

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 30 July 2024

DOCKET NUMBER: AR20230003974

APPLICANT REQUESTS: in effect,

- Separation to be medically unfit in the line of duty
- A medical retirement
- A personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Certificate of Achievement (Honor Graduate), 18 May 2012
- Army Reserve Achievement Medal, 8 August 2012
- Army Reserve Component Overseas Training Ribbon (El Salvador), 6 June 2015
- (4) Non-Commissioned Officer Evaluation Report (NCOER), (15 July 2015 – 13 July 2019) 20150715-20190713
- DA Form 4187 (Personnel Action) (TPL (Unknown) Promotion Offer), 5 March 2017
- Medical Record (5 pages), 12 August 2017 - 28 September 2017
- Statement of Wartime Service, 15 November 2017
- DD Form 2796 (Post Deployment Health Assessment (PDHA)) (13 pages), 3 January 2018
- PDHA (5 pages), 3 January 2018
- DD Form 2807-1 (Report of Medical History), 3 January 2018
- DD Form 214 (Certificate of Release or Discharge from Active Duty), 14 February 2018
- Veterans Affairs (VA) Rated Disabilities, 15 February 2018
- Baylor Medical record (34 Pages), 10 April 2018
- Baylor Medical record (8 pages), 6 June 2018
- Open Burn Pit Registry, 13 June 2018
- Progress Notes (Sleep Apnea Test) (4 pages), 18 June 2018
- Neurology, 27 June 2018
- Carpal Tunnel Study, 27 June 2018
- Labs VA, 27 June 2018
- Labs DR H., 3 July 2018

- Magnetic resonance imaging (MRI) Neck photo, 3 July 2018
- Medical Record in Theater (5 pages), 5 July 2018
- Carpal Tunnel Note, 9 July 2018
- Neurology Follow-up, 9 July 2018
- VA Pulmonary, 23 July 2018
- Breathing Test, 23 July 2018
- Blood Work, 24 July 2018
- Physical Therapy (45 pages), 13 August 2018
- Plantar Fasciitis emergency room (ER) VA (4 pages), 25 September 2018
- Foot Achilles, 26 September 2018
- Course Reservation Verification, 19 November 2018
- Picture of coin received from Col Macgregor 2019
- My HealtheVet (5 pages) (Ankle), 11 February 2019
- My HealtheVet (5 pages) (Feet Standing), 11 February 2019
- My HealtheVet (5 pages) (Liver and Gallstones), 11 February 2019
- VA Chemistry Hematology, 14 March 2019
- My HealtheVet (5 pages) (Knee), 19 March 2019
- Adult and Pediatric Therapy records (54 pages), 20 March 2019
- DA Form 638 (Recommendation for Award), 28 June 2019
- Army Achievement Medal Certificate, 28 June 2019
- Physical Profile Record, 2 August 2019
- Physical Profile Record, 19 October 2019
- Permanent Profile Record, 12 January 2020
- Pain Consultants (19 pages), 24 March 2020
- Course Cancellation, 2 April 2020
- DA Form 7652 (Disability Evaluation System (DES) Commander's Performance and Functional Statement), 12 July 2020
- Army Physical Fitness Test Memorandum for Record (MFR) for MEB, 21 July 2020
- DA Form 199 (Informal Physical Evaluation Board (PEB) Proceedings), 19 November 2020
- PEB Recommendation for Non-Duty Related (NDR) Case, 19 November 2020
- Pain Consultants, 7 January 2021
- Pain Consultants, 8 February 2021
- Apple Podiatry MRI (8 pages), 5 March 2021
- Pain Consultants, 8 March 2021
- Doctors Note, 10 March 2021
- ER note, 10 March 2021
- DA Form 2173 (Statement of Medical Examination and Duty Status), 10 March 2021
- Podiatry X Ray (6 pages) from 10 March 2020 Injury, 11 March 2021

- Chiropractor (5 pages), 11 March 2021
- ER Midlothian Note, 13 March 2021
- ER Midlothian (19 pages), 13 March 2021
- Apple Podiatry Work Note, 15 March 2021
- Civilian Medical Provider's Functional Assessment, 16 March 2021
- Email Commander and ME, 23 March 2021
- Negotiating 10 March 2021 Drill email, 25 March 2021
- Podiatry (32 pages), 11 March 2021 - 15 April 2021
- Apple Podiatry Physical Therapy
- First sergeant emails, 13 May 2021
- R___ Emails (4 pages), 14 May 2021
- Functional Assessment Form, 15 May 2021
- DA Form 2823 (Sworn Statement) Sergeant First Class (SFC) G., 6 June 2021
- Statement (Anonymous Letter in support)
- Apple Podiatry (4 pages). 9 June 2021
- Flag email, 22 June 2021
- Equal Opportunity Complaint, 23 June 2021
- Statement (Sergeant H.), 24 June 2021
- Counselor Letter, 28 June 2021
- Orders Revoked Confirmation Request email, 16 July 2021
- Intake Form, 30 July 2021
- Statement Good Character (Staff Sergeant R.), 31 July 2021
- Statement (Specialist S.), 1 August 2021
- Class Move, 1 August 2021
- Statement Witness (SFC H.S.), 2 August 2021
- Recent Emails_ Orders Revoked (8 pages), 2 August 2021
- DA Form 4836 (Oath of Extension of Enlistment or Reenlistment), 27 August 2021
- Final Notification Office of the Inspector General (OIG), 8 September 2021
- Human Resources Command (HRC) Advisory Opinion NDR Response, 9 September 2021
- DA Form 199-1 (Formal PEB Proceedings), 23 September 2021
- Texas Army National Guard (TXARNG) Letter of Instructions for Formal PEB, 30 September 2021
- Letter To the PEB, 3 October 2021
- United States Army Physical Disability Agency (USAPDA) appeal with encls (79 pages), 12 October 2021
- DA Form 199-2 (USAPDA Revised PEB Proceedings) Administrative Correction, 21 October 2021
- DA Form 199-2 (Revised Findings), 26 October 2021
- DA Form 199-2, USAPDA Revised PEB Proceedings, 26 October 2021

