

IN THE CASE OF: [REDACTED]

BOARD DATE: 17 October 2024

DOCKET NUMBER: AR20240002806

APPLICANT REQUESTS: correction of his records to award him constructive active service credit of 3 years, 7 months, and 24 days in the form of COAD (continuation on active duty) to reach 20 years of active service.

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

- Counsel's Legal Brief
- Applicant Affidavit
- Separation Order
- DD Form 149 (Application for Correction of Military Record)
- DA Form 5893, Soldier's Medical Evaluation Board/Physical Evaluation Board Counseling Checklist

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20220005465 on 14 December 2022.
2. Counsel states the applicant's retirement orders show that the applicant was retired from the service on 18 December 2014. At this juncture, the applicant had 16 years, 4 months, and 6 days of active service. Because of his injuries, the applicant qualified for, and should have been granted, COAD. As a result, this Board should grant the applicant constructive service from the time of his retirement until the date he would have attained 20 years of active service.
 - a. Although the applicant's DA Form 5883 indicates that the applicant was counseled regarding COAD, he has no memory of being meaningfully counseled regarding the COAD program and what he needed to do to apply for it. He does not have any memory of this counseling and would certainly have applied for COAD if he had been counseled. The DA Form 5883 is very dense and complicated, and if the form is not meaningfully explained to a servicemember, confusion can result. The applicant does not recall receiving any explanation let alone a meaningful one, regarding COAD, and would have applied for the program if he had. This Board should grant the applicant

constructive service from the time of his retirement until the date he would have attained 20 years of active service.

b. The applicant has made many positive strides since his application to the Board. His youngest son was born on [Date]. He also adopted his two teenage children on [Date]. Professionally, he has entered a PhD. program for computer science and interviewed for a GG-14 position at the Joint Interoperability Test Command. These personal and professional achievements demonstrate his efforts to better himself and his community and speak to the inequity of denying him constructive service from the time of his retirement until the date he would have attained 20 years of active service.

3. The applicant states this affidavit is in support of his counsel's letter regarding his recently received retirement orders. His DA Form 5883 indicates that he was counseled regarding Continuation on Active Duty ("COAD"). He has no memory of this happening. If he were counseled, the counseling did not help him understand what COAD is and why he should or should not have requested it. He has no recollection of being told what COAD is, what it would do for him, or why or how he should apply for it. If he had been counseled regarding COAD, he would have certainly applied for it. In 2014, he wanted to continue serving our great country and reach his 20-year retirement mark.

a. If he had understood that COAD was one way he could continue to be useful to the mission, he would have certainly explored it. But no one made this clear to him. A lot of the Army's administrative requirements and forms are confusing and hard to follow for him. DA Form 5883 is no exception. He swears today that he has no memory of being counseled regarding COAD. If he were, he certainly didn't receive an opportunity to meaningfully understand that the program was all about.

b. For this reason, among the others he has listed in his application, he believes that the fairest thing for this Board to do is grant him constructive service credit so that he can get his 20 year retirement, as he would have done if he had understood what the COAD program was all about. He has made many positive strides since his application to the Board. His youngest son was born on a date in 2022. He also adopted his two teenage children on date in 2022. Professionally, he has entered a Ph.D. program for computer science and interviewed for a GG-14 position at the Joint Interoperability Test Command. These personal and professional achievements demonstrate his efforts to better himself and his community. He thinks these efforts also demonstrate the justice of granting him constructive service from the time of his retirement until the date he would have attained 20 years of active service.

3. Having had prior Regular Army enlisted service (12 years and 8 months), the applicant was appointed a Reserve warrant officer on 13 April 2011 and entered active duty on 13 April 2011. He held military occupational specialty 352N, Signal Intelligence Technician. He was promoted to chief warrant officer two (CW2).

- a. On 18 April 2014, a medical evaluation board (MEB) determined that the applicant's diagnosis of thoracic spine degenerative changes failed retention standards in accordance with Army Regulation (AR) 40-501 (Standards of Medical Fitness). The MEB recommended his referral to a physical evaluation board (PEB). The MEB proceedings show he was diagnosed with 18 additional conditions, including obstructive sleep apnea, which were deemed to meet retention standards in AR 40-501.
- b. On 3 August 2014, an informal PEB found the applicant unfit for further military service due to thoracic spine degenerative changes. The PEB recommended a 10% disability rating and the applicant's separation with severance pay.
- c. The PEB found the applicant's additional 18 medical conditions, including obstructive sleep apnea, not unfitting because the MEB indicated these conditions met retention standards.
- d. The applicant's DA Form 199 (Informal PEB Proceedings) contains the following statements in Section VI:
 - (1) This case was adjudicated as part of the Integrated Disability Evaluation System (IDES) under the 19 December 2011 Policy and Procedure Directive-type Memorandum (DTM) 11-015.
 - (2) The specific VASRD codes to describe the Soldier's condition and the disability percentage was determined by the VA and is documented in a VA memorandum dated 22 July 2014. The disposition recommendation was determined by the PEB based on the VA disability rating proposed and applicable statutes and regulations for the Physical Disability Evaluation System (PDES).
- e. On 20 August 2014, the applicant's PEB Liaison Officer completed the DA Form 5893, counseling the applicant throughout all phases of disability process, including COAD. The applicant initialed next to the block that reads: "I have been counseled and understand the criteria and procedures for requesting continuation on active duty or continuance in the Active Reserve (COAD/COAR)."
- f. On 15 September 2014, the applicant concurred with the PEB's findings and recommendations and did not request reconsideration of his VA ratings.
- g. Orders 337-0902, issued by Headquarters, U.S. Army Cyber Center, Fort Gordon, GA on 3 December 2014, ordered his separation effective 1 December 2014 due to disability (10%) with entitlement to severance pay.
- h. The applicant's DD Form 214 shows he was discharged on 18 December 2014 under the provisions of AR 635-40 (Disability Evaluation for Retention, Retirement, or

