

IN THE CASE OF: [REDACTED]

BOARD DATE: 24 April 2024

DOCKET NUMBER: AR20230008476

APPLICANT REQUESTS:

- correction of his DA Form 199 (Informal Physical Evaluation Board (PEB) Proceedings) to show a higher disability rating for post-traumatic stress disorder (PTSD)
- personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Department of Veterans Affairs (VA) Disability Evaluation System (DES) Propose Rating, dated 13 October 2020
- memorandum from the U.S. Army Physical Disability Agency (USAPDA), subject: Removal from Temporary Disability Retired List (TDRL) Notification, dated 18 May 2023

FACTS:

1. The applicant states that after 24 years of service, he was placed on the TDRL. During his reevaluation, major medical issues were omitted without just cause or were improperly diagnosed. As a result, he was only awarded a 30% disability rating when it clearly stated that his PTSD disability was diagnosed by previous medical experts before and after his service, along with the VA diagnoses and compensation. He is requesting that his case be reopened, and his evaluation be transfer to a more capable and suitable institution. There are too many biases in this procedure and lack of quality oversight.

2. The applicant was appointed a warrant officer on 18 December 2007. He had over 10 years of prior enlisted service.

3. On 16 December 2020, a PEB found the applicant unfit for further military service due to:

- a. PTSD (50% rating),

b. lumbosacral degenerative disk disease with disc protrusions, L4-L5 disc herniation that impinges the left L5 nerve root, degenerative arthritis/spondylosis/facet arthrosis, central canal stenosis, neuroforaminal narrowing and sacroiliitis; and congenital L4-L5 and L5-S1 developmentally short pedicles; and congenital 13th transitional thoracic vertebrae and transitional L5 vertebrae/lumbarization of the S1 vertebrae with pseudoarticulation of the left transverse process and the left sacral ala (Bertolotti syndrome) (20% rating), and

c. left lumbar radiculitis (10% rating).

4. The PEB recommended a combined 60% rating and the applicant's placement on the TDRL with reexamination during September 2021. The PEB found him fit for 46 additional conditions because the Medical Evaluation Board (MEB) indicated the conditions met medical fitness standards per Army Regulation 40-501 (Standards of Medical Fitness), did not indicate any of the conditions prevented him from performing any functional activities, and did not indicate the performance issues, if any were due to these the conditions.

5. The DA Form 199 contains the following statements in section VI:

a. The PEB recommends placement on the TDRL because at least one unfitting compensable condition is unstable.

b. Based on results of a future TDRL evaluation, for each unfitting unstable condition, the PEB will determine whether the unstable condition remains unfitting (and compensable). When the PEB determines condition remains unfitting but is now stable, it will determine whether to retain initial rating or award a higher or lower rating.

c. This Soldier's behavioral health (BH) condition is unstable because placement on the TDRL is required for BH condition.

6. On 28 December 2020, the applicant concurred with the PEB findings and recommendations and waived a formal hearing of his case. He did no request reconsideration of his VA ratings.

7. Orders issued on 31 December 2020 directed the applicant's placement on the TDRL effective 30 March 2021.

8. On 10 April 2023, a PEB reevaluated the applicant's PTSD condition and assigned a 0% disability rating. The PEB stated PTSD was rated at 0% because a mental condition has been formally diagnosed, but symptoms are not severe enough either to interfere with occupational and social functioning or to require continuous medication. The assigned impairment level is based on consideration of the Soldier's symptoms which

include depressed mood and disturbances of motivation and mood. The TDRL evaluation of 28 February 2023 states that the Soldier is competent to manage financial affairs and is capable of understanding the nature of, and cooperating in, PEB proceedings. The PEB also indicated the applicant's two other disabling conditions were permanent and stable, so no reevaluation was required.

