

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 18 June 2024

DOCKET NUMBER: AR20230011354

APPLICANT REQUESTS: to correct his DD Form 214 (Certificate of Release or Discharge from Active Duty) for the period ending 30 August 2022, by amending item 28 (Narrative Reason) to reflect "Sufficient Service for Retirement" vice "Disability, Permanent".

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

- DD Form 149 (Application for Correction of Military Record)
- DA Form 2166-8 (Noncommissioned Officer (NCO) Evaluation Report), dated 6 January 2012
- DA Form 199 (Informal Physical Evaluation Board (PEB) Proceedings), dated 6 June 2022
- Orders 178-0121, dated 27 June 2022
- DD Form 214, for the period ending 30 August 2022
- VA disability rating letter, dated 22 August 2023
- DD Form 2860 (Claim for Combat-Related Special Compensation (CRSC))
- VA post-traumatic stress disorder (PTSD) questionnaire
- VA benefits letter, dated 2 November 2023

FACTS:

1. The applicant states since he was medically retired at 19 years and 2 months of active federal service, he is requesting a regular retirement. During his medical board process, he requested, through a colonel (O6) in his chain of command (COC), to extend his 20 years of service and was essentially denied due to the unit's upcoming deployment. His leg has suffered permanent damage due to the surgeon that performed the surgery. His superficial peroneal nerve was damaged, causing complex regional pain syndrome, paresthesia, and severe atrophy in his foot. During his enlisted time in the Army, he served as a special forces (SF) medical sergeant with multiple deployments and during his time a chief warrant officer he served as a chinook pilot (CH-47F). He was faced with medical issues concerning his legs a few years before the PEB, but he did not complain as he wanted to serve till the 20-year mark. His wife and children were supportive of him continuing to serve and he is heartbroken that he can no longer do so. He understands the issues that the Army is facing recruiting and

retention, and issues like his could make it worse. He has tried to dispute his separation at the appropriate levels and has been unsuccessful. He does not like to complain, but he does not want to suffer in silence any longer. He owes it to his family to try and rectify this egregious situation.

2 The applicant provides the following:

a. DA Form 2166-8 (Noncommissioned Officer (NCO) Evaluation Report) dated 6 January 2012, reflects the applicant received all excellence ratings during this rating period. He ranked among the best in his unit, with superior potential for promotion or positions of greater responsibility.

b. On 27 June 2022, Headquarters, III Corps and Fort Hood, TX, published Orders 178-0121 reassigning him to the transition center for separation processing effective 30 August 2022. The order further shows he was retired at the grade of chief warrant officer 3 (CW3) with the percentage of a permanent disability of 40 percent (%).

c. On 22 August 2023, the VA issued a disability rating letter that shows his combined evaluation to be 100% with an effective date of 1 December 2022.

4. The applicant's service record reflects the following:

a. He had prior honorable enlisted service in the Regular Army from 8 November 2005 to 24 April 2012, for a period of 6 years, 5 months, and 17 days.

b. Officer Record Brief (ORB), shows he entered active duty during this period of service on 25 April 2012.

c. DA Form 199, shows a PEB was convened on 6 June 2022 wherein the applicant was found physically unfit with a recommended disability rating of 40 percent (%) for chronic regional pain syndrome of left lower extremity status post-surgery left lower extremity peroneal and tibial neuropathy, which began in April 2008, while on active duty. He underwent surgery but the condition continued to require duty limitations. Functional activity limitations made him unable to reasonably perform required duties. The applicant concurred with the findings, waived a formal hearing of his case, and did not request reconsideration of his VA ratings. This document further shows the PEB made the following administrative determinations:

(1) The disability disposition is not based on disease or injury incurred in the line of duty in combat with an enemy of the United States and as a direct result of armed conflict or caused by an instrumentality of war and incurring in the line of duty during a period of war as defined by law (5 USC 8332, 3502 and 6303).

