

IN THE CASE OF: [REDACTED]

BOARD DATE: 17 January 2025

DOCKET NUMBER: AR20230010997

APPLICANT REQUESTS:

- medical retirement
- an appearance before the Board via video/telephone

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

- DD Form 149 (Application for Correction of Military Record)
- DA Form 2-1 (Personnel Qualification Record)
- Personnel Qualification Record
- Separation Documents: Preseparation Counseling Checklist, Servicemembers' Group Life Insurance Election and Certificate, Record of Emergency Data
- Orders 023-0008
- DD Form 214 (Certificate of Release or Discharge from Active Duty)

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 now knows he should have been retired in instead of discharged. He was pushed out at 10 percent (%) and promised by the doctor that the Department of Veterans Affairs (VA) would step in to help him. He found out that he was a lot worse than let on. He went to 70% from 10% and eventually to 100%. He just received a total and permanent disability rating from the evidence of his military service. The Army never sent the imagery or scans or opinions in. He was misled upon his discharge about the care and what his medical issues were with his spinal injury. They found out with more imagery that he had issues with his hips and legs not just his spine. He has over 1400 pages of medical documents since he left to prove this all. He knows the war is going on and he assumed that his government doctors were giving him the best options.

He has not had long-term work since the day he left the Army and that did not affect his day to day. He spoke to his Congressman's office and inspector general who also advised him to file this form with the Army.

b. He does not know how much longer he can take these pains that come and go from his spine into his genitals and around his nervous system. It really hurts on a 1 to 10 scale it can be an 11. He receives therapy, which helps; it can be managed enough for a bit to allow him to breathe and not think about it.

c. He did not know that a disability rating of 30% from the Army would have retired him, but he was pushed out at 10%, only to find out that his disability rating increased from the VA from 10% to 70%. He lists other mental health as related to his request.

3. A review of the applicant's service records reflect:

a. DD Form 4 (Enlistment/Reenlistment Document) which shows the applicant enlisted in the Regular Army on 14 February 2000.

b. A Medical Evaluation Board (MEB) convened on 3 December 2002. The diagnosis was Chronic Left Orchialgia, which was incurred while on active duty and did not exist prior to service. The Board recommended the applicant be referred to a Physical Evaluation Board (PEB). The applicant did not desire to continue on active duty. The findings and recommendation of the board were approved. The applicant agreed with the board's findings and recommendation.

c. A Physical Evaluation Board (PEB) was convened on 17 December 2002 and the board found the applicant was physically unfit for Chronic Left Orchialgia and recommended a disability rating of 10% and that the applicant's disposition be separated with severance pay. The applicant had been advised of the findings and recommendation of the PEB and he concurred and waived a formal hearing of his case.

d. DA Form 4187 (Personnel Action), 16 January 2003 shows the applicant was being separated through the Headquarters Department of the Army Disability Branch for an approved medical discharge.

e. Orders 023-0008, 23 January 2003 reassigned the applicant to the U.S. Army transition point for transition processing and discharged him from the Regular Army. He was authorized disability severance pay in pay grade private first class/E-3 with percentage disability of 10%.

f. On 15 March 2003, he was honorably discharged. His DD Form 214 shows he was discharged under the provisions of Army Regulation 635-40 (Personnel Separations Disability Evaluation for Retention, Retirement, or Separation) Chapter 4

for disability, severance pay with separation code "JFL" and reentry code "3". He completed 3 years, 1 month, and 2 days of active service. His severance pay amount was \$8652.60.

4. On 18 January 2024, a staff member at ARBA, requested the applicant provide medical documents that support his issue of other mental health and medical issues. The applicant did not respond.

5. By regulation, (AR 15-185), 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. 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 additional medical conditions be determined to have been unfitting for continued service with an increase in his military disability ratings and a subsequent change in his disability discharge disposition from separated with severance pay to permanent retirement for physical disability. On his DD form 149, he has noted that Other Mental Health conditions are related to this request. He states:

"I know now that I should have been retired in my discharged. I was pushed out at 10% promised by the doctor that VA would step in to help me and what I found out is that I was a lot worse than let on. I was within a few years put to 70% from 10%, eventually to 100%. I just received a total and permanent these past years of evidence from my military service.