9. The PEB recommended a 30% disability rating and the applicant's permanent disability retirement.

10. A memorandum from the U.S. Army Medical Department Activity, Fort Stewart, GA, dated 16 May 2023, subject: [applicant], addressed to the U.S. PEB President, states the following:

a. The applicant is currently in the TDRL process. As part of this process, the Soldier is required to make an election on the PEB findings.

b. Three failed attempts by certified mail, telephonic communication and/or electronic mail to contact the service member and ensure completion of this required action have been made and documented. The initial attempt to contact the Soldier was made on 11 April 2023.

c. Positive contact as verified by (acceptance of certified mail, verbal contact via telephone, or reply to electronic mail) was made with the applicant on 11 April 2023, 21 April 2023, and 16 May 2023. In that contact, the requirement to make an election on the PEB findings within the prescribed timelines of said contact was made clear to the member.

d. As of the date of this memorandum, the applicant has failed to make an election on the PEB findings, and no request for an extension with explanation has been received by this office. Consequently, the case is forwarded for further processing per Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation).

11. Orders issued by the USAPDA on 18 May 2023, directed the applicant's removal from the TDRL and his placement on the Permanent Disability Retired List (PDRL) effective 18 May 2023.

12. During the processing of this case, an advisory opinion was obtained from the USAPDA. It states:

a. The applicant was originally found unfit on 16 December 2020 for PTSD as well as back conditions. The PTSD was rated by the VA at 50%, but he was assigned a 70% rating due to comingled traumatic brain injury (TBI). The PEB only found the PTSD to be unfitting; thus, it assigned the 50% rating. It also found that the condition was combat

related and that it was unstable for rating purposes. Therefore, the applicant was placed on the TDRL. He reviewed and accepted the findings of the PEB on 28 December 2020.

b. The VA did not invoke Title 38, Code of Federal Regulations (38 CFR), Section 4.129 and a future VA reexam was not scheduled. Nonetheless, on 28 February 2023, the Army reexamined the applicant due to being on the TDRL. During the reexamination, his treatment medical records were examined. His treating provider noted that on 30 December 2021, he reported feeling "good" and was at a good stopping point for continued therapy, which his provider concurred with. The examiner also noted that the applicant has no service-connected VA rating for PTSD, likely because it was subsumed by his TBI rating.

c. The examiner also noted that at the time of reexam, he had a diagnosis of PTSD, but his symptoms were not severe enough to interfere with occupational and social functioning or required continuous medications. The examiner also found that he only had two symptoms, which were not at the same level of rating. As a result, the PEB rated his unfitting PTSD at 0% based upon VA Diagnostic Codes 9411-8045 under the General Rating Formula for Mental Disorders. The applicant failed to make a timely election and was deemed to have accepted the findings of the PEB on 16 May 2023. He now appeals seeking the above stated relief.

d. Per Title 10, U.S. Code, Section 1216a(a)(1)(A), the Army is required to apply the VA Schedule for Rating Disabilities (VASRD) in effect at the time of separation. The PEB did not find the applicant's TBI to be unfitting, but it did find his PTSD to be unfitting. The VA was able to provide a rating for PTSD at 50%, but under 38 CFR Section 4.7, the higher of the two evaluations for PTSD and TBI was applied. In his VA case, that meant 70% for TBI with PTSD. The Army applied the 50% for PTSD since it was unfitting, but not for TBI. The applicant was placed on the TDRL, and he was required to be reexamined.

e. During his reexamination, it was noted by the examiner that he had improved so much that he and his treating provider agreed that he could stop therapy and no longer needed continuous medication. Moreover, the examiner noted that while he still has the diagnosis of PTSD his symptoms were not severe enough to interfere with occupational and social functioning. The examiner noted two symptoms were present (depressed mood and disturbances of motivation and mood). The VA rates BH conditions based upon the higher of the occupational and social impairment (OSI) level or symptomology where at least two symptoms are present at a given rating percentage. The applicant's PTSD OSI level equated to a rating of 0%.

f. The applicant did not present with two or more symptoms at the same higher rating percentage. Therefore, his assigned rating is 0%. He presented no evidence to dispute the analysis of the assigned rating. He only argues that there are somehow

biases in the process and that his case should be assigned to some other Agency for review and reconsideration. He fails to understand that VA and Army ratings are two different ratings. VA ratings can ebb and flow overtime, whereas his Army rating is a snapshot in time. At the time of his evaluation, his OSI level and symptomology combined to equate to a 0% rating, which was applied correctly by the PEB.

g. Based upon the above and because no new evidence was provided, the USAPDA finds the applicant's request that his unfitting BH condition be rated at 50% to be legally insufficient.

