

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 16 July 2024

DOCKET NUMBER: AR20230011883

APPLICANT REQUESTS: reconsideration of his previous request “to receive total disability rating, to include other medical conditions previously not considered by the DOD Physical Disability Board of Review (PDBR)” and amend disability percentage to allow for disability retirement vice severance pay.

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

- DD Form 149 (Application for Correction of Military Record)
- Congressional Correspondence

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Dockets Number:

- AR20160018789 on 27 December 2016
- AR20170016897 on 1 October 2020

2. The applicant states the first condition that was considered unfitting was his right heel Achilles calcification and the decision was based only on his back injury. The DOD PDFBR did not consider his sleep apnea, asthma, planter-calcaneal spur, dystrophic calcification within the distal archils tendon versus avulsion of an archils calcaneal spur of the right knee turn meniscus. He also had a heart attack and heart condition resulting in posterior two attacks (the VA Hospital took care of that) and the placement of two stents, right testicle hypoechoic lesion.

3. Review of the applicant’s record shows:

a. The applicant enlisted in the Regular Army on 4 March 1994. He held military occupational specialty 88M, Motor Transport Operator.

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

15 December 1995 to 15 May 1996; and attained the rank/grade of staff sergeant (SSG)/E-6. to his original enlistment contract.

c. His medical records, including a medical evaluation board (MEB) Consultation Sheet show, in 1996, while serving in Croatia, he slipped and fell on black ice injuring his lower back. He sought medical treatment for pain relief. A line of duty information sheet was prepared outlining the extent of his injury.

(1) On 21 February 2003, he received a permanent profile, as recorded on DA Form 3349, of "P2" for his lower extremities due to back pain. For the Army Physical Fitness Test (APFT) he was authorized to conduct the push up event and ride a bicycle. He was authorized to perform unit physical fitness training at his own pace and tolerance.

(2) On 29 April 2003, he received a temporary "T3" for his lower extremities due to his condition of chronic Achilles tendonitis. At the time he was in a walking removable cast with numerous duty limitations such as no running, marching, prolonged standing or standing in temperatures less than 40 degrees Fahrenheit.

(3) An MEB consultation narrative dictated on 16 April 2003 at Landstuhl Regional Medical Center, Germany, shows the applicant's chief complaint was low back pain. He injured himself in Croatia 8 years prior and continued to have low back pain. He reinjured his back lifting heavy items. He was prescribed medication to manage the pain and physical therapy with lumbar stabilization, manipulation, strengthening, and stretching exercises with no significant relief. He had a series of temporary profiles for this complaint because exacerbating factors included running, jumping, lifting items greater than 20 pounds, wearing his load bearing equipment, carrying a rucksack, wearing a flak vest, or marching. The findings of his x-rays were consistent for someone his age, 44 years old.

(4) On 25 June 2003 he received a permanent "P3" for his lower extremities continuing the restrictions noted on his 29 April 2003 physical profile. The profiling officer who also initiated and signed his 29 April 2003 physical profile, stated that an MEB had been initiated.

(5) On 25 June 2003 an MEB Addendum was prepared at Landstuhl Regional Medical Center for his chief complaint of "heel pain of his right foot." He was an out-patient in the podiatry clinic. His diagnosis was insertional Achilles tendinitis/bursitis and plantar fasciitis. For this complaint he also was on temporary profiles for a significant period. After the physical examination and results of tests or x-rays he received a permanent profile for his chronic back pain, insertional Achilles tendinitis, and his plantar fasciitis for no jumping, rucking, marching, or running, no prolonged standing greater than 30 minutes, no flutter kicks, no flak vest, and riding in tactical vehicles as

tolerated. A Doctor of Podiatric Medicine concluded his narrative statement by stating the applicant did not meet the retention standards for this complaint under the provisions of Army Regulation 40-501 (Standards of Medical Fitness), paragraph 3-13b(5). A permanent profile of "P3" was issued for his lower extremities.

d. The Informal Physical Evaluation Board (PEB) Proceedings are not available for review. Other evidence shows he requested a formal hearing of his case.

e. On 16 September 2003, a formal PEB convened with applicant and counsel present and found the applicant's medical condition unfitting. The DA Form 199 (PEB Proceedings) shows the only medical condition listed is low back pain. He reported pain with motion and intermittent left radiculopathy. His physical exam included a neurological assessment showing no deficiencies noted and radiographs were non-contributory to his rating from his medical evaluation board. Therefore, he was rated for low back pain with motion. The formal PEB found him physically unfit and his disposition as separation with severance pay.

