

IN THE CASE OF: [REDACTED]

BOARD DATE: 21 March 2024

DOCKET NUMBER: AR20230005599

APPLICANT REQUESTS: physical disability retirement in lieu of administrative discharge due to failed medical/physical procurement standards

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

- DD Form 149 (Application for Correction of Military Record)
- brief in support of application
- multiple DA Forms 5500 (Body Fat Content Worksheet), from 11 July 2008 – 5 February 2009
- DD Form 2215E (Reference Audiogram), 6 February 2009
- numerous Standard Forms 600 (Chronological Record of Medical Care) from 6 - 23 February 2009
- Moncrief Form 689-R (Fort Jackson Sick Slip), 23 February 2009
- DA Form 4707 (Entrance Physical Standards Board (EPDBD) Proceedings), 25 February 2009
- multiple Standard Forms 600, from 5 – 6 March 2009
- Moncrief Form 689-R, 6 March 2009
- DA Form 5138 (Separation Action Control Sheet), 5 – 9 March 2009
- Basic Combat Training (BCT) Soldier Separation Recommendation Summary) and Battalion Checklist for Chapters, undated
- Two Department of Veterans Affairs (VA) Forms 21-0820 (Report of General Information), 5 and 11 August 2010
- VA memorandum, 9 August 2010
- Compensation and Pension (C&P) Exam Inquiry, 25 August 2010
- C&P Exam Report, 23 September 2010
- Radiology Reports, 23 September 2010
- VA Rating Decision, 22 October 2010
- C&P Examination, 27 April 2012
- C&P Examination Addendum, 4 June 2012
- Independent Medical Review, 14 June 2013
- Board of Veterans' Appeals Appeal and Remand, 16 December 2013
- C&P Exam and Notes, 20, 21, and 27 August 2015
- Board of Veterans' Appeals decision letter and Order, 27 June 2019

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. He is appealing the decision of the EPSBD finding that his medically unfit condition existed prior to service (EPTS). He requests a permanent disability rating of at least 30 percent based on the standards articulated in the VA Schedule for Rating Disabilities (VASRD) for right lower extremity radiculopathy and lower back pain that was incurred while serving in the military.

b. He has two main challenges to his discharge. The first is that he was not properly diagnosed while on active duty, as his condition was not EPTS. Second, assuming for argument's sake that his condition was EPTS, he was not properly processed through disability channels during his brief time on active duty and should have had his condition evaluated for service aggravation.

c. He was only on active duty for a brief period of time when he became injured in BCT. He became interested in enlisting in the Army National Guard (ARNG) in 2007, but knew he was not in the right physical shape for his training. He spent the next 2 years changing his diet and starting to exercise in order to prepare himself for the level of fitness expected in order to complete BCT. He officially enlisted in September 2008, but did not begin active duty training in BCT until 4 February 2009, when he was in the best shape of his life. In between September and February 2009, he attended monthly Recruit Sustainment Programs, where he would take Army Physical Training Tests (APFT) and to physical training. He did not have any difficulty during these events and was physically ready to ship to BCT. He cleared all the tests at the Military Entrance Processing Station (MEPS) and was excited to begin his military career.

d. He was doing fine with training until the third week when they began doing extreme physical fitness exercises. Pyramid sit-ups was an exercise where you would start by doing five sit-ups. The next round you added five to that and repeated this all the way up to 100 sit-ups. Then you worked your way back down the pyramid, reducing the number by five each round. This adds up to over 2,000 sit-ups done in one session, not crunches, but sit-ups, where the hands are placed behind the individual's neck.

e. During this marathon session of sit-ups, he started experiencing severe pain in his right lower back. He attempted to continue training, but the pain persisted. It began to radiate from his back down to his right leg and became so painful he could not put

weight on his leg. He was seen on 15, 18, and 19 February 2009 and had a magnetic resonance imaging (MRI) of his spine performed on 20 February 2009.

