

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 26 January 2024

DOCKET NUMBER: AR20230006970

APPLICANT REQUESTS: in effect, correction of his records to show he received a disability which resulted from a combat-related injury incurred in a combat zone or while performing combat-related operations, and entitlement to either -

- disability severance pay
- physical disability retirement

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

- DD Form 149 (Application for Correction of Military Record)
- four pages of service medical records, dated between 27 February 2015 and 31 December 2015
- Master Military Pay Account (MMPA) printout, dated 18 December 2021
- email correspondence, dated 14 August 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:

a. He was hurt during a Joint Readiness Training Center (JRTC) training event while preparing his unit for combat. It was reported on a sick call slip that was never put into his file. Documentation of his injury was not put into his records until he was back at his home station at Fort Drum, NY. The injury was incurred during combat training at Fort Polk, LA.

b. The error was discovered during an audit changing him from 90 percent to 100 percent; [presumably his disability rating with the Department of Veterans Affairs (VA)]. He provided a print-out from the Defense Finance and Accounting Service (DFAS) showing he owes them no debt.

3. The applicant enlisted in the Regular Army on 29 June 2004.
4. The applicant deployed to the following locations during the following timeframes:
  - Afghanistan, from 11 November 2006 through 3 March 2007
  - Iraq, from 28 November 2007 through 5 January 2009
  - Iraq, from 27 June 2010 through 18 June 2011
  - Afghanistan, from 22 January 2013 through 24 September 2013
5. The applicant provided multiple service medical records, dated between 27 February 2015 and 31 December 2015, which show:
  - a. The applicant was seen by a physician assistant on 27 February 2015, for complaints of lower back pain for 4 days. He was putting down a bar and felt a pinch in his back with pain that shoots down his leg. His average pain level is a 7/10. He has pain on flexion, extension, and when leaning side to side. Nothing has made it better so far. He was evaluated by the Battalion Aid Station and given Flexeril, Ibuprofen, and Tylenol.
  - b. He was again seen at a medical appointment on 23 March 2015, for lower back pain for the past month. He stated he felt a pinch in his back while setting down a tow bar in JRTC. He was bending and suddenly there was a painful pinch feeling in his lower back with pain radiating down the posterior right leg down to the knee. He was taking Naproxen as needed.
  - c. The applicant was seen at Connor Troop Medical Clinic (CTMC) Fort Drum, NY, on 13 April 2015 for a physical therapy initial evaluation, for right low back pain he experienced for the past 2 months. While at JRTC, he took a tow bar and put it down to his left and had pain. He tried to continue to load the vehicle but could not continue. He later could not get out of bed and had significant decreased mobility for about 1 month, with pain radiating into his lower buttocks on the right. He was given a home exercise program, assessed with low back pain, and his physical profile was extended. His physical profile is not in his available records for review.
  - d. The applicant was seen at Bayne Jones Army Community Hospital, Orthopedic Clinic, at Fort Polk, LA, on 31 December 2015 for continued low back pain in the right L5 area for about 1 year. He injured himself during field training at Fort Polk, LA, while he was moving heavy equipment/tow bars.
6. The applicant's DA Form 3349 (Physical Profile), DA Form 7652 (Disability Evaluation System (DES) Commander's Performance and Functional Statement), Medical Evaluation Board (MEB) Narrative Summary (NARSUM), DA Form 3947 (MEB

Proceedings), VA Compensation and Pension (C&P) Exam, and VA Rating Decision are not in his available records for review and have not been provided by the applicant.

7. A DA Form 199 (Informal Physical Evaluation Board (PEB) Proceedings) shows:

a. An informal PEB convened on 23 February 2018, found the applicant physically unfit with a recommended rating of 20 percent and that his disposition be separation with severance pay.

b. His unfitting condition is thoracolumbar chronic pain status post spinal fusion (MEB diagnosis (Dx) 1), 20 percent.

c. The MEB Dx 2-15 were not found unfitting, because the MEB indicates these conditions meet medical fitness standards of Army Regulation 40-501 (Standards of Medical Fitness), chapter 3.

d. Section V: Administrative Determinations shows the PEB made the following findings:

- the disability disposition is not based on disease or injury incurred in the line of duty (LOD) in combat with an enemy of the U.S. and as a direct result of armed conflict or caused by an instrumentality of war and incurred in the LOD during a period of war
- the disability did not result from a combat-related injury under the provisions of Title 26, U.S. Code section 104 or Title 10 U.S. Code section 10216
- disability severance pay was not awarded for disability incurred in a combat zone or incurred while performing combat-related operations as designated by the Secretary of Defense

e. On 17 February 2018, the applicant signed the form indicating he had been advised of the findings and recommendations of the informal PEB; he concurred with the findings and waived a formal hearing of his case. He did not request reconsideration of his VA Ratings.

