

IN THE CASE OF: ██████████

BOARD DATE: 24 April 2024

DOCKET NUMBER: AR20230009216

APPLICANT REQUESTS: correction of his DA Form 199 (Informal Physical Evaluation Board (PEB) Proceedings) by adding post-traumatic stress disorder (PTSD) as unfitting resulting in a higher disability rating.

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

- DD Form 149 (Application for Correction of Military Record)
- DA Form 3349-SG (Physical Profile Record)
- Integrated Disability Evaluation System (IDES) Narrative Summary (NARSUM)
- DA Form 3947 (Medical Evaluation Board (MEB) Proceedings)
- DA Form 199, dated 9 June 2017
- U.S. Army Reserve (USAR) separation orders
- Department of Veterans Affairs (VA) Rating Decision, dated 2 February 2017
- VA Rating Decisions, dated 2 April 2018
- VA Rating Decision, dated 26 September 2019
- VA Disability Benefits Questionnaires
- DA Form 199-2 (U.S. Army Physical Disability Agency (USAPDA) Revised PEB Proceedings)

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, in effect, the PEB did not consider his PTSD condition (diagnostic code 9411) as service-connected and unfitting. The VA awarded him service-connected disability compensation for PTSD effective 6 February 2017. He believes his PTSD should be considered as an unfitting medical condition and calculated into his total disability rating percentage.
3. The applicant enlisted in the USAR on 25 July 2011.

4. On 14 November 2016, the applicant was issued a permanent physical profile due to lower back injury/pain.

5. The applicant's IDES NARSUM shows he was diagnosed with the following conditions, which failed retention standards in accordance with Army Regulation 40-501 (Standards of Medical Fitness):

- degenerative arthritis lumbar spine
- right lower extremity radiculopathy
- left lower extremity radiculopathy

6. The NARSUM shows in item 8 (Mental Competency Statement), the entry: Not applicable. There is no behavioral health diagnosis.

7. On 4 April 2017, an MEB referred the applicant to a PEB based on the conditions identified in the NARSUM as not meeting retention standards. The MEB Proceedings also show he was diagnosed with the following conditions, which were deemed to meet retention standards in accordance with Army Regulation 40-501:

- bilateral pes planus
- bilateral sensorineural hearing loss
- tinnitus
- gluteus hamstring condition
- hernia condition

8. On 9 June 2017, a PEB found the applicant physically unfit for further military service due to degenerative arthritis lumbar spine and bilateral lower extremity radiculopathy. The PEB recommended a 60% disability rating and the applicant's permanent disability retirement. The PEB determined the applicant's conditions of bilateral pes planus, bilateral sensorineural hearing loss, tinnitus, gluteus hamstring and hernia conditions were not unfitting because the MEB indicated the conditions met medical fitness standards, did not indicate that any of the conditions prevented him from performing any functional activities, and did not indicate that performance issues, if any, were due to these conditions.

9. The DA Form 199 contains the following statements:

a. This case was adjudicated as part of the IDES.

b. As documented in the VA) memorandum dated 2 June 2017, the VA determined the specific VA Schedule for rating Disabilities (VASRD) code(s) to describe the Soldier's condition(s). The PEB determined the disposition recommendation based on

the proposed VA disability rating(s) and in accord with applicable statutes and regulations.

10. On 23 June 2017, the applicant concurred with the PEB's findings and recommendations and waived a formal hearing of his case. He did not request reconsideration of his VA ratings.

11. Orders issued on 1 September 2017 directed the applicant's release from assignment and duty and his placement on the Permanent Disability Retired List effective 6 October 2017.

12. The applicant provided his VA Rating Decision, dated 2 February 2017, showing he was denied service-connected disability compensation for PTSD because the medical evidence did not show that PTSD had been clinically diagnosed.

13. The applicant also provided his VA Rating Decisions, dated 2 April 2018 and 26 September 2019, respectively, showing he was granted service-connected disability compensation for, among other conditions, PTSD with panic attacks, major depressive disorder, and alcohol use disorder effective 6 February 2017.

14. On 15 June 2023, as a result of an ABCMR decision, the USAPDA issued a DA Form 199-2 showing the applicant's unfitting conditions resulted from a combat-related injury. The unfitting conditions and assigned ratings were not changed.

