

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 15 May 2024

DOCKET NUMBER: AR20230001898

APPLICANT REQUESTS:

- an increase in his disability rating.
- a personal appearance before the Board.

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

- DD Form 149 (Application for Correction of Military Record) (Online)
- Department of Veterans Affairs (VA) Summary of Benefits, 19 December 2022

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, when he was medically separated the Army gave him 30 percent for his medical condition of Polycythemia Vera. About a year later, the VA raised his condition from 30 percent to 100 percent. He would like to see if the Army could raise his rating to match the VA.
3. The applicant provides a copy of his VA summary of benefits, dated 19 December 2022, and shows the applicant has one or more service-connected disabilities. His combined service-connected evaluation is 100 percent, and he is considered to be totally and permanently disabled due solely to his service-connected disabilities. His effective date of when he became totally and permanently disabled is 5 February 2019.
4. A review of the applicant's service record shows:
  - a. NGB Form 22E (National Guard Bureau Report of Separation and Record of Service), which shows he served honorably in the California Army National Guard from 29 March 1996 to 30 July 1997.

b. DD Form 4 (Enlistment/Reenlistment Document) shows the applicant enlisted in the Regular Army on 31 July 1997.

c. DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was honorably discharged on 18 November 2004 to accept a warrant officer appointment in the Army.

d. On 19 November 2004, he took his oath of office as a Reserve Warrant Officer as a warrant officer one (WO1).

e. DA Form 199-1 (Formal Physical Evaluation Board (PEB) Proceedings) shows on 11 July 2018, a formal PEB convened to consider the applicant's physical condition. The PEB found the applicant unfit and recommended a rating of 50 percent and that his disposition be permanent disability retirement.

(1) The following medical conditions were determined to be unfitting:

- Polycythemia vera, with a rating of 40 percent.
- Left cubital tunnel, status post ulnar nerve release and left carpal tunnel syndrome, with a rating of 20 percent.

(2) The ratings were combined in accordance with the VA Schedule for Rating Disabilities (VASRD). 40 percent combined with 20 percent = 52 percent which rounded to 50 percent.

(3) On 20 July 2018, the applicant was counseled on the findings and recommendations of the formal PEB. He concurred with the findings and requested that the VA reconsider his disability ratings.

(4) On 17 August 2018, the U.S. Army Physical Disability Agency (USAPDA) approved the findings and recommendations of the PEB.

f. Orders Number 228-0126, issued by Headquarters, III Corps and Fort Hood, Fort Hood, TX on 16 August 2018, shows effective 30 October 2018 he was released from assignment and duty because of physical disability incurred while entitled to basic pay and under conditions that permit his retirement for permanent physical disability. He was placed on the retirement list, effective 31 October 2018.

g. On 30 October 2018 he was honorably retired by reason of disability, permanent (enhanced). His DD Form 214 shows in:

- Block 4a (Grade, Rate or Rank): Chief Warrant Officer 4 (CW4)
- Block 4b (Pay Grade): WO4

## 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 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 an increase in military disability rating. He states:

“When I was medically separated the Army gave me 30% for my medical condition Polycythemia vera. About a year later the VA raised my condition from 30% to 100%. I would like to see if the Army could raise my rating to match the VA from 30% to 100%.

My Military records show that I was separated with 30% for my medical condition. I would like to have that raised from 30% to 100%.”

c. The Record of Proceedings details the applicant's service and the circumstances of the case. His DD 214 for the period of Service under consideration shows he entered the regular Army on 19 November 2004 and was and was permanently retired for physical disability on 30 October 2018 under provisions provided in chapter 4 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (19 January 2017).

d. The applicant's 11 July 2018 Formal Physical Evaluation Board (PEB) Proceedings (DA Form 199-1) show he was determined to have two conditions unfitting for continued military service – Polycythemia vera and Left cubital tunnel syndrome status post ulnar nerve release. The PEB applied the Veterans Benefits Administration derived ratings of 40% and 20% respectively for a combined military disability rating of 50% (40% combined with 20% = 52% which rounds to 50%). The formal PEB then recommended the applicant be permanently retired for physical disability with a rating of 50%.

e. On 20 July 2018, after being counseled by his PEB Liaison Officer (PEBLO) on the PEB's findings and recommendations, the applicant concurred with the PEB's finding and requested a VA reconsideration of the disability rating for his cubital tunnel syndrome.