8. The applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was honorably discharged on 27 May 2018, under the provisions of Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation), due to disability with severance pay, non-combat, enhanced, with separation code of JEB and a reentry code of 3. He was credited with 13 years, 10 months, and 29 days of net active service.

9. The applicant provided an MMPA printout, dated 18 December 2021, reflecting no indebtedness.

10. 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.

11. 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/or the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant has applied to the ABCMR requesting his sole unfitting disability be determined combat related. He states:

"I was hurt during a JRTC [Joint Readiness Training Center] training event preparing my unit for combat. It was reported on sick call slip that never was put in file. My injury was not put in my records until I was back at home station, Ft. Drum, NY. The injury occurred during combat training at Ft. Polk."

c. The Record of Proceedings details the applicant's service and the circumstances of the case. The DD 214 for the period of service under consideration shows he entered the regular Army on 29 June 2004 and was separated with \$117,230.40 of disability severance pay on 27 May 2018 under provisions provided in 4-24 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (19 January 2017).

d. The applicant provided a 23 March 2015 AHLTA encounter which states "35-year-old male SM [service member] complaining of lower back pain x 1 month. SM states he felt a pinch in his back while putting down a tow bar."

e. This mechanism of injury was noted on 23 February 2018 Informal Physical Evaluation Board (PEB) Proceedings (DA Form 199) for his now unfitting Thoracolumbar chronic pain s/p spinal fusion:"

"The Soldier reports onset of this condition In February of 2015 from moving heavy equipment while attending the Joint Readiness Training Center at Fort Polk, Louisiana."

f. Thus, the PEB correctly determined this condition was not combat related: They found no evidence that one it was the direct result of armed combat; was related to the use of combat devices (instrumentalities of war); the result of combat training; incurred while performing extra hazardous service though not engaged in combat; incurred while performing activities or training in preparation for armed conflict in conditions simulating war; or that he was a member of the military on or before 24 September 1975.

g. The PEB then applied the VA derived rating of 20% to his disability and recommended he be separated with disability severance pay. On 23 February 2018, after being counseled on the board's findings and recommendation by his PEB liaison officer, he concurred with the PEB, waived his right to a formal hearing, and declined a VA reconsideration of his disability rating.

h. Section b(3) of 26 U.S. Code § 104 requires there be a cause-and-effect relationship in order to establish the finding that a medical condition is combat related:

(3) Special rules for combat-related injuries: For purposes of this subsection, the term "combat-related injury" means personal injury or sickness—

(A) which is incurred—

- (i) as a direct result of armed conflict,
- (ii) while engaged in extra-hazardous service, or
- (iii) under conditions simulating war; or

(B) which is caused by an instrumentality of war.

i. The applicant's injury incurred while lowering a tow bar does not qualify as combat related as incurred under conditions (training) simulating war or due to an instrumentality of war.

j. Injuries incurred during the performance of duty under conditions simulating war are incurred while directly and actively involved in such activities as war games, practice alerts, tactical exercises, airborne operations, leadership reaction courses, grenade and live fire weapon practice, bayonet training, hand-to-hand combat training, repelling, and negotiation of combat confidence and obstacle courses. Just because the applicant was at JRTC when the injury was incurred does not make in combat related under conditions simulating war.

k. An instrumentality of war is defined as a vehicle, vessel, or device designed primarily for military service and intended for use in such Service at the time of the occurrence or injury. They may also include such instrumentalities not designed

primarily for military service if use of or occurrence involving such instrumentality subjects the individual to a hazard peculiar to military service. Just because a Soldier was injured while in, on, around, wearing/carrying, or working on/with an instrumentality of war doesn't automatically make it a disability caused by an instrumentality of war. The disability must be because the use of the military equipment or the circumstances surrounding the injury is uniquely military and different from the use or occurrences in similar circumstances in civilian pursuits. Tow bars are neither unique to the military nor is their use unique to military pursuits.

I. It is the opinion of the ARBA medical advisor there is insufficient probative evidence to support the reversal of the United States Army Physical Disability Agency's determination that his unfitting back was not combat related as defined by statute.