f. On 25 February 2009, he was again seen for pain and was diagnosed with spondylosis 721.9. He was then recommended for separation, based on his failure to meet medical procurement standards. On this same date, and EPSB convened, which found the applicant could not complete BCT and recommended his separation for failure to meet medical procurement standards of Army regulation 40-501 (Standards of Medical Fitness), chapter 2-19i.

g. On 5 March 2009, he was again seen by the medical clinic for pain and on 6 March 2009, he met with the ARNG Liaison, who counseled him to accept the recommendation to be discharged and go home as quickly as possible. The applicant did not understand what, if any other options, he had and was in extreme pain. Between the injury and this counseling session, he had Toradol for pain and also had tried water therapy. These provided temporary relief, but he was still being required to walk 1/2 mile each way to have meals. He was told if he did not walk to the dining facility, he would not eat. There were multiple days he chose not to eat because he could not stand up without stabbing pain. When the time came for him to be counseled regarding his separation, he decided to go home where he could receive help that would not require him to walk miles each day for food. He received an entry level, uncharacterized discharge on 17 March 2009, under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), chapter 5-11, due to failed medical/physical procurement standards.

h. He was diagnosed with spondylosis after his MRI on active duty. The findings of the MRI were as follows:

(1) At L2/L3 mild circumferential broad base disc bulge is present with disc desiccation and a small focal central protrusion extending posterior approximately 2 millimeters (mm); no lateral recess or foraminal narrowing.

(2) At L3/L4 disc desiccation with circumferential broad based disc bulge is seen; the lateral recesses and neural foramen are patent.

(3) At L4/L5, a circumferential broad based disc bulges present with right paracentral to the right recess preponderance; mild facet arthrosis; mild narrowing of the right lateral recess; no significant central canal or foraminal narrowing.

(4) At L5/S 1 no significant abnormality seen.

(5) Impression: Multilevel degenerative disc disease with the findings most prominent from L2/L3 through L4/L5.

i. After his separation from active duty, he sought treatment from a local chiropractic clinic in [REDACTED]. He filed for VA assistance and had his first C&P Examination in September 2010. He was seen by a primary care nurse and her assessment was that "while his condition started intra-service, the initial problem and the continued residuals of his low back pain stem more from lack of muscular condition or deconditioning in his thoracolumbar torso." In support of this position, the nurse wrote that he "had to lose a large amount of weight prior to getting into the Army; this injury started without a specific event; lack of objective pathology or radiculopathy; and his obese body habits that prevent him from being able to physically condition his core."

j. He appealed this decision and had a second C&P Examination in April 2012. He was evaluated by an advanced practice nurse (APN) who opined regarding his degenerative changes and their EPTS status that degenerative disc changes do not occur over a 32 day period but are changes that occur over years. When asked if there was any increase in impairment of his specific condition during active duty, she wrote, "No degenerative disc disease is a slowly progressive disease of many years, with changes occurring over a long period of time; you do not see radiographic changes within a 32-day period."

k. At this point, he consulted a private physician for a review of his medical records. Dr. [REDACTED] is a Board Certified Orthopaedic Surgeon and served in the Navy. In 2013, he performed an extensive review of the applicant's medical records, conducted a personal interview with him, and reviewed lay person testimony from people who have known the applicant for long periods of time. Dr. [REDACTED] made the following findings of fact in his detailed report:

(1) At the time of the veteran's entrance exam for the Army National Guard, he was 6'4" tall and weighed 240 pounds (lbs.). He was in excellent physical condition, especially considering he could run 6-7 miles at a time and had been on a progressive core strengthening program.

(2) There is absolutely no history of prior back problems despite having spent his whole adult life working in positions that involve extensive lifting and carrying throughout most of his working shift. The only record of any medical treatment is to the chiropractor treatments that occurred during his year of training (in preparation for being physically fit to join the military). Both of these incidents involved basically sore muscles that cleared immediately and had no aftereffects in respect to the veteran's work activities or his training program.

