

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 19 December 2023

DOCKET NUMBER: AR20230001734

APPLICANT REQUESTS: correction of his military records to show medical/disability retirement vice disability severance pay.

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

- DD Form 149 (Application for Correction of Military Record)
- DA Form 199 Informal Physical Evaluation Board (PEB) Proceedings)
- Department of Veterans Affairs (VA) medical records
- Radiology Reports
- DD Form 214 (Certificate of Release or Discharge from Active Duty)

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 he was unjustly given a medical board rather than a medical retirement. He was medically discharged because of his back injury which the Army tried to correct in 2015 prior to his medical discharge in 2017. He believes he deserves a reconsideration for an Army Medical Retirement because he allowed the Army to try to fix his back. The surgery did not work, and he was medically separated because the initial finding said his back injury was not one that would worsen or restrict functionality. However, since his discharge, he has had another back surgery and continues to practice various rehabilitation routines that have yet to correct issues or pain. His back injury was and continues to worsen, which has now affected his neck and upper extremities, limiting his ability to be a normal civilian let alone a Soldier of the U.S. Army. He would like a review of his medical records and reconsideration for a medical retirement. He allowed three years plus to pass because he was told he couldn't ask for a reconsideration, and he also wanted to build his supporting medical records proving his back is injured to the extent of no corrections without a permanent life changing process. He feels the Board should at least respect his service as he is sure they do to review his medical records from tenure in the Army as well as thereafter and recognize

that he has done things to improve his injury. However, nothing has worked, nor will anything help.

3. Review of the applicant's service records shows:

a. He enlisted in the Regular Army on 7 July 2008 and held military occupational specialty 13D, Field Artillery Automated Tactical Data Systems Specialist, and later 79R, Recruiter.

b. He served through extensions or reenlistments, in a variety of assignments, including Afghanistan from July 2009 to July 2010 and Kuwait from August 2013 to May 2014. He was promoted to staff sergeant/E-6.

c. On 20 July 2017, an informal PEB convened and found the applicant's medical condition(s) of Thoracolumbar degenerative arthritis) and Right S1 radiculopathy moderate to severe, unfitting as follows:

(1) VASRD Code 5243, 10% Thoracolumbar degenerative arthritis. (MEB Dx 1), he reported that his back pain began in 2011 after deployment to Afghanistan while stationed at Fort Hood He had had intermittent pain through the years. On 12 August 2013, he sought medical attention with his primary care manager (PCM). His back worsened, and he developed right lower extremity referred pain. Off post, spine surgeon evaluated him and performed L5-S1 microdiscectomy in 2015. Conservative management & surgical intervention failed to improve the Soldiers lower back condition.

(2) VASRD Code 8520, 10% Right S1 radiculopathy moderate to severe. (MES Dx 2), this condition relates to thoracolumbar degenerative arthritis (MES Dx 1). On 12 August 2013, he sought medical attention with his PCM. His back worsened, and he developed right lower extremity referred pain. Off post, spine surgeon evaluated him and performed L5-S1 microdiscectomy in 2015. The conservative management and surgical intervention failed to improve the Soldiers lower back condition, and right lower extremity radicular pain and numbness worsened. EMG/NCS confirmed radiculopathy.

(3) The ratings were combined in accordance with VASRD para 4.25 10% combined with 10% = 19% which rounds to 20%. The applicant's disposition is listed as separation with severance pay if otherwise qualified.

(4) The applicant was counseled: He waived his right to a formal hearing of his case, and he elected not to request reconsideration of his VA rating.

(5) His case was adjudicated as part of the Integrated Disability Evaluation System (IDES). As documented in the Department of Veterans Affairs (OVA) memorandum dated 15 June 2017, the VA determined the specific VASRD code(s) to

describe his condition(s). The PEB determined the disposition recommendation based on the proposed VA disability rating(s) and in accord with applicable statutes and regulations.

d. On 21 August 2017, Headquarters, III Corps, Fort Hood published Orders 233-0177, reassigning him to the U.S. Army transition point shown for transition processing and discharge on 13 November 2017 with 20% disability.

e. The applicant was discharged on 13 November 2017. His DD Form 214 shows he was discharged in accordance with Army Regulation (AR) 635-40 (Disability Evaluation for Retention, Retirement, or Separation), paragraph 4-19, due to disability - severance pay (combat related). He completed 9 years, 3 months, and 27 days of active service and credited with ^60,706.80 severance pay.

