

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 26 March 2024

DOCKET NUMBER: AR20230007965

APPLICANT REQUESTS:

- physical disability separation in lieu of honorable administrative discharge due to completion of required active service
- personal appearance before the Board

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)
- DD Form 214 (Certificate of Release or Discharge from Active Duty) ending 26 September 1997
- medical document, 18 April 2005
- Multi-National Corps Iraq Permanent Orders 331-183, 27 November 2005
- DD Form 2697 (Report of Medical Assessment), 25 November 2008
- DD Form 2807-1 (Report of Medical History), 1 December 2008
- partial DD Form 2808 (Report of Medical Examination), 1 December 2008
- DD Form 214 ending 12 February 2009
- Department of Veterans Affairs (VA) Rating Decision, 3 December 2009
- VA Rating Decision, 7 October 2010
- DD Form 215 (Correction to DD Form 214), 8 February 2011
- letter from The American Legion, 1 October 2012
- DD Form 294 (Application for a Review by the Physical Disability Board of Review (PDBR) of the Rating Awarded Accompanying a Medical Separation from the Armed Forces of the United States), 17 August 2014
- letter from The American Legion, undated
- letter from The American Legion, 21 April 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 never recommended for a Medical Evaluation Board (MEB) by his unit, despite having been deployed overseas multiple times and having evidence of medical issues from each deployment reflected on his Post Deployment Health Assessment (PDHA) and his Post Deployment Health Reassessment (PDHRA). At the time of his discharge, administrative personnel never directed him to go through the MEB and Physical Evaluation Board (PEB) process and he has been denied entry into the Disability Evaluation System (DES).

b. At that time, he did not realize that his condition of post-traumatic stress disorder (PTSD) and other conditions were going to get worse over time and he was never advised of the DES process or directed to undergo an MEB/PEB by his unit. Every service member has the right to be referred to the MEB or PEB if he has evidence at the time of the conditions that they were caused or aggravated by military service. The applicant is currently being treated by the VA system.

c. The American Legion recognized the negligence of his unit in not recognizing his condition and referring him to an MEB when he was on active duty. In 2014, he made a claim filling out a DD Form 294 with an accompanying letter of recommendation from The American Legion on his behalf. He has not received a response to that form and The American Legion is currently trying to help him in that regard.

3. The applicant enlisted in the U.S. Army Reserve (USAR) on 5 December 1996.

4. The applicant provided a DD Form 214 which shows he entered active duty for training as a member of the USAR on 16 December 1997 and was awarded the Military Occupational Specialty (MOS) 88 M (Motor Transport Operator). He was released from active duty after 8 months and 11 days on 26 September 1997, due to completion of required active service and transferred back to his USAR unit.

5. A physical profile is used to classify a Soldier's physical disabilities in terms of six factors or body systems, as follows: "P" (Physical capacity or stamina), "U" (Upper extremities), "L" (Lower extremities), "H" (Hearing), "E" (Eyes), and "S" (Psychiatric) and is abbreviated as PULHES. Each factor has a numerical designation: 1 indicates 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 (P) or temporary (T).

6. A DD Form 2808 shows the applicant underwent medical examination on 28 June 2002, for the purpose of Regular Army enlistment and was found qualified for service with a PULHES of 111111. The summary of defects and diagnoses shows mild bilateral pes planus (does not interfere with duties), 5 pounds overweight, failed color vision test.

7. The applicant enlisted in the Regular Army on 16 July 2002.

8. The applicant deployed to Iraq from 23 March 2003 through 12 December 2003

9. Headquarters, U.S. Army Reserve Command (USARC) Orders 04-118-0002, dated 27 April 2004, retroactively honorably discharged the applicant from the USAR effective 15 July 2002, as a result of his immediate reenlistment in the active Army on 16 July 2002.

10. The applicant deployed to Iraq for a second time from 26 October 2004 through 4 October 2005.

11. A medical document, signed by a psychiatrist on 28 April 2005, while the applicant was deployed to Iraq, shows:

a. The applicant presented at the Operational Medicine Clinic (OSMC) on the date of the form after referral from his Chaplain, stating he had been having a lot of nightmares and problems sleeping for 3 weeks. This was his second deployment to Iraq in 2 years. He had a neutral mood and congruent affect. He denied suicidal and homicidal ideation. He felt heightened guilt and decreased energy and concentration with difficulty focusing.

b. He was diagnosed with combat operation stress reaction (COSR), prescribed Seroquel, and was returned to duty as fit for full duty.