(3) The veteran experienced severe low back pain with radiation into his right lower extremity while involved in the "Red Phase" of his basic training. During this phase he was required to do "pyramid sit-ups." This involved rounds of sit-ups

beginning with five sit-ups, and thereafter incrementally increasing by five additional setups for each round until the round of 100 sit-ups in succession was reached. The trainee was then required to incrementally reduce by five the number of sit-ups in each round until the final round of five sit-ups. These sit-ups were not crunches (where the upper extremities are held in front of the chest), but rather sit-ups for the hands were grasped behind the trainee's neck.

(4) The veteran's low back and right lower extremity symptoms never relented while he was in the military.

(5) An MRI of the veteran's lumbar spine done during his military service revealed no evidence of arthritis. The L3/L4 and L4/L5 disc were abnormal in that there was desiccation and herniation of the annulus at each level.

l. In making his medical findings, Dr. [REDACTED] commented on the C&P Examinations, strongly disagreeing with the nurse in the first examination. He found the applicant was in excellent condition when he enlisted and what caused his herniated disc was the pyramid sit-ups, he was required to do in BCT. The MRI confirmed a significant injury to the L3/L4 disc level, and it is somewhat uncommon to have the L3/L4 disc level involved and certainly not seen very often as the result of the natural aging process in an individual less than 40 years of age. The L4/L5 herniated disc with extension into the right foraminal region is a common level of disc damage secondary to a traumatic event. It is impossible to tell if the injury was acute or chronic, but in this case, without a prior history of significant back problems and the sudden onset of lumbar pain and associated right lower extremity radiculopathy, it was very acute and spontaneous. He also disagreed with the nurse's findings in the 2012 C&P Exam, that this was a soft tissue injury, as this was negated by the MRI findings of February 2009. He describes the errors propagated throughout the applicant's file as being based on incorrect orthopaedic conclusions.

m. Based on this medical opinion, he again appealed to the VA. The VA added the additional diagnosis of right lower extremity radiculopathy based on Dr. [REDACTED] assessment. In addition to his service-connected spondylosis, degenerative disc disease and strain of the lumbar spine, he was granted a 20 percent rating for the radiculopathy backdated to 7 June 2010, along with the 10 percent for the lumbar back injury. To date, he has a current disability rating of 60 percent with the VA and also receives compensation for his unemployability, as evidenced in the Board of Veterans' Appeals decisions dated 13 December 2013 and 27 June 2019. The VA determined the 2013 private opinion of Dr. [REDACTED] deserved significant probative value.

n. It is clear that the VA agreed that based on Dr. [REDACTED] opinion, he was not properly diagnosed while on active duty. If he had been, it would be known that his condition was not EPTS and was incurred while on active duty. According to Army

Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation), paragraph 5-11, there is a presumption of sound condition for Soldiers on orders to active duty specifying a period of more than 30 days. The applicant had a clear medical examination coming into active duty, with no known medical issues. He had a condition that did not meet retention standards and should have been referred for evaluation by a Physical Evaluation Board (PEB). The PEB will presume that Soldiers, including Reserve Component Soldiers on continuous orders to active duty specifying a period of more than 30 days entered their current period of military service in sound condition when the disability was not noted at the time of the Soldier's entrance into the current period of active duty. The PEB may overcome this presumption if clear and unmistakable evidence demonstrated that the disability existed before the Soldier's entrance on their current period of active duty and was not aggravated by their current period of military service. Absent such clear and unmistakable evidence, the PEB will conclude that the disability was incurred or aggravated during their current period of military service.

o. There was no clear and unmistakable evidence to conclude the applicant's disability existed before his entrance on active duty. His medical records and sick slips he was able to retain copies of demonstrate he was unable to perform any training until his discharge. He essentially had a permanent profile, making him unable to complete his training which should have triggered a PEB. And even if the PEB found he had a condition that may have possibly existed before he came on active duty, he should have been further evaluated to see if his condition was aggravated by military service.