- f. The VA maintained the 20% rating as seen in their 8 August 2018 decision:

“The proposed 20 percent evaluation of left upper extremity cubital tunnel and carpal tunnel syndromes, status post-surgeries is confirmed ...

Request for reconsideration contended the evaluation should be equated with moderate nerve damage under Diagnostic Code 8613 because of pain and weakness. Additional treatment records and a copy of the servicemember’s currently physical profile were offered in support of the contention ...

The proposed 20 percent evaluation is confirmed. The primary problem is sensory. The new evidence appears to be consistent with the VA examination report. It does not present features so clear as to warrant elevation to the moderate level.”

- g. His case complete, the applicant was permanently retired for physical disability with a 50% rating.

- h. Polycythemia vera as described on the Johns Hopkins Medicine website:

Polycythemia vera is a rare blood disorder in which there is an increase in all blood cells, particularly red blood cells. The increase in blood cells makes your blood thicker. This can lead to strokes or tissue and organ damage.

Polycythemia vera is caused by a genetic change (mutation) that develops during your lifetime. It is not an inherited genetic disorder. In most cases it is not known why this happens. (<https://www.hopkinsmedicine.org/health/conditions-and-diseases/polycythemia-vera>)

- i. JLV shows the applicant’s rating for polycythemia vera is currently 60% having been increased from 40% on 5 February 2019.

j. 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.

- k. It is the opinion of the Agency Medical Advisor that neither an increase in his military disability rating nor referral 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 referral to the Disability Evaluation System is warranted. The Board determined the applicant concurred with the PEB's finding and requested a VA reconsideration of the disability rating for his cubital tunnel syndrome, which VA maintained the 20% rating as seen in their 8 August 2018 decision: Based on the medical opine and preponderance of evidence, the Board found insufficient evidence to support the applicant's contentions for an increase in his disability rating. Therefore, relief was denied.

2. The Board agreed the VA applies its own polices and regulations to make service connection and rating determinations. It is not bound by determinations made by the Army. With that, unlike the VA, the Army's determination of fitness and its mandatory application of VA ratings is a snapshot in time whereas the VA can make service connection and rating determinations throughout the veteran's life. The VA provides post-service support and benefits for service-connected medical conditions. The VA operates under different laws and regulations than the Department of Defense (DOD). In essence, the VA will compensate for all service-connected disabilities.

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.

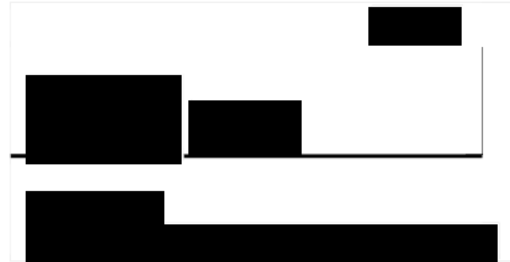
BOARD VOTE:

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.



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. Title 10, United States 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 (PDES) and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with DOD Directive 1332.18 and AR 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 an MEB; when they receive a permanent medical profile rating of 3 or 4 in any factor and are referred by an 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/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 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 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 a medical impairment prevents reasonable performance of the duties required of the Soldier's office, grade, rank, or rating.

3. 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.

4. 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.

5. Army Regulation 40-501 (Standards of Medical Fitness) governs medical fitness standards for enlistment, induction, appointment (including officer procurement programs), retention, and separation (including retirement). The Department of

Veterans Affairs Schedule for Rating Disabilities (VASRD) is used by the Army and the VA as part of the process of adjudicating disability claims. It is a guide for evaluating the severity of disabilities resulting from all types of diseases and injuries encountered as a result of or incident to military service. This degree of severity is expressed as a percentage rating which determines the amount of monthly compensation.

6. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. Boards for Correction of Military/Naval Records may grant clemency regardless of the court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice. This guidance does not mandate relief but provides standards and principles to guide Boards in application of their equitable relief authority.

a. In determining whether to grant relief on the basis of equity, injustice, or clemency grounds, Boards shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment.

b. Changes to the narrative reason for discharge and/or an upgraded character of service granted solely on equity, injustice, or clemency grounds normally should not result in separation pay, retroactive promotions, and payment of past medical expenses or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded service characterization.

7. Section 1556 of Title 10, United States Code, 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.

8. 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.

//NOTHING FOLLOWS//