

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 6 August 2024

DOCKET NUMBER: AR20230013887

APPLICANT REQUESTS: in effect, correction of his records to show he completed 20 years of creditable service/qualifying years toward a non-regular retirement.

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

- DD Form 149 (Application for Correction of Military Record)
- Letter of support
- Orders 030-1084, 30 January 2014
- Memorandum, subject: Notification of Eligibility for Retired Pay for Non-Regular Service (15 Year Letter), 29 October 2013
- NGB Form 23B (Army National Guard (ARNG) Retirement Points History Statement)
- NGB Form 22 (Report of Separation and Record of Service)
- NGB Form 55B (Honorable Discharge Certificate)
- DA Form 4187 (Personnel Action)
- DA Form 4856 (Developmental Counseling Form)
- Enlisted Record Brief

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, in effect, he wants to start receiving Concurrent Military Retired Pay and Department of Veterans Affairs (VA) Disability Compensation (CRDP) but to be eligible, he must have completed 20 years; he is 3 months and 14 days short. His unit made no mention of CRDP when they counseled him about the non-duty related physical evaluation board (NDR PEB), and he had no idea he could have completed the remaining service requirement through COAR (Continuation on Active Reserve). All they told him was that he would not be receiving retired pay because he had not completed 20 qualifying years of ARNG service, and, in any case, his VA disability compensation would be more than the retired pay he would otherwise have received.

3. The applicant provides documents from his service record and a letter submitted by the PAARNG Retirement Services office; which states, they believe that [applicant's] unit and higher state headquarters should have investigated (Applicant's) shortage of days (i.e., 3 months and 14 days) and explored options in making him eligible for COAR. [Applicant] was not aware of this loss of retirement pay until 13 September 2023.

4. A review of the applicant's service record shows the following:

a. The applicant was born in A\_\_\_\_ 1965. He would turn 60 years of age in A\_\_\_\_ 2025.

b. On 13 May 1999, after completing over 4 years of service in the U.S. Air Force, the applicant enlisted into the PAARNG for 1 year; he continued his enlistment via extensions. The Army mobilized the applicant and he deployed twice to Iraq (respectively, 20040208 to 20050121 and 20090208 to 20090528).

c. On 16 October 2013, the applicant's unit provided him "Non-Duty PEB Counseling."

(1) The form disclosed the applicant had been counseled on the following:

(a) That, if the applicant did not complete the NDR PEB process by his expiration term of service (ETS) date, he could receive a 1-year medical extension. If the Soldier voluntarily opted not to be extended, he could lose benefits associated with a medical discharge.

(b) The applicant had to provide medical documentation from his civilian provider and the VA covering the last 6 months, and in the event he reached "Optimum Medical Care," meaning no further medical treatment would improve his medical condition, the applicant was to obtain an "Optimum Care Statement" from his physician.

(c) The applicant was advised that his disqualifying medical condition was being processed as an NDR PEB case; if the applicant's medical condition was actually duty-related, he would need to submit supporting medical documentation to substantiate an in-line-of-duty determination.

(d) Discharge. The applicant was counseled that if he elected discharge, he could no longer be attending any form of military duty while awaiting discharge orders.

(2) In response, the applicant stated, "I understand if I voluntary ETS, I will forego completion of a PEB. I also understand that my condition is being reviewed as non-duty related. I understand that, if my condition is in the line-of-duty, it is my

responsibility to provide my unit of assignment the medical documentation from the date(s) of injury to substantiate a line-of-duty being completed. I further understand that I can only elect to have my case reviewed by the DA (Department of the Army) if I am able to provide all required documents listed on the ND(R) PEB Checklist. I understand that if I elect to be discharged, I will no longer attend any type of military duty while awaiting my discharge orders."

d. On 16 October 2013, the applicant completed the "Notification of Intent – Soldier Election Form" memorandum, wherein he requested consideration for the Early Reserve Retirement (ERR) for disabled members. Also, on 16 October 2013, the applicant submitted a DA Form 4187, requesting separation from the PAARNG. Under "Justification of Action," the form stated, "Soldier completed ND(R) PEB Election form requesting consideration for Early Reserve Retirement for disabled members. Soldier has been referred to PEB since the Soldier does not meet retention standards IAW (in accordance with) Chapter 3 (Medical Fitness Standards for Retention and Separation, Including Retirement), AR 40-501."

e. On 29 October 2013, the PAARNG issued the applicant his 15-Year Letter (Notification of Eligibility for Retired Pay for Non-Regular Service).

f. On 30 January 2014, PAARNG Orders honorably discharged the applicant and transferred him to The Retired Reserve. Under "Assignment/Loss Code," the order stated, "EARLY RET PAY AT AGE 60 (INVOL) MED DISQUAL MBR (15+YRS SVC)." His NGB Form 22 shows he completed 11 years, 10 months, and 25 days of service, with 2 years, 9 months, and 23 days of prior Reserve Component Service, and 4 years, 4 months, and 14 days of prior active Federal service; total service for retired pay was 19 years, 8 months, and 16 days.

g. On 25 January 2024, the U.S. Army Human Resources Command issued orders placing the applicant on the Army of the United States Retired List, effective 2 July 2024.

