

IN THE CASE OF: [REDACTED]

BOARD DATE: 24 January 2025

DOCKET NUMBER: AR20240004892

APPLICANT REQUESTS:

- in effect, reconsideration of his prior request for placement on the Permanent Disability Retired List (PDRL) in lieu of removal from the Temporary Disability Retired List (TDRL) after a finding of fitness for duty
- personal appearance before the Board

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

- DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States)
- Pulmonary Functions Test, 19 October 2023

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 AR20200004021 on 13 August 2021.

2. The applicant states:

a. He submitted a prior application considered under Docket Number AR20200004021, but he has not heard back about that application. That may be due to no evidence of the current reason he was discharged.

b. He is submitting evidence with this application to justify why his retirement should be active and any decision to nullify his retirement be reversed. Reversal of this decision will not only help him financially, but will help with ongoing treatment for respiratory conditions, post-traumatic stress disorder (PTSD), tinnitus, etc. This will assist him in getting the best care for himself.

3. After a prior period of honorable service in the U.S. Army Reserve (USAR), the applicant enlisted in the Regular Army on 25 January 2007.

4. The applicant deployed to Afghanistan from 30 August 2007 through 6 October 2007.

5. The applicant's DA Form 3349 (Physical Profile), DA Form 7652 (Disability Evaluation System (DES) Commander's Performance and Functional Statement), Medical Evaluation Board (MEB) Narrative Summary (NARSUM), DA Form 3947 (MEB Proceedings), Department of Veterans Affairs (VA) Compensation and Pension (C&P) Exam, VA Proposed Rating Decision for DES purposes, and VA Rating Decision are not in his available records for review and have not been provided by the applicant.

6. A DA Form 199 (Physical Evaluation Board (PEB) Proceedings) shows:

a. A PEB convened on 11 April 2008, where the applicant was found physically unfit with a recommended combined rating of 30 percent and that his disposition be placement on the TDRL with reexamination in October 2009.

b. His unfitting condition is listed as VA Schedule for Rating Disabilities (VASRD) code 6602, which is asthma. A health record note, dated 3 March 2006, shows questionable history of asthma as a child without diagnosis and some symptoms of shortness of breath while running since Basic Combat Training (BCT). While deployed to Afghanistan, symptoms increased and he continues to have complaints of shortness of breath with exertion, chronic nighttime cough, and most recent emergency room visit was November 2007. His medication profile supports daily use of bronchodilators and oral leukotriene receptor antagonist. Unstable for final rating. Rated 30 percent for daily medications. (MEB diagnosis (Dx) 1).

c. The conditions listed as MEB Dx 2, 3, 4, and 5 were determined to meet retention standards. The PEB found these conditions to not be unfitting and therefore not ratable.

7. Headquarters, 1st Infantry Division and Fort Riley Orders 129-0007, 8 May 2008, released the applicant from assignment and duty because of physical disability incurred while entitled to basic pay and under conditions that permit his placement on the TDRL, with a date of retirement of 30 June 2008 and a temporary disability rating of 30 percent.

8. A DA Form 4187 (Personnel Action) shows the applicant was advanced from the rank/grade of private first class (PFC)/E-3 to specialist (SPC)/E-4 effective 1 June 2008.

9. The applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was retired under the provisions of Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation) due to temporary disability, with corresponding separation code SFK on 30 June 2008. He completed 1 year, 5 months, and 6 days of active service.

10. A DD Form 215 (Correction to DD Form 214), issued on 17 July 2008, corrected the applicant's DD Form 214 to show his rank and grade as SPC/E-4 and his retired list grade [rank] as SPC.

