

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 19 January 2024

DOCKET NUMBER: AR20230006822

APPLICANT REQUESTS:

- reconsideration of his prior requests for physical disability retirement in lieu of physical disability separation with severance pay
- personal appearance before the Board via video or telephone

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

- two DD Forms 149 (Application for Correction of Military Record)
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- Department of Veterans Affairs (VA) letter, dated 20 July 1998

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's cases by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR1999017256 on 27 May 1999 and Docket Number AR20190002468 on 1 July 2021.

2. The applicant states:

a. He is requesting his disability discharge be changed to medical retirement. His previous request was denied because the evidence he submitted was a VA decision letter dated 28 July 1998, showing that the conditions for which he was separated, retropatellar knee pain and depression, remained at 20 percent and 0 percent disabling, respectively.

b. He submitted an appeal to that VA decision and was granted a combined disability rating of 40 percent, with a new increase to 10 percent disability for the depression, effective 21 June 1997. Unfortunately, he never received that decision letter and since his overall monthly compensation did not change, he assumed his appeal had been denied. Therefore, the letter he submitted as evidence to the Board was outdated and incorrect.

c. In 2018 or 2019, he tried to have the error of his Army discharge corrected and was informed there would be no change to his separation status because on the original VA rating of 40 percent, his depression had been rated at 0 percent. He is submitting a copy of the VA award letter showing the increase in rating and once more requests that the Army reconsider its decision and grant him a medical retirement. The severance pay he received with his disability separation has been paid in full.

3. The applicant enlisted in the Regular Army on 13 October 1981 and deployed to Saudi Arabia from 1 January 1990 through 2 May 1991.

4. A Medical Evaluation Board (MEB) Narrative Summary (NARSUM), dated 21 April 1997, shows:

a. The applicant's chief complaints and his diagnoses as:

- bilateral retropatellar knee pain syndrome
- depression

b. He did not meet retention standards of Army Regulation 40-501 (Standards of Medical Fitness), paragraph 3-41 (miscellaneous conditions and defects) and his case was forwarded to the Physical Evaluation Board (PEB) for final disposition.

5. An MEB Addendum, dated 23 April 1997, shows:

a. The applicant's diagnoses as:

- depressive disorder, not otherwise specified
- bilateral retropatellar pain syndrome
- occupational problems while pending MEB

b. Based on his psychiatric diagnosis alone, the applicant does not meet retention standards of Army Regulation 40-501. He is capable of understanding all of the proceedings. His condition is likely to continue in remission on Prozac. If he were to be medically separated or retired, he should continue on the medication to ameliorate his symptoms.

6. A DA Form 3947 (MEB Proceedings) shows the following:

a. An MEB convened on 25 April 1997 and the applicant was referred to a PEB for the following medical conditions:

- bilateral retropatellar pain syndrome
- depression

b. On 8 May 1997, the applicant signed the form indicating he had been informed of the approved findings and recommendation of the MEB and agreed.

7. A DA Form 199 (PEB Proceedings) shows:

a. A PEB convened on 13 May 1997. The applicant was found physically unfit with a recommended combined rating of 0 percent and that his disposition be separation with severance pay for the disability of bilateral retropatellar pain syndrome, rated at 0 percent.

b. The condition listed as MEB diagnosis #2 and addendum diagnosis Axis I [depression/depressive disorder not otherwise specified] was considered by the PEB and found to not be unfitting and therefore not ratable.

c. On 21 May 1997, the applicant signed the form indicating he had been advised of the findings and recommendations of the PEB and concurred, waiving a formal hearing of his case.

8. The applicant's DD Form 214 shows on 20 June 1997, he was honorably discharged under the provisions of Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation) due to disability with severance pay. He was credited with 15 years, 8 months, and 8 days of net active service.

9. A VA letter, dated 28 July 1997, shows the approved combined award for service-connected disability compensation for the applicant was 40 percent, for the following conditions:

- back strain, 10 percent
- degenerative arthritis, 10 percent
- knee condition, left lower, 10 percent
- knee condition, right lower, 10 percent
- dysthymic disorder, 0 percent

10. A second VA letter, likewise, dated 28 July 1997, shows the applicant was granted a combined service-connected disability rating of 40 percent for the following conditions:

- mechanical low back pain, 10 percent
- bilateral shoulder arthritis, 10 percent
- retropatellar pain syndrome left knee, 10 percent
- retropatellar pain syndrome right knee, 10 percent
- depression, 0 percent

11. A VA letter, dated 20 July 1998, shows the VA made a decision on the applicant's claim for increased service-connected compensation benefits, as follows:

a. The applicant's depression, which was previously rated at 0 percent was increased to 10 percent disabling.

b. They did not find any evidence which would suggest a change in the evaluation of the following conditions:

- mechanical low back pain remained 10 percent disabling
- bilateral shoulder arthritis remained 10 percent disabling

c. His combined service-connected evaluation remained 40 percent.

12. The applicant previously applied to the ABCMR in September 1997, requesting placement on the Temporary Disability Retired List (TDRL) or in effect, physical disability retirement in lieu of physical disability separation with severance pay through the consideration of additional unfitting conditions that were deemed service-connected and rated as disabling by the VA. On 27 May 1999, the Board denied the applicant's request, determining the evidence presented did not demonstrate the existence of a probable error or injustice.

