

IN THE CASE OF: [REDACTED]

BOARD DATE: 13 December 2024

DOCKET NUMBER: AR20230009251

APPLICANT REQUESTS:

- medical retirement
- a personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record), online application
- DD Form 149 (Application for Correction of Military Record)
- Self-Authored Letter
- DD Form 2648 (Preseparation Counseling Checklist)
- DA Form 2-1 (Personnel Qualification Record)
- Orders 3005-0007 Transition Orders
- DD Forms 214 (Certificate of Release or Discharge from Active Duty)
- Letters from Department of Veterans Affairs (VA)
- DA Form 5016 (Chronological Statement of Retirement Points)
- Letter from Retired First Sergeant (1SG)
- Medical Documents

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 he was separated with a 20 percent disability rating by the VA but secondary conditions to the primary conditions were not included, at the time of his separation. Also other conditions were not included which caused a medical separation instead of a medical retirement with a over 30 percent disability rating, at the time of his separation. He attached documents to show his VA percentages along with a request for review. At the time of his separation he did not know what he had to do and claim. He is requesting disability retirement instead of disability separation. He feels the assignment ratings are incorrect for his cervical lumbar spondylosis because secondary

conditions were omitted, at the time of his separation. He served his country with pride and honor and was unable to finish his career because he was medically separated with only 20 percent disability. Only two conditions were listed, omitting all the secondary conditions associated with the two primary conditions and other primaries like post-traumatic stress disorder (PTSD), sleep apnea, migraines, and other conditions he mentions in his letter were not considered.

3. The applicant provides the following documents:

a. Self-authored letter to the Army Physical Disability Review Board (APDRB), 9 June 2023, states:

(1) He would like to request a review to his APDRB regarding his VA rating decision, 23 January 2013. He feels the assignment ratings are incorrect for his cervical and lumbar spondylosis.

(2) For cervical spondylosis and degenerative disc disease, the physical evaluation board (PEB) rated it at 10 percent omitting the secondary conditions to the primary disability. The secondary conditions are radiculopathy right upper extremity rated by the VA at 40 percent and radiculopathy left upper extremity rated by the VA at 30 percent.

(3) For the lumbar degenerative disc disease and spondylosis, the PEB rated it at 10 percent omitting the secondary conditions to the primary disability. The secondary conditions are radiculopathy right lower extremity static nerve rated by the VA at 20 percent and radiculopathy left lower extremity static nerve rated by the VA at 20 percent.

(4) His current VA rating is 100 percent, permanent, all service connected. His other conditions are PTSD, sleep apnea, and migraines caused while he was on active duty. Not all of his disabilities were added to the PEB, at the time of his separation. He has attached all of his medical records with the ratings he was given by the VA as well as letters that confirm all the medical conditions he had before his separation.

(5) He would greatly appreciate a full review of these conditions and all of his other conditions to ensure his ratings are correct and that disability retirement is granted instead of a disability separation.

b. An undated letter from the VA, stated the letter provides an early estimate of his VA benefits. The medical description of unfitting disabilities is lumbar degenerative disc disease and spondylosis at 10 percent and cervical spondylosis and degenerative disc disease at 10 percent. The entire letter is available for the Board's review.

c. Letter from the VA, 24 May 2017, shows, in pertinent part, he received service-connected disability for PTSD at 50 percent, effective 24 January 2017 and migraine headaches at 10 percent, effective 24 January 2017. His combined rating changed from 20 percent to 60 percent, effective 24 January 2017. The entire letter is available for the Board's review.

d. Letter from the VA, 23 July 2020, shows the applicant has the following service connected disabilities:

- Radiculopathy, right upper extremity, 40 percent, effective 16 December 2019
- Radiculopathy, right lower extremity, sciatic nerve, 20 percent, effective 16 December 2019
- Radiculopathy, left lower extremity, sciatic nerve, 20 percent, effective 16 December 2019
- Radiculopathy, left upper extremity, 30 percent, effective 16 December 2019

e. Letter from the VA, 30 September 2021, shows he received service connected disability for obstructive sleep apnea at 50 percent, effective 20 November 2017. His combined rating was 100 percent, effective 16 December 2019.

f. Letter from Retired 1SG [REDACTED] 19 May 2023 states he was the 1SG during Operation Joint Guard, Expeditionary Mission from February through October 1997. He certifies, while deployed, the applicant went on a mission outside the Forward Operating Base (FOB). While outside the FOB, he watched children playing around land mines. He went to stop the children, but the land mines went off in front of him causing him to fall on his back from the blast. The explosion caused many casualties and left many children dead. He was ordered to help with the collection of bodies and remains.

g. Medical documents, which are available for the Board's review and will be reviewed by the Army Review Boards Agency (ARBA) medical section who will provide an advisory.

