

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 26 June 2024

DOCKET NUMBER: AR20230011991

APPLICANT REQUESTS: physical disability retirement in lieu of physical disability separation with severance pay

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

- DD Form 149 (Application for Correction of Military Record)
- Headquarters III Corps and Fort Hood Orders 011-0134, dated 11 January 2013
- Department of Veterans Affairs (VA) letter, dated 1 May 2023
- VA Form 21-4138 (Statement in Support of Claim), dated 4 August 2023.

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 should have been medically retired, not medically separated. His disability percentage was increased after more medical information was given to and received by the VA. They had made the original determination when he went through the Integrated Disability Evaluation System (IDES) medical board.
 - b. He was not aware that the VA increasing his rating could affect his discharge status. There was no disclosure of this. He has provided a VA benefits letter dated within 1 year of his discharge.
3. The applicant enlisted in the Regular Army on 31 December 1997.

4. The applicant deployed to the following locations during the following periods:
 - Iraq, from 14 March 2004 through 13 March 2005
 - Iraq, from 4 April 2008 through 14 March 2009
 - Afghanistan, from 8 July 2001 through 27 March 2012.
5. The complete facts and circumstances surrounding the applicant's discharge are not in his available records for review.
6. The applicant's DA Form 3349 (Physical Profile), DA Form 7652 (Disability Evaluation System (DES) Commander's Performance and Functional Statement), Medical Evaluation Board (MEB) Narrative Summary (NARSUM), DA Form 3947 (MEB Proceedings), DA Form 199 (Informal Physical Evaluation Board (PEB) Proceedings), DA Form 199-1 (Formal PEB Proceedings), VA Compensation and Pension (C&P) Exam, and VA Rating Decision are not in his available records for review and have not been provided by the applicant.
7. Headquarters III Corps and Fort Hood Orders 011-0134, dated 11 January 2013, discharged the applicant due to physical disability with severance pay with a disability rating of 20 percent effective 28 January 2013.
8. The applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was honorably discharged under the provisions of Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation) due to disability, severance pay, combat related (enhanced), with corresponding separation code JEA. He was credited with 15 years and 28 days of net active service.
9. A VA letter, dated 1 May 2023, provided the applicant a summary of his VA benefits. It shows he has one or more service-connected disabilities with a combined evaluation of 100 percent effective 1 February 2023 and that he is considered totally and permanently disabled due to his service-connected disabilities effective 20 August 2013.
10. A VA Form 21-4138, dated 4 August 2023, shows the applicant provided a statement in support of his claim, stating he enclosed five pages of evidence in support of his claim.
11. In a letter from the Army Review Boards Agency (ARB), dated 23 January 2024, the applicant was requested to provide copies of his medical documents supporting his application. The applicant did not respond.
12. 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.

13. MEDICAL REVIEW:

1. The Army Review Boards Agency (ARBA) Medical Advisor reviewed the supporting documents, the Record of Proceedings (ROP), and the applicant's available records in the Interactive Personnel Electronic Records Management System (iPERMS), the Health Artifacts Image Management Solutions (HAIMS) and the VA's Joint Legacy Viewer (JLV). The applicant was separated with severance pay. Because the VA increased his rating, he now requests medical retirement.

2. The ABCMR ROP summarized the applicant's record and circumstances surrounding the case. The applicant entered service in the Regular Army 31Dec1997. His primary MOS was 91B Wheel Vehicle Mechanic. He had 3 combat deployments: Iraq (20080404-20090314 and 20040314-20050313) and Afghanistan (20110708-20120327). He underwent separation through medical discharge proceedings through IDES (Integrated Disability Evaluation System). He was discharged from service 28Jan2013.

