

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 1 March 2024

DOCKET NUMBER: AR20230005350

APPLICANT REQUESTS: in effect, physical disability retirement in lieu of physical disability separation with severance pay, through the inclusion of additional unfitting conditions.

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

- DD Form 149 (Application for Correction of Military Record)
- partial Standard Form 93 (Report of Medical History), 23 May 1989
- DA Form 5181-R (Screening Note of Acute Medical Care), 9 October and 25 October 1989
- Standard Form 513 (Consultation Sheet), 30 May and 12 June 1990
- Standard Form 600 (Chronological Record of Medical Care), 15 – 20 June 1990
- partial Medical Evaluation Board (MEB) Narrative Summary (NARSUM), 19 May 1992
- partial MEB appeal, 2 June 1992
- multiple service medical records from 16 June 1992 – 16 September 1992
- MEB Addendum, 20 May 1993
- self-authored memorandum to the Physical Evaluation Board (PEB), 29 July 1993
- DA Form 199 (PEB Proceedings), 2 August 1993
- Standard Form 513, 9 and 19 August 1993
- self-authored memorandum to the PEB, 12 August 1993
- Standard Form 600, 19 August 1993
- MEB Addendum, 20 August 1993
- Neurologist's memorandum for the PEB, 31 August 1993
- two statements of support/witness statements to the PEB, August and September 1993
- U.S. Total Army Personnel Command Orders D189-14, 4 October 1993
- DD Form 214 (Certificate of Release or Discharge from Active Duty), covering the period ending 11 November 1993
- partial VA, Veterans Health Initiative, Independent Study Course titled: "Cold Injury: Diagnosis and Management of Long Term Sequelae), March 2002

- Department of Veterans Affairs (VA) Form 21-4138 (Statement in Support of Claim) 11 September 2013
- VA Form 21-4142 (Authorization and Consent to Release Information to the VA), 11 September 2013
- Goldsboro Psychiatric Clinic, PA, Mental Residual Functional Capacity Assessment, undated

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:

a. The Medical Evaluation Board (MEB) did not rate him for all medical conditions due to his skin color and improper medical screening. In addition, the Physical Evaluation Board (PEB) did not consider the Army medical evidence and the witness statements provided.

b. An error was made in his medical discharge from the military because he was not evaluated for the mental distress and impact caused by his injuries, which forced him to be discharged from the Army. The Army lost his medical documentation regarding his cold weather injury sustained in Ranger School. The test to verify his cold weather injury, Raynaud's Disease, could not be performed due to his dark skin complexion. He feels that was unjust and racially discriminatory toward him as a result of his skin color.

c. The Board should find it in the interest of justice to consider his application because the Army lost his records, and the proper medical evaluation could not be performed due to his skin color. He feels that he was mistreated, and unintentionally discriminated against due to his skin color, which plays a major part in conducting the medical diagnosis of Raynaud's disease. He is asking the Board to rate him at 30 percent or higher due to the error and injustice of the PEB's findings.

3. The applicant was appointed a second lieutenant (2LT) in the U.S. Army Reserve (USAR) on 21 May 1989.

4. A partial Standard Form 93 shows the applicant provided his medical history in conjunction with a medical examination on 23 May 1989, for the purpose of Infantry Officer Basic Course attendance. He checked "yes" next to multiple conditions, including foot trouble, depression or excessive worry, and nervous trouble of any sort.

