ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [redacted]

BOARD DATE: 6 August 2024

DOCKET NUMBER: AR20230005016

APPLICANT REQUESTS: a medical retirement vice separation for disability with severance pay.

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Certificate of Release or Discharge from Active Duty), for the period ending 26 September 1995
- Two Department of Veterans Affairs (VA) Letters

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 multiple Veterans in his support groups have been medically retired, despite having less time in service than him. In the interest of equity and fairness, he would like the results of his physical evaluation board (PEB) reviewed in the context of current guidelines as well as his honorable service. The applicant points out that the Army's rules, regulations, and overall climate have changed for the better since his separation, and, but for his medical conditions, he would have completed not less than 20 years.

3. The applicant provides two VA letters:

a. 25 January 2016, advised the applicant of his entitlement amount, the payment start date, and what VA had decided. With regard to his service-connected disabilities, the letter showed the following and indicated all listed ratings had been awarded, effective 28 August 2015:

- Bilateral pes planus and plantar fasciitis – 50 percent

- Lumbar degenerative disc disease, intervertebral disc syndrome, spondylosis, spondylolisthesis, and spinal stenosis – 40 percent
- PTSD – 30 percent
- Cervical degenerative disc disease, intervertebral disc syndrome, cervical spondylosis, spinal and neuroforaminal stenosis – 30 percent
- Radiculopathy, lower right extremity – 20 percent
- Radiculopathy, upper left extremity – 20 percent
- Left shoulder glenohumeral and acromioclavicular joint arthritis – 20 percent
- Right shoulder glenohumeral and acromioclavicular joint arthritis – 20 percent

b. 10 February 2017, identified the applicant's dates of honorable service and reported his combined disability rating was increased to 100 percent, effective 1 December 2016.

4. A review of the applicant's service record shows:

a. On 8 October 1982, the applicant enlisted into the Regular Army. He continued his service through reenlistments and extensions.

b. On 20 December 1989, the applicant deployed to Panama in support of Operation Just Cause; he redeployed, on 12 January 1990. On 20 September 1990, the applicant deployed to Southwest Asia for Operations Desert Shield/Desert Storm. He redeployed on 15 March 1991.

c. In or around January 1995, medical authority referred the applicant into the Physical Disability Evaluation System (PDES), and, on 12 January 1995, he underwent a medical examination in preparation for a medical evaluation board (MEB). On his Standard Form 93 (Report of Medical History), the applicant reported experiencing depression or excessive worry; in his comments, the examining physician noted, "Depression Situational."

d. On or about 18 January 1995, medical authority issued the applicant a physical profile (DA Form 3349), which showed physical factors "U" (upper extremities) and "L" (lower extremities) with numerical designators "3."

e. On or about 7 February 1995, an Army physician completed a narrative summary for the applicant's MEB. The doctor reported that, about 16 months prior, the applicant had incurred an injury to his lower back during an airborne operation; he received treatment but continued to have lower back pain down to both legs due to the duties associated with his military occupational specialty. Ultimately, after an evaluation by the Spine Surgery Service at Eisenhower Army Medical Center, Fort Gordon, GA, doctors determined the applicant should be referred into the PDES.

f. On 9 February 1995, a MEB found the applicant failed medical retention standards for low back pain secondary to herniated nucleus pulposus; degenerative joint disease; and L4 spondylosis. The MEB recommended referral to a PEB for a fitness determination. On 21 February 1995, the applicant concurred with the MEB's findings and recommendations. Additionally, the applicant indicated his desire to continue on active duty (COAD).

g. On 1 March 1995, the applicant's commander provided a memorandum, subject: Unit Commander's Evaluation. The commander wrote that, over that past 24 months, he had observed that the applicant's physical abilities were limited by one profile after another; most recently, the applicant had received a permanent profile for his back condition. "Based on the limitations of his profile, [applicant] can no longer perform airborne operations, low crawl, march over one half file, do push-ups, or perform sit-up(s) that meet Army standards. [Applicant] is a marginal performer, and his current condition renders him virtually useless for future service."

h. On 21 March 1995, a PEB found the applicant physically unfit for continued military service, based on low back pain secondary to herniated nucleus pulposus L4/L5, L5/S1 with degenerative joint disease and L4 spondylolysis. The PEB recommended separation with severance pay and a 10 percent disability rating. On 3 April 1995, the applicant concurred with the PEB's findings and recommendations and waived his right to a formal hearing. On 24 May 1995, the PEB amended the VA Schedule for Rating Disabilities (VASRD) code it had initially applied, neither the rating nor the recommended disposition changed with this correction.

i. On 26 September 1995, the Army honorably discharged the applicant due to physical disability. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged under the provisions of Army Regulation 635-40 (Physical Disability for Retention, Retirement, or Separation), with Separation Code JFL and Reentry Code 3. He completed 12 years, 11 months, and 19 days of active duty service.