f. On 15 October 2003, Baumholder Transition Center published Orders 288-01 on 15 October 2003 ordering his discharge from active duty effective 1 January 2004. His orders state he was entitled to disability severance pay in the rank/grade of SSG/E-6 based on 13 years, 9 months and 28 days of service computed under the provisions of Title 10, U.S. Code, section 1208. His percentage of disability is shown as 10% and his injury was not classified as a combat related injury as defined by law.

g. The applicant was honorably discharged from active duty on 1 January 2004. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged in accordance with Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation), paragraph 4-24 (3) with entitlement to severance pay (\$65,030.40).

4. On 27 September 2016, the DOD PDBR considered the applicant's case. The PDBR recommended modifying his disability rating percentage from 10% to 20% for low back pain. The PDBR Record Proceedings states:

a. The scope of the PDBR is limited to those condition(s) determined by the PEB to be unfitting for continued military service. The PDBR's authority is limited to assessing the fairness and accuracy of the PEB rating determinations and recommending corrections, where appropriate. The PDBR's assessment of the PEB rating determinations is based upon a review of medical records and all available evidence for application to the Department of Veterans Affairs (DVA) and use of the VA Schedule for Rating Disabilities (VASRD).

b. The PEB considered the condition of lower back pain (VASRD Code 5299-5295) rating it 10%. The VA shows his condition as lumbar spine degenerative joint disease with disc disease (VASRD Code 5010-5237) with an examination date of 13 August 2003. The VA rating for this condition was 20%. His VA record shows his overall combined rating for his service-connected medical conditions was 60%.

c. Within the record of proceedings its states, "The MEB forwarded 'chronic back pain secondary to left sacroiliac joint pain syndrome' for PEB adjudication." There were no other medical conditions considered. The VA decision of a 20% rating for lumbar spine degenerative joint disease with disc disease (arthritis, due to trauma, substantiated by x-ray findings analogous to lumbosacral or cervical strain). Further the VASRD states, "The lumbosacral and sacroiliac joints should be considered as one anatomical segment for rating purpose." Therefore, the PDBR considered his lower back pain and sacroiliac dysfunction together for fitness and rating determinations.

d. The PDBR also stated in its record of proceedings that there were no other conditions within its scope of review for consideration.

5. On 27 December 2016 acting on behalf of the Secretary of the Army, the Deputy Assistant Secretary of the Army (Review Boards)) (DASA (RB) accepted the PDBR recommendation. The DASA (RB) directed correction of his record as shown in the PDBR. The DASA (RB) also indicted this decision was final under the provisions of Title 10, U.S. Code, section 1554a.

6. Accordingly, Orders 068-0002, issued b Baumholder Transition Center on 9 March 2017 amended his Orders 068-0002 dated 15 October 2003 by showing his percentage of disability was now 20%.

7. On 1 October 2020, following his petition to the ABCMR to add unknown medical conditions to his DOD PDBR case, the Board considered his case.

a. Prior to adjudicating his case, the applicant was informed that by law the PDBR decision was final, and the issues considered by the PDBR cannot afterward be considered by the ABMCR. He also was informed he could seek relief from the ABCMR for other medical issues not previously considered by the PDBR. He was asked to clarify his ABMCR application by providing the Board with a specific medical issue not considered by the PDBR or earlier medical boards. He did not respond to either request for clarification.

b. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. The medical advisory stated:

(1) There are no encounters in AHLTA. The supporting documentation contains separate medical evaluation board (MEB) narrative summaries evaluating his low back pain and right foot heel pain, and the applicant had been placed on a permanent duty limiting profile for both conditions. Assuming regular order, both these conditions would have been evaluated by both his informal and subsequent formal physical evaluation board. On 16 September 2003, the formal PEB found him unfit for the low back pain and he was subsequently separated with disability severance pay.

(2) Documents show the applicant underwent left foot surgery in October 1996. There is no documentation showing a complication or that the problem addressed by the surgery persisted, and it is therefore assumed he had a satisfactory result. He underwent pulmonary function testing in 2003 but there is no provider documentation related to this testing. Documentation shows several visits to the optometrist and a minor surgical procedure by urology.

