

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 27 September 2024

DOCKET NUMBER: AR20230012130

APPLICANT REQUESTS: reconsideration of his previous request to correct his DD Form 214 (Certificate of Release or Discharge from Active Duty) to show he was medically retired due to a permanent physical disability vice discharged due to a physical disability with severance pay.

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

- DD Form 149 (Application for Correction of Military Record)
- Department of Veterans Affairs (VA) medical record documents (142 pages)

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 Docket Number AR20190005445 on 1 March 2022.

2. The applicant states when he was discharged, he was misdiagnosed with a mental health condition. It was subsequently diagnosed by the VA as major depressive disorder and assigned a higher disability rating. He also contends the VA Scale for Rating Disabilities (VASRD) was applied incorrectly in diagnosing all of his additional disabilities and the percentages assigned when determining his fitness for duty.

3. On 15 October 1993, the applicant enlisted in the Regular Army.

4. The specific facts and circumstances surrounding the applicant's separation are not available in his record. However, the record of proceedings from his previous consideration by the Board shows:

a. On 19 August 1996, he was issued a profile for left elbow pain (cubital tunnel surgery) which was approved on 4 September 1996.

b. On 6 June 1997, a Line of Duty Investigation was conducted for his injury that occurred on 6 January 1995, to his left elbow. On 21 July 1997, it was determined in the line of duty.

c. On 26 August 1997, a DA Form 3349 (Physical Profile) in the Action by Unit Commander section his commander annotated this permanent change in profile does require a change in member's military occupational specialty.

d. A narrative summary was conducted on 30 December 1997, which diagnosed him with the following:

- Left arm ulnar nerve dysfunction
- Mechanical low back pain
- Right foot porokeratosis skin lesions
- Adjustment disorder with depressed mood

e. A medical evaluation board (MEB) convened on 31 December 1997 and referred him to a physical evaluation board (PEB).

f. On 3 February 1998, an informal PEB convened and found the applicant's following medical conditions were unfitting and assigned a combined disability rating of 20 percent for:

(1) Left arm ulnar nerve dysfunction rated at 10 percent.

(2) Mechanical low back pain rated at 10 percent.

(3) Right foot porokeratosis skin lesions were not unfitting.

(4) Adjustment disorder with depressed mood, in accordance with Army Regulation 635-40 (Physical Evaluation for Retention, Retirements, or Separation), Table B-9, adjustment disorders are to be dealt with through administrative channels and not through the disability system.

(5) The PEB found the applicant physically unfit and recommended a combined disability rating of 20 percent and that his disposition be: Separation with severance pay if otherwise qualified. The applicant concurred.

5. He was honorably discharged on 20 March 1998 under the provisions of Army Regulation 635-40, paragraph 4-24b(3), by reason of disability, severance pay, with separation code JFL and reentry code 3. He completed 4 years, 5 months, and 6 days of active service.

6. The applicant provides 142 pages of documents extracted from his VA medical record which show he received treatment for numerous physical and mental health conditions during the period from January 2001 to September 2010.

7. 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.

8. Title 38, United States Code (USC), Sections 1110 (General - Basic Entitlement) and 1131 (Peacetime Disability Compensation - Basic Entitlement), permit the VA to award compensation for disabilities which were incurred in or aggravated by active military service. However, an award of a VA rating does not establish an error or injustice on the part of the Army.

9. Title 38, Code of Federal Regulations (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.

10. In reaching its determination, the Board shall consider the applicant's petition, available records and/or submitted documents in support of the petition.

11. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. Documentation reviewed included the applicant's ABCMR application and accompanying documentation, the military electronic medical record (AHLTA), 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 reconsideration of their prior denial of his request for an increase in his military disability rating with a subsequent change in his disability discharge disposition from separated with severance pay to permanent retirement for physical disability. He states:

"I would like my discharge to be upgraded to a medical retirement. When I was discharged, I was misdiagnosed with a mental condition. It was later diagnosed as major depressive disorder. Also, the VASDR [VASRD = VA Schedule for Rating

Disabilities] was applied incorrectly in diagnosing all my disabilities and the percentages assigned.”

c. The Record of Proceedings details the applicant’s military service and the circumstances of the case. The applicant’s DD 214 for the period of service under consideration shows he entered the regular Army on 15 October 1993 and was discharged with \$11,032.80 of disability severance pay on 20 March 1998 under provisions in paragraph 4-24b(3) of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (1 September 1990). The DD 214 does not show a deployment.

d. This request was previously denied by the ABCMR on 1 March 2022 (AR20190005445). Rather than repeat their findings here, the board is referred to the record of proceedings and medical advisory opinion for that case. This review will concentrate on the new evidence submitted by the applicant.

e. The applicant has submitted VA medical documentation from 2001 thru 2012. Because this non-contemporaneous documentation addresses medical evaluations, diagnoses, and treatments after the applicant was separated from the Army in 1998, it is of no probative value.

f. JLV continues to show he has been awarded multiple VA service-connected disability ratings, including one for major depressive disorder effective 15 December 2000. However, the DES compensates an individual only for service incurred condition(s) which have been determined to disqualify him or her from further military service. 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. Again, these roles and authority are granted by Congress to the Department of Veterans Affairs and executed under a different set of laws.

g. It remains the opinion of the ARBA Medical Advisor that neither an increase in his military disability rating nor a referral of his case to the DES 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.

