

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 30 August 2024

DOCKET NUMBER: AR20230013392

APPLICANT REQUESTS:

- correction of his DD Form 214 (Certificate of Release or Discharge from Active Duty) for the period ending 31 August 2023 to show he was medically discharged.
- a video/telephonic appearance before the Board.

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

- DD Form 149 (Application for Correction of Military Record)
- DA Form 199 (Informal Physical Evaluation Board (PEB) Proceedings, 29 December 2022)
- DD Form 214, 31 August 2023

FACTS:

1. The applicant states, he went through the Integrated Disability Evaluation System (IDES) process and was found unfit to continue serving, but his DD Form 214 does not reflect the medical discharge. When he went to the transition point, there was no packet submitted for his separation. The only thing that was available to him and the human resources person was his orders. The medical evaluation board (MEB), his unit or the U.S. Army Human Resources Command (HRC) did not provide the proper information; therefore, his discharge was determined to be a regular discharge which it should not have been. He went through the medical board process for close to 10 months, and now he is concerned that there will be issues regarding Veterans Affairs (VA) disability moving forward.

2. A review of the applicant's service records show:

a. A DD Form 4 (Enlistment/Reenlistment Document) which shows he enlisted in the Regular Army on 9 September 1982.

b. He was honorably discharged on 8 September 1985. His DD Form 214 shows he completed 3 years of net active service during the covered period.

c. NGB Form 22 (Report of Separation and Record of Service) which shows he served honorably in the New Jersey Army National Guard (ARNG) from 18 November 1989 to 17 November 1991.

d. A DD Form 4, which shows he enlisted in the U.S. Army Reserve (USAR) on 13 March 1992.

e. A DA Form 199 shows on 29 December 2022, an informal PEB convened to consider the applicant's physical condition. The PEB found the applicant physically unfit due to lumbosacral degenerative disc disease, spinal stenosis, and spondylolisthesis status post discectomy L4-5. In accordance with Army Regulation (AR) 635-40 (Disability Evaluation for Retention, Retirement, or Separation), the applicant was unfit because DA Form 3349 (Physical Profile), section 4, functional activity limitations associated with the conditions make him unable to reasonably perform required duties. The PEB recommended a disability rating of 20 percent and that the applicant's disposition be separated with severance pay. The PEB noted:

(1) A Soldier with at least 20 qualifying years for Reserve retirement and a rating of less than 30 percent has the option of accepting disability severance pay and forfeiting nonregular Retired pay; or, requesting transfer to the Inactive Status List or Retired Reserve and receiving nonregular retired pay at age 60 or as otherwise provided by law, 10 U.S. Code (USC), chapter 67.

(2) The applicant's disability rating is less than 30 percent. Soldiers with a disability rating of less than 30 percent, and with less than 20 years of service as computed under 10 USC 1208 (active plus Reserve Component equivalent service), requires separation from service with disability severance pay.

f. On 23 May 2023, the applicant acknowledged that he had been advised of the findings and recommendations of the Informal PEB and he received a full explanation of the results of the findings and recommendations, and the legal rights pertaining thereto.

(1) He concurred and waived a formal hearing of his case.

(2) He did not request reconsideration of his VA ratings.

(3) He elected to transfer to the Retired Reserve in lieu of being separated for disability with entitlement to disability severance pay or in lieu of being separated without entitlement to disability benefits, as applicable.

g. A memorandum from the U.S. Army Physical Disability Agency (USAPDA), dated 24 May 2023, which shows the PEB determined that the applicant was physically unfit and would be transferred to the Retired Reserve. Pursuit to the authority contained in 10 USC 1209, the applicant was entitled to apply for retirement benefits upon reaching age sixty. The memorandum further states that the applicant would be processed for discharge from his perspective component headquarters with transfer to the Retired Reserve.

h. The applicant's DD Form 214 shows he was discharged on 31 August 2023, by reason of completion of required active service, in the rank and pay grade of sergeant first class (SFC)/E-7.

i. Orders Number 0006306201.00, dated 16 October 2023, issued by the Department of the Army, show effective 16 October 2023 the applicant was permanently assigned to the USAR Retired Reserve, by reason of retirement – voluntary. His orders show he had 20 years, 5 months, and 19 days of total service and 9 years, 0 months, and 8 days of total active federal service.

j. Orders: C06-495923, dated 20 June 2024, issued by the HRC show the applicant was retired and will be placed on the Army of the United States Retired list on 1 November 2024, in the retired grade of E-7.

3. On 11 April 2024, the USAPDA legal advisor rendered an advisory opinion in the processing of this case. The legal advisor found the applicant's case to be legally insufficient to amend or revise his DD Form 214 to reflect he separated from military service under AR 635-40, as the applicant waived that separation in lieu of being placed in the Retired Reserve. He opined:

a. On 29 December 2022, the applicant was found unfit for his back condition at 20 percent and was recommended for separation with severance pay. On 23 May 2023, he reviewed and accepted the findings for the Informal PEB and elected not to seek a VA Ratings Reconsideration (VARR) and elected to Transfer to the Retired Reserve in lieu of being separated for disability with entitlement to disability severance pay.

b. By electing to Transfer to the Retired Reserve and waive separation for disability, the appropriate separation authority on his DD Form 214 should be AR 635-200 (Active Duty Enlisted Administrative Separations) instead of AR 635-40. Per his IDES selection, his DD Form 214 reflects the separation authority as AR 635-200.

4. On 24 April 2024, the advisory opinion was forwarded to the applicant for acknowledgment and/or response. The applicant has not provided a response to date.

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 Headquarters U.S. Army Physical Disability Agency advisory opinion, the Board concurred with the advising official finding the applicant's request for correction of his DD Form 214 for the period ending 31 August 2023 to show he was medically discharged, legally insufficient.

2. The Board determined the applicant was found to be unfit due to his back condition and was separated with severance pay. Evidence shows the applicant accepted the findings from the IPEB and elected to not seek a VA rating reconsideration as well as electing to transfer to the retired reserves in lieu of being separated for disability with entitlement to disability severance pay. The Board agreed, based on the advising opine, and the applicant's elections from the IPEB, there is insufficient evidence to support the applicant's contentions showing he was medically discharged. Therefore, the Board denied relief.

3. The applicant's request for a personal appearance hearing was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

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.

[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. Army Regulation 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.

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.

b. Public Law 110-181 defines the term, physical DES, 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 composed of medical evaluation boards, physical evaluation boards, counseling of Soldiers, and mechanisms for the final disposition of disability evaluations by appropriate personnel.

c. 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.

d. 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.

e. 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.

f. 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.

2. Army Regulation 40-501 (Standards of Medical Fitness), governs medical fitness standards for enlistment, induction, appointment, retention, and separation. It states 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.

3. 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 (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, chapter 3, as evidenced in an 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. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. Boards for Correction of Military/Naval Records may grant clemency regardless of the court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice. This guidance does not mandate relief but provides standards and principles to guide Boards in application of their equitable relief authority.

a. In determining whether to grant relief on the basis of equity, injustice, or clemency grounds, Boards shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and

behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment.

b. Changes to the narrative reason for discharge and/or an upgraded character of service granted solely on equity, injustice, or clemency grounds normally should not result in separation pay, retroactive promotions, and payment of past medical expenses or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded service characterization.

5. Section 1556 of Title 10, United States 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 Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

6. Army Regulation 15-185 (ABCMR) 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, which is that what the Army did was correct.

a. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

b. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

//NOTHING FOLLOWS//