13. The USAPDA advisory opinion was provided to the applicant and given the opportunity to provided additional evidence or comments. No response was received.

14. The applicant provided his VA DES Propose Rating, dated 13 October 2020, showing that for the purpose of entitlement to VA benefits, the VA proposed to establish service connection for TBI with PTSD (also claimed as PTSD, anxiety, depression, attention deficit hyperactivity disorder, insomnia, mood swinger, anger issues, TBI with memory loss) with a 70% disability rating.

15. 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.

16. MEDICAL REVIEW:

1. The Army Review Boards Agency (ARBA) Medical Advisor reviewed the supporting documents, the Record of Proceedings (ROP), and the applicant's available records in the Interactive Personnel Electronic Records Management System (iPERMS), the Health Artifacts Image Management Solutions (HAIMS) and the VA's Joint Legacy Viewer (JLV). In essence, the applicant requests a higher rating for his PTSD condition.

2. The ABCMR ROP summarized the applicant's record and circumstances surrounding the case. The applicant entered active duty in the Regular Army 03Jan1997. His MOS was 915E Ordnance. He was deployed once to Afghanistan 28Aug2009 for 11 months and twice to Iraq 27Jan2005 (11 months) and 09Mar2003 (4 months). He was recommended to be permanently medically retired by an Informal PEB due to physical disability at 30%.

a. In December 2019 Schofield Barracks Embedded Behavioral Health (SB EBH) he reported a history of sporadic BH treatment the prior few years. He had taken medication (bupropion) in 2016 and wanted to resume this medication. Diagnosis:

Major Depressive Disorder, Single Episode, Mild. Wellbutrin was discontinued due to side effects and changed to Prazosin. He was only seen for a few visits prior to the initial MEB proceedings. His diagnoses were MDD and PTSD. 27Feb2020 BASIS-24 score 1.01 (subclinical to low level general distress); suicide screen (negative); GAD-7 score 3 (anxiety was unlikely); PCL-5 score 14 (none to low PTSD symptoms reported).

b. 21Jul2020 Initial PTSD DBQ. He had no previous mental health history prior to deployment. Combat stressors included participation in recovery missions involving placement of bodies and body parts of young soldiers in bags to bring them back; and recovery of damaged vehicles that were filled with blood and human tissue. The examiner opined the occupational social impairment attributable to his condition was with reduced reliability and productivity (50%).

c. The original 14Oct2020 MEB Proceedings (DA Form 3947) listed PTSD and mild TBI as meeting retention standards. The applicant requested independent medical review of his case petitioning for several additional orthopedic conditions to be added as not meeting retention standards (and incidentally did not contain a request concerning a BH condition). Subsequently, in the BH narrative summary by MEB Clinical Psychologist 19Nov2020, it was determined the PTSD condition no longer met retention standards and was listed as such on the revised DA Form 3947 dated 20Nov2020.

d. 16Dec2020 Informal PEB found PTSD at 50% under 9411-8045; Lumbosacral. Degenerative Disc Disease with Disc Protrusions, L4-L5 Disc Herniations that Impinges the left L5 nerve root, Degenerative Arthritis/Spondylosis/Facet Arthrosis, Central Canal Stenosis, Neuroforaminal Narrowing and Sacroiliitis; and Congenital L4-L5 and L5-S1 developmentally short pedicles; and congenital 13<sup>th</sup> transitional thoracic vertebrae and transitional L5 vertebrae/lumbarization of the S1 vertebrae with pseudo articulation of the left transverse process and the left sacral ala (Bertolotti syndrome) at 20% under 5242-5243; and Left lumbar radiculitis at 10% under 8520, unfitting for continued service. The two unfitting lumbar conditions were determined to be stable for permanent rating. However, the PTSD condition was determined to not be stable for permanent rating and the applicant was placed on the Temporary Disability Retired List (TDRL). The ratings were applied as per the 13Oct2020 Disability Evaluation System Proposed Rating based largely on the 21Jul2020 Initial PTSD DBQ and 26Aug2020 Initial TBI DBQ exams. The VA examiner noted it was not possible to differentiate the symptoms that were attributable to the PTSD diagnosis and the applicant's TBI condition. Consequently, the PTSD and TBI conditions were evaluated together. The VA did provide a separate 50% rating solely for the PTSD condition for PEB rating purposes since the TBI condition was not found unfitting by the PEB.