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:

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 requesting his PTSD be determined an additional unfitting disability and a subsequent increase in military disability rating. He states:

“Order D 244-11 (issued 01 Sept 2017) and DA Form 199-2 [U.S. Army Physical Disability Agency (USAPDA) Revised Physical Evaluation Board (PEB) Proceedings] (issued 2023-06-15) and Medical Evaluation Board proceeding have not considered a service connect disability (9411) [VA Schedule for Rating Disabilities (VASRD) diagnostic code (DC) for posttraumatic stress disorder] that was later retroactively granted to 02/06/2017 that also has the same effective date as other 3 MEB [medical evaluation board] rated conditions (5243, 8520, 8520) granted also for 02/06/2017.

Base on the attached Department of Veteran Affairs (VBA) rating decision granted this disability (9411) effective prior to my discharge date and the same effective date as my other MEB/IDES [Integrated Disability Evaluation System] rated conditions of 02/06/2017, I believe that the disability 9411 should be considered as a medical condition determined to be unfitting and be calculated into Permanent Disability PDRL [Permanent Disability Retirement List] total percentage retroactively.”

c. The Record of Proceedings details the applicant’s service and the circumstances of the case. Orders published by the United States Army Physical Disability Agency on 1 September 2017 show the drilling reservist was permanently retired for physical disability effective 6 October 2017 with a 60% disability rating and that none of his disabilities was determined to be combat related.

d. The On 18 August 2022, the ABCMR granted his request (AR20210016144), determining he had a combat related disability:

“The Board determined the evidence presented is sufficient to warrant a recommendation for relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by amending U.S. Army Physical Disability Agency Orders Number D 244-11, 1 September 2017, to show the following:

- Disability is based on injury or disease received in LOD as a direct result of Armed Conflict or caused by an instrumentality of war and incurred in the LOD during a war period as defined by law: YES
- Disability resulted from a combat related injury as defined in Title 26, USC, section 104: YES”

e. The applicant's 15 June 2023 U.S. Army Physical Disability Agency (USAPDA) Revised Physical Evaluation Board (PEB) Proceedings (DA Form 199-2) show the applicant continued to have the same three disabilities with the same ratings but this lumbar spine condition was changed to combat related at the direction of the ABCMR.

- Degenerative arthritis lumbar spine (VASRD DC 5243)
- Right lower extremity radiculopathy (VASRD DC 8520)
- Left lower extremity radiculopathy (VASRD DC 8520)

f. Orders published by the USAPDA (Order D 166-01) on 15 June 2023 show the changes made to Orders D244-11 published 1 September 2017:

“As Reads:

Disability is based on injury or disease received in LOD as a direct result of Army Conflict or caused by an instrumentality of war and incurred in the LOD during a war period as defined by law: NO Disability resulted from a combat related injury as defined in 26 USC 104: NO

How Changed:

Disability is based on injury or disease received in LOD as a direct result of Army Conflict or caused by an instrumentality of war and incurred in the LOD during a war period as defined by law: YES Disability resulted from a combat related injury as defined in 26 USC 104: YES”

g. For the applicant's claim of unfitting PTSD, there are no behavioral health encounters in the EMR.

h. The applicant's mental health was evaluated while he was in the Disability Evaluation System (DES). In the Integrated DES, the VA Disability Benefits Questionnaires (DBQs), previously referred to as VA Compensation and Pension examinations, are the examinations of record. This single set of disability medical examinations are utilized by the Military Departments' MEBs and PEBs in their evaluation processes; and by the Veterans Benefits Administration's Disability Rating Activity Sites for their determination of the of disability ratings used by the Military Department's PEBs. Other documentation is considered (e.g., AHLTA and civilian encounters) in the MEB's evaluation or the Soldier's medical condition(s), and discrepancies must be explained in the MEB narrative summary. This and other documentation, e.g., evaluation reports and commander's evaluations, are utilized throughout the process to aid in the adjudication of each individual case.

i. He claimed “Post traumatic stress disorder (personal trauma)” on his VA/DOD Joint Disability Evaluation Board Claim. The applicant's Initial Post Traumatic Stress

Disorders (PTSD) Disability Benefits Questionnaire was completed on 8 March 2017. Following the evaluation, the psychologist stated "Veteran does not have a mental disorder that conforms with DSM-5 criteria:"

"The veteran reports serving in the Army. The veteran reports serving the Army Reserve. He indicates he served a total of 5+ year(s). The period(s) of service were from: 07.25.2011 to present. He reports he did not participate in combat activity.

Claimant reported being assaulted but current mental health symptoms do not meet clinical significance for diagnosis of depression, anxiety or PTSD at this time. Based upon the examination, the claimant does not need to seek any follow up treatment at this time. The claimant does not appear to pose any threat of danger or injury to self or others.

