

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 16 January 2025

DOCKET NUMBER: AR20240003212

APPLICANT REQUESTS: in effect, physical disability discharge from the Army National Guard (ARNG) in lieu of an honorable administrative discharge due to Army Physical Fitness Test (APFT) failure

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

- DD Form 149 (Application for Correction of Military Record)
- Department of Veterans Affairs (VA) Disability Ratings printout, undated

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:

a. He was discharged due to back to back APFT failures. He had spoken to his command regarding the struggles with breathing he had while running. He would fail his run by 4-6 minutes but would still push through it.

b. After getting out of the ARNG, he saw a civilian doctor and explained his issues. That doctor took the time to listen and look at him properly. He discovered he has severe sleep apnea as well as obstructive airway. He took his case to the VA and showed how, when he constantly complained about his issues with sleeping and breathing, all he would be given was Ambien to fix the problem. Because of the lack of care and the timeframe, the VA was able to grant him a disability.

c. In February, he received a letter stating he owed the ARNG almost \$1,000.00 from his time in service 8 years ago. He asked why this letter was coming to him from so many years ago and was told that the State was still trying to catch up on cases. He

explained that his APFT failures were due to medical conditions that were not looked into and brushed under the rug. Yet, the VA recognized they were wrong and granted him a disability because of it.

d. The Board should consider the fact that when he spoke with leadership and medical staff, no one cared to listen and just passed him over regarding his day to day struggles. It was not until a civilian doctor took the time and cared to see what his issues were that he received help. The system let him down.

3. The applicant enlisted in the ARNG on 29 September 2004, and was awarded the Military Occupational Specialty (MOS) 15P (Aviation Operations Specialist).

4. A DD Form 214 (Certificate of Release or Discharge from Active Duty) shows:

a. The applicant was ordered to active duty in support of Operation Enduring Freedom on 20 June 2011, and served in Afghanistan from 15 August 2011 through 18 June 2012.

b. He was honorably released from active duty on 5 September 2012, due to completion of required active service and transferred back to his ARNG unit.

c. He was credited with 1 year, 2 months, and 16 days of net active service this period.

5. The applicant's records contain numerous DA Forms 705 (APFT Scorecard), which reflect:

- he failed the weight, body fat percentage, and 2-mile run event on a record APFT on 3 May 2015
- he failed the weight, body fat percentage, and 2-mile run event on a record APFT on 15 October 2015
- he failed the weight, body fat percentage, and 2-mile run event on a record APFT on 24 October 2015

6. A DA Form 4856 (Developmental Counseling Form) shows:

a. The applicant was counseled by his company commander on 6 February 2016 for failing the APFT standards and failing all diagnostic tests given since his initial failure.

b. His permanent physical profile for the push-up event is annotated on the counseling as well as his DA Forms 705, excusing him from passing that event.

c. He was advised that under normal circumstances, record APFT failures will result in a recommendation for separation under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), but there is a current policy from The Adjutant General in place directing that Soldiers are not to be out processed for two consecutive APFT failures but allowed to reenlist.

d. He was also advised, in accordance with Army Regulation 600-8-19 (Enlisted Promotions and Reductions), that company commanders have the authority to administratively reduce Soldiers within their company who are ranked specialist (SPC) and below. He was advised if he did not pass his APFT by April 2016, an administrative reduction would be processed. (Note that the applicant's rank/grade was sergeant (SGT)/E-5 and therefore, per regulatory guidance, the authority for his reduction would lie with a field grade commander in the rank of lieutenant colonel or higher and not his company commander).

7. Multiple additional DA Forms 705 show:

- the applicant failed the weight, body fat percentage, and 2-mile run event on a record APFT on 3 April 2016
- he failed the weight, body fat percentage, and 2- mile run event on four additional diagnostic APFTs between 15 November 2015 – 11 June 2016

8. On 1 May 2016, the applicant was notified by his immediate commander of his recommendation to reduce him one rank/grade from SGT/E-5 to SPC/E-4 for failure to pass the APFT. He initially failed his APFT on 24 October 2015 and his record was flagged. He was counseled on 6 February 2016, that if he failed to pass his APFT by April 2016, he would be reduced. He was advised that due to his time in service, he was authorized a reduction board if he chose.