5. The applicant's DD Form 214 shows he completed the 16-week Infantry Officer Basic course in September 1989.
6. DA Form 5181-R shows the applicant was seen at the Troop Medical Clinic (TMC) on 9 October 1989, for exercise-related trauma to his left knee resulting in swelling and tenderness. He had complaints of left knee pain for 10 days with bending and stooping excessively. His range of motion was normal with no redness or difference in skin. The assessment was excessive strain on knee. The plan included aspirin, an Ace wrap and ice.
7. The applicant's DD Form 214 shows he completed the 9-week Ranger Course in January 1990.
8. A physical profile is used to classify a Soldier's physical disabilities in terms of six factors or body systems, as follows: "P" (Physical capacity or stamina), "U" (Upper extremities), "L" (Lower extremities), "H" (Hearing), "E" (Eyes), and "S" (Psychiatric) and is abbreviated as PULHES. Each factor has a numerical designation: 1 indicates a high level of fitness, 2 indicates some activity limitations are warranted, 3 reflects significant limitations, and 4 reflects one or more medical conditions of such a severity that performance of military duties must be drastically limited. Physical profile ratings can be either permanent or temporary.
9. A Standard Form 513 shows:
 - a. The applicant was seen by a medical professional on 30 May 1990, for complaints of recurrent pains in both ankles' status post recent injury sprain of left ankle which was placed in a cast 1 month prior. X-rays of both ankles done on 29 May 1990, show bony growth inner surfaces of distal right tibial/fibula; probable osteochondroma per radiology. Physical therapy evaluation of both ankles and rehabilitation exercises were recommended and requested.
 - b. He was evaluated by physical therapy on 12 June 1990. The notes show a history of pain in left ankle since January 1990 in Ranger School when he had several bilateral sprains during training. Routine x-ray shows probably osteochondroma on the right, but he reports no symptoms and degenerative joint disease (DJD) on the left. He was given stretches and exercises and an ankle brace with instructions to follow-up on 29 June 1990.
10. A Standard Form 600 shows the applicant received continued physical therapy treatment for his right ankle on 15, 18, and 20 June 1990, with accompanying notes indicating he continued to have pain and felt he was making little progress. The notes from 17 June 1990 show left ankle probably osteochondroma is asymptomatic, but he

still had left ankle pain. The assessment shows slow improvement. The plan shows a new P2 profile was given to limit road marching, running, and walking at own pace and distance.

11. An undated memorandum from the Military Occupational Specialty (MOS) Medical Retention Board (MMRB) to the applicant's commander, shows the applicant was evaluated by an MMRB and based on a thorough review of his permanent physical profile and all other pertinent records and reports, the MMRB determined the limitations imposed by his permanent profile were so prohibitive that they precluded retraining and reclassification into another MOS. The applicant was recommended for referral to an MEB and that his case should be referred to a PEB regardless of the MEB findings.

12. A second memorandum, dated 28 April 1991, shows:

a. The Assistant Division Commander's approval of the MMRB recommendation to refer the applicant to the Physical Disability System (PDS) was requested.

b. The background and discussion show the applicant's physical profile rating (PULHES) of 113111 was for post-traumatic arthritis of the left ankle, which limited him to running at his own pace not to exceed 2 miles, 3 times per week. It was the opinion of his chain of command that he should be reclassified, but it was the opinion of the MMRB that he was not capable of performing a full range of duty in any MOS in a worldwide field environment and recommended his referral to the PDS.

13. A partial MEB NARSUM, dated 19 May 1992, shows:

a. Physical examination performed on 11 February 1992, shows lower extremities abnormal with left ankle sprains and probably right ankle osteochondroma. The remainder of the general physical examination is noncontributory. Muscle strength in both feet and ankles is normal with full range of motion in each. There is pain with pressure at the anterolateral, anteromedial, and posteromedial aspects of the left ankle joint with extremes of range of motion. The right ankle joint was mildly painful to pressure at the anterior aspect of the distal tibiofibular syndesmosis.

b. The applicant's diagnosis was post-traumatic arthritis with osteochondral defect of the left ankle, status post diagnostic arthroscopy and resection of osteochondral loose body.

c. The recommendation shows the applicant did not meet the retention standards of Army Regulation 40-501 (Standards of Medical Fitness), chapter 3 and was unable to perform his military duties. He was referred by an MMRB for evaluation in the PDS and it was recommended that the PEB evaluate the applicant for separation from the service

under the provisions of Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation).

14. DA Form 3947 (MEB Proceedings) shows:

a. An MEB convened on 20 May 1992.

b. The applicant's condition is listed as post-traumatic arthritis with osteo-chondral defect of left ankle, status post diagnostic arthroscopy and resection of osteochondral loose body, incurred while entitled to base pay in April 1990 and permanently aggravated by service.

c. The findings and recommendations of the MEB were approved on 20 May 1992, and the applicant was referred to the PEB.

d. The applicant indicated he did not desire to continue on active duty. After having been informed of the approved findings and recommendations of the MEB, the applicant signed the form on 2 June 1992, indicated he did not agree with the board's findings and recommendations and submitted an appeal.