p. The EPSBD recommended his separation for failure to meet medical procurement standards due to his diagnosis of spondylolysis, but according to Army Regulation 635-200, paragraph 5-11, the next step should have been to determine whether he met the retention standards of Army Regulation 40-501, chapter 3, which states spondylolysis with more than mild symptoms resulting in repeated outpatient visits or limitations effective performance of duty is cause for referral to a Medical Evaluation Board (MEB).

q. The applicant was seen approximately 6 times in the course of 2 weeks for his severe back pain. Assuming the diagnosis of spondylolysis was correct, regulatory guidance states referral to an MEB is required. The EPSBD proceedings state that due to his persistent level of incapacitating pain he could not complete BCT. When it was determined he did not meet retention standards, he should have been presented the option of being referred to a PEB to start disability processing; however, he was never presented with this option, as required by regulation.

r. The back of the EPSBD paperwork states the applicant had several options when presented with the results of his findings. However, according to regulation, he should not have been before an EPSBD at all, as his diagnosed condition did not meet

retention standards. When he checked the box that he concurred with the proceedings and requested to be discharged without delay, he was operating under the assumption that he did not have any other options, as he was told he could not complete BCT. He was in extreme pain and had not experienced any relief. His only option at that time was to go home, as he was not presented with the option of going to a PEB.

s. In light of the above, it is respectfully requested that the Board reevaluate the applicant's medical records and assess him with a permanent disability retirement based on the 30 percent rating he properly received from the VA for his injuries sustained while on active duty. Processing him through disability channels will allow for a proper evaluation of his medical injuries and grant him the due process he deserves as a veteran. Our veterans deserve our best and are due corrections to their records when mistakes have been made.

3. A DD Form 2807-1 (Report of Medical History) shows on 14 May 2007, the applicant provided his medical history for the purpose of ARNG enlistment. He indicated he was currently in good health with no conditions annotated aside from wearing glasses/contact lenses.

4. 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 (P) or temporary (T).

5. A DD Form 2808 (Report of Medical Examination) shows on 14 May 2007, the applicant underwent a medical examination for the purpose of ARNG enlistment. He was initially found disqualified for service with a temporary physical profile rating of 3 in factor P, due to being overweight, was amended to a PULHES of 111111 and he was found qualified for service on a subsequent, illegible date.

6. The applicant provided multiple DA Forms 5500, which show he was not in compliance with Army height/weight standards on 11 July 2008, but was in compliance with Army standards on 29 September 2008 and beyond.

7. The applicant's DD Form 4 (Enlistment/Reenlistment Document) shows he enlisted in the ARNG on 29 September 2008.

8. MEPS Orders 9022027, dated 22 January 2009, ordered the applicant to initial active duty for training (IADT) with a reporting date to BCT on 5 February 2009 and a follow-on reporting date to Advanced Individual Training (AIT) on 27 April 2009.

9. The applicant provided multiple Standard Forms 600, dated between 6 -23 February 2009, which have been provided in full to the Board for review, and show in pertinent part:

a. On 6 February 2009, he was seen at the Fort Jackson Physical Exam Center for a baseline hearing exam.

b. On 9 February 2009, he was seen at the Moncrief Army Community Hospital for initial entry training (IET) immunizations.

c. On 10 February 2009, he was seen at the Fort Jackson Physical Exam Center for his IET vision exam.

d. On 18 February 2009, an L-Spine Series was ordered at the Troop Medical Clinic (TMC) for lower back pain radiating down the right leg. The impression was mild multilevel spondylosis; correlate with MRI as clinically warranted for radiculopathy. The assessment/plan shows lumbago and spondylosis.

e. On 19 February 2009, he was seen at the TMC for lower back pain that sometimes radiates down both legs. The assessment/plan shows lumbago and spondylosis, and he was given 24 hours quarters.

