

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 8 May 2024

DOCKET NUMBER: AR20230010488

APPLICANT REQUESTS: medical retirement instead of discharge from the Army National Guard (ARNG) due to medical unfitness for retention.

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

- DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States) in lieu of DD Form 149 (Application for Correction of Military Record)
- Department of Veterans Affairs (VA) benefits decision and summary of benefits letters

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 discovered recently that he could have been medically retired. He was discharged but he was not notified upon separation that he could have been medically retired. He suffered a stroke a couple of weeks after returning Afghanistan, which prompted his medical discharge.
3. Following active service in the Regular Army, the applicant enlisted in the ARNG on 19 June 2002. He served in Afghanistan from 4 April to 23 December 2008.
4. Orders issued on 21 October 2010 directed the applicant's discharge from the ARNG effective 11 December 2010 by reason of "medical, physical or mental condition retention."
5. The applicant's National Guard Bureau (NGB) Form 22 (Report of Separation and Record of Service) shows he was discharged from the ARNG on 11 December 2010 under the authority of National Guard Regulation 600-200 (Enlisted Personnel Management), paragraph 6-35I(8) (medically unfit for retention per Army Regulation

40-501 (Standards of Medical Fitness)). The NGB Form 22 also shows he was credited with 11 years total service for retired pay.

6. The applicant provided his VA benefits decision and summary of benefits letters showing he is receiving service-connected disability compensation for post-traumatic stress disorder.

7. The Army rates only conditions determined to be physically unfitting at the time of discharge, which disqualify the Soldier from further military service. The Army disability rating is to compensate the individual for the loss of a military career. The VA does not have authority or responsibility for determining physical fitness for military service. The VA may compensate the individual for loss of civilian employability.

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 (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/or the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant has again applied to the ABCMR in essence requesting referral to the Disability Evaluation System. He states:

“Was medically discharged and would request that I have medically discharged on my DD 214. I would also request medical retirement and cannot receive it until my separation DD 214 states that I was medical discharged under honorable conditions.”

c. The Record of Proceedings and prior denial detail the applicant's service and the circumstances of the case. The DD 214 for the referenced period of Service shows the applicant was mobilized in support of Operation Enduring Freedom from 17 January 2008 thru 19 February 2009 with service in Afghanistan from 4 April 2008 thru 23 December 2008. He was released from active duty at the completion of his required active service under paragraph 4 of AR 635-200, Active Duty Enlisted Administrative Separations (17 December 2009).

d. His Report of Separation and Record of Service (NGB 22) for the period of Service under consideration shows he entered the Army National Guard on 19 June 2002 was separated from the New York Army National Guard (NYARNG) effective 11

December 2010 provisions of paragraph 6-35l(8) of NGR 600-200, Enlisted Personnel Management (31 July 2009): Medically unfit for retention per AR 40-501(Standards of Medical Fitness). It shows he had 11 years, 0 months, and 0 days of total service for retired pay.

e. A 27 February 2009 VA neurology evaluation shows the applicant appears to have sustained a transient ischemic attack (TIA) earlier in the month. The provider concluded:

“Patient with an episode February 2009 of a right MCA (middle cerebral artery) distribution RIND [reversible ischemic neurological deficits] (?) event with left sided numbness and weakness. His extensive workup has been negative. I find his exam today benign. I will observe him on ASA [aspirin] and Plavix.

f. He had a similar episode at the end of March 2009. The record is silent until he was seen by neurology on 29 October 2009:

“Since that time, patient complains of problems with loss of feeling (and his Fiancé said left facial droop, not apparently now) in the left side of his face on or about mid-October 2009. Some days he feels he cannot get out of bed due to left sided weakness. Left upper and left lower extremity. Almost always occurs when he wakes up from sleep. If he is working hard, after a while he notes some weakness on the left as well. He has blurred vision, and his left eye twitches.”

g. There were neurological deficits found during this examination and the applicant was diagnosed with left sided residuals of a stroke.

h. On 30 April 2010, the applicant was placed on a very restrictive duty limiting permanent physical profile for post stroke residuals.