9. A DA Form 2166-9 (Noncommissioned Officer Evaluation Report (NCOER) (SGT), covering the period from 11 June 2015 through 10 June 2016, shows:

a. The applicant failed the APFT on 3 April 2016 and was not within the standard for height and weight. The comments show his increased effort to pass the APFT was evident by cutting almost 2 minutes off his run time. He showed little to no progress to decrease his overall body composition.

b. In Part IV (Performance Evaluation, Professionalism, Attributes, and Competencies) (Rater) he was rated "Did Not Meet Standard" in Presence (Military and professional bearing, Fitness, Confidence, Resilience) with comments including:

- failed height and weight standards/exceeded body composition standard in accordance with regulatory guidance by 4 percent; entered into the Army Body Composition Program
- failed the 2-mile run event on last record APFT and achieved a score of 113 while on profile; displayed a lack of motivation for continued service in the Army

10. On 12 June 2016, the applicant acknowledged receipt of the notice of recommendation for his reduction issued to him on 12 June 2016. He indicated he did not wish to make any statements in rebuttal, declined legal advice related to these pending actions, and requested a reduction board, to which is was entitled.

11. On 13 June 2016, the applicant was notified by his battalion commander of his support of his unit's command team and intention to reduce him one grade from E-5 to E-4 based on his failure to meet the APFT requirements.

a. In October 2015, he failure a record APFT. In the following months, he failed to pass the APFT and on 6 February 2016, he was counseled and notified that if he did not pass the APFT by April 2016, he would be reduced in rank. In April 2016, he again failed the APFT.

b. His command afforded him the proper amount of time required by Army regulation to meet the APFT standards and he failed to perform to the standard expected of an NCO. It was understood that the applicant denied his right to legal advice but requested a reduction board. His request would be forwarded to the Utah ARNG Judge Advocate General's Office for board proceedings.

12. A DA Form 5500 (Body Fat Content Worksheet) (Male), 4 December 2016, shows the applicant was not in compliance with standard; the maximum body fat percentage allowed was 24 percent and his body fat percentage was 31 percent.

13. The acronym "PUHLES" describes the following six physical factors used in the profiling system to classify medical readiness: "P" (Physical capacity or stamina), "U" (Upper extremities), "L" (Lower extremities), "H" (Hearing), "E" (Eyes), and "S" (Psychiatric). Physical profile ratings are permanent (P) or temporary (T). A service member's level of functioning under each factor is represented by the following numerical designations: 1 indicates a high-level of fitness, 2 indicates some activity limitations are warranted, 3 reflects significant limitations, and 4 reflects one or more medical conditions of such a severity that performance of military duties must be drastically limited.

14. A review of the U.S. Army Human Resources Command (AHRC) Soldier Management System (SMS) shows the applicant's PULHES was 121111, based on his

last physical on 1 December 2016, with a rating of 2 in the factor U (Upper Extremity). He had no significant limitations in factor U and had no limitations in any other factors.

15. The applicant's available service records do not show:

- he was issued a permanent physical profile rating
- he suffered from a medical condition, physical or mental, that affected his ability to perform the duties required by his MOS and/or grade or rendered him unfit for military service
- he was diagnosed with a medical condition that warranted his entry into the Army Physical Disability Evaluation System (PDES)
- he was diagnosed with a condition that failed retention standards and/or was unfitting

16. A DA Form 4187 (Personnel Action) shows on 12 January 2017, the applicant requested voluntary transfer to the Individual Ready Reserve (IRR) for the remainder of his contracted service. His current expiration term of service (ETS) was 28 October 2018.

a. He stated he was requesting to be placed in the IRR due to the fact that he was having difficulty keeping up with his civilian as well as his military life. He was doing all he could to keep his head above water when it came to staying ahead of personal finances, which included recently taking on a fourth job (including his ARNG job).

b. He further stated he had little free time. He went from one job to another every day, having to take time off from his civilian jobs for weekend drills with a unit he would not be deploying with was keeping him from putting in time with his civilian employers, who pay a significant amount more for his time and allow him to keep a roof over his head.

17. Email correspondence between the applicant and officials in the UTARNG on 26 January 2017 shows there was confusion related the applicant's reduction board process, as in some portions of the paperwork he indicated he wanted a reduction board, but in other sections he indicated he did not. The applicant responded definitively that effective 26 January 2017, he waived the right to a reduction board.