- MFR, 16 February 2022
- Request to Reopen Physical Disability Processing, 23 Feb 22 10
- Apple Podiatry Note, 1 March 2022
- Apple Podiatry note (4 pages), 1 March 2022
- Signed Written Appeal to PEB, 8 March 2022
- Chiropractor (4 pages), 9 March 2022
- Army Physical Disability Appeal Board (APDAB) Appeal (90 pages), 11 March 2022
- Increased VA percentage, 11 March 2022
- APDAB memo, 22 April 2022
- OIG letter, 24 May 2022
- Discharge Orders, 24 May 2022
- Technician Discharge (5 pages), 27 July 2022
- Benefit Summary Letter, 28 July 2022
- DD Form 2697 (Report of Medical Assessment), 17 December 2022
- My HealtheVet (5 pages) (Lumbar Spine), 15 December 2022
- My HealtheVet (5 pages) (Spine Cervical), 15 December 2022
- My HealtheVet (21 pages), 15 December 2022
- My HealtheVet (80 pages), 15 December 2022
- My HealtheVet (117 pages), 15 December 2022

FACTS:

1. The applicant states he was involuntarily medically separated found not in the line of duty. He would like that changed to medically separated in the line of duty, a rating and medically retired. The reason it was unjust is because they did not look at his evidence. He went to the Formal Physical Evaluation Board (FPEB), and they agreed with him and said it was in the line of duty. When it was sent back from Texas, they did not agree with the formal board. Also, Texas tried to dismiss his case in error saying that he did not respond to them. He, nor his appointed council, or unit, received any notification of decision. He had to request it be sent back to the PEB. He has been fighting every step during this PEB process. Also, during this time he was going through the inspector general and a discrimination case against his commander which could have influenced the decision. Texas had errors in the case and all they wanted to do was get his case processed and leave him without benefits and process him out. Also, his VA rating was increased during the time of his case for his back. The deputy adjutant general did not take care of his soldier and did not even look at his case. The medical reviewer did not look at all his evidence. He was involuntarily medically separated, without benefits with them claiming it was not within the line of duty. He was a dual status technician with the guard for 9 years, on several missions for the state. He was deployed to Iraq, and he is a 100 percent disabled veteran. He was unjustly denied his medically retirement.

2. The applicant provided over 100 documents in support of his claim including awards, medical records, emails, and evaluations listed above under applicant's supporting documents considered by the Board. [All documents are available for the Board's review].
3. The applicant enlisted in the TXARNG on 24 April 2009. He held military occupational specialty 15B (Aircraft Powerplant Repairer).
4. DD Form 220 (Active Duty Report) shows he entered a period of active duty on 18 May 2009. He was released from active duty on 1 August 2009 after completing 74 days of active duty.
5. Orders 228-1028, issued by TXARNG on 16 August 2011, shows he was honorably discharged from the TXARNG on 7 August 2011, for officer candidate school enlist option.
6. NGB Form 22-3 (Request for Waiver) shows on 17 August 2011, he requested a waiver due to OCS Enlist Drop. After interviewing the applicant, he was found acceptable to become a member of the TXARNG.
7. He again enlisted in the TXARNG on 31 August 2011, for a period of 6 years.
8. He entered a period of active-duty training (ADT) on 4 January 2012. He was honorably released from active duty on 18 May 2012, after completion of required active service.
9. He entered a period of active duty in support of Operation Enduring Freedom/Inherent Resolve. He served in Kuwait from 7 April 2017 – 9 May 2017 before proceeding north into Iraq from 9 May 2017 – 30 August 2017 then returning to Kuwait on 30 August 2017 – 2 January 2018. He was honorably released from active duty on 14 February 2018, upon completion of required active service.
10. The applicant provided:
 - a. DA Form 199, showing a PEB convened on 19 November 2020, which found the applicant physically unfit and recommended his disposition be referred for case disposition under reserve component regulations. The following unfitting conditions were:
 - (1) Cervical spondylosis; plantar fasciitis; arthritis of left foot and ankle due to gout. The Soldier was diagnosed with cervical degenerative disc disease, canal and forminal stenosis and received treatment for this condition as well as physical therapy for his plantar fasciitis in 2018 and 2019 resulting in permanent profile limitations.

