

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 28 October 2024

DOCKET NUMBER: AR20240002308

APPLICANT REQUESTS: correction of his retired rank/grade to staff sergeant (SSG)/E-6 with a date of rank (DOR) of 28 September 2006. Additionally, he requests an appearance before the Board via video or telephone.

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

- DD Form 149 (Application for Correction of Military Record)
- Recommended List for Promotion of Enlisted Personnel, dated 26 May 2006
- Enlisted Record Brief (ERB), dated 16 June 2006
- Physical Disability Information Report, dated 30 June 2006
- DD Form 214 (Certificate of Release or Discharge from Active Duty), for the period ending 28 September 2006
- Memorandum, Army Review Boards Agency (ARBA), dated 26 February 2018
- Orders 086-0310, U.S. Army Installation Management, Headquarters, U.S. Army Garrison, Fort Bragg, NC, dated 27 March 2018
- DD Form 215 (Correction to DD Form 214), issued on 29 March 2018

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 pursuant to Title 10, USC, Sections 1201 and 1372, he is entitled to the next higher retirement grade. He earned sergeant promotable (SGT(P)) and was promotable in July 2003 while overseas. During airborne operations in February 2005, he sustained injuries that would end his career. In September 2006, he was separated without a retirement. However, in February 2018, he was awarded a retroactive retirement. Had his retirement been awarded in 2006, he most likely would have learned of the aforementioned laws while out-processing.

3. The applicant entered active duty in the Regular Army on 2 July 1987. He was honorably released from active duty and transferred to the Individual Ready Reserve on

22 January 1993, under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 4, by reason of expiration term of service, in the rank grade of specialist/E-4. He completed 5 years, 6 months, and 21 days of net active service this period.

4. He reenlisted in the Regular Army on 10 September 1997, in the rank grade of private/E-2 and subsequently reenlisted on 2 March 2000, in the rank/grade of SGT/E-5.

5. Orders Number 181-0268, issued by the 18th Airborne Corps, Fort Bragg, NC, on 30 June 2006, shows the applicant was ordered to be discharged on 28 September 2006, under the provisions of Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation), with a 10 percent (%) disability rating. He was authorized disability severance pay in the pay grade of E-5, based upon 14 years, 7 months, and 10 days of service.

6. Order Number 188-0270, issued by the same command, on 7 July 2006, shows the previous order was amended to show the applicant was authorized disability severance pay in the pay grade of E-6, based upon 14 years, 7 months, and 10 days of service.

7. The applicant was honorably discharged on 28 September 2006, in the rank/grade of SGT/E-5, under the provisions of Army Regulation 635-40, paragraph 4-24b(3), by reason of disability, severance pay. He completed 9 years and 19 days of net active service this period, with 5 years, 6 months, and 21 days of total prior active service.

8. On or about 28 January 2018, the Physical Disability Board of Review (PDBR) adjudicated the disability rating accompanying the applicant's medical separation. After carefully reviewing the applicant's application and medical separation case file, the board recommended the separation be recharacterized to reflect a permanent disability retirement with a combined disability rating of 30%.

9. The PDBR recommendation was forwarded to ARBA for approval. On 26 February 2018, the Deputy Assistant Secretary of the Army approved the recommendation and directed that all Department of the Army records pertaining to the applicant be corrected to show he was separated by reason of permanent disability retirement, effective the date of the original medical separation; that the applicant be provided with orders showing he was retired with permanent disability; that pay and allowances be adjusted accordingly; and the applicant be given an opportunity to elect Survivor Benefit Plan (SBP) and Tricare retiree options.

10. On 27 March 2018, the applicant's previous separation order was rescinded. Orders Number 086-0310, issued by the 18th Airborne Corps, Fort Bragg, NC, on that same date, ordered the applicant's release from assignment and duty by reason of physical disability, with an effective date of retirement as 28 September 2006 and

placement on the retired list on 29 September 2006, in the rank/grade of SGT/E-5 with a DOR of 1 March 2000.

11. The applicant was issued a DD Form 215, on 29 March 2018, which shows the applicant was transferred to the Retired Reserve on 28 September 2006, under the provisions of Army Regulation 635-40, paragraph 4-24b(1), by reason of disability, permanent.

12. The applicant provides the following:

a. His ERB, dated 16 June 2006, which shows his DOR to SGT/E-5 as 1 March 2000 and completion of the Warrior Leader Course in 1991.

b. A Recommended List for Promotion of Enlisted Personnel, dated 26 May 2006, shows the applicant was recommended for promotion to SSG/E-6.

c. A Physical Disability Information Report, dated 30 June 2006, shows the pertinent information regarding the applicant's initial separation with 10% disability, in the grade of E-5.

d. The additional documents provided by the applicant are included in his service record and summarized in the Record of Proceedings above.

13. In the processing of this case, an advisory opinion was obtained on 27 August 2024, from the Chief, Enlisted Promotions, Promotions Branch, U.S. Army Human Resources Command (AHRC). The advisory official noted and opined, in pertinent part:

a. [The applicant's] request for correction of his DD Form 214 to reflect his rank/grade as SSG/E-6 with a date of pay grade as 28 September 2006 should be approved, per Army Regulation 600-8-19 (Enlisted Promotions and Reductions).

b. Due to his separation from the Army, he is no longer in the personnel system. Therefore, a promotion transaction cannot be completed, and a promotion order cannot be issued.

c. He is not entitled to back pay.