5. The VA and the Army (under the Department of Defense) operate under separate provisions of U.S. Code (respectively Title 38 (Veterans' Benefits) and Title 10 (Armed Forces)). As such, each makes independent determinations, based upon the requirements set forth within their respective parts of the law and their own internal regulations. Determinations made by the VA are not binding on the Army. Additionally, the VA, unlike the Army, can adjust a Veteran's disability rating, based on changes in the severity of service-connected disabilities over the course of his/her lifetime.

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 (EMR – AHLTA and/or MHS Genesis), 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 has applied to the ABCMR requesting an increase in his military disability rating with a subsequent change in his disability separation disposition from separated with disability severance pay to permanently retired for physical disability. He has indicated on his DD 149 that PTSD is a condition related to his requests. He states:

> "I had 13 years of Honorable and Faithful service prior to my service-connected disabilities as listed by the Department of Veteran Affairs that Medically Disqualified me from completing my 20 years of regular service.
>
> There are multiple Veterans that have been Medically Retired that are in my support groups for multiple reasons that have less time in service than I had. In the interest of equality, fairness, I would also like consideration for a medical retirement based on current guidelines and my Honorable service."

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. His DD 214 he entered the regular Army on 8 October 1982 and was separated on 26 September 1995 with $42,948.00 disability severance pay under provisions provided in paragraph 4-24b(3) of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (1 September 1990).

d. In 1994, the applicant was referred to the Physical Disability Evaluation System (PDES) for a lumbar spine condition.

e. On his medical evaluation board (MEB) Report of Medical History, he indicated he had had or currently had motion sickness, depression or excessive worry, and that he was taking medication. The provider noted the applicant's referred lumbar spine condition and "Depression – situational." The only positive findings on the accompanying Report of Medical Examination were decreased lumbar flexion and a left lower extremity radiculopathy.

f. The MEB narrative summary shows he was injured while on an airborne operation approximately 16 months prior to his referral to the PDES. A CT scan revealed a "a central and left paracentral broad based HNP herniated disc at L4,5 with compression

of the thecal sac, especially on the left side." A bone scan was negative for fracture and tumor.

g. He was treated with a variety of conservative modalities but they did not provide long lasting relief of his symptoms. He was evaluated by the spine service and felt not to be a good candidate for surgery at that time. "Due to the failure of all conservative treatment and his limitations with his profile and his MOS [military occupational specialty] duties, he is now referred to a Physical Evaluation Board."
His lumbar spine condition was found fail medical retention standards. The applicant concurred with the MEB's findings and recommendation on 21 February 1995 and case was referred to a physical evaluation board (PEB) for adjudication.

h. On 21 March 1995, his informal physical evaluation board (PEB) determined his "Low back pain secondary to herniated nucleus pulposus L4/L5, L5/S1 with degenerative joint disease and L4 spondylolysis" was his sole unfitting for continued service. Using the VA Schedule for Rating Disabilities, they derived and applied a 10% disability rating. As the rating was below the 30% required for a disability retirement, the Board recommended he be separated with disability severance pay. On 3 April 1995, after being counseled by his PEB liaison officer on the Board's findings and recommendation, the applicant concurred with the PEB and waived his right to a formal hearing.

i. No additional medical documentation was submitted with the application and there are no encounters in the EMR.

j. His Unit Commander's Evaluation used for his PDES processing and his final NCO Evaluation Report show he was a successful Soldier except for the limitations his lumbar spine condition placed on his performance of duties.

k. There is no probative evidence the applicant had any additional medical condition(s) which would have failed the medical retention standards of chapter 3 of AR 40-501, Standards of Medical Fitness, prior to his discharge. Thus, there was no cause for referral to the Disability Evaluation System. Furthermore, there is no evidence that any additional medical condition prevented the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his discharge.

l. JLV shows the applicant was later awarded multiple VA service-connected disability ratings, including ratings for flat foot condition and PTSD. 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.

m. JLV also shows the rating for his lumbar spine condition was increase to 40% effective 28 August 2015. 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.