4. The applicant's service record contains the following documents:

a. DD Form 4 (Enlistment/Reenlistment Document Armed Forces of the United States) shows he enlisted in the Regular Army through the U.S. Army Reserve (USAR) delayed entry program (DEP) on 11 January 1996.

b. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was enlisted in the Regular Army from 30 May 1996 through 5 March 2000. He had completed 3 years, 9 months, and 6 days of active service. He was honorably transferred to the USAR Control Group (Reinforcement). He was in the DEP from

11 January 1996 through 29 May 1996. He had service in Bosnia from 18 March 1997 through 18 October 1997. He was released from active duty to attend school.

c. Orders D-01-401273, published by U.S. Army Human Resources Command, 14 January 2004 honorably discharged him from the USAR Control Group (Reinforcement) effective 14 January 2004.

d. DD Form 4 (Enlistment/Reenlistment Document Armed Forces of the United States) shows he enlisted in the USAR on 4 June 2007.

e. DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was ordered to active duty, as a member of the USAR, on 3 November 2007 and was honorably transferred to USAR Control Group (Reinforcement) on 1 November 2008. He had completed 11 months and 29 days of active duty service with 3 years, 9 months, and 6 days of prior active duty service and 4 months and 19 days of prior inactive duty service. He was released from active duty for completion of required active service.

f. DD Form 4 (Enlistment/Reenlistment Document Armed Forces of the United States) shows he enlisted in the Regular Army on 23 December 2008.

g. Orders 313-0005, published by U.S. Army Support Activity, Joint Base Langley-Eustis, 8 November 2012, show the applicant would be discharged from the Army effective 22 January 2013. He had a disability percentage of 20 percent. He was authorized disability severance pay. His disability was incurred in the line of duty but was not as a direct result of armed conflict or caused by an instrumentality of war.

h. DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was honorably discharged on 22 January 2013. He had completed 4 years and 1 month of active service with 4 years, 9 months, and 5 days or prior active duty service and 3 years, 10 months, and 5 days of prior inactive duty service. He received disability severance pay in the amount of \$61,862.40. His narrative reason for separation was disability, severance pay, non-combat (enhanced).

i. The applicant's service record is void of documentation showing he received a medical evaluation board or PEB.

5. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. 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.

6. Based on the applicant's documentation showing he suffered from service-connected disabilities and his discharge for disability, the ARBA Medical Section provided a medical review for the Board's consideration.

7. 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 additional medical conditions be determined to have been unfitting for continue service prior to his separation; an 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:

"I was separated with a 20% disability rate by VA but Secondary conditions to the primary were not included at the time of separation. Also, other conditions were not included causing a Medical separation instead of a retirement with over 30% rating at the time of separation. Documents attach will show my VA percent along with a review request letter to APDRB."

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 23 December 2008 and was separated with \$61,862.40 of disability severance pay on 22 January 2013 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 23 July 2012, the applicant was referred to the IDES for cervical and lumbar spine spondylosis (degenerative changes). He claimed 2 additional conditions on a VA Form 21-0819: Hypertension and testicular hydrocoele. A medical evaluation board (MEB) determined the referred conditions failed the medical retention standards of AR 40-501, Standards of Medical Fitness. They determined the two claimed medical conditions met medical retention standards. On 8 August 2012, the applicant agreed with the board's findings and recommendation and his case was forwarded to a physical evaluation board (PEB) for adjudication.

