

IN THE CASE OF: [REDACTED]

BOARD DATE: 25 April 2024

DOCKET NUMBER: AR20230002686

APPLICANT REQUESTS: in effect, correction of his record to show he was permanently retired for disability. He also requests a personal appearance before the Board.

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

- On line application in lieu of a DD Form 149 (Application for Correction of Military Record)
- DD Form 293 (Application for the Review of Discharge) in lieu of the DD Form 149
- Physical Evaluation Board (PEB) Proceedings (initial)
- Department of Veterans Affairs (VA) authorized private medical records
- PEB denial of appeal
- Additional range of motion records

FACTS:

1. The applicant states he believes the down grading of his 40% disability rating is unjust and the private records provided support this fact.
2. The applicant enlisted in the Regular Army on 6 February 2017 for 4 years. He completed training with award of the military occupational specialty 92A (Automated Logistical Specialist. The highest grade he held was E-4.
3. A Formal Physical Evaluation Board (FPEB), dated 3 August 2020, found the applicant physically unfit, due to lumbar degenerative disc disease without radiculopathy at a 40% disability level. The FPEB also found he was suffering from the following conditions that were not unfitting:

- |  |   |
|--|---|
| • Tinnitus                                 | obstructive sleep apnea                 |
| • stricture of esophagus                   | erectile dysfunction                    |
| • laceration scar on leg                   | migraine including migraine variants    |
| • right lateral collateral ligament sprain | left lateral collateral ligament sprain |

- |   |  |
|---|--|
| • right knee strain                     | left knee strain                       |
| • right shin splints                    | left shin splints                      |
| • right patellofemoral pain syndrome    | left patellofemoral pain syndrome      |
| • right shoulder strain                 | left shoulder strain                   |
| • cataract, right eye                   | herpetic simplex keratitis, right eye  |
| • anxiety disorder unspecified          | right temporomandibular joint disorder |
| • left temporomandibular joint disorder | bruxism                                |
| • right wrist sprain, chronic           |  |

It was recommended he be placed on the Temporary Disability Retired List (TDRL) with a re-examination pending in February 2022.

4. The applicant was released from active duty and placed on the Temporary Disability Retired List effective 19 November 2020.

5. The VA conducted a medical evaluation and authorized private medical treatment through the Community Health program for his back. The applicant provided the treatment records for the period covering 30 April 2021 through 10 January 2023.

6. It appears that the applicant was afforded a FPEB on 3 February 2023; however, a copy of this FPEB is not of record.

7. In a Headquarters, U.S. Army Physical Disability Agency (APDA) Memorandum, dated 9 February 2023, it was noted that the applicant had disagreed with the FPEB findings, contending his back condition should be rated at a 40% level and he be medically permanently retired.

a. Based upon their review of the preponderance of evidence, they concurred with the FPEB as summarized on a DA Form 199-1, dated 3 February 2023.

b. They considered the variation in the applicant's combined ROM measurements of 190 degrees on VA examination dated 22 June 2022 and 115 degrees on Chiropractic exam on 18 January 2023, as well as the generally accepted ROM required to perform his daily activities to include driving and working full-time.

c. According to the General Rating Formula for Diseases and Injuries of the Spine (VASRD Codes 5242-5243), the applicant's lumbar degenerative disc disease (without unfitting radiculopathy) condition warrants a rating of 20% based on forward flexion of the thoracolumbar spine greater than 30 degrees but not greater than 60 degrees and the combined range of motion of the thoracolumbar spine not greater than 120 degrees. It is generally accepted that the sit-to-stand and stand-to-sit activities required 56% to 66% lumbar flexion (Measurement of Joint Motion: A Guide to Goniometry, 5th Edition,

pg. 508). During sworn testimony, the applicant disclosed that he can transition from lying to seated and standing positions throughout the day.

d. They concluded that the applicant's case was properly adjudicated by the FPEB in accordance with the rules that govern the Physical Disability Evaluation System (PDES) in making its determination. The findings and recommendations are supported by a preponderance of evidence and are therefore affirmed. The issues raised in the applicant's appeal dated 6 February 2023 were adequately addressed by the PEB.

