

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 28 May 2024

DOCKET NUMBER: AR20230011084

APPLICANT REQUESTS: correction of his DA Form 199 (Informal Physical Evaluation Board (PEB) Proceedings) by including additional medical conditions as unfitting and to show his disabilities resulted from combat-related injuries.

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

- DD Form 149 (Application for Correction of Military Record)
- DA Form 199
- Department of Veterans Affairs (VA) Rating Decision
- VA/Department of Defense (DOD) eBenefits rated disabilities
- third-party statement
- 52 pages of medical records

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, in effect:

a. The PEB only addressed his initial neck injury but did not address injuries that occurred while deployed to Iraq and Afghanistan. These injuries resulted in a permanent profile and his medical retirement. Additionally, the neck and back injuries he incurred while deployed to Iraq and to Afghanistan are combat-related. The combat-related determination will provide some tax relief for his retirement pay.

b. He recently became aware of the error after speaking with a former military member at a veteran's organization. His DA Form 199 shows that the PEB only identified his 1995 injury during advanced individual training. There is no mention of injuries which occurred while deployed to Iraq and Afghanistan. In either case, he believes the 1995 injuries, as a result of an accident, should be considered combat-related because the injuries occurred while in route to military training.

3. The applicant enlisted in the Regular Army on 6 October 1994. He served in Iraq from 5 March 2003 to 10 February 2004. He was appointed a warrant officer on 26 September 2006 and served in Iraq from 27 August 2007 to 26 October 2008 and in Afghanistan from 24 May 2012 to 23 April 2013.

4. On 17 February 2015, a PEB found the applicant unfit for further military service due to the following conditions (onset for all conditions occurred in 1995 while serving in the Continental United States):

- cervical spine degenerative joint disease PEB referred as: cervical spine degenerative joint disease/degenerative disc disease
- lumbar spine degenerative joint disease PEB referred as: lumbosacral degenerative joint disease/degenerative disc disease/intervertebral disc disease (IVDD) w/Sciatic Neuropathy
- lumbar radiculopathy, left leg (sciatic) PEB referred as: lumbosacral degenerative joint disease/degenerative disc disease/IVDD w/sciatic neuropathy
- lumbar radiculopathy, right leg (sciatic) PEB referred as: lumbosacral degenerative joint disease/degenerative disc disease/IVDD w/sciatic neuropathy

5. The PEB recommended a 60% disability rating and the applicant's permanent disability retirement. The PEB found the applicant fit for 21 additional conditions because the Medical Evaluation Board (MEB) indicated the conditions met retention standards, did not indicate any of the conditions caused profile limitations, and did not indicate that performance issues, if any, were due to these conditions.

6. The DA Form 199 contains the following statements:

a. The disability disposition is not based on disease or injury incurred in the line of duty in combat with an enemy of the United States and as a direct result of armed conflict or caused by an instrumentality of war and incurred in the line of duty during a period of war (Title 5, U.S. Code, sections 8332, 3502, and 6303). This determination is made for all compensable cases but pertains to potential benefits for disability retirees employed under Federal Civil Service.

b. The disability did not result from a combat-related injury under the provisions of Title 26, U.S. Code, sections 104 or 10216.

c. This case was adjudicated as part of the Integrated Disability Evaluation System (IDES).

d. As documented in the VA memorandum dated 3 February 2015, the VA determined the specific VA Schedule for Rating Disabilities (VASRD) code(s) to describe the Soldier's condition(s). The PEB determined the disposition

recommendation based on the proposed VA disability rating(s) and in accord with applicable statutes and regulations.

7. Orders issued on 19 March 2015 directed the applicant's release from assignment and duty because of physical disability and his permanent disability retirement effective 9 June 2015. The orders contain the following entries:

a. Disability is based on injury or disease received in line of duty as a direct result of armed conflict or caused by an instrumentality of war and incurred in the line of duty during a war period as defined by law: No

b. Disability resulted from a combat-related injury as defined in Title 26, U.S. Code, section 104: No

8. The applicant's DD Form 214 shows he was retired on 9 June 2015 by reason of disability, permanent (enhanced).

9. The applicant provided:

a. VA and DOD disabilities ratings documents showing he was granted service-connected disability compensation for various conditions with a 100% disability rating.

b. A third-party statement, provided by a former member of his unit, stating she witness the applicant falling from a helicopter while hovering about 10 feet in the air. She also stated she noticed the applicant was walking with a noticeable limp weeks after and often complained about back pain. The complete statement was provided to the Board for their review.

