

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 4 October 2024

DOCKET NUMBER: AR20230011543

APPLICANT REQUESTS: an upgrade of his disability rating from the U.S. Army to more than 30 percent (%).

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

- DD Form 293 (Application for Review of Discharge)
- Orders 072-0157 Retirement Orders
- Department of Veterans Affairs (VA) Rating Decision
- Letters from the VA

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 he was discharged/retired due to a permanent disability. The VA determined all of his medical findings to be service connected at 80%. He requests his orders be amended to reflect yes on all "service connected" questions, and his percentage increased to over 30%.
3. The applicant provides the following documents:
  - a. VA Rating Decision, 1 November 2007, shows he received service connection for sleep apnea at 50%, mitral valve prolapse with mitral regurgitation at 30%, intervertebral disc syndrome with degenerative arthritis at 20%, intervertebral disc syndrome with sensory deficit of deep peroneal nerve lower right extremity at 10%, intervertebral disc syndrome with degenerative arthritis at 10% and bilateral tinnitus at 10%.
  - b. Letter from VA, 9 November 2007, shows his monthly entitlements for his disabilities. The entire letter is available for the Board's review.

c. Letter from VA, 8 August 2008, certifies he is in receipt of disability compensation on account of his service-connected disability rated at 30% or higher. The entire letter is available for the Board's review.

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

a. DD Form 4 (Enlistment/Reenlistment Document Armed Forces of the United States) shows he enlisted in the Regular Army (RA) and entered active duty on 24 September 1986. He remained in the RA through immediate reenlistments.

b. Orders 072-0157, published by Headquarters, U.S. Army Armor Center and Fort Knox, 13 March 2007, show he was retired on 31 May 2007 and placed on the retired list on 1 June 2007. He received a 10% disability rating. His retirement type was permanent disability. The disability was not based on injury or disease received in line of duty as a result of armed conflict or caused by an instrumentality of war and was not incurred in the line of duty during a war period as defined by law. His disability did not result from a combat related injury.

c. DD Form 214 shows he was honorably transferred to the U.S. Army Reserve Control Group (Retirement) on 31 May 2007. He completed 20 years, 8 months, and 7 days of active duty service. His narrative reason for separation was disability permanent. He had service in Bosnia from 16 July 1996 to 31 March 1997.

d. His service record is void of a DA Form 199 (Physical Evaluation Board Proceedings) showing the disability for which he received 10%

#### 5. 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 (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 has applied to the ABCMR requesting an increase of 30% to his combined military disability rating.

c. The Record of Proceedings and prior denial detail the applicant's service and the circumstances of the case. The DD 214 for the period of Service under consideration shows he entered the Regular Army on 24 September 1986 and was permanently

retired for physical disability on 31 May 2007 under provisions provided in paragraph 4-24b(1) of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (8 February 2006). It shows a net active service for this period of 20 years, 8 months, and 07 days.

d. On 8 November 2006, a medical evaluation board (MEB) found his “Degenerative disk disease of the cervical and lumbosacral spine” and “Status post multiple disk excisions cervical and lumbar spine with residual symptoms in the lumbar spine area and residual right lumbar radiculopathy” to fail medical retention standards and warranted referral to the physical evaluation board (PEB). The applicant non-concurred with the MEB findings and recommendation but his appeal is not available for review. The Medical Evaluation Board Proceedings (DA Form 3947) shows his appeal was considered, the MEB’s original findings and recommendation confirmed, and his case was forwarded to a PEB for adjudication.

e. On 14 February 2007, the applicant’s informal Physical Evaluation Board (PEB) found he had three conditions which were unfitting medical conditions for continued service: “Right lower extremity radiculopathy,” “Chronic low back pain, status post lumbar laminectomy and discectomy,” and “Chronic neck pain, status post 3 level spinal fusion for cervical disc disease.” Using the VA Schedule for Rating Disabilities (VASRD), the PEB derived applied ratings of 10%, 0%, and 0% respectively to these conditions. Though his combined military disability rating was less than the 30%, he was eligible for a permanent disability retirement for length of service. From the PEB Proceedings (DA Form 199):

“Although your disability is less than 30 percent, records show that you have completed at least 20 years of active federal service therefore, permanent retirement is recommended, if otherwise qualified.”

f. On 24 February 2007, after being counseled on the informal PEB’s findings by his PEB Liaison Officer (PEBLO), the applicant concurred with the informal PEB’s findings waived his right to a formal hearing,

g. The VA Schedule for Rating Disabilities (VASRD) is the document used by the military services to rate unfitting military disabilities. Paragraph B-1a and B1b of Appendix B to AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (8 February 2006):

#### B–1. Purpose of the Department of Veterans Affairs Schedule for Rating Disabilities (VASRD)

a. Congress established the VASRD as the standard under which percentage rating decisions are to be made for disabled military personnel. Such decisions

are to be made according to Title IV of the Career Compensation Act of 1949 (Title IV is now mainly codified in 10 USC 61.)