#### 8. 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 on his DD form 293 that his characterization of service be changed to uncharacterized "Because of injuries lower back pain at field, eye surgeries, sleep apnea!"

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 6 February 2017 and was placed on the Temporary Disability Retirement List (TDRL) on 19 November 2020 under provisions in chapter 4 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (19 January 2017). His Physical Disability Information Report (PDIR) shows his percentage of disability was 40.

d. Orders published by the United States Army Physical Disability Agency on 10 February 2023 show he was removed from the TDRL and separated with disability severance pay on 10 February 2023.

e. 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).

f. Soldiers then receive one set of VA Disability Benefits Questionnaires (DBQ – aka 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.

g. 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.

h. On 30 January 2020, the applicant was referred to the IDES for "Chronic lumbar arthralgia." The applicant claimed seventeen additional conditions on a separate Application for Disability Compensation and Related Compensation Benefits (VA Form 21-526EZ) and Statement in Support of Claim (VA Form 21-4138). A medical evaluation board (MEB) determined his "Lumbar degenerative disc disease" failed the medical retention standards of AR 40-501, Standards of Medical Fitness. The MEB determined twenty-three additional medical conditions met medical retention standards.

i. The applicant requested an Impartial Medical Review of his case, specially wanting to know why his mild obstructive sleep apnea (OSA) on his permanent physical profile had been downgraded from a duty limiting (P3) condition to a non-duty limiting (P2) condition.

j. The reviewing provider noted that when the applicant was compliant with treatment (wearing his automatically adjusting positive airway pressure machine, or APAP), his sleep apnea met medical standards and that it did not meet medical retention standards when he was non-compliant with treatment. Then later, he was sleeping without device at all and doing well.

"On his Pulmonary Sleep clinic follow-up on 27 Mar 2019, the provider documented ... Assessment: SM [Service Member] is compliant with APAP use and their OSA is considered successfully managed. SM denies inappropriate daytime sleepiness in general. Follow-up in 6 months to reassess how OSA

treatment is going as CBTi [cognitive behavioral therapy for insomnia] progresses.”

On his Pulmonary clinic follow-up on 04 Feb 2020, the provider documented: “32-year-old active-duty service member f/u mild OSA. MEB for back; inquiring about P3 for OSA ... Assessment/Plan: OSA (obstructive sleep apnea). mild OSA. SM is not compliant with PAP use; diagnosed 2 years ago. P3 submitted for OSA; SM understands that typically Med Board does not medically separate for non-compliance and that it results in administrative separation. If motivated to treat OSA and use PAP, f/u in 2 months.

At his 04 Mar 2020 MAMC [Madigan Army Medical Center] Sleep clinic behavioral health therapist outpatient follow-up, the provider documented: “He advised that when he is [REDACTED], he has no problem sleeping at all. He said in [REDACTED] he goes to sleep at a similar time each night and sleeps solidly between 4 to 7 hours each night, waking up each day feeling refreshed. This happened on leave and he anticipates return to normalcy when he returns to [REDACTED] at the completion of his MEB”

The causes for referral to the DES as stated in AR 40-501: Obstructive sleep apnea (OSA) that causes daytime hypersomnolence or snoring that interferes with the sleep of others and cannot be corrected with weight loss, positive airway pressure (PAP), surgery, or an oral appliance.

The undersigned opines that Obstructive sleep apnea does not fail retention standards because his obstructive sleep apnea responds to positive airway pressure. Based from his download data, the residual AHI [apnea hypopnea index] was minimal during the time period he was found compliant in APAP usage as well as from the time periods he was non-compliant.”

k. With the IMR completed, the applicant concurred with the MEB’s decision on 4 May 2020 and his case was forwarded to a physical evaluation board (PEB) for adjudication.

l. The applicant’s informal PEB found his lumbar spine to be his sole unfitting condition for continued military service. They found the twenty-three remaining medical conditions not unfitting for continued service. The PEB applied the Veterans Benefits Administration (VBA) derived ratings of 40% and recommended the applicant be placed on the TDRL as the condition was not stable for ratings purposes. The applicant non-concurred with the PEB, maintaining that his condition was permanent and stable for rating purposes.

m. The applicant was present for and represented by regularly appointed counsel at his 3 August 2020 formal PEB. Following evaluation of the evidence and sworn

testimony provided, they determined his lumbar condition was unstable for rating purposed and again recommended he be placed on the TDRL.

