

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 17 July 2024

DOCKET NUMBER: AR20230014492

APPLICANT REQUESTS: correction of his records to show he was permanently retired for disability and personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- Department of Veterans Affairs (VA) Rating Decision

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. Upon discharge from active service, he was placed on the Temporary Disability Retired List (TDRL) and was never contacted further to submit evidence to be placed on the permanent list. He realized the error on 1 September 2023, when he attempted to get an identification card for his spouse to enroll her in Tricare. He would like reconsideration to be placed on the permanent retired list.

b. He served two deployments in Iraq. He suffered with post-traumatic stress disorder (PTSD) and respiratory problems after returning.

c. When he retired from the U.S. Army with a 50 percent (%) disability rating, he initiated care with the VA where he was rated at 50%, at the time, which has since increased to 100% permanent and total.

d. In 2013, the TDRL department reached out to him for a release of information to gain his medical records from the VA for the purpose of evidence to be placed on the permanent list. Due to his traumatic brain injury and PTSD, he was unaware that

anything further was needed to be done to be placed on the permanent list. He was under the impression with his VA medical records this would take place automatically.

e. He came to the realization he was removed from the TDRL, when he attempted to enroll his spouse in Tricare and he was told he was ineligible because he was administratively removed from the TDRL list in May 2015 instead of having a board opportunity to be placed on the permanent list.

3. The applicant provides a VA rating decision, 30 May 2023, which shows he receives the following disabilities:

- PTSD 100%
- Lumbar spine degenerative joint disease 40%
- Left lower extremity radiculopathy involving sciatic nerve 20%
- Right lower extremity radiculopathy involving the sciatic nerve 20%
- Left knee strain (limitation of extension) 30%
- Left knee strain (limitation of flexion) 10%

4. The applicant's service record contains the following documents:

a. DD Form 4 (Enlistment/Reenlistment Document Armed Forces of the United States) shows he enlisted in the Regular Army and entered active duty on 17 June 2004. He remained in the Regular Army through an immediate reenlistment.

b. DA Form 199 (Physical Evaluation Board (PEB) Proceedings), 30 March 2010, shows his PTSD was evaluated at 50%. There were no other conditions considered by the PEB. The board found he was physically unfit for duty and that he be placed on the TDRL with reexamination during December 2010. The applicant concurred with the board's findings and waived a formal hearing in his case.

c. Orders 109-0503, published by Headquarters, United States Army Garrison, Fort Rucker, 19 April 2010, placed the applicant on the TDRL with an effective date of retirement of 21 May 2010 and placement on the retired list on 22 May 2010 with a 50% disability rating.

d. DD Form 214, 21 May 2010, honorably transferred the applicant to U.S. Army Reserve Control Group (Retired). He had completed 5 years, 11 months, and 5 days of active duty service. He had service in Iraq from 20 September 2005 through 10 September 2006 and from 20 September 2007 through 19 November 2008. He was awarded or authorized the:

- Army Commendation Medal (3rd Award)
- Army Achievement Medal (3rd Award)

- Army Good Conduct Medal
- National Defense Service Medal
- Global War on Terrorism Service Medal
- Iraq Campaign Medal with Campaign Star (3rd Award)
- Army Service Ribbon
- Overseas Service Ribbon (2nd Award)
- Combat Action Badge
- Driver and Mechanic Badge - Mechanic

e. His service record was void of information removing him from the TDRL, placing him on the permanent retired list, or reexamination of his PEB.

5. Based on the applicant being on the TDRL and his diagnosis of PTSD, the ARBA Medical Section provided a medical review for the Board's consideration.

6. 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/or 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 reversal of his TDRL termination and to be permanently retired for physical disability. On his DD 149, he has indicated that PTSD and other mental health issues are related to this request.