#### BOARD DISCUSSION:

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 the applicant was found medically unfit for retention in the ARNG. Upon notification of his disqualification, he submitted a DA Form 4187, requesting separation from the PAARNG. Under "Justification of Action," the form stated, "Soldier completed NDR (non-duty related) PEB Election form requesting consideration for Early Reserve Retirement. Soldier has been referred to PEB since the Soldier does not meet retention

standards in accordance with Chapter 3 (Medical Fitness Standards for Retention and Separation, Including Retirement), AR 40-501." Accordingly, he was honorably discharged in January 2014. Because he completed more than 15 but less than 20 qualifying years of service towards non-regular retirement (19 years, 8 months, and 16 days) and was separated due to a medical condition, he was issued a 15-Year Letter which would allow him to retire at age 60, albeit with reduced retirement. The applicant was also placed on the retired list in July 2024. The Board found no error or injustice in his separation processing. The Board also found no evidence he applied for or qualified for continuation. Since he did not complete 20 qualifying years of service, and since he was issued a 15-Year letter, and has since been placed on the retired list, the Board determined there is insufficient evidence to grant him the requested relief.

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:

a. Section 1414 (Members Eligible for Retired Pay who are also Eligible for Veterans' Disability Compensation for Disabilities Rated 50 Percent or Higher: Concurrent Payment of Retired Pay and Veterans' Disability Compensation).

(1) Subject to subsection (b) (Special Rules for Chapter 61(Retirement or Separation for Physical Disability) Disability Retirees), a member or former member of the uniformed services who is entitled for any month to retired pay and who is also entitled for that month to Veterans' disability compensation for a qualifying service-connected disability (hereinafter in this section referred to as a "qualified retiree") is entitled to be paid both for that month without regard to sections 5304 (Prohibition Against Duplication of Benefits) and 5305 (Waiver of Retired Pay) of title 38 (Veterans' Benefits). During the period beginning on January 1, 2004, and ending on December 31, 2013, payment of retired pay to such a qualified retiree is subject to subsection (c) (Phase-In of Full Concurrent Receipt).

(2) Subsection (b) (Special Rules for Chapter 61(Retirement or Separation for Physical Disability) Disability Retirees).

(a) Career Retirees. The retired pay of a member retired under chapter 61 of this title with 20 years or more of service, or at least 20 years of service computed under section 12732 of this title, at the time of the member's retirement is subject to reduction under sections 5304 and 5305 of title 38, but only to the extent that the amount of the member's retired pay under chapter 61 of this title exceeds the amount of retired pay to which the member would have been entitled under any other provision of law based upon the member's service in the uniformed services if the member had not been retired under chapter 61 of this title.

(b) Disability Retirees With Less Than 20 Years of Service. Subsection (a) does not apply to a member retired under chapter 61 of this title with less than 20 years of service as computed under section 12732 of this title, at the time of the member's retirement.

(3) Phase-In of Full Concurrent Receipt. During the period beginning on January 1, 2004, and ending on December 31, 2013, retired pay payable to a qualified retiree will be incrementally phased in.

b. 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.

c. Section 12731 (Age and Service Requirement). To receive retired pay, the person must have attained age eligibility, performed at least 20 years of qualifying service, and applied for retired pay.

d. Section 12731b (Special Rule for Members with Physical Disabilities Not Incurred in Line of Duty). In the case of a member of the Selected Reserve who no longer meets the membership qualifications solely because the member is unfit due to physical disability, the Secretary concerned may, for purposes of section 12731 of this title, determine to treat the member as having met the service requirements if the member has completed at least 15, and less than 20, years of service.

d. Section 12732 (Entitlement to Retired Pay: Computation of Years of Service). The person's years of service are computed by adding the following: Each one-year period, after July 1, 1949, in which the person has been credited with at least 50 points, based on one point for each day of active service and one point for each attendance at a drill or equivalent instruction. Additionally, the person will receive 15 points per year for membership in a Reserve Component.

## 2. Title 38.

a. Section 5304. Not more than one award of pension, compensation, emergency officers', regular, or reserve retirement pay, or initial award of naval pension granted after July 13, 1943, shall be made concurrently to any person based on such person's own service or concurrently to any person based on the service of any other person.

b. Section 5305. Any person who is receiving pay pursuant to any provision of law providing retired or retirement pay to persons in the Armed Forces and who would be eligible to receive pension or compensation under the laws administered by the Secretary if such person were not receiving such retired or retirement pay, shall be entitled to receive such pension or compensation upon the filing by such person with the department by which such retired or retirement pay is paid of a waiver of so much of such person's retired or retirement pay as is equal in amount to such pension or compensation. To prevent duplication of payments, the department with which any such waiver is filed shall notify the Secretary of the receipt of such waiver, the amount waived, and the effective date of the reduction in retired or retirement pay.

3. AR 40-501, paragraph 10-25, in effect at the time, stated ARNG Soldiers with non-duty related impairments were eligible for referral to a non-duty related physical evaluation board (NDR PEB) solely for a fitness determination, not to be considered for disability benefits. The regulation required the ARNG unit to counsel the Soldier and

complete a Letter of Duty Performance; the State Surgeon completed the DA Form 3349 (Physical Profile), a Fitness for Duty examination, and obtained any consults from civilian physicians; and the Soldier had to request the PEB and prepare for the submission of his packet for PEB evaluation.

4. AR 635-40, chapter 6, in effect at the time, stated once a PEB determined the Soldier was unfit for continued military service, the Soldier could request COAR, provided the requested period did not exceed 20 qualifying years of service for a non-regular retirement. For ARNG Soldiers, the COAR approval authority was the Chief, NGB.

//NOTHING FOLLOWS//