

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 5 March 2024

DOCKET NUMBER: AR20230007266

APPLICANT REQUESTS: medical retirement instead of discharge with severance pay.

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

- DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States) in lieu of DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- Department of Veterans Affairs (VA) Rating Decision
- 507 pages of medical records

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 he was found unfit for duty and medically separated due to a cervical fusion of C3-6 and 18 related conditions. He was not medically retired because the Physical Evaluation Board (PEB) did not believe his condition was severe enough to qualify for a medical retirement. The records indicated his conditions would improve and he was assigned a 20% disability rating by the PEB. After continuous treatment for the same conditions, he had to get a second surgery, but this time a posterior laminectomy. Several months have passed since his second surgery and he now has a pinched nerve, and his problem is not getting better. He has been receiving continuous treatment since 2016 when he first encountered the symptoms of cervical spine disease. He believes, and his VA medical records can confirm, he should be retired. He was reevaluated by the VA and his disability rating increased to 50%.
3. The applicant enlisted in the Regular Army on 11 September 1999.
4. On 31 August 2017, an informal PEB found the applicant unfit for further military service due to intervertebral disc syndrome status post anterior cervical discectomy and

fusion. The PEB recommended a 20% disability rating and the applicant's separation with severance pay. The PEB found him fit for 28 additional conditions.

5. On 7 September 2017, the applicant concurred with the PEB's findings and recommendations and waived a formal hearing of his case. He did not request reconsideration of his VA ratings.

6. The applicant's DA Form 199 (Informal PEB Proceedings) contains the following statements:

a. This case was adjudicated as part of the Integrated Disability Evaluation System (IDES).

b. As documented in the VA memorandum dated 28 August 2017, the VA determined the specific VA Schedule for Rating Disabilities (VASRD) code(s) to describe the Soldier's condition(s). The PEB determined the disposition recommendation based on the proposed VA disability rating(s) and in accord with applicable statutes and regulations.

7. The applicant's DD Form 214 shows he was discharged on 30 December 2017 under the provisions of Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation), chapter 4, by reason of disability, severance pay, non-combat (enhanced). The DD Form 214 also shows he was credited with 18 years, 3 months, and 20 days of active service.

8. The applicant provided his VA rating decision showing he was granted service-connected disability compensation for various conditions that include a 100% disability rating based on surgical or other treatment necessitating convalescence for intervertebral disc syndrome, status post anterior cervical discectomy and fusion, status post cervical decompression surgery and post laminectomy syndrome.

9. 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.

10. MEDICAL REVIEW:

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

b. The applicant is applying to the ABCMR requesting an increase in his current military disability rating for his cervical disability with a subsequent change in his disability discharge disposition from separated with disability severance pay to permanently retired for physical disability. He states:

“Cervical fusion from C-3 thru C-6 was worsening and not getting better since the time of the condition started to be uncontrollable FEB 19, 2016, was the day start to worsening.”

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 11 September 1999 and was separated with \$162,604.80 of disability severance pay on 30 December 2017 under provisions provided in chapter 4 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (19 January 2017).

d. A Soldier is referred to the Integrated Disability Evaluation System (IDES) when they have one or more conditions which appear to fail medical retention standards reflected on a duty limiting permanent physical profile. At the start of their IDES processing, a physician lists the Soldiers referred medical conditions in section I the VA/DOD Joint Disability Evaluation Board Claim (VA Form 21-0819). The Soldier, with the assistance of the VA military service coordinator, lists all other conditions they believe to be service-connected disabilities in block 8 of section II of this form, or on a separate Application for Disability Compensation and Related Compensation Benefits (VA Form 21-526EZ).

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

standards and/or be unfitting for continued military service. Their findings are then sent to the physical evaluation board for adjudication.

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

g. On 27 February 2017, the applicant was referred to the IDES for "Cervical strain, s/p [status post] C3-6 fusion." The applicant claimed thirty-two additional conditions. A medical evaluation board (MEB) determined his "Intervertebral Disc Syndrome s/p ACDF [anterior cervical discectomy and fusion], cervical" failed the medical retention standards of AR 40-501, Standards of Medical Fitness. The MEB determined twenty-eight additional medical conditions met medical retention standards. On 5 July 2017, the applicant concurred with the MEB findings his case was forwarded to a physical evaluation board (PEB) for adjudication.

h. On 31 August 2017, the applicant's informal PEB determined his "Intervertebral disc syndrome status post anterior cervical discectomy and fusion" was the sole unfitting conditions for continued military service. They found the twenty-eight remaining medical conditions not unfitting for continued military service. The PEB applied the Veterans Benefits Administration (VBA) derived ratings of 20% and recommended the applicant be separated with disability severance pay.

i. From the 28 August 2017 VA Rating Decision:

We have assigned a 20 percent evaluation for your Intervertebral disc syndrome status post anterior cervical discectomy and fusion. (MEB Dx 1) (claimed as , Cervical strain s/p C3-6 fusion, Cervical strain s/p C3-6 fusion (IDES Referred Condition), Neck condition) based on:

- Forward flexion of the cervical spine greater than 15 degrees but not greater than 30 degrees

Additional symptom(s) include:

- With no incapacitating episodes during the past 12 months
- Combined range of motion of the cervical spine greater than 170 degrees but not greater than 335 degrees
- Painful motion upon examination

A higher evaluation of 30 percent is not warranted for intervertebral disc syndrome (IVDS) unless the evidence shows:

- Favorable ankylosis of the entire cervical spine; or,
- Forward flexion of the cervical spine 15 degrees or less.

