

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 26 April 2024

DOCKET NUMBER: AR20230010554

APPLICANT REQUESTS:

- physical disability retirement in lieu of removal from the Temporary Disability Retired List (TDRL) retroactive to 14 May 1991
- personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Standard Form 93 (Report of Medical History), 18 January 1989
- Standard Form 88 (Report of Medical Examination), 18 January 1989
- Medical Evaluation Board (MEB) Narrative Summary (NARSUM), 2 February 1989
- Air Force (AF) Form 618 (Medical Board Report), 16 February 1989
- Fort Stewart, U.S. Army Medical Department Activity (MEDDAC) memorandum, 23 March 1989
- DA Form 199 (Physical Evaluation Board (PEB) Proceedings, 13 April 1989
- DD Form 214 (Certificate of Release or Discharge from Active Duty) covering the period ending 28 June 1989
- DA Form 664 (Service Member's Statement Concerning Compensation from the Veterans Administration (VA), 28 June 1989
- Defense Finance and Accounting Service (DFAS)-Indianapolis (IN) Form 20 160B (VA Disability Compensation Benefits and/or Waiver of Retired Pay), 19 December 1992
- James A. Haley Veterans' Hospital, Podiatry Section Chief letter, 16 June 2023

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:

a. He is asking for his military record to be corrected to grant him permanent disability retirement dating back to 14 May 1991. His Medical Board Report, completed on 6 February 1989, by Dr. M____, included a NARSUM that provided specific medical evidence that he had suffered permanent restrictions, which would make him not qualified for worldwide assignment, and subsequently resulted in his honorable discharge from the military for medical reasons on 28 June 1989. Instead of being placed on the Permanent Disability Retired List (PDRL) after Dr. M____'s findings, he was placed on the TDRL.

b. On 14 May 1991, he had a mandatory reevaluation examination performed. This reevaluation was exceptionally brief, where he was asked only to move his ankle and wrist. He never had to perform any other physical tests, which is evidenced by the lack of medical documentation in the VA records for this visit. The result of this exam is that he was arbitrarily found to be fit for duty, with no basis for the finding, and stripped of his military disability retirement. However, the doctor who performed this exam still found him 30 percent disabled. Per Title 10, U.S. Code, Chapter 61, he should have been placed on the PDRL based on his continued 30 percent disability rating. He was certainly not fit for duty. What happened to him on this reevaluation visit in May 1991 was unjust and riddled with error.

c. Throughout the years, he has suffered from significant ankle stiffness and pain. Recently, that pain has become so severe that he sought help at the VA Hospital in Tampa, FL. He had an appointment with Dr. B____ on 30 May 2023. During this appointment, he learned that his ankle had always been permanently disabled due to the accident in 1987. Dr. B____ has highly recommended he undergo a full ankle replacement surgery and has written a letter included in this request.

3. The applicant enlisted in the Regular Army on 1 October 1985.

4. A physical profile is used to classify a Soldier's physical disabilities in terms of six factors or body systems, as follows: "P" (Physical capacity or stamina), "U" (Upper extremities), "L" (Lower extremities), "H" (Hearing), "E" (Eyes), and "S" (Psychiatric) and is abbreviated as PULHES. Each factor has a numerical designation: 1 indicates a high level of fitness, 2 indicates some activity limitations are warranted, 3 reflects significant limitations, and 4 reflects one or more medical conditions of such a severity that performance of military duties must be drastically limited. Physical profile ratings can be either permanent (P) or temporary (T).

5. A Standard Form 93, dated 18 January 1989, shows the applicant provided his medical history for the purpose of an MEB. He indicated he had swollen or painful joints, frequent or severe headaches, broken bones, and foot trouble.

6. A Standard Form 88 shows the applicant underwent medical examination on 18 January 1989, for the purpose of an MEB. The summary of defects and diagnoses shows fractured left ankle. The recommendations show he was to follow-up with Internal Medicine for headaches and Orthopedics for ankle. The form further shows his qualification for worldwide service was questionable, with the disqualifying defect being his fractured left ankle.

