

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 7 August 2024

DOCKET NUMBER: AR20230014247

APPLICANT REQUESTS: in effect, the amendment of his U. S. Army Physical Disability Agency (USAPDA) Orders Number D296-08 to be calculated to match his National Guard Bureau (NGB) Form 23A (Army National Guard (ARNG) Current Annual Statement)

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

- DD Form 149 (Application for Correction of Military Record)
- U. S. AHRC Orders Number D296-08
- Application for retired pay packet

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 requests the amendment of his USAPDA Orders Number to correction his service calculation to match his retirement points and creditable years of service on his NGB Form 23A. When he applied for his retired pay, he was informed by the Defense Finance and Accounting Service he could not receive his Concurrent Retirement and Disability Pay (CRDP) or his retirement pay because his service calculation on the orders which placed him on the PDRL, which stated not applicable did not match his NGB Form 23A. The USAPDA Orders Number D296-08 needs to be corrected to reflect:

- Basic Pay: 23 years, 10 months, 21 days
- Disability retirement: 12 years, 3 months, 21 days
- Title 10 United States Code (USC), section 1405: 14 years, 2 months, 6 days

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

a. The applicant's NGB Form 22 (NGB Report of Separation and Record of Service) shows the applicant enlisted in the ARNG on 25 January 1992. He had active Federal Service during the period of 1 October 1992 through 12 February 1993. The applicant was discharged from the ARNG effective 13 May 15 for failure to meet medical procurement standards with an uncharacterized character of service. NGB Form 22 shows the applicant completed 2-years, 3-months and 21-days of ARNG service.

b. On 1 May 1996, the applicant enlisted in the ARNG. He had continuous service through extensions and reenlistments. He served in the military occupational specialties (MOS) 13C (Tactical Automated Fire Control System Specialist), 95B (Military Police) and 92Y (Unit Supply Specialist).

c. The applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) shows the applicant was ordered to active duty for training effective 7 July 1996. He was released from active duty on 15 August 1996 with an uncharacterized character of service. DD Form 214 shows the applicant completed 1-month and 9-days of active service.

d. On 11 June 1998, Orders Number 162-4, issued by Headquarters, 29 Infantry Division (Light) Artillery, the applicant was awarded the MOS 13C effective 11 June 1998.

e. The applicant's service record is void of evidence he was ordered to active duty. However, on 22 June 2004, Orders Number A-06-405967, issued by the AHRC, the applicant was retained on active duty effective 22 June 2004 to participate in the Reserve component medical holdover medical retention processing program for completion of medical care and treatment.

f. The applicant's DD Form 214 shows he was ordered to active duty effective 7 July 2003 in support of Operation Enduring Freedom. On 25 October 2004, he was honorably released from active duty. DD Form 214 shows the applicant completed 1-year, 3-months and 19-days of active service.

g. On 14 August 2007, Orders Number 226-078, issued by the State of Maryland (MD) Military Department Fifth Regiment Armory, the applicant was ordered to full time NG duty, in Active Guard Reserve (AGR) status effective 16 August 2007.

h. On 15 January 2008, the applicant was honorably released from active duty to revert to a traditional Guardsmen status to continue in another active duty status. DD Form 214 shows the applicant completed 5-months of active service.

i. The applicant DD Form 214 shows he was ordered to active duty effective 16 January 2008 in support of Operation Iraqi Freedom. He was honorably released from active duty on 14 October 2008. DD Form 214 shows the applicant completed 8-months and 29-days of active service.

j. On 23 January 2011, Orders Number 023-005, issued by the State of MD Military Department Fifth Regiment Armory, the applicant was ordered to fill time NG duty in AGR status effective 15 May 2011.

k. On 3 November 2014, the MD ARNG Joint Force HQs MD, notified the applicant of his eligibility for retired pay for non-regular service at age 60 unless he would qualify for a reduce eligibility age retirement.

l. On 27 May 2015, the applicant's NGB Form 23A shows he obtained 4,820 total career points, 4,668 total points for retired pay with 21-years, 3-months and 21-days of creditable service for retired pay.

m. On 3 November 2015, Orders Number 307-0003, issued by the U. S. Army Garrison, Aberdeen Proving Ground, the applicant was placed on the Temporary Disability Retired List (TDRL) effective 16 December 2015 under the authority of Title 10 USC, section 1202 with an 80 percent temporary disability.