Although the Soldiers Commanders statement indicates the Soldier sustained injuries during deployment, the TXARNG indicated this condition does not meet medical fitness standards and the injuries were not duty related. This condition is not compensable because the PEB's review of available military and civilian medical records did not reveal any evidence that the condition was either incurred or aggravated while on Title 10 or Title 32 duty status. In accordance with (IAW) Department of Defense Instructions (DoDI) 1332.18, Enclosure 3, Appendix 2, paragraph 2.a., this Soldier is unfit because DA Form 3349, Physical profile limitations associated with this condition make this Soldier unable to reasonably perform duties as required by his 15B PMOS. The Soldier's condition prevents him from performing DA 3349, Physical profile, Section 4 functional activities 24a. physical and/or mentally able to carry and fire individual assigned weapon; 24b. ride in a military vehicle wearing usual protective gear without worsening condition; 24c. wear a helmet, body armor, and LBE without worsening condition; 24d. wear protective mask and MOPP 4 for at least 2 continuous hours per day; 24e. move 40 lbs while wearing usual protective gear up to 100 yards; 24f. live and function, without restrictions in any geographic or climatic area without worsening the condition.

(2) The PEB recommended his condition be non-compensable NDR.

(3) The applicant did not concur and demanded a formal hearing. His written appeal was submitted.

b. DA Form 2173, showing while on inactive duty training which he reported for on 10 March 2021, he report he had a Gout flare and had slipped on rocks rolling his ankle. He went to the ER and was diagnosed with right ankle sprain and cervical sprain, and referred to podiatry for Gout. He was seen by a podiatrist on 11 March 2021, was informed he might possibly have tears in ligaments and tendons. He was also seen by chiropractor for neck pain and informed he has aggravated herniated disk. He was given a boot and prescribed medication to keep swelling down. 22 March 2021, he had an MRI taken which found 3 torn tendons. 21 April 2021, he was referred to physical therapy. He was still being seen by podiatry and a chiropractor. It was marked the injury was considered to have been incurred in the line of duty. There is no signature by the commander.

c. HRC Advisory Opinion NDR Response, dated 9 September 2021, stating AHRC received an advisory opinion request from the Joint Base San Antonio (JBSA) NDR PEB requesting an in-line of duty advisory opinion for his lumbar strain condition and lumbosacral radiculopathy.

(1) After a thorough review and a medical opinion obtained by the AHRC Surgeon General's office, his lumbar strain condition and lumbosacral radiculopathy was not incurred by military service. Continue processing this claim as NDR.

(2) While deployed in 2017, he was seen in the theater clinic for low back and shoulder pain. He stated he injured his lower back and shoulder when he slipped and fell, and he stated that he continues to lift weights in the gym. The applicant denied radicular symptoms. The provider noted some lower back muscle tightness, but the Soldier had full range of motion of his lumbar spine, and the lower extremity neurologic exam was unremarkable. The diagnosis listed was back strain lumbar. The provider referred him to physical therapy, and he was instructed to follow up in three weeks if the symptoms did not improve. There was no follow-up visit in Armed Forces Health Longitudinal Technology Application (AHLTA) for back pain for this Soldier.

(3) On his PDHA dated 3 January 2018, he reported having back pain while deployed, but no specifics were given regarding an injury. He reported being “bothered a little” by back pain on his Post Deployment Health Reassessment dated 12 January 2019.

(4) According to supplied medical records, he was seen by physical therapy in 2018 primarily for neck pain, although he occasionally mentioned low back muscle spasms. A medical provider saw the Soldier on 27 June 2018 for a number of physical complaints, including back pain. On the physical exam, the provider noted him to have lumbar facet tenderness with lumbar extension, but no other lower extremity abnormalities and lumbar x-rays were not performed.

(5) There were no records in Joint Legacy Viewer documenting that he was seen for lumbar spine issues by the Department of Veterans Affairs.

(6) In the file, there are no medical records documenting a complaint or diagnosis of lumbar radiculopathy.

(7) His fall while deployed caused a lumbar muscle strain. The records provided document treatment for many physical complaints but with no diagnosis of lumbar radiculopathy. There were no lumbar radiograph results that documented the possibility of lower extremity radiculopathy. His diagnosis of lumbar muscle strain while in theater is not of lasting significance, therefore, his lumbar spine condition is not service incurred.

d. DA Form 199-1, showing a formal PEB was convened on 23 September 2021, for the following unfitting conditions.

(1) Plantar fasciitis, arthritis of left foot and ankle due to gout. NDR Case: The Soldier was treated for plantar fasciitis, arthritis of left foot and ankle due to gout by Neuro Rehabilitation with physical therapy and steroid injections from February 2019 to 8 March 2019 while in a non-duty status. The condition did not improve with medication and conservative treatment resulting in permanent profile limitations. Although the

Soldier's Commander's statement indicates the Soldier sustained injuries during deployment, the TXARNG indicated this condition does not meet medical fitness standards and the injuries were not duty related. This condition is not compensable because the PEB's review of available military and civilian medical records did not reveal any evidence that the condition was either incurred or aggravated while on Title 10 or Title 32 duty status. Not rated.