7. An MEB NARSUM, dated 2 February 1989, shows:

a. The applicant was involved in a motor vehicle accident (MVA) in June 1987, where he suffered with an open fracture of his medial malleolus as well as a fracture of his left scaphoid. He was treated with an open reduction/internal fixation of his medial malleolar fracture as well as being placed in a spica cast for his left scaphoid fracture. While his fractures were healing uneventfully, he suffered poor progress in gaining dorsiflexion back in his left ankle. Progress of the range of motion remained poor. Despite extensive physical therapy, the most he could dorsiflex his foot was to 10 degrees of equinus. Being in this constant equinus position made ambulation difficult and running impossible.

b. In January 1988, he was admitted to the hospital for a surgical lysis of adhesions. He underwent release of the tibiotalar and talocalcaneal joint capsules as well as a fractional heel-cord lengthening. He was cased in approximately 12 degrees of dorsiflexion. Approximately 6 weeks postoperatively, he was dorsiflexing approximately to 17 degrees above neutral and plantar flexing 50 degrees. He demonstrated approximately an inch and a half of calf atrophy at the time. He continued with physical therapy and ambulation as tolerated and slowly suffered with a decrease in his ability to dorsiflex his ankle despite extensive physical therapy. By December 1988, he still had pain with prolonged walking and demonstrated an inch of calf atrophy on the left; however, at this point he could only dorsiflex to approximately 8 degrees above neutral and plantar flexion was limited to 30 degrees. Radiographs at that time showed early degenerative changes within his ankles. Reevaluation in late January revealed only 3-5 degrees of dorsiflexion and 30 degrees of plantar flexor.

c. Their best efforts at avoiding equinus contractures in his ankle appear to fail with time. He is again at a point where dorsiflexion of his ankle is extremely limited, making prolonged ambulation uncomfortable and any running or jogging impossible. His pain and fixed limitations of motion interfere with both his work and normal activities of daily living. Because of these injuries and their refractory nature, resolution of his problems is not anticipated. He would have to be precluded from such activities as running or prolonged walking, which would be permanent restrictions and make him not worldwide qualified. Indeed, such profiling has been instituted for more than 1 year already and they do not anticipate a resolution of his problems.

8. A Medical Board Report shows:

a. An MEB convened on 16 February 1989, to consider the following diagnoses:

(1) S/P open fracture, medial malleolus, left with residual chronic pain and arthrofibrosis; date of origin June 1987.

(2) Closed fracture, left carpal scaphoid with residual arthrofibrosis; date of origin June 1987.

b. The MEB recommendation was referral to the PEB. The applicant acknowledged the recommendation and did not submit a letter of exception.

9. A Fort Stewart MEDDAC memorandum, dated 23 March 1989, forwarded the MEB recommendations to the PEB for their consideration, indicating the applicant's functional impairment, prognosis, and determination of unfitting conditions under the provisions of Army Regulation 40-501 (Standards of Medical Fitness), chapter 3.

10. A DA Form 199 shows:

a. A PEB convened on 13 April 1989, where the applicant was found physically unfit with a recommended combined disability rating of 30 percent and that his disposition be placement on the TDRL with reexamination during October 1990.

b. The applicant's unfitting conditions are:

(1) Loss of motion in left ankle, s/p open reduction with internal fixation of fractured medial malleolus and ankle arthroplasty; dorsiflexion 5 degrees, plantar flexion 30 degrees, wit constant pain; 20 percent.

(2) Left wrist pain with loss of grip strength, s/p fracture of carpal navicular; dorsiflexes 10 degrees, plantar flexes 20 degrees, ulnoradial deviation 20 degrees; 10 percent.

c. The applicant had activity limitations imposed by a permanent profile which preclude adequate performance of the normal duties associated with his office, grade, rank, or rating. Accordingly, he was found unfit for further service; however, his condition had not stabilized and a period of time on the TDRL is considered appropriate.

d. The portion of the form reflective of the applicant's election and signature is illegible.

11. U.S. Total Army Personnel Command Orders D109-15, dated 7 June 1989, relieved the applicant from assignment and duty because of physical disability incurred while entitled to basic pay and under conditions which permit his placement on the TDRL effective 28 June 1989, with a disability rating of 30 percent.

12. The applicant's DD Form 214 shows he was retired on 28 June 1989, under the provisions of Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation), due to physical disability- temporary. He was credited with 3 years, 8 months, and 28 days of net active service.

13. The applicant provided a DA Form 664, dated 28 June 1989, which reflects he had filed an application for compensation with the VA, with appropriate supporting documentation.

14. A Physical Disability Branch memorandum, dated 29 June 1989, advised the applicant he was placed on the TDRL effective 29 June 1989 and was required by law to undergo periodic medical examinations. His next examination was scheduled for October 1990.

