

IN THE CASE OF: [REDACTED]

BOARD DATE: 26 January 2024

DOCKET NUMBER: AR20230005840

APPLICANT REQUESTS: in effect, a medical retirement vice separation due to disability severance pay.

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:
DD Form 149 (Application for Correction of Military Record)

FACTS:

1. The applicant states, in effect he is asking that his Physical Evaluation Board decision be looked at again. His knee is really bad, he is unable to walk correctly, and he cannot run. He received 10 percent severance pay. He is asking that he receive medical retirement with a higher percentage of disability due to not being able to use his left knee properly. His left knee condition is now affecting his right knee. He hurt his knee in a vehicle accident in a convoy. He also has a line of duty (LOD) due to falling and injuring his knee, showing this accident was determined to be in the line of duty (ILOD). This is what led to him not being able to do his job in military occupational specialty (MOS) 12C (Bridge Crewmember). His Veterans Affairs and military records document his accident and show it occurred in the ILOD.
2. The applicant underwent a medical examination for enlistment on 8 February 2011. He was found not qualified for service due to eczema. He was recommended for a waiver. On 21 February 2011, after review of his records a waiver for eczema was approved and he was assigned a PULHES of 111111.

A physical profile, as reflected on a DA Form 3349 (Physical Profile) or DD Form 2808, is derived using six body systems: "P" = physical capacity or stamina; "U" = upper extremities; "L" = lower extremities; "H" = hearing; "E" = eyes; and "S" = psychiatric (abbreviated as PULHES). Each body system has a numerical designation: 1 meaning 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.

3. The applicant enlisted in the [REDACTED] Army National Guard ([REDACTED] ARNG) on 28 February 2011.
4. He entered a period of active-duty for training (ADT) on 16 May 2011. He was released from ADT on 29 September 2011, after completion of required active service.
5. He entered another period of active duty in support of Operation Enduring Freedom on 2 January 2013. He served in Jordan from 31 January 2013 – 17 October 2013. He was released from active duty on 24 November 2013 and returned to his [REDACTED] ARNG unit.
6. On 23 August 2021, a Physical Evaluation Board convened and determined the applicant was unfit and recommended a combined rating of 10 percent that his disposition be separation with severance pay.
 - a. The condition found to be unfitting was left knee bursitis rated at 10 percent. He first sought treatment for this condition in June 2017 while stationed to Fort Knox, Kentucky.
 - b. This condition was caused when he lost his footing and fell off of a military vehicle and injured his left knee (V3 - Yes: Incurred under conditions simulating war). In Accordance With (IAW) Army Regulation (AR) 635-40 (Disability Evaluation for Retention, Retirement, or Separation), this Soldier is unfit because the DA Form 3349, Physical Profile Record, Section 4, functional activity limitations associated with this condition make this Soldier unable to reasonably perform required duties.
 - c. The applicant concurred and waived a formal hearing of his case. He did not request reconsideration of his VA ratings.
7. Orders D 245-11, issued by Headquarters, United States Army Physical Disability Agency, on 2 September 2021, shows the applicant was to be discharged from the ARNG effective 2 October 2021, under the provisions of AR 635-40, in the rank/grade of staff sergeant (SSG)/E-6. The order also shows:
 - Percentage of disability: 10 percent
 - The disability resulted from a combat-related injury as defined in 26 USC 104: YES
 - The disability was incurred in a combat zone or incurred during the performance of duty in combat-related operations as designated by Secretary of Defense (10 USC 1212 NDAA 2008 Sec 1646): YES
8. The applicant was honorably discharged from the [REDACTED] ARNG on 1 October 2021. His NGB Form 22 (National Guard Report of Separation and Record of Service) shows he completed 10 years, 7 months, and 2 days net service this period. It also shows he was

discharged and placed on the temporary disability Retired list (TDRL) under the provisions of National Guard Regulation 600-200, paragraph 6-36t (Placement on the TDRL); however, neither his PEB nor his discharge orders confirm his placement on the TDRL.