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/or 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 reversal of the United States Army Physical Disability Agency's administrative determinations that none of his four military disabilities was related to combat as defined by law:

“DA form 199 only addressed the initial neck injury and did not address injuries that occurred while deployed OCONUS to Iraq in from 2003-2004 and 2007-2008, and Afghanistan 2012-2013 which injuries resulted in Permanent Profile (P3) causing Medical Evaluation Board (MEB) review to evaluate if I was fit for continued military service. Resulting in my medical retirement.

PEB Code V1, V2, V3, V4 should have been applied to my retirement and review of medical treatment records while Deployed OCONUS 2003-2004, 2007-2008, and 2012-2013 to Iraq and Afghanistan for neck and back injuries should have been used to award PEB codes for tax free pay for Army retirement. I have attached documents for treatment OCONUS and Buddy Letter of witness of event that resulted in injury while in Afghanistan.”

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 26 September 2016 and was permanently retired for physical disability on 9 June 2015 under provisions provided in chapter 4 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (20 March 2012).

d. A Soldier is referred to the IDES when they have one or more conditions which appear to fail medical retention standards as documented on a duty limiting permanent physical profile. At the start of their IDES processing, a physician lists the Soldier's referred medical conditions in section I the VA/DOD Joint Disability Evaluation Board Claim (VA Form 21-0819). The Soldier, with the assistance of the VA military service coordinator, lists all conditions they believe to be service-connected disabilities in block 8 of section II or a separate Statement in Support of Claim (VA form 21-4138).

e. Soldiers then receive one set of VA C&P examinations called Disability Benefits Questionnaires (DBQs) covering all their referred and claimed conditions. These examinations, which are the examinations of record for the IDES, serve as the basis for both their military and VA disability processing. All conditions are then rated by the VA prior to the Soldier's discharge. The physical evaluation board (PEB), after adjudicating the case sent them by the medical evaluation board (MEB), applies the applicable VA derived ratings to the Soldier's unfitting condition(s), thereby determining their final combined rating and disposition. Upon discharge, the Veteran immediately begins

receiving the full disability benefits to which they are entitled from both their Service and the VA.

f. On 25 September 2014, the applicant was referred to the IDES “Chronic Lumbar Strain w/ DDD [degenerative disc disease].” The applicant claimed an addition 28 medical conditions.

g. The MEB determined he had two conditions which failed the medical retention standards in chapter 3 of AR 40-501, Standards of Medical Fitness: “Cervical Spine [Degenerative Joint Disease] / DDD” and Lumbosacral DJD / DDD / IVDS [intervertebral disc disease] W/ Sciatic Nerve Neuropathy. They determined the remaining conditions met medical retention standards.

h. The onset of these two conditions as documented in his MEB Narrative Summary:

“This injury is not combat or deployment related. I find no evidence of this condition EPTS [existed prior to service]. CW3 [Applicant] reported that he initially injured his neck and lower back in 1995 secondary to a motor vehicle accident and again in another motor vehicle accident in 2010.

24 March 2010 AHLTA note revealed that CW3 [Applicant] injured his back while lifting weights. He reported that he reinjured his lumbar region moving office furniture and again on 12 June 2014 while performing a diagnostic physical fitness test. Since the initial injury, his cervical and lumbar pain has progressively worsened.”

i. This is the same mechanism of injury as noted in his Neck (Cervical Spine) Conditions Disability Benefits Questionnaire:

“SPECIFIC HISTORY FOR: Neck condition. The date of onset of the symptoms is 1995. The claimant states the above condition began when he was rear-ended by a drunk driver. The condition has gotten worse.

j. This is the same mechanism of injury as noted in his Back (Thoracolumbar Spine) Conditions Disability Benefits Questionnaire:

“SPECIFIC HISTORY FOR: Chronic lumbar strain with Degenerative Disc Disease. The date of onset of the symptoms is 1995-2010-2014, 2009. The claimant states multiple car accidents where he was rear ended, both times by drunk drivers, and while moving and office safe. The condition has gotten worse. Additionally, the claimant indicates the following: many years of physical therapy and pain management with no improvement.”

k. A review of the EMR shows various non-combat related exacerbations of his cervical and lumbar spine pain:

24 March 2010 AHLTA: "Patient is a 34-year-old male present today because of lower back pain possibly due to weightlifting approximate a week ago."

12 May 2010 AHLTA: "Patient denies direct trauma to the back. He reports that around the time he first noticed the pain, he had been moving furniture around in his office (some of which was heavy)."

30 April 2013: "Patient has had progressively worsening neck/upper back pain and bilateral wrist pain. Denies any specific injury but states the injury has gotten worse and worse throughout the deployment. Also has developed multiple respiratory tract infections and now uses daily inhaler which he did not require prior to the deployment."

19 September 2013: "Complaining of neck pain without radiation. Turning the head to the left is very painful. S/P MVA [motor vehicle accident] in 1995, when a car hit him from back, and caused whiplash injury."