“ ... Soldier testified that he does not take any analgesic or anti-inflammatory medications for his back condition, takes on-line classes, helps with minor chores around the home, dresses himself, and drives a car as needed. A December 2017 medical note (exhibits) documents, “Normal range of motion (ROM), normal strength.” And “Likely musculoskeletal strain.” Moreover, ROM measurements taken by the VA show internal inconsistencies that do not comport with Soldier’s diagnosis and daily level of functioning.”

As a matter of general medical principles, mechanical back pain (not requiring surgical intervention) tends to improve over time with conservative measures and specialized exercises. The preponderance of the evidence indicates there is a greater than 50% chance that his rating will change following a TDRL period. Therefore, the decision of the Informal Board is sustained.”

n. The applicant non-concurred with the formal PEB and appealed their decision to the United States Army Physical Disability Agency (USAPDA). The agency maintained the formal PEB’s finding in their 16 August 2020 memorandum to the applicant:

“ ... The preponderance of the evidence continues to indicate that your back condition is unstable for rating purposes. You have a 40% rating for marked limitation of back motion. However, you have minimal findings on imaging, and have required no back surgery. As a matter of general medical principles, mechanical back pain (not requiring surgical intervention) tends to improve over time with conservative measures and specialized exercises ...

There is indication that some improvement has already occurred. You testified that you do not take any analgesic or anti-inflammatory medications for your back condition. You provided no medical documentation with your appeal to support a stable rating percentage.”

o. The case was then finalized for the Secretary of the Army and the applicant was subsequently placed on the TDRL with 40% disability rating.

p. The applicant underwent the TDRL reevaluation of his lumbar spine at a VA facility on 13 June 2022. The examining provider wrote “Abnormal range of motion (forward flexion only) limits maximal and prolonged bending, twisting, and walking. Such an isolated range of motion defect for the lumbar spine is highly, highly, unusual: His forward flexion was 40 degrees with the remaining 5 planes of motion all measured 30 degrees (normal) for a combined range of motion or 190 degrees. Other than some tenderness to palpation over the lumbar spine, the remainder of the examination (strength testing, sensory testing, provocative testing, etc.) was normal.

q. In August 2022, the informal PEB for his TDRL reevaluation found his lumbar degenerative disc disease continued to be unfitting for continued service but was now stable for rating purposes. Using the VASARD, they derived and applied a 20% disability rating and recommend the applicant be separated with disability severance pay. The applicant non-concurred with the new rating and requested a formal PEB.

r. The PEB used appropriately and applied VASRD code 5243 – Intervertebral disc syndrome - in their correct derivation of his 20% rating. This code along with many other spine related codes uses the General Rating Formula for Diseases and Injuries of the Spine. Bracketing his 20% rating:

“Forward flexion of the thoracolumbar spine greater than 60 degrees but not more than 85 degrees; or combined range of motion greater than 120 degrees but not greater than 235 degrees; or muscle spasm, guarding, or localized tenderness not resulting in abnormal gait or abnormal spinal contour ...10%

Forward flexion of the thoracolumbar spine between 30-60 degrees; or combined motion is less than 120 degrees; or muscle spasm or guarding severe enough to result in an abnormal gait or abnormal spinal contour ..... 20%

Forward flexion of the thoracolumbar spine 30 degrees or less; or, favorable ankylosis of the entire thoracolumbar spine ..... 40%”

s. As part of his appeal, he submitted into evidence a 10 January 2023 evaluation from a physical therapist which, if accurate, showed a serious, if not incapacitating, decline in his condition over the 4 months since his informal PEB based on the physical examination: All six planes of motion were identified as “Very restricted” due to “pain” without providing measurements. He had abnormal flexibility and weakness throughout both extremities. Sensory testing was not performed.

t. The applicant was present for and represented by regularly appointed counsel at his formal PEB on 3 February 2023. Following the presentation and review of evidence and the applicant’s sworn testimony, the Board confirmed the informal PEB’s findings and recommendation:

“During formal proceedings the Soldier testified that his medical providers manage his condition with conservative measures such as physical therapy, Lidoderm patches, home exercises and, stretches, and over-the-counter medication as needed. He has not required Neurology, Neurosurgery, Orthopedic Surgery or Pain Management consultation.