3. Summary of IDES proceedings

a. The back condition began after a motor vehicle accident at Fort Jackson on 20Oct2005 (08Nov2005 TMC Ambulatory). He began having more constant lower back pain after his neck surgery in 2010 after which he underwent physical therapy. He had another exacerbation of back pain during a subsequent deployment (2011-2012). The lumbar MRI (Darnall) showed minimal, early degenerative change of a lower lumbar spine without evidence of neural compressive disease.

b. 22Nov2010, he had an 11-month history of neck pain and right arm issues. He stated that it all started when he was conducting combatives, and over time he began feeling numbness/tingling in his right upper extremity. He underwent physical therapy and injections by pain services. The applicant underwent neck surgery on 21Dec2010 for C5-6 HNP (herniated nucleus pulposus) with Right Radiculopathy (Fort Hood). The 18May2012 cervical spine series noted the near anatomic alignment of hardware from the neck fusion surgery.

c. 20Jul2012 VA General Compensation & Pension Exam: Neck exam showed flexion 0 to 36 degrees (normal 0 to 45); and extension 0 to 32 degrees (normal 0 to 45). Back exam showed flexion 0 to 80 degrees (normal 0 to 90); and extension 0 to 24 degrees (normal 0 to 30 degrees).

d. 18Oct2012 MEB Proceedings (DA Form 3947). The MEB found the following conditions did not meet retention standards of AR 40-501 chapter 3-39(h): Status post ACDF (anterior cervical discectomy with fusion); residual post laminectomy syndrome (cervical); and multilevel lumbar disc and joint degeneration with sciatica. The applicant agreed with the MEB findings. The MEB NARSUM (narrative summary) indicated the applicant's 08Oct2012 permanent physical profile (DA Form 3349) was 233111. There were multiple functional activity limitations attributable to the neck and back conditions: He was not able to wear IBA; and could not run, jump etc.

e. 28Nov2012 VA Rating Decision. The 10% cervical rating was based on forward flexion of the cervical spine greater than 30 degrees but not greater than 40 degrees; combined ROM of the cervical spine greater than 170 degrees but not greater than 335 degrees; and muscle spasm not resulting in abnormal gait or abnormal spinal contour. The VA assigned a 10% disability rating for the thoracolumbar spine condition based on a combined ROM of the thoracolumbar spine of greater than 120 degrees but not greater than 235 degrees.

f. 16Dec2012 Informal PEB. The applicant was found unfit to continue service due to Cervical Fusion at 10% under code 5237 and Multilevel Lumbar Disc and Joint Degeneration at 10% under code 5237. The recommended disposition was separation with severance pay at 20% total disability rating. The case was adjudicated under the IDES system—the ratings were obtained from the 28Nov2012 VA Rating Decision. The applicant concurred with PEB proceedings and waived a formal hearing of his case. He did not request reconsideration of the VA ratings.

4. Rating change for the neck condition after discharge from service.

a. The 18Jun2013 VA Rating Decision continued the 10% ratings each for the neck and back conditions. Later, almost 11 months after discharge from service, on 21Nov2013, the applicant underwent another neck C&P exam. The applicant reported he was doing well but started having neck spasms in the summer 2013 (after discharge from service). The neck exam showed forward flexion 0 to 30 degrees and extension 0 to 20 degrees. He did not have radicular pain. Cervical spine films in November 2013 showed stable post-surgical changes—no signs of instability. That notwithstanding, the 08Jan2014 VA Rating Decision showed the neck condition rating was increased to 20% effective 22Aug2013 (the date his claim was received) reflecting the ROM changes noted in the November 2013 neck C&P exam: Forward flexion of the cervical spine greater than 15 degrees but not greater than 30 degrees. It should be noted the effective date was changed to the day the applicant applied for the increase although the applicant had appealed to the VA to change the effective date to the date of discharge from service. The VA declined stating "We are unable to assign an effective date of January 29, 2013, for the 20 percent evaluation because there was no evidence

that you met the criteria for this evaluation prior to the examination on November 21, 2013”.

b. The applicant provided a letter from the VA which indicated the effective date he became totally and permanently disabled due to service-connected disabilities, was 20Aug2013. This change included the neck condition increase to 20% based on the Neck Conditions DBQ that was completed 11 months after discharge from service. Based on records available for review, there is insufficient evidence the neck condition warranted a rating higher than 10% or that the back condition warranted a rating higher than 10% at the time of discharge. A total combined 20% disability rating warranted disposition separation with severance pay.