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 an increase in the applicant's rating decision at the time of separation was not appropriate and referral of his case to the Disability Evaluation System (DES) is 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 amendment of the ABCMR decision rendered in Docket Number AR20190005445 on 1 March 2022.

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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, USC, Section 1556, provides the Secretary of the Army shall ensure that an applicant seeking corrective action by ARBA is provided a copy of all correspondence and communications, including summaries of verbal communications, with any agencies or persons external to agency or board, or a member of the staff of the agency or Board, that directly pertains to or has material effect on the applicant's case, except as authorized by statute.
2. Army Regulation 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The regulation provides that 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. It is not an investigative body.
3. Title 10, USC, Chapter 61, provides for the retirement and discharge of members of the Armed Forces who incur a physical disability in the line of duty while serving on active or inactive duty. However, the disability must have been the proximate result of performing military duty. It further provides for disability retirement or separation for a member who is physically unfit to perform the duties of his office, rank, grade, or rating because of disability incurred while entitled to basic pay.
4. Title 38, USC, Section 1110 provides: 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.
5. Title 38, USC, Section 1131 provides: 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.

6. Army Regulation 40-501 (Medical Services - Standards of Medical Fitness) provides information on medical fitness standards for induction, enlistment, appointment, retention, and related policies and procedures. Chapter 3 (Medical Fitness Standards for Retention and Separation, Including Retirement) provides a listing of all medical conditions and specific causes for referral to an MEB. It states:

a. The various medical conditions and physical defects which may render a Soldier unfit for further military service and which fall below the standards required for all enlisted Soldiers of the Active Army, Army Reserve National Guard, and United States Army Reserve. The medical conditions and physical defects, individually or in combination, are those, that:

(1) Significantly limit or interfere with the Soldier's performance of their duties.

(2) May compromise or aggravate the Soldier's health or well-being if they were to remain in the military Service. This may involve dependence on certain medications, appliances, severe dietary restrictions, or frequent special treatments, or a requirement for frequent clinical monitoring.

(3) May compromise the health or well-being of other Soldiers.

(4) May prejudice the best interests of the Government if the individual were to remain in the military Service.

b. Soldiers with conditions listed in Chapter 3, who do not meet the required medical standards will be evaluated by an MEBD. Possession of one or more of the conditions listed in this chapter does not mean automatic retirement or separation from service. Physicians are responsible for referring Soldiers with conditions listed in Chapter 3 to an MEBD.

7. Army Regulation 635-40 establishes the PDES according to the provisions of Title 10, U.S. Code, chapter 61 (Retirement or Separation for Physical Disability) and Department of Defense Directive 1332.18.2. This regulation governs the evaluation for physical fitness of Soldiers who may be unfit to perform their military duties because of physical disability. It states:

a. The mere presence of an impairment does not, 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 the requirements of the duties the Soldier reasonably may be expected to perform because of tier office, grade, rank or rating. To ensure all solders are physically qualified to perform their duties in a reasonable manner, medical retention qualification standards have been established in Army Regulation 40-501. These guidelines are used to refer a Soldier to an MEB.

b. The Soldier will not be declared physically unfit for military service because of disabilities known to exist at the time of the Soldier's acceptance for military service that have remained essentially the same in degree since acceptance and have not interfered with the Soldier's performance of effective military service.

c. 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 they can no longer continue to reasonably perform because of a physical disability incurred or aggravated in service.

d. When a Soldier is being processed for separation or retirement for reasons other than physical disability, continued performance of assigned duty commensurate with his or her rank or grade until the Soldier is scheduled for separation or retirement, creates a presumption that the Soldier is fit. An enlisted Soldier whose reenlistment has not been approved before the end of his or her current enlistment, is not processing for separation; therefore, this rule does not apply. The presumption of fitness may be overcome if the evidence establishes that:

(1) The Soldier was, in fact, physically unable to perform adequately the duties of his or her office, grade, rank or rating for a period of time because of disability. There must be a causative relationship between the less than adequate duty performance and the unfitting medical condition or conditions.

(2) An acute, grave illness or injury or other significant deterioration of the Soldier's physical conditions occurred immediately prior to, or coincident with processing for separation or retirement for reasons other than physical disability and which rendered the Soldier unfit for further duty.

e. The fact that a Soldier has a condition listed in the VASRD does not equate to 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.

f. The medical treatment facility commander with the primary care responsibility will evaluate those referred to him/her and will, if it appears as though the member is not medically qualified to perform duty or fails to meet retention criteria, refer the member to a MEB. Those members who do not meet medical retention standards will be referred to a PEB for a determination of whether they are able to perform the duties of their grade and MOS with the medically disqualifying condition. The PEB evaluates all cases of physical disability equitably for the Soldier and the Army. The PEB investigates the nature, cause, degree of severity, and probable permanency of the disability of Soldiers whose cases are referred to the board. Finally, it makes findings and recommendations

required by law to establish the eligibility of a Soldier to be separated or retired because of physical disability.

8. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records (BCM/NR) regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. BCM/NRs may grant clemency regardless of the type of court-martial. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to other corrections, including changes in a discharge, which may be warranted based on equity or relief from injustice.

a. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. In determining whether to grant relief based on equity, injustice, or clemency grounds, BCM/NRs shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment.

b. Changes to the narrative reason for discharge and/or an upgraded character of service granted solely on equity, injustice, or clemency grounds normally should not result in separation pay, retroactive promotions, and payment of past medical expenses or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded service characterization.

//NOTHING FOLLOWS//