15. A TDRL NARSUM, dated 3 January 1991 shows:

a. The applicant was previously evaluated approximately 2 years ago following an injury to his left medial malleolus and left carpal navicular as a result of a MVA in June 1987, necessitating closed treatment of the carpal navicular fracture and open reduction, internal fixation of an open fracture to the left medial malleolus. His fractures healed uneventfully but, he was left with a lack of motion to his foot. He subsequently underwent surgical release of the tibiotalar and talocalcaneal joints as well as a heel cord lengthening allowing greater dorsiflexion. Despite physical therapy, he progressively deteriorated, and he went through a medical board and was retired. Since retirement, he has gone to work as a computer technician and states he still has atrophy and discomfort in his left calf.

b. On examination of the left wrist, he actively exhibits approximately 50 degrees of dorsiflexion and about 60 degrees of palmar flexion. Radial and ulnar deviation appear to be normal. Passively full motion is noted. No tenderness is noted about the area of the snuff box or directly over the carpal navicular bone.

c. On evaluation of the lower extremity, there is a healed scar noted over the medial malleolus. The patient's dorsiflexion is limited to approximately 5 to 6 degrees and plantar flexion is limited to about 20 degrees. No subtalar loss of motion is noted. There is some tenderness noted over the anterior aspect of the ankle joint with no swelling noted. There is atrophy of approximately 2.5 centimeters (cm) about 10 cm distal to the inferior pole of the patella.

d. X-rays obtained today reveal a healed carpal navicular fracture. No evidence of any degenerative changes is noted at the distal radius. X-rays of the left ankle reveal an intact ankle mortis with some calcification of the deltoid ligament and capsule, but a smooth appearing ankle joint with no evidence of any marked degenerative changes.

e. The impression shows:

- s/p left carpal navicular fracture
- s/p fracture, left medial malleolus

f. On general observation, the applicant did not appear in any undue distress or discomfort, although he did complain of pain. The radiographic findings also do not exhibit any more changes that would preclude him from returning to active duty. The examiner was somewhat surprised at the amount of atrophy to the calf; one would expect, even with the lack of complete dorsiflexion, a return to the preinjury status to the calf musculature.

g. There does not appear to be any marked interval change over the previous board. The examiner would recommend, however, that the patient be returned to active duty if he were able to avoid running activities. If that is unacceptable, then he needs to be retained in the current status and be re-evaluated in the future.

16. A Fort Stewart MEDDAC memorandum, dated 7 February 1991, provided the applicant with a copy of the NARSUM from his recent physical examination and he was advised to complete the endorsement portion on the bottom of the memorandum and return it. If he did not agree with the medical report, he was to include a statement telling why he disagreed. The applicant signed the memorandum on 26 February 1991, indicating he did not concur and attached a rebuttal statement.

17. The applicant's undated rebuttal statement to the Fort Stewart MEDDAC, shows:

a. He was examined on 3 January 1991 by an Army National Guard (ARNG) doctor, as a part of his TDRL re-evaluation. He took less than 5 minutes to examine him, checking for range of motion responses in his wrist and ankle and neglected to ask about any pain or distress. When he did speak of the pain and discomfort he experienced, he replied his wrist was in worse shape than his and if he cant deal with his pain, he can too.

b. The doctor stated he had stopped therapy, but he has been involved in an extensive therapy routine in an attempt to regain the range of motion and size to his left calf, left wrist and forearm. The doctor checked the size of my calf by comparing it with his hands to the size of his other calf, neglecting to use a tape measure of any other

type of measuring device. He does not feel he was given a thorough exam and does not concur with the findings of the exam.

18. A Fort Stewart MEDDAC memorandum to the PEB President, dated 15 March 1991, shows the applicant's rebuttal was reviewed, it contains no new medical information, and has been forwarded to the PEB for processing.

19. A second DA Form 199, shows:

a. A PEB convened on 20 March 1991, where the applicant was found physically fit with no recommended combined rating and that his disposition be returned to duty as fit.

b. The applicant had been placed on the TDRL on 29 June 1989 for disabilities with a combined rating of 30 percent. Current evaluation indicated he had recovered from the conditions for which he was placed on the TDRL. Therefore, the PEB found him fit for duty.

c. On 8 April 1991, the applicant signed the form indicating he had been advised of the findings and recommendations of the PEB and did not concur and demanded a formal hearing with personal appearance.