15. The applicant's MEB appeal, dated 2 June 1992, shows:

a. He disagreed with the MEB Proceedings because the MEB failed to place key emphasis on the extent of his right ankle injury. The NARSUM shows the osteochondroma in the right ankle was asymptomatic and noncontributory; however, he strongly disagreed. In June 1990, there was no discomfort in that area and the fact there is now discomfort is clearly a sign of progression of the injury.

b. This osteochondroma is substantial evidence of an abnormality in his right ankle from an injury he sustained in Ranger school and the rigorous training of his MOS. This osteochondroma is a separate permanent injury sustained while on active duty and must be indicated as such.

c. The NARSUM also fails to make mention of the lower back pain he has been experiencing. He informed his doctor of this problem, and he informed him it could be associated with the way he walks due to the injury he sustained to his left ankle. No one has ever referred him to orthopedics for an examination; therefore, he requested examination by an orthopedic doctor for his lower back pain. If it is related to the left ankle injury and walking, he is requesting that information be added to the NARSUM as a separate injury.

d. He requested his right ankle osteochondroma be added as a separate injury and diagnosis and that the P2 profile for this injury be annotated on the P3 profile for the left

ankle injury to provide the MEB with the accurate information pertaining to his overall health. He also requested the lower back problem be annotated in the summary of the NARSUM.

16. Multiple additional service medical records dated between 16 June 1992 – 16 September 1992, show:

a. A Standard Form 600 shows the applicant was seen by a medical professional on 16 June 1992 with complaints of lower back pain for the past 2 weeks and right ankle tremor for the past 2 years. The notes show he needed to be seen again by Podiatry and also be seen for mechanical lower back pain trauma or injury. The plan shows Podiatry reevaluation, patient education, Motrin, Bengay, heating pad, cold packs, stretching, rest on weekends, follow-up as needed.

b. A Standard Form 513 shows a consultation with Podiatry was requested on 16 June 1992, to reevaluate the applicant's left ankle condition and right ankle pain with osteochondroma.

c. A Radiographic Report shows a computed tomography (CT) scan of the right ankle was done on 16 September 1992. The impression shows osteochondroma of the distal right tibia with no significant interval change from 18 September 1990.

17. An MEB Addendum, dated 20 May 1993, shows the following diagnoses were added:

- post-traumatic arthritis with osteochondral defect of left ankle, status post diagnostic arthroscopy and resection of osteochondral loose body
- degenerative joint disease of the lumbar spine
- osteochondroma of the right ankle

18. The applicant's available records do not contain documentation of his informal PEB.

19. A second self-authored memorandum to the PEB, dated 29 July 1993, shows:

a. The applicant requested an indefinite continuance of his formal board to allow for additional medical evaluations. He was additionally requesting a formal reconsideration due to the PEB's non-review of his total disabling conditions for compensation purposes.

b. The disabling injuries pertain to his lower back, left ankle, and toes. The original physician's NARSUM indicated the wrong diagnosis, which was reviewed by the PEB during the informal board. It is imperative the necessary evaluations are conducted to ensure the most accurate information is provided to the PEB. He was scheduled for an

electromyography (EMG) on 17 August 1993, and those findings should be added as new medical evidence to the NARSUM and addendum.

20. A DA Form 199 shows:

a. A PEB convened on 2 August 1993, to reconsider the applicant's informal PEB.

b. The applicant was found physically unfit with a recommended combined rating of 20 percent and that his disposition be separation with severance pay for the following unfitting conditions:

- post-traumatic arthritis with osteochondral defect, left ankle, status post arthroscopy and resection of osteochondral loose body, 10 percent
- degenerative joint disease, lumbar spine with characteristic pain on motion, 10 percent

c. The applicant's signature indicating concurrence/nonconcurrence is not reflected on the form.

21. A Standard Form 513 shows the applicant was seen at the Neurology clinic on 9 August 1993, where he was referred to Vascular Surgery clinic for evaluation of a cold weather injury to the feet.