14. The applicant was provided a copy of this advisory opinion on 3 September 2024. He provided a rebuttal, dated 4 October 2024, wherein he states, it was his intent to request all that was and is afforded under the laws and regulations cited, to include Title 10, USC, Section 1372 and Army Regulation 600-8-19, paragraph 1-20(c). Since the law, as written, prescribes a due promotion to the pay grade that would have been promoted to, he is making that request. He did not get a resolution in his first medical

board that would have afforded him an in-service promotion order under the law as it would have at that time.

15. The Board should consider the applicant's argument and/or evidence in accordance with the published equity, injustice, or clemency determination guidance.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was 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 request, available military records and the U.S. Army Human Resources Command – Enlisted Promotions Branch advisory opinion, the Board concurred with the advising official recommendation for approval for correction of the applicant's DD Form 214 to reflect his rank/grade as SSG/E-6 with a date of pay grade as 28 September 2006. The Board noted, the opine the applicant is not entitled to back pay. Based on the advising opine and evidence from the Physical Disability Board of Review (PDBR) the Board granted 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

■	■	■	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board determined the evidence presented is sufficient to warrant a recommendation for relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be adjusted to show the applicant's rank/grade as SSG/E-6 with a date of pay grade as 28 September 2006. There is no entitlement to back pay.

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 (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 Army Board for Correction of Military Records (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, Section 1372 provides the legal authority for the grade to be awarded to members retiring for physical disability. Unless entitled to a higher retired grade under some other provision of law, any member of an armed force who is retired for physical disability under Section 1201 or 1204 of this title, or whose name is placed on the temporary disability retired list under Section 1202 or 1205 of this title, is entitled to the grade equivalent to the highest of the following:
 - a. The grade or rank in which he is serving on the date when his name is placed on the temporary disability retired list or, if his name was not carried on that list, on the date when he is retired.
 - b. The highest temporary grade or rank in which he served satisfactorily, as determined by the Secretary of the armed force from which he is retired.

c. The permanent regular or reserve grade to which he would have been promoted had it not been for the physical disability for which he is retired, and which was found to exist as a result of a physical examination.

d. The temporary grade to which he would have been promoted had it not been for the physical disability for which he is retired if eligibility for that promotion was required to be based on cumulative years of service or years of service in grade and the disability was discovered as a result of a physical examination.

3. Army Regulation 15-80 (Army Grade Determination Review Board (AGDRB) and Grade Determinations), paragraph 3-1, states enlisted Soldiers will usually retire in the grade held on the day before placement on the retired list. The AGDRB will make final determinations on behalf of the Secretary of the Army and will determine the highest grade in which the Soldier has served satisfactorily for purposes of disability retirement.

4. Army Regulation 15-185 (Army Board for Correction of Military Records) prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR. The regulation provides that applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

5. Army Regulation 600-8-19 (Enlisted Promotions and Reductions), prescribes the enlisted promotions and reductions function of the military personnel system.

a. Paragraph 1-20c provides that, per the provisions of Title 10, USC, Section 1372, Soldiers on a promotion list at the time of retirement for disability will be retired for disability at the promotion list grade. Further, the Soldier will be promoted to the designated grade effective the day before placement on the retired list.

b. Per the provisions of Title 10, USC, Section 1212, Soldiers who are on a promotion list at the time of separation for disability with entitlement to disability severance pay will be paid such compensation at the promotion list grade.

c. Further, the Soldier will be promoted effective on the Soldier's separation date. The Noncommissioned Officer Professional Development System (NCOPDS) requirements in paragraph 1-29 are waived. For Reserve Component (RC) Soldiers, such promotions will occur without regard to vacancy.

6. Army Regulation 635-40 (Disability Evaluation for Retention Retirement, or Separation), 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 or her office, grade, rank, or rating. Chapter 4-30 (Grade on retirement or separation for physical disability) provides that the grade at which a

Soldier is retired or receives disability severance pay will be the highest of the options listed below in accordance with the provisions of 10 USC 1212 and 10 USC 1372, respectively, and as implemented by Army Regulation 15–80 for determinations of highest grade satisfactorily held.

(1) Current grade. No time-in-grade is required.

(2) Highest grade satisfactorily held. In accordance with Army Regulation 15–80, Soldiers determined unfit who are not currently serving in the highest grade served will be referred by the U.S. Army Physical Disability Agency to the AGDRB, unless the Soldier is entitled to a higher or equal grade by operation of law (10 USC 1212 and 1372) or the Soldier upon being advised of his entitlement to a review fails to submit matters. If a Soldier referenced in this paragraph does not receive a review by the AGDRB before the placement on the disability retired list, separation with severance pay for disability, or receives a review and is dissatisfied with the determination, the Soldier may apply to the ABCMR for a review of their retired grade.

(3) Grade to which the Soldier would have been promoted had it not been for the physical disability for which the Soldier was determined unfit. In general, this provision pertains to Soldiers on a promotion list. For Active Army and RC enlisted disability cases, this option is implemented under the provisions of Army Regulation 600–8–19. 7. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records (BCM/NR) regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. BCM/NRs may grant clemency regardless of the type of court-martial. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to other corrections, including changes in a discharge, which may be warranted based on equity or relief from injustice.

//NOTHING FOLLOWS//