13. The applicant again applied to the ABCMR in February 2019, requesting reconsideration of his prior request for physical disability retirement in lieu of physical disability separation with severance pay, through the inclusion of additional unfitting conditions rated as service-connected and disabling by the VA.

14. In the adjudication of the applicant's 2019 request, a medical advisory opinion was provided by the Army Review Boards (ARBA) medical advisor, who opined in pertinent part that there was no evidence the applicant had additional conditions which failed medical retention standards or were unfitting prior to his separation with severance pay.

15. On 1 July 2021, the Board denied the applicant's request, determining the evidence presented does not demonstrate the existence of a probable error or injustice and the overall merits of his case are insufficient as a basis for correction of his records.

16. 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.

## 17. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. Documentation reviewed included the applicant's ABCMR application and accompanying documentation, the previous ABCMR denial (22 November 2016, AR20150009779) the military electronic medical record (AHLTA), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant is applying to the ABCMR requesting a reconsideration of their prior denial of his request for an increase in his military disability rating and that his disability discharge disposition be changed from separated with severance pay to permanent retirement for physical disability. He states:

“I was separated from the ARMY with a 20% disability rating on 06/20/1997 for knee pain and depression. On 07/28/1997, the VA granted me a 40% disability rating with a 0% Service-Connected Rating for my depression. I appealed the decision and was granted a 10% rating effective 06/21/1997.”

c. The Record of Proceedings and the previous ABCMR denial detail the applicant's military service and the circumstances of the case. The DD 214 for the period of service under consideration shows he entered the regular Army on 13 October 1981 and was discharged on 20 June 1997, being separated with \$46,720.80 disability severance pay under provisions in paragraph 4-24b(3) of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (1 September 1990). It shows a period of Service in Southwest Asia from 1 January 1990 thru 2 May 1991

d. On 25 April 1997, a medical evaluation board determined the applicant had bilateral retropatellar pain syndrome and depression which failed medical retention standards. On 8 May 1997, he agreed with the board's findings and recommendation and his case was forwarded to a physical evaluation board.

e. On 13 May 1997, his informal physical evaluation board found his bilateral retropatellar pain syndrome was unfitting for continued military service and that his depression was not an unfitting condition for continued Service. They recommended the applicant be separated with disability severance pay.

“It is noted that your disability rating is less than 30 percent. For Soldiers with a disability rating of less than 30 percent and with less than 20 years of service, AR 635-40 requires separation from service with severance pay.”

f. A VA disability compensation award letter dated 28 July 1997 shows that he was awarded 10% service-connected disability ratings for “Back Strain” and “Degenerative Arthritis” effective 1 July 1997. However, the combined rating for his knee conditions remained below 30% and thus his disability discharge disposition continues to be separated with severance pay.

g. His depression, rated as dysthymic disorder, was initially given a 0% service-connected disability rating. A 20 July 1998 VA benefits letter shows it was now diagnosed as depression with the rating increased to 10%. However, this change has no effect on his final military disability rating because the PEB had found the condition not unfitting for continued military service.

h. Paragraph 3-1 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (1 September 1990) states:

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

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

j. JLV shows his service-connected mental disorder is now rated as PTSD at 70%. However, The disability Evaluation System (DES) has neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions incurred during or were permanently aggravated by their military service; or for compensating conditions which did not contribute to career termination. These roles and authorities are granted by Congress to the Department of Veterans Affairs and executed under a different set of laws.

k. It is the opinion of the Agency Medical Advisor that either a change in his military disability ratings and/or a referral of his case to the DES remain unwarranted.

**BOARD DISCUSSION:**

1. The applicant's request for a personal appearance was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance before the Board is not necessary to serve the interest of equity and justice in this case.

2. 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 applicant requests reconsideration of his prior case; however, his application does not reveal any new documentation for consideration by the Board. In reviewing his previous case, the Board found no clear or convincing evidence of an error or injustice and, in the absence of any new or relevant information, concluded that the burden of proof had not been met and a recommendation for relief is not warranted.

3. Prior to closing the case, the Board noted the applicant's reference to the rating he received by the Department of Veterans affairs. Although the Board is cognizant of the applicant's service connected compensation, the Army and VA disability rating processes serve two different purposes and operate under different authorities, thus ratings vary. It is important to understand that the VA operates under different rules, laws, and regulations when assigning disability percentages than the Department of Defense (DoD). In essence, the VA will compensate for all disabilities felt to be unsuiting. At the time of his discharge, there is no medical evaluation documentation showing he fell below retention standards at the time of his discharge thus medical disability/retirement is not warranted. The DoD does not compensate for unsuiting conditions but rather for conditions that are determined to be unfitting. The role of compensating for post separation progression or complications of service-connected conditions was granted by Congress to the Department of Veterans Affairs and not a function or role of the DoD.

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 to amend the decision of the ABCMR set forth in Docket Number AR20120002909 on 27 May 1999 and Docket Number AR20190002468 on 1 July 2021.

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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 (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.

2. 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.

3. 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.

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. 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.

7. Army Regulation 15-185 (Army Board for Correction of Military Records (ABCMR)) prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR. Paragraph 2-11 states applicants do not have a right to a formal hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

//NOTHING FOLLOWS//