

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: ██████████

BOARD DATE: 10 July 2024

DOCKET NUMBER: AR20230011280

APPLICANT REQUESTS: reconsideration of his previous request to correct his records to reflect transfer into the Retired Reserve with entitlement to retired pay at age 60 in lieu of separation with severance pay.

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

- Self-authored letter in lieu of DD Form 149 (Application for Correction of Military Record)
- Privacy Act Consent Form
- DD Form 287 (Authorization for Disclosure of Medical or Dental Information)
- Department of Veterans Affairs (DVA) letter, 12 February 2016
- Army Board for Correction of Military Records (ABCMR) Docket Number AR20220006707
- Notification of Eligibility for Retired Pay at Age 60 (20-year letter), 12 May 2004
- Memorandum – Subject: Department of Defense Physical Disability Board of Review Recommendation, 2 June 2015
- Excerpt Docket Number AR20150008351
- Memorandum – Subject: Physical Disability Board of Review (PDBR) Recommendation
- Record of Proceedings – PDBR
- DD Form 294 (Application for a Review by the PDBR of the Rating Awarded Accompanying a Medical Separation from the Armed Forces of the U.S.), 19 September 2013
- U.S. Army Human Resources Command (AHRC) letter, 26 February 2021

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the ABCMR in Docket Number AR20220006707 on 19 January 2023.

2. The applicant states in pertinent part that he is currently being denied retirement pay because he was medically discharged on 5 March 2004 with entitlement to disability

severance pay. He contests that repayment of the severance pay has already occurred however he is still precluded from receiving his retired pay despite reaching age 60.

3. A review of the applicant's available service records reflects the following:

- a. On 25 August 1981, the applicant enlisted in the Regular Army.
- b. On 31 August 1984, the applicant was honorably released from active duty and transferred into the U.S. Army Reserve (USAR) Control Group (Reinforcement).
- c. On 1 July 1985, the U.S. Army Reserve Personnel Center issued Orders Number C-07-028594 reassigning the applicant to a Troop Program Unit.
- d. On 12 May 2004, the applicant was issued a Notification of Eligibility for Retired Pay at Age 60 (20-year letter).
- e. On 13 January 2004, an informal Physical Evaluation Board convened finding the applicant physically unfit for continued military service with a recommendation that he be separated with entitlement to severance pay if otherwise qualified.
- f. On 20 January 2004, the applicant concurred with the board's recommendation and waived his rights to a formal appeal.
- g. On 17 February 2004, the applicant was afforded the opportunity to elect to be transferred into the Retired Reserve with entitlement to apply for Reserve Retirement upon reaching age 60 in accordance with Title 10, United States Code (USC), section 1209 or to be discharged with entitlement to receive severance pay pursuant to Title 10, USC, section 1212. The applicant elected to receive severance pay. He further acknowledged that this election was final and conclusive for all purposes and could not be subsequently changed.
- h. On 5 March 2004, the applicant was discharged from military service. The orders associated with this personnel action are not available within the applicant's service records.
- i. On 30 January 2015, the PDBR convened. The applicant was advised that after review of his records and medical documentation they determined that there was insufficient evidence to warrant re-characterization of his disability or separation determination.
- j. On 2 June 2015, the Deputy Assistant Secretary of the Army – Review Boards denied the applicant's appeal of the PDBR's decision noting that his separation disability rating and entitlement to severance pay was accurate.

k. On 26 February 2021, AHRC advised the applicant that an audit of his records reflects evidence that he received severance pay in 2004 thereby severing ties with the military and making him ineligible to receive retired pay. In accordance with Title 10, Sections 12731-12737 a USAR Soldier must not have elected to receive severance pay in lieu of non-regular retired pay. Based upon the above, the applicant's request for retired pay was denied.

l. DA Form 5016 (Chronological Statement of Retirement Points), dated 2 July 2024, shows the applicant completed 21 years, 11 months, and 24 days of qualifying creditable service towards retirement.