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. His DD 214 for the period of Service under consideration shows he entered the Regular Army on 17 June 2004 and was placed on the temporary disability retirement list (TDRL) on 21 May 2010 under provisions provided in paragraph 4-24b(2) of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (8 February 2006). Orders published by US Army Installation Management Command at Fort Rucker show he was placed on the TDRL with a 50% disability rating.

d. On 30 March 2010, the physical evaluation board (PEB) recommended the applicant be placed on the TDRL with a disability rating of 50% for PTSD. On 6 April 2010, after being counseled on the Board's findings and recommendation by his PEB liaison officer, he concurred with the PEB and waived his right to a formal hearing. On

the front page of his signed Physical Evaluation Board (PEB) Proceedings (DA Form 199):

“Failure to report for a scheduled periodic examination or to inform the U.S. Army Human Resources Command of a change in address could result in suspension of retired pay.”

e. Paragraph 7-4 of AR 635-40 states “A Soldier on the TDRL must undergo a periodic medical examination and PEB evaluation at least once every 18 months to decide whether a change has occurred in the disability for which the Soldier was temporarily retired.” Paragraph 7-4c:

“Soldiers who fail to complete a physical examination when ordered will have their disability retired pay suspended.

f. From paragraph 7-11b of AR 635-40:

“b. Periodic examination not performed. The USA HRC will take the actions described below when a periodic examination cannot be carried out.

(1) Soldier’s failure to report or reply. If a Soldier fails to respond to correspondence concerning the medical examination or fails or refuses to complete a medical examination, USA HRC will make an effort to discover the reason. If such action cannot be justified and the fifth anniversary of placement on the TDRL has not been reached, USA HRC will notify the Soldier and the Chief, Retired Pay Operations, U.S. Army Finance and Accounting Center (USAFAC), to suspend retired pay. USA HRC will keep the Soldier’s name on the TDRL until the fifth anniversary unless it is removed sooner by other action.”

g. A 26 June 2014 memorandum from the United States Army Physical Disability Agency (USAPDA) show the applicant was to undergo his TDRL reevaluation in the second half of 2014. There is no evidence this took place to that the applicant had been keeping contact with USAHRC as he had been so directed. Subsequently, multiple emails and letters sent via FedEx over the next 10 months to all his known addresses went unanswered. From their final letter dated 17 June 2015:

“On May 21, 2015 your tenure on the Temporary Disability Retirement List (TDRL) expired. Our records indicate that you never completed a periodic medical examination while on the TDRL. Had this occurred, it is likely that your case could have been finalized and you could have possibly received either permanent disability

retirement status (and lifelong disability benefits) or disability severance pay from the Army.

This letter is being sent to all addresses we have for you in an attempt to contact you and allow you to take a final medical examination and receive a final disability determination. If you receive this letter and desire to undergo a final physical examination, contact the TDRL Customer Service Desk at (855) 863-0426 or [usarmy.pentagon.hrc.mbx.usapda-tdrl@mail.mil](mailto:usarmy.pentagon.hrc.mbx.usapda-tdrl@mail.mil) immediately in order to begin the scheduling process. If we receive notification that this letter was delivered to you and you have not contacted us within 10 days of receipt, we will administratively remove your name from the TDRL on May 22, 2015 or on the 11th day after notification of delivery, whichever comes later. This will result in you losing eligibility for future disability benefits from the Army.

I encourage you to contact the TDRL Customer Service Desk as soon as you receive this letter so that you may receive a detailed explanation of your options.”

h. Orders published by the United States Army Physical Disability Agency on 21 July 2015 removed him from the TDRL effective that day:

“You have failed to complete a scheduled physical reexamination required by law. Because of this, you are administratively removed from the Temporary Disability Retired List on the date indicated without entitlement to severance pay.”

i. JLV shows the applicant has several VA service-connected disabilities, including PTSD.

j. It is the opinion of the ARBA medical advisor that neither an increase in his military disability rating nor a referral of his case to the Disability Evaluation System is 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. 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 petition, available military records and the medical review, the Board concurred with the advising official finding neither an increase in the applicant's military disability rating nor a referral of his case to the Disability Evaluation System is warranted. The opine noted the applicant failed to

comply with to complete a scheduled physical reexamination required by law. The Board determined there is insufficient evidence to support the applicant's contentions for correction of his records to show he was permanently retired for disability. Based on the opine and evidence in the applicant's record, the Board denied 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:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	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 correction of the records of the individual concerned.