22. A third self-authored memorandum to the PEB, dated 12 August 1993, shows the applicant requested reconsideration of the PEB's determination based on their non-review of his total disabling injuries for compensation. The disabling injuries are to his lower back, left ankle, and toes and prohibit him from performing his required critical tasks as an Infantryman and a platoon leader. He must be able to lead a platoon over rigorous terrain varying from arctic to jungle environments and provide the necessary leadership and direction to optimize combat readiness and successful execution of the wartime mission, which he is unable to do with the limitations imposed upon him by his injuries.

23. The follow up notes to the 9 August 1993 Standard Form 513 show the applicant was seen by the Vascular Staff on 18 August 1993, for the applicant's provided history of a wet cold weather injury to both feet in December 1989, characterized by continuous tingling and pins and needles with sharp aches and pains with cold stimulus to the toes and ankles. He was assessed with a cold weather injury to both feet based on his history and referral to the Pain Clinic for possible temporary or permanent sympathetic block for relief.

24. A Standard Form 600 shows a Neurology Services note dated 19 August 1993, reflecting the applicant was evaluated by Vascular Surgery. Although the test was negative for large vessels disease the surgeon could not rule out small vessels disease causing Raynaud Phenomena because of his skin color, it was impossible to perform the cold water test immersion. He was assessed with degenerative disc L5,S1 causing mechanical pain and Raynaud Phenomena by history. The plan shows administration of a sympathetic block.

25. A second MEB Addendum, dated 20 August 1993, shows:

a. A consultation was sent to Neurology regarding the applicant's complains of a cold-weather injury. He had a cold-weather injury to both feet in December 1989, characterized by continuous tingling with pins and needles, sharp pain, and aches to cold stimulus to both toes and ankles. His vascular status for the large vessels was found to be within normal limits; however, the surgeon could not rule out small vessel disease causing a Raynaud's Phenomenon. Because of his skin color, it is impossible to perform the cold water test emerging.

b. His diagnoses are listed as degenerative dis disease L5, S1 causing mechanical back pain and Raynaud's Phenomenon by history.

c. The plan shows to follow the cold-weather injury. If pain continues, the applicant was advised that a temporary sympathetic block to access relief may be possible, or a permanent block may be done at a later time. He can be sent to physical therapy to be followed for the mechanical back pain

d. The Physical Therapy consultation show the applicant was referred for range of motion measurements of his back for evaluation of permanent impairment. His lumbar flexion was a 2 percent impairment; his lumbar extension was a 5 percent impairment; his lateral bending right was a 2 percent impairment; his lateral bending left was a 2 percent impairment; and his straight-leg raise was with 1 percent of total flexion.

26. A Neurologist's memorandum for the PEB, dated 31 August 1993, shows the applicant had been his patient at Headquarters, U.S. Army Medical Department Activity (MEDDAC) Fort Ord, CA, since July 1993. He complains of lower back and ankle pain on exertion as well as paresthesias (Raynaud's Phenomenon) in the feet in cold weather. Due to the applicant's physical impairments, it is his profession opinion that he cannot perform in the Infantry and be deployable.

27. Two witness statements in support of the applicant, dated August and September 1993, addressed the PEB and the applicant's appeal. One statement is from his wife and the second is from a colleague who attended Infantry Officer Basic Course and Ranger School with the applicant. Both attest to the applicant's cold weather injury and

chilblains to his feet incurred while in Ranger School and detail the resultant debilitating pain that limited his ability to perform his duties as an Infantryman.

28. U.S. Total Army Personnel Command Orders D189-14, dated 4 October 1993, honorably discharged the applicant from the USAR effective 11 November 1993, due to physical disability with severance pay, with a 20 percent disability rating.

29. The applicant's DD Form 214 shows he was honorably discharged from the Army/USAR on 11 November 1993, under the provisions of Army Regulation 635-40 due to physical disability with severance pay with corresponding separation code JFL. He was credited with 4 years, 5 months and 21 days of net active service.

