ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [redacted]

BOARD DATE: 13 February 2024

DOCKET NUMBER: AR20230006168

APPLICANT REQUESTS: a medical retirement vice disability severance pay.

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

- DD Form 149 (Application for Correction of Military Record)
- Veterans Affairs (VA) Summary of benefits, 21 February 2023

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 on 31 July 2004, he was medically separated from the Army due to medical disability that occurred during active duty. He is now rated by the VA as 100% disabled permanent and total.

3. The applicant enlisted in the Regular Army on 25 August 2000.

4. The applicant's available records do not contain, nor did he provide copies of his medical evaluation board or physical evaluation board.

5. Orders 198-04A, issued by Darmstadt Transition Center, on 16 July 2004, show the applicant was reassigned to US Army transition point on 31 July 2004. He was entitled to disability severance pay in the rank of private first class. His percentage of disability at time of separation was 0%. Disability did not result from a combat related injury.

6. On 31 July 2004, the applicant was honorably discharged in accordance with Army Regulation (AR) 635-40 (Physical Evaluation for Retention, Retirements, or Separation), paragraph 4-24b (3). His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 3 years, 11 months, and 6 days net active service this period. He received $9,513.00 in severance pay. It also shows:

- Item 26 (Separation Code): JFL
- Item 27 (Reentry Code): 3
- Item 28 (Narrative Reason for Separation): Disability, Severance Pay

7. The applicant provides a VA Summary of benefits showing he has 100% combined service-connected disabilities effective 26 August 2021.

8. 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.

9. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor reviewed the supporting documents, the Record of Proceedings (ROP), and the applicant's available records in the Interactive Personnel Electronic Records Management System (iPERMS), the Health Artifacts Image Management Solutions (HAIMS) and the VA's Joint Legacy Viewer (JLV). The applicant requests change in discharge from separated with severance pay to medical disability retirement. He indicated that 'Other Mental Health' condition was related to his claim. He contends that the VA has determined that he is totally and permanently disabled at 100%.

b. The applicant's available records were summarized in the ABCMR ROP. The DD Form 214 indicated that he entered Regular Army 25Aug2000. His MOS was 35F10 Special Electronic Devices Repairer. He was discharged 31Jul2004 for medical disability with severance pay under provisions of AR 635-40, para 4-24B(3). His service was characterized as honorable.

c. The medical discharge records (MEB/PEB proceedings) were not available for review. No records were found in the electronic Physical Evaluation Board (ePEB) system. The following records were found in JLV and HAIMS concerning the Asthma diagnosis history and MEB.

- 04May2000 entrance exam (Report of Medical Examination DD Form 88) did not show any significant abnormalities.
- August 2002 Respiratory Therapy Consult was requested by primary care for a 2-month history of worsening cough and shortness of breath associated with running and going upstairs; now present even at rest.
- 10Feb2003 PFTs. FVC was measured at 3.24l(58%); with FEV1 2.79l(59%); and FEV1/FVC ratio of (86%). Following the use of an inhaled bronchodilator, there was significant improvement in airflow and total volume (33%). The

obstructive component was improved (35%). Test results were consistent with Asthma. These pulmonary function tests (PFTs) were completed 17 months prior to discharge from service.

- 21Jan2004 HDB Internal Medicine. The note indicated that therapy for Asthma had been maximized with use of leukotriene inhibitor, steroid, long acting B2 agonist, and short acting agonist (rescue inhaler). The applicant's medication compliance was unknown. A letter from his superiors stated he could not pass the 2-mile run and it was uncertain if he could wear a protective mask. He was determined to not meet retention standards and was issued a permanent P3 physical profile and sent for a MEB.
- 12Apr2004 Medical Board Summary: Asthma was manifested by chronic cough and dyspnea. He was unable to pass the APFT run or the CTT in protective mask. The diagnosis was confirmed by pulmonary function tests (PFTs or spirometry). Soldier fails to meet retention standards under AR 40-501, paragraph 3-27A. The applicant reported using Albuterol inhaler as needed, but at least once a day. He also reported having used Advair previously but was not currently prescribed any steroid inhaler. There had been no hospitalizations for asthma and no emergency room visits for asthma exacerbations. There was no history of intubation, prescriptions for oral steroids or supplemental oxygen. This information was documented in the 12Oct2017 Respiratory Conditions DBQ.
- 03Aug2005 Primary Care Physician Follow Up Note. 29Mar2005 PFTs were interpreted as 'normal'. The results were not available for this review. These tests were completed 7 months after discharge from service.
- 14Jun2019 PFTs Bronx VAMC (15 years post discharge). FEV1 88%; FEV1/FVC 72%. There was a significant response to bronchodilator, consistent with Asthma. Lung volumes were within normal limits.

d. Review of VASRD principles showed the following rating protocol for Asthma, bronchial under DC 6602:

- FEV1 of 56 to 70 percent predicted, or; FEV1/FVC of 56 to 70 percent, or; daily inhalational or oral bronchodilator therapy, or; inhalational anti-inflammatory medication 30%
- FEV1 of 71 to 80 percent predicted, or; FEV1/FVC of 71 to 80 percent, or; intermittent inhalational or oral bronchodilator therapy 10%
- A zero percent evaluation shall be assigned when the requirements for a compensable evaluation are not met (§4.31 Zero percent rating). 0%

e. The applicant contends that he was separated with severance pay and orders issued to him confirmed that he was separated with severance pay. It can be inferred from this that his Asthma condition was rated at 10% or 0% (possible ratings less than 30%). According to the service medical records, the applicant had been prescribed albuterol. He had also been prescribed inhaled steroids (or inhalational anti-

inflammatory medication) which is part of the rating criteria warranting a rating of at least 30%. Review of the applicant's medication profile in JLV revealed for the inhaled steroid prescription: A one month supply was filled on 15May2003 and 5 out of 5 refills remained unfilled. Two months later, on 10Jul2003, a prescription for a one-month supply of inhaled steroid was filled and 5 of 5 refills remained unfilled. Based on this, it appears that at the time of the 12Apr2004 MEB, he was not using inhaled steroids. This was confirmed by his statement during the MEB that he was prescribed inhaled steroid previously (Advair), but he was not currently prescribed one. Two months prior to discharge, a one-month supply was filled and only 1 of 3 refills remained unfilled. And finally, almost 2 weeks prior to discharge a one-month supply of inhaled steroids was filled and 3 of 3 refills remained unfilled. The applicant reported daily use of Albuterol inhaler during MEB proceedings; however, his assertion in this regard was not consistent with other evidence in the record that indicated otherwise: Review of the albuterol inhaler prescription usage in JLV showed a one month supply was filled 15May2003 and 5 out of 5 refills remained unfilled. One year later, on 05May2004 a one-month supply was filled, and again 5 out of 5 refills remained unfilled. This evidence would support intermittent use of the Albuterol inhaler in the absence of use of outside prescriptions.

f. Rationale/Opinion. JLV search today showed current rating for Asthma at 30%. Medical records proximate to the MEB/discharge are consistent with no use of inhaled steroids; and prescription records do not support daily use of albuterol inhaler at the time of the MEB. PFTs results were consistent with lung volumes that were within normal limits; and a mild obstructive component that was readily responsive to bronchodilator inhalation. Based on records available for review, in the ARBA Medical Reviewer's opinion, there is insufficient evidence to support recommending a change to the Asthma condition rating to 30% or above.

g. The applicant did not submit any medical treatment records. There were few service treatment records in JLV. The following records were found in JLV (mostly embedded in DBQ exams for VA compensation and pension benefits) and HAIMS.

- In February 2001, the applicant was seen at sick call in Georgia for left hamstring strain sustained during running for physical training. Treatment included ibuprofen, cold packs, limited duty and [temporary] physical profile. He also received physical therapy according to the note. The 18Sep2001 [redacted] ACH left femur film did not show fracture. These service treatment records were found in the 07Nov2017 Muscle Injuries DBQ. This condition was rated by the VA as Thigh Muscle Injury at 40%.
- In 2003 in Germany, tinnitus was reported in relation to a specific exposure to hazardous noise (firearms). The VA examiner indicated service audiograms revealed a 20dB threshold shift in the left ear at 6kHz (2004). The applicant reported that due to his MOS he was constantly exposed to loud firearms. In the

16Jan2020 Audiology Evaluation, he reported bilateral tinnitus, due to noise exposure on the rifle range in service. No hearing loss or communication issues were reported at the time of the evaluation. The VA rated Tinnitus at 10%.