f. On 20 February 2009, he was seen at the TMC for an MRI for his lower back pain made worse by exercise. He was scheduled for EPTS discharge on Monday. The assessment/plan shows spondylosis. The MRI impressions shows multilevel degenerative disc and joint disease, the findings most prominent from L2/L3 through L5/L5.

g. On 23 February 2009, he was seen at the TMC for a pink looking eye with sneezing and clear rhinitis, where he was diagnosed with conjunctivitis and given eye drops.

h. On 23 February 2009, he was seen at the TMC for his EPTS appointment. The history of present illness shows the applicant was in his third week of BCT and had persistent back pain after doing sit-ups and push-ups in the first week. A plain film x-ray revealed multilevel spondylosis, which was confirmed with an MRI. He has been seen multiple times in the TMC and UCC. Despite treatment, he continued to have back pain and due to his persistent level of incapacitating pain, he could not complete BCT.

The assessment/plan shows spondylosis: EPTS discharge; released with work/duty limitations; PULHES 113111.

10. A Moncrief Form 689-R shows the applicant was given a sick slip from the TMC on 23 February 2009, for an EPTS condition which limited his ability to perform all listed exercises from that date until his EPTS discharge.

11. A DA Form 4707 shows:

a. An EPSB convened on 25 February 2009 where it was recommended the applicant be separated from the Army for failure to meet medical procurement standards in accordance with Army Regulation 40-501, chapter 2.

b. The history of his EPTS condition shows he was a 38 year old in his third week of BCT. He had persistent back pain after doing sit-ups and push-ups in the first week of training. A plain films x-ray revealed multilevel spondylosis, which was confirmed with an MRI. He has been seen multiple times in the TMC and UCC. Despite treatment, he continued to have back pain and due to his persistent level of incapacitating pain, he could not complete BCT.

c. His diagnosis was spondylosis, with a PULHES of 113111 from 23 February 2009 through 23 March 2009.

d. The findings were approved by the medical approving authority on 2 March 2009 and the applicant signed the form on 5 March 2009, indicating he had been informed of the medical findings, concurred with the proceedings, and requested to be discharged from the U.S. Army without delay.

e. The applicant did not mark the blocks indicating he disagreed with the proceedings because his condition was not EPTS or that he disagreed with the proceedings because his condition was not disqualifying on entry and was aggravated by service, and he requested reconsideration.

12. Multiple additional Standard Forms 600 show the applicant was again seen at the TMC on 5 and 6 March 2009 for his chronic lower back pain.

13. A second Moncrief Form 689-R shows the applicant was given an additional sick slip from the TMC on 6 March 2009, for his lower back condition, which continued to limit his ability to perform all listed exercises until his discharge, but added the additional remarks that he should not sit on the floor and should be allowed to lay down several times a day and prescribed him medication.

14. A Separation Action Control Sheet shows on 6 March 2009, the applicant was notified of initiation of separation procedures, he acknowledged receipt of notification, and indicated his election of rights.

15. The applicant's DD Form 214 shows he was released from IADT and returned to the ARNG on 17 March 2009, under the provisions of Army Regulation 635-200, paragraph 5-11, due to failed medical/physical procurement standards, with a corresponding separation code of JFW. He was credited with 1 month and 14 days of net active service and his service was uncharacterized.

16. The applicant's National Guard Bureau (NGB) Form 22 (Report of Separation and Record of Service) shows he was discharged from the ARNG on 17 March 2009, due to being not medically qualified under procurement medical fitness standards. He was credited with 5 months and 19 days of net service and his service was uncharacterized.

17. Headquarters MOARNG Joint Force Headquarters Orders 103-046, dated 13 April 2009, discharged the applicant from the ARNG effective 17 March 2009 with assignment/loss code TK (Trainee discharge program release from IADT). His service was uncharacterized.

