

IN THE CASE OF: [REDACTED]

BOARD DATE: 9 September 2024

DOCKET NUMBER: AR20230008591

APPLICANT REQUESTS: in effect, an increased physical disability retirement rating through the inclusion of a compensable disability rating for his unfitting condition of asthma.

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

- DD Form 149 (Application for Correction of Military Record)
- Department of Veterans Affairs (VA) letter, February 2022
- DA Form 199 (Informal Physical Evaluation Board (PEB) Proceedings), 1 April 2002
- Headquarters, U.S. Army Physical Disability Agency (USAPDA) Order D 122-14, 2 May 2022
- PACT Act printout from www.va.gov cite, 23 May 2023

FACTS:

1. The applicant states he should receive additional physical disability retirement compensation for his asthma. He believes the correction should be made because when he was medically retired in June 2022, asthma was not compensable, but a few months later the PACT Act of 2022 was passed, making it compensable. He would greatly appreciate if this compensation would be added to his Army physical disability percentage.
2. The applicant enlisted in the Regular Army on 12 January 1999 and was honorably released from active duty after years active service on 11 January 2001, due to completion of required service and transferred to a unit in the Army National Guard (ARNG).
3. The applicant was ordered to active duty on 3 January 2003 in support of Operation Enduring Freedom with service in Afghanistan from 5 February 2003 through 24 August 2003. He was honorably released from active duty on 23 September 2003, due to completion of required active service and transferred back to his ARNG unit. He was credited with 8 months and 21 days of net active service this period.

4. A VA letter, dated 3 February 2022, shows the applicant's evaluation of sleep apnea, allergic bronchopulmonary aspergillosis with asthma and eosinophilic lung disease, which was currently 30 percent disabling, was increased to 50 percent effective 26 August 2021.

5. 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), Department of Veterans Affairs (VA) Compensation and Pension (C&P) Exam, and VA Rating Decision are not in his available records for review and have not been provided by the applicant.

6. A DA Form 199 shows, an informal PEB convened on 1 April 2022, where the applicant was found physically unfit with a recommended rating of 50 percent and that his disposition be permanent disability retirement.

a. His medical conditions determined to be unfitting are:

(1) Post-traumatic stress disorder (PTSD); 50 percent; MEB diagnosis (DX) 1. He first sought treatment for this condition in February 2021 while serving as a drilling member of the Reserve Component. This condition was caused by his deployment to Afghanistan in 2003 and is attributed to experiencing mortar fire, rocket fire, land mines, and witnessing loss of life. This condition is attributed to combat stressors and is the direct result of armed conflict. He is unfit because the DA Form 3349 functional activity limitations associated with this condition make him unable to perform required duties.

(2) Type 2 diabetes mellitus; non-compensable; MEB Dx 2. The applicant first sought treatment for this condition in February 2010, in Minden, LA, while a drilling member of the Reserve Component. The condition presented as elevated HgA1C levels. At the time he was diagnosed with type 2 diabetes, he was not in an active duty status for more than 30 days or entitled to base pay, and there is no line of duty (LOD) investigation for this condition. Therefore, the condition is not compensable because the evidence overcomes both the presumption of soundness and the presumption of permanent aggravation. He is unfit because the DA Form 3349 functional activity limitations associated with this condition make him unable to reasonably perform required duties.

(3) Cough variant asthma; non-compensable; MEB Dx 3. The applicant first sought treatment for this condition in November 2016, while a drilling member of the Reserve Component. The condition presented as a persistent cough. At the time the applicant was diagnosed with this condition, he was not in an active duty status for more than 30 days or entitled to base pay and there is no LOD investigation for this condition. Additionally, there is no evidence within his available case file that indicates military

service has aggravated the condition. Therefore, the condition is not compensable because the evidence overcomes both the presumption of soundness and the presumption of permanent service aggravation. He is unfit because the DA Form 3349 functional activity limitations associated with this condition make him unable to reasonably perform required duties. Although the VA Code Sheet lists sleep apnea, allergic bronchopulmonary aspergillosis with asthma and eosinophilic lung disease and awarded 50 percent for it, the discussion in the narrative portion of the VA Rating Decision discusses how the rating for allergic bronchopulmonary aspergillosis with asthma and eosinophilic lung diseases was determined. Per the applicant's DA Form 3947, the sleep apnea condition meets retention standards and there is no indication it is unfitting. As both conditions are non-compensable for PEB purposes, no rating is applied.

b. He was found fit for the medical condition of MEB Dx 4 (the specific diagnosis is unlisted on this document).

c. On 27 April 2022, the applicant signed the form indicating he concurred with the findings and recommendations of the informal PEB and waived a formal hearing of his case. He also indicated he did not request reconsideration of his VA Ratings.

7. Headquarters, USAPDA Order D 122-14, dated 2 May 2022, released the applicant from assignment and duty because of physical disability incurred while entitled to basic pay and under conditions that permit his retirement for permanent physical disability effective, 1 June 2022, with a disability rating of 50 percent.

8. Louisiana ARNG Orders 0001897323.00, dated 29 June 2022, transferred the applicant to the Retired Reserve effective 1 June 2023, due to placement on the permanent disability retired list (PDRL).

9. The applicant provided a PACT Act printout from the www.va.gov cite, dated 23 May 2023, which shows the VA added Gulf War era and post 9/11 veteran eligibility for service-connection for more than 20 burn pit and other toxic exposure presumptive conditions based on the PACT Act. It lists a number of cancers and illnesses that are now considered presumptive. Asthma that was diagnosed after service is one of the listed presumptive illnesses.

10. In the adjudication of this case an advisory opinion was provided by the USAPDA on 16 October 2023, which shows:

a. The applicant served in Afghanistan in 2003. On 1 April 2022 he was found to be unfit for his cough variant asthma condition by the informal PEB. The VA examined and rated his unfitting asthma as well as bronchopulmonary aspergillosis and eosinophilic disease at 30 percent. The conditions are combined to avoid pyramiding under

38 C.F.R., Part 4, Section 4.14. The Army found the condition to be non-duty related and thus, non-compensable because at the time he was diagnosed, he was not in a pay status and he had no LOD determination. On 2 June 2022, the applicant was placed on the PDRL with a rating of 50 percent for his PTD condition with combat codes. The PACT Act, which includes asthma as a VA compensable condition, became effective on 10 August 2022.

b. The PACT Act provides a legal presumption of service-connection for a specific list of conditions associated with burn pit exposure due to service in several countries, including Afghanistan. The presumption of service-connection is for VA medical and compensation benefits. The PACT Act does not appear to extend the presumption of service-connection to the Department of Defense (DOD). The USAPDA has requested legal guidance from the DOD as to the PACT Act's applicability to Disability Evaluation system (DES) cases, but has not yet received such guidance.

c. If the PACT Act and its presumption of service-connection were applicable to the DOD, then the applicant's unfitting asthma condition would be rated at 30 percent and an amended DA Form 199 would need to be issued adjusting his final combined rating. If the PACT Act does not extend service-connection to the DOD, then the final rating for the applicant is correct and no further action is warranted. In either instance, the applicant's disposition on the PDRL will not change.

d. If the PACT Act's presumption of service-connection does not apply to the DOD, the applicant's request that his unfitting, non-compensable asthma condition be found duty- related and compensable is legally insufficient. If the PACT Act presumption of service-connection does apply to the DOD, then the applicant's request is legally sufficient.

11. On 23 October 2023, the applicant was provided a copy of the USAPDA advisory opinion and given an opportunity to submit comments in rebuttal, but he did not respond.

12. 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.

13. 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 is applying to the ABCMR requesting the Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics Act of 2022 be retroactively applied to his non-compensable unfitting asthma.

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. His DD 214 shows he entered the Regular Army on 26 August 2013 and was permanently retired for physical disability on 26 July 2022 under provisions provided in chapter 4 of AR 635–40, Physical Evaluation for Retention, Retirement, or Separation (17 January 2017).

d. The applicant's Informal Physical Evaluation Board (PEB) Proceedings (DA 199) shows that on 1 April 2022 the PEB determined the drilling Army National Guard Soldier had three conditions which were unfitting for continued military service: Posttraumatic stress disorder, Type 2 diabetes mellitus, and cough variant asthma. They determined the latter two conditions were neither incurred during nor permanently aggravated by his military Service.

“Type 2 diabetes mellitus. (non-compensable)

The Soldier first sought treatment for this condition in February 2010 in Minden, Louisiana while a drilling member of the Army Reserves. The condition presented as elevated HgA 1 C levels. At the time the Soldier was diagnosed with Type 2 Diabetes he was not in an Active-Duty status for more than 30 days or entitled to base pay, and there is no Line of Duty investigation for this condition. Additionally, there is no evidence within the Soldier's available case file that indicates that military service has aggravated the condition. Therefore, the condition is not compensable because the evidence overcomes both the presumption of soundness and the presumption of permanent service aggravation.

Cough variant asthma. (non-compensable)

The Soldier first sought treatment for this condition in November 2016 while a drilling member of the Army Reserves. The condition presented as persistent cough. At the time the Soldier was diagnosed with this condition he was not in an Active-Duty status for more than 30 days or entitled to base pay, and there is no Line of Duty investigation for this condition. Additionally, there is no evidence within the Soldier's available case file that indicates that military service has aggravated the condition. Therefore, the condition is not compensable because the evidence overcomes both the presumption of soundness and the presumption of permanent service aggravation."

e. The PEB applied the VA derived disability rating of 50% to his compensable PTSD and recommended the applicant be permanently retired for physical disability. On 27 April 2022, after having been counseled on the Board'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 VA reconsideration of his ratings.

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. The evidence shows a PEB found the applicants medical condition of PTSD unfitting and assigned a 50% disability rating with his disposition as permanent disability retirement. The PEB considered the medical conditions of Type 2 Diabetes and Cough variant Asthma. At the time he was diagnosed with these two conditions, he was not in an active duty status for more than 30 days or entitled to base pay, and there is no line of duty (LOD) investigation for this condition, and for the Cough variant Asthma; there is no evidence within his available case file that indicates military service has aggravated the condition. Therefore, neither condition is compensable. The Board also discussed the PACT Act since it was raised by the applicant. The Board reviewed and agreed with the USAPDA Legal advisor's determination that the presumption of service-connection is for VA medical and compensation benefits. Based on available evidence, the Board determined relief is not 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.

9/9/2024

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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 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.

2. 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.

d. Paragraph 5-11 (Presumption of sound condition for Soldiers on orders to active duty specifying a period of more than 30 days), states the PEB will presume Soldiers, including Reserve Component Soldiers and recalled retirees on continuous orders to active duty specifying a period of more than 30 days, entered their current period of military service in sound condition when the disability was not noted at the time of the Soldier's entrance to the current period of active duty.

(1) The PEB may overcome this presumption if clear and unmistakable evidence demonstrates the disability existed before the Soldier's entrance on their current period of active duty and was not aggravated by their current period of military service. Absent such clear and unmistakable evidence, the PEB will conclude that the disability was incurred or aggravated during their current period of military service.

(2) The PEB must base a finding that the Soldier's condition was not incurred in or aggravated by their current period of military service on objective evidence in the record, as distinguished from personal opinion, speculation, or conjecture. When the evidence is unclear concerning whether the condition existed prior to their current period of military service or if the evidence is equivocal, the presumption of sound condition at entry to the current period of military service has not been rebutted, and the PEB will find the Soldier's condition was incurred in or aggravated by military service.

3. 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.

4. The Sergeant First Class (SFC) Heath Robinson Honoring our Promise to Address Comprehensive Toxics (PACT) Act, signed into law in August 2022, addresses health care, presumption of service-connection, research, resources and other matters related to veterans who were exposed to toxic substances during military service. It expands the Department of Veterans Affairs (VA) health care and benefits for veterans exposed to burn pits, Agent Orange, and other toxic substances. The PACT Act brings these changes:

a. Expands and extends eligibility for VA health care for veterans with toxic exposures and veterans of the Vietnam, Gulf War, and post-9/11 eras.

b. Add 20 plus more presumptive conditions for burn pits, Agent Orange, and other toxic exposures, asthma being among them.

c. Adds more presumptive-exposure locations for Agent Orange and radiation, Afghanistan being among them.

d. Requires VA to provide a toxic exposure to screening to every veteran enrolled in VA healthcare.

e. Helps improve VA research, staff education, and treatment related to toxic exposures.

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.

//NOTHING FOLLOWS//