- 21Apr2004 Medical Board Summary indicated the applicant had symptoms of gastroesophageal reflux disease (GERD) treated with Rabeprazole. After discharge, a 21Jun2006 upper gastrointestinal radiographic study and barium swallow were normal. The tests were ordered for heartburn and dyspepsia after eating for about 3 years. These service records were documented in the 12Oct2017 Esophageal Conditions DBQ. The VA rated Hiatal Hernia at 10%.
- The 01Jun2004 wrist film obtained after a slip and fall injury on wet floor, showed a possible scaphoid fracture. He had swelling and difficulty moving his fingers. There were no other service records available for this condition. After discharge, during the 29Sep2004 visit to establish care at the VA, he did not mention right wrist concerns. He reinjured the right wrist working out in 2010. The 25Jun2010 right wrist film by the VA was normal. This condition was rated by the VA for Limited Motion of Wrist at 10%.
- 29Sep2004 Primary Care Note. He reported Asthma symptoms if he forgot his inhaler. He also reported GERD and Allergic Rhinitis. Of note, he did not report back symptoms or a back condition.
- 03Aug2005 Primary Care Notes. The applicant was seen for back pain after yard work (moving heavy blocks and using a jack hammer) the day prior.
- 23Sep2020 Neurosurgery Telephone Note. The history presented was he diagnosed with chronic strain in left hamstring due to military service and lower back pain that started a few years prior. The applicant had also developed associated right and left leg pain. He was found to have L4-L5 disc compressing right L5 nerve root, L5-S1 disc possible compressing L S1 nerve root. This was the only note found by the ARBA Medical Reviewer tying the back condition to his military service. The Back Conditions DBQ was not found. The first back film was ordered in 2020 per JLV search. The VA rated Degenerative Arthritis of the Spine at 40% and Paralysis of Sciatic Nerve at 20%.
- 23Aug2017 Northport VAMC. The applicant first sought care for BH symptoms in 2017, almost 13 years after discharge from service. He shared that his current depressive symptoms resulted from being unable to perform as a Soldier due to Asthma. He also shared that the resulting depressive symptoms, had impacted his occupational functioning to the point where he was dismissed from a manager position (electronics repair department New York City Fire Department) that he held for 8-years because he could not focus and track his assignments, deadlines, etc. He was not currently working. He lost the job in 2018. He received counseling and took Zoloft 2 weeks before self-discontinuing it. He denied suicidal/homicidal ideations. He denied suicide attempts, history of substance abuse, legal issues, psychosis, mania, and psychiatric hospitalization. He also denied exposure to combat and military sexual trauma. Diagnosis: Unspecified Depressive Disorder. Some of the applicant's BH history was found

in the 28Oct2021 Mental Disorders DBQ. The BH condition was rated by the VA (as a secondary service-connected disability) as Mood Disorder at 70%.

h. The MEB determined that the Asthma condition failed medical retention standards. In the ARBA Medical Reviewer's opinion, based on records available for review, there was insufficient evidence to support that there were any other conditions which failed medical retention standards of AR 40-501 chapter 3 at the time of discharge from service. Referral for further medical discharge processing is not warranted.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. The applicant's MEB and PEB are not available for review. However, other evidence shows an MEB determined that the applicant's Asthma condition failed medical retention standards and referred him to a PEB that found his condition unfitting and rated it under 30%, resulting in his discharge with severance pay. The applicant has the burden of proving an error or injustice by a preponderance of the evidence. The Board considered the medical records, any VA documents provided by the applicant and the review and conclusions of the medical reviewer. The Board agreed with the medical reviewer's finding that based on records available for review, there was insufficient evidence to support that there were any other conditions which failed medical retention standards of AR 40-501 chapter 3 at the time of discharge from service, and therefore the Board determined referral for further medical discharge processing is not warranted.

BOARD VOTE:

Mbr 1	Mbr 2	Mbr 3	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
[redacted]	[redacted]	[redacted]	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.2.

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, 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.

3. Army Regulation (AR) 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.

a. The disability evaluation assessment process involves two distinct stages: the MEB and PEB. The purpose of the MEB is to determine whether the service member's injury or illness is severe enough to compromise his or 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 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.

b. Service members whose medical condition did not exist prior to service who are determined to be unfit for duty due to disability are either separated from the military or are permanently retired, depending on the severity of the disability. 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. A Soldier is physically unfit when medical impairment prevents reasonable performance of the duties required of the Soldier's office, grade, rank, or rating.

d. 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 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 his or her office, grade, rank, or rating in such a way as to reasonably fulfill the purpose of his or her employment on active duty.

e. 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.

4. AR 635-40, Appendix B, paragraph B-24f, of the regulation in effect at the time, states often a Soldier will be found unfit for any variety of diagnosed conditions which are rated essentially for pain. Inasmuch as there are no objective medical laboratory testing procedures used to detect the existence of or measure the intensity of subjective complaints of pain, a disability retirement cannot be awarded solely on the basis of pain. However, lack of objective findings does not constitute a valid reason for finding a Soldier unfit by analogy to a neuropsychiatric disability or assuming that the Soldier is malingering. Rating by analogy to degenerative arthritis as an exception to analogous rating policies may be assigned in unusual cases with a 20% ceiling, either for a single diagnosed condition or for a combination of diagnosed conditions each rated essentially for a pain value. To do otherwise would be to combine pain ratings so as to achieve a percentage of disability that would result in erroneous disability retirement. (Severe eye pain is an exception).

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%.

6. Title 38, USC, Sections 1110 and 1131, permit the VA to award compensation for disabilities which were incurred in or aggravated by active military service. However, an award of a VA rating does not establish an error or injustice on the part of the Army.

7. Title 38, CFR, Part IV is the VA's schedule for rating disabilities. The VA awards disability ratings to veterans for service-connected conditions, including those conditions detected after discharge. As a result, the VA, operating under different policies, may award a disability rating where the Army did not find the member to be unfit to perform his duties. Unlike the Army, the VA can evaluate a veteran throughout his or her lifetime, adjusting the percentage of disability based upon that agency's examinations and findings.

8. Section 1556 of Title 10, U.S. Code, requires the Secretary of the Army to ensure that an applicant seeking corrective action by 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 ABCMR applicants (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//