

IN THE CASE OF: [REDACTED]

BOARD DATE: 7 February 2024

DOCKET NUMBER: AR20230007042

APPLICANT REQUESTS: a physical disability retirement in lieu of his honorable discharge for expiration of term of service

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States)
- DA Form 3349 (Physical Profile), 3 January 2014
- DD Form 214 (Certificate of Release or Discharge from Active Duty), 23 May 2014
- Department of Veterans Affairs (VA) Rating Decision, 14 January 2020
- medical record (44 pages)

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 notes his application is related to post-traumatic stress disorder (PTSD) and traumatic brain injury (TBI) and states he was recommended for a Medical Evaluation Board (MEB) for his broken neck (2 and 3 cervical vertebra) but when he brought it up to his unit's physician assistant (PA), he did not want the applicant to go through the process and advised he should allow his term of service to expire. The applicant was advised the process would keep him in Alaska for 6 to 18 months to finish the medical board. The PA told him the VA would take care of it and it is the same. He was told he could change his discharge to a medical retirement.

3. The applicant enlisted in the Regular Army on 18 January 2011 for a period of 3 years and 18 weeks. He completed his required training and was assigned to Fort Richardson, AK.
4. The applicant was deployed to Afghanistan in support of Operation Enduring Freedom from 4 December 2011 to 2 October 2012.
5. A Physical Profile shows on 3 January 2014, the applicant was assigned a temporary profile of 311111 for fracture of C2 vertebra (broken neck) with an expiration date of 17 January 2014.

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.

6. The applicant's DD Form 214 shows he was honorably released from active duty on 23 May 2014 and transferred to the Ready Reserve. He was credited 3 years 4 months 6 days net active service. He was honorably discharged from the Army Reserve on 14 August 2018.
7. The applicant provided his VA rating decision of 14 January 2020 showing a combined evaluation of 80 percent for the following conditions:
  - posttraumatic stress disorder (PTSD) with persistent depressive disorder, 50 percent effective 24 May 2014
  - mix migraine and tension headaches and cervicgia headache, 30 percent effective 24 May 2014
  - traumatic degenerative changes with strain status post fracture second vertebrae, cervical spine, 20 percent effective 24 May 2014
  - tinnitus, 10 percent effective 24 May 2014
  - right hip trochanteric pain syndrome associated with right lateral collateral ligament sprain, 10 percent effective 15 November 2018
  - left ankle tendonitis associated with right lateral collateral ligament sprain, 10 percent effective 15 November 2018
  - right lateral collateral ligament sprain, 10 percent effective 4 April 2019
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 was asked to review this case. Documentation reviewed included the applicant's ABCMR application and accompanying documentation, the military electronic medical record (EMR) (AHLTA and/or MHS Genesis), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and/or the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant has applied to the ABCMR requesting a referral to the Disability Evaluation System (DES) and a subsequent permanent retirement for physical disability. He states:

"I was recommended for a med board but the process was never started before I ETS [Expiration Term of Service].

I was recommended for a medical discharge while I was in the Army. The recommendation came from a Naval Captain (06) that oversaw the Traumatic Brain Injury at 673d Medical Group on Joint Base Elmendorf Richardson. When I went to my mental health provider, and he read in my notes he asked me how I felt about it and I told him I wanted to retire but at the time was also worried about my broken neck (2 and 3 cervical vertebra).

He said he supported the medical retirement. I then had to meet with our units Physician Assistant Army Capt. ■ He said he didn't agree and wouldn't send it off. He didn't want to go that route because I should just finish my contract as I was only 4 months from getting out. He then went on bragging that he was going to Germany on his next duty station."

