

IN THE CASE OF: [REDACTED]

BOARD DATE: 3 October 2024

DOCKET NUMBER: AR20230012400

APPLICANT REQUESTS: a medical retirement vice medical discharge.

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:
DD Form 149 (Application for Correction of Military Record)

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 had 17 years of service and would have otherwise retired. He is rated at 100% through the Department of Veterans Affairs (VA).
3. A review of the applicant's service record shows:
 - a. He enlisted in [REDACTED] Army National Guard ([REDACTED] ARNG) on 31 May 2000.
 - b. Orders 058-141 issued by the Military Department of Indiana on 27 February 2003 ordered the applicant to active duty in support of Operation Enduring Freedom.
 - c. On 24 August 2004, he was released from active duty (REFRAD) with an honorable characterization of service. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 1 year, 5 months, and 28 days of active service.
 - d. Orders A-10-030610 issued by U.S. Army Human Resources Command (HRC) on 28 October 2010 ordered the applicant to active duty in support of a national emergency declared under Presidential Proclamation 7463.
 - e. Orders 341-1019 issued by Camp Atterbury Joint Maneuver Training Center on 7 December 2011 released the applicant from active duty, effective 12 December 2011.

f. On 12 December 2011, he was released from active duty (REFRAD) with an honorable characterization of service. His DD Form 214 shows he completed 3 years, 11 months, and 29 days of active service.

g. Order 234-08 issued by the United States Army Physical Disability Agency on 21 August 2012 discharged the applicant from the ARNG, effective 25 September 2012.

h. Order 234-08, issued by the U.S. Army Physical Disability Agency on 21 August 2012 discharged the applicant from the ARNG, effective 25 September 2012. The applicant was discharged under the provisions of Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation). He was authorized disability severance pay in the grade of E-6 based on 11 years and 14 days of service with a 20% disability percentage.

4. The applicant's personnel record does not contain documentation pertaining to his Physical Evaluation Board (PEB) proceedings.

5. On 1 April 2024, an advisory opinion was provided in the processing of this case from the U.S. Army Physical Disability Agency. The legal advisor concluded the applicant's case to be legally insufficient to place him into medical retirement as there does not appear to be any errors or omissions from his previous Disability Evaluation System case file.

a. The applicant was found unfit for diabetes mellitus. His formal PEB recommended a rating of 20% and separation with severance pay. On 31 July 2012, the applicant concurred with the findings of the PEB and waived his right to appeal and/or to request a one-time only VA ratings consideration. The applicant offered no argument as to why he now believes he should be medically retired, except that he is rated 100% disabled by the VA.

b. The PEB is required to follow the VA standards for rating disability for any unfitting conditions. The PEB adopted the rating of 20% for the applicant's unfitting condition. While VA ratings may ebb and flow over the course of one's lifetime, DES ratings are a snapshot in time at the point of discharge. The applicant has made no argument that his rating for his unfitting condition was improper at the time of his discharge or that any of his other conditions were somehow also unfitting.

c. After reviewing the presented case file, it appears the PEB acted properly and in accordance with policy and statute.

6. On 9 April 2024, the applicant was provided a copy of the advisory opinion with the opportunity to provide a response and/or rebuttal. He did not reply.

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 (EMR – AHLTA and/or 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 applied to the ABCMR in essence requesting referral to the Disability Evaluation System. He states:

"I had 17 years in service and would have retired. I am 100% through the VA."

c. The Record of Proceedings detail the applicant's service and the circumstances of the case. Orders published by the United States Army Physical Disability Agency (USAPDA) on 21 August 2012 show the applicant was to be separated with disability severance pay effective 25 September 2012 for a 20% military disability rating under provisions in AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (20 March 2012).

