

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 17 May 2024

DOCKET NUMBER: AR20230011378

APPLICANT REQUESTS:

- an increase of his disability rating to 30 percent or higher
- medical retirement
- correction of his DD Form 214 (Certificate of Release or Discharge from Active Duty) to show in:
  - item 4a (Grade, Rate or Rank): sergeant first class (SFC)
  - item 4b (Pay Grade): E7

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

- DD Form 149 (Application for Correction of Military Record)
- Self-Authored Statement
- Commander's Performance Statement, dated 26 October 2004
- DA Form 3947 (Medical Evaluation Board (MEB) Proceedings), dated 8 November 2004
- Physical Disability Information Report
- DA Form 199 (Physical Evaluation Board (PEB) Proceedings), dated 23 November 2004
- DA Form 5893 (PEB Liaison Officer (PEBLO) Counseling Checklist/Statement), dated 29 November 2004
- Order Number 352-68, dated 17 December 2004
- DD Form 2648 (Pre-Separation Counseling Checklist), dated 18 January 2005
- Orders 025-0103, dated 25 January 2005
- Enlisted Record Brief (ERB)
- DD Form 214, for the period ending 15 February 2005
- Medical documents

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 believes his PEB ratings should be adjusted due to the following:

- his shoulder injury has resulted in significantly limited range of motion so it should have led to a higher disability rating
- the symptoms have not improved since his discharge
- his behavioral health diagnosis was not included during his PEB, although it was stated in his narrative summary (NARSUM) that the behavioral health addendum would be performed

b. His shoulder injury happened while on active duty, after many steroid treatments and surgery, his condition was not improving. Due to the severe damage to his shoulder, he was advised that his military career was over as he would not be able to wear standard issue gear or even fire his weapon. After his orthopedic surgeon's evaluation explained his condition in great detail, he was referred to the PEB. His complete letter is available for the Board's review in its entirety.

3. The applicant provides:

a. A memorandum from the applicant's commander, dated 26 October 2004, which states he recommended the applicant be afforded the opportunity to medically retire due to the physical limitations that resulted from his injury. He explains how this was an injury that incurred while the Soldier was on active duty, and after medications, multiple treatments, and two surgeries to correct the issue, he still was unable meet the Army's physical fitness standards. He considered the applicant to be non-deployable as he could only perform his immediate duties in an office environment. This document is available in its entirety for the Board's review.

b. DA Form 3947 (MEB Proceedings), dated 8 November 2004, shows after consideration of clinical records, laboratory findings, and physical evaluation, the MEB finds the [applicant] has the following medical conditions/defects: right shoulder pain and joint contracture, which originated in 1993, was incurred while entitled to base pay, did not exist prior to service, and was permanently aggravated by his service. This issue was identified as failing to meet retention criteria standards. This document does not reflect any BH related entries. Furthermore, the DA Form 3947 reflects:

- The applicant did not present did not present views in his own behalf
- He was referred to a PEB
- He did not desire to continue active duty
- He agreed with the board findings

c. Physical disability information report reflects the following:

- Percentage of Disability: this portion is blank
- Disability is based on injury or disease received in the line of duty as a direct result of armed forces conflict or caused by an instrumentality of war and incurred in the line of duty during a period of war as defined by law: No
- Mentally competent: Yes
- Disability resulted from a combat related injury as defined in 26 USC104: No

d. DA Form 199 (PEB), shows a PEB was convened on 23 November 2004 wherein the applicant was found physically unfit with a recommended rating of 0% for chronic right shoulder pain, which began in September 1993, while on active duty. The pain with prolonged repetitive or strenuous use, prevented him from functioning in his military occupational specialty and in most military tasks.

e. The PEB made the following administrative determinations:

(1) The Soldier's retirement 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 incurring in the line of duty during a period of war as defined by law.

(2) The disability did not result from a combat-related injury as defined in Title 26, U.S. Code, section 104.

f. DA Form 5893 (PEBLO Counseling Checklist/Statement), dated 29 November 2004, reflects the applicant was advised and further acknowledged the following:

- Medical Evaluation Board Decision (MEBD)
- PEB Adjudication (informal and formal)
- A review by the United States (US) Army Physical Disability Agency (USAPDA) and the Army Physical Disability Appeals Board (APDAB)
- Benefits and programs

g. Order Number 352-68, issued by the U.S. Army Human Resources Command on 17 December 2004, shows the applicant was promoted to SFC/E-7, with an effective date of 1 January 2005.

h. The applicant provides medical documents regarding his chronic right shoulder pain; however, he does not provide any supporting documentation or medical documents, which reflect any behavioral health issues.