(2) Lumbosacral strain. FORMAL - Based on a review of the evidence of record, to include the testimony and the exhibits provided during the formal board proceedings; in full consideration of DoDI 1332.18, Enclosure 3, Appendix 2; and considering the requirements for reasonable performance of duties required by rank and military specialty, the PEB finds the Soldier is unfit for the condition lumbar strain. In regards to the conditions of lumbar strain, the Soldier presented new evidence that included a witness statement that substantiated his report of a fall in Iraq on 20 May 2017. On this date he reported that he was working on an Apache engine that was on an engine stand, he slipped on oil that was on the floor and immediately fell to the floor. The witness statement confirms this incident. The Soldier states he was seen by unit medics and given over the counter pain medication. Exhibit B is a theater note confirming the Soldier was seen on 28 September 2017 for lumbar back strain and reported he had fallen. Exhibit C is a post deployment health assessment in which he reports back pain. The Soldier continued to receive care from civilian providers upon his return from deployment for his back condition, which are notated in exhibits D through F. Therefore, the PEB finds that the preponderance of evidence is sufficient to find the condition of lumbar strain to be unfitting. Not rated.

(3) Cervical spondylosis. NDR Case: The Soldier was diagnosed with cervical degenerative disc disease, canal and forminal stenosis and received Neuro Rehabilitation treatment for this condition. Despite treatment to include nerve blocks, physical therapy from 13 August 2019 to 5 November 2018, and pain medication, the condition did not improve resulting in permanent profile limitations. Although the Soldier's Commander's statement indicates the Soldier sustained injuries during deployment, the TXARNG indicated this condition does not meet medical fitness standards and the injuries were not duty related. This condition is not compensable because the PEB's review of available military and civilian medical records did not reveal any evidence that the condition was either incurred or aggravated while on Title 10 or Title 32 duty status.

(4) FORMAL - Regarding the Soldier's contention that he is not physically fit to perform his duties as a Soldier, specifically as the Aircraft Powerplant Repairer for D Co, 2-149 GASB: Based upon a review of the objective evidence of record, including the Soldier's testimony and exhibits provided during Formal Board proceedings; in full consideration of DoDI 1332.18, Enclosure 3, Appendix 2; and considering the requirements for reasonable performance of duties required by rank and military

specialty, the PEB finds the Soldier fit for lumbosacral radiculopathy. In full consideration of DoDI 1332.18, Enclosure 3, Appendix 2, to include combined, overall effect, the condition is not unfitting. The evidence supports that this condition does not prevent reasonable duty performance. Continuing in the military does not pose a risk to the Soldier or to others. This condition does not impose unreasonable requirements on the military to maintain or protect the Soldier. The updated facts to support this finding is there are no medical records to support the diagnosis, no medications being taken that are related to the condition and no specialty visits in connection with the diagnosis. This condition is not listed on the DA Form 3349 indicating no functional limitations for this condition. The Commander Statement annotated numerous physical conditions preventing the Soldier from performing his duties with no mention of this condition. There is insufficient objective medical evidence available to the PEB to change the findings of the informal board.

(5) Regarding the contention that the lumbar strain, lumbosacral radiculopathy and cervical conditions be found duty related. Based upon a review of the objective evidence of record, including the Soldier's testimony and exhibits provided during the Formal Board, a request for opinion was sent to HRC for line of duty (LOD) determination. HRC rendered a decision that these conditions were not found in the LOD and to continue processing this case as non-duty related.

(6) The applicant did not concur. He submitted a written letter to the PEB on 3 October 2021.

e. USAPDA appeal with enclosures (79 pages), 12 October 2021, requesting:

- USAPDA return his case to HRC for the advisory opinion to be reconsidered
- PEB findings to be set aside and for lumbar strain, lumbosacral radiculopathy and related limitation to be found to be unfitting
- PEB findings to be set aside and for cervicalgia, cervical spondylosis and related limitation to be affirmed as unfitting
- Clarification to be made regarding the ability of the Physical Evaluation Board to issue a compensability findings in the absence of a line of duty determination

f. DA Form 199-2 showing on 21 October 2021, an Administrative Correction was completed as described in Section VII. This is an Administrative Correction to the previously issued DA Form 199, dated 23 September 2021, to correct Section I. This administrative correction does not change the disposition or rating.

11. DA Form 199-2 shows on 26 October 2021, a revised findings were published. The USAPDA has revised the findings of his Formal Physical Evaluation Board (PEB) Proceedings, conducted at Joint Base San Antonio and completed on 23 September

2021, as indicated below. The board found the soldier was physically unfit and that the soldier's disposition be referred for case disposition under reserve component regulations. The following medical conditions were determined to be unfitting:

a. Plantar fasciitis, arthritis of left foot and ankle due to gout. NDR Case: The Soldier was treated for plantar fasciitis, arthritis of left foot and ankle due to gout by Neuro Rehabilitation with physical therapy and steroid injections from February 2019 to 8 March 2019 while in a non-duty status. The condition did not improve with medication and conservative treatment resulting in permanent profile limitations. Although the Soldier's Commander's statement indicates the Soldier sustained injuries during deployment, the TXARNG indicated this condition does not meet medical fitness standards and the injuries were not duty related. This condition is not compensable because the PEB's review of available military and civilian medical records did not reveal any evidence that the condition was either incurred or aggravated while on Title 10 or Title 32 duty status.

