

IN THE CASE OF: ██████████

BOARD DATE: 10 April 2024

DOCKET NUMBER: AR20230009607

APPLICANT REQUESTS: reconsideration of his previous request for correction of his narrative reason for discharge from "disability, severance pay" to "disability, retirement."

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

- Appeals letter, 8 May 2023
- Department of Veterans Affairs (VA) disability rating
- Combat Related Special Compensation (CRSC) reconsideration request form, 8 May 2023

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20210013165 on 8 August 2022.
2. The applicant states he is appealing his denied decision by the Board. He was separated by the Army due to his knee condition which was rated at 20% but has since been upgraded to 40% immediately after being evaluated for VA disability. This caused him to suffer secondary disabilities with his left knee at 40% as well as 60% to his back. He was not diagnosed with post-traumatic stress disorder (PTSD) at the time of his separation, which he believes caused him to agree to the decision to be medically separated. His packet included evidence of his PTSD diagnosis, left knee and back injury, and disabilities he was suffering at the time of his separation.
3. The applicant enlisted in the Regular Army on 9 June 1982. He subsequently reenlisted on 30 April 1984, and on 15 December 1986. His final reenlistment was on 14 July 1992. He was awarded the military occupational specialty (MOS) 94B (Food Service Specialist). The highest rank he attained was sergeant (SGT)/E-5.
4. The applicant was approved a permanent change of profile for his anterior cruciate ligament (ACL) insufficiency right knee with arthritis, he underwent a MOS/Medical Retention Board (MMRB) on 8 April 1992. The Board recommended he be retained in

his MOS and the MMRB Convening Authority directed retention on active duty in his MOS.

5. The complete facts and findings of his physical disability processing are not available for review; specifically, his medical evaluation board (MEB) and physical evaluation board (PEB) proceedings.

6. His record contains a message dated, 15 October 1993, and Orders 292-00251, showing the applicant was to be discharged under the provisions of Army Regulation (AR) 635-40 (Physical Evaluation for Retention, Retirement, or Separation), paragraph 4-24b(3), in the rank of SGT with a disability rating of 20%, and additionally adding his disability did not result from a combat-related injury.

7. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was honorably discharged on 1 November 1993, in the rank/grade of SGT/E-5, under the provisions of AR 635-40, paragraph 4-24b(3), by reason of disability, severance pay. He was assigned separation code JFL, and reentry code 3. He was credited with 11 years, 4 months, and 23 days of net active service this period. He was awarded or authorized the following decorations, medals, badges, citations and campaign ribbons:

- Kuwait Liberation Medal
- Army Achievement Medal (2nd oak leaf cluster)
- Southwest Asia Service Medal with 3 bronze stars
- Army Good Conduct Medal (2nd award)
- National Defense Service Medal
- Noncommissioned Officer Professional Development Ribbon
- Army Service Ribbon
- Overseas Service Ribbon with numeral 2
- Marksman Badge Rifle, M-16

8. The applicant provides a printout of his rated disabilities, showing his combined disability rating of 100%. Specially, his disability rating was highlighted to show his PTSD diagnosis. He additionally provides his CRSC Reconsideration Request Form, dated 8 May 2023, stating the PTSD requires psychotropic medication and outpatient treatment.

9. The ABCMR reviewed the applicant's request for correction of his narrative reason. The Board determined the evidence presented did not demonstrate the existence of a probable error or injustice, and the overall merits of the case were insufficient as a basis for correction.

10. AR 635-40 governs the evaluation for physical fitness of Soldiers who may be unfit to perform their military duties because of physical disability. Paragraph 4-24b(3) provides separation for physical disability without severance pay.

11. In reaching its determination, the Board can consider the applicant's petition, service record, and statements in light of the published guidance on equity, injustice, or clemency.

12. 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 (AHLTA), 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 reconsideration of their denial of his request for an increase in his military disability rating with a subsequent change in his disability discharge disposition from separated with severance pay to permanent retirement for physical disability. He states on this application:

“At the time of my separation by the Army due to my knee condition which was rated at 20% at the time but was upgraded to 40% immediately after being evaluated for veteran's disability which also caused me to suffer secondary disabilities with my left knee at 40% as well as 60% with my back.

Also, the fact that I wasn't diagnosed with PTSD at the time of my separation which I believe caused me to agree to the decision to be medically separated. I have enclosed evidence of my PTSD diagnosis, left knee and back injury disabilities that I was suffering at the time of separation.”