He has not required any disability modifications to his domicile to facilitate activities of daily living as a consequence of his back pain. Additionally, during sworn testimony, the Soldier disclosed he is able to transition from lying to seated and standing positions throughout the day. He further testified that he

performs daily physical therapy exercises that require him to perform kneeling modified push-ups, lie on his back and curl his knees to his chest and adduct his thighs from a prone position. He is able to operate a motor vehicle for approximately 30 minutes at a time.

The Soldier is a full-time civilian employee as of November 2022 without physical limitations where he is required to work seated at a desk top computer. The Board finds that the preponderance of evidence supports that this condition does not meet the higher rating criteria listed in the Veterans Affairs Schedule for Rating Disabilities for lumbar degenerative disc disease without unfitting radiculopathy.”

u. The applicant appealed the formal PEB’s findings and recommendation to the United States Army Physical Disability Agency. In their 9 February 2023 appeal response, they addressed his case, and in particular, the 18 January 2023 chiropractic examination submitted as evidence:

“We considered the variation in your client’s combined ROM measurements of 190 degrees on VA examination dated 22 June 2022 and 115 degrees on Chiropractic exam on 18 January 2023 as well as the generally accepted ROM required to perform his daily activities to include driving and working full-time.

According to the General Rating Formula for Diseases and Injuries of the Spine (VASRD Codes 5242-5243), your client’s lumbar degenerative disc disease (without unfitting radiculopathy) condition warrants a rating of 20% based on forward flexion of the thoracolumbar spine greater than 30 degrees but not greater than 60 degrees and the combined range of motion of the thoracolumbar spine not greater than 120 degrees.

It is generally accepted that the sit-to-stand and stand-to-sit activities required 56% to 66% lumbar flexion (Measurement of Joint Motion: A Guide to Goniometry, 5th Edition, pg. 508). During sworn testimony, your client disclosed that he can transition from lying to seated and standing positions throughout the day.

We conclude that your client’s case was properly adjudicated by the FPEB in accordance with the rules that govern the Physical Disability Evaluation System (PDES) in making its determination. The findings and recommendations are supported by a preponderance of evidence and are therefore affirmed.”

v. The case was finalized for the Secretary of the Army and the applicant subsequently separated with disability severance pay.

w. Review of his PEB case file in ePEB along with his encounters in AHLTA revealed no substantial inaccuracies or discrepancies.



x. It is the opinion of the ARBA medical advisor that neither an increase in his military disability rating nor a referral of his case back to the DES is warranted.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found relief is not warranted. The Board found the available evidence sufficient to consider this case fully and fairly without a personal appearance by the applicant.
2. The Board concurred with the conclusion of the ARBA Medical Advisor that the evidence fully supports the decision of the USAPDA to remove the applicant from the TDRL and discharge him due to disability with severance pay. Based on a preponderance of the evidence, the Board determined the applicant's honorable discharge for disability with severance pay is not in error or unjust.

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.

9/18/2024

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. 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, USC, section 1556 provides the Secretary of the Army shall ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) is provided a copy of all correspondence and communications, including summaries of verbal communications, with any agencies or persons external to agency or board, or a member of the staff of the agency or Board, that directly pertains to or has material effect on the applicant's case, except as authorized by statute.
3. 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. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, 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.
4. Title 10, US Code, Chapter 61 sets forth provisions for retirement or separation due to a physical disability including for personnel receiving medical retirement with a 30% or greater disability rating.
5. Army Regulation 635-40 (Disability Evaluation For Retention, Retirement, Or Separation), paragraph 7-2, provides that an individual may be placed on the TDRL (for the maximum period of 5 years which is allowed by Title 10, United States Code, section 1210) when it is determined that the individual's physical disability is not stable and he or she may recover and be fit for duty, or the individual's disability is not stable and the degree of severity may change within the next 5 years so as to change the disability rating.
6. The Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records on 25 July 2018, regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. BCM/NRs 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 grounds.

a. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. 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.

//NOTHING FOLLOWS//