Additionally, a higher evaluation of 40 percent is not warranted for intervertebral disc syndrome (IVDS) unless the evidence shows:

- Intervertebral disc syndrome (IVDS) with incapacitating episodes having a total duration of at least four weeks but less than six weeks during the past 12 months.”

j. On 7 September 2017, after being counseled on the PEB's findings and recommendation by his PEB liaison officer, the applicant concurred with the PEB, waived his right to a formal hearing, and declined to request a VBA reconsideration of his disability ratings (VARR).

k. Review of the applicant's Back (Thoracolumbar Spine) Conditions Disability Benefits Questionnaire upon which his disability ratings with the VA's Proposed Ratings dated 15 June 2017 shows the ratings to be IAW the VASRD.

l. JLV shows the applicant has been awarded a number of VA service-connected disability ratings. The rating for the applicant's cervical spine condition is 20%.

m. Even if the Veterans Benefits Administration were to increase this rating, the awarding of a higher VA rating does not establish prior error or injustice. A disability rating is intended to compensate an individual for interruption of a military career after it has been determined that the individual suffers from an impairment that disqualifies him or her from further military service. The rating derived from the VA Schedule for Rating Disabilities reflects the disability at the point in time the VA exams were completed. The DES has neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions incurred during or permanently aggravated by their military service. These roles and authorities are granted by Congress to the Department of Veterans Affairs and executed under a different set of laws.

n. Review of the submitted documentation, ePEB case file, and AHLTA record found no material errors of deficiencies.

o. It is the opinion of the ARBA medical advisor that neither an increase in his military disability rating nor a referral of his case to the DES is warranted.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered.

a. The evidence shows the applicant was referred to the IDES for "Cervical strain, status post (s/p) C3-6 fusion. He claimed 32 additional conditions. An MEB determined this medical condition failed the medical retention standards of AR 40-501, Standards of Medical Fitness. The MEB determined 28 additional medical conditions that met medical retention standards. He concurred with the MEB's. An informal PEB found him unfit for further military service due to intervertebral disc syndrome status post anterior cervical discectomy and fusion. The PEB applied the VA derived ratings of 20% and recommended the applicant be separated with disability severance pay. The PEB found him fit for 28 additional conditions. He also concurred with the PEB's findings and recommendations and waived a formal hearing of his case. He did not request reconsideration of his VA ratings.

b. Although the applicant has a higher rating for his service-connected conditions, the awarding of a higher VA rating does not establish prior error or injustice by the Army. A disability rating is intended to compensate an individual for interruption of a military career after it has been determined that the individual suffers from an impairment that disqualifies him or her from further military service. The rating derived from the VA Schedule for Rating Disabilities reflects the disability at the point in time the VA exams were completed. The VA has the role and authority to compensate service members for anticipated future severity or potential complications of conditions incurred during or permanently aggravated by their military service.

c. The Board found the applicant's evidence and argument unconvincing and agreed with the medical reviewer's finding that neither an increase in his military disability rating nor a referral of his case to the DES is warranted.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

: : : 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.

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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 and executes Secretary of the Army decision-making authority as directed by Congress in

chapter 61 and in accordance with Department of Defense (DOD) Directive 1332.18 and Army Regulation 635-40.

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.

a. The disability evaluation assessment process involves two distinct stages: the Medical Evaluation Board (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.

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%.

5. Directive-type Memorandum (DTM) 11-015, dated 19 December 2011, explains the IDES. It states:

a. The IDES is the joint DOD-VA process by which DOD determines whether wounded, ill, or injured service members are fit for continued military service and by which DOD and VA determine appropriate benefits for service members who are separated or retired for a service-connected disability. The IDES features a single set of disability medical examinations appropriate for fitness determination by the Military Departments and a single set of disability ratings provided by VA for appropriate use by both departments. Although the IDES includes medical examinations, IDES processes are administrative in nature and are independent of clinical care and treatment.

b. Unless otherwise stated in this DTM, DOD will follow the existing policies and procedures requirements promulgated in DODI 1332.18 and the Under Secretary of

Defense for Personnel and Readiness memoranda. All newly initiated, duty-related physical disability cases from the Departments of the Army, Air Force, and Navy at operating IDES sites will be processed in accordance with this DTM and follow the process described in this DTM unless the Military Department concerned approves the exclusion of the service member due to special circumstances.

c. IDES medical examinations will include a general medical examination and any other applicable medical examinations performed to VA Compensation and Pension standards. Collectively, the examinations will be sufficient to assess the member's referred and claimed condition(s) and assist VA in ratings determinations and assist military departments with unfit determinations.

d. Upon separation from military service for medical disability and consistent with the Board for Correction of Military Records (BCMR) procedures of the military department concerned, the former service member may request correction of his or her military records through his or her respective military department BCMR if new information regarding his or her service or condition during service is made available that may result in a different disposition. For example, a veteran appeals VA's disability rating of an unfitting condition based on a portion of his or her service treatment record that was missing during the IDES process. If the VA changes the disability rating for the unfitting condition based on a portion of his or her service treatment record that was missing during the IDES process and the change to the disability rating may result in a different disposition, the service member may request correction of his or her military records through his or her respective Military Department BCMR.

e. If, after separation from service and attaining veteran status, the former service member desires to appeal a determination from the rating decision, the veteran has one year from the date of mailing of notice of the VA decision to submit a written notice of disagreement with the decision to the VA regional office of jurisdiction.

6. Title 38, U.S. Code, 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, Code of Federal Regulations, Part IV is the VASRD. 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 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 ABCMR applicants (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//