

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 21 May 2024

DOCKET NUMBER: AR20230010966

APPLICANT REQUESTS:

- correction of her DA Form 199 (Physical Evaluation Board (PEB) Proceedings) by adding additional conditions as unfitting
- personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record) (two forms)
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- DD Form 215 (Correction to DD Form 214)
- Department of Veterans Affairs (VA) rated disabilities document

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 she did not have a proper and complete evaluation prior to her medical discharge. She would like to have her VA rated disabilities added to her medical discharge because they were found in her records. The following conditions should be added to her PEB Proceedings as unfitting:
 - amputation left great toe
 - fibromyalgia (related to environmental hazard in Gulf War)
 - menorrhagia
 - status post bilateral plantar fascial
 - asthma
3. The applicant enlisted in the Regular Army on 19 January 1988.

4. On 12 April 2002, a PEB found the applicant unfit for further military service due to bilateral foot pain and hallux limitus (rated for pain). The PEB recommended a 10% disability rating and the applicant's separation with severance pay.

5. On 16 April 2002, the applicant concurred with the PEB's findings and recommendations and waived a formal hearing of her case.

6. The applicant's DD Form 214 shows she was discharged on 24 May 2002 by reason of disability, severance pay.

7. The applicant submitted an application to the Department of Defense (DoD) Physical Disability Board of Review (PDBR) for a review of her PEB's disability rating. On 2 February 2011, the PDBR recommended modification of the disability rating previously assigned to reflect a 10% rating for plantar fasciitis and surgical residuals, left foot, and 10% rating for plantar fasciitis and surgical residuals, right foot, a combined 20% rating without recharacterization of the separation.

8. The PDBR's recommendation was accepted by the Deputy Assistance Secretary (Army Review Boards) on 17 February 2011.

9. The applicant provided a VA rated disabilities document showing she was granted service-connected disability compensation, with a combined 80% rating, for various conditions that include those conditions identified by the applicant in her application.

10. 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.

11. 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 a reconsideration of her military disability ratings and to have her VA service-connected disability ratings added to her combined military disability rating.

c. The Record of Proceedings details the applicant’s military service and the circumstances of the case. Her DD 214 shows she entered the regular Army on 23 July 1987 and was discharged with \$52,693.20 of disability severance pay on 24 September 2002 under provisions in paragraph 4-24b(3) of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (1 September 1990).

d. The applicant’s PEB Proceedings (DA Form 199) shows that on 12 April 2002 her informal PEB found her bilateral foot pain unfitting for continued military service. Using the VA Schedule for Rating Disabilities (VASRD), they derived and applied a 10% disability rating to her condition. Because the rating was less than the 30% required for a permanent retirement for physical disability, they recommended the applicant be separated with disability severance pay. On 16 April 2002, after being counseled on the Board’s findings and recommendation by her PEB liaison officer, the applicant concurred with the PEB and waived her right to a formal hearing.

e. When the applicant’s case was reviewed Physical Disability Board of Review (PDBR), the Board determined on 14 February 2011: “Board Findings: IAW DoDI 6040.44, provisions of DoD or Military Department regulations or guidelines relied upon by the PEB will not be considered by the Board to the extent they were inconsistent with the VASRD in effect at the time of the adjudication. PEB reliance on the USAPDA pain policy for rating the bilateral foot condition was operant in this case and the condition was adjudicated independently of that policy by the Board. In the matter of the bilateral foot pain condition, the Board unanimously recommends that separate 10% ratings be designated for each foot, coded 5299-5284, IAW VASRD §4.71a. The Board unanimously agrees that there were no other conditions eligible for Board consideration which could be recommended as additionally unfitting for rating at separation. Recommendation: The Board recommends that the CI's [covered individual] prior determination be modified as follows, effective as of the date of her prior medical separation.

UNFITTING CONDITION	VASRD CODE	RATING
Plantar Fasciitis and Surgical Residuals, Left Foot	5299-5284	10%
Plantar Fasciitis and Surgical Residuals, Right Foot	5299-5284	10%
COMBINED (Incorporating BLF)		20%

f. Their recommendation was approved by the Deputy Assistant Secretary of the Army Review Boards on 17 February. DoD PDBR decisions are final and the issues considered by the PDBR cannot afterward be considered by the Army Board for

Correction of Military Records. Her disability discharge disposition of separated with severance pay remained unchanged as her new combined military disability rating of 20% was below the 30% required for a permanent retirement for physical disability.

g. The applicant did not identify the additional medical conditions to be addressed. There are no clinical encounters in the EMR and no medical documentation was submitted with the application.

h. JLV shows she has been awarded multiple VA service-connected disability ratings, including a rating for loss of great toe effective 25 May 2002, fibromyalgia effective 11 March 2008, and asthma effective 1 July 2013. However, 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.

i. It is the opinion of the ARBA Medical Advisor that neither an increase in her military disability rating nor a referral of her case back to the Disability Evaluation System is warranted.

BOARD DISCUSSION:

1. The Board determined 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.

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

a. The applicant was discharged due to disability after a PEB found her unfit due to bilateral foot pain and hallux limitus (rated for pain). The PEB recommended a 10% disability rating and the applicant's separation with severance pay. Years later, the applicant applied to the DOD PDBR for a review of her PEB's disability rating. In February 2011, the PDBR recommended modification of the disability rating previously assigned to reflect a 10% rating for plantar fasciitis and surgical residuals, left foot, and 10% rating for plantar fasciitis and surgical residuals, right foot, a combined 20% rating without recharacterization of the separation.

b. The Board reviewed and agreed with the medical reviewer’s finding that the applicant in her current application did not identify the additional medical conditions to be addressed. There are no clinical encounters in the medical record and no medical documentation was submitted with the application. Although she has been awarded service-connected disability compensation or various conditions, the military disability system only compensates an individual for service incurred medical condition(s) which have been determined to disqualify him/her from further military service. The VA on the other hand has 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. The Board agreed that neither an increase in her military disability rating nor a referral of her case back to the Disability Evaluation System is warranted.

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.2.

[REDACTED]

[REDACTED]

[REDACTED]

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 U.S. Army Physical Disability Agency 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 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 Medical Evaluation Board (MEB) and 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.

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 his or her 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 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 his or her office, grade, rank, or rating in such a way as to reasonably fulfill the purpose of his or her 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. Title 10, U.S. Code, section 1201, provides for the physical disability retirement of a member who has at least 20 years of service or a disability rating of at least 30%. Title 10, U.S. Code, section 1203, provides for the physical disability separation of a member who has less than 20 years of service and a disability rating of less than 30%.

5. The PDBR, was legislated by Congress and implemented by DoD to ensure the accuracy and fairness of combined disability ratings of 20% or less assigned to service members who were discharged between 11 September 2001 and 31 December 2009.

- The PDBR uses medical information provided by the VA and the military department.
- Once a review is complete, the PDBR forwards a recommendation to the secretary of the respective branch of the armed services.
- It is up to the individual service branch to make the final determination on whether to change the original disability determination.

6. 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.

7. 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 his or her lifetime, adjusting the percentage of disability based upon that agency's examinations and findings.

8. Army Regulation 15-185 (ABCMR) provides Department of the Army policy, criteria, and administrative instructions regarding an applicant's request for the correction of a

military record. Paragraph 2-11 states 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.

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

//NOTHING FOLLOWS//