

IN THE CASE OF: [REDACTED]

BOARD DATE: 26 September 2024

DOCKET NUMBER: AR20240000475

APPLICANT REQUESTS: Retirement under the Temporary Early Retirement Authorization (TERA) vice disability retirement

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

- DD Form 293 (Application for Review of Discharge) online application
- DD Form 293, paper application

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 he was retired medically on a Medical Evaluation Board (MEB)/Physical Evaluation Board (PEB). He requests to retire under TERA in 2011. His command would not allow him to retire under TERA. The reason he wants this to be looked at is to allow him to choose between the Concurrent Retirement and Disability Pay (CRDP) and Combat-Related Special Compensation (CRSC) retirement plans. In lieu of his PEB his PEB Liaison Officer did not submit his TERA request. He medically retired at 16 years and 9 months of service. He would have opted to retire under Title 10 U.S. Code (USC) servicemembers who do not meet 20 years for retirement but have 18 years or he would have retired under TERA. This would allow him to receive full retirement benefits as a servicemember with 20 years of creditable service.
3. The applicant's service records contain the following documents:
  - a. DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was in the U. S. Marine Corps from 24 January 1996 through 30 November 2008. He had completed 12 years, 10 months, and 7 days of active duty service.
  - b. DD Form 4 (Enlistment/Reenlistment Document Armed Forces of the United States) shows he enlisted in the Regular Army on 1 December 2008.

- c. DA Form 199 (PEB Proceedings), 17 May 2011 shows he was evaluated for lumbar degenerative arthritis; post-traumatic stress disorder (PTSD) and major depressive disorder; and left knee arthroscopic surgery bilateral plantar fasciitis and status post varicocelectomy . He was found fit for duty and he concurred with the board's findings.
- d. Memorandum approval of PEB, 7 June 2011, informed the command the applicant was found fit for duty and the findings were approved.
- e. DA Form 199 (PEB Proceedings), 26 June 2012, shows the applicant was found to be physically unfit for duty for PTSD. The board recommended he be placed on the Temporary Disability Retired List (TDRL) with a rating of 50 percent and a reexamination in March 2013. The disability resulted from a combat-related injury. He did not make an election regarding concurrence or nonconcurrence.
- f. A DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was honorably discharged from the Regular Army on 30 October 2012 for disability, temporary (enhanced). He had completed 3 years and 11 months of active duty service with 12 years, 10 months, and 7 days of prior active duty service. The applicant signed the DD Form 214 on 24 August 2012.
- g. A DA Form 199 (PEB Proceedings), 3 April 2015, shows the board found he was physically unfit for duty due to PTSD. The board recommended he be permanently retired due to disability with a rating of 70 percent. He concurred with the board's findings.
- h. Orders D099-108, published by U.S. Army Physical Disability Agency, 9 April 2015 removed him from the TDRL and permanently retired him with 70 percent disability.
- i. Letter from U.S. Army Human Resources Command, CRSC, 2 July 2013 shows he received CRSC for PTSD at 50 percent disability.
- j. His service record is void of information regarding a request to retire under TERA.

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 noted that the applicant's disability retirement was approved and he had outprocessed prior to the Army's implementation of TERA in October of 2012. The

Board found the applicant would not have had a reasonable opportunity to apply for retirement under TERA and determined there is no error or injustice.

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.



CHAIRPERSON

Signed by: USA

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. Title 10, USC, 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 Department of Defense (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 (Standards of Medical Fitness), 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 military occupational specialty 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.

3. Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation) establishes 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. Only the unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability.