4. The Army rates only conditions determined to be physically unfitting at the time of discharge, which disqualify the Soldier from further military service. The Army disability rating is to compensate the individual for the loss of a military career. The VA does not have authority or responsibility for determining physical fitness for military service. The VA may compensate the individual for loss of civilian employability.

5. 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.

6. 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 his or her lifetime, adjusting the percentage of disability based upon that agency's examinations and findings.

7. 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 essentially requesting an increase in his current military disability rating with a subsequent change in his disability discharge disposition from separated with disability severance pay to permanently retired for physical disability. He states:

“I was medically discharged because of my back injury which the Army tried to correct in 2015 prior to my medical discharge in 2017. I deserve a reconsideration for an Army Medical Retirement because I allowed the Army to try to fix my back. The surgery did not work and I was medically separated because the initial finding said my back injury was not one that would worsen or restrict functionality.

However, since my discharge I had another back surgery and continue to practice various rehabilitation routines that have yet to correct issues or pain. My back injury was and continues to worsen, which has now affected my neck and upper extremities, limiting my ability to be a normal civilian let alone a Soldier of the U.S. Army. I would like a review of my medical records and reconsideration for Army Medical Retirement.”

c. The Record of Proceedings details the applicant's service and the circumstances of the case. The DD 214 for the period of Service under consideration shows he entered the regular Army on 7 July 2008 and was separated with \$60,706.80 of disability severance pay on 13 November 2017 under provisions provided in chapter 4 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (19 January 2017).

d. A Soldier is referred to the Integrated Disability Evaluation System (IDES) when they have one or more conditions which appear to fail medical retention standards reflected on a duty limiting permanent physical profile. At the start of their IDES processing, a physician lists the Soldiers referred medical conditions in section I the VA/DOD Joint Disability Evaluation Board Claim (VA Form 21-0819). The Soldier, with the assistance of the VA military service coordinator, lists all other conditions they believe to be service-connected disabilities in block 8 of section II of this form, or on a separate Application for Disability Compensation and Related Compensation Benefits (VA Form 21-526EZ).

e. Soldiers then receive one set of VA C&P examinations covering all their referred and claimed conditions. These examinations, which are the examinations of record for the IDES, serve as the basis for both their military and VA disability processing. The medical evaluation board (MEB) uses these exams along with AHLTA encounters and other information to evaluate all conditions which could potentially fail retention standards and/or be unfitting for continued military service. Their findings are then sent to the physical evaluation board for adjudication.

f. All conditions, both claimed and referred, are rated by the VA using the VA Schedule for Rating Disabilities (VASRD). The physical evaluation board (PEB), after adjudicating the case, applies the applicable ratings to the Soldier's unfitting condition(s), thereby determining his or her final combined rating and disposition. Upon discharge, the Veteran immediately begins receiving the full disability benefits to which they are entitled from both their Service and the VA.

g. On 27 February 2017, the applicant was referred to the IDES for "Lumbar Intervertebral Disc Syndrome" and "Right S1 Radiculopathy." The applicant claimed eleven additional conditions on his VA Form 21-526EZ. A medical evaluation board (MEB) determined his "Thoracolumbar degenerative arthritis of the spine sip microdiscectomy" and "Right S1 radiculopathy moderate to severe" failed the medical retention standards of AR 40-501, Standards of Medical Fitness. The MEB determined seven additional medical conditions met medical retention standards.

h. These two conditions as noted in his MEB Narrative Summary:

"Thoracolumbar degenerative arthritis of the spine sip microdiscectomy and right S1 radiculopathy moderate to severe:

SM [Service Member] was initially treated by PCM [primary care manager] for low back pain on 20130812 without history of trauma. SM had intermittent pain through the years and was referred to physical therapy. He was given a temporary profile for low back pain on 20141218. SM pain in his back worsened and he developed right lower extremity referred pain.