9. The Army only rates 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.

10. 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 (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 an increase in his military disability rating with a subsequent change of his disability discharge disposition from separate with severance pay to permanent retirement for physical disability. He states:

"I am asking that my MEB [medical evaluation board] decision be looked at again. My knee is really bad and I'm unable to walk correctly and I can't run. I received 10% severance pay. I am asking that I receive medical retirement at for a higher percentage due to not being able to use my left knee properly and now it is affecting my right knee."

c. The Record of Proceedings details the applicant's service and the circumstances of the case. Orders published by the United States Army Physical Disability Agency show the former drilling Army National Guard Soldier was separated with disability severance pay for a 10% military disability rating effective 2 October 2021. The condition was determined to be combat related.

d. A Soldier is referred to the Integrated Disability Evaluation System (IDES) when they have one or more conditions which appear to fail medical retention standards reflected on a duty limiting permanent physical profile. At the start of their IDES processing, a physician lists the Soldiers referred medical conditions in section I the

VA/DOD Joint Disability Evaluation Board Claim (VA Form 21-0819). The Soldier, with the assistance of the VA military service coordinator, lists all other conditions they believe to be service-connected disabilities in block 8 of section II of this form, or on a separate Application for Disability Compensation and Related Compensation Benefits (VA Form 21-526EZ).

e. Soldiers then receive one set of VA C&P examinations covering all their referred and claimed conditions. These examinations, which are the examinations of record for the IDES, serve as the basis for both their military and VA disability processing. The medical evaluation board (MEB) uses these exams along with AHLTA encounters and other information to evaluate all conditions which could potentially fail retention standards and/or be unfitting for continued military service. Their findings are then sent to the physical evaluation board for adjudication.

f. All conditions, both claimed and referred, are rated by the VA using the VA Schedule for Rating Disabilities (VASRD). The physical evaluation board (PEB), after adjudicating the case, applies the applicable ratings to the Soldier's unfitting condition(s), thereby determining his or her final combined rating and disposition. Upon discharge, the Veteran immediately begins receiving the full disability benefits to which they are entitled from both their Service and the VA.

g. On 25 March 2021, the applicant was referred to the IDES for "Left Knee Hemarthrosis [blood in the joint]." Despite numerous requests to the applicant to do so, he did not claim additional claims for evaluation by the IDES. From the VA Report of General Information (VA Form 27-0820):

"MSC [Military Service Coordinator, a VA employee] completed initial IDES interview on 03/30/21. MSC has not received a response from Service member regarding returning a substantially complete application. Following steps taken to have SM return a signed 526ez.

03/30/21 Initial interview

03/30/21 Email VA Form 526ez to Service member for completion

04/05/21 Reminder email sent for signed application

04/05/21 Response from SM application will be sent 4/6/21

04/06/21 Notified SM application will be addressed after PEB due to late submission

04/06/21 RFA letter mailed to Service Member and exams requested for conditions identified by the Service department listed on 0819 only

III.i.2.D.4.g. MSC Actions When a Participant Does Not Immediately Return a Completed VA Form 21-526EZ”

h. A medical evaluation board (MEB) determined his “Left Knee Bursitis (VA Dx) (Referred as Left Knee Hemarthrosis)” failed the medical retention standards of AR 40-501, Standards of Medical Fitness. They determined four unclaimed medical conditions diagnosed by the VA met medical retention standards: Insomnia disorder, Tinnitus, Left ankle bursitis, and Obstructive sleep apnea. On 16 June 2021, the applicant concurred with the MEB’s decision and his case was subsequently forwarded to a physical evaluation board (PEB) for adjudication.

i. On 23 August 2021, the applicant’s informal PEB found his “Left Knee Bursitis” to be the sole unfitting for continued military service. They found the four VA diagnosed conditions were not unfitting for continued service. The PEB applied the Veterans Benefits Administration (VBA) derived rating of 10% and recommended the applicant be separated with disability severance pay.

j. On 31 August 2021, after being counseled on the board’s findings and recommendation by his PEB liaison officer, the applicant concurred with the PEB, waived his right to a formal hearing, and declined to request a VA reconsideration of his disability rating.

k. The 22 July 2021 VA rating decision shows the rationale for the 10% rating for his left knee:

“An evaluation of 10 percent is assigned from March 29, 2021.

We have assigned a 10 percent evaluation for your left knee bursitis based on:

- Painful motion of the knee (38 CFR §4.59 allows consideration of functional loss due to painful motion to be rated to at least the minimum compensable rating for a particular joint. Since you demonstrate painful motion of the knee, the minimum compensable evaluation of 10 percent is assigned)

The provisions of 38 CFR §4.40 and §4.45 concerning functional loss due to pain, fatigue, weakness, or lack of endurance, incoordination, and flare-ups, as cited in DeLuca v. Brown and Mitchell v. Shinseki, have been considered and applied under 38 CFR §4.59.

