

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 9 August 2024

DOCKET NUMBER: AR20230013984

APPLICANT REQUESTS:

- to be retroactively placed on Title 10 United States Code (USC), Section 12301(h) orders effective 1 October 2020 – 29 September 2023 with entitlement to back pay
- a personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Self-authored letter
- Memorandum – Subject: Request Additional Information
- Memorandum – Subject: Exception to Policy (ETP)
- DA Form 3349 (Physical Profile Record)
- DD Form 361 (Report of Investigation – Line of Duty and Misconduct Status)
- Email communication

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code (USC), 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 pertinent part, she was injured while serving on Active-Duty for Operational Support (ADOS) orders. She contests that it took years to receive a diagnosis and be placed on a permanent performance limiting profile for this injury. She notes that by the time this process was completed, she had six-months remaining on her active-duty orders and had just begun working with a Physical Evaluation Board Liaison Officer (PEBLO). Unfortunately, her ADOS orders were not extended, and she was returned to her status as a drilling guardsman. During this period, she experienced extreme hardship due to a lack of pay and healthcare for her son. She has consistently worked with the Maryland Army National Guard (MDARNG) to obtain an ETP (still pending) which would extend her previous ADOS orders with

entitlement to back pay and service credit. She notes that in accordance with various military policies and Army Regulations "service members are to be retained on active-duty orders until deemed fit/unfit and continued on active duty throughout the Integrated Disability Evaluation System (IDES) process."

In a self-authored letter, she provides a chronological account of the events pertaining to her requested relief. While serving on active-duty orders with the ARNG she began receiving care through both her civilian and military healthcare providers for lower back pain. From October 2016 – September 2018, she served on ADOS orders with the U.S. Army Physical Disability Agency (USAPDA) to assist with the processing of disability claims. During this time, she was on and off profile without a specific diagnosis.

From June 2019 – September 2019 and from December 2019 – September 2020, she served on ADOS orders. During this period, medical examinations were conducted finally resulting in a diagnosed condition (posterior labral tear with focal chondral defect superior and posterosuperiorly for left hip pain). In June 2020, she provided medical documents to initiate her Line of Duty (LOD) determination and began seeking assistance with being retained on active duty. Sadly, she received very little assistance with doing so prior to her orders ending in September 2020.

In December 2020, she was advised that she was not eligible to receive 12301(h) orders i.e., orders extending ARNG Soldiers on active-duty to complete the IDES process. Prior to this, she believed that she qualified for these orders which would have provided for the same pay and healthcare previously afforded under the ADOS orders. This is just one example of the inaccurate information provided throughout the process. She was advised by her PEBLO that she was eligible for 12301(h) orders and should be entitled to backpay during this period.

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

- a. Following her service on active duty in the U.S. Marine Corps, on 2 October 2008, the applicant enlisted in the Virginia ARNG for 1 year.
- b. On 1 October 2009, the applicant was honorably discharged from the ARNG.
- c. On 26 March 2010, the applicant enlisted in the MDARNG.
- d. On 29 September 2016, the MDARNG issued Orders Number 22-6273-00023 placing the applicant on ADOS orders, under the provisions of Title 10, USC, section 12301 (D), effective 1 October 2016 for a period of 365 days; 30 September 2017 end date.

e. On 19 September 2017, the MDARNG issued Orders Number 22-7262-00002 placing the applicant on ADOS orders, effective 1 October 2017 for a period of 365 days; 30 September 2018 end date.

f. On 15 August 2018, the MDARNG issued Orders Number 22-7262-00002A01 amending Orders Number 22-7262-00002 to reflect an end date of 31 August 2018 (335 days) rather than 30 September 2018 (365 days).

g. On 31 August 2018, the applicant was honorably released from active duty.

h. On 8 May 2019, the U.S. Army Human Resources Command (AHRC) issued Orders Number HR-9128-00016 placing the applicant on ADOS orders, effective 13 May 2019 for a period of 141 days; 30 September 2019 end date.

i. On 19 June 2019, AHRC issued Orders Number HR-9128-00016A01 amending Orders Number HR-9128-00016 to reflect a report date of 3 June 2019 (120 days) rather than 13 May 2019 (141 days).

j. On 1 October 2019, the applicant was honorably released from active duty.

k. On 4 December 2019, AHRC issued Orders Number HR-9338-00026 placing the applicant on ADOS orders, effective 15 December 2019 for a period of 290 days; 29 September 2020 end date.

l. On 30 September 2020, the applicant was honorably released from active duty.

m. On 14 April 2021, the applicant was issued a Notification of Eligibility for Retired Pay for Non-Regular Service (20 Years) letter.

n. On 30 August 2023, USAPDA issued Orders Number D 242-01 releasing the applicant from assignment and duty because of physical disability incurred while entitled to basic pay and under conditions that permitted her retirement for permanent physical disability, effective 29 September 2023, with a disability rating of 30 percent.

o. On 5 October 2023, the MDARNG issued Orders Number 6228815 placing the applicant in the Retired Reserve, effective 30 September 2023.

