

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 11 October 2024

DOCKET NUMBER: AR20230005356

APPLICANT REQUESTS: the Board void his disability separation with severance pay and grant him a medical retirement.

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

- Online DD Form 149 (Application for Correction of Military Record)
- Records – Applicant's letter to the Board
- Records2 – DD Form 214 (Certificate of Release or Discharge from Active Duty) and extract from DA Form 2-1 (Personnel Qualification Record – Part II)
- Record3 – Separation Orders
- Record4 – Medical Evaluation Board (MEB) documents
- Record5 – Extract from service treatment records (STR)
- Record6 – Department of Veterans Affairs (VA) letter and Disability Rating Decision
- Record7 – VA Medical Certificate and Progress Notes
- Record8 – Consultation Sheet, VA tests, VA compensation statement
- Record9 – VA Supplemental Statement of Case and VA Proceedings
- Record10 – VA Proceedings, first continuation
- Record11 – VA Proceedings, second continuation

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 during his term of active duty, both in Korea and at Fort Hood, TX (now renamed Fort Cavazos), several Army physicians classified his Asthma as moderate.

a. During an official evaluation for an MEB, doctors reported that the "PFT summary...was moderate obstructive disease with an FVC increase of over 10 percent,

FEV1 increasing by more than 15 percent, and FEF 25/75 percent increasing by more than 20 percent."

b. In the last part of his term of service, the Army placed the applicant on a "P3 permanent profile with a recommended MMRB (Military Occupational Specialty (MOS)/Medical Retention Board)." His health continued to decline as a direct result of his medical condition, in that he subsequently developed sleep apnea, sinusitis, and was finally granted service connection for a right knee condition.

c. The applicant fully intended to continue his military service, and his goal was to become a warrant officer, but his poor health destroyed those plans, and, as a result, he became severely depressed. He often spoke with a chaplain about his situation but has been unable to secure any records of those conversations.

d. The applicant states his current VA disability ratings are as follows:

- Right knee disability – 10 percent
- Right knee strain, limited flexion – 10 percent
- Obstructive sleep apnea with Asthma – 50 percent
- Sinusitis – 10 percent
- Seasonal allergic rhinitis – 30 percent
- Left ankle sprain residuals – 0 percent

3. The applicant provides documents from his service record, his MEB, STR, and the VA. Included is a record of proceedings for a VA administrative hearing, conducted in June 1996, wherein the applicant appealed his VA disability ratings; the VA subsequently increased his disability rating for Asthma to 30 percent.

4. The applicant's service record shows the following:

a. On 25 July 1985, the applicant enlisted into the Regular Army for 4 years. Upon completion of initial entry training and the award of MOS 35K (Avionic Mechanic; later converted to MOS 68N), orders assigned him to Germany, and he arrived at his new unit, on 9 April 1986. The applicant continued his active-duty service, through subsequent reenlistments and with assignments in both within the continental United States (CONUS) and overseas (OCONUS). Effective 1 March 1990, the applicant's leadership promoted him to sergeant (SGT)/E-5.

b. Between March 1990 and October 1994, the applicant's rating chain issued him six DA Forms 2166-7 (Noncommissioned Officer Evaluation Reports (NCOER)); each evaluation stated the applicant had passed his Army Physical Fitness Test (APFT), and neither rater nor senior rater entered any comments addressing the applicant's medical condition.

c. On 13 December 1994, while stationed in Korea, medical authority issued the applicant a physical profile showing a level "3" (medical condition requiring certain assignment restrictions) for physical factor "P" (Physical Capacity or Stamina); medical authority recommended the applicant for an MMRB.

d. On 1 March 1995, the applicant's higher command convened an MMRB. The applicant appeared before the board, and the board reviewed all records, reports and other pertinent information. The board found the applicant had a profile for Asthma, and it concurred with the applicant's unit commander, who maintained the applicant's medical condition was too limiting and, due to assignment restrictions, the applicant would be unavailable for worldwide deployment. The board recommended the applicant for an MEB.

e. On 19 July 1995, an MEB determined the applicant had two medical conditions that failed the medical retention standards of Army Regulation (AR) 40-501 (Standards of Medical Fitness): Asthma and seasonal allergic rhinitis. Neither condition existed prior to service, and both were permanently aggravated by service; the MEB recommended the applicant's referral to a physical evaluation board (PEB) for a fitness determination. On 31 July 1995, the applicant concurred with the MEB's findings and recommendations.

f. On 2 August 1995, a PEB found the applicant's Asthma with mild reduction of FEV1 and FVC to be unfitting; the PEB recommended separation with disability severance pay at a 10 percent disability rating. On 10 August 1995, the applicant concurred and waived his right to a formal PEB.

g. On 30 October 1995, the Army honorably discharged the applicant due to physical disability. His DD Form 214 shows he completed 10 years, 3 months, and 6 days of net active-duty service. Item 18 (Remarks) indicates the applicant received disability severance pay at his separation.