18. The applicant provided multiple VA memoranda, C&P Examinations, and Radiology Reports, dated between 5 August 2010 and 23 September 2010, which have been provided in full to the Board and were used in part in the VA Raring Decision, dated 22 October 2010, which shows the applicant's lower back strain (claimed as spondylosis) was determined do be not service connected and not incurred/caused by service.

19. A C&P Exam, dated 27 April 2012, shows the applicant was diagnosed with a thoracolumbar spine condition with pain on movement, unchanged from the prior C&P Exam. It was the opinion of the medical examiner that the applicant's spondylosis/degenerative disc and joint disease noted on an in-service MRI was EPTS and the evidence did not indicate an increase in impairment or aggravation of the condition beyond a normal progression while he was in training from 4 February 2009 through 17 March 2009. The claimed condition was at lease as likely as not incurred in or caused by the claimed in-service injury, event, or illness. The rationale shows the applicant's low back strain may be a chronic condition today with onset during BCT; however, the etiology of the issue was pre-existing and inclusive for obesity, decondition, and lack of skeletal muscular tone.

20. A C&P Addendum, dated 4 June 2012, shows it was the opinion o f the medical examiner that the applicant's spondylosis/degenerative joint disease was EPTS and was not caused by or a result of military service, but rather changes that occurred over years as a result of the applicant's weight and overall deconditioning.

21. An Independent Medical Review, dated 14 June 2013, has been provided in full to the Board for review, and shows in pertinent part that it is at least as likely as not that the service-connected spine injuries that occurred while the applicant was participating in BCT are the direct cause of his present spine symptoms and right lower extremity radiculopathy. The precise injury incurred was an acute herniation of two lumbar discs at L3/L4 and particularly L4/L5, with the latter resulting in impingement of the right L5 nerve root. He has pain on a daily basis with acute exacerbations secondary to the aforementioned activities. He suffers from a moderate symptomatic radiculopathy involving the right L5 nerve root of the sciatic nerve that is permanent in nature.

22. In response to the applicant's appeal to the VA Regional Office for entitlement to service-connection for low back disability and entitlement to a total disability rating based on individual unemployability due to service-connected disability (TDIU), on 16 December 2013, the Board of Veterans' Appeals remanded the case to the VA for the following actions:

- a. Schedule the applicant for an evaluation by a VA vocational rehabilitation specialist to determine the effect of his service-connected disability on his ability to secure or follow a substantially gainful occupation.

- b. Notify the applicant of VA examination.

- c. Once completed, re-adjudicate his claim of entitlement to a TDIU.

23. C&P Exam and Notes, dated 20, 21, and 27 August 2015, have been provided in full to the Board for review and show the applicant's degenerative joint disease and degenerative disc disease of the thoracolumbar spine were found service-connected.

24. A Board of Veterans' Appeals letter and Order, both dated 27 June 2019, show the applicant's entitlement to an effective date of 7 June 2010 for award of service-connection for right lower extremity radiculopathy was granted.

25. 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.

26. 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/or 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 an upgrade of his 17 March 2009 uncharacterized and, in essence, a referral to the Disability Evaluation System (DES). He states through counsel:

“There are two challenges to PV2 [Applicant]'s discharge. The first is that he was not properly diagnosed while on active duty, as his condition did not exist prior to service. Second, assuming for arguments sake that the condition did exist prior to service, PV2 [Applicant]'s was not properly processed through disability channels during his brief time on active duty and should have had his condition evaluated for service aggravation.”