b. Cervical spondylosis. NDR Case: The Soldier was diagnosed with cervical degenerative disc disease, canal and forminal stenosis and received Neuro Rehabilitation treatment for this condition. Despite treatment to include nerve blocks, physical therapy from 13 August 2019 to 5 November 2018, and pain medication, the condition did not improve resulting in permanent profile limitations. Although the Soldier's Commander's statement indicates the Soldier sustained injuries during deployment, the TXARNG indicated this condition does not meet medical fitness standards and the injuries were not duty related. This condition is not compensable because the PEB's review of available military and civilian medical records did not reveal any evidence that the condition was either incurred or aggravated while on Title 10 or Title 32 duty status.

c. The voting membership of the PEB included an Officer of the Reserve Component. During formal proceedings, the PEB reevaluated all available medical and performance records to include sworn testimony and exhibits provided by the Soldier. This case was adjudicated as a non-duty related case. DODI 1332.18, 3d. The voting membership of the PEB included a physician. In accordance with AR 635-40 (Disability Evaluation for Retention, Retirement, or Separation), paragraph 4-22c (3), the US Army Physical Disability Agency has modified your findings, rating and disposition.

d. The condition of lumbosacral strain was found to be not unfitting. Regarding the contention that the lumbosacral strain, lumbosacral radiculopathy and cervical conditions be found duty related. Based upon a review of the objective evidence of record, including the Soldier's testimony and exhibits provided during the Formal Board, a request for opinion was sent to HRC for LOD determination. HRC rendered a decision that these conditions were not found in the LOD and to continue processing this case as non-duty related.

e. There was no indication within his available records that shows his election.

12. A memorandum from USAPDA shows as of 10 November 2021, the applicant had not met the required time from for submission. He had not provided a signed election or any appeal documentation. Reserve Component failed to provide documentation within a reasonable time frame and therefore is outside of mandated requirements to properly adjudicate the case. Every reasonable effort has been made to contact and obtain the Soldier's election. The case was forwarded in accordance with AR 635-40, paragraph 4-24 k (2) for further processing.

13. The applicant provided APDAB Appeal (90 pages), 11 March 2022, wherein his counsel requested the APDAB overturn any USAPDA and HRC decisions regarding the duty-related nature of his disabling conditions. He requested the APDAB find that his plantar fasciitis and cervicalgia are duty-related. He also asserts that his duty related lumbar strain is also an unfitting condition.

14. On 8 April 2022, the APDAB, convened under the provisions of AR 635-40, paragraph 4-26, to consider the case of the applicant.

a. On 15 March 2022, the Deputy Commander, USAPDA requested an appellate review by the APDAB regarding the case of the applicant. The basis for this review is (a) the applicant's [non-concurrence] with the USAPDA's revision changing his lumbar strain from an [unfitting] medical condition to a [not unfitting] medical condition, as documented on the DA Form 199-2 (Revised Physical Evaluation Board (PEB) Proceedings), dated 20211026 and (b) that the two issues determined [unfit for continued service] should have been documented as incurred in the line of duty and therefore be compensable.

b. The board carefully reviewed the issues raised in the memorandum, dated 11 March 2022 and all available records. The APDAB, by unanimous vote, found the applicant received a full and fair hearing; that the proceedings conformed to applicable laws, governing Department of Defense issuances, and Army regulations; and the USAPDA revision is supported by the applicable standard of evidence for the category of determination. The APDAB is returning the case to USAPDA for final processing.

15. Orders 0001839997.00 issued by TXARNG, on 24 May 2022, discharged the applicant effective 28 February 2022, IAW National Guard Regulation (NGR) 600-200, by reason of medical physical/mental condition.

16. 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.

17. Title 38, U.S. Code, 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.

18. Title 38, CFR, Part IV is the VA's schedule for rating disabilities. The DVA awards disability ratings to veterans for service-connected conditions, including those conditions detected after discharge. As a result, the DVA, 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 DVA can evaluate a veteran throughout his or her lifetime, adjusting the percentage of disability based upon that agency's examinations and findings.

19. By regulation, AR 15-185 (ABCMR) 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.

MEDICAL REVIEW:

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: The applicant has applied to the ABCMR requesting a reversal of the Army Physical Disability Appeal Board's, the United States Army Physical Disability Agency's, and the United States Army Human Resources Command decisions that his case was appropriately adjudicated and/or that neither of his unfitting medical conditions was duty related and therefore not compensable.

a. The Record of Proceedings details the applicant's military service and the circumstances of the case. Orders published 24 May 2022 by the Texas Army National Guard (TXARNG) show the applicant was discharged for a non-duty related medically disqualifying condition(s) effective 22 February 2022.

b. On 12 January 2020, the applicant was placed on a duty limiting permanent physical profile for "Neck Injury/Pain" and "Ankle/Foot Injury/Pain (Left)." The TXARNG determined these conditions were not related to his military service, and the applicant subsequently requested referral to a non-duty related physical evaluation board.