#### BOARD DISCUSSION:

1. 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 applicable regulatory guidance and U. S. Code. The Board considered the circumstances which the applicant states caused his injury. The Board recognized that the applicant was at the Joint Readiness Training Center when he was injured. He was afforded evaluation by a Medical Evaluation Board and a Physical Evaluation Board which determined he had an unfitting condition. However, the Board found insufficient evidence of a causal relationship between handling a tow bar and it being combat related under conditions simulating war or any other determiners that would be considered an instrumentality of war. After due consideration of the applicant's request, the Board determined the evidence insufficient to warrant recommendation for relief.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	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 reversal of the United States Army Physical Disability Agency's determination that the applicant's unfitting back condition is not combat related as defined by statute is not warranted.

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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, 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 (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.

3. 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.

4. 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.

5. Title 10, U.S. Code, section 1413a, as amended, established Combat-Related Special Compensation (CRSC). CRSC provides for the payment of the amount of money a military retiree would receive from the VA for combat-related disabilities if it were not for the statutory prohibition for a military retiree to receive a VA disability pension. Payment is made by the Military Department, not the VA, and is tax free. Eligible members are those retirees who have 20 years of service for retired pay computation (or 20 years of service creditable for Reserve retirement at age 60) and who have a physical disability retirement with less than 20 years' service for injuries that are the direct result of armed conflict, especially hazardous military duty, training exercises that simulate war, or caused by an instrumentality of war. CRSC eligibility includes disabilities incurred as a direct result of:

- armed conflict (gunshot wounds, Purple Heart, etc.)
- training that simulates war (exercises, field training, etc.)
- hazardous duty (flight, diving, parachute duty)
- an instrumentality of war (combat vehicles, weapons, Agent Orange, etc.)

6. Department of Defense Instruction (DODI) 1332.38 (Physical Disability Evaluation), paragraph E3.P5.2.2 (Combat-Related), covers those injuries and diseases attributable to the special dangers associated with armed conflict or the preparation or training for armed conflict. A physical disability shall be considered combat related if it makes the member unfit or contributes to unfitness and was incurred under any of the following circumstances:

- as a direct result of armed conflict
- while engaged in hazardous service
- under conditions simulating war
- caused by an instrumentality of war

7. DODI 1332.38, paragraph E3.P5.2.2.3 (Under Conditions Simulating War), in general, covers disabilities resulting from military training, such as war games, practice alerts, tactical exercises, airborne operations, leadership reaction courses, grenade and live-fire weapons practice, bayonet training, hand-to-hand combat training, rappelling, and negotiation of combat confidence and obstacle courses. It does not include physical training activities, such as calisthenics and jogging or formation running and supervised sports.

8. Appendix 5 (Administrative Determinations) to enclosure 3 of DODI 1332.18 (Disability Evaluation System) (DES) currently in effect, defines armed conflict and instrumentality of war as follows:

a. Incurred in Combat with an Enemy of the United States: The disease or injury was incurred in the LOD in combat with an enemy of the United States.

b. Armed Conflict: The disease or injury was incurred in the LOD as a direct result of armed conflict (see Glossary) in accordance with sections 3501 and 6303 of Reference (d). The fact that a Service member may have incurred a disability during a period of war, in an area of armed conflict, or while participating in combat operations is not sufficient to support this finding. There must be a definite causal relationship between the armed conflict and the resulting unfitting disability.

c. Engaged in Hazardous Service: Such service includes, but is not limited to, aerial flight duty, parachute duty, demolition duty, experimental stress duty, and diving duty.

d. Under Conditions Simulating War: In general, this covers disabilities resulting from military training, such as war games, practice alerts, tactical exercises, airborne operations, and leadership reaction courses; grenade and live fire weapons practice; bayonet training; hand-to-hand combat training; rappelling; and negotiation of combat confidence and obstacle courses. It does not include physical training activities, such as calisthenics and jogging or formation running and supervised sports.

e. Caused by an Instrumentality of War: Occurrence during a period of war is not a requirement to qualify. If the disability was incurred during any period of service as a result of wounds caused by a military weapon, accidents involving a military combat vehicle, injury or sickness caused by fumes, gases, or explosion of military ordnance, vehicles, or material, the criteria are met. However, there must be a direct causal relationship between the instrumentality of war and the disability. For example, an injury resulting from a Service member falling on the deck of a ship while participating in a sports activity would not normally be considered an injury caused by an instrumentality of war (the ship) since the sports activity and not the ship caused the fall. The exception occurs if the operation of the ship caused the fall.

9. 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.

10. 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.

11. 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//