

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 24 September 2024

DOCKET NUMBER: AR20240001346

APPLICANT REQUESTS: placement on the Permanent Disability Retired List with a 100% disability rating.

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

- DD Form 149 (Application for Correction of Military Record)
- third-party statement (from spouse)
- orders for the Temporary Disability Retired List (TDRL)
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- Department of Veterans Affairs (VA) summary of benefits letter
- VA Health Summaries (one page)
- VA Rating Decision
- marriage license
- copies of Department of Defense Uniform Services identification cards

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 is requesting a reevaluation that was never done from TDRL which was originally awarded to permanently medically retired.
3. The applicant provided a statement from his spouse stating the following:

The reason for this letter is to change [the applicant] to full medical retirement instead of the 30% with Temporary Disability Retired List awarded by the United States Army. The reason I believe the Army should grant him a disability retirement is because he suffers from PTSD [post-traumatic stress disorder] with post-concussion syndrome due to the events he experienced during combat. Due to his PTSD he was placed on TDRL in April 2008 and until this day he is still receiving medical treatments and is on several medications. The current medications he is on

Mirtazapine 45mg, Prazosin HCL 5mg, Quetiapine Fumarate 400mg, and Venlafaxine HCL 75mg. These medications I have to order and make sure he is taking them every day, since he cannot manage taking them properly. He cannot perform everyday tasks such as driving, taking his medications, handling his finances, cooking, or perform day to day tasks around the house. I had to leave my job two years ago to care for him since he requires 24 hour care since he is a danger to himself if left alone. He also suffers from migraines, tinnitus and has a left ear scar which was caused by a rocket attack in Iraq in 2004. Due to his medical history, he was granted a service connected evaluation by the VA of 100% totally and permanently disabled on 14 August 2020. With his medical history I believe he should have an increase from 30% TDRL to 100% permanently medically retired.

4. The applicant enlisted in the Regular Army on 23 July 2002. His record shows he served in Iraq from 12 February 2004 to 3 March 2005.

5. A DA Form 199 (Physical Evaluation Board (PEB) Proceedings) that on 11 December 2007, a PEB found the applicant unfit for further military service due to PTSD secondary to deployment to Iraq. The PEB recommended a 30% disability rating and the applicant's placement of the TDRL with reexamination during March 2009.

6. The DA Form 199 contains the following entries informing the applicant of the following:

a. Based on a review of the medical evidence of record, the PEB concludes that your medical condition prevents satisfactory performance of duty in your grade and specialty. This condition has not stabilized to the point that a permanent degree of severity can be determined. You are therefore placed on the TDRL.

b. While on the TDRL you will be scheduled for periodic medical reexaminations and reevaluations. To assist in future evaluations, the PEB may request information from you concerning your medical treatment while on the TDRL.

c. When you report for your TDRL periodic medical reexamination you must provide the examining physician copies of all medical records (civilian, military, or VA), including pharmacy records, documenting all treatment since placement on the TDRL. Failure to comply with this requirement may result in termination of disability retired pay.

d. You must keep the U.S. Army Physical Disability Agency (USAPDA) informed of your current mailing address. Address changes must be reported to: Commander, U.S. Army Physical Disability Agency, ATTN: TAPD-PDB (TDRL Section), Building 7, Walter Reed Army Medical Center, Washington, DC 20307-5001.

e. Failure to report for a scheduled exam or to notify the USAPDA of an address change will result in the suspension of retired pay.

7. The applicant's available DA Form 199 does not contain the "Soldier's Election" section/page. This section of the form shows whether the Soldier's concurred or did not concur with the PEB findings and recommendations. This section also shows the Soldier's signature acknowledging he/she was advised of the findings and recommendations of the PEB and that he/she received a full explanation of the results of the findings and recommendations and legal rights pertaining thereto.

8. Orders issued on 10 January 2008 directed the applicant's release from assignment and duty because of physical disability and his placement on the TDRL effective 2 April 2008.

9. The applicant's DD Form 214 shows he was released from active duty on 2 April 2008 under the provisions of Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation) by reason of disability, temporary.

10. The applicant provided:

a. A VA Health Summaries showing his active and recently expired medications.

b. VA documents showing he was granted service-connected disability compensation for PTSD and left ear scar with a combined 100% disability rating.