(2) The disability did not result from a combat-related injury as defined in Title 26, U.S. Code, section 104.

d. DD Form 214 for the period ending 30 August 2022, shows he was discharged with an honorable discharge, pursuant to Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation), Chapter 4. His narrative reason for separation was disability, permanent. He completed 10 years, 4 months, and 6 days of net active service this period, with 8 years, 9 months, 18 days of prior active service. Applicant has service in Tajikistan from 13 October 2010 to 18 December 2010 and Afghanistan from 23 February 2011 to 17 January 2012. This document further shows he was awarded the Bronze Star Medal (BSM), Combat Infantryman Badge (CIB), and the Special Forces Tab.

e. A CRSC decision letter (Claim Number 10481) issued to the applicant by the U. S. Army Human Resources Command (HRC) on 23 February 2023, which states, his claim for CRSC pay was approved in accordance with current program guidance. He received a total combat rated disability rating of 40%, effective September 2022. The following issues were verified as combat-rated injuries:

- PTSD with Bruxism: 30% disability, due to combat award received, effective September 2022
- tinnitus: 10% disability, due to combat award received, effective September 2022
- allergic rhinitis: 0% disability, due to an Instrumentality of War, effective September 2022

f. An advisory opinion regarding the applicant's request for a regular retirement was issued by HRC on 10 October 2023. This document states that "The applicant knowingly and voluntarily decided not to apply for Continuation on Active Duty (COAD), which can only be approved/disapproved by HRC. The argument that his command would not support his request for COAD is not dispositive as to whether he would have been approved/disapproved for COAD and is thus, not a defense for failing to make the request in a timely manner. His request to retroactively be allowed to file a COAD request was found legally insufficient.

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

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

evidence shows a PEB found the applicant unfit and recommended a combined disability rating of 40% for chronic regional pain syndrome of left lower extremity. He was retired due to disability on 30 August 2022, with 19 years and 2 months of total active service. The Board reviewed and agreed with the advisory official's finding the applicant did not serve beyond the 19 years and 3 months of active service. He was counseled about COAD but did not request it. The Board was not persuaded by his argument that his command would not support his request for COAD, had he requested it. Based on the evidence, the Board determined relief is not warranted.

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 15-185 (Army Board for Correction of Military Records) prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR. 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.

3. Title 10, USC, 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 AR 635-40 (Physical 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 (Standards of Medical Fitness), chapter 3, as evidenced in a Medical Evaluation Board (MEB); when they receive a permanent medical profile rating of 3 or 4 in any factor and are referred by an MOS Medical Retention Board; and/or they are command-referred for a fitness-for-duty medical examination.

b. The disability evaluation assessment process involves two distinct stages: the MEB and 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. A designation of "unfit for duty" is required before an individual can be separated from the military because of an injury or medical condition. Service members who are determined to be unfit for duty due to disability either are separated from the military or are permanently retired, depending on the severity of the disability and length of military service. 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.

c. The mere presence of a medical impairment does not in and of itself justify a finding of unfitness. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier may reasonably be expected to perform because of his or her office, grade, rank, or rating. Reasonable performance of the preponderance of duties will invariably result in a finding of fitness for continued duty. A Soldier is physically unfit when a medical impairment prevents reasonable performance of the duties required of the Soldier's office, grade, rank, or rating.

4. Title 38 USC, section 1110 (General - Basic Entitlement) states for disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

5. AR 635-40 (Physical Evaluation for Retention, Retirement, or Separation) prescribes the Army Disability Evaluation System and sets forth policies, responsibilities, and procedures that apply in determining whether a Soldier is unfit because of physical disability to reasonably perform the duties of his office, grade, rank, or rating. It implements the requirements of Title 10, U.S. Code, chapter 61; Department of Defense Instructions (DoDI) 1332.18 (Disability Evaluation System (DES)); DoD Manual 1332.18 (DES Volumes 1 through 3) and Army Directive 2012-22 (Changes to Integrated Disability Evaluation System Procedures) as modified by DoDI 1332.18.

a. The objectives are to maintain an effective and fit military organization with maximum use of available manpower; provide benefits to eligible Soldiers whose military service is terminated because of a service-connected disability; provide prompt disability evaluation processing ensuring the rights and interests of the Government and Soldier are protected; and, establish the Military Occupational Specialty Administrative Retention Review (MAR2) as an Army pre-DES evaluation process for Soldiers who require a P3 or P4 (permanent profile) for a medical condition that meets the medical retention standards of Army Regulation 40-501. Soldiers, and mechanisms for the final disposition of disability evaluations by appropriate personnel.