He was seen by off-post spine surgeon who performed L5-S1 microdiscectomy in 2015. Initially, SM improved significantly at his 6-week post-operative visit. Then as time progressed SM reported his pain increased in his back and down his right lower extremity. SM was seen by neurology who confirmed abnormal findings for the right lower extremity via EMG [Electromyography, aka nerve conduction studies].

SM was referred to on-post orthopedics but did not desire to have another surgery. Therefore, conservative treatment was to continue and he was referred to pain management. PCM initiated MEB once having reviewed orthopedics note."

i. On 18 April 2017, the applicant concurred with the MEB findings his case was forwarded to a physical evaluation board (PEB) for adjudication.

j. On 20 July 2017, the applicant's informal PEB determined his lumbar spine condition and S1 radiculopathy were unfitting conditions for continued military service.

They found the seven remaining medical conditions not unfitting for continued military service.

k. The PEB applied the Veterans Benefits Administration (VBA) derived ratings of 10% and 10% and recommended the applicant be separated with disability severance pay. On 28 July 2017, after being counseled on the PEB's findings and recommendation by his PEB liaison officer, the applicant concurred with the PEB, waived his right to a formal hearing, and declined to request a VBA reconsideration of his disability ratings (VARR).

l. Review of the applicant's Back (Thoracolumbar Spine) Conditions Disability Benefits Questionnaire upon which his disability ratings with the VA's Proposed Ratings dated 15 June 2017 shows the ratings to be IAW the VASRD.

m. JLV shows the rating for the applicant's lumbar spine condition was increased to 20% effective 29 October 2019 and the rating for his S1 radiculopathy was increased to 20% effective 27 June 2023.

n. The awarding of a higher VA rating does not establish prior error or injustice. A disability rating is intended to compensate an individual for interruption of a military career after it has been determined that the individual suffers from an impairment that disqualifies him or her from further military service. The rating derived from the VA Schedule for Rating Disabilities reflects the disability at the point in time the VA exams were completed. The DES has neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions incurred during or permanently aggravated by their military service. These roles and authorities are granted by Congress to the Department of Veterans Affairs and executed under a different set of laws.

o. Review of the submitted documentation, ePEB case file, and AHLTA record found no material errors of deficiencies.

p. 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 DES is warranted.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. The evidence shows an informal PEB found the applicant unfit for thoracolumbar degenerative arthritis and right radiculopathy and assigned a 20% disability rating with his disposition as separation with severance pay. These were the only two conditions listed on his MEB as failing retention standards and were found unfitting. Although the VA rated him for other conditions and/or increased his rating for these conditions, the

awarding of a higher VA rating does not establish prior error or injustice. A disability rating is intended to compensate an individual for interruption of a military career after it has been determined that the individual suffers from an impairment that disqualifies him or her from further military service. The rating derived from the VA Schedule for Rating Disabilities reflects the disability at the point in time the VA exams were completed. The disability evaluation system (DES) does not compensate service members for anticipated future severity or potential complications of conditions incurred during or permanently aggravated by their military service. Such role belongs to the VA. Based on available evidence, the Board found no material errors of deficiencies, and determined that neither an increase in his military disability rating nor a referral of his case to the DES is warranted.

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 correction of the records of the individual concerned.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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 40-501 (Standards of Medical Fitness) 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:

3. 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. Soldiers are referred to the disability system when they no longer meet medical retention standards in accordance with AR 40-501, chapter 3, as evidenced in a medical evaluation board (MEB); when they receive a permanent physical profile rating of "3" or "4" in any functional capacity factor and are referred by a 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 PEB. The purpose of the MEB is to determine whether the service member's injury or illness is severe enough to compromise his or her 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 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 are either 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 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 his or her 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 medical impairment prevents reasonable performance of the duties required of the Soldier's office, grade, rank, or rating.

d. 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.

4. 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.

5. 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.

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//