11. During the processing of this case, an advisory opinion was obtained from the USAPDA Legal Advisor. It states:

a. This is in response to a request for a legal advisory opinion regarding the applicant's petition "to do a reevaluation that was never done from TDRL which was originally awarded to permanently medically retired." Additionally, it is requested that the original rating of 30% be increased to 100% based on VA ratings dated 14 August 2020. The requests were made on his behalf by his spouse. For the reasons set forth in more detail below, the USAPDA finds the requests to be legally insufficient.

b. On 11 December 2007, a PEB found the applicant unfit for PTSD with a 30% rating based on VA ratings. He was notified that he would be placed on the TDRL and informed that failure to report for a scheduled exam, or to notify the USAPDA of an address change, would result in the suspension of retired pay. He concurred on 21 December 2007; his effective date of retirement was 2 April 2008; and he was placed on the TDRL the following day.

c. Army Regulation 15-185 (ABCMR), paragraph 2-9 states that, with respect to the allegations of errors related to military records, there is a presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence. Title 10, U.S. Code, §1210(a) states, "If a member fails to report for an examination... his disability retired pay may be terminated. However, payments to him shall be resumed if there was just cause for his failure to report. If payments are so resumed, they may be made retroactive for not more than one year." Based on the facts presented, the applicant has failed to overcome the presumption of administrative regularity or otherwise demonstrate error or injustice.

d. While the applicant's spouse's letter is commendable, it is unfortunately devoid of facts pertinent to the relevant time period (i.e., 2008 - 2013). Notably, while she explains that her husband incurred combat-related PTSD and post-concussion syndrome, she refers only to his current condition and treatment. Moreover, the increase in ratings by the VA is based on a review of treatment records from 2014-2020, as well as Disability Benefits Questionnaires completed in 2020. Absent more detailed facts about any failure to report to TDRL-related examinations between 2008 and 2013, the presumption of regularity must carry as a matter of law.

e. Conclusion: For the reasons set forth above, the USAPDA find the request to be legally insufficient because the evidence presented fails to overcome the presumption of regularity. As it relates to his ratings, the evidence of record indicates that the PEB acted appropriately and the servicemember concurred in the findings and recommendations. However, as it relates to his retirement status, the USAPDA is open to reconsidering this position upon the presentation of evidence that, in accordance with Title 10, U.S. Code, §1210(a), shows just cause for his failure to report to examinations during the relevant time period.

12. The USAPDA advisory opinion was provided to the applicant and given the opportunity to provide additional evidence or comments. No response was received.

13. The Army rates only conditions determined to be physically unfitting at the time of discharge, which disqualify the Soldier from further military service. The Army disability rating is to compensate the individual for the loss of a military career. The VA does not have authority or responsibility for determining physical fitness for military service. The VA may compensate the individual for loss of civilian employability.

14. 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 requesting reinstatement of his disability retirement or a referral to the Disability Evaluation System.

c. The Record of Proceedings outlines the applicant's service and the circumstances of the case. The applicant's DD 214 shows he entered the regular Army on 23 July 2002 and placed on the temporary disability retirement list (TDRL) on 2 April 2008 under the authority provided by paragraph 4-24b(2) of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (8 February 2006).

d. The outside advisory from the United States Army Physical Disability Agency thoroughly addresses the issue in this case: The applicant was placed on the TDRL for PTSD and he then failed to report for his TDRL reevaluation and was removed from the TDRL without benefits as required by law.

e. The EMR shows the applicant was seen twice for his PTSD at Kenner Army Health Clinic shortly after discharge, on 21 May 2008 and 4 June 2008. The only other two mental encounters during his TDRL period were also at Kenner on 14 October 2009 and 18 March 2011.

f. JLV shows his first encounter at a VA facility VA was on 8 September 2014 and his first behavioral health encounter at a VA facility was an initial evaluation on 9 September 2014.

g. Neither the EMR nor JLV contain any other clinical encounters for the period of time during which the applicant was on and prior to his removal from the TDRL.

h. There is insufficient evidence the applicant had a mental health or other medical condition which prevented him or possible care providers from maintaining contact with the USAPDA and/or attending his TDRL reevaluation examination(s).

i. It is the opinion of the ARBA Medical Advisor that a reinstatement of his prior disability rating, a change in status to permanently retired for physical disability, and/or a referral to the Disability Evaluation System are all unwarranted.