(3) There is no probative evidence the applicant had a medical condition which was not addressed by the Disability Evaluation System (DES), and which would have failed the medical retention standards of chapter 3, AR 40-501 prior to his discharge. While the applicant did have other medical conditions, paragraph 3-1 of AR 635-40, dated 1 September 1990, states: "The mere presence of an impairment does not, of itself, justify a finding of unfitness because of physical disability. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier reasonably may be expected to perform because of his or her office, grade, rank, or rating."

(4) The medical advisory indicated that a referral to this case to the DES for evaluation is not warranted.

c. After reviewing the application and all supporting documents, the Board determined relief was not warranted. Based upon the documentary evidence, the Board found that the applicant does not provide sufficient documentation of any additional medical symptoms or conditions previously determined as unknown. Therefore, the Board concluded there was insufficient evidence of an error or injustice which would warrant a change to the applicant's record.

8. 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 conditions be determined to have been unfitting for continued military service with a subsequent increase in his military disability ratings and a change in his disability discharge disposition from separated with severance pay to permanent retirement for physical disability. The conditions he lists are "Right heel Achilles Tendon Calcification," sleep apnea, asthma, plantar calcaneal spur, right knee torn meniscus, a heart attack, and right testicular hypoechoic lesion.

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 4 March 1994 and was discharged with \$65,030.40 of disability severance pay on 1 January 2004 under provisions in paragraph 4-24b(3) of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (1 September 1990).

d. The applicant's sole unfitting medical condition - Lumbar Spine Degenerative Joint and Disc Disease - was reviewed Physical Disability Board of Review (PDBR) in 2016. On 27 September 2016, they recommended increasing his disability rating from 10% to 20%. Their recommendation was approved by the Deputy Assistant Secretary of the Army Review Boards on 27 December 2016. DoD PDBR decisions are final and the issues considered by the PDBR cannot afterward be considered by the Army Board for Correction of Military Records. His disability discharge disposition of separated with severance pay remained unchanged as his new combined military disability rating of 20% was below the 30% required for a permanent retirement for physical disability.

e. A request to have additional medical conditions determined unfitting was previously denied by the ABCMR on 1 October 2020 (AR20170016897). Rather than repeat their findings here, the board is referred to the record of proceedings and medical advisory opinion for that case. This advisory included a review of the available evidence related to his left and right foot conditions. This review will concentrate on the new claims and new evidence submitted by the applicant.

f. Contemporaneous medical documentation shows the applicant underwent surgical removal of a right spermatocele and a follow-up testicular ultrasound revealed a small left hydrocele and "two small hypoechoic lesions suggesting spermatoceles." A 3 February 2003 radiologist's report of left heel radiographs stated he had a plantar calcaneal spur and abnormal calcification of the distal Achilles tendon.

g. There are no contemporaneous medical documents addressing the additional claimed conditions and there are no clinical encounters in the EMR.

h. There is insufficient probative evidence the applicant had additional medical conditions 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.

i. Paragraph 3-1 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (1 September 1990) states:

“The mere presence of an impairment does not, of itself, justify a finding of unfitness because of physical disability. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier reasonably may be expected to perform because of his or her office, grade, rank, or rating.”

j. JLV shows he has been awarded multiple VA service-connected disability ratings, including ratings for sleep apnea, asthma, and limited motion of the right ankle. However, the DES only compensates an individual for service incurred medical condition(s) which have been determined to disqualify him or her from further military service and consequently prematurely ends their career. 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.

k. It is the opinion of the ARBA Medical Advisor that an increase in his military disability rating and/or a referral of his case back to the DES remain unwarranted.

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 applicant's contentions, the military record, and regulatory guidance were carefully considered. The evidence shows a formal PEB found the applicant medically unfit for low back pain. This is the only condition that the PEB found unfitting. The formal PEB rated his condition at less than 30% and his disposition as separation with severance pay. He was accordingly discharged with severance pay. The applicant contends there were several other conditions that should have also been considered. However, the Board noted that the mere presence of an impairment does not, of itself, justify a finding of unfitness

because of physical disability. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier reasonably may be expected to perform because of his or her office, grade, rank, or rating. The Board also reviewed and agreed with the medical reviewer's finding insufficient probative evidence the applicant had additional medical conditions which would have failed the medical retention standards of chapter 3 of AR 40-501, Standards of Medical Fitness, prior to his discharge. Therefore, the Board determined that an increase in his military disability rating and/or a referral of his case back to the disability evaluation system remain unwarranted.