5. They were other ratings that contributed to the 100% total disability rating by the VA effective 20Aug2013; special attention was given to the conditions listed below with effective 29Jan2013 (the day after discharge). It should be noted, that for each condition below, the C&P examiner indicated that there was no impact on usual daily activities. The ROMs for joint conditions did not fall below the minimum standard. The conditions below did not have permanent P3 physical profiles. Based on records available for review, there was insufficient evidence to support the following conditions failed retention standards of AR 40-501 chapter 3 at the time of discharge.

a. OSA (obstructive sleep apnea, also claimed as insomnia) 50%. In 2008, the applicant noted disruption in sleep, fatigue, snoring and headaches. OSA was diagnosed by sleep study 28Jun2012. The 25Sep2012 Addendum to the 20Jul2012 C&P exam indicated the applicant's OSA was severe. He was pending an appointment for equipment fitting. The MEB preparer noted the OSA condition was not at MRDP. He was issued a permanent P2 physical profile for this condition 08Oct2012.

b. Tender Scars (head to toe) 30%. He had intermittent inguinal discomfort after bilateral orchiopexy (April 2004) and later scar revision surgeries (2008 and 2012).

c. Right Shoulder Strain 20% and Left Shoulder Strain 10%. This bilateral condition was manifested as intermittent muscle spasms and was considered to be related to the neck condition. There was full active ROM in the right shoulder. Pain was present. The left shoulder had flexion 0 to 170 degrees (normal 0 to 180 degrees).

d. Migraine Headaches 10%. During the 20Jul2012 C&P exam, the applicant reported near daily (tension) headaches which started during service and were thought to be due to his neck condition. He also had rare migraine headaches (1-3 per year). His headaches required an occasional visit to the emergency room. He had missed work 2-3 days in the past year due to headaches. He was self-treating with over-the-counter pain medications with good response. The condition did not require neurology consultation during service.

e. Tendonitis Patellar, Right Knee 10% and Tendonitis Patellar, Left Knee 10%. The applicant stated he had pain with running which became worse in 2007. At the time, it was treated with knee braces and a no run physical profile. Right knee flexion was 0 to 108 (normal 0 to 140 degrees); left knee flexion was 0 to 110 degrees.

f. Right Ankle Joint Laxity 10%. He noted laxity initially during basic training. He reported intermittent sprains with resolution. The exam showed tenderness to the lateral joint. ROM was not recorded. Ankle muscle strength (dorsiflexion and plantar flexion) was 5/5 (normal). The condition had not required surgery.

g. Tinnitus 10%. In the 18Jul2012 Hearing Loss and Tinnitus DBQ, right ear and left ear hearing exhibited 100% Speech Discrimination Score (normal).

h. Surgical Anterior Neck Scar 10%. The showed 4.0 cm x 0.25 cm closed, non indurated, linear, hypopigmented, and non-tender scar, without tissue loss.

i. Carpal Tunnel Syndrome, Right 10% and Carpal Tunnel Syndrome, Left 10%. 20Jul2012 C&P exam: Wrist flexion and extension strength were 5/5 (normal). The 01Apr2013 Nerve Conduction Study result was consistent with Bilateral Carpal Tunnel Syndrome. Initial treatment was for the applicant to wear a night wrist splint.