17 June 2014: 38-year-old active-duty male presents to the clinic for chronic lower back pain. Patient states he has been experiencing LBP [low back pain] x19 years that has been progressed since then. Patient states he has had multiple injuries to his back and neck."

I. From a 25 June 2014 Neurosurgery consult:

"He presents with a history of chronic low back pain. He doesn't recall any specific injury or trauma preceding the onset of his symptoms however he does first recall that he had moderate low back pain after a motor vehicle accident in 1995 and that these symptoms are significantly exacerbated 2010 after another motor vehicle accident."

m. On 11 November 2014, the applicant agreed with the MEB's findings and recommendation and his case was forwarded to a physical evaluation board (PEB) for adjudication.

n. The applicant's Informal Physical Evaluation Board (PEB) Proceedings (DA Form 199) dated 17 February 2015 show the board determined he had four conditions which were unfitting conditions for continued military service: Cervical Spine Degenerative Joint Disease, Lumbar Spine Degenerative Joint Disease, Lumbar Radiculopathy, Left Leg (Sciatic), Lumbar Radiculopathy, Right Leg (Sciatic). The PEB made the administrative determination that none of the disabilities was not combat related: They found no evidence that one of these disabilities was the direct result of armed combat; was related to the use of combat devices (instrumentalities of war); the result of combat training; incurred while performing extra hazardous service though not engaged in combat; incurred while performing activities or training in preparation for armed conflict

in conditions simulating war; or that he was a member of the military on or before 24 September 1975:

Cervical Spine Degenerative Joint Disease: "Onset occurred in 1995 while Soldier was CONUS [Continental United States]."

Lumbar Spine Degenerative Joint Disease: "Onset occurred in 1995 while Soldier was CONUS."

Lumbar Radiculopathy, Left Leg (Sciatic): "Onset occurred in 1995 while Soldier was CONUS."

Lumbar Radiculopathy, Right Leg (Sciatic): "Onset occurred in 1995 while Soldier was CONUS."

o. The PEB determined the remaining conditions were not unfitting for continued service. They then applied the VA derived ratings for combined military disability rating of 30%, 20%, 10%, and 10% respectively for a combined military disability rating of 60% and recommended the applicant be permanently retired for physical disability. On 6 March 2015, after being counseled on the PEB's findings and recommendation by his PEB liaison officer, he concurred with the board's findings, waived his right to a formal hearing, and declined to request a VA reconsideration of his disability ratings.

p. Combat related is defined in Section b(3) of 26 U.S. Code § 104, and requires there be a direct cause and effect relationship:

(3) Special rules for combat-related injuries: For purposes of this subsection, the term "combat-related injury" means personal injury or sickness—

(A) which is incurred—

- (i) as a direct result of armed conflict,
- (ii) while engaged in extra-hazardous service, or
- (iii) under conditions simulating war; or

(B) which is caused by an instrumentality of war.

q. No substantiating medical documentation or command endorsements were submitted with the application nor found in the EMR to support an affirmative combat related.

r. It is the opinion of the ARBA Medical Advisor there is insufficient probative evidence upon which to reverse the United States Army Physical Disability previous non-combat related determinations for his unfitting disabilities.

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 and the medical advisory the Board concurred with the advising official finding insufficient probative evidence upon which to reverse the United States Army Physical Disability previous non-combat related determinations for his unfitting disabilities. The opine note there were no substantiating medical documentation or command endorsements were submitted with the application nor found in the EMR to support an affirmative combat related.

2. The Board determined there is insufficient evidence to support the applicant contentions for correction of his DA Form 199 by including additional medical conditions as unfitting and to show his disabilities resulted from combat-related injuries. Furthermore, evidence shows the PEB made the administrative determination that none of the applicant's disabilities were combat related: Based on the preponderance of evidence and advising opine, the Board determined the applicant's contentions are without merit. Therefore, the Board denied relief.

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.

[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 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 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. Army Regulation 635-40 further states the PEB also makes certain administrative determinations that may have benefit implications under other provisions of law. The regulation states in:

a. Paragraph 5-24 (Determination for Purposes of Federal Civil Service Employment) the physical disability evaluation will include a decision and supporting documentation regarding whether the injury or disease that makes the Soldier unfit or that contributes to unfitness was incurred in combat with an enemy of the United States, was the result of armed conflict, or was caused by an instrumentality of war during a period of war. These determinations impact the eligibility of certain military retirees for certain benefits when employed under the Federal Civil Service System.

(1) The determinations will be recorded on the record of proceedings of the Soldier's adjudication.