4. The applicant provides the following a:

a. DD Form 287 reflective of the applicant's authorized release of medical and dental records to his Congressional representative.

b. DVA letter dated 12 February 2016, reflective of the applicant being advised that an audit of his account was conducted which revealed that he was not issued the proper Special Monthly Compensation (SMC) from 1 April 2011 – 1 June 2011. The correction made resulted in the repayment of the difference to the applicant. This document further provides evidence of the recoupment of the applicant's disability severance pay from April 2011 – June 2017; appearing to be discontinued effective 1 July 2017.

c. Memorandum – Subject: PDBR Recommendation, reflective of the applicant being advised that in accordance with Title 10, United States Code (USC), section 1554a and in compliance with Department of Defense Instruction 6040.44, on 30 January 2015, the PDBR convened a board to review his disability rating awarded during his medical separation. After review, the PDRB recommended no re-characterization of the separation or modification of the disability rating previously assigned.

d. DD Form 294 dated 19 September 2013, reflective of the applicant's submitted appeal of the 20 percent disability rating awarded in connection with his separation from military service. The applicant notes that since his separation, his rating has been increased to 70 percent.

5. On 19 January 2023, in ABCMR Docket Number AR20220006707 the Board denied the applicant's requested relief noting that his receipt of severance pay precluded him from receiving retired pay at age 60.

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 and available military records, the Board determined there is insufficient evidence to support the applicant's contentions for reconsideration of his previous request to correct his records to reflect transfer into the Retired Reserve with entitlement to retired pay at age 60 in lieu of separation with severance pay.

2. The Board determined the applicant did not demonstrate an error or injustice in the characterization of his separation. The Board noted that an informal Physical Evaluation Board was convened finding the applicant physically unfit for continued military service with a recommendation that he be separated with entitlement to severance pay if otherwise qualified. Furthermore, evidence shows the applicant concurred with the board's recommendation and waived his rights to a formal appeal. Based on the preponderance of evidence and the Physical Disability Board of Review, the Board found reversal of the previous Board determination is without merit. 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 Board found 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 to amend the decision of the ABCMR set forth in Docket Number AR20220006707 on 19 January 2023.



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. Army Regulation (AR) 635-40 (Disability Evaluation for Retention, Retirement, or Separation), paragraph 4-19I(2) (Advisory Statements) in effect provides that the DA Form 199 will inform the Soldier of legal or administrative requirements that impact on the Soldier's disability benefits, in among other situations, the following situation:

When a Soldier has a rating of less than 30 percent and has at least 20 qualifying years for retirement for non-regular service: "You have the option of accepting discharge with disability severance pay and forfeiting retirement for non-regular service; or you may request transfer to the Retired Reserve and receive retired pay at age 60. According to sections 1209 and 1213, Title 10 USC, you will forfeit all rights to retired pay if you accept severance pay instead of transfer to the Retired Reserve.

2. Title 10, USC, section 1174 (Separation Pay upon Involuntary Discharge or Release from Active Duty) provides that a member who has received separation pay under this section, or severance pay or readjustment pay under any other provision of law, based on service in the armed forces shall not be deprived, by reason of his receipt of such separation pay, severance pay, or readjustment pay, of any disability compensation to which he is entitled under the laws administered by the Department of Veterans Affairs, but there shall be deducted from that disability compensation an amount equal to the total amount of separation pay, severance pay, and readjustment pay received, less the amount of Federal income tax withheld from such pay (such withholding being at the flat withholding rate for Federal income tax withholding, as in effect pursuant to regulations prescribed under chapter 24 of the Internal Revenue Code of 1986.

3. Title 10, USC, section 1201, provides for the physical disability retirement of a member who has at least 20 years of service or a disability rating of at least 30 percent. Title 10, United States Code, section 1203, provides for the physical disability separation of a member who has less than 20 years of service and a disability rating of less than 30 percent.

4. Title 10, USC, section 1209 (Transfer to inactive status list instead of separation) states that any member of the armed forces who has at least 20 years of service computed under section 12732 of this title, and who would be qualified for retirement under this chapter but for the fact that his disability is less than 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs at the time of the determination, may elect, instead of being separated under this chapter, to be transferred to the inactive status list under section 12735 of this title and, if otherwise eligible, to receive retired pay under section 12739 of this title upon becoming 60 years of age.

5. AR 135-180 (Qualifying Service for Retired Pay Nonregular Service) in effect at the time states in paragraph 2-1, to be eligible for retired pay, an individual need not have a military status at the time of application, but must have attained age 60, completed a minimum of 20 years of qualifying service, served the last eight years of his or her qualifying service as a Reserve component Soldier. In addition, an applicant must not be entitled to retired pay from the Armed Forces under any other provision of law and not have elected to receive disability severance pay in lieu of retired pay at age 60.

//NOTHING FOLLOWS//