n. It is the opinion of the ARBA Medical Advisor that neither an increase in his military disability rating nor a referral of his case to the DES is warranted.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. The evidence shows an informal PEB found the applicant physically unfit for continued military service, based on low back pain secondary to herniated nucleus pulposus L4/L5, L5/S1 with degenerative joint disease and L4 spondylolysis. The PEB recommended separation with severance pay and a 10% disability rating. The applicant was counseled, concurred with the PEB's findings and recommendations, and waived his right to a formal hearing. The Board found no error or injustice in his disability separation processing. The Board also considered the medical records, any VA documents provided by the applicant and the review and conclusions of the medical reviewing official. The Board concurred with the medical official's finding no probative evidence the applicant had any additional medical condition(s) which would have failed the medical retention standards of chapter 3 of AR 40-501, Standards of Medical Fitness, prior to his discharge. Thus, there was no cause for referral to the Disability Evaluation System (DES). Furthermore, there is no evidence that any additional medical condition prevented the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his discharge. Therefore, the Board determined that neither an increase in his military disability rating nor a referral of his case to the DES is warranted.

BOARD VOTE:

Mbr 1	Mbr 2	Mbr 3	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
[redacted]	[redacted]	[redacted]	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, USC, section 1556 (Ex Parte Communications Prohibited) 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 applicant’s (and/or their counsel) prior to adjudication.

3. AR 635-40 (Physical Evaluation for Retention, Retirement, or Separation), in effect at the time, established the Physical Disability Evaluation System (PDES), and implemented chapter 61 (Retirement or Separation for Physical Disability), Title 10, USC. The regulation set forth policies, responsibilities, and procedures that governed the evaluation for physical fitness of Soldiers who may be unfit to perform their military duties because of physical disability.

a. Chapter 3 (Policies) stated the mere presence of impairment did not alone justify a finding of unfitness because of physical disability. In each case, it was necessary to compare the nature and degree of the physical disability with the requirements of the Soldier's duties, as required by his or her office, rank, grade or rating.

b. Chapter 4 (Procedures). Commanders or medical authority could refer Soldiers into the DES when there was evidence a medical condition/disability was inhibiting a Soldier's ability to perform his/her duties.

(1) Medical authority convened an MEB to document the Soldier's medical status and determine whether the Soldier met medical retention standards, per AR 40-501. Those Soldiers who failed medical retention standards were referred to a PEB for a fitness determination.

(2) PEBs investigated the nature, cause, degree of severity, and probable permanency of the Soldier's disability, evaluated the Soldier's physical condition against the physical requirements of the Soldier's grade/rank and military occupational specialty, and then submitted findings and recommendations as to the Soldier's disposition.

(3) If the Soldier was entitled to disability benefits, the PEB decided the rating for each compensable disability using the VASRD, as modified by the regulation's Appendix B (Army Application of the VASRD). The percentage ratings were to reflect the severity of the Soldiers' disabling condition(s) at the time of the rating. Concerning the VASRD, the PEB was advised that the first 31 paragraphs of the VASRD did not apply and were replaced by sections I and II in Appendix B.

(4) Final disposition could include the Soldier being returned to duty or separated under the following circumstances:

- With or without severance pay, depending on whether the disability was incurred in the line of duty, and for those cases where the combined disability rating was 20 percent or less
- Retired, when the combined disability rating was 30 percent or higher

c. Appendix B (Army Application of the Department of Veterans Affairs Schedule for Rating Disabilities), paragraph B-14 (Use of VASRD Codes). The VASRD codes appearing opposite the listed ratable disabilities were numbers for showing the basis of the evaluation assigned and for statistical analysis. Great care had to be used in the selection of the applicable code and in its citation on the rating sheet. The written diagnosis entered on the rating form was to include any description considered necessary to indicate the extent of severity or etiology of the condition.

(1) In the selection of codes, injuries were generally represented by the number assigned to the residual condition on the basis of which the rating was determined. If the rating was determined on the basis of residual conditions, the code appropriate to the residual condition was to be added, preceded by a hyphen. Thus, atrophic rheumatoid arthritis rated as ankylosis of the lumbar spine would be coded "5002-5287." In this way, the exact source of each rating could be easily identified.

(2) Hyphenated codes are used in the following circumstances:

(a) When the VASRD provided that a listed condition was to be rated as some other code, for example, myocardial infraction rated as arteriosclerotic heart disease (7006-7005) or nephrolithiasis rated as hydronephrosis (7508-7509).

(b) When the VASRD provided a minimum rating and the unfitting disability was being rated on residuals, for example, multiple sclerosis rated with very diffuse residuals, rated by analogy (8018-8105).