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 31 March 2000 was separated from [REDACTED] Army National Guard ([REDACTED] ARNG) effective 25 September 2012 under provisions of paragraph 6-35I(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 13 years, 7 months, and 19 days of total service for retired pay.

e. The applicant's PEB case file was neither submitted with the application nor in ePEB.

f. MEDCHART contains his final permanent duty limiting profile which was approved 3 February 2012. It is this profile which referred him to the DES. There are two conditions listed on the profile – duty limiting diabetes as it prevents him from deploying to an austere environment, and non-duty limiting sleep apnea.

g. The USAPDA's 1 April 2024 external advisory provides and nicely lays out the information required for this case. Their counsel's analysis:

"Per 10 USC §1216a(a)(1)(A), the FPEB is required to follow the VA Schedule for Rating Disabilities (VASRD) for any unfitting conditions. Here, the FPEB adopted the VASRD rating of 20% for Mr. [REDACTED] unfitting DM. While VA ratings may ebb and flow over the course of one's lifetime, DES ratings are a snapshot in time at the point of discharge. Mr. [REDACTED] has made no argument that the rating for his DM was improper at the time of his discharge or that any of his other conditions were somehow also unfitting. After reviewing the presented case file, it appears that the FPEB acted properly and in accordance with policy and statute."

h. No medical documentation was submitted with application. The EMR shows

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. JLV shows he has been awarded multiple VA service-connected disability ratings. However, the DES only compensates an individual for service incurred medical condition(s) which have been determined to disqualify him or her from further military service and consequently prematurely ends their career. The DES has neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions which were incurred or permanently aggravated during their military service; or which did not cause or contribute to the termination of their military career. These roles and authorities are granted by Congress to the Department of Veterans Affairs and executed under a different set of laws.

l. Paragraph 3-1 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (20 March 2012) states:

"The mere presence of an impairment does not, of itself, justify a finding of unfitness because of physical disability. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier reasonably may be expected to perform because of their office, grade, rank, or rating."

m. 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 relief is not warranted.
2. The Board concurred with the conclusions of the Physical Disability Agency advisory official and the ARBA Medical Advisor that the evidence does not support correction of the record to show the applicant retired. He was assigned the VA rating in effect for his unfitting condition at the time of his discharge in accordance with Disability Evaluation System requirements, and there is no evidence of other unfitting conditions. Based on a preponderance of the evidence, the Board determined the applicant's discharge for disability with severance pay was not in error or unjust.

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.

3/29/2025

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, 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 (DES) 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 (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 Military Occupational Specialty (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 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. 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.

3. Army Regulation 635-40 establishes 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. Only the unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability.

a. Disability compensation is not an entitlement acquired by reason of service-incurred illness or injury; rather, it is provided to Soldiers whose service is interrupted and who can no longer continue to reasonably perform because of a physical disability incurred or aggravated in military service.

b. Soldiers who sustain or aggravate physically-unfitting disabilities must meet the following line-of-duty criteria to be eligible to receive retirement and severance pay benefits:

(1) The disability must have been incurred or aggravated while the Soldier was entitled to basic pay or as the proximate cause of performing active duty or inactive duty training.

(2) The disability must not have resulted from the Soldier's intentional misconduct or willful neglect and must not have been incurred during a period of unauthorized absence.

c. The percentage assigned to a medical defect or condition is the disability rating. A rating is not assigned until the PEB determines the Soldier is physically unfit for duty. Ratings are assigned from the Department of Veterans Affairs (VA) Schedule for Rating Disabilities (VASRD). The fact that a Soldier has a condition listed in the VASRD does not equate to a finding of physical unfitness. An unfitting, or ratable condition, is one which renders the Soldier unable to perform the duties of their office, grade, rank, or rating in such a way as to reasonably fulfill the purpose of their employment on active duty. There is no legal requirement in arriving at the rated degree of incapacity to rate a physical condition which is not in itself considered disqualifying for military service when a Soldier is found unfit because of another condition that is disqualifying. Only the unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability.

4. Title 38, U.S. Code, 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. Title 38, U.S. Code, section 1131 (Peacetime Disability Compensation – 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 other than 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.

6. 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.

//NOTHING FOLLOWS//