b. The DES begins for a Soldier when either of the events below occurs:

(1) The Soldier is issued a permanent profile approved in accordance with the provisions of Army Regulation 40-501 and the profile contains a numerical designator of P3/P4 in any of the serial profile factors for a condition that appears not to meet

medical retention standards in accordance with AR 40–501. Within (but not later than) 1 year of diagnosis, the Soldier must be assigned a P3/P4 profile to refer the Soldier to the DES.

(2) The Soldier is referred to the DES as the outcome of MAR2 evaluation.

c. A medical evaluation board is convened to determine whether a Soldier's medical condition(s) meets medical retention standards per Army Regulation 40-501. This board may determine a Soldier's condition(s) meet medical retention standards and recommend the Soldier be returned to duty. This board must not provide conclusions or recommendations regarding fitness determinations.

d. The physical evaluation board determines fitness for purposes of Soldiers' retention, separation, or retirement for disability under Title 10, U.S. Code, chapter 61, or separation for disability without entitlement to disability benefits under other than Title 10, U.S. Code, chapter 61. The physical evaluation board also makes certain administrative determinations that may benefit implications under other provisions of law.

e. Unless reserved for higher authority, the U.S. Army Physical Disability Agency approves disability cases for the Secretary of the Army and issues disposition instructions for Soldiers separated or retired for physical disability.

f. Chapter 4 provides that Public Law 110–181 defines the term, physical DES, in part, as a system or process of the DOD for evaluating the nature and extent of disabilities affecting members of the Armed Forces that is operated by the Secretaries of the military departments and is comprised of MEBs, PEBs, counseling of Soldiers, and mechanisms for the final disposition of disability evaluations by appropriate personnel. Soldiers may not be discharged or released from active duty because of a disability until they have made a claim for compensation, pension, or hospitalization with the VA or have signed a statement that their right to make such a claim has been explained or have refused to sign such a statement.

6. AR 40-501 (Standards of Medical Fitness), medical evaluation of certain enlisted military occupational specialties and officer duty assignments in terms of medical conditions and physical defects are causes for rejection or medical unfitness for these specialized duties. If the profile is permanent the profiling officer must assess if the Soldier meets retention standards. Those Soldiers on active duty who do not meet retention standards must be referred to a medical evaluation board.

7. Title 10, U.S. Code, section 1556 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 Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

8. Army Regulation 635-200 (Active Duty Enlisted Administrative Separations) sets forth the basic authority for the separation of enlisted personnel. The version in effect at the time provided that:

a. Chapter 12 provides that Soldiers who have completed 20 but less than 30 years of active Federal service and who have completed all required service obligations are eligible, but not entitled, to retire upon request. Soldiers who have completed 19 or more years of active Federal service may apply for retirement. The request must be made within 12 months of the requested retirement date.

b. Soldiers who have requested retirement or have an approved retirement become hospitalized or have an identified medical problem which might result in their referral to a PEB, the unit commander will submit notification through the chain of command to CG, HRC. The notification should be based on consultation with medical treatment facility personnel or a senior medical officer who has detailed knowledge of medical fitness and unfitness standards, disposition of patients, and disability separation processing. In the case of HQDA approved retirements, the notification should request that the Soldier's retirement orders be suspended pending completion of the DES process. When the outcome of the DES evaluation is a finding of fit, the Soldier's retirement date should be the first day of the month following the month of the finding. If found unfit, the retirement date will be no later than 90 days subject to approved permissive TDY or leave. If the PEB is not necessary but additional medical care is, the retirement will be processed as a non-disability retirement. Continuing medical problems will be treated up to and after the retirement date. Retirement dates will not be changed to continue medical treatment that will extend past the approved retirement date. If referral to a PEB results, approved retirement dates will not be changed until approved by CG, HRC.

9. Title 38, CFR, Part IV is the VA's 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 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.

//NOTHING FOLLOWS//