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.

a. The applicant is asking this Board to reinstate his disability retirement or refer him back to the disability evaluation system. The evidence shows a PEB found the applicant's medical condition unfitting but at the time, his condition had not stabilized to the point that a permanent degree of severity can be determined. Thus, the PEB temporarily retired him by placing him on the TDRL at a 30% disability rating, with future reexamination. The PEB informed him that failure to report for a scheduled exam, or to notify the U.S. Army Physical Disability Agency (USAPDA) of an address change, would result in the suspension of retired pay. He concurred on 21 December 2007; his effective date of retirement was 2 April 2008; and he was placed on the TDRL the following day.

b. The evidence further shows the applicant failed to report for an examination, and as a result, his disability retirement was terminated, as required by the governing regulation. The Board found no error or injustice in his separation processing as he has not shown just cause for his failure to report to examinations that would have determined his medical fitness during the relevant time period. The Board also reviewed and agreed with the USAPDA legal reviewer's determination as well as the agency's medical reviewer's determination that reinstatement of his prior disability rating, and/or a change in status to permanently retired for physical disability, and/or a referral to the Disability Evaluation System are all unwarranted.

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 10, U.S. Code, 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 (USAPDA) is responsible for administering the Army Disability Evaluation System (DES) and executes Secretary of the Army decision-making authority as directed by Congress

in chapter 61 and in accordance with Department of Defense Directive 1332.18 and Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation).

3. Army Regulation 635-40 establishes the Army DES 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. The regulation in effect at the time of the applicant's placement on the Temporary Disability Retired List (TDRL) states in

a. Paragraph 3-9, the TDRL is used in the nature of a "pending list". It provides a safeguard for the Government against permanently retiring a Soldier who can later fully recover, or nearly recover, from the disability causing him or her to be unfit. Conversely, the TDRL safeguards the Soldier from being permanently retired with a condition that may reasonably be expected to develop into a more serious permanent disability. Requirements for placement on the TDRL are the same as for permanent retirement. The Soldier must be unfit to perform the duties of his or her office, grade, rank, or rating at the time of evaluation. The disability must be rated at a minimum of 30% or the Soldier must have 20 years of service computed under Title 10, United States Code, Section 1208. In addition, the condition must be determined to be temporary or unstable.

b. Paragraph 4-19, when the recommendation of the PEB is placement or retention on the TDRL, failure to report for a scheduled periodic examination or to inform the U.S. Army Human Resources Command of a change in address will result in the suspension of retired pay.

c. Chapter 7, a Soldier's name may be placed on the TDRL when it is determined that the Soldier is qualified for disability retirement under but for the fact that his or her disability is determined not to be of a permanent nature and stable. A Soldier on the TDRL must undergo a periodic medical examination and PEB evaluation at least once every 18 months to decide whether a change has occurred in the disability for which the Soldier was temporarily retired. Soldiers who fail to complete a physical examination when ordered will have their disability retired pay suspended. To prevent the Soldier suffering severe financial and other hardships, processing delays will be avoided. All portions of the medical examination will be conducted on a priority basis. All involved agencies and personnel will ensure that cases of Soldiers nearing expiration of 5-year TDRL tenure are identified and given priority processing.

d. The USAPDA will remove a Soldier from the TDRL as described below on the fifth anniversary of the date the Soldier's name was placed on the list, or sooner on the approved recommendation of a PEB. If the Soldier meets the following criteria, the Soldier will be removed from the TDRL, permanently retired for physical disability, and entitled to receive disability retired pay:

(1) The Soldier is unfit.

(2) The disability causing the Soldier's name to be placed on the TDRL has become permanent.

(3) The disability is rated at 30% or more under the VA Schedule for Rating Disabilities, or the Soldier has at least 20 years of active Federal service.

4. Title 10, U.S. Code, section 1210 provides:

a. A physical examination shall be given at least once every 18 months to each member of the armed forces whose name is on the TDRL to determine whether there has been a change in the disability for which he was temporarily retired. He/she may be required to submit to those examinations while his/her name is carried on that list. If a member fails to report for an examination under this subsection, after receipt of proper notification, his/her disability retired pay may be terminated. However, payments to him/her shall be resumed if there was just cause for his/her failure to report. If payments are so resumed, they may be made retroactive for not more than one year.

b. If, as a result of a periodic examination it is determined that the member's physical disability is of a permanent nature and stable and is at least 30% under the standard schedule of rating disabilities in use by the Department of Veterans Affairs at the time of the determination, his/her name shall be removed from the TDRL and he/she shall be permanently retired for physical disability.

5. Title 10, U.S. Code, 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%.

6. Title 38, U.S. Code, Sections 1110 and 1131, permit the VA to award compensation for disabilities which were incurred in or aggravated by active military service. However, an award of a VA rating does not establish an error or injustice on the part of the Army.

7. Title 38, Code of Federal Regulations, Part IV is the VA Schedule for Rating Disabilities. The VA awards disability ratings to veterans for service-connected conditions, including those conditions detected after discharge. As a result, the VA, operating under different policies, may award a disability rating where the Army did not find the member to be unfit to perform his duties. 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. 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.

//NOTHING FOLLOWS//