I was just told about DD 149 so that why I am filling this out as well. The Army never sent the imagery or scans or opinions therein. I was misled upon my discharge to care and what my medical issues were with my spine injury. They found out with more imagery that I had issues with my hips and legs not just my spine.

I have over 1400 pages of medical professional since I left to prove this all. I know the war was going on and I assumed that my government doctors were given me the best options. I have not had long term work since the day I left the Army that didn't affect my day to day."

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. His DD 214 shows he entered the regular Army on 14 February 2000 and was discharged with \$8,652.60 of disability severance pay on 15 March 2003 under provisions in paragraph 4-24b(3) of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (1 September 1990).

d. On 9 December 2002, a medical evaluation board (MED) determined the applicant had one condition which failed medical retention standards – Chronic left orchialgia (testicular pain). No additional medical conditions were listed on his Medical Evaluation Board Proceedings (DA Form 3947), MEB medical examination documented on a Report of Medical Examination (DA Form 2808), nor in his MEB narrative summary. On 10 December 2002, the applicant agreed with the Board's findings and recommendation and the case was forwarded to a physical evaluation board (PEB) for adjudication.

e. Dated 17 December 2002, the applicant's Informal Physical Evaluation Board (PEB) Proceedings (DA Form 199) show the PEB determined the referred condition was the sole unfitting condition for continue military service. Using the VA Schedule for Rating Disabilities as required by law, they derived and applied a 10% disability rating and recommended the applicant be separated with disability severance pay. On 23 December, after being counseled by his PEB liaison officer, the applicant concurred with the PEB and waived his right to a formal hearing.

f. JLV shows he has been awarded multiple VA service-connected disability ratings, including neurosis, general anxiety disorder originally effective April 2011; lumbosacral of cervical strain originally effective April 2011, and limited motion of both upper extremities originally effected in January 2021.

g. 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.

h. No medical documentation was submitted with the application and his period of service predates the EMR.

i. There is no evidence the applicant had any additional duty incurred medical condition which would have failed the medical retention standards of chapter 3 of AR 40-501, Standards of Medical Fitness, prior to his discharge. Thus, there was no cause for referral to the Disability Evaluation System.

j. 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 an increase in the applicant's rating decision at the time of separation was not appropriate and referral of his case 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.

4/8/2025

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. Section 1556 of Title 10, USC, 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.

3. Title 38 USC, 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 USC, 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. Army Regulation 635-40 (Personnel Separations Disability Evaluation for Retention, Retirement, or Separation), in effect at the time, 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. Once a determination of physical unfitness is made, all disabilities are rated using the Department of Veterans Affairs Schedule for Rating Disabilities (VASRD).

a. Chapter 3-2 states 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. Chapter 3-4 states 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. 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.

6. Department of Defense Instruction 6040.44 (Physical Disability Board of Review (PDBR)). This instruction establishes policies assigns responsibilities and provides procedures for PDBR operations and management required by Title 10, U.S. Code 1554a. The PDBR was legislated by Congress and implemented by the 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 military department.

Once a review is complete, the PDBR forwards a recommendation to the Secretary of the respective branch of the armed services.

7. 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.

a. Soldiers are referred to the disability system when they no longer meet medical retention standards in accordance with AR 40-501 (Standards of Medical Fitness), chapter 3, as evidenced in an MEB; when they receive a permanent medical profile rating of 3 or 4 in any 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 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 either are separated from the military or are permanently retired, depending on the severity of the disability and length of military service.

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. 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.

8. Title 38, USC, permits the VA to award compensation for a medical condition which was incurred in or aggravated by active military service. The VA, however, is not required by law to determine medical unfitness for further military service. The VA, in accordance with its own policies and regulations, awards compensation solely on the basis that a medical condition exists and that said medical condition reduces or impairs the social or industrial adaptability of the individual concerned. Consequently, due to the two concepts involved, an individual's medical condition, although not considered medically unfitting for military service at the time of processing for separation, discharge, or retirement, may be sufficient to qualify the individual for VA benefits based

on an evaluation by that agency. The VA can evaluate a veteran throughout his or her lifetime, adjusting the percentage of disability based upon that agency's examinations and findings.

9. 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 begins its consideration of each case with the presumption of administrative regularity, which is that what the Army did was correct.

a. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

b. 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.

10. 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 percent. 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 percent.

//NOTHING FOLLOWS//