g. The applicant's informal PEB found his "Lumbar degenerative disc disease and spondylosis" and "Cervical spondylosis and degenerative disc disease" to be unfitting for continued service. They determined the remaining two medical conditions were not unfitting for continued military service. The PEB applied the VBA derived ratings of 10% and 10% respectively for a combined military disability rating of 20%. Because the applicant's combined military disability rating was less than 30%, the PEB recommended the applicant be separated with disability severance pay. On 3 October 2012, after being counseled on the PEB's findings by his PEB liaison, the applicant concurred with the Board, waived his right to demand a formal hearing, and declined to request a VA reconsideration of his disability ratings.

h. The only mental health encounter in the EMR is dated 25 January 2011. It is listed as a "Mental Eva." after which the provider opined "No psychiatric diagnosis or condition on axis 1."

i. 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.

j. Submitted medical documentation is non-contemporaneous VA medical records from 2013-2023.

k. 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.

l. JLV shows he has been awarded multiple VA service-connected disability ratings, including ratings for PTSD (effective 24 January 2017), sleep apnea (effective 20 November 2017), paralysis of bilateral radicular nerve groups (effective 16 December 2019), and paralysis of bilateral sciatic nerves (effective 16 December 2019). The ratings for his cervical and lumbar spine conditions remain at 10% effective 23 January 2013.

m. The DES only compensates an individual for service incurred medical condition(s) which have been determined to disqualify him or her from further military service. The DES has neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions which were incurred or permanently aggravated during their military service; or which did not cause or contribute to the termination of their military career. These roles and authorities are granted by Congress to the Department of Veterans Affairs and executed under a different set of laws.

n. 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 review based on law, policy, and regulation. Upon review of the applicant's petition, available military records, and the medical review, the Board concurred with the advising official finding that the applicant's Department of Veterans Affairs rating determinations are based on the roles and authorities granted by Congress to the Department of Veterans Affairs and executed under a different set of laws. Based on this, the Board determined a referral of his case back to the Disability Evaluation System (DES) is not warranted.

2. 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:

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.

3/25/2025

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, 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. Army Regulation 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that 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.

3. Title 10, USC, 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 and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with Department of Defense Directive 1332.18 and Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation).

4. Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation) 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. Soldiers are referred to the disability system when they no longer meet medical retention standards in accordance with AR 40-501, chapter 3, as evidenced in a medical evaluation board (MEB); when they receive a permanent physical profile rating of "3" or "4" in any functional capacity factor and are referred by a Military Occupational Specialty Medical Retention Board; 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 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. Service members 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 and length of military service. Individuals who are "separated" receive a onetime 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 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 medical impairment prevents reasonable performance of the duties required of the Soldier's office, grade, rank, or rating.

5. Title 10, USC, 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, USC, 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.

6. Army Regulation 40-501 (Standards of Medical Fitness), provides policies and procedures on medical fitness standards for induction, enlistment, appointment, and retention. Paragraph 3-33 (anxiety, somatoform, or dissociative disorders) states the causes for referral to an MEB are as follows:

- persistence or recurrence of symptoms sufficient to require extended or recurrent hospitalization; or
- persistence or recurrence of symptoms necessitating limitations of duty or duty in protected environment; or
- persistence or recurrence of symptoms resulting in interference with effective military performance

7. Title 38, USC, sections 1110 and 1131, permits the VA to award compensation for disabilities that were incurred in or aggravated by active military service. However, an award of a higher VA rating does not establish error or injustice on the part of the Army. The Army rates only conditions determined to be physically unfitting at the time of discharge which disqualify the Soldier from further military service. The VA does not have the authority or responsibility for determining physical fitness for military service. The VA awards disability ratings to veterans for service-connected conditions, including

those conditions detected after discharge, to compensate the individual for loss of civilian employability. These two government agencies operate under different policies. 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.

8. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records (BCM/NRs) regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. BCM/NRs may grant clemency regardless of the type of court-martial. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to other corrections, including changes in a discharge, which may be warranted based on equity or relief from injustice.

a. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. In determining whether to grant relief on the basis of equity, injustice, or clemency grounds, BCM/NRs shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment.

b. Changes to the narrative reason for discharge and/or an upgraded character of service granted solely on equity, injustice, or clemency grounds normally should not result in separation pay, retroactive promotions, and payment of past medical expenses or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded service characterization.

9. 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//