

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 18 September 2024

DOCKET NUMBER: AR20230008425

APPLICANT REQUESTS: in effect, physical disability retirement in lieu of physical disability separation with severance pay, through the inclusion of additional unfitting conditions

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

- DD Form 149 (Application for Correction of Military Record)
- 97 pages of Department of Veterans Affairs (VA) 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:
 - a. His Army disability rating is in error as not all of his disabilities were fully rated. His rheumatoid arthritis is the main condition which was not properly rated, as the Army did not have the proper way to diagnose these types of disorders.
 - b. The Army does not have the proper procedures in place nor the proper time allotted for diagnosing certain diseases. They can take years to have a fully confirmed diagnosis. He feels this was the case in his situation, as he continues this journey of understanding and patience. He wasn't aware of the procedures for requesting a correction until a VA representative informed him.
3. A DD Form 2808 (Report of Medical Examination) shows the applicant underwent medical examination on 29 May 2008, for the purpose of Regular Army enlistment and was found qualified for service with a physical profile rating of 1 in all factors.
4. The applicant enlisted in the Regular Army on 17 July 2008.

5. The applicant deployed to Iraq from 18 December 2009 through 31 December 2010.
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), DA Form 199 (Informal Physical Evaluation Board (PEB) Proceedings), DA Form 199-1 (Formal PEB Proceedings), Department of Veterans Affairs (VA) Compensation and Pension (C&P) Exam, VA Rating Decision are not in his available records for review and have not been provided by the applicant.
7. U.S. Army Installation Management Command Orders 259-1002, dated 16 September 2014, separated the applicant with severance pay effective 18 September 2014, with a disability rating of 20 percent.
8. The applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was honorably separated on 18 September 2014, 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 corresponding separation code JEB. He was credited with 6 years, 2 months, and 2 days of net active service.
9. The applicant provided post-service VA medical records, in excess of 100 pages, which have been provided in full to the Board for review. They show he has a 100 percent service-connected disability rating, the effective date of which is unlisted, for the following conditions:
 - residuals of foot injury, 10 percent
 - limited motion of wrist, 10 percent
 - thigh condition, 0 percent
 - limited motion of arm, 20 percent
 - limited flexion of forearm, 0 percent
 - paralysis of ulnar nerve, 10 percent
 - hypertensive vascular disease, 0 percent
 - lumbosacral or cervical strain, 20 percent
 - limited motion of ankle, 10 percent
 - limited flexion of thigh, 0 percent
 - limited flexion of forearm, 0 percent
 - limited flexion of knee, 10 percent
 - arthritis rheumatoid (atrophic), 10 percent
 - thigh condition, 0 percent
 - thigh condition, 0 percent
 - limited flexion of thigh, 0 percent

- limited motion of arm, 20 percent
- limited extension of thigh, 10 percent
- limited extension of thigh, 10 percent
- tinnitus, 10 percent
- hyperthyroidism, 10 percent
- asthma, bronchial, 30 percent
- limited flexion of knee, 10 percent
- limited motion of ankle, 10 percent
- degenerative arthritis of the spine, 20 percent
- Reynaud's syndrome, 40 percent
- arthritis rheumatoid (atrophic), 10 percent

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 (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 an additional condition – rheumatoid arthritis – be determined to have been unfitting for continued service with a subsequent increase in his military disability rating and change in his current disability separation disposition from separated with disability severance pay to permanent retirement for physical disability. The applicant states:

“My disability rating as the Army has not fully rated all my disabilities. Mainly the Rheumatoid arthritis as the Army didn't have the proper way to diagnose these types of disorders. The Army does not have the proper procedures or time allotted for diagnosing certain diseases. They can take years to have a fully confirmed diagnosis. I feel this is the case in my situation. As I continue this journey of understanding and patience.”

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 17 July 2008 and was separated with \$29,127.60 of disability severance pay on 18 December 2014 under provisions provided in Chapter 4 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (20 March 2012).

d. A Soldier is referred to the IDES when they have one or more conditions which appear to fail medical retention standards as documented on a duty limiting permanent physical profile. At the start of their IDES processing, a physician lists the Soldier's 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 conditions they believe to be service-connected disabilities in block 8 of section II or a separate Statement in Support of Claim (VA form 21-4138).