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. Decisions made by the VA are not binding on the Army and do not show an error on the Army's part. Additionally, the VA, unlike the Army, can adjust a Veteran's disability rating over the course of his/her lifetime, based on changes in the severity of the service-connected disabilities.

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 previous ABCMR denial (22 November 2016, AR20150009779) the military electronic medical record (AHLTA), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant is applying to the ABCMR requesting additional medical conditions be determined to have been unfitting for service prior to his 1995 disability separation; a subsequent increase in his military disability rating; and that his disability discharge disposition be changed from separated with disability severance pay to permanent retirement for physical disability. He states:

"During my military service in Korea and while stationed at Ft. Hood in the Med Hold detachment at Darnell Community Hospital several Army physicians classified my asthma as Moderate Asthma

My health has continued to fail directly due to my original illness. I have developed sleep apnea (secondary to the asthma and sinusitis), sinusitis (secondary to the Rhinitis), I have been finally granted service connection to the right knee .

I had fully intended on continuing my military service and had hopes of attending the warrant officer candidate school to become an aviation maintenance officer. My second tour to Korea and the subsequent rapid decline in health destroyed those ideas. I was severely depressed about my inability to continue my career in the service and often spoke to my military chaplain in Korea about my problems."

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. The DD 214 for the period of service under consideration shows he entered the regular Army on 25 July 1985 and was discharged with \$31,100.00 disability severance pay on 30 October 1995 under provisions in paragraph 4-24b(3) of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (1 September 1990).

d. On 19 July 1995, a medical evaluation board determined the applicant's asthma and seasonal allergic rhinitis failed medical retention standards. On 31 July 1995, he

agreed with the board's findings and recommendation and his case was forwarded to a physical evaluation board (PEB).

e. On 2 August 1995, his informal PEB found his asthma was unfitting for continued military service and that his seasonal allergic rhinitis was not an unfitting condition for continued Service. Using the VA Schedule for Rating Disabilities (VASRD), they derived and applied a 10% to his disability with the recommendation he be separated with disability severance pay. On 10 August 1995, after being counseled on the Board's findings and recommendation by his PEB liaison officer, he concurred with the PEB and waived his right to a formal hearing.

f. The VASRD is the document used to rate unfitting military disabilities. Paragraph B-1a and B1b of Appendix B to AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (1 September 1990):

“a. Congress established the VASRD as the standard under which percentage rating decisions are to be made for disabled military personnel. Such decisions are to be made according to Title IV of the Career Compensation Act of 1949 (Title IV is now mainly codified in chap 61 of Title 10, United States Code).

b. Percentage ratings in the VASRD represent the average loss in earning capacity resulting from these diseases and injuries. The ratings also represent the residual effects of these health impairments on civil occupations.”

g. A 25 January 1996 VA rating decision shows that he was awarded a 10% service-connected disability rating for “Asthma with seasonal allergic rhinitis.” There were no additional rated disabilities at that time.

h. There is no evidence the applicant had additional condition(s) failed medical retention standards or were unfitting prior to his separation with severance pay; or that any additional medical condition(s) prevented the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his discharge.

i. JLV shows he has several VA service-connected disability ratings, including ratings for Hodgkin's Disease (lymphoma), sleep apnea, and major depressive disorder. However, the disability Evaluation System (DES) has neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions incurred during or were permanently aggravated by their military service; or for compensating conditions which did not contribute to career

termination. These roles and authorities are granted by Congress to the Department of Veterans Affairs and executed under a different set of laws.

k. It is the opinion of the Agency Medical Advisor that neither a change in his military disability ratings 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 Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation. Upon review of the applicant's petition, available military records and medical review, the Board concurred with the advising official finding that neither a change in the applicant's military disability ratings nor a referral of his case to the DES is warranted. The opine noted, no evidence the applicant had additional condition(s) failed medical retention standards or were unfitting prior to his separation with severance pay; or that any additional medical condition(s) prevented the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his discharge. The Board found insufficient evidence to support the applicant's contentions to void his disability separation with severance pay and grant him a medical retirement. Therefore, the Board denied relief.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
■	■	■	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.

I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

REFERENCES:

1. Title 10, U.S. Code, section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.
2. Title 10, 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. Army Regulation (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, U.S. Code. 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 medical evaluation board (MEB) to document the Soldier's medical status and determine whether the Soldier met medical retention standards, per AR 40-501 (Standards of Medical Fitness). Those Soldiers who failed medical retention standards were referred to a physical evaluation board (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 (VA Schedule for Rating Disabilities), 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 that they 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

//NOTHING FOLLOWS//