20. The applicant's undated rebuttal to the PEB mirrors in pertinent part his rebuttal to the Fort Stewart MEDDAC, addressed above. He believed his wrist was recovering well, but his ankle was not and was only getting worse. He was previously examined in the MacDill Air Force Base Orthopedic Clinic, where the orthopedist stated if he had been doing his TDRL re-evaluation, he would recommend permanent retirement due to his ankle disabilities.

21. A memorandum from the PEB Alternate President, dated 23 April 1991, informed the applicant the PEB reviewed his rebuttal letter in which he felt he received a less than thorough medical evaluation. He was advised this board must consider the evaluation as valid unless there is evidence to the contrary. Based upon the evidence at hand, the board felt the applicant was fit for duty. Since he elected a formal board, his formal board will be held as scheduled on 22 May 1991.

22. A memorandum for record from the applicant's legal counsel, dated 3 May 1991, shows after having conferred with his legal counsel, the applicant wished to accept the 20 March 1991 informal reconsideration of his PEB findings of physical fitness and withdrew his request for a formal hearing.

23. U.S. Total Army Personnel Command Orders D91-31, dated 13 May 1991, show the applicant was found fit for duty and was removed from the TDRL effective 13 May 1991.

24. A U.S. Total Army Personnel Command memorandum for the Commander, U.S. Army 2nd Recruiting Brigade memorandum, dated 13 May 1991, shows the applicant was removed from the TDRL and effective his removal date will be afforded the opportunity to reenlist in the Regular Army. It further shows the applicant had a Reserve obligation and if he declined reenlistment, would be placed in the appropriate Reserve category until completion of his Reserve obligation. The applicant's corresponding election relative to reenlistment form is not completed or signed.

25. The applicant provided a DFAS-IN Form 20-160B, dated 19 December 1992, which shows the was removed from the TDRL effective 14 May 1992.

26. U.S. Army Reserve Personnel Center Orders D-09-382246, dated 28 September 1993 honorably discharged the applicant from the U.S. Army Reserve Control Group (Ready Reserve) effective 28 September 1993.

27. The applicant provided a letter from the Podiatry Section Chief, James A. Haley Veterans' Hospital, dated 16 June 2023, which shows:

a. The applicant is an active patient of his for his chronic left ankle and foot deformity. He is a double board-certified foot and ankle surgeon with over 30 years of VA experience, qualified to render an expert opinion.

b. It is clear from the orthopedic surgeon's 1987 medical evaluation report that the applicant had a severe and permanent equinus deformity with 12 degrees of equinus. He did not feel any further surgical intervention was going to improve his condition.

c. He recently examined the applicant and can confirm he still has a severe equinus deformity with significant atrophy of the calf muscle as compared to the right lower extremity. He has pain with range of motion and palpation to the left ankle. He continues to have a fixed equinus deformity and is locked at approximately 10 to 12 degrees of plantarflexion. He recommended a surgical option of a total ankle replacement with complete release of his gastric and/or Achilles tendon on the lower extremity.

d. It is his expert opinion that the applicant's current condition and deformity are directly related to his injury sustained in 1987 and it is clear from the orthopedic surgeon's medical evaluation that this was a permanent injury. This injury was severe and permanent and has led to significant functional loss to his left lower extremity. In his opinion, the applicant should have been discharged with a permanent medical disability and he respectfully asks the Board to revisit this and reconsider this disability as

permanent and directly related to his active duty military. It is clear from the VA document he reviewed dated 19 December 1992, that the officer who signed this document clearly misled the benefits board by stating he was fit for duty. It is clear and unquestionable that the orthopedic surgeon who operated on him stated this was a permanent disability and he agrees with that assessment 100 percent.

28. 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.

MEDICAL REVIEW:

1. 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:

2. The applicant has applied to the ABCMR requesting reversal of the United States Army Physical Disability Agency's determination he was fit for duty and that he subsequently be permanently retired for physical disability. He states:

My Medical Board Report completed on February 16, 1989, by Dr. M.H. M., included a narrative summary that provided very specific medical evidence that I had suffered "permanent" restrictions which would make me "not worldwide qualified," and subsequently resulted in my Honorable discharge (for medical reasons) from the military on June 28, 1989. Instead of me being granted PDRL after Dr. Moriarty's findings, however, I was placed on TDRL.

On May 14, 1991, I had a mandatory re-evaluation exam performed. This re-evaluation was exceptionally brief where I was asked to move my ankle and wrist. I never had to perform any other physical tests, which is evidenced by the lack of medical documentation in the VA records for this visit. The result of this exam was that I was arbitrarily found to be "fit for duty," with no basis for the finding, and stripped of my disability military retirement.