18. On 2 February 2017, the applicant's battalion commander notified him of his decision to reduce him one grade from E-5 to E-4, based on his failure to meet the APFT requirements. It was understood he waived his right to legal advice and a reduction board. This decision would be sent to the UTARNG, G-1 and the action would be effective immediately.

19. The above-referenced DA Form 4187 shows on 14 February 2017, the applicant's immediate commander recommended approval of the applicant's 12 January 2017, request for transfer to the IRR.

20. A National Guard Bureau (NGB) Form 22 (National Guard Report of Separation and Record of Service) shows the applicant was honorably transferred from the ARNG to the U.S. Army Reserve (USAR) Control Group (IRR) effective 18 May 2017, under the provisions of National Guard Regulation 600-200 (Enlisted Personnel Management) paragraph 6-36f, at the request of the Soldier to be transferred to the IRR. He was credited with 12 years, 7 months, and 20 days of net active service and his rank/grade is reflected as SPC/E-4.

21. UTARNG Orders 220-024, 8 August 2017, honorably discharged the applicant from the ARNG and assigned him to the USAR Control Group (IRR) effective 18 May 2017, under the provisions of National Guard Regulation 600-200, paragraph 6-36f, with assignment/loss code IJ (incompatible occupation). Further instructions indicate Selected Reserve Incentive Program (SRIP) termination and recoupment effective 18 May 2017.

22. An undated VA Disability Ratings printout, presumably pertaining to the applicant although he is not identified by name on the form, shows his combined service-connected disability rating in 80 percent for the following conditions:

- post-traumatic stress disorder (PTSD), 30 percent effective 28 June 2023
- eczema, 0 percent effective 8 August 2022
- obstructive sleep apnea with shortness of breath on exertion, 50 percent effective 16 June 2019
- scars, right shoulder, 0 percent effective 12 August 2018
- bilateral tinnitus, 10 percent effective 4 July 2018
- right shoulder impingement syndrome, status post arthroscopic subacromial decompression, 20 percent effective 4 July 2018

23. The applicant did not provide a copy of the letter of indebtedness referenced in his application.

24. Title 38, USC, 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.

25. Title 38, CFR, Part IV is the VA's 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 their lifetime, adjusting the percentage of disability based upon that agency's examinations and findings.

26. 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:

"I was discharged due to back-to-back PT [Army physical fitness test] failures. I had spoken to my command regarding the struggles of breathing when running. I would fail my run by 4-6 mins but I would still push through it.

After getting out of the guard, I saw a civilian doctor and explained my issues. That doctor took the time to listen and look at me properly and discovered I have severe sleep apnea as well as obstructive airway. I took my case to the VA and showed how when I constantly complained about my issues with sleeping and breathing and all I would be given was Ambien to fix the problem.

Because of the lack of care and the time frame the VA was able to grant me disability because of it."

c. The Record of Proceedings details the applicant's service and the circumstances of the case. His National Guard Report of Separation and Record of Service (NGB Form 22) for the period of Service under consideration shows the former drilling Soldier entered the Army National Guard on 29 September 2004 and was honorably discharged from the Utah Army National Guard (UTARNG) on 18 May 2017 under provisions provided in paragraph 6-36f of NGR 600-200, Enlisted Personnel Management (31 July 2009): Individual request of the Soldier not to be discharged from the Reserve of the Army status in order to become a member of the Army Reserve, Individual Ready Reserve.

Multiple Army Physical Fitness Scorecards (DA form 705) show the applicant failed two Army Physical Fitness Tests (APFT) in 2015 and another two in April 2016. They also showed the applicant failed Army height and weight standards throughout this period.

d. On 1 May 2016, his commander informed him of his recommendation for a reduction in rank from sergeant (E5) to specialist (E4) for multiple APFT failures. He declined counsel and later waived his right to a reduction review board. On 14 February 2017, the applicant requested transfer to the Individual Ready Reserve (IRR) for the remainder of his contract. Orders published by the UTARNG show the applicant was transferred to the USAR Control Group (IRR) effective 18 May 2017.

e. JLV shows he has been awarded multiple VA service-connected disability ratings, including PTSD originally effective June 2023 and sleep apnea originally effective in June 2019. There is no evidence either condition failed the medical retention standards of chapter 3 of AR 40-501, Standards of Medical Fitness, prior to his discharge; or was a significant factor in his multiple APFT failures. Thus, there was no cause for referral to the Disability Evaluation System. In addition, there is no evidence his sleep apnea was either incurred while or permanently service aggravated during a period of qualifying military Service.

f. Finally, there is no evidence that any duty-incurred medical condition prevented the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his discharge.

g. The DES compensates an individual only for service incurred 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 authority were granted by Congress to the Department of Veterans Affairs and are executed under a different set of laws.

h. It is the opinion of the Agency 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 that relief was not warranted.