i. The applicant's Army National Guard Current Annual Statement (NGB 23A) shows the applicant returned to a drilling member status following his February 2009 redeployment from Afghanistan with only ten (10) Inactive Duty (IDT) points from 20 February 2009 thru his discharge on 12 March 211 December 2010. Members earn one point for each 4-hr period of IDT, but no more than 2 points in a 24-hour period.

j. There is no probative evidence the applicant's profiled medical condition, which resulted in his separation for a medically disqualifying condition, was incurred during or permanently service aggravated while in a qualified duty status. Hence, the condition is not related to his military service and not eligible for referral to the DES.

k. It is the opinion of the ARBA medical advisor the applicant's condition is not eligible for referral to the DES.

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. The Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation. Upon review of the applicant's petition, available military records and the medical advisory, the Board concurred with the advising official finding applicant's condition is not eligible for referral to the DES. The opine noted insufficient probative evidence the applicant's profiled medical condition, which resulted in his separation for a medically disqualifying condition, was incurred during or permanently service aggravated while in a qualified duty status.

2. The Board determined there is insufficient evidence to support the applicant's contentions for a medical retirement instead of discharge from the Army National Guard (ARNG) due to medical unfitness for retention. The Board agreed based on the applicant's record and advisory opine, his condition lacks sufficient evidence that is condition is related to his military service. Therefore, the Board denied relief.

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 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]

[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, 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, U.S. Code, 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 DOD Directive 1332.18 and Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation).

a. Soldiers are referred to the disability system when they no longer meet medical retention standards in accordance with Army Regulation 40-501, chapter 3.

b. The disability evaluation assessment process involves two distinct stages: the Medical Evaluation Board (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/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 or not a service member is fit for duty.

c. Service members whose medical condition did not exist prior to service 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. Individuals who are "separated" receive a one-time 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.

3. Army Regulation 40-501 provides information on medical fitness standards for induction, enlistment, appointment, retention, and related policies and procedures. Soldiers with conditions listed in chapter 3 who do not meet the required medical standards will be evaluated by an MEB and will be referred to a PEB as defined in Army Regulation 635-40. The regulation in effect at the time states in:

a. Paragraph 3-3, U.S. Army Reserve or ARNG Soldiers not on active duty whose medical condition was not incurred or aggravated during an active duty period, will be processed in accordance with chapter 9 and chapter 10 of this regulation.

b. Chapter 10 (ARNG) sets basic policies, standards, and procedures for medical examinations and physical standards for the ARNG. The Clinical Section, NGB, Office of the Chief Surgeon, is the office responsible for management of all issues pertaining to this chapter.

c. Paragraph 10-25 (Soldiers pending separation for failing to meet medical retention standards) states members with non-duty related impairments are eligible to be referred to the PEB solely for a fitness determination, but not a determination of eligibility for disability benefits.

4. National Guard Regulation 600-200, paragraph 6-35l(8), of the regulation in effect at the time, states commanders, who suspect that a Soldier may not be medically qualified for retention, will direct the Soldier to report for a complete medical examination per Army Regulation 40-501. Commanders who do not recommend retention will request the Soldier's discharge. When medical condition was incurred in line of duty, the procedures of Army Regulation 600-8-4 (Line of Duty Policy, Procedures, and Investigations) will apply. Discharge will not be ordered while the case is pending final disposition.

5. Title 38, U.S. Code, Sections 1110 and 1131, permit the VA to award compensation for disabilities which were incurred in or aggravated by active military service. However, an award of a VA rating does not establish an error or injustice on the part of the Army.

6. Title 38, Code of Federal Regulations, Part IV is the VA Schedule for Rating Disabilities. The VA awards disability ratings to veterans for service-connected

conditions, including those conditions detected after discharge. As a result, the VA, operating under different policies, may award a disability rating where the Army did not find the member to be unfit to perform his/her duties. 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.

7. Section 1556 of Title 10, U.S. Code, 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 ABCMR applicants (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//