12. Multi-National Corps Iraq Permanent Orders 331-183, dated 27 November 2005, awarded the applicant the Combat Action Badge (CAB) for engaging or being engaged by the enemy on 20 July 2005.

13. The latest dated DA Form 2166-8 (Noncommissioned Officer Evaluation Report (NCOER)) in the applicant's available records, covering the period from 1 September 2006 through 31 August 2007, shows:

a. The applicant was rated "Excellence" or "Success" in all Values/Responsibilities by his Rater and "Fully Capable" in overall potential for promotion and/or service in positions of greater responsibility.

b. Rater comments include:

- possessed the mental and physical toughness to accomplish any demanding and challenging missions in preparing for Operation Iraqi Freedom (OIF) 07-09; average day 16 hours
- projected self-confidence, authority, and enthusiasm
- adapted exceptionally well during ever changing and highly stressful reception, integration, staging, and onward movement into OIF 07-09

c. He passed the Army Physical Fitness Test (APFT) on 30 April 2007.

14. The applicant deployed to Iraq for a third time from 10 July 2007 through 29 August 2008.

15. A DD Form 2697, dated 25 November 2008, provided the applicant's self-medical assessment and shows he indicated:

- compared to his last medical assessment/physical examination, his overall health was worse
- he suffered from back pain while on active duty for which he did not seek medical care

16. On a DD Form 2807-1, dated 1 December 2008, the applicant provided his medical history, which shows:

a. The applicant indicated he had/received:

- frequent back pain
- pain in his left ankle after running or walking long distances
- broken a finger on his right hand 8 years ago
- got dizzy when riding in the passenger seat or in the back of a vehicle
- bad dreams two or three times per month
- counseling from a psychologist 1 year ago in Iraq
- hurt his right knee 15 years ago
- a head injury 20 years ago

b. The medical examiner indicated the applicant had back pain present for 1 month with no reported history of trauma. He has been seen at the Troop Medical Clinic (TMC)

for this problem in the past -AND- he has had anxiety and nightmares since 2005. He is not on medications and has not been seen by Mental Health since returning from Iraq.

17. A partial DD Form 2808, dated 1 December 2008, shows the applicant underwent medical examination on the date of the form for the purpose of separation. The examiner indicated:

a. The applicant had paraspinal muscle thrombotic thrombocytopenic purpura (TTP) (where blood clots form in small blood vessels).

b. They discussed the applicant's depression and nightmares. He was concerned about what to do after the Army. He did not have any plans to harm himself or others.

c. The portion of the form indicating his PULHES and qualification for separation has not been provided and is not in his available records for review.

18. The applicant's Enlisted Record Brief (ERB) dated 18 December 2008, shows his PULHES as 111111.

19. The applicant's DD Form 214 shows he was honorably discharged on 12 February 2009, due to completion of required active service, with corresponding separation code JBK. He was credited with 6 years, 6 months, and 27 days of net active service this period; 1 year, 2 months, and 6 days of total prior service; and 4 years, 5 months, and 5 days of total prior inactive service. Among his decorations, medals, and badges awarded or authorized is the CAB.

20. The applicant's available service records do not show:

- he was issued a permanent physical profile rating
- he suffered from a medical condition, physical or mental, that affected his ability to perform the duties required by his MOS and/or grade or rendered him unfit for military service
- he was diagnosed with a medical condition that warranted his entry into the Army Physical Disability Evaluation System (PDES)
- he was diagnosed with a condition that failed retention standards and/or was unfitting

21. A VA Rating Decision, dated 3 December 2009, shows:

- the applicant was granted service-connection for PTSD with a rating of 30 percent effective 13 February 2009
- his evaluation of right ear hearing loss, which was currently 0 percent disabling, was continued

22. A second VA Rating Decision, dated 7 October 2010, shows the applicant's evaluation of PTSD, which was currently 30 percent disabling, was increased to 50 percent effective 13 January 2010.

23. A DD Form 215, dated 8 February 2011, corrected the applicant's DD Form 214 covering the period ending 12 February 2009, to reflect award of the Army Achievement Medal with First Oak Leaf Cluster and correct his third deployment to reflect service in Iraq from 10 July 2007 through 29 September 2008.