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. The applicant's DD 214 for the period of service under consideration shows the former Guard Soldier entered the regular Army for basic combat training on 4 February 2009 and was discharged on 17 March 2009 under provisions provided by paragraph 5-11 of AR 635-200, Active Duty Enlisted Administrative Separations (6 June 2005): Separation of personnel who did not meet procurement medical fitness standards.

d. Paragraph 5-11a and 5-11b of AR 635-200:

“a. Soldiers who were not medically qualified under procurement medical fitness standards when accepted for enlistment or who became medically disqualified under these standards prior to entry on AD [active duty] or ADT [active duty for training] for initial entry training, may be separated. Such conditions must be discovered during the first 6 months of AD. Such findings will result in an entrance physical standards board [EPSBD]. This board, which must be convened within the soldier's first 6 months of AD, takes the place of the notification procedure (para 2–2) required for separation under this chapter.

b. Medical proceedings, regardless of the date completed, must establish that a medical condition was identified by an appropriate military medical authority

within 6 months of the soldier's initial entrance on AD for RA or during ADT for initial entry training for ARNGUS and USAR that—

(1) Would have permanently or temporarily disqualified the soldier for entry into the military service or entry on AD or ADT for initial entry training had it been detected at that time.

(2) Does not disqualify the soldier for retention in the military service per AR 40–501 [Standards of Medical Fitness], chapter 3. As an exception, soldiers with existed prior to service (EPTS) conditions of pregnancy or HIV infection (AR 600–110) will be separated.”

e. The applicant's pre-entrance Report of Medical History and Report of Medical Examination show he had no significant medical history or conditions other than being significantly overweight. His height was 76 inches, his weight was 279 lbs., and his actual body fat percentage was 34% with a max allowable body fat percentage of 28%.

f. The EMR shows the applicant was first seen for low back pain on 15 February 2009 – just 11 days after entering active duty. His weight at the time was 240 lbs. for a body mass index of 29.2:

“Was doing sit-ups earlier today and noted onset of R [right] lower back pain that seems to have worsened since onset. Lower back, some radiation to R leg (mid-thigh). No hx [history] of direct trauma, no hx of chronic back issues. Can find comfortable positions, but the pain returns after a brief respite and he has to shift again to get comfortable.

g. Conservative treatment, to include working with an athletic trainer, was initiated for his “Low back pain.” Lumbar radiographs obtained 18 February 2009 revealed “Mild multilevel spondylosis.” Spondylosis is the medical term applied to osteoarthritis of the spine, and the term is often used more generally for chronic degenerative changes of the spine. A lumbar MRI obtained 20 February 2009 fully revealed the extent of the chronic degenerative changes with the radiologist concluding “IMPRESSION: Multilevel degenerative disc and joint disease, the findings most prominent from L2/L3 through L4/L5 as detailed above.”

h. When the applicant was seen for his MRI follow-up with his provider, he was informed that his spondylosis, which had clearly existed prior to service, failed the medical procurement standards of AR 40-501 and he was being referred for discharge. Supporting documents show he was referred to an Entry Physical Standards Board (EPSBD) for this condition under provisions provided in paragraph 5-11 of AR 635-200.

i. EPSBDs are convened IAW paragraph 7-12 of AR 40-400, Patient Administration. This process is for enlisted Soldiers who within their first 6 months of active service are

found to have a preexisting condition which does not meet the enlistment standard in chapter 2 of AR 40-501, Standards of Medical Fitness, but does meet the chapter 3 retention standard of the same regulation. The fourth criterion for this process is that the preexisting condition was not permanently service aggravated.

j. Paragraph 2-33a of AR 40-501, Standards of Medical Fitness (29 August 2003), states "Arthritis" of the spine is a cause for rejection for appointment, enlistment, and induction.

k. From the applicant's 25 February 2009 Entry Physical Standards Board (EPSBD) Proceedings (DA Form 4707):

"HISTORY OF EPTS CONDITION: The patient is a 38-year-old male. This soldier is in the 3rd week of basic training. He has had persistent back pain after doing sit-ups and push-ups in the 1st week. A plain films x-ray revealed multilevel spondylosis which was confirmed with an MRI.

He has been seen multiple times in the TMC [troop medical clinic] and UCC [urgent care clinic]. Despite treatment, he continues to have back pain. Due to his persistent level of incapacitating pain, this Soldier cannot complete basic training."