The doctor who performed this exam, however, still found me to be 30% disabled. Per Chapter 61 Title 10 U.S. Code, I should have been placed on PDRL based on my 30% continued disability rating. I was certainly not fit for duty.

3. The Record of Proceedings details the applicant's military service and the circumstances of the case. His DD 214 shows the former automatic switch repairman (36L) entered the regular Army on 1 October 1985 and was placed on the Temporary Disability Retirement List on 28 June 1989 under provisions provided in chapter 4 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (13 December 1985). Orders show his temporary military disability rating was 30%. Orders published by the U.S. Total Army Personnel Command on 13 May 1991 state "You have been found fit for duty and, on the date indicated, are removed from the Temporary Disability Retired List. Effective date 13 MAY 1991."
4. His 2 February 1989 medical evaluation board (MEB) narrative summary states he fractured his left ankle and left scaphoid (a wrist bone) in a June 1987 motor vehicle accident. The ankle fracture was treated surgically. The applicant developed an equinus deformity (upward bending motion of the ankle joint was limited) which failed to adequately respond to a combination of conservative and surgical treatment. His scaphoid fracture healed but he continued to have dome pain with heavy gripping and decreased grip strength.
5. These two conditions were found fail medical retention standards and the applicant's case was referred to a PEB for adjudication.
6. On 13 April 1999, his informal physical evaluation board (PEB) determined his "Loss of motion in left ankle" and "Left wrist pain with loss of grip strength" were unfitting for continued service and "your condition has not stabilized and a period of TDRL is appropriate." Using the VA Schedule for Rating Disabilities (VASRD), they derived and applied 20% and 10% disabilities respectively and recommend he be placed on the TDRL with a combined disability rating of 30%.
7. The applicant underwent his TDRL reevaluation examination on 3 January 1991. As appropriate for any TDRL reevaluation, the examiner only evaluated the unstable conditions for which the applicant had been placed on the TDRL. The examining provider noted little change in his conditions and recommended he could be returned to duty:

Since retirement the patient has gone to work as a computer technician at SOCOM [Special Operations Command] at MacDill AFB. He states that he still has atrophy and discomfort in his left calf.

PHYSICAL EXAMINATION: On examination of the left wrist, he actively exhibits approximately 50 degrees of dorsiflexion and about 60 degrees of palmar flexion. Radial and ulnar deviation appear to be normal. Passively, full motion is noted. No tenderness is noted about the area of the snuff box or directly over the carpal navicular bone

On evaluation of the lower extremity there is a healed scar noted over the medial malleolus. The patient's dorsiflexion is limited to approximately 5 to 6 degrees and plantar flexion is limited to about 20 degrees. No subtalar loss of motion is noted. There is some tenderness noted over the anterior aspect of the ankle joint. No swelling is noted. There is atrophy of approximately 2.5 cm about 10 cm distal to the inferior pole of the patella.

X-RAYS: X-rays obtained today reveal a healed carpal navicular fracture. No evidence of any degenerative changes is noted at the distal radius.

X-rays of the left ankle reveal an intact ankle mortis with some calcification of the deltoid ligament and capsule but a very smooth appearing ankle joint with no evidence of any marked degenerative changes.

IMPRESSION: 1 Status post left carpal navicular fracture
2. Status post fracture left medial malleolus.

DISCUSSIONS: ... On the basis of this examination, it appears as if he has adapted very well to nonmilitary life. Throughout the examination there did not appear to be any undue discomfort exhibited by the patient although he did complain of the pain as noted above.

The radiographic findings also do not exhibit any more changes that would preclude this patient from returning to active duty. I am somewhat surprised at the amount of atrophy to the calf. It would appear to me that this patient has either stopped performing his therapy or that the therapy that had been administered previously did not include the use of Nautilus and Cybex machines with emphasis to rebuild the calf muscles.

There does not appear to be any marked interval change over the previous Board provided to this individual. I would recommend, however, that this patient be returned to active duty if he were able to avoid running activities. If that is unacceptable then this patient needs to be retained on the current status and be re-evaluated in the future.

8. The applicant non-concurred with the exam and the examiner, and his statement was reviewed by the Deputy Commander For Clinical Service at Winn Army Community Hospital. He stated:

Patient's rebuttal was reviewed which contains no new medical information and is forwarded to the PEB [physical evaluation board] for processing.