4. Title 10, USC, section 1201, provides for the physical disability retirement of a member who has at least 20 years of service or a disability rating of at least 30 percent. Title 10, U.S. Code, section 1203, provides for the physical disability separation of a member who has less than 20 years of service and a disability rating of less than 30 percent.
5. Public Law 102-484, section 4403 of the Fiscal Year 1993 National Defense Authorization Act, dated 23 October 1992, was the first authorization to allow the U.S. Army to create an early retirement program, the Temporary Early Retirement Authorization (TERA) for Active Component and Active Guard and Reserve Soldiers who had completed 15 years of Active Federal Service (AFS), but less than 20 years of AFS at their separation date and who requested retirement in lieu of separation.
6. Department of Defense Instruction Number 1332.38 (Physical Disability Evaluation) implements policy, assigns responsibilities, and prescribes procedures for retiring or separating service members because of physical disability; making administrative determinations for Service members with Service-incurred or Service aggravated conditions; and authorizing a fitness determination for members of the Ready Reserve who are ineligible for benefits because the condition is unrelated to military status and duty. Enclosure 3 (Procedures), Part 7 (Final Disposition), paragraph E3.P7.2 (General Rules Regarding Disposition), subparagraph E3.P7.2.1.1, provides that members with a disposition of separation for physical disability who have 15 but less than 20 years of service computed under Title 10, USC, section 1208 (10 USC 1208) and whose unfitting conditions are not due to the member's intentional misconduct or willful neglect or incurred during a period of unauthorized absence, shall be afforded the opportunity to elect separation for physical disability or to apply for, and if approved, non-disability retirement under the Temporary Early Retirement Authority (TERA) under Title 10 USC 3911 during the period of temporary special qualification authority beginning on 23 October 1993 and ending on 1 October 2001. Further, the same opportunity shall be afforded to members recommended for placement on or separation from the Temporary Disability Retired List.
7. Title 38, U.S. Code, sections 1110 and 1131, permits the VA to award compensation for disabilities that were incurred in or aggravated by active military service. However, an award of a higher VA rating does not establish error or injustice on the part of the Army. The Army rates only conditions determined to be physically unfitting at the time of discharge which disqualify the Soldier from further military service. The VA does not have the authority or responsibility for determining physical fitness for military service. The VA awards disability ratings to veterans for service-connected conditions, including those conditions detected after discharge, to compensate the individual for loss of civilian employability. These two government agencies operate under different policies.

Unlike the Army, the VA can evaluate a veteran throughout his or her lifetime, adjusting the percentage of disability based upon that agency's examinations and findings.

8. Department of Defense Instruction 7000.14-R (Financial Management Regulation), states:

- a. The Temporary Early Retirement Authority (TERA) provides the Secretary of Defense a temporary force management tool with which to affect the drawdown of military forces and yet maintain an adequate and effective well trained military force. TERA provides the authority for voluntary retirement of members on active duty with at least 15 years, but less than 20 years of creditable service. An eligible member of the Armed Forces may apply for early retirement under the program and receive an annuity equivalent to 2.5 percent of retired pay base for each year of service completed and a deduction of one percent for each year short of 20 years of service. A member of the Armed Forces who is approved for early retirement must be currently serving on active duty and complete 15 or more years of active service upon the effective date of retirement.
- b. The Secretary of the Military Department concerned may reduce the 20 years of creditable service requirement to as few as 15 years, under TERA, for retirements during the period of 23 October 1992 and ending 1 September 2002 for regular and non-regular retirements.
- c. Section 640101, effective 1 January 2004, eligible military retirees are entitled to concurrent receipt of both retired pay and Department of Veterans Affairs (VA) disability compensation.
- d. Section 640201 (Eligibility) a qualified retiree must be a member or former member of the Uniformed Services who is entitled for any month to both retired pay and VA disability compensation that is based on a qualifying service-connected disability. A qualifying service-connected disability is a service-connected disability (or combination of service-connected disabilities) that VA rates at 50 percent or higher.
- e. Section 6403 (Application) a member is not required to submit an application to receive CRDP payments. DFAS will establish procedures to ensure that qualified retirees receive CRDP to which they are entitled pursuant to Title 10, USC, section 1414. Members who believe they are entitled to CRDP, but are not receiving it, should submit a written claim/inquiry to DFAS to ascertain the reason they are not currently receiving CRDP.

9. The DFAS website provides the following guidance related to Concurrent Retirement and Disability Pay (CRDP). CRDP allows military retirees to receive both military retired pay and Veterans Affairs (VA) compensation. You must be eligible for retired pay to

qualify for CRDP. If you were placed on a disability retirement but would be eligible for military retired pay in the absence of the disability, you may be entitled to receive CRDP. You may be entitled to CRDP if you are a regular retiree with a VA disability rating of 50 percent or greater or you are a disability retiree who earned entitlement to retired pay under any provision of law other than solely by disability.

10. MILPER Message Number 12-329, Temporary Early Retirement Authority (TERA), issued on 16 October 2012 (now rescinded), stated the TERA offered voluntary early retirement, at a reduced monthly retirement pay, to eligible members prior to completing 20 years of active service. TERA applies to Soldiers with established Headquarters, Department of the Army (HQDA) involuntary separation dates from active duty of 30 September 2018 or earlier, who have completed at least 15 years of active service.

a. This early retirement benefit was not extended to Soldiers who were previously separated under Voluntary Separation Incentive (VSI), Special Separation Benefit (SSB), Voluntary Separation Pay (VSP) programs or under evaluation for disability retirement under Title 10, chapter 61 (Retirement or separation for physical disability).

b. All Soldiers had to meet all eligibility requirements for retirement for length of service for a 20-year retirement, except as provided for in this message. In all cases, early retirement could not occur prior to attainment of 15 years of service on the established separation date.

//NOTHING FOLLOWS//