e. 30Dec2021 Video Visit Note [REDACTED] VAMC. The applicant reported feeling good. He had just hosted family and friends for Christmas. He was enjoying aspects of his job. He discussed enjoying the following hobbies: Walking and listening

to audiobooks, and he had just obtained a fishing license. He was still waiting for the judge to finalize the divorce. Diagnoses: Psychosocial Stressors and PTSD by History. The applicant had made significant gains in therapy and wanted to try skills on his own. He was aware of how to reengage in therapy if he desired in the future.

f. 28Feb2023 TDRL Examination Report summarized the applicant's TDRL proceedings based on the 30Dec2021 Video Visit Note and 28Feb2023 Review PTSD DBQ. The Review PTSD DBQ VA examiner assessed: There were no disabling BH related residual symptoms. The Review PTSD DBQ VA determined a mental condition had been formally diagnosed but symptoms were not severe enough either to interfere with occupational and social functioning or to require continuous medication. There were only 2 symptoms identified for rating purposes and they occupied 2 different rating levels: Depressed mood (30% level) and disturbance of motivation and mood (50% level). The applicant was employed fulltime at a company that built equipment. He was also enrolled in ██████████ College for IT. He lived with his mom to help to care of her and had a supportive relationship with his four adult children. He reported that at the time his psychiatrist contacted IDES endorsing that his PTSD condition did not meet retention standards, his prominent stressor was his on-going divorce which was now complete. After placement on TDRL, he had continued BH therapy until 30Dec2021 when he and the therapist mutually decided to end therapy sessions. He had no current significant symptoms therefore the Review PTSD DBQ VA examiner opined the PTSD condition was in full remission. There were no substance abuse issues. The MEB psychologist for the TDRL review determined the PTSD condition met retention standards of AR 40-501 chapter 3. They also determined the prognosis for the PTSD condition was it could likely permit return to full duty from a BH standpoint.

g. 10Apr2023 Informal PEB found that the PTSD continued to remain unfitting for continued service. The PTSD condition was considered stable for permanent rating and was rated at 0% under 9411-8045. The PEB recommended total disability rating was 30% with final disposition being permanent disability retirement.

### 3. After removal from TDRL

a. 24Jul2023 Mental Health Consult Request. The applicant stated he mainly sought care for help with sleep disturbance. He also reported some mood symptoms related to missing his work at the military and needing to redefine his sense of purpose; and memory/forgetfulness he believed may be related to a concussion around 2008.

b. 21Sep2023 Mental Health Diagnostic Study Note. PHQ-9 score 21 (consistent with reported severe depressive symptoms); GAD-7 score 15 (consistent with reported severe anxiety symptoms); Insomnia Score Index score 22 (consistent with reported severe clinical insomnia symptoms); PCL-5 score 60 consistent with PTSD symptoms. The screening for positive hazardous drinking was also positive.

c. 25Oct2023 Mental Health Note. The mental status exam revealed depressed mood. There was no psychosis or suicide ideation. He declined trauma-based therapy and psychotropic medications. He agreed to individual psychotherapy. There were no further BH visits.

d. 06Feb2024 Primary Care Note. The provider noted the applicant's history of PTSD. In the review of systems, he denied depression, anxiety, memory loss, behavioral issues, feeling sadness, and difficulty sleeping. His PTSD condition was stable. He denied nightmares, and suicide/homicide ideation. There was no previous suicide attempt or psychiatric hospitalization. He was not taking psychotropic meds.

4. Concerning the mild TBI condition, history 2010 TBI after getting head by slamming door. He reported problems with memory and attention. He participated in a TBI memory programs in 2013 while at Ft Stewart but had to stop due to school obligations. He presented in 2016 due to perceived worsening memory. Neuropsych testing revealed the applicant had no difficulty in processing and sequencing information or in performing his executive functions. He was evaluated by TBI speech pathology, TBI occupational therapy and TBI psychology. No work limitations were recommended.