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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 (AR) 15-185 (ABCMR) states Board members will review all applications that are properly before them to determine the existence of an error or injustice; direct or recommend changes in military records to correct the error or injustice, if persuaded that material error or injustice exists and that sufficient evidence exists on the record. The ABCMR will decide cases on the evidence of record. It is not an investigative body. The ABCMR may, in its discretion, hold a hearing. 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 635-40 (Physical Evaluation for Retention, Retirement, or Separation), in effect at the time, establishes the Army Physical Disability Evaluation System (PDES) according to the provisions of 10 USC 61 and DoDD 1332.18. It 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. If a Soldier is found unfit because of physical disability, this regulation provides for disposition of the Soldier according to applicable laws and regulations.

a. The 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 or 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. b. Requirements for placement on the TDRL are the same as for permanent retirement. The Soldier must be unfit to perform the duties of his or her office, grade, rank, or rating at the time of evaluation. The disability must be rated at a minimum of 30 percent or the Soldier must have 20 years of service computed under section 1208, title 10, United States Code (10 USC 1208). In addition, the condition must be determined to be temporary or unstable. c. A Soldier who is determined to be physically fit will not be placed on the TDRL regardless of the severity of the physical defects or the fact that they might become unfitting were the soldier to remain on active duty for a period of time.

b. PERSCOM will dispose of the case by publishing orders or issuing proper instructions to subordinate headquarters, or return any disability evaluation case to-

USAPDA for clarification or reconsideration when newly discovered evidence becomes available and is not reflected in the findings and recommendations. Subparagraph b (Final disposition), based upon the final decision of USAPDA or APDAB, PERSCOM will issue retirement orders or other disposition instructions as follows:

- permanent retirement for physical disability
- placement on the TDRL
- separation for physical disability without severance pay
- separation for physical disability with severance pay
- transfer Soldier who has completed 20 qualifying years of service
- separation for physical disability without severance pay when disability was incurred as result of intentional misconduct, willful neglect, or during unauthorized absence
- return Soldier to duty determined physically fit

c. A Soldier on the TDRL must undergo a periodic medical examination and PEB evaluation at least once every 18 months to decide whether a change has occurred in the disability for which the Soldier was temporarily retired.

- Soldiers who have waived retired pay to receive compensation from the VA, continue to be retired Army Soldiers, Soldiers must undergo examinations when ordered
- Soldiers recalled to active duty while still on the TDRL must also undergo a periodic examination when ordered by the Commander, USA HRC
- Soldiers who fail to complete a physical examination when ordered will have their disability retired pay suspended
- Soldiers on the TDRL will notify Commander, HQUSAPDA (AHRC-PDB) of any change in their current mailing address

d. The Army Human Resources Command (AHRC) will notify the Soldier of the forthcoming medical examination. The letter will include the information below:

- name, address, and telephone number of the appointed MTF closest to the Soldier's home
- name and telephone number of the PEBLO who will assist the Soldier during and after the medical examination
- Soldier may telephone the MTF collect to resolve any problems
- MTF will arrange for and schedule the medical examination, every effort will be made to schedule the examination for the Soldier's convenience; however, the medical examination must be carried out within the month prescribed
- at the discretion of USA HRC, an escort may accompany a Soldier who is unable to travel alone to the place of examination, one person may travel with



the Soldier upon request when the record clearly shows that the Soldier is not physically or mentally able to travel without help