A higher evaluation of 20 percent is not warranted for limitation of flexion of the leg unless the evidence shows:

- Limitation of flexion of 16 to 30 degrees. (38 CFR 4.71a)

Additionally, a higher evaluation of 20 percent is not warranted for limitation of extension of the knee unless the evidence shows:

- Limitation of extension of 15 to 19 degrees. (38 CFR 4.71a)”

l. There is no evidence the applicant’s left knee condition would have warranted a 20% disability rating. Because a 30% or higher rating is required to be retired for physical disability, even if the knee had warranted a 20% rating, he would have received the same disposition and monies through his separation with disability severance pay.

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

n. Review of his PEB case file in ePEB along with his encounters in AHLTA revealed no substantial inaccuracies in or discrepancies.

o. JLV shows he continues to have the same 10% rating for his left knee. It also shows he has been awarded multiple service-connected disability ratings. However, the DES compensates an individual only for service incurred 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 during or permanently aggravated by their military service. These roles and authority are granted by Congress to the Department of Veterans Affairs and executed under a different set of laws.

p. It is the opinion of the ARBA Medical Advisor that neither an increase in his military disability rating, a change of his disability discharge disposition, nor a referral of his case back 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 contentions, the military record, and regulatory guidance. The Board noted that the applicant was separated with disability severance pay for a 10% military disability rating effective 2 October 2021 for a combat-related condition of his left knee.. The applicant concurred with the Medical Evaluation Board's decision and a Physical Evaluation Board and declined to request reconsideration by the VA of his rating. The Board agreed that the applicant was afforded proper medical evaluation and

adjudication. Documentation does not support that the applicant's condition would have warranted a higher rating or that he had additional service incurred conditions that would have failed medical retention standards in accordance with applicable regulatory guidance. The Board further agreed that evidence did not support that any additional medical conditions would have disallowed him from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his discharge. After due consideration of the request, the Board determined the evidence presented insufficient to warrant a recommendation for relief and a correction to his record is not warranted.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

: : : GRANT FULL RELIEF

: : : GRANT PARTIAL RELIEF

: : : GRANT FORMAL HEARING

█ █ █ DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board determined 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 and neither an increase in his military disability rating, a change of his disability discharge disposition, nor referral of his case back to the DES is warranted.

2/26/2024

X _____

CHAIRPERSON

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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, chapter 61, provides the Secretaries of the Military Departments with authority to retire or discharge a member if they find the member unfit to perform military duties because of physical disability. The U.S. Army Physical Disability Agency

is responsible for administering the Army physical disability evaluation system and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with DOD Directive 1332.18 and Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation).

a. Soldiers are referred to the disability system when they no longer meet medical retention standards in accordance with Army Regulation 40-501 (Standards of Medical Fitness), chapter 3, as evidenced in a Medical Evaluation Board (MEB); when they receive a permanent medical profile rating of 3 or 4 in any factor and are referred by an Military Occupational Specialty (MOS) Medical Retention Board; and/or they are command-referred for a fitness-for-duty medical examination.

b. The disability evaluation assessment process involves two distinct stages: the MEB and Physical Evaluation Board (PEB). The purpose of the MEB is to determine whether the service member's injury or illness is severe enough to compromise his/her ability to return to full duty based on the job specialty designation of the branch of service. A PEB is an administrative body possessing the authority to determine whether or not a service member is fit for duty. A designation of "unfit for duty" is required before an individual can be separated from the military because of an injury or medical condition. Service members who are determined to be unfit for duty due to disability either are separated from the military or are permanently retired, depending on the severity of the disability and length of military service. Individuals who are "separated" receive a one-time severance payment, while veterans who retire based upon disability receive monthly military retired pay and have access to all other benefits afforded to military retirees.

c. The mere presence of a medical impairment does not in and of itself justify a finding of unfitness. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier may reasonably be expected to perform because of his or her office, grade, rank, or rating. Reasonable performance of the preponderance of duties will invariably result in a finding of fitness for continued duty. A Soldier is physically unfit when a medical impairment prevents reasonable performance of the duties required of the Soldier's office, grade, rank, or rating.

2. Army Regulation (AR) 40-501 (Standards of Medical Fitness) provides information on medical fitness standards for induction, enlistment, appointment, retention, and related policies and procedures. Soldiers with conditions listed in chapter 3 who do not meet the required medical standards will be evaluated by an MEB and will be referred to a PEB as defined in Army Regulation 635-40 with the following caveats, in pertinent part:

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

c. Normally, RC Soldiers who do not meet the fitness standards set by chapter 3 will be transferred to the Retired Reserve or discharged from the Reserve Component per Army Regulation 135–178 (ARNG and Reserve Enlisted Administrative Separations), or another applicable Reserve Component regulation. They will be transferred to the Retired Reserve only if eligible and if they apply for it.