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 to amend the decision of the ABCMR set forth in Dockets Number:

- AR20160018789 on 27 December 2016
- AR20170016897 on 1 October 2020

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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 1554 (Review of retirement or separation without pay for physical disability) states:

a. The Secretary concerned shall from time to time establish boards of review, each consisting of five commissioned officers, two of whom shall be selected from officers of the Army Medical Corps, officers of the Navy Medical Corps, Air Force officers designated as medical officers, or officers of the Public Health Service, as the case may be, to review, upon the request of a member or former member of the uniformed services retired or released from active duty without pay for physical disability, the findings and decisions of the retiring board, board of medical survey, or disposition board in the member's case. A request for review must be made within 15 years after the date of the retirement or separation.

b. A board established under this section has the same powers as the board whose findings and decision are being reviewed. The findings of the board shall be sent to the Secretary concerned, who shall submit them to the President for approval. The board established under this section shall be based upon the records of the armed forces concerned and such other evidence as may be presented to the board. A witness may present evidence to the board in person or by affidavit. A person who requests a review under this section may appear before the board in person or by counsel or an accredited representative of an organization recognized by the Secretary of Veterans Affairs under chapter 59 of title 38.

c. Section 1554a(c) (1) states upon the request of a covered individual, or a surviving spouse, next of kin, or legal representative of a covered individual, the PDBR shall review the findings and decisions of the Physical Evaluation Board (PEB) with respect to such covered individual. Subject to paragraph (3), upon its own motion, the PDBR may review the findings and decisions of the PEB with respect to a covered individual.

d. Section 1554a(c) (2) states the review by the PDBR under paragraph (1) shall be based on the records of the armed force concerned and such other evidence as may be presented to the PDBR. A witness may present evidence to the Board by affidavit or by any other means considered acceptable by the Secretary of Defense.

e. Section 1554a(c) (3) states if the PDBR proposes to review, upon its own motion, the findings and decisions of the PEB with respect to a covered individual, the PDBR shall notify the covered individual, or a surviving spouse, next of kin, or legal representative of the covered individual, of the proposed review and obtain the consent of the covered individual or a surviving spouse, next of kin, or legal representative of the covered individual before proceeding with the review.

f. Section 1554a(c) (4) states with respect to any review by the PDBR of the findings and decisions of the PEB with respect to a covered individual, whether initiated at the request of the covered individual or a surviving spouse, next of kin, or legal representative of the covered individual or initiated by the PDBR, the board shall notify the covered individual or a surviving spouse, next of kin, or legal representative of the covered individual that, as a result of the request or consent, the covered individual or a surviving spouse, next of kin, or legal representative of the covered individual may not seek relief from the BCMR operated by the Secretary concerned (emphasis added).

g. Section 1554a (e) states the Secretary concerned may correct the military records of a covered individual in accordance with a recommendation made by the PDBR. Any such correction may be made effective as of the effective date of the action taken on the report of the PEB to which such recommendation relates.

2. DoD Number 6040.44 establishes policies, assigns responsibilities, and provides procedures for PDBR operation and management as required by Title 10, U.S. Code, section 1554a.

a. It is policy that the PDBR will reassess the accuracy and fairness of the combined disability ratings assigned to former Service members who: (1) Separated with a combined disability rating of 20% or less during the period beginning on 11 September 2001 and ending on 31 December 2009; and (2) were not found to be eligible for retirement, including former Reserve Component Service members with 20 satisfactory years

b. The PDBR will review the PEB record of findings and the combined disability rating decisions regarding the specific military unfitting medical condition(s) for a Service member. The review is based on the records of the Military Department concerned and such other evidence as may be presented to the PDBR.

c. The VASRD in effect at the time of the Service member's disability rating was assigned will be used for recommendations, along with all applicable statutes, and any directives in effect at the time of the contested separations.

d. The PDBR will review only those medical conditions determined to be specifically unfitting for continued military service, as previously determined by the Military Department PEB. It will also review those conditions identified but not determined to be unfitting by the Military Department PEB, as requested by the Service member. X

3. Army Regulation 635-40, Physical Evaluation for Retention, Retirement, or Separation), dated 1 September 1990, states: "The mere presence of an impairment does not, of itself, justify a finding of unfitness because of physical disability. In each

case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier reasonably may be expected to perform because of his or her office, grade, rank, or rating.”

//NOTHING FOLLOWS//