Separation), chapter 4, by reason of disability, severance pay, combat zone. The DD Form 214 also shows he completed 16 years, 4 months, and 6 days of active service.

4. On 14 December 2022, this Board responded to his petition. He requested two things: physical disability retirement in lieu of separation with severance pay and correction of his records to show he completed 20 years of qualifying service for retirement.

a. Prior to adjudicating his case, the Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. The medical reviewer determined the following:

(1) The applicant was diagnosed with diabetes with the initiation of oral medication in May 2014. Diabetes requiring oral medication fails the medical retention standard in paragraph 3-11d of AR 40-501, Standards of Medical Fitness (4 August 2011). This new condition should have been evaluated by an MEB and referred to a PEB for adjudication.

(2) The applicant's cardiac condition should also have been referred to the PEB for adjudication. The applicant was referred to cardiology in May for further evaluation of an abnormal echocardiogram.

(3) The applicant had been diagnosed with chronic ischemic heart disease. One measure of the heart's ability to support physical activity in the MET or metabolic equivalent. AR 40-501 shows that myocardial disease which is Functional Class II or worse fails medical retention standards. Table 3-1 of AR 40-501 lists these standards which would meet and fail retention standards. Based on the limited information in the record, the applicant's cardiac condition was either a marginal class I or class II and so should have undergone further evaluation before it was declared to meet medical retention standards.

(4) The ARBA Medical Advisor recommended that a referral of his case back to the DES is warranted for evaluation of his diabetes and cardiac condition.

b. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that partial relief was warranted. The Board carefully considered through counsel 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.

(1) Upon review through counsel of the applicant's petition, available military records and the medical advisory the Board concurred with the advising official finding a referral of the applicant's case back to the DES is warranted for evaluation of his

diabetes and cardiac condition. Based upon the preponderance of the evidence, the Board agreed that counsel demonstrated the applicant's record should be directed to be entered into the Disability Evaluation System (DES) for medical evaluation consideration, with all relief dependent upon a final medical determination. Therefore, the Board granted partial relief.

(2) Referral to the IDES occurs when a Soldier has one or more conditions which appear to fail medical retention standards as documented on a duty liming permanent physical profile. 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.

(3) The Board determined that the evidence presented was sufficient to warrant a recommendation for partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by directing the applicant be entered into the Disability Evaluation System (DES) and a Medical Evaluation Board (MEB) convened to determine whether the applicant's condition(s), to include [applicable conditions], met medical retention standards at the time of service separation.

(a) In the event that a formal physical evaluation board (PEB) becomes necessary, the individual concerned will be issued invitational travel orders to prepare for and participate in consideration of her case by a formal PEB. All required reviews and approvals will be made subsequent to completion of the formal PEB.

(b) Should a determination be made that the applicant should have been separated under the DES, these proceedings will serve as the authority to void his administrative separation and to issue him the appropriate separation retroactive to his original separation date, with entitlement to all back pay and allowances and/or retired pay, less any entitlements already received.

5. As a result of the Board's decision,

a. Headquarters, U.S. Cyber Command published Order 293-0901 on 20 October 2023 that revoked Orders 337-0902, issued by Headquarters, U.S. Army Cyber Center, Fort Gordon, GA on 3 December 2014, that ordered his separation effective 1 December 2014, due to disability (10%) with entitlement to severance pay.