e. AHRC will take the actions described below when a periodic examination cannot be carried out. (1) Soldier's failure to report or reply. If a Soldier fails to respond to correspondence concerning the medical examination or fails or refuses to complete a medical examination, USA HRC will make an effort to discover the reason. If such action cannot be justified and the fifth anniversary of placement on the TDRL has not been reached, HRC will notify the Soldier and the Chief, Retired Pay Operations, U.S. Army Finance and Accounting Center (USAFAC), to suspend retired pay. HRC will keep the Soldier's name on the TDRL until the fifth anniversary unless it is removed sooner by other action. (2) Unable to locate Soldier. When reasonable efforts to locate the Soldier are unsuccessful, HRC will take the action prescribed in (1), above. (3) Soldier imprisoned by civil authorities. A report by the responsible MTF commander may indicate that examination of a Soldier is not possible because the Soldier is imprisoned and civil authorities will not permit the examination. If so, HRC will take the action prescribed in (1), above. (4) Removal on fifth anniversary. Soldiers on the TDRL shall not be entitled to permanent retirement or separation with severance pay without a current acceptable medical examination, unless just cause is shown for failure to complete the examination. Six months before the fifth anniversary of placement on the TDRL, HRC will make a final attempt to contact the Soldier or proper civil authorities and arrange a final examination. If this fails and the Soldier does not undergo a physical examination, HRC will administratively remove him or her from the TDRL on the fifth anniversary of placement on the list without entitlement to any of the benefits.

f. AHRC may restore the Soldier's eligibility to receive disability retirement pay if, after failure to report for and complete the required periodic examination, the Soldier later satisfactorily meets the examination requirements. AHRC will notify the Chief, Retired Pay Division, USAFAC, to restore disability retired pay retroactive to the date the Soldier undergoes the examination provided the Soldier is still qualified for retention on the TDRL. The Soldier's eligibility to receive retired pay may be made retroactive, not to exceed 1 year, if the soldier can show just cause for failure to respond to official notice or orders. A Soldier's name may have been removed from the list as provided in paragraph 7-11b (4). If so, the Soldier may take application to the Army Board for Correction of Military Records (ABCMR).

4. Title 38, U.S.C sections 1110 and 1131, permits the VA to award compensation for disabilities that were incurred in or aggravated by active military service. However, an award of a higher VA rating does not establish error or injustice on the part of the Army. The Army rates only conditions determined to be physically unfitting at the time of discharge which disqualify the Soldier from further military service. The VA does not have the authority or responsibility for determining physical fitness for military service. The VA awards disability ratings to veterans for service-connected conditions, including

those conditions detected after discharge, to compensate the individual for loss of civilian employability. These two government agencies operate under different policies. Unlike the Army, the VA can evaluate a veteran throughout his or her lifetime, adjusting the percentage of disability based upon that agency's examinations and findings.

5. DTM 11-015, 19 December 2011, provides for the Integrated Disability Evaluation System (IDES). The IDES is the joint Department of Defense (DOD) - VA process by which DOD determines whether wounded, ill, or injured Service members are fit for continued military service and by which DOD and VA determine appropriate benefits for Service members who are separated or retired for a service-connected disability.

a. Appendix 10 to Attachment 4 states within 15 days of receiving proposed disability ratings from the (D-RAS), the PEB would apply the ratings using the diagnostic code(s) provided by the D-RAS to the Service member's unfitting conditions and publish the disposition recommendation.

b. Appendix 11 to Attachment 4 (D-RAS Procedures), in effect at the time, stated:

1) Upon receipt of the case files (request for rating and service treatment record) of unfit Service members from PEB administration, the D-RAS determines whether the VA C&P disability examination report is adequate for disability rating purposes.

2) The D-RAS will rate the service member's referred and claimed service-connected disabilities and provide a proposed rating decision, with rationale, to the PEB within 15 days of notification by the PEB administration staff that a service member is unfit.

3) Once the D-RAS has rated all unfitting conditions, the D-RAS will provide their proposed rating decision to the PEB. The D-RAS will defer rating all other conditions that require additional claim development in accordance with VA business practices and regulations.

4) Within 15 days of receipt from the PEB of a service member's written request for a one-time reconsideration of a proposed disability evaluation assigned for unfitting conditions by VA, the VA decision review officer will consider any new documentation or information from the Service member and provide the PEB updated proposed ratings, if any.

5) This is a one-time "request for reconsideration" of the rating(s) from the D-RAS. Subsequent appeals of ratings to VA must occur when the Service member has separated, attained veteran status, and has been formally notified of the rating decision

6. 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//