6. BH condition: The applicant was not diagnosed with a BH condition while in service. He was seen in 2009 after the second deployment due to being overwhelmed with family responsibilities and his wife's physical disability. During the 02Jul2012 Mental Disorder C&P exam, the applicant denied history of depression, anxiety, confusion or suicide ideation. The applicant's MEB Proceedings (18Oct2012 DA Form 3947) did not include a BH condition. The applicant did not claim a BH condition (VA Form 21-4138) for the IDES process. He has not been service connected by the VA for PTSD (or other mental health condition) nor for TBI. In NCO Evaluation Reports covering periods from 20101202 to 20111130 and 20100228 to 20101201, for overall performance and potential, he was rated 'among the best'. There were no emergency room visits or hospitalizations for mental health purposes. There was no report of suicide ideation/attempts, mania or psychosis. There were no reported substance abuse issues. The applicant was not issued a BH physical profile and there was no indication that he had duty limitations attributable to BH condition that would warrant a profile. Of note, a few months after discharge, he did report a military sexual assault by a female service member when he was passed out drunk. However, he did not report any ongoing BH symptoms attributable to the incident (28Oct2016 Mental Health Consult). Based on records available for review, there was insufficient evidence that the applicant had a mental health condition which failed medical retention standards of AR 40-501 chapter warranting Army disability rating.

7. Concerning traumatic brain injury, the applicant was seen a few months after discharge with concerns of TBI due to multiple blast exposures during the first 2 deployments (2004-2005 and 2008-2009) with two instances of close exposures in particular, in 2004 (22Mar2013 Physical Medicine Rehab Consult and 25Feb2013 Social Work Note): He had no loss of consciousness and was not knocked down but was dazed and confused for a few seconds. He currently reported poor sleep, irritability and decreased short term memory. He also reported hypervigilance and discomfort in crowds. The physical exam did not reveal abnormalities. A formal cognitive assessment was not completed; however, the examiner noted moderate impairment in short term memory. *Of note, during the 02Jul2012 Mental Disorder C&P exam, the applicant reported he was attending CTC (63 hours so far) for psychology degree earning As and Bs and only one C.* The examiner concluded the applicant's current cognitive issue of forgetfulness was not due to (presumed) very mild concussion 8 years ago, but more likely associated with the hyper-arousal which was common post-deployment. The examiner assessed that there was no current clinical evidence of brain injury. Because of the applicant's interest, he was provided information concerning cognitive rehab and the Brain Boosters program. He was discharged from the TBI clinic. Based on records available for review, there was insufficient evidence that the applicant had a TBI condition which failed medical retention standards of AR 40-501 chapter warranting Army disability rating.

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 and standard review based on law, policy and regulation. Upon review of the applicant's petition, available military records and medical review, the Board concurred with the advising official finding insufficient evidence that the applicant had a mental health condition which failed medical retention standards, warranting Army disability rating. The Board determined there is insufficient evidence found in the applicant's records that demonstrate he was improperly separated. Based on this, the Board denied relief for a physical disability retirement in lieu of physical disability separation with severance pay.

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.

█ [REDACTED]
█ [REDACTED] █ [REDACTED]
█ [REDACTED]
█ [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 physical 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 (Discharge Review Board (DRB) Procedures and Standards) and Army Regulation 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 Military Occupational Specialty (MOS) Medical Retention Board (MMRB); 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/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. Army Regulation 635-40 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. 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. 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. A rating is not assigned until the PEB determines the Soldier is physically unfit for duty. Ratings are assigned from the Department of Veterans Affairs (VA) Schedule for Rating Disabilities (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 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.

4. Title 10, U.S. Code, section 1201, provides for the physical disability retirement of a member who has at least 20 years of service or a disability rating of at least 30 percent. Title 10, U.S. Code, section 1203, provides for the physical disability separation of a member who has less than 20 years of service and a disability rating of less than 30 percent.

5. Title 38, U.S. Code, 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.

6. Title 38, U.S. Code, 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.

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.

8. Army Regulation 15-185 (Army Board for Correction of Military Records (ABCMR)) prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR. The ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

//NOTHING FOLLOWS//