5. The ARBA Medical Reviewer made the following observations: There were no additional medical conditions found that did not meet retention standards of AR 40-501 chapter 3. Based on evidence available for review, the PTSD continued to fail medical retention standards as the condition's resilience under stressful circumstances had not been tested while on TDRL and may likely deteriorate if exposed to rigors of military service (especially combat deployment). The applicant re-engaged in BH services November 2020 and regular attended sessions until 30Dec2021. From December 2021 until August 2023, the applicant did not require BH services to include psychotropic medication (except for vocational rehab services). During the TDRL re-exam, the applicant did not report having any difficulties at work or with personal relationships due to his BH condition. He was also not taking any psychotropic medications. He was rated by the PEB at 0% for mental condition had been formally diagnosed but symptoms were not severe enough either to interfere with occupational and social functioning or to require continuous. There appeared to be no error in the 0% rating for the PTSD condition per VASRD principles.

#### 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 and Headquarters, U.S. Army Physical Disability Agency (USPDA) advisory opinion, the Board concurred with the advising official finding the applicant did not present two or more symptoms at the same higher rating percentage. The Board noted the VA rates behavioral health conditions based upon the higher of the occupational and social impairment level (OSI) or symptomology where at least two symptoms are present at a given rating percentage.

2. The Board agreed at the time of the applicant’s evaluation, his OSI level and symptomology combined equated to a 0% rating and was found to be applied correctly by the IPEB. Evidence in the record show the applicant concurred with the PEB findings and recommendations and waived a formal hearing of his case. He did no request reconsideration of his VA ratings. Based on the preponderance of evidence and the advising official opine, the Board determined correction of the applicant’s DA Form 199 to show a higher disability rating for post-traumatic stress disorder (PTSD) Is without merit. Therefore, the Board denied relief.

3. The Board agreed the VA applies its own polices and regulations to make service connection and rating determinations. It is not bound by determinations made by the Army. With that, unlike the VA, the Army’s determination of fitness and its mandatory application of VA ratings is a snapshot in time whereas the VA can make service connection and rating determinations throughout the veteran’s life. The VA provides post-service support and benefits for service-connected medical conditions. The VA operates under different laws and regulations than the Department of Defense (DOD). In essence, the VA will compensate for all service-connected disabilities.

4. The applicant’s request for a personal appearance hearing was carefully considered. In this case, 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.

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.

5/6/2024

X

CHAIRPERSON

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, 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 USAPDA is responsible for administering the Army DES 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.

2. Army Regulation 635-40 establishes the Army DES 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 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.

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. These ratings are assigned from the VASRD.

d. The TDRL is used in the nature of a "pending list." It provides a safeguard for the Government against permanently retiring a Soldier who can later fully recover, or nearly recover, from the disability causing him/her to be unfit. Conversely, the TDRL safeguards the Soldier from being permanently retired with a condition that may reasonably be expected to develop into a more serious permanent disability.

e. Requirements for placement on the TDRL are the same as for permanent retirement. The Soldier must be unfit to perform the duties of his/her office, grade, rank, or rating at the time of the evaluation. The disability must be rated at a minimum of 30% or the Soldier must have 20 years of service. In addition, the condition must be determined to be temporary or unstable.

f. Soldiers will be placed on the TDRL when they would be qualified for permanent disability retirement and the preponderance of evidence indicates one or more conditions will change within the next 5 years so as to result in a change in rating or a finding of fit. The Army DES will re-evaluate each Soldier placed on the TDRL at least once every 18 months. Evaluation may be sooner. Once the PEB finds each condition is stable upon evaluation, the PEB will assign a final rating that includes the ratings for the disabilities determined to be permanent and stable when the Soldier was placed on the TDRL or during preceding TDRL adjudications.

g. Soldiers whose disabilities have stabilized and who are not determined fit for duty and meeting medical retention standards for the conditions for which they were placed on the TDRL, will be removed from the TDRL and placed on the PDRL if the physical disability rating remains 30%.

3. 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.

4. 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.

5. 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 (ABCMR) applicants (and/or their counsel) prior to adjudication.

6. Army Regulation 15-185 (ABCMR) provides Department of the Army policy, criteria, and administrative instructions regarding an applicant's request for the correction of a military record. Paragraph 2-11 states applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

//NOTHING FOLLOWS//