- b. Headquarters, U.S. Cyber Command published Order 293-0902 on 20 October 2023 that changed the applicant's disposition from separation with severance pay at 10% to permanent disability retirement at 50%, backdated to the applicant's original separation date of 18 December 2014. He was placed on the permanent disability retired list in the rank of CW2 effective 19 December 2014, with back pay and allowances.
- c. Headquarters, U.S. Cyber Command published a DD Form 215 (Correction to DD Form 214) that changed the discharge to retirement with corresponding authority and separation code, and reason from "disability severance pay" to "disability retirement."
6. There is no evidence in the record that shows the applicant applied for COAD or served on active duty beyond his original separation date of 18 December 2014.
7. By regulation (AR 635-40), a Soldier who has been found unfit by a PEB for further military service has no inherent or vested right to continuation. Soldiers must elect to be considered for COAD or COAR. However, the Secretary of the Army, or designee, may involuntarily continue the Soldier in consideration of the Soldier's service obligation, special skill, or experience. Requests will be approved based on the needs of the Army. Requests will not be approved solely to increase the Soldier's separation or retirement benefits.

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. Although the applicant asserts he was not adequately counseled on COAD, the Board found the applicant's initials on the DA Form 5893 acknowledging he was counseled on COAD contrary to his assertion. The Board found insufficient evidence to support a conclusion that the applicant was unfairly deprived of an opportunity to request COAD. Based on a preponderance of the evidence, the Board determined the applicant's retirement prior to completing 20 years of active duty service is not an error or an injustice.

BOARD VOTE:

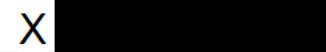
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: : : GRANT FULL RELIEF
: : : GRANT PARTIAL RELIEF
: : : GRANT FORMAL HEARING
 DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined that the overall merits of this case are insufficient as a basis to amend the decision of the ABCMR set forth in Docket Number AR20220005465 on 14 December 2022.

4/2/2025


XCHAIRPERSON


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:

Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation) prescribes Army policy and responsibilities for the disability evaluation and disposition of Soldiers who may be unfit to perform their military duties due to physical disability.

a. Paragraph 6-1 prescribes the criteria for Soldiers to be continuation on Active Duty (COAD) and continuation on Active Reserve (COAR), as applicable, subsequent to being found unfit after completion of the duty-related DES process. The purpose of this exception to policy is to conserve manpower by effective use of needed skills or experience in a limited duty status. The fact that a Soldier has or has not applied for COAD or COAR will not influence the determination of fitness or the determination of the disability rating percentage, when applicable. A Soldier who has been found unfit by a PEB for further military Service has no inherent or vested right to continuation.

Soldiers must elect to be considered for COAD or COAR. However, the Secretary of the Army, or designee, may involuntarily continue the Soldier in consideration of the Soldier's service obligation, special skill, or experience. Requests will be approved based on the needs of the Army. Requests will not be approved solely to increase the Soldier's separation or retirement benefits. A status of COAD or COAR is not authorized until a finding of unfit is approved by USAPDA.

b. Paragraph 6-5. Decision criteria. Approval of an eligible request remains subject to the needs of the Army. In addition, the approval authority will use the criteria and considerations below to decide approval or disapproval.

(1). Criteria. (1) The Soldier's unfitting disability(ies) must be basically stable or of slow progression according to accepted medical principles. (This standard does not cause disqualification of requests from Soldiers pending placement on the TDRL based on TDRL disposition, alone.); and (2) The Soldier's disability must not be detrimental to the Soldier's health or to the best interests of the Army. For example, the disability does not preclude the Soldier from being physically capable of performing useful duty; does not require undue loss of time from duty for medical treatment; and does not pose a risk to the health or safety of other Soldiers.

(2) Considerations. (1) Time in service; (2) Level of performance, trends in efficiency, and professional values and/or attributes; (3) Performance prior to injury; (4) Ability to attend professional military education; (5) The ability to lead or positively influence Soldiers. Reconsideration or appeal. Once a request for continuation is disapproved by an approving authority, there is no reconsideration or appeal.

(3) Paragraph 6-6. Length of continuation: The approval authority will determine the length of continuation on a case-by-case basis. Final determinations for enlisted Soldiers will take into consideration established dates for ETS and RCPs. An approved period of continuation, to include to 20 years of active Service, does not constitute a waiver of disability disposition at expiration of the continuation period.

(a) A request for COAD may be approved for any period up to the last day of the month in which the Soldier attains 20 years of active Service, but will not exceed the RCP, if applicable, for the current grade. The continuation period will not exceed the maximum service time an officer is allowed to serve in accordance with 10 USC.

(b) A request for COAR may be approved for any period of time up to the minimum time required for the Soldier to attain 20 qualifying years for a non-regular retirement but will not exceed the maximum years of service authorized for the Soldier's grade or mandatory removal date from active status.

(c) A Soldier approved for continuation for a period of less than 20 years as outlined in paragraphs 6-6a and 6-6b may reapply for another period of continuation after completion of the follow-on MEB.

(d) Normally, a Soldier approved for continuation to the applicable 20-year period will not be approved for another period of continuation unless their skills or specialties are mission-essential. Such requests must be endorsed by the first O-6, or DA Civilian equivalent, in the requesting organization's chain of command. The request must justify the nature of the mission-essential requirement. Mandatory removal or retirement dates and maximum years of service will be considered in the adjudication of such requests.

//NOTHING FOLLOWS//