Reserve Component (RC) Service Members who are not on a call to active duty of more than 30 days and who are pending separation for non-duty related medical conditions may enter the Disability Evaluation System (DES) for a determination of fitness.

c. A non-duty related physical evaluation board (NDR PEB) affords these Soldiers the opportunity to have fitness determined under the standards that apply to Soldiers who have the statutory right to be referred to the DES for a duty related medical condition. After 2014, these boards also look to see if the referred condition(s) were duty related, and if so, return them to the sending organization for entrance into the duty related processes of the DES.

d. On 19 November 2020, the applicant's informal NDR PEB determined that the two profiled conditions were unfitting for continued military service and recommended the applicant's disposition be referred for case disposition under Reserve Component regulations. They found no evidence either condition was duty related: "Although the Soldier's Commander's statement indicates the Soldier sustained injuries during deployment, the Texas Army National Guard indicated this condition does not meet medical fitness standards and the injuries were not duty related. This condition is not compensable because the PEB's review of available military and civilian medical records did not reveal any evidence that the condition was either incurred or aggravated while on Title 10 or Title 32 duty status."

e. The applicant failed to complete his elections in a timely manner. On 29 December 2020, the applicant requested, through counsel, for an extension to 11 January 2011. The extension request was granted. On 5 January 2021, the applicant non-concurred with the informal PEB's findings, provided a written appeal, and requested a formal PEB with a personal appearance and assistance of regularly appointed counsel.

f. The applicant had previously contended his unfitting conditions were duty related. Prior to the formal PEB, the PEB had correctly referred these decisions to the United States Army Human Resources Command (USAHRC) for review and adjudication. Paragraph 5-23d of AR 635-40:

"d. Line of duty challenges during the formal hearing. It is not intended that PEBs act as hearing authorities for Soldier appeals of LOD {line of duty} determinations. AR 600-8-4 {Line of Duty Policy, Procedures, and Investigations} sets out appeal procedures.

(1) The above, notwithstanding the Soldier or Soldier's counsel, may present evidence of error concerning a LOD finding that a condition is EPTS without permanent aggravation. The PEB will consider such evidence. If the PEB believes the evidence warrants reconsideration of the LOD finding, the PEB may request review of the determination in accordance with the provisions of

paragraphs 5–23b and 5–23c. The Soldier’s counsel will be notified. If the PEB determines that the evidence does not provide reason to question the LOD determination, the PEB will inform the Soldier and the counsel of this fact and that the case was adjudicated based upon the approved LOD.”

g. In a 27 August 2021 memorandum and prior to the formal PEB, the USAPDA referred the issue to the USAHRC at the request of the formal PEB. USAHRC has the functional responsibility for the Army’s line of duty processes. Paragraph 1-6a of AR 600-8-4, Line of Duty Policy, Procedures, and Investigations (15 April 2004): “The Commanding General (CG), U.S. Army Human Resources Command (USA HRC) will have functional responsibility for LD determinations and act for the SA on all LD determinations and appeals referred to Headquarters, Department of the Army (HQDA) and all exceptions to procedures described in this regulation.”

h. In their 9 September 2021 response, USAHRC informed USAPDA these two conditions were not duty related: “After a thorough review and a medical opinion obtained by the AHRC Surgeon General’s office, SGT [Applicant]’s lumbar strain condition and lumbosacral radiculopathy was not incurred by military service. Continue processing this claim as NDR.”

i. The formal PEB noted that the U.S. Army Human Resources Command had previously determined his conditions were not duty related: Regarding the contention that the lumbar strain, lumbosacral radiculopathy and cervical conditions be found duty related. Based upon a review of the objective evidence of record, including the Soldier’s testimony and exhibits provided during the Formal Board, a request for opinion was sent to HRC for LOD determination. HRC rendered a decision that these conditions were not found in the LOD and to continue processing this case as non-duty related. (Contention Memo 11 AUG 21 with Exhibits A-I, HRC NDR Opinion Memorandum 9 Sep 21, Sworn testimony, Case File).”

j. At the formal PEB on 23 September 2021, the applicant maintained that his lumbosacral strain and lumbar radiculopathy were additional unfitting medical conditions for continued military service. The board determined the lumbosacral strain was an unfitting condition for continued service but that the lumbar radiculopathy was not unfitting for continued military service: “In full consideration of DoDI 1332.18 {Department of Defense Instruction 1332.18 SUBJECT: Disability Evaluation System (DES), 5 August 2014}, Enc. 3, App. 2; and considering the requirements for reasonable performance of duties required by rank and military specialty, the PEB finds the Soldier fit for lumbosacral radiculopathy. In full consideration of DoDI 1332.18, Enc. 3, App. 2, to include combined, overall effect, the condition is not unfitting. The evidence supports that this condition does not prevent reasonable duty performance. Continuing in the military does not pose a risk to the Soldier or to others. This condition does not impose unreasonable requirements on the military to maintain or protect the

Soldier. The updated facts to support this finding are there are no medical records to support the diagnosis, no medications being taken that are related to the condition and no specialty visits in connection with the diagnosis. This condition is not listed on the DA Form 3349 {Physical Profile Record} indicating no functional limitations for this condition.”

k. After the case was forwarded to USAPDA for finalization and Secretarial Approval, USAPDA issued a U.S. Army Physical Disability Agency (USAPDA) Revised Physical Evaluation Board (PEB) Proceedings (DA form 199-2) on 26 October 2021: They reversed the formal PEB’s determination that his lumbar strain was an unfitting condition for continued service.