b. Percentage ratings in the VASRD represent the average loss in earning capacity resulting from these diseases and injuries. The ratings also represent the residual effects of these health impairments on civil occupations.

h. Review of the MEB narrative summary shows his disability ratings were low for his cervical and lumbar spine disease. The VA is the expert when it comes to applying the complicated VASRD to disabilities. A 9 November 2007 VA rating decision shows a 10% rating for his cervical spine condition and a 20% rating for his lumbar spine condition both effective 1 June 2007. When combined with the 10% rating for his radiculopathy (unchanged in the VA rating decision), his combined military disability rating is 40% (20% combined with 10% = 28% combined with 10% = 35% which rounds to 40%).

i. Because the applicant's initial combined military disability rating of 10% was less than 30%, the applicant was retired under paragraph (b)(3)(A) of U.S. Code § 1201 - Regulars and members on active duty for more than 30 days: retirement: "the member has at least 20 years of service computed under section 1208 of this title."

j. While his 13 March 2007 discharge orders show a 10% permanent disability rating, his retired pay was calculated under 10 U.S. Code § 1401 - Computation of retired pay. In general for a length of service retirement, this provides 2.5% of base pay for each year of creditable service which for a Service Member with 20 years would equal 50% of base pay.

k. When a service member is retired in this manner, the Defense Finance Accounting Service (DFAS) calculates and then applies the most beneficial retirement to the former Service Member.

#### 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. Upon review of the applicant's petition, available military records, and the medical review, the Board concurred with the advising official finding the Defense Finance and Accounting Service calculates and applies the most beneficial retirement to the applicant.

a. The evidence shows an informal Physical Evaluation Board (PEB) convened on 14 February 2007 and determined three medical conditions were unfitting for continued military service; right lower extremity radiculopathy, chronic low back pain, status post lumbar laminectomy and discectomy, and chronic neck pain, status post 3 level spinal fusion for cervical disc disease. The PEB then applied the Department of Veterans Affairs Schedule for Rating Disabilities (VASRD) derived ratings of 10 percent, 0 percent, and 0 percent respectively to these conditions. Although his combined military disability rating was less than 30 percent, he was eligible for a permanent disability retirement based on length of service (20 years, 8 months, and 7 days). After being counseled on the informal PEB findings, he waived his right to a formal hearing.

b. The Board noted the applicant's contention the VA increased his service-connected disability rating for his condition(s) to a higher rating and the Army should do the same. However, the awarding of a higher VA rating does not establish prior error or injustice. A military 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. The rating derived from the VASRD reflects the disability at the point in time the VA examinations were completed. The military's Disability Evaluation System (DES) does not compensate service members for anticipated future severity or potential complications of conditions incurred during or permanently aggravated by their military service. The VA has those roles and authorities according to their laws. Therefore, the Board found no error or injustice in his military disability rating. The Board determined an increase in his military disability rating was not warranted.

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 Department of Defense Directive 1332.18 and Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation).

3. Army Regulation (AR) 635-40 (Disability Evaluation for Retention, Retirement, or Separation) establishes the Army Disability Evaluation System and sets forth policies, responsibilities, and procedures that apply in determining whether a Soldier is unfit because of physical disability to reasonably perform the duties of his office, grade, rank, or rating. Only the unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability.

a. Soldiers are referred to the disability system when they no longer meet medical retention standards in accordance with AR 40-501, chapter 3, as evidenced in a medical evaluation board (MEB); when they receive a permanent physical profile rating of "3" or "4" in any functional capacity 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 physical evaluation board (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. Service members 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 and length of military service. Individuals who are "separated" receive a onetime 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 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 medical impairment prevents reasonable performance of the duties required of the Soldier's office, grade, rank, or rating.

4. Title 10, USC, 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, USC, 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.

5. AR 40-501 (Standards of Medical Fitness), provides policies and procedures on medical fitness standards for induction, enlistment, appointment, and retention. Paragraph 3-33 (anxiety, somatoform, or dissociative disorders) states the causes for referral to an MEB are as follows:

- persistence or recurrence of symptoms sufficient to require extended or recurrent hospitalization; or
- persistence or recurrence of symptoms necessitating limitations of duty or duty in protected environment; or
- persistence or recurrence of symptoms resulting in interference with effective military performance

6. Title 38, USC, sections 1110 and 1131, permits the VA to award compensation for disabilities that were incurred in or aggravated by active military service. However, an award of a higher VA rating does not establish error or injustice on the part of the Army. The Army rates only conditions determined to be physically unfitting at the time of discharge which disqualify the Soldier from further military service. The VA does not have the authority or responsibility for determining physical fitness for military service. The VA awards disability ratings to veterans for service-connected conditions, including those conditions detected after discharge, to compensate the individual for loss of civilian employability. These two government agencies operate under different policies. 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.



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

//NOTHING FOLLOWS//