 60.
 - c. 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 16 August 2004 and was honorably released on 4 March 2005. He had completed 6 months and 19 days of net service this period with 4 months and 20 days of prior active service and 23 years, 3 months, and 22 days of prior inactive service. He was ordered to active duty in support of Operation Iraqi Freedom.
 - d. NGB Form 22 (Report of Separation and Record of Service) shows he was honorably transferred to U.S. Army Reserve Control Group (Retired Reserve) on 4 March 2005. He had 24 years, 3 months, and 1-day total service for pay and 24 years, 2 months, and 1 day total service for retired pay.
 - e. NGB Form 23B (ARNG Retirement Points History Statement), 9 February 2007, shows he 24 years, 2 months, and 1-day creditable service for retired pay.
6. On 4 January 2024, the Chief, Personnel Services Division, AHRC provided an advisory opinion, which recommends approval of the applicant's request. They state:

AHRC has reviewed the applicant's records and realized he did not submit his retirement application nine months before his retirement date. AHRC received a list from DFAS of servicemembers who were not aware of the application process. AHRC is requesting the ABCMR consider the insufficiency of guidance from their past units and chain of command. They recommend that every applying servicemember receive their full retirement pay from the date of eligibility.

7. On 16 May 2024, the advisory opinion was provided to the applicant to allow him the opportunity to respond. On 20 May 2024, he responded, stating he would only add, when he was discharged from the U.S. Army, his unit had already departed for Fort Hood, Texas for pre-deployment training. He was not discharged until almost two weeks later, so he did not have the benefit of any guidance from his command as to submit a request for retirement.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was warranted.
2. The Board carefully considered the applicant’s contentions, his record of service, his NGB 22, the date of his eligibility for retired pay, the date he applied and the AHRC advisory opinion. The Board agreed with the advising official’s conclusion that the applicant was likely not aware of the application procedures for retired pay due to insufficient guidance. Based on a preponderance of evidence, the Boar determined that the denial of full retired pay was unjust and that a records correction was warranted.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
■	■	■	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board determined the evidence presented is sufficient to warrant a recommendation for relief. As a result, the Board recommends that all Department of Army records of the individual concerned be corrected by: showing he timely applied for and was granted retirement pay upon qualification at age 60 on 27 December 2013: his application was received and processed in a timely manner by proper authorities, and; he is entitled to receive retired pay from the date he was first eligible.

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, USC, section 12731 (Age and service) states:

a. A person is entitled, upon application, to retired pay computed under section 12739 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)in the case of a person who completed the service requirements of paragraph (2) before 25 April 2005, performed the last six years of qualifying service while a member of any category named in section 12732(a)(1) of this title, but not while a member of a regular component, the Fleet Reserve, or the Fleet Marine Corps Reserve, except that in the case of a person who completed the service requirements of paragraph (2) before 5 October 1994, the number of years of such qualifying service under this paragraph shall be eight; and (4)is not entitled, under any other provision of law, to retired pay from an armed force or retainer pay as a member of the Fleet Reserve or the Fleet Marine Corps Reserve.

b. Application for retired pay under this section must be made to the Secretary of the military department, or the Secretary of Homeland Security, as the case may be, having jurisdiction at the time of application over the armed force in which the applicant is serving or last served.

c. The Secretary concerned shall notify each person who has completed the years of service required for eligibility for retired pay under this chapter. The notice shall be sent, in writing, to the person concerned within one year after the person completes that service.

3. Title 10, USC, section 12738 (Limitations on revocation of retired pay)

a. After a person is granted retired pay under this chapter, or is notified in accordance with section 12731(d) of this title that the person has completed the years of service required for eligibility for retired pay under this chapter, the person's eligibility for retired pay may not be denied or revoked on the basis of any error, miscalculation, misinformation, or administrative determination of years of service performed as required by section 12731(a)(2) of this title, unless it resulted directly from the fraud or misrepresentation of the person.

b. The number of years of creditable service upon which retired pay is computed may be adjusted to correct any error, miscalculation, misinformation, or administrative determination and when such a correction is made the person is entitled to retired pay in accordance with the number of years of creditable service, as corrected, from the date the person is granted retired pay.

4. Title 31, USC, section 3702, is the 6-year barring statute for payment of claims by the government. In essence, if an individual brings a claim against the government for monetary relief, the barring statute says that the government is only obligated to pay the individual 6 years from the date of approval of the claim. Attacks to the barring statute have resulted in litigation in the U.S. Court of Federal Claims. In the case of *Pride versus the United States*, the court held that the BCMR is not bound by the barring act, that the BCMR decision creates a new entitlement to payment and the 6 years starts running over again, and that payment is automatic and not discretionary when a BCMR decision creates an entitlement.

5. Army Regulation 135-180 (Qualifying Service for retired Pay Non-Regular Service) implements statutory authorities governing the granting of "retired pay" to Soldiers and former Reserve Component Soldiers. Chapter 2 provides eligibility criteria and states, in pertinent part, that in order to qualify for non-regular retirement, a member must have attained age 60 and completed a minimum of 20 years of qualifying service. Paragraph 2-8 defines qualifying service and states, in pertinent part, that a Reserve Component Soldier must earn a minimum of 50 retirement points each retirement year to have that year credited as qualifying service.

//NOTHING FOLLOWS//