4. A review of the applicant's service records show:

a. He enlisted in the Regular Army on 9 August 1993.

b. He served through multiple extensions or reenlistments, in a variety of stateside or overseas assignments, including Korea and Bosnia.

c. On 23 November 2004, an informal PEB convened and found the applicant's medical condition of chronic right shoulder pain unfitting. The condition began during advanced individual training in September 1993, Status post-surgery for impingement in 2003 and a SLAP (superior labrum anterior to posterior) repair in 2004. The PEB rated his unfitting condition at 0% and determined his disposition as separation without severance pay. Item 13 (Election of Soldier) of the DA Form 199 is incomplete.

d. On 17 December 2004, the U.S. Army Human Resources Command published Orders Number 352-68, promoting the applicant to SFC/E-7, effective 1 January 2005.

f. On 25 January 2005, Headquarters, U.S. Army Intelligence Center, published Orders 025-0103 reassigning him to the transition center for separation processing effective 15 February 2005. The order further shows he was authorized disability severance pay in pay grade of staff sergeant (SSG) and the percentage of disability as 0%.

g. On 28 January 2005, the same headquarters published Orders 028-0104 that amended his separation orders to read he was authorized disability severance pay in pay grade of SFC vice SSG.

h. The applicant was honorably discharged from active duty on 15 February 2005 in accordance with Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation), paragraph 4-24B (3), due to disability at 0% and was authorized severance pay. He completed 11 years, 6 months, and 7 days of active service. His DD Form 214 shows in:

- item 4a (Grade, Rate or Rank): SSG
- 4b (Pay Grade): E-6
- item 12h (Effective Date of Pay Grade): 1 November 1999

5. Title 38, CFR, Part IV is the VA's schedule for rating disabilities. 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.

6. Based on the applicant's condition the Army Review Boards Agency medical staff provided a medical review for the Board members. See "MEDICAL REVIEW" section.

#### 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 (EMR - AHLTA / 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:

2. The applicant is applying to the ABCMR requesting a review of the disability rating for his right shoulder; that a mental health condition be determined to have been an unfitting for continued military service prior to his separation with disability severance pay; and a corresponding increase in his prior military disability rating and a change in his disability disposition from separated with disability severance pay to permanently retired for physical disability. He states:

"My significantly limited shoulder range of motion does not seem to equate to a 0% rating. The pain and limited ROM [range of motion] has not improved at all since my discharge.

My NARSUM [narrative summary] stated that a Behavioral Health addendum would be included with the packet but was not. Since that time, the ratings have changed for BH [behavioral health] diagnoses. Therefore, my PEB [physical evaluation board] findings should be adjudicated based on the updated percentages.

NOTE: I included every document I received from the PEBLO [PEB liaison officer] when my ratings returned. I am unaware of any other agency that may have a copy of my findings, other than the PEB office where the PEB was conducted.”

3. 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 9 August 1993 and was separated with \$74,030.40 of disability severance pay on 15 February 2005 under provisions in paragraph 4-24b(3) of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (1 September 1990). It does not list a period of Service in a hazardous duty pay area.

4. The applicant was referred to a medical evaluation board on 19 October 2004 for a right shoulder injury. His NARSUM shows he had an 11-year history of right shoulder pain after it was injured during advanced individual training in 1993. His symptoms of pain and intermittent popping continued and, in the spring of 2003, he was referred to orthopedics for evaluation. Conservative treatment failed to improve his symptoms and he subsequently underwent an open subacromial decompression with distal clavicle excision.

5. His symptoms persisted and he was referred for a civilian surgeon for a second opinion. A MRI arthrogram revealed a labral tear for which he underwent arthroscopic repair. The NARSUM writer then stated:

“After surgery the soldier had administrative difficulties with Tricare and his physical therapy was delayed three months. This resulted in a tremendous amount of scar tissue within the shoulder and a painful range of motion ...

#### PHYSICAL EXAMINATION :

Right shoulder physical examination reveals well-healed portal scars and a well-healed incision on the superior portion of the shoulder.

He has forward flexion actively and passively to 135 degrees and 135 degrees and 135 degrees . He has abduction actively and passively to 130 degrees, 130 degrees, and 130 degrees. He has internal rotation at 90 degrees to 45 degrees, 45 degrees, and 45 degrees . He has external rotation at 90 degrees to 85 degrees, 85 degrees and 85 degrees .

He has no anterior posterior translation of the humeral head on the glenoid ... He does have a pain at the extremes of his ranges of motion. ... his strength is 5/5

for his deltoid, biceps, tri ceps, supraspinatus, infraspinatus and subscapularis, and teres minor.”

6. The provider noted the applicant had a history of depression and that a mental health addendum would be performed. The provider went on to review the histories of several other conditions which had either resolved or were no longer a significant issue.

7. The applicant’s Medical Board Proceedings (DA 3947) shows the applicant was found to have one condition failing the medical retention standards in chapter 3 of AR 40-501, Standards of Medical Fitness: “Right shoulder Pain and Joint Contracture.” No additional conditions meeting medical retention standards were identified.

8. In his 3-page Commanders’ Performance Statement, his company commander went into detail on how the applicant’s right shoulder condition negatively affected and prevented the performance of several of his duties. He made no mention of any behavioral health issues, concerns, or symptoms, concluding:

“SSG [Applicant] is physically impaired due to an injury caused by actions taken while at Basic Training. His service to his Country has further compounded the problem, but he has worked through the pain and the procedures and has continued to do his job at various levels and in strenuous locations.

His service has been honorable and he continues to do what he can to this very day. I, however, recommend SSG [Applicant] be afforded the opportunity to be reviewed for medical retirement.”