l. Because USAPDA maintained the formal PEB’s findings that his two remaining unfitting conditions were not incurred in the line of duty based on the review by the USAHRC, this revision had no effect on the final recommendation that the applicant’s disposition be referred for case disposition under Reserve Component regulations for medically disqualifying non-duty relate medical conditions.

m. The applicant again failed to elect in a timely manner. In a 10 November 2021 memorandum, USAPDA notified the TXARNG of the applicant’s failure to make his elections on his DA 199-2:

- “1. The PDA proceedings, pertaining to above Service Member, have not met the required time frame for submission.
- 2. SGT {Applicant} was sent a copy of the NDR PDA Modification Proceedings on 26 October 2021. As of 10 November 2021, SGT {Applicant} has not provided a signed election or any appeal documentation.
- 3. Reserve Component failed to provide documentation within a reasonable time frame and therefore is outside of mandated requirements to properly adjudicate the case.
- 4. Every reasonable effort has been made to contact and obtain the Soldier’s election. The case is forwarded in accordance with AR 635-40, para 4-24 k(2) for processing.”

n. The findings of the United States Army Physical Disability Agency as annotated on the applicant’s DA 199-2 were finalized and approved for the Secretary of the Army on 11 November 2011.

o. The applicant requested an extension of his election period in March 2022. His appeal of his DA 199-2 revised findings is dated 11 March 2022. The applicant’s appeal was subsequently referred to APDAB. On 22 April 2022, the Board unanimously found the applicant received a full and fair hearing; that the proceedings conformed to applicable laws, governing Department of Defense

issuances, and Army regulations; and the USAPDA revision was supported by the applicable standard of evidence for the category of determination.

p. There remains insufficient probative evidence that either of these two conditions was incurred during or permanently aggravated during this drilling Soldiers service. JLV shows he has been awarded multiple VA service-connected disability ratings, including rheumatoid arthritis and atypical psychosis. However, the DES only compensates an individual for service incurred medical condition(s) which have been determined to disqualify him or her from further military service and consequently prematurely ends their career. The DES has neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions which were incurred or permanently aggravated during their military service; or which did not cause or contribute to the termination of their military career. These roles and authorities are granted by Congress to the Department of Veterans Affairs and executed under a different set of laws.

q. It is the opinion of the ARBA medical advisor that reversals of the findings of the USAPDA, USAHRC, and APDAB are not warranted. A referral of his case back to the DES is also not warranted.

BOARD DISCUSSION:

1. The Board determined 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.

2. 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.

a. An informal PEB convened and found the applicant physically unfit (cervical spondylosis; plantar fasciitis; arthritis of left foot and ankle due to gout) and recommended his disposition be referred for case disposition under reserve component regulations, non-duty related. He did not concur. The formal PEB reached a similar conclusion. He was discharged from the ARNG on 28 February 2022, in accordance with NGR 600-200, by reason of medical physical/mental condition.

b. The Board reviewed and agreed with the medical reviewing official's finding insufficient probative evidence that his conditions were incurred during or permanently aggravated during this drilling Soldiers service. Although he was awarded multiple VA service-connected disability ratings, including rheumatoid arthritis and atypical psychosis; the Board noted that the military's disability evaluation system only compensates an individual for service incurred medical condition(s) which have been

determined to disqualify him or her from further military service and consequently prematurely ends their career. The VA on the other hand compensates service members for anticipated future severity or potential complications of conditions which were incurred or permanently aggravated during their military service; or which did not cause or contribute to the termination of their military career.

c. Therefore, the Board agreed with the medical reviewer's analysis and determined that reversals of the findings of the various medical reviews are not warranted. The Board also determined a referral of his case back to the DES is not warranted.

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.

[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. Army Regulation (AR) 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 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.

2. Title 10, U.S. 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 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 Army Regulation 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 a Medical Evaluation Board (MEB); when they receive a permanent medical profile rating of 3 or 4 in any factor and are referred by an Military Occupational Specialty (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 Physical Evaluation Board (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.

4. Army Regulation (AR) 635-40 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. 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.

b. Soldiers who sustain or aggravate physically-unfitting disabilities must meet the following line-of-duty criteria to be eligible to receive retirement and severance pay benefits:

(1) The disability must have been incurred or aggravated while the Soldier was entitled to basic pay or as the proximate cause of performing active duty or inactive duty training.

(2) The disability must not have resulted from the Soldier's intentional misconduct or willful neglect and must not have been incurred during a period of unauthorized absence.

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. 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. The percentage assigned to a medical defect or condition is the disability rating. A rating is not assigned until the PEB determines the Soldier is physically unfit for duty. Ratings are assigned from the VASRD. The fact that a Soldier has a condition listed in the VASRD does not equate to a finding of physical unfitness. An unfitting or ratable condition is one which renders the Soldier unable to perform the duties of his or her office, grade, rank, or rating in such a way as to reasonably fulfill the purpose of his or her employment on active duty.

e. There is no legal requirement in arriving at the rated degree of incapacity to rate a physical condition which is not in itself considered disqualifying for military service when a Soldier is found unfit because of another condition that is disqualifying. 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.