30. A VA Form 21-4138, dated 11 September 2013, provides the applicant's statement in support of his claim, which shows:

a. He was an Infantry platoon leader in Ranger School in December 1989 and during the Northern Florida phase of training he was exposed to cold weather while he got wet after a river crossing. As a result, his boots were water-logged while conducting the Ranger missions and road marching. His feet were wet and exposed to the cold weather for a longer period of time during the training. At the completion of the training, he suffered severe soreness, stinging, and sharp pain in his feet and toes.

b. The pain was severe, which prevented him from walking and made it difficult to keep his feet warm. As an Infantry platoon leader, he found he could not perform combat maneuvers, which included road marching, raids, ambushes, and walking over rough terrain. The extent of the pain made him mobility impaired.

c. Ever since that time, he continues to experience chronic, sharp, stinging pain in his feet and toes. As a result, he has to be careful about not letting his feet get cold and wet. He has to watch how damp his socks become in order to limit the extent of a flare up and carries a spare pair of socks in order to prevent flare ups. He must also make sure he has the best of boots and socks during the winter to protect his feet from accumulating too much moisture during his daily routine. He has to be careful how much he exposes his feet to air conditioning, which means wearing socks during the summer and making sure a blanket is always nearby.

d. As a result of this constant problem, he could not pursue careers that directly correlated with his military background and training, such as with the FBI, DEA, CIA, Secret Service, and law enforcement careers. He also could not perform work which would expose him to the outside elements, such as in construction or landscaping.

e. After being medically discharged from the Army, he was unemployed for over 1 year before landing a full-time position. This injury has truly impacted the quality of his

life. He suffers from this injury on a daily basis and is consistently reminded of how this injury from the torturous and rigorous training of Ranger School continues to torment his life.

31. An VA Form 21-4142 accompanying the applicant's VA claim form shows a doctor signed the form on 11 September 2013, indicating he treated the applicant for the past 18 years for Raynauds Phenomenon and his medical records establish chronicity of treatment for the ailment claimed. It was his opinion it is at least as likely as not that the condition the applicant suffers from was wither incurred during or aggravated by his military service.

32. A Goldsboro Psychiatric Clinic, PA, Mental Residual Functional Capacity Assessment, shows:

- a. The applicant began treatment on 4 May 2021.
- b. His current diagnoses include major depression, generalized anxiety disorder, diabetes, hypertension, arthritis (multiple joints).
- c. The applicant's chronic pain, mainly in his ankles, brought on depression and continues to contribute to depression and anxiety. His nightmares began in 1994 and he has flashbacks with reminders of the military, intrusive thoughts, and panic attacks every 2 months.
- d. The applicant's depression and anxiety are secondary to service-connected post-traumatic stress disorder (PTSD) and multiple service-connected joint injuries and should therefore also be service-connected.

33. 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.

MEDICAL REVIEW:

1. 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:

2. The applicant has applied to the ABCMR requesting an increase in his military disability rating with a subsequent change in his disability discharge disposition from separated with disability severance pay to permanent retirement for physical disability. He states:

The medical review board did not rate me for all medical conditions due to my skin color and improper medical screening. In addition, the PEB did not consider the medical evidence from the Army and the witness statements provided. An error was made in my medical discharge from the military because I was not evaluated for the mental distress and impact caused by my injuries which forced me to be discharged from the Army. The Army lost my medical documentation regarding my cold weather injury in Ranger School. The test to verify my cold weather injury, Raynaud's Disease, could not be performed due to my dark skin complexion. I feel that was unjust and racially discriminatory to me due to my skin color.

3. The Record of Proceedings details the applicant's military service and the circumstances of the case. His DD 214 for the period of Service under consideration shows the former USAR Officer entered the active duty on 21 May 1989 and was separated with \$19,500 of disability severance pay on 11 November 1993 under provisions provided in paragraph 4-24b(3) of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (1 September 1990).

4. Submitted medical documentation shows the applicant was evaluated and treated for left and right ankle sprains. At some point, the applicant was referred to the Physical Disability Evaluation System (PDES). The first page of his 19 May 1992 medical evaluation board (MEB) narrative summary is not in the supporting documentation. The second page shows he had full range of motion of both ankles with tenderness to palpation about the joints, more on the left than the right. The provider, chief of the podiatry service, diagnosed him with Post-traumatic arthritis with osteochondral defect of left ankle, status post diagnostic arthroscopy and resection of osteochondral loose body. He stated "He can run for short distance, one-half to one mile, before beginning to experience sharp pain and soreness in the left ankle. Similar symptoms occur with marching one to two mile."