24. The applicant provided a DD Form 294, dated 17 August 2014, and three letters written on his behalf from The American Legion, dated between October 2021 and April 2023, all of which have been provided in full to the Board for review and in pertinent part show:

a. The applicant was separated from the Army at his expiration term of service (ETS) without being considered for an MEB, despite evidence of award of the CAB and multiple medical conditions incurred during several deployments in support of OIF, which were brought to the attention of his chain of command prior to his ETS. The evidence shows he was physically and mentally unfit prior to his discharge.

b. They strongly believe the applicant should have undergone an MEB prior to his ETS separation as his medical history of prescribed medications and medical care through his multiple deployments warranted as much and his chain of command had a duty and responsibility to recommend him for an MEB while he was on active duty. The applicant has the same right to be evaluated by an MEB as any other service member who loyally served overseas for our great nation when it was needed in our darkest hour.

c. They have faith in the military system and our nation and understand that sometimes administrative procedures can be overlooked, but it is our service members who are paying the price for these errors. They are simply requesting to correct the situation so the applicant and his family can receive his rightful benefits that earned and is entitled to thorough his service.

25. 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.

## 26. 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 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 is requesting a referral to the Disability Evaluation System (DES). He states:

“Service member was never recommended for a MEB [medical evaluation board] from his unit being deployed multiple times overseas and having evidence of medical issues from each deployment on PDHA [Post Deployment Health Assessment] and PDHRA [Post Deployment Health Reassessment]. He has been denied and never oriented to go to the process of PEB[physical evaluation board] and MEB by his administrative personnel at that time.

In that time, he didn't realize that the condition of PTSD and his other physical conditions were going to increase during time and he was never oriented or recommended to pass any medical board by his unit, every service member has the right to be referred to MEB or PEB because he had evidence in that time of the conditions that were aggravating currently during time and is being attended in the VA System.”

c. The Record of Proceedings outlines the applicant's military service and the circumstances of the case. The applicant's DD 214 for the period of Service shows he entered the regular Army on 16 July 2002 and was honorably discharged on 12 February 2009 under authority provided in chapter 4 of AR 635-200, Active Duty Enlisted Administrative Separations (6 June 2005), having completed his required active service. His separation code of JBK denotes “Completion Of Required Active Service” and his reentry code of “1” signifies he was fully qualified for reenlistment.

d. It shows the former motor transport operator Served three tours in Iraq: 23 March 2003 thru 12 December 2003, 26 October 2004 thru 4 October 2005, and 10 July 2007 thru 29 September 2008. He was awarded a combat action badge.

e. The EMR shows he was an infrequent utilizer of health care. He was treated for low back pain, an ankle sprain, viral illnesses, and once for a knee sprain. There are no mental health encounters.

f. The applicant completed his pre-separation medical examination in December 2008. The significant positives on his Report of Medical History included a history of low back pain and nightmares since his return from Iraq. He wrote that he had been counseled by a “psychologic doctor a year ago back in Iraq,” and the provider noted the applicant had not sought mental health care since his return from Iraq. The provider documented some mild tenderness to palpation in the left lower lumbar area of his back and that the applicant “discussed depression nightmares. He is concerned about what to do after the Army. He does not have any plans to harm self or others.”

g. The final NCOER available for review was an annual covering 1 September 2006 thru 31 August 2007. It shows the applicant passed his Army Physical Fitness Test on 30 April 2007, met height and weight standards, and was a “Fully Capable” and successful Soldier. His rater opined:

- promote with peers; send to BNCOC [Basic Noncommissioned Officers Course]
- demonstrates the potential to perform at levels of increased responsibilities
- solid performance in training and developing Soldiers in all aspects of his MOS [military occupational specialty]

h. There is no probative evidence the applicant had any duty incurred medical condition which would have 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. Furthermore, there is no evidence that any medical condition prevented the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his discharge.

i. Review of his records in JLV shows he has been awarded several VA service-connected disability ratings, including ratings for PTSD and lumbosacral strain. 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.

j. Paragraph 3-2b(1) of AR 635–40, Physical Evaluation for Retention, Retirement, or Separation (8 February 2006) 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 they can no longer continue to reasonably perform because of a physical disability incurred or aggravated in service.”

k. It is the opinion of the Agency Medical Advisor that referral of his case to the DES is not warranted.

#### BOARD DISCUSSION:

1. The Board determined the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing 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 applicant's contentions, the military record, and regulatory guidance were carefully considered. The evidence shows the applicant was honorably discharged on 12 February 2009, due to completion of required active service. The Board reviewed and agreed with the medical reviewers finding no probative evidence the applicant had any duty incurred medical condition which would have 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. Furthermore, there is no evidence that any medical condition prevented the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his discharge.

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.

[REDACTED]

[REDACTED]

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[REDACTED]

[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. 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 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.

6. 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.

7. 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.

8. 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//