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. His DD 214 for the period of Service under consideration shows he entered the regular Army on 18 January 2011 and was honorably discharged on 23 May 2014 at the completion of his required active service under authority provided in chapter 4 of AR 635-200, Active Duty Enlisted Administrative Separations (17 December 2009). It shows he served in Afghanistan from 4 February 2011 thru 2 October 2012. He was not awarded a combat action badge.

d. The applicant was evaluated at the TBI Clinic on 7 November 2012 for the management of daily headaches (HA):

“Pt [patient] was flagged for TBI during the DCS (demobilization) process for answering positive to symptoms post blast exposure. Pt was involved in an IED [improvised explosive device] blast while on mounted patrol in MAT-V 2012 in Kwost Province, Afghanistan. Pt experienced no LOC [loss of consciousness], AMS [altered mental status], amnesia, or Head injury. Pt was cleared by unit PA [physician assistant] with negative concussive symptoms and normal MACE [Military Acute Concussion Evaluation] evaluations. Pt did not seek medical attention for HA for the remainder of deployment but is now claiming that daily 4/10 HAs are persistent.”

e. The provider wrote: “Suspect tension/stress HAs without concerning underlying pathology. Will initiate preventative management with Elavil with clear instructions on use and return to clinic in 4 to 6 weeks for further evaluation.”

f. From a 26 November 2013 follow-up encounter:

“Patient reports that if he takes topiramate before running, it makes him throw up, but if he doesn't take it he gets a migraine from running. Otherwise mostly doesn't get headaches.”

g. From a 9 December 2013 follow-up encounter:

“Patient reports that taking the dose in the evening. he doesn't have nausea in the morning, but running still predictably causes a severe headache which last 4-5 hours. If he doesn't run, headaches are mild but still daily.”

h. At his next appointment on 20 December 2013, the provider opined that his headaches may be secondary to his neck pain / old C2 fracture.

i. Plain radiographs of the cervical spine obtained on 3 January 2014 were susp for abnormalities of C2 and a CT was recommended. From the radiologist's report for the CT exam that same day:

“Comminuted fracture involving both pars interarticularis of C2 level with sclerosis of the fracture margins. There is a 4 mm calcific fragment near the right lateral recess of the C2 vertebral body suspicious for free fragment. Additional

5.1 mm fragment is seen near the left extra foraminal zone at the C2 level.  
Recommend neurosurgical consultation further assessment and management.”

j. The applicant was placed on a two-week temporary duty limiting physical profile for a fracture of the second cervical vertebra (C2) on 3 January 2014. His provider discussed the findings with a specialist (neurosurgeon) who stated the old fracture was likely stable but should be clinically evaluated.

k. From the first page of a neurosurgical follow-up encounter dated 24 March 2014:

HISTORY OF PRESENT ILLNESS: [REDACTED] is seen in follow-up after a nerve root block and new cervical x-rays. He has a C2 fracture possibly from an incident where he fell off a cliff in 2012 in Afghanistan. He continues to have constant soreness in his neck and rates it at 4/10 in severity. He has numbness and tingling in his bilateral upper extremities most noticeable in all of his fingers.

He also has sensation changes in the soles of his feet and all his toes. His major concern is his headaches that are constant and daily. He has been on Topamax which has provided some relief. Is not very active due to his pain and is unsure if he has any weakness. He reports that the C2 nerve root block provided no relief for his neck pain or headaches.

l. The portion of the physical examination which is on the first page is normal, including a normal musculoskeletal examination of the spine with a normal gait, sensory exam, motor exam, and upper extremity strength.

m. The applicant was seen in follow-up at the TBI Clinic on 25 March 2014, and the encounter shows there had been improvement in his condition as he was now having one migraine per week:

“Patient reports that he still has about one migraine a week which responds well to Maxalt if he catches it soon enough. The injections didn't help his neck pain and his posterior headaches continue about the same. He states that the neurologist recommended Botox injections.”

n. Paragraph 3-30g of AR 40-501, Standards of Medical Fitness (4 August 2011), list the causes for a headache condition to be referred to a medical evaluation board for failing medical retention standards:

