

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 13 February 2025

DOCKET NUMBER: AR20240007794

APPLICANT REQUESTS:

- promotion to the rank of staff sergeant (SSG) at the time of medical retirement
- a video/telephonic appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Enlisted Record Brief (ERB)
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- Memorandum for Removal from Temporary Disability Retired List (TDRL)
- Orders Number D127-60, dated 7 May 2014
- DD Form 2648 (Preseparation Counseling Checklist for Active Component Service Members)
- Letter Request for Medical Retirement Pay (High-36 month)
- Defense Finance and Accounting Service (DFAS) Response Letter
- Military Compensation Excerpt

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, prior to his reduction in rank due to his conviction of driving under the influence (DUI), he held the rank of SSG while he was in the process of a medical board review. Due to this, he should be compensated at High-36 vice Final Pay rates.
3. The applicant provides the following:
 - a. A DD Form 2648 shows the applicant completed all separation requirements on 22 September 2010.

b. A letter to DFAS dated 29 November 2023, wherein the applicant noted he had received disability retirement pay based on his final pay. He did not believe he received retirement pay based on "High-36," and he listed two reasons why he believed he should have received it.

c. A response from DFAS dated 14 March 2024, notified the applicant his request for was denied. He was reduced in rank because of a DUI conviction with pay computed at the sergeant (SGT)/E-5 rates.

d. A Military Compensation excerpt showing the compensation benefit and rate for Final Pay, High-36, and Disability.

4. A review of the applicant's available service record reflects the following:

a. He enlisted in the Regular Army on 18 September 1996.

b. The applicant's Enlisted Record Brief lists the date of rank for his promotions to noncommissioned officer (NCO) as follows:

- sergeant (SGT) – 19 November 2010
- staff sergeant (SSG) – 1 December 2008

c. On 2 November 2000, Orders Number 307-800 show the applicant was promoted to the rank of sergeant (SGT) with a retroactive effective date of 1 November 2000.

d. On 31 January 2009, the Georgia State Patrol police report shows he was arrested for failure to maintain lane and DUI and released to his unit. His conviction resulted in a fine of \$2,600.00 and 12 months' probation. Additionally, he was required to enroll into the Army Substance Abuse Program (ASAP) and remedial driver training. Furthermore, his government motor vehicle operator's license was suspended.

e. On 9 September 2010, he accepted non-judicial punishment for one specification of failure to go to his appointed place of duty and one specification of wrongful previous overindulgence in intoxicating liquor or drugs, leading to his incapacitation for the performance of his duties. His punishment included reduction to SGT, suspended for a period of 6 months.

f. On 6 December 2010, he accepted non-judicial punishment for one specification of wrongful previous overindulgence in intoxicating liquor or drugs, incapacitated for the proper performance of duties, His punishment included reduction in rank to the grade of specialist /E-4. overindulgence in intoxicating liquor or drugs, incapacitated for the proper performance of duties on or about 7 November 2010.

g. On 18 July 2011, he was honorably retired as disability, temporary with a net service of 14 years, 10 months, and 1 day. His rank at the time of retirement reflects SGT.

h. On 2 May 2014, a Physical Evaluation Board (PEB) was conducted finding the applicant physically unfit and a recommendation that he be permanently listed as SGT.

i. On 7 May 2014, Orders Number D127-60 removed the applicant from the TDRL and placed him on PDRL with a 30 percent disability rating in the rank of SGT.

5. On 10 January 2025, the U.S. Army Human Resources Command, Chief, Enlisted Promotions, Promotions Branch provided an advisory opinion recommending denial of the applicant's request.

a. Army Regulation 600-8-19, dated 30 April 2010, was the regulation in effect at the time of the Soldier's separation. Paragraph 1-20 a. Soldiers who are pending referral to a MOS/medical retention board (MMRB) under AR 600-60 or referral to a medical evaluation board under AR 40-400 or physical evaluation board under AR 635-40 will not be denied promotion (if already promotable) on the basis of medical disqualification if they are otherwise qualified for promotion.

b. Review of the documents submitted with the ABCMR application reveal that he was demoted from SSG to SGT. After being reduced to SGT there is no document that shows that he regained a promotable status prior to his separation from the Army on 18 September 2011. There are no documents filed in his Army Military Human Resources Record (AMHRR) to support his request.

c. He is not eligible for promotion to SSG under Promotion of Soldiers pending referral to a military occupational specialty/medical retention board, medical evaluation board, or physical evaluation board.

6. On 15 January 2025, the applicant was provided with a copy of this advisory opinion to give him an opportunity to submit a rebuttal and/or comments. The applicant has not responded to date.

7. By regulation (AR 15-185), an applicant is not entitled to a hearing before the ABCMR. Hearings may be authorized by a panel of the ABCMR or by the Director of the ABCMR.

8. By regulation (AR 600-8-19), Soldiers who are pending referral to a MOS/medical retention board (MMRB) under AR 600-60 or referral to a medical evaluation board under AR 40-400 or physical evaluation board under AR 635-40 will not be denied

promotion (if already promotable) on the basis of medical disqualification if they are otherwise qualified for promotion.

9. By regulation (AR 635-5), separation documents which are prepared for individuals upon retirement, discharge, or release from active military service or control of the Army. For Block 4a (Grade, Rate or Rank) and Block 4b (Pay Grade) to enter the active-duty grade and pay grade at the time of separation, respectively.

10. By regulation (AR 635-40), the grade at which a Soldier is retired or receives disability severance pay, will be the 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.

11. Title 10, USC, section 1372 states 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, is entitled to the grade equivalent to the highest 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.

BOARD DISCUSSION:


1. After reviewing the application, all supporting documents, the evidence found within the military record, and applicable policy, the Board found that relief was not warranted.
2. The Board carefully considered the applicant's contentions, his military record, the frequency and nature of his misconduct, his reductions as a result of NJP, his rank at the time of medical processing and transfer to the TDRL. The Board considered the review and conclusions of the HRC advising official. The Board found that the applicant's reduction in rank was not in error or unjust; there was no evidence in the record or provided by the applicant that he was in a promotable status at the time of his medical disqualification/retirement. Based on a preponderance of evidence, the Board determined that the rank in which the applicant retired was not in error or unjust.
3. 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:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
XX:	XX:	XX:	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.


X //SIGNED//

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. 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. Army Regulation 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR begins its consideration of each case with the presumption of administrative regularity, which is that what the Army did was correct.

a. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

b. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 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.

3. Army Regulation 600-8-19 (Enlisted Promotions and Reductions), in effect at the time, prescribes the enlisted promotions and reductions function of the military personnel system. Soldiers who are pending referral to a MOS/medical retention board (MMRB) under AR 600-60 or referral to a medical evaluation board under AR 40-400 or physical evaluation board under AR 635-40 will not be denied promotion (if already promotable) on the basis of medical disqualification if they are otherwise qualified for promotion.

4. Army Regulation 635-5 (Separation Documents) in effect at the time, provides the separation documents which are prepared for individuals upon retirement, discharge, or release from active military service or control of the Army. For Block 4a (Grade, Rate or Rank) and Block 4b (Pay Grade) to enter the active-duty grade and pay grade at the time of separation, respectively.

5. Title 10, USC, section 1372 states 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, is entitled to the grade equivalent to the highest 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.

6. Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation) paragraph 4-30c states the grade at which a Soldier is retired or receives disability severance pay, will be the 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.

//NOTHING FOLLOWS//