(2) Armed Conflict: The fact that a Soldier may have incurred a medical impairment during a period of war, in an area of armed conflict, or while participating in combat operations, is not sufficient to support a finding that the disability resulted from armed conflict. There must be a definite causal relationship between the armed conflict and the resulting unfitting disability.

b. Paragraph 5-25 (Determination for Federal Tax Benefits) physical disability evaluation will include a determination and supporting documentation on whether the Soldier's disability compensation is excluded from Federal gross income under the provisions of Title 26, U.S. Code, section 104. The entitlement to this exclusion is based on the Soldier having a certain status on 24 September 1975 or being retired or separated for a disability determined to be combat related as set forth in this paragraph. The determination will be recorded on the record of proceedings of the Soldier's adjudication.

c. Combat related: This standard covers those injuries and diseases attributable to the special dangers associated with armed conflict or the preparation or training for armed conflict. A physical disability will be considered combat-related if it causes the Soldier to be unfit or contributes to unfitness and was incurred under any of the following circumstances:

(1) As a direct result of armed conflict.

(2) While engaged in hazardous service. Such service includes, but is not limited to, aerial flight duty, parachute duty, demolition duty, experimental stress duty, and diving duty.

(3) Under conditions simulating war. In general, this covers disabilities resulting from military training, such as war games, practice alerts, tactical exercises, airborne operations, leadership reaction courses, grenade and live fire weapons practice, bayonet training, hand-to-hand combat training (combatives training), rappelling, and negotiation of combat confidence and obstacle courses. It does not include physical training activities, such as calisthenics and jogging or formation running and supervised sports.

(4) Caused by an instrumentality of war. Occurrence during a period of war is not required. A favorable determination is made if the disability was incurred during any period of service as a result of such diverse causes as wounds caused by a military weapon, accidents involving a military combat vehicle, injury, or sickness caused by fumes, gases, or explosion of military ordnance, vehicles, or material. However, there

must be a direct causal relationship between the instrumentality of war and the disability. For example, if a Soldier is on a field exercise and is engaged in a sporting activity and falls and strikes an armored vehicle, the injury will not be considered to result from the instrumentality of war (the armored vehicle), because it was the sporting activity that was the cause of the injury, not the vehicle. On the other hand, if the individual was engaged in the same sporting activity and the armored vehicle struck the Soldier, the injury would be considered the result of an instrumentality of war (the armored vehicle).

5. Title 26, U.S. Code, section 104, states that for the purpose of this subsection, the term "combat-related injury" means personal injury or sickness which is incurred as a direct result of armed conflict, while engaged in extra hazardous service, or under conditions simulating war; or which is caused by an instrumentality of war.

6. Directive-type Memorandum (DTM) 11-015, dated 19 December 2011, explains the IDES. It states:

a. The IDES is the joint DOD-VA process by which DOD determines whether wounded, ill, or injured service members are fit for continued military service and by which DOD and VA determine appropriate benefits for service members who are separated or retired for a service-connected disability. The IDES features a single set of disability medical examinations appropriate for fitness determination by the Military Departments and a single set of disability ratings provided by VA for appropriate use by both departments. Although the IDES includes medical examinations, IDES processes are administrative in nature and are independent of clinical care and treatment.

b. Unless otherwise stated in this DTM, DOD will follow the existing policies and procedures requirements promulgated in DODI 1332.18 and the Under Secretary of Defense for Personnel and Readiness memoranda. All newly initiated, duty-related physical disability cases from the Departments of the Army, Air Force, and Navy at operating IDES sites will be processed in accordance with this DTM and follow the process described in this DTM unless the Military Department concerned approves the exclusion of the service member due to special circumstances.

c. IDES medical examinations will include a general medical examination and any other applicable medical examinations performed to VA Compensation and Pension standards. Collectively, the examinations will be sufficient to assess the member's referred and claimed condition(s) and assist VA in ratings determinations and assist military departments with unfit determinations.

d. Upon separation from military service for medical disability and consistent with the Board for Correction of Military Records (BCMR) procedures of the military department concerned, the former service member may request correction of his or her

military records through his or her respective military department BCMR if new information regarding his or her service or condition during service is made available that may result in a different disposition. For example, a veteran appeals VA's disability rating of an unfitting condition based on a portion of his or her service treatment record that was missing during the IDES process. If the VA changes the disability rating for the unfitting condition based on a portion of his or her service treatment record that was missing during the IDES process and the change to the disability rating may result in a different disposition, the service member may request correction of his or her military records through his or her respective Military Department BCMR.

e. If, after separation from service and attaining veteran status, the former service member desires to appeal a determination from the rating decision, the veteran has one year from the date of mailing of notice of the VA decision to submit a written notice of disagreement with the decision to the VA regional office of jurisdiction.

7. 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.

8. 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.

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//