“Migraine, tension, or cluster headaches, when manifested by frequent incapacitating attacks. All such Soldiers will be referred to a neurologist, who will

ascertain the cause of the headaches. If the neurologist feels a trial of prophylactic medicine is warranted, a 3-month trial of therapy can be initiated. If the headaches are not adequately controlled at the end of the 3 months, the Soldier will undergo an MEB for referral to a PEB [physical evaluation board]. If the neurologist feels the Soldier is unlikely to respond to therapy, the Soldier can be referred directly to MEB.”

o. At the time of his discharge, the applicant was undergoing treatment for his headaches which had led to considerable improvement. There is insufficient evidence the applicant’s headaches or any duty incurred medical condition failed the medical retention standards of chapter 3 of AR 40-501, Standards of Medical Fitness, prior to his discharge. Thus, there was no cause for referral to the Disability Evaluation System.

p. JLV shows he has been awarded multiple VA service-connected disability ratings, including PTSD (50%) and migraine headaches. (30%). However, the DES only compensates an individual for service incurred medical condition(s) which have been determined to disqualify him or her from further military service. The DES has neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions which were incurred or permanently aggravated during their military service; or which did not cause or contribute to the termination of their military career. These roles and authorities are granted by Congress to the Department of Veterans Affairs and executed under a different set of laws.

q. It is the opinion of the ARBA medical advisor that a referral of his case to the DES 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 Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation. Upon review of the applicant’s petition, available military records and medical review, the Board concurred with the advising official finding insufficient evidence the applicant’s headaches or any duty incurred medical condition failed the medical retention standards of chapter 3 of AR 40-501, Standards of Medical Fitness, prior to his discharge. Thus, there was no cause for referral to the Disability Evaluation System. The Board agreed based on the opine, there is insufficient evidence to support the applicant contentions for a physical disability retirement in lieu of his honorable discharge for expiration of term of service. As such, the Board denied 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 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.

2/22/2024

X [REDACTED]

---

CHAIRPERSON  
[REDACTED]

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

REFERENCES:

1. Title 10, U.S. Code, section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.
2. Army Regulation (AR) 635-200 (Personnel Separations - Active Duty Enlisted Administrative Separations) sets policies, standards, and procedures to ensure the readiness and competency of the force while providing for the orderly administrative

separation of Soldiers for a variety of reasons. Chapter 4 provided for the separation of Soldiers upon expiration of enlistment or fulfillment of service obligation.

3. Title 10, USC, 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 (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 an MEB; when they receive a permanent medical profile rating of 3 or 4 in any factor and are referred by an 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 PEB. The purpose of the MEB is to determine whether the service member's injury or illness is severe enough to compromise his/her ability to return to full duty based on the job specialty designation of the branch of service. A PEB is an administrative body possessing the authority to determine whether or not a service member is fit for duty. A designation of "unfit for duty" is required before an individual can be separated from the military because of an injury or medical condition. Service members who are determined to be unfit for duty due to disability either are separated from the military or are permanently retired, depending on the severity of the disability and length of military service. Individuals who are "separated" receive a one-time severance payment, while veterans who retire based upon disability receive monthly military retired pay and have access to all other benefits afforded to military retirees.

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

4. Title 38 USC, 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 USC, 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. AR 635-40 (Physical Evaluation for Retention, Retirement, or Separation) 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. Once a determination of physical unfitness is made, all disabilities are rated using the Department of Veterans Affairs Schedule for Rating Disabilities (VASRD).

a. Paragraph 3-2 states 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. Paragraph 3-4 states 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.

7. AR 40-501 (Standards of Medical Fitness) governs medical fitness standards for enlistment, induction, appointment (including officer procurement programs), retention, and separation (including retirement). The Department of Veterans Affairs Schedule for Rating Disabilities (VASRD). VASRD is used by the Army and the VA as part of the process of adjudicating disability claims. It is a guide for evaluating the severity of disabilities resulting from all types of diseases and injuries encountered as a result of or incident to military service. This degree of severity is expressed as a percentage rating which determines the amount of monthly compensation.

8. Section 1556 of Title 10, USC, 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//