3. AR 635-40 (Disability Evaluation for Retention, Retirement, or Separation), in effect at the time, set forth the policies for the disposition of Soldiers found unfit because of physical disability to reasonably perform the duties of his/her office, grade, rank, or rating.

a. Paragraph 5-8 describes the applicability of 10 U.S. Code sections 1201 through 1203. Adjudication of compensability under the provisions of U.S. Code sections 1201 through 1203 applies to:

(2) RC Soldiers currently on an order to active duty specifying a period of more than 30 days (other than for training under 10 U.S. Code 10148(a) or as limited by 10 U.S. Code 1206a).

(3) RC Soldiers in a REFRAD status who are referred to the DES for a disability incurred or aggravated when the Soldier was on an order to active duty specifying a period of more than 30 days.

b. Paragraph 5-9 states the requirements listed below pertain to the categories of Soldiers delineated in paragraph 5–8, above. The statutory requirements listed below concerning unfit, duty status, in sound condition, and line of duty determine compensability. The requirements listed below concerning stability, years of service, or disability rating percentage determine disposition (retirement or separation).

(1) The disability is permanent and stable.

(2) The member has—

- at least 20 years of service computed in accordance with 10 U.S. Code 1208; or
- the disability is at least 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs at the time of the determination, and either that disability—

- was not noted at the time of the member's entrance on active duty unless the Secretary of the Military Department concerned demonstrates with clear and unmistakable evidence that the disability existed before the member's entrance on active duty and was not aggravated by active military Service;
- is the proximate result of performing active duty;
- was incurred in the line of duty in time of war or national emergency; or
- the disability was incurred in the line of duty after 14 September 1978

c. Paragraph 5-20a states: Previous determinations. During TDRL re-evaluation, previous determinations concerning application of any presumption established by this regulation, LOD, misconduct, and whether a medical impairment was service-incurred or preexisting and permanently aggravated will be considered administratively final for those conditions for which the Soldier was placed on the TDRL unless one of the following circumstances apply:

(1) There is evidence of fraud.

(2) There is an expected change of diagnosis that warrants the application of accepted medical principles for a preexisting condition. For example, the diagnosis of schizophreniform disorder either resolves or becomes a different mental diagnosis.

(3) Correction of error in favor of the Soldier.

(4) Rating percentages are administratively final unless the condition was determined unstable at the time of placement on the TDRL or one of the exceptions to administrative finality at paragraph 5-20a, applies. However, the change of a rating percentage occurs at the time the Soldier is removed from the TDRL. For example, a Soldier retained on the TDRL does not incur a change of rating for purposes of recompilation of retired pay though the Soldier's condition may have improved or worsened.

d. Paragraph 5-20c Unfitting condition improves to meet medical retention standards. States when a Soldier was placed on the TDRL with only one unfitting condition and upon re-examination of that condition by the MTF it is determined that the member now meets medical retention standards for that condition, the MTF will conduct a thorough medical examination to determine if there are any other conditions that fail retention standards or would preclude a return to duty. The MTF will also conduct an examination if there were multiple unstable and unfitting conditions, and all have improved to meet retention standards and the member had no unfitting condition that was stable at time of placement on TDRL. The PEB will not find a Soldier fit off the TDRL unless the Soldier is fully capable (medically) of performing duty. If the Soldier was found fit for the condition(s) causing placement on the TDRL but has other

unrelated and unfitting conditions, the provisions above apply, and the Soldier will not be found fit. If the PEB does not receive a comprehensive medical examination on a Soldier who is being found fit for the condition(s) causing placement on the TDRL, they will return the case to the MTF for such an examination rather than issue a finding of fit.

e. Paragraph 5-21 The rating of compensable disabilities states: Disabilities determined to be unfitting and compensable will be rated in accordance with the VASRD. This rating will generally be determined by the VA Disability Evaluation System Rating Activity Site. For those cases that are evaluated as an exception to IDES, the military department determines the rating.

4. 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.

5. 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.

6. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records (BCM/NRs) regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. BCM/NRs may grant clemency regardless of the type of court-martial. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to other corrections, including changes in a discharge, which may be warranted based on equity or relief from injustice. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. In determining whether to grant relief based on equity, injustice, or clemency grounds, BCM/NRs shall consider the prospect for rehabilitation,

external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment. Changes to the narrative reason for discharge and/or an upgraded character of service granted solely on equity, injustice, or clemency grounds normally should not result in separation pay, retroactive promotions, and payment of past medical expenses or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded service characterization.

7. 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//