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. The applicant's DD 214 for the period of service under consideration shows he entered the regular Army on 9 June 1982 and was discharged with \$32,623.80 of disability severance pay on 1 November 2003 under provisions in paragraph 4-24b(3) of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (1 September 1990).

d. This request was denied by the ABCMR on 8 August 2022 (AR20210013165). Rather than repeat their findings here, the board is referred to the record of proceedings

[REDACTED]

g. The rating for his right knee condition was 30% effective 2 November 1993. However, the effective date in this circumstance is very likely to be the day he filed the claim and not the day of the examination upon which the rating was based. The effective date for a VA claim is whichever comes later: The date they receive the claim or the date of injury or illness. Since the applicant's injury was incurred in-service, this date was likely the date of the claim. The VA will back date the effective date of a rating up to 365 days, up to the day after the veteran left service.

h. In addition, the awarding of a higher VA rating does not establish prior error or injustice. A disability rating is intended to compensate an individual for interruption of a military career after it has been determined that the individual suffers from an impairment that disqualifies him or her from further military service. The rating derived from the VA Schedule for Rating Disabilities reflects the disability at the point in time the VA exams were completed. The DES has neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions incurred during or permanently aggravated by their military service. These roles and authorities are granted by Congress to the Department of Veterans Affairs and executed under a different set of laws.

i. It remains the opinion of the ARBA Medical Advisor that neither an increase in his military disability nor a referral the DES is warranted.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation. Upon review of the applicant's petition, available military records, the Board concurred with the advising official finding neither an increase in his military disability nor a referral the DES is warranted. The Board determined there is insufficient evidence to support the applicant's contentions based on the preponderance of evidence and the advising opine warranting reconsideration of his previous request for correction of his narrative reason for discharge from "disability, severance pay" to "disability, retirement." The Board agreed reversal of the previous Board determination is without merit and denied relief.

2. 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.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
█	█	█	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board found 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 to amend the decision of the ABCMR set forth in Docket Number AR20210013165 on 8 August 2022.

4/11/2024

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CHAIRPERSON
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I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

REFERENCES:

1. Section 1556 of Title 10, U.S. Code (USC), requires the Secretary of the Army to ensure that an applicant seeking corrective action by 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.

2. 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, under the operational control of the Commander, U.S. Army Human Resources Command (HRC), is responsible for administering the Physical Disability Evaluation System (PDES) 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.

a. The objectives of the system are to:

- maintain an effective and fit military organization with maximum use of available manpower
- provide benefits for eligible Soldiers whose military service is terminated because of service-connected disability
- provide prompt disability processing while ensuring that the rights and interests of the government and the Soldier are protected

b. Soldiers are referred to the PDES:

- 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
- receive a permanent medical profile, P3 or P4, and are referred by an MOS Medical Retention Board
- are command-referred for a fitness-for-duty medical examination
- are referred by the Commander, Human Resources Command

c. The PDES assessment process involves two distinct stages: the MEB and the 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 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 one-time severance payment, while veterans who retire based upon disability receive monthly military retirement payments and have access to all other benefits afforded to military retirees.

d. The mere presence of a medical impairment does not in and of itself justify a finding of unfitness. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier may reasonably be expected to perform because of his or her office, grade, rank, or rating. Reasonable performance of the preponderance of duties will invariably result in a finding of fitness for continued duty. A Soldier is physically unfit when a medical impairment prevents reasonable performance of the duties required of the Soldier's office, grade, rank, or rating.

3. AR 635-40 establishes the Army disability 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 or her office, grade, rank, or rating. It provides for medical evaluation boards, which are convened to document a Soldier's medical status and duty limitations insofar as duty is affected by the Soldier's status. A decision is made as to the Soldier's medical qualifications for retention based on the criteria in Army Regulation 40-501 (Standards of Medical Fitness). Paragraph 4-24b (3) provides that the final disposition, was based upon the final decision of the U. S. Army Physical Disability Agency or the Army Physical Disability Appeal Board. Personnel Command – HRC would issue retirement orders or other disposition instructions as follows: separation for physical disability with severance pay (Title 10 USC 1203 or 1206).

4. On 25 August 2017, the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to Discharge Review Boards (DRB) and Boards for Correction of Military/Naval Records (BCM/NR) when considering requests by Veterans for modification of their discharges due in whole or in part to: mental health conditions, including PTSD; traumatic brain injury; sexual assault; or sexual harassment. Standards for review should rightly consider the unique nature of these cases and afford each veteran a reasonable opportunity for relief even if the sexual assault or sexual harassment was unreported, or

the mental health condition was not diagnosed until years later. Boards are to give liberal consideration to Veterans petitioning for discharge relief when the application for relief is based in whole or in part on those conditions or experiences.

5. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military DRBs and 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, Boards 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.

//NOTHING FOLLOWS//