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. All conditions are then rated by the VA prior to the Soldier's discharge. The physical evaluation board (PEB), after adjudicating the case sent them by the medical evaluation board (MEB), applies the applicable VA derived ratings to the Soldier's unfitting condition(s), thereby determining their 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.

f. On 6 November 2013, the applicant was referred to the IDES for "Patella Chondromalacia." He claimed 14 additional conditions on a Statement in Support of Claim (VA Form 21-4138) which did not include an autoimmune disease. A medical evaluation board (MEB) determined his "Chondromalacia patella of the left knee" failed the medical retention standards of AR 40-501, Standards of Medical Fitness; and after his appeal, they determined his hypothyroidism also failed medical retention standards.

g. They determined 13 additional medical conditions met medical retention standards. Raynaud's disease was among these, and while the condition may be a sign of an underlying autoimmune disorder such as scleroderma or lupus, the applicant was not found to have an autoimmune disease per se. The applicant was tested for an autoimmune disorder and the serum rheumatoid factor was within the normal range, the nuclear antibody test was negative, and his C-reactive protein (a marker for any ongoing inflammatory process) was normal.

h. His case was then forwarded to a physical evaluation board (PEB) for adjudication.

i. The applicant's informal PEB found his "Left Knee Chondromalacia Paella" and "Hypothyroidism" were unfitting medical conditions for continued service. They determined the remaining 13 medical conditions were not unfitting for continued military service. The PEB applied the VBA derived ratings of 10% and 10% respectively, and because the applicant's combined military disability rating was less than 30%, the PEB recommended the applicant be separated with disability severance pay. On 4 September 2014, after being counseled by his PEB liaison officer (PEBLO) on the Board's findings and recommendation, the applicant concurred with the PEB, waived his right to a formal hearing, and declined the opportunity to request a VA reconsideration of his disability ratings.

j. No contemporaneous medical documentation was submitted with the application. The submitted medial documentation are from his VA care in 2022-2023.

k. JLV shows the applicant started treatment for seronegative rheumatoid arthritis in August 2015 and has received one 10% service-connected disability rating for atrophic rheumatoid arthritis of his right upper extremity effective 20 September 2016.

l. Even if the applicant had subclinical or mild rheumatoid arthritis at the time of his separation, it would not have failed medical retention standards. Paragraph 3-40j of AR 40-501, Standards of Medical Fitness (4 August 2011), states that rheumatoid arthritis failed medical retention standards only when it "interferes with successful performance of duty or requires geographic assignment limitations or requires medication for control that requires frequent monitoring by a physician due to debilitating or serious side effects.

m. Paragraph 3-1 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (20 March 2012) states:

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

n. Review of the DES case file in ePEB and his records in the EMR show the findings throughout his DES process are consistent with the medical evidence in the case file. No material errors, discrepancies, or omissions were identified.

o. There is no significant probative evidence the applicant had any additional medical condition(s) which would have failed the medical retention standards of chapter 3 of AR 40-501, Standards of Medical Fitness, prior to his discharge; or which prevented the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his discharge.

p. 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 and consequently prematurely ends their career. 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 neither an increase in his military disability rating nor a referral of his case back to the DES is warranted.

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 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 that neither an increase in the applicant's military disability rating nor a referral of his case back to the DES is warranted. The opine noted, the applicant's record is void significant probative evidence that he had any additional medical condition(s) which would have failed the medical retention standards, prior to his discharge.

2. The Board agreed, there is insufficient evidence to support the applicant's contentions for a physical disability retirement in lieu of physical disability separation with severance pay, through the inclusion of additional unfitting conditions. The Board determined after being counseled by his PEB liaison officer (PEBLO) on the Board's findings and recommendation, the applicant concurred with the PEB, waived his right to a formal hearing, and declined the opportunity to request a VA reconsideration of his disability ratings. Based on the preponderance of evidence, the Board denied relief.

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 (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. The ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

//NOTHING FOLLOWS//