5. A second MEB narrative summary completed by the Chief of Orthopedics shows the applicant was also diagnosed with degenerative joint disease of lumbar spine and an osteochondroma (a benign cartilage capped bone growth) of the right ankle. The

applicant noted that the osteochondroma caused occasional mild pain. A CT scan in September 1992 showed no significant change from one obtained in September 1990. He stated the pain in his lower back had gotten progressively worse since 1991 to the point where it now interfered with normal activities.

6. The applicant non-concurred with the MEB's finding that his right ankle condition did not fail medical retention standards. He also appears to have requested his Raynaud's syndrome also be found to fail medical retention standards, but the actual document was not found in the supporting documentation. An addendum to his medical evaluation board added that his lower extremity electromyography (EMG) and nerve conduction studies were normal and added "Raynaud's phenomenon by history" as an additional diagnosis.

7. On 2 August 1993, the PEB determined his left ankle and lumbar spine conditions were unfitting for continued military service. They noted "Condition listed a medical board diagnosed 3 was considered by the PEB and found not to be either unfitting or ratable." This appears to have been the Raynaud's syndrome. The derived and applied a 10% disability rating for each condition for a combined military disability rating of 20% and recommended the applicant be separated with disability severance pay.

8. The applicant non-concurred, requesting a higher disability rating because he could no longer perform as an infantry officer and that his Raynaud's syndrome be added as an additional unfitting condition. The PEB's response to his appeal is not available for review, but given no change in his disability disposition, it is assumed they maintained the informal PEB's findings and recommendation. It should also be noted that disability ratings are not based on a Soldier's military specialty but on clinical findings using the VA Schedule for Rating Disabilities.

9. It is clear the applicant had a right ankle osteochondroma and a history of Raynaud's syndrome. However, paragraph 3-1 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (1 September 1990) states:

The mere presence of an impairment does not, of itself, justify a finding of unfitness because of physical disability. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier reasonably may be expected to perform because of his or her office, grade, rank, or rating.

10. There is insufficient probative evidence these two conditions or any additional medical condition(s) have failed the medical retention standards of chapter 3, AR 40-

501 and thus been subject to a finding of unfitness for continued service and compensable prior to his discharge. Furthermore, there is no evidence an 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.

11. JLV shows he has been awarded numerous VA service-connected disability rating, including ratings for degenerative arthritis of the spine and Raynaud's syndrome. However, the DES compensates an individual only for service incurred medical condition(s) which have been determined to disqualify him or her from further military service. 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.

12. It is the opinion of the ARBA Medical Advisor that neither an increase in his military disability rating with a subsequent change in disability discharge disposition from separated with severance pay to permanent retirement for physical disability nor a referral of his case back to the DES is warranted.

BOARD DISCUSSION:

1. The Board carefully considered the applicant's request for a physical disability retirement in lieu of physical disability separation with severance pay, through the inclusion of additional unfitting conditions, the applicant's contentions, all supporting documents, the medical advisory opinion, and the evidence found within the military record, and the regulatory and statutory guidance. The Board found that relief was not warranted.

2. The Board agreed the medical advisory opinion, which states, "neither an increase in his military disability rating with a subsequent change in disability discharge disposition from separated with severance pay to permanent retirement for physical disability nor a referral of his case back to the DES is warranted... 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..."

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.

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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. On 25 August 2017, the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to

Discharge Review Boards (DRBs) and Boards for Correction of Military/Naval Records (BCM/NRs) when considering requests by veterans for modification of their discharges due in whole or in part to: mental health conditions, including PTSD, traumatic brain injury, sexual assault, or sexual harassment. Boards are to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based, in whole or in part, on those conditions or experiences.

3. 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 (DES) and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with DOD Directive 1332.18 (Discharge Review Board (DRB) Procedures and Standards) and Army Regulation 635-40 (Physical 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 (MMRB); 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 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 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 Department of Veterans Affairs (VA) Schedule for Rating Disabilities (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 their office, grade, rank, or rating in such a way as to reasonably fulfill the purpose of their employment on active duty. 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.

5. 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 percent.

6. Title 38, U.S. Code, section 1110 (General – Basic Entitlement) states for disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

7. Title 38, U.S. Code, section 1131 (Peacetime Disability Compensation – Basic Entitlement) states for disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during other than a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

8. Title 10, U.S. Code, section 1556 requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//