9. On 8 November 2004, the applicant agreed with the board’s findings and recommendation, and his case was forwarded to a PEB for adjudication.

10. The informal PEB convened on 23 November 2004 and determined his “Chronic Right Shoulder Pain” was the sole unfitting condition for continued service. Using the VA Schedule for Rating Disabilities (VASRD), they derived and applied a combined military disability rating of 0% disability and recommended the applicant be separated with disability severance pay.

11. The applicant’s shoulder rating was increased by the Veterans Administration Benefits Administration to 30% effective 16 February 2005 using VASRD diagnostic code 5201 – Arm, Limitation of Motion:

5201 Arm, limitation of motion of:	Dominant	Non-dominant
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To 25° from side .....	40	30
Midway between side and shoulder level [45 degrees]	30	20
At shoulder level..... [90 degrees]	20	20

12. His MEB narrative summary shows both his forward flexion and abduction were 135 degrees. The applicant probably should have received a 10% rating for painful motion of his shoulder IAW 38 CFR §4.59. 38 CFR §4.59 allows consideration of functional loss due to painful motion to be rated to at least the minimum compensable rating for a particular joint. In these circumstances, painful motion of the joint or joints is assigned the minimum compensable evaluation of 10 percent. However, this final rating of 10% would still have resulted in his separation with severance pay as a rating of 30% or more is required to be permanently retired for physical disability.

13. There are no behavior health encounters in the EMR.

14. His final NCO Evaluation Report covered March 2004 thru January 2005 shows he continued to be outstanding Soldier and NCO. His rater top-blocked him as “Among The Best.” His senior rater top-blocked him with 1’s on a scale of 1 to 5 for both Overall Performance” and Overall Potential” stating:

- “promote now
- send to ANCOG [Advance NCO Course] now
- assign to the most challenging duties; he will succeed
- truly outstanding performance in development and validation of the 96B10 RC
- reclassification course
- his efforts will have a long-lasting impact on the future success of 96B
- Soldiers”

15. There is no probative evidence the applicant had a mental health condition or 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. Furthermore, there is no evidence that any additional medical condition prevented the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his discharge.



16. JLV shows he has been awarded numerous VA service-connected disability ratings, including separate 30% ratings for major depressive disorder on 16 February 2005 and limited motion of his right arm on 16 February 2005.

17. The awarding of a higher VA rating does not establish prior error or injustice. A disability rating is intended to compensate an individual for interruption of a military career after it has been determined that the individual suffers from an impairment that disqualifies him or her from further military service. Given his good shoulder range of motion, a 10% rating derived from the VA Schedule for Rating Disabilities would have reflect the disability at the point in time the VA exams were completed.

18. The new 30% rating was based on a marked decrease in his shoulder range of motion from 135 degrees to 26 – 45 degrees. This would have been found on a post-separation examination. While the effective date is the day after his separation from the service, the Veterans Benefits Administration (VBA) determines the effective date for a disability that was caused - or made worse - by military service as whichever of these comes later: The date they get the Veteran's claim, or the date of onset for illness or injury (also known as the date your entitlement arose). If they receive the Veteran's claim within one year of the day he or she is released from a period of active service, the effective date can be as early as the day following separation.

19. The DES has neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions incurred during or permanently aggravated by their military service. These roles and authorities are granted by Congress to the Department of Veterans Affairs and executed under a different set of laws.

20. It is the opinion of the ARBA Medical Advisor that neither a referral of his case back to the DES or increase of his disability rating is warranted.

#### BOARD DISCUSSION:

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.

a. 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 the applicant's rating decision at the time of separation was appropriate and does not warrant further increase and referral of his case to the Disability Evaluation System (DES) is not warranted.

b. The Board also determined the applicant's record contains Orders 028-0104, which amend his discharge orders to show his pay grade as sergeant first class (SFC)/E-7 vice staff sergeant (SSG)/E-6 under Section 1208, Section 10, U.S. Code. However, the Board denied relief to amend his DD Form 214 to reflect the rank/grade as SFC/E-7 noting that the DD Form 214 is a summary of the Soldier's most recent period of continuous active service and reflects the record as it existed at the time the DD Form 214 was created.

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. Title 10, USC, chapter 61, provides the Secretaries of the Military Departments with authority to retire or discharge a member if they find the member unfit to perform military duties because of physical disability. The U.S. Army Physical Disability Agency is responsible for administering the Army physical disability evaluation system 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 AR 635-40 (Physical Evaluation for Retention, Retirement, or Separation).

a. Soldiers are referred to the disability system when they no longer meet medical retention standards in accordance with Army Regulation 40-501 (Standards of Medical Fitness), chapter 3, as evidenced in a Medical Evaluation Board (MEB); when they receive a permanent medical profile rating of 3 or 4 in any factor and are referred by an MOS 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. 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. Reasonable performance of the preponderance of duties will invariably result in a finding of fitness for continued duty. A Soldier is physically unfit when a medical

impairment prevents reasonable performance of the duties required of the Soldier's office, grade, rank, or rating.

3. 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, 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. 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.

//NOTHING FOLLOWS//