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. On 25 August 2017, the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to Discharge Review Boards (DRBs) and Boards for Correction of Military/Naval Records (BCM/NRs) when considering requests by veterans for modification of their discharges due in whole or in part to: mental health conditions, including post-traumatic stress disorder (PTSD), traumatic brain injury (TBI), sexual assault, or sexual harassment. Boards are to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based, in whole or in part, on those conditions or experiences.

3. 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 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 DOD Directive 1332.18 (Discharge Review Board (DRB) Procedures and Standards) and Army Regulation 635-40 (Disability 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 a Medical Evaluation Board (MEB); when they receive a permanent medical profile rating of 3 or 4 in any factor and are referred by an Military Occupational Specialty (MOS) 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 Physical Evaluation Board (PEB). The purpose of the MEB is to determine whether the service member's injury or illness is severe enough to compromise their 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 their 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.

4. Army Regulation 635-40 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.

a. 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 who can no longer continue to reasonably perform because of a physical disability incurred or aggravated in military service.

b. Soldiers who sustain or aggravate physically-unfitting disabilities must meet the following line-of-duty 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.

(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.

5. Army Regulation 40-501 provides information on medical fitness standards for induction, enlistment, appointment, retention, and related policies and procedures. Soldiers with conditions listed in chapter 3 who do not meet the required medical standards will be evaluated by an MEB and will be referred to a PEB as defined in Army Regulation 635-40 with the following caveats:

a. U.S. Army Reserve (USAR) or Army National Guard (ARNG) Soldiers not on active duty, whose medical condition was not incurred or aggravated during an active duty period, will be processed in accordance with chapter 9 and chapter 10 of this regulation.

b. Reserve Component Soldiers pending separation for In the Line of Duty injuries or illnesses will be processed in accordance with Army Regulation 40-400 (Patient Administration) and Army Regulation 635-40.

c. Normally, Reserve Component Soldiers who do not meet the fitness standards set by chapter 3 will be transferred to the Retired Reserve per Army Regulation 140-10 (USAR Assignments, Attachments, Details, and Transfers) or discharged from the Reserve Component per Army Regulation 135-175 (Separation of Officers), Army Regulation 135-178 (ARNG and Reserve Enlisted Administrative Separations), or other applicable Reserve Component regulation. They will be transferred to the Retired Reserve only if eligible and if they apply for it.

d. Reserve Component Soldiers who do not meet medical retention standards may request continuance in an active USAR status. In such cases, a medical impairment incurred in either military or civilian status will be acceptable; it need not have been incurred only in the line of duty. Reserve Component Soldiers with non-duty related medical conditions who are pending separation for not meeting the medical retention standards of chapter 3 may request referral to a PEB for a determination of fitness in accordance with paragraph 9-12.

6. 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 percent.

7. National Guard Regulation 600-200 (Enlisted Personnel Management) prescribes he criteria, policies, processes, procedures, and responsibilities to classify, assign utilize, transfer within and between States, provides special duty assignment pay, separate, and appoint to and from Command Sergeant Major ARNG and Army National Guard of the Unites States enlisted Soldiers. Paragraph 6-36 lists the reasons for separation from the State ARNG not listed in paragraph 6-35 and includes:

a. Paragraph 6-36f, shows individual request for the Soldier not to be discharged from the reserve of the Army status in order to become a member of the USAR, Individual Ready Reserve (IRR).

b. Paragraph 6-36g shows incompatible occupation (employment conflict). The Soldier must submit documentation to support undue and genuine hardship or conflict caused by membership in the ARNG and civilian occupation.

8. Title 38, U.S. Code, section 1110 (General – Basic Entitlement) states 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.

9. Title 38, U.S. Code, section 1131 (Peacetime Disability Compensation – Basic Entitlement) states 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.

10. 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//