11. A second DA Form 199 shows:

a. A PEB convened on 29 January 2009, where the applicant was found physically fit and that his disposition be returned to duty as fit.

b. Based on review of the TDRL examination, the PEB found the applicant's former disability, specifically asthma, had resolved. There were presently no restrictions which would preclude him returning to military service and no prohibition against normal physical activities expected for reasonable performance.

c. Reconsideration shows the applicant is fit. His asthma does not affect his ability to perform the Army Physical Fitness Test (APFT) or Soldier skills. The doctor states the applicant is symptom free and "is no longer prone to moderate to severe asthma." He ran the 2-mile event in 14:07 on 11 December 2008 and in 13:15 on 20 January 2009.

d. His right shoulder pain, bronchitis, frequent tonsillitis, and gastroesophageal reflux disease (GERD) were present, but determined not unfitting, therefore were not rated at the time of placement on the TDRL. They have been determined by the PEB to not be unfitting.

e. The informal findings were reconsidered based on the exhibits submitted in preparation for the formal board. The PEB finds the applicant's current impairment is best described and rated as above. The DA Form 199 dated 28 December 2008 is hereby superseded. Note, the referenced DA Form 199 dated 28 December 2008, is not in the applicant's available records for review.

f. The applicant signed the form on 3 February 2009, indicating he had been advised of the findings and recommendations of the PEB and concurred, waiving a formal hearing of his case.

12. U.S. Army Physical Disability Agency (USAPDA) Orders D041-17, 10 February 2009, show the applicant was found fit for duty and effective 9 March 2009, was removed from the TDRL.

13. A USAPDA memorandum, 10 February 2009, advised the U.S. Army 2nd Recruiting Brigade that the applicant was removed from the TDRL pursuant to above referenced orders. As of the effective date of removal from the TDRL, the applicant would be afforded the opportunity to reenlist in the Regular Army and would not be

required to meet accession standards for the condition for which he was placed on the TDRL.

14. The applicant previously applied to the ABCMR in December 2019, requesting correction of the PEB determination that he was fit for duty and subsequent placement on the PDRL in lieu of removal from the TDRL. On 13 August 2021, the Board denied the applicant's request, determining the evidence presented did not demonstrate the existence of a probable error or injustice and the overall merits of his case were insufficient as a basis for correction of his records.

15. The applicant provided a Pulmonary Function Test, 19 October 2023, which has been provided in full to the Board for review. It shows his diagnosis as asthma and that he had been exposed to burn pits and sand while overseas. The diagnostic impression shows spirometry reveals severe obstructive defect. There is a response to bronchodilators. Lung-volume testing reveals restrictive defect. Membrane diffusion capacity is mildly reduced. Flow-volume loops reveal obstructive pattern.

16. 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 reconsideration of their denial of his request that his temporary retirement for physical disability be reversed and that he be permanently retired for physical disability.

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. His DD 214 shows he entered the regular Army on 25 January 2007 and was placed on the temporary retirement disability list (TDRL) on 30 June 2008 as provided by paragraph 4-24b(2) of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (8 February 2006). Discharge orders published by the United States Army Physical Disability Agency on 10 February 2009 show the applicant had been determined fit for duty at this TDRL reevaluation and was removed from the TDRL effective 9 March 2009.

d. This request was previously denied by the ABCMR on 13 August 2021 (AR20200004021). Rather than repeat their findings here, the board is referred to the record of proceedings and medical advisory opinion for that case. This review will concentrate on the new evidence submitted by the applicant.

e. The only new evidence submitted with this application is civilian documentation showing the applicant had abnormal pulmonary function testing in October 2023, more than 14 years after discharge.

f. From the prior medical advisory:

g. On 11 April 2008, a PEB determined the applicant's history of asthma was his sole unfitting condition for continued service:

"Health record note dated 3 Mar 2006 questionable history of asthma as a child without diagnosis and some symptoms of shortness of breath while running since basic. While deployed to Afghanistan symptoms increased. Soldier began medications for asthma. Current Pulmonary function testing post medication showed FEV1=95% and FEV1/FVC=89%. He continues to have complaints of shortness of breath with exertion, has chronic night-time cough, and most recent emergency room visit was in Nov 07.

h. They recommended the applicant be placed on the TDRL because the Soldier's disability was not sufficiently stable for a permanent evaluation and rating for disability.

i. It is notable that his pulmonary function tests cited in his PEB finding were essentially normal.

j. The PEB found him fit for duty at his TDRL reevaluation on 29 January 2009:

Soldier is fit. His Asthma does not affect his ability to perform the APFT or Soldier skills. Dr. S. states that the Soldier is symptom free and "is no longer preone [predisone?] to moderate to severe Asthma." He ran the 2 mile run in 14:07 on 11 December 2008 and 13:15 on 20 January 2009.

k. On 3 February 2009, the applicant concurred with the PEB's finding and waived his right to a formal hearing.

l. AHLTA shows that also on 3 February 2009, the applicant completed a pre-deployment health assessment; and that he was an overseas civilian contractor in 2012 and 2014.

m. It is the opinion of the ARBA Medical Advisor that a referral of his case to the Disability Evaluation System remains unwarranted.

#### 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. The Board carefully considered the applicant's record of service, documents submitted in support of the petition, and executed a comprehensive review based on law, policy, and regulation. Upon review of the applicant's petition, available military records, and the medical review, the Board concurred with the advising official finding referral of his case to the Disability Evaluation System remains unwarranted. The Board concluded there was no error that warranted placement on the PDRL vice removal from the TDRL after being found fit for duty based on the evidence provided.

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 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 amendment of the ABCMR decision rendered in Docket Number AR20200004021 on 13 August 2021.

5/5/2025

X

CHAIRPERSON

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. 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.

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.

c. The percentage assigned to a medical defect or condition is the disability rating. A rating is not assigned until the Physical Evaluation Board (PEB) determines the Soldier is physically unfit for duty. Ratings are assigned from the Department of Veterans Affairs (VA) Schedule for Rating Disabilities (VASRD). The fact that a Soldier has a condition listed in the VASRD does not equate to a finding of physical unfitness. An unfitting, or ratable condition, is one which renders the Soldier unable to perform the duties of their office, grade, rank, or rating in such a way as to reasonably fulfill the purpose of their employment on active duty. There is no legal requirement in arriving at the rated degree of incapacity to rate a physical condition which is not in itself considered disqualifying for military service when a Soldier is found unfit because of another condition that is disqualifying. 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.

d. The Temporary Disability Retired List (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/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.

e. Requirements for placement on the TDRL are the same as for permanent retirement. The Soldier must be unfit to perform the duties of his/her office, grade, rank, or rating at the time of the evaluation. The disability must be rated at a minimum of 30 percent or the Soldier must have 20 years of service. In addition, the condition must be determined to be temporary or unstable.

f. Soldiers will be placed on the TDRL when they would be qualified for permanent disability retirement and the preponderance of evidence indicates one or more conditions will change within the next 5 years so as to result in a change in rating or a finding of fit. The Army Disability Evaluation System will re-evaluate each Soldier placed on the TDRL at least once every 18 months. Evaluation may be sooner. Once the PEB finds each condition is stable upon evaluation, the PEB will assign a final rating that includes the ratings for the disabilities determined to be permanent and stable when the Soldier was placed on the TDRL or during preceding TDRL adjudications.

g. A final determination of the case of each Soldier on the TDRL will be made at the latest upon the expiration of 5 years after the date when the Soldier was placed on the TDRL. If, at the time of that determination the physical disability for which the Soldier was placed on the TDRL still exists, it will be considered to be permanent and stable. Placement on the TDRL confers no right to remain on the TDRL for the entire 5-year period.

h. If upon reexamination, Soldiers whose disabilities have stabilized and who are not determined fit for duty and meeting medical retention standards for the conditions for which they were placed on the TDRL will be removed from the TDRL and placed on the PDRL if the physical disability rating remains 30 percent or greater. If upon reexamination, the Soldier is found unfit for duty and not meeting medical retention standards but the stabilized physical disability percentage is rated at below 30 percent, the Soldier will be removed from the TDRL and separated with severance pay if the Soldier has less than 20 years of active Federal service.

2. 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.

3. Army Regulation 15-185 (Army Board for Correction of Military Records (ABCMR)) prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR. Paragraph 2-11 states applicants do not have a right to a formal hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

//NOTHING FOLLOWS//