

IN THE CASE OF: [REDACTED]

BOARD DATE: 3 October 2024

DOCKET NUMBER: AR20230012212

APPLICANT REQUESTS: in effect –

- a higher disability rating for her eye condition based on the Department of Veterans Affairs (VA) rating
- a retirement due to permanent disability
- a personal appearance before the Board via video/telephone

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

- DD Form 149, Application for Correction of Military Record
- DA