(c) When an unlisted condition was rated by analogy, for example, spondylolisthesis rated as lumbrosacral strain (5299-5295). In cases where an unlisted disease, injury, or .residual condition was encountered, and it required a rating by analogy, the diagnostic code number was to be "built-up" as follows. The first two digits were to be selected from the part of the schedule most closely identifying the part, or system, of the body involved. The last two digits will be "99" for all unlisted conditions (i.e., "5299" could pertain to an unlisted spinal condition).

d. B-39. 5293 – Intervertebral Disc Syndrome and 5295 Lumbosacral Strain.

(1) A 40 or 60 percent disability rating will be predicated upon objective medical findings of neurological involvement.

(a) Deep tendon reflex asymmetry in the ankles, as manifested by an absent or diminished reflex, constitutes an important objective sign. Highly significant objective signs are loss of bladder and or bowel control which are neurogenic in origin.

(b) Lesser objective signs are those of muscular weakness and sensory loss along one aspect of an extremity as determined by pinprick testing. Detection of paravertebral muscle spasms on examination is significant.

(c) With respect to muscle weakness, it can be a subjective sign especially when break-away is noted on testing. All laboratory test results from X-rays, EMGs, nerve conduction velocities, myelograms, CT scans, and MRIs are considered objective findings. The weight to be attached to each objective sign for rating-purposes will, vary according to the confirmation by laboratory test results along with the co-presence of other confirmed objective signs as well as the presence of subjective symptomatology consistent with the diagnosis.

(2) Lesser ratings will begin with a 0 percent rating for chronic low back pain of unknown etiology (mechanical low back pain). Demonstrable pain on spinal motion or discovery of back pain etiology will warrant a 10 percent rating unless paravertebral muscle spasms are also present, in which case a 20 percent rating, will be awarded.

4. VASRD, dated 1 July 1995; VASRD code 5293 (Intervertebral Disc Syndrome).

- Condition pronounced with persistent symptoms compatible with sciatic neuropathy with characteristic pain and demonstrable muscle spasm, absent ankle jerk, or other neurological findings appropriate to site of diseased disc, little intermittent relief – 60 percent
- Severe, recurring attacks with intermittent relief, the rating – 40 percent
- Moderate, recurring attacks – 20 percent
- Mild – 10 percent
- Post-Operative, Cured – 0 percent

5. In September 2003, VA revised the criteria for VASRD code 5293 and moved the associated conditions under the following codes:

- 5235 (Vertebral Fracture or Dislocation)
- 5236 (Sacroiliac Injury or Weakness)
- 5237 (Lumbosacral or Cervical Strain)
- 5238 (Spinal Stenosis)
- 5239 (Spondylolisthesis or Segmental Instability)
- 5240 (Ankylosing Spondylitis)
- 5241 (Spinal Fusion)

- 5242 (Degenerative Arthritis, Degenerative Disc Disease other than Intervertebral Disc Syndrome)
- 5243 (Intervertebral Disc Syndrome)

6. The general rating formula for diseases and injuries of the spine (VASRD codes 5235 through 5243) are as follows (With or without symptoms such as pain (whether or not it radiates), stiffness, or aching in the area of the spine affected by residuals of injury or disease):

a. Unfavorable ankylosis of the entire spine – 100 percent.

b. Unfavorable ankylosis of the entire thoracolumbar spine – 50 percent.

c. Unfavorable ankylosis of the entire cervical spine; or forward flexion of the thoracolumbar spine 30 degrees or less; or favorable ankylosis of the entire thoracolumbar spine – 40 percent.

d. Forward flexion of the cervical spine 15 degrees or less or favorable ankylosis of the entire cervical spine – 30 percent.

e. Forward flexion of the thoracolumbar spine greater than 30 degrees but not greater than 60 degrees; or, forward flexion of the cervical spine greater than 15 degrees but not greater than 30 degrees; or, the combined range of motion of the thoracolumbar spine not greater than 120 degrees; or, the combined range of motion of the cervical spine not greater than 170 degrees; or, muscle spasm or guarding severe enough to result in an abnormal gait or abnormal spinal contour such as scoliosis, reversed lordosis, or abnormal kyphosis – 20 percent.

f. Forward flexion of the thoracolumbar spine greater than 60 degrees but not greater than 85 degrees; or, forward flexion of the cervical spine greater than 30 degrees but not greater than 40 degrees; or, combined range of motion of the thoracolumbar spine greater than 120 degrees but not greater than 235 degrees; or, combined range of motion of the cervical spine greater than 170 degrees but not greater than 335 degrees; or, muscle spasm, guarding, or localized tenderness not resulting in abnormal gait or abnormal spinal contour; or, vertebral body fracture with loss of 50 percent or more of the height – 10 percent.

//NOTHING FOLLOWS//