4. The applicant provides the following a:

a. Memorandum – Subject: Request Additional Information, reflective of the National Guard Bureau Surgeon's review of the applicant's submitted LOD Investigation. Based on this review, the Surgeon was unable to make a medical assessment due to the lack of required documentation. To do so, the Surgeon required

medical documentation pertaining to the requested period. No further action would be taken until the supporting documentation was received.

b. Memorandum – Subject: ETP reflective of the MDARNG, Deputy Chief of Staff, G-1 – Personnel (DCSPER) submitted request for an ETP to retroactively backdate the applicant's ADOS orders to 1 October 2020. The DCSPER provides that the applicant was placed on permanent profile in September 2020, while on ADOS orders and should have been retained on active duty in accordance with Army Regulation (AR) 635-40 (Disability Evaluation for Retention, Retirement or Separation), paragraph 4-2a.(3) wherein it provides that "Reserve Component on active duty orders specifying a period of more than 30 days will, with their consent, be kept on active duty for disability evaluation processing...". He further provides that the applicant was initially placed on profile in August 2020, but they were unclear if the applicant met the Medical Retention Determination Point. In September 2020, the applicant was placed on permanent profile and assigned a PEBLO and appeared to have initiated the IDES process. Upon completion of her ADOS orders on 30 September 2020, the applicant's IDES processing was terminated. An LOD was initiated in October 2020 but was not approved until December 2021. In October 2022, the applicant was assigned a PEBLO and reentered into the IDES process. This document is further provided in its entirety within the Supporting Documents for the Board's review.

c. DA Form 3349 reflective of the applicant being placed on a permanent performance limiting profile for hip pain, effective 17 September 2020. The profile shows a "3" for lower extremity.

d. DD Form 361 dated 11 May 2021, reflective of a LOD determination pertaining to the applicant's hip injury, that was not associated with any known incident, but occurred overtime during a period where she was lifting heavy weights. The Investigating Officer (IO) determined that this injury was incurred in the line-of-duty. The IO's findings were approved on 14 October 2021 and approved by the reviewing authority on 16 December 2021.

e. Email communication, reflective of communication concerning the applicant's submitted ETP, LOD and IDES processing. These documents are further provided in their entirety within the Supporting Documents for the Board's review.

#### 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 review based on law, policy, and regulation. Upon review of the applicant's petition, and available military records, the

Board determined the applicant was released from active duty on 30 September 2020. Subsequent to her final release from active duty service, she was placed on the retired list with 30 percent disability from the Army National Guard on 30 August 2023, nearly 3 years after her release from active duty date. The Board concluded there is no evidence to support the applicant would have extended or remained on active duty for 3 additional years or that a condition existed at the time of her release from active duty that would have warranted her extension on active duty to receive medical care and/or treatment. Based on a preponderance of the evidence, the Board denied relief.

2. 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

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|---|---|---|----------------------|
| : | : | : | 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, USC, 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. AR 635-40 (Disability Evaluation for Retention, Retirement or Separation), provides policy and responsibilities for the disability evaluation and disposition of Soldiers who may be unfit to perform their military duties due to physical disability. Chapter 4 (Disability Evaluation System) provides that a Soldier 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 Veterans Affairs or have signed a statement that their right to make such a claim has been explained or have refused to sign such a statement.

a. Paragraph 4-2a(3) provides that Reserve Component (RC) Soldiers on active duty orders specifying a period of more than 30 days will, with their consent, be kept on active duty for disability evaluation processing until final disposition, subject to the circumstances set forth in paragraph 4-2a(2). The original orders issuing authority is responsible for funding and coordinating with the Army Medical Command (MEDCOM) to generate a 12301(h) order extending the RC Soldier on active duty to complete the IDES process.

b. Paragraph 4-2a(2) provides that RC Soldiers, who were called to active duty under the provisions of Title 10, USC, section 12301 but then released from active duty by the 30th day due to the identification of a pre-existing condition not aggravated by the current tour of active duty, and which fails retention standards, will come under the applicable DES process based on whether the pre-existing condition was previously incurred in the LOD (duty-related process) or was a condition incurred when not in a duty status (non-duty-related process).

3. Title 10, USC, section 12301(h) (Reserve Components – General) provides that when authorized by the Secretary of Defense, the Secretary of a military department may, with the consent of the member, order a member of a RC to active duty to receive authorized medical care or to be medically evaluated for disability.

a. A member ordered to active duty under this subsection may, with the member's consent, be retained on active duty, if the Secretary concerned considers it appropriate, for medical treatment for a condition associated with the study or evaluation, if that treatment of the member is otherwise authorized by law.

b. A member of the Army National Guard of the United States or the Air National Guard of the United States may be ordered to active duty under this subsection only with the consent of the Governor or other appropriate authority of the State concerned.

4. Title 10, USC, section 1552 states, the Secretary concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his or another's service in the Army.

5. AR 15-185 (Army Board for Correction of Military Records) states, the ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that applicant's 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//