f. AR 635-40, paragraph 4-24 k (2) states from the date the Soldier receives the FPEB findings, the Soldier has 10 days to make an election, even if a Soldier was initially found fit but is subsequently found unfit. Paragraph 4-24k (4) states in the absence of an approved extension, the Soldier is deemed to have concurred with the FPEB findings and waived any right to appeal the FPEB findings to USAPDA when the PEB does not receive the Soldier's election by the 10th day. The PEBLO must prepare a memorandum stating reasonable efforts have been made to contact the Soldier.

g. Paragraph 4-26 states the APDAB reviews only cases in which USAPDA issued a revision to the Soldier's PEB findings and recommendations, the Soldier non-concurred with the USAPDA revision, and the Soldier submitted a timely appeal. The Soldier is not eligible to appeal to APDAB when USAPDA makes an administrative correction to the Soldier's case, or when the USAPDA affirms the PEB findings and recommendations, unless the USAPDA affirmed PEB findings in a case where the USAPDA earlier returned a case to the PEB resulting in a revised PEB decision unfavorable to the Soldier. (Administrative corrections are addressed in para 425e.) In the situation of a USAPDA revision, the APDAB review is the final level of Soldier's appeal before disposition of the Soldier's case.

5. AR 40-501 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 AR 635-40 with the following caveats:

a. U.S. Army Reserve (USAR) or Army National Guard (ARNG) Soldiers not on active duty, whose medical condition was not incurred or aggravated during an active

duty period, will be processed in accordance with chapter 9 and chapter 10 of this regulation.

b. Reserve Component Soldiers pending separation for In the Line of Duty injuries or illnesses will be processed in accordance with Army Regulation 40-400 (Patient Administration) and Army Regulation 635-40.

c. Normally, Reserve Component Soldiers who do not meet the fitness standards set by chapter 3 will be transferred to the Retired Reserve per Army Regulation 140-10 (USAR Assignments, Attachments, Details, and Transfers) or discharged from the Reserve Component per Army Regulation 135-175 (Separation of Officers), Army Regulation 135-178 (ARNG and Reserve Enlisted Administrative Separations), or other applicable Reserve Component regulation. They will be transferred to the Retired Reserve only if eligible and if they apply for it.

d. Reserve Component Soldiers who do not meet medical retention standards may request continuance in an active USAR status. In such cases, a medical impairment incurred in either military or civilian status will be acceptable; it need not have been incurred only in the line of duty. Reserve Component Soldiers with non-duty related medical conditions who are pending separation for not meeting the medical retention standards of chapter 3 may request referral to a PEB for a determination of fitness in accordance with paragraph 9-12.

6. National Guard Regulation 600-200 (Enlisted Personnel Management) prescribes the criteria, policies, processes, procedures and responsibilities to classify, assign utilize, transfer within and between States, provides special duty assignment pay, separate and appoint to and from Command Sergeant Major ARNG and Army National Guard of the United States enlisted Soldiers. Paragraph 6-35 provides for the separation of Soldier found medically unfit for retention per Army Regulation 40-501. Paragraph 6-35c (6) other designated physical or mental conditions. Administrative separation board procedures per paragraph 6-32 are required. RE3.

7. AR 600-8-4 (Line of Duty Policy, Procedures, and Investigations) prescribes policies and procedures for investigating the circumstances of disease, injury, or death of a Soldier providing standards and considerations used in determining LOD status.

a. The Army LOD Program is a commander's program which essentially protects the interest of both the Soldier and the U.S. Government where service is interrupted by injury, illness, disease, or death. LOD investigations determine duty status at the time of incident and whether misconduct was involved and, if so, to what degree. Additionally, LOD investigations may be required to determine an existed prior to service condition, and, if so, determine service aggravation.

b. An LOD investigation will be conducted for all Soldiers, regardless of Component, if the Soldier experiences a loss of duty time for a period of more than 24 hours and:

(1) The injury, illness, or disease is of lasting significance (to be determined by a physician, physician assistant, or nurse practitioner).

(2) There is a likelihood that the injury, illness, or disease will result in a permanent disability.

(3) If a Reserve Component Soldier requires follow-on care for an injury, illness, or disease incurred during a period of active duty.

c. A formal LOD investigation is a detailed investigation that normally begins with a DA Form 2173 completed by the medical treatment facility and annotated by the unit commander as requiring a formal LOD investigation. The appointing authority, on receipt of the DA Form 2173, appoints an investigating officer who completes the DD Form 261 (Report of Investigation LOD and Misconduct Status) and appends appropriate statements and other documentation to support the determination, which is submitted to the General Court Martial Convening Authority for approval.

d. An injury, disease, or death is presumed to be in LOD unless refuted by substantial evidence contained in the investigation. LOD determinations must be supported by substantial evidence and by a greater weight of evidence than supports any different conclusion. The evidence contained in the investigation must establish a degree of certainty so that a reasonable person is convinced of the truth or falseness of a fact.

8. Title 10, U.S. Code, section 1201, provides for the physical disability retirement of a member who has at least 20 years of service or a disability rating of at least 30% percent. Title 10, U.S. Code, section 1203, provides for the physical disability separation of a member who has less than 20 years of service and a disability rating of less than 30%.

9. 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.

10. 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.

11. Section 1556 of Title 10, U.S. Code, requires the Secretary of the Army to ensure that an applicant seeking corrective action by 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 ABCMR applicants (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//