9. At his 20 March 1991, his TDRL re-evaluation PEB determined the applicant was fit for duty:

Current evaluation indicates that you have recovered from the condition for which you were placed on the TDRL. Therefore, the PEB finds you fit for duty.

If you elect to return to active duty you should apply to any Recruiting Office after receiving final disposition Instructions from the US Total Personnel Command.

10. The applicant non-concurred and provided a written rebuttal mostly directed at the inadequacy of the examination. His rebuttal was reviewed, the board officer stated the medical evaluation was valid, and noted his requested formal board was scheduled for 22 May 1991.

11. On 3 May 1991, after receiving legal counsel, the applicant withdrew his request for a formal board and concurred with the informal PEB. From counsel's memorandum submitted to the PEB:

After having conferred with CPT M.M, he wishes to accept the 20 March 1991 informal reconsidered PEB finding of physical fitness.

12. The applicant, having been found fit for duty after his TDRL reevaluation and 20 March 1991 informal physical evaluation board the applicant was removed from the TDRL afforded the opportunity to return to active duty.

13. In his application, the applicant opined he should have been found unfit because "restrictions which would make me 'not worldwide qualified.'" During his period of Service, worldwide deployability was not a requirement for fitness, and many Soldiers who were not deployable were found fit by PEBs and served successful careers. The fitness requirement for worldwide deployability was not added to Army Policy until 2016 (Army Directive 2016-07 – Redesign of Personnel Readiness and Medical Deployability. 1 March 2016).

14. While JLV shows the applicant to still have a 20% rating for limited motion of his left ankle and 10% for limited motion of his left wrist, VA ratings per se do not make a Soldier unfit for continued service.

15. Paragraph 2-1 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (13 December 1985) states:

The mere presence of an impairment does not, of itself, justify a finding of unfitness because of physical disability. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the member reasonably may be expected to perform because of his or her office, grade, rank, or rating, given due consideration to his or her availability for worldwide deployment under field conditions.

16. It is the opinion of the ARBA Medical Advisor that neither the granting of a permanent retirement for physical disability nor a referral of his case to the DES for another reevaluation is warranted.

BOARD DISCUSSION:

1. The applicant's contentions, the military record, and regulatory guidance were carefully considered. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted.

2. The applicant's request for a personal appearance hearing was carefully considered. However, in this case, the evidence of record and independent evidence provided by the applicant 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.

3. The Board concurs with the ARBA medical advisory in this case; neither the granting of a permanent retirement for physical disability nor a referral of his case to the DES for another reevaluation is warranted.

a. The mere presence of an impairment does not, of itself, justify a finding of unfitness for military service because of physical disability.

b. The Army and the VA operate under a separate rules and laws. A disability rating by the VA does not necessarily make a Soldier unfit for continued military duty.

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.

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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. 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 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. 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. The Temporary Disability Retired List (TDRL) is used in the nature of a “pending list.” It provides a safeguard for the Government against permanently retiring a Soldier who can later fully recover, or nearly recover, from the disability causing them to be unfit. Conversely, the TDRL safeguards the Soldier from being permanently retired with a condition that may reasonably be expected to develop into a more serious permanent disability.

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

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

g. A final determination of the case of each Soldier on the TDRL will be made at the latest upon the expiration of 5 years after the date when the Soldier was placed on the TDRL. If, at the time of that determination the physical disability for which the Soldier was placed on the TDRL still exists, it will be considered to be permanent and stable. Placement on the TDRL confers no right to remain on the TDRL for the entire 5-year period.

h. If upon reexamination, Soldiers whose disabilities have stabilized and who are not determined fit for duty and meeting medical retention standards for the conditions for which they were placed on the TDRL will be removed from the TDRL and placed on the PDRL if the physical disability rating remains 30 percent or greater. If upon reexamination, the Soldier is found unfit for duty and not meeting medical retention standards but the stabilized physical disability percentage is rated at below 30 percent, the Soldier will be removed from the TDRL and separated with severance pay if the Soldier has less than 20 years of active Federal service.

i. When the recommendation of the PEB is placement or retention on the TDRL, failure to report for a scheduled periodic examination or to inform U.S. Army Human Resources Command of a change in address will result in the suspension of retired pay.

3. 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.

4. 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.

5. Title 10, U.S. Code, section 1556 requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

6. Army Regulation 15-185 (Army Board for Correction of Military Records (ABCMR)) prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR. Paragraph 2-11 states applicants do not have a right to a formal hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

//NOTHING FOLLOWS//