DIAGNOSIS: SPONDYLOSIS

RECOMMENDATIONS: It is recommended that this Soldier be separated from the US Army for failure to meet medical procurement standards IAW AR 40-501."

l. The board determined this degenerative condition had existed prior to service, had not been permanently service aggravated, failed the medical procurement standards in chapter 2 of AR 40-501, and so recommended he be discharge due to this preexisting condition. On 5 March 2009, the applicant concurred with the board's findings selecting the first of four options: "I concur with these proceedings and request to be discharged from the US Army without delay."

m. Contrary to his counsel's assertions, it is clear the applicant's lumbar degenerative arthritis existed prior to service, it failed medical retention standards, and his case was processed IAW with applicable regulations. As stated in paragraph 5-11a of AR 635-200:

"Soldiers who were not medically qualified under procurement medical fitness standards when accepted for enlistment or who became medically disqualified under these standards prior to entry on AD or ADT for initial entry training, may

be separated. Such conditions must be discovered during the first 6 months of AD.”

n. In his case, the condition was discovered in the first 11 days of service.

o. JLV shows he has been awarded multiple VA service-connected disability ratings, two of which are associated with the lumbar spine. 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. These roles and authorities are granted by Congress to the Department of Veterans Affairs and executed under a different set of laws.

p. An uncharacterized discharge is given to individuals on active duty who separate prior to completing 180 days of military service, or when the discharge action was initiated prior to 180 days of service. For the reserve components, it also includes discharges prior to completing initial entry training (IET). There are two phases - Basic Combat Training (BCT) and Advanced Individual Training (AIT). Because the applicant did not complete BCT, he was in an entry level status at the time of his discharge and so received an uncharacterized discharge. This type of discharge does not attempt to characterize service as good or bad. Through no fault of his own, he simply had a medical condition which was, unfortunately, not within enlistment standards.

q. It is the opinion of the Agency Medical Advisor that a referral of his case to the DES is not warranted.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found relief is not warranted.

2. The Board concurred with the conclusion of the ARBA Medical Advisor that the applicant's back condition, discovered within the first few days of BCT, met all criteria to be considered EPTS. The Board found no evidence of error in his discharge processing and further concurred with the conclusion of the ARBA Medical Advisor that the evidence does support referring the applicant to the Disability Evaluation System. Based on a preponderance of the evidence, the Board determined the applicant's release from active duty and uncharacterized discharge due to not meeting procurement medical fitness standards was not in error or unjust.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

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

BOARD DETERMINATION/RECOMMENDATION:

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

6/27/2024

X

CHAIRPERSON

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

REFERENCES:

1. Title 10, U.S. Code, section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.

2. Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), sets policies, standards, and procedures to ensure the readiness and competency of the force while providing for the orderly administrative separation of Soldiers for a variety of reasons.

a. Paragraph 5-11 (Separation of personnel who did not meet procurement medical fitness standards) shows Soldiers who were not medically qualified under procurement

medical fitness standards when accepted for enlistment or who became medically disqualified under these standards prior to entry on active duty or active duty training for initial entry training, may be separated. Such conditions must be discovered during the first 6 months of active duty. Such findings will result in an entrance physical standards board. This board, which must be convened within the Soldier's first 6 months of active duty, takes the place of the notification procedure required for separation.

b. Medical proceedings, regardless of the date completed, must establish that a medical condition was identified by an appropriate military medical authority within 6 months of the Soldier's initial entrance of active duty for Regular Army or active duty training for Army National Guard of the United States and U.S. Army Reserve that:

(1) would have permanently or temporarily disqualified the Soldier for entry into the military service or entry on active duty or active duty training for initial entry training had it been detected at the time

(2) does not disqualify the Soldier for retention in the military service per Army Regulation 40-501, chapter 3. As an exception, Soldiers with existed prior to service conditions of pregnancy or HIV infection will be separated.

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//