

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 25 September 2024

DOCKET NUMBER: AR20240000114

APPLICANT REQUESTS: in effect, separation or retirement due to disability vice being released from active duty upon completion of his required active service.

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

- DD Form 293, Application for Review of Discharge
- Pathology, Microbiology, and Immunology Report
- Doctor's Statement
- Public Law 117-168, Honoring Our PACT Act of 2022

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, that upon returning from Iraq in 2010 he began experiencing breathing issues. In 2018, he was diagnosed with constrictive bronchiolitis via lung biopsy resulting from the burn pits he operated in Iraq during his 2009 to 2010 deployment. He requested to be evaluated by a medical board; however, he was returned to his unit without any testing.
3. A review of the record shows the applicant enlisted in the Indiana Army National Guard (INARNG) on 23 March 2007. He held military occupational specialty 88M, Motor Transport Operator.
4. He was ordered to active duty in support of Operation Iraqi Freedom on 2 January 2009 and served in Kuwait/Iraq from 22 January 2009 to 20 December 2009. He was honorably released from active duty on 12 January 2010 in accordance with chapter 4 of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations) due to completion of his required active service.

5. On 22 March 2014, he was discharged from the INARNG in the rank of private first class/E-3 and transferred to U.S. Army Reserve Control Group (Reinforcement). His NGB Form 22 (Report of Separation and Record of Service) shows he was separated in accordance with National Guard Regulation 600-200 (Enlisted Administrative Separations) due to completion of his ARNG service (Reentry Code 1) (expiration of active status commitment in the Selected Reserve).

6. The applicant provided –

a. His final pathology from his lung biopsy, 19 April 2018. He was diagnosed with peribronchiolar anthracitic pigment deposition and polarizable dust, focal pleural adhesion, and mild emphysematous change.

b. A doctor's statement, 4 May 2018. The physician stated the applicant's constrictive bronchiolitis was a permanent condition.

c. A copy of Public Law 117-168, Honoring the PACT Act of 2022 which is an Act to improve the health care and benefits for veterans exposed to toxic substances, and for other purposes.

7. 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.

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 (AHLTA), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant is applying to the ABCMR in essence requesting a referral to the Disability Evaluation System (DES). He states:

"Upon returning from Iraq in 2010, I began experiencing breathing issues. In 2018 I was diagnosed with Constrictive Bronchiolitis via lung biopsy due to burn pits I operated in Iraq during my 2009-2010 deployment. On 10 Aug 2022, the PACT Act

was signed into legislation deeming my Constrictive Bronchiolitis a presumptive disability due to my deployment. I applied to be MEB boarded however I was returned to my unit without any testing."

c. The Record of Proceedings outlines the applicant's military service and the circumstances of the case. His National Guard Report of Separation and Record of Service (NGB Form 22) shows he entered the Army National Guard on 23 March 2007 and was honorably discharged from the Indiana Army National Guard (INARNG) on 22 March 2014 under provisions in paragraph 6-36n of NGR 600-200, Enlisted Personnel Management (31 July 2009): Expiration of active status commitment in the Selected Reserve. It shows 6 years, 0 months, and 0 days of total service for retired pay. From the VA website:

"The PACT Act is a law that expands VA health care and benefits for Veterans exposed to burn pits, Agent Orange, and other toxic substances. This law helps us provide generations of Veterans—and their survivors—with the care and benefits they've earned and deserve. And starting March 5, 2024, we're expanding VA health care to millions of Veterans—years earlier than called for by the PACT Act."

<https://www.va.gov/resources/the-pact-act-and-your-va-benefits/>

d. There are several encounters in the EMR and numerous encounters in JLV prior to his 2014 separation but none appear to address a pulmonary issue until 2015.

e. MEDCHART shows he was placed on a non-duty limiting permanent physical profile effective 23 September 2013 for moderate hearing loss, patellofemoral knee pain, and a chronic ankle sprain. No other conditions were listed on the profile. The applicant was marked as capable of performing all the functional activities required of all Soldiers, including living in an austere environment. The profile simply allowed the applicant to perform an alternate aerobic event in lieu of the 2-mile run event for his Army Physical Fitness Test (APFT). No further permanent profiles were issued.

f. 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."

g. Medical documentation submitted with this application includes the results of bilateral lung biopsies obtained on 17 April 2018. The finding for each lung were essentially the same: "Peribronchiolar anthracotic pigment deposition and polarizable dust, focal pleural adhesion, and mild emphysematous change."

h. In a 4 May 2018 "To Whom it May Concern" memorandum from his pulmonologist, it states the applicant had been diagnosed with constrictive bronchiolitis, it may be progressive, there is no known effective therapy, and it was recommended "that he avoid environments associated with temperature extreme , dust , chemical fumes and exhaust. I have also advised him to try and maintain his exercise capacity with conditioning as tolerated."

i. There is insufficient evidence the applicant had a pulmonary or other medical condition which would have failed the medical retention standards of chapter 3, AR 40-501 prior to his voluntary discharge; or which prevented him from reenlisting to continue his military career. Thus, there was no cause for referral to the Disability Evaluation System. Furthermore, there is no evidence that any medical condition prevented the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his voluntary discharge.

j. JLV shows he has been awarded multiple VA service-connected disability ratings. However, the DES compensates an individual only for service incurred medical condition(s) which have been determined to disqualify him or her from further military service. 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.

k. It is the opinion of the ARBA medical advisor that a referral of his case to the DES is not warranted.

#### 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 conclusion of the ARBA Medical Advisor that the applicant did not have any conditions prior to his discharge that would have been a

basis for referring him to the Disability Evaluation System. Based on a preponderance of the evidence, the Board determined the applicant's discharge upon completion of his active status commitment in the Selected Reserve 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.

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. Army Regulation (AR) 635-40, Personnel Separations-Physical Evaluation for Retention, Retirement, or Separation

- a. 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.
- b. 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 they can no longer continue to reasonably perform because of a physical disability incurred or aggravated in service.
- c. Under the laws governing the Army PDES, Soldiers who sustain or aggravate physically unfitting disabilities must meet the following LD 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 (IDT). (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.
- d. When a commander or other proper authority believes that a Soldier not on extended active duty is unable to perform the duties of their office, grade, rank, or rating because of physical disability, the commander will refer the Soldier for medical evaluation according to AR 40-501, Medical Services-Standards of Medical Fitness, or NGR 40-3, Medical Services-Medical Care for Army National Guard Members.
- e. If eligible for referral to a PEB, the Soldier may remain, with his or her consent, under control of the MTF during disability processing. If the PEB finds the Soldier unfit, the Soldier will remain under administrative control of the MTF pending receipt of the final decision. If determined fit, the Soldier will be returned to his or her duty station unless the training period has expired. If expired, the Soldier will be permitted to return home. The MTF commander where the MEB is held will notify the RC unit of the disposition of the Soldier's case.

3. Title 38, U.S. Code section 1110, General - Basic Entitlement: 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.

4. Title 38, U.S. Code, section 1131, Peacetime Disability Compensation - Basic Entitlement: 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.

5. The Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records on 25 July 2018, 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 grounds.

a. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. 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.

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.

7. AR 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. The ABCMR will decide cases on the evidence of record. It is not an investigative body. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

//NOTHING FOLLOWS//