- Basic pay was based on 23-years, 10-months and 21-days of service
- Disability retirement was based on 12-years, 3-months and 21-days of service
- Service computation was 14-years, 2-months and 6-days of service.

n. On 5 November 2015, Orders Number 309-001, issued by the U. S. Army Garrison, Aberdeen Proving Ground, revoked Orders Number 307-0003.

o. On 5 November 2015, Orders Number 309-0002, issued by the U. S. Army Garrison, Aberdeen Proving Ground, the applicant was placed on the TDRL effective 16 December 2015 under the authority of Title 10 USC, section 1202 with an 80 percent temporary disability.

- Basic pay was based on 23-years, 10-months and 21-days of service
- Disability retirement was based on 12-years, 3-months and 21-days of service
- Service computation was 14-years, 2-months and 6-days of service.

p. The applicant's DD Form 214 shows he was ordered to active duty effective 15 October 2008. He was honorably retired from active duty effective 15 December 2015. DD Form 214 shows the applicant completed 7-years, 2-months and 1-days of active service with 5-years, 1-month and 21-days of prior active service for a total of 12-years, 3-months and 21-days of active Federal service. The applicant had 11-years and

7-months of prior inactive service for a total of 23-years, 10-months and 21-days of service.

q. The applicant's NGB Form 22 shows on 12 December 2015, the applicant was honorably released from the ARNG and assigned to the U. S. Army Reserve (USAR) Control Group (Retired Reserve). It also shows the applicant completed 19-years, 7-months and 15-days of service with 2-years, 3-months and 21-days of prior service for a total of 21-years, 11-months and 6-days of service for retired pay.

r. On 16 December 2015, Orders Number 350-003, issued by HQs, MD ARNG Fifth Regiment Armory, the applicant was honorably retired from the ARNG and assigned to the USAR Control Group (Retired Reserve) effective 15 December 2015 and placed on the TDRL.

s. On 4 January 2016, the applicant's NGB Form 23A shows he obtained 5,058 total career points, 4,897 total points for retired pay with 21-years, 11-months and 06-days of creditable service for retired pay.

t. On 22 March 2017, the Informal Physical Evaluation Board found the applicant physically unfit for retention and recommended he be placed on the Permanent Disability Retired List (PDRL) with 80 percent disability for:

- Major depressive disorder – 50 percent disability
- Right upper extremity cervical radiculopathy – 40 percent disability
- Left upper extremity cervical radiculopathy – 20 percent disability
- Cervical disc degeneration – 10 percent disability

u. On 23 October 2017, Orders Number D296-08, issued by the U. S. Army Physical Disability Agency, the applicant was removed from the TRDL effective 23 October 2017 and placed on the PDRL with 80 percent disability rating authorized under Title 10 USC, section 1201. However, the order stated

- Statute authorizing retirement: 1201
- Other eligible laws: Not Applicable
- Disability retirement: Not Applicable
- Basic pay: Not Applicable
- Completed over 4-years of active service as an enlisted Soldier or Warrant Officer: No.

v. On 18 July 2021, the applicant's NGB Form 23A shows he obtained 5,058 total career points, 4,897 total points for retired pay with 21-years, 11-months and 06-days of creditable service for retired pay.

w. On 23 October 2023, AHRC notified the applicant a review of his CRDP application revealed an error with the order which placed him on the PDRL and his NGB Form 23. His service calculation on his PDRL orders did not match the total points for retired pay on his NGB Form 23. Therefore, his request for CRDP could not be processed. It was recommended the applicant apply to the Army Board for Correction of Military Records to request the necessary correction to his PDRL orders to match his NGB Form 23 so he could be eligible to receive CRDP.

4. The applicant provides the application for retired pay benefits which he submitted on or about 22 July 2021 requesting his retirement pay to begin on 22 April 2022, the date of his 60th birthday.

5. On 24 May 2024, in the processing of this case, the NGB provided an advisory opinion regarding the applicant's request for the correction of his PDRL Orders Number 307-0003 to allow him to collect his non-regular retirement pay. The advisory official recommended disapproval of the applicant's request. The applicant is not eligible to receive non-regular retirement in accordance with Title 38 USC, section 5304, a military retiree may not receive Veteran Affairs (VA) disability compensation and military retirement pay concurrently. The applicant waived his non-regular retirement pay and began receiving his VA disability compensation in 2015 when he was placed on the PDRL.

a. The memorandum from AHRC which stated his application for CRDP could not be processed because of the mismatching Title 10 USC, section 1405 service calculation on the PDRL order and the NGB Form 23.

b. The NGB Retirement Branch determined both calculation to be accurate and because the applicant was a M-Day status Soldier the calculation for service and retirement points will not match, this is the case for an active duty Soldier.

6. On 29 May 2024, the Army Review Boards Agency Case Management Division provided the applicant the advisory opinion for review and comment. The applicant has not responded.

#### 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 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 the National Guard Bureau – Special Actions Branch advisory opinion, the Board concurred

with the advisory official finding the applicant is not eligible to receive non-regular retirement in accordance with Title 38 USC, section 5304, a military retiree may not receive Veteran Affairs (VA) disability compensation and military retirement pay concurrently. The record further shows the applicant waived his non-regular retirement pay and began receiving his VA disability compensation in 2015 when he was placed on the PDRL. Based upon a preponderance of the evidence, the Board determined there was insufficient evidence of an error or injustice to warrant relief in this case. Therefore, relief was denied.

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. Title 38 United States Code (USC), section 5304 (Prohibition against duplication of benefits), (a) (1) except as provided in Title 10 USC, section 1414 or to the extent that retirement pay is waived under other provisions of law, not more than one award of pension, compensation, emergency officers', regular, or reserve retirement pay, 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. (2) Notwithstanding the provisions of paragraph (1) of this subsection and of section 5305 of this title, pension under section 1521 or 1541 of this title may be paid to a person entitled to receive retired or retirement pay described in section 5305 of this title concurrently with such person's receipt of such retired or retirement pay if the annual amount of such retired or retirement pay is counted as annual income for the purposes of chapter 15 of this title.
  
3. Title 38 USC, section 5305 (Waiver of retired pay), except as provided in Title 10 USC, section 1414, 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.
  
4. Title 10 USC, section 1201 (Regulars and members on active duty for more than 30-days: retirement), upon a determination by the Secretary concerned that a member is unfit to perform the duties of the member's office, grade, rank, or rating because of physical disability incurred while entitled to basic pay or while absent, the Secretary may retire the member, with retired pay computed under section 1401 of this title, if the Secretary also makes the determinations with respect to the member and that disability specified in subsection (b). (b) Required Determinations of Disability, determinations by the Secretary that: based upon accepted medical principles, the disability is of a permanent nature and stable; the disability is not the result of the member's intentional misconduct or willful neglect, and was not incurred during a period of unauthorized absence; and either; the member has at least 20-years of service computed under

section 1208 of this title; or the disability is at least 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs at the time of the determination; and either:

- disability was not noted at the time of the member's entrance on active duty (unless clear and unmistakable evidence demonstrates that the disability existed before the member's entrance on active duty and was not aggravated by active military service);
- disability is the proximate result of performing active duty;
- disability was incurred in line of duty in time of war or national emergency; or
- disability was incurred in line of duty after 14 September 1978

5. Title 10 USC, section 1202 (Regulars and members on active duty for more than 30-days: temporary disability retired list), Upon a determination by the Secretary concerned that a member described in section 1201(c) of this title would be qualified for retirement under section 1201 of this title but for the fact that his disability is not determined to be of a permanent nature and stable, the Secretary shall, if he also determines that accepted medical principles indicate that the disability may be of a permanent nature, place the member's name on the temporary disability retired list, with retired pay computed under section 1401 of this title.

6. Title 10 USC, section 1405 (Years of service), for the purposes of the computation of the years of service of a member of the armed forces under a provision of this title providing for such computation to be made under this section, the years of service of the member are computed by adding:

- his years of active service;
- the years of service, not included in clause (1), with which he was entitled to be credited on May 31, 1958, in computing his basic pay; and
- the years of service, not included in clause (1) or (2), with which he would be entitled to be credited under section 12733 of this title if he were entitled to retired pay under section 12731 of this title

7. Title 10 USC, 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), Payment of Both Retired Pay and Compensation, 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 is entitled to be paid both for that month without regard to Title 38 USC, sections 5304 and 5305. During the period beginning on 1 January 2004, and ending on 31 December 2013, payment of retired pay to such a qualified retiree is subject to subsection (c), except that payment of



retired pay is subject to subsection (c) only during the period beginning on 1 January 2004, and ending on 31 December 2004, in the case of the following:

- a qualified retiree receiving veterans' disability compensation for a disability rated as 100 percent
- a qualified retiree receiving veterans' disability compensation at the rate payable for a 100 percent disability by reason of a determination of individual unemployability

8. Qualifying service-connected disability means a service-connected disability or combination of service-connected disabilities that is rated as not less than 50 percent disabling by the Secretary of Veterans Affairs.

9. Special Rules for Chapter 61 Disability Retirees, Career retirees; the retired pay of a member retired under chapter 61 of this title with 20-years or more of service otherwise creditable under section 1405 of this title, 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. 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 otherwise creditable under section 1405 of this title, or with less than 20-years of service computed under section 12732 of this title, at the time of the member's retirement.

//NOTHING FOLLOWS//