The claimant did not meet any criteria in Criteria B for a diagnosis of PTSD. The claimant did not meet any criteria in Criteria C for a diagnosis of PTSD. The claimant did not meet any criteria in Criteria D for a diagnosis of PTSD. The claimant did not meet any criteria in Criteria E for a diagnosis of PTSD. The claimant did not meet Criteria F for a diagnosis of PTSD. The claimant did not meet Criteria G for a diagnosis of PTSD. The claimant did not meet Criteria H for a diagnosis of PTSD.

Evidence reviewed in support of the diagnosis include: DD214 stated honorable discharge. Evaluation completed by Angela Freeman NP-C dated 08.6.2016 stated "no" nightmares, constantly being on guard or feeling numb and concluded "SM not found to be at risk for MH concerns."

j. His medical evaluation board determined the applicant had three conditions which failed medical retention standards: Degenerative arthritis lumbar spine, Right lower extremity radiculopathy, and Left lower extremity radiculopathy. Five conditions were found to meet medical retention standards. With no diagnosed mental health condition, there was no mental health condition documented on his 4 April 2017 Medical Evaluation Board Proceedings (DA Form 3947). On 16 April 2017, the applicant agreed with the board's findings and recommendation and his case was forwarded to a PEB for adjudication.

k. On 9 June 2017, the applicant's informal PEB found the applicant had three unfitting medical conditions: Degenerative arthritis lumbar spine, Right lower extremity radiculopathy, and Left lower extremity radiculopathy. The applied the Veterans Benefits Administration derived ratings of 40%, 20%, and 20% respectively for a combined military disability rating or 60% (bilateral factor: 20% combined with 20% =

36% plus 3.6 bilateral factor = 39.6% which rounds to 40% 40% combined with 40% = 64% which rounds to 60%).

l. The PEB recommended the applicant be permanently retired for physical disability. On 23 June 2017, after being counseled by his PEB Liaison Officer (PEBLO) on the board's findings and recommendation, the applicant concurred with the board, waived his right to a formal hearing, and declined to request a VA reconsideration of his disability ratings.

m. Following a Mental Disorders (other than PTSD and Eating Disorders) Disability Benefits Questionnaire examination completed on 28 November 2017, the applicant was diagnosed with "Persistent Depressive Disorder With Anxious Distress."

n. There is insufficient probative evidence the applicant had PTSD or other mental health 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.

o. JLV shows the was awarded his initial rating for PTSD on 6 February 2017 and this was increased to 100% effective 8 January 2019. However, the Veterans Benefits Administration (VBA) determines the effective date for a disability that was caused - or made worse - by military service as whichever of these comes later: The date they get the Veteran's claim, or the date of onset for illness or injury (also known as the date your entitlement arose). If they receive the Veteran's claim within one year of the day he or she is released from a period of active service, the effective date can be as early as the day following separation.

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 Agency Medical Advisor that neither an increase in his military disability rating nor referral to the Disability Evaluation System 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 neither an increase in his military disability rating nor referral to the Disability Evaluation System is warranted. The Board determined based on the opine, there is insufficient probative evidence the applicant had PTSD or other mental health condition which would have failed the medical retention standards prior to his discharge.

2. Evidence in the records show the PEB recommended the applicant be permanently retired for physical disability. The Board noted on 23 June 2017, after being counseled by his PEB Liaison Officer (PEBLO) on the board's findings and recommendation, the applicant concurred with the board, waived his right to a formal hearing, and declined to request a VA reconsideration of his disability ratings. Based on this, the Board found correction of his DA Form 199 by adding post-traumatic stress disorder (PTSD) as unfitting resulting in a higher disability rating is without merit. Therefore, the Board denied relief.

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

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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, 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 USAPDA is responsible for administering the Army Disability evaluation System (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 (Disability Evaluation for Retention, Retirement, or Separation).
3. 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 their 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 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 their office, grade, rank, or rating.

d. 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 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.

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

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

b. Unless otherwise stated in this DTM, DOD will follow the existing policies and procedures requirements promulgated in DODI 1332.18 and the Under Secretary of Defense for Personnel and Readiness memoranda. All newly initiated, duty-related physical disability cases from the Departments of the Army, Air Force, and Navy at operating IDES sites will be processed in accordance with this DTM and follow the process described in this DTM unless the Military Department concerned approves the exclusion of the service member due to special circumstances.

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

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

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

5. 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.

6. 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 their lifetime, adjusting the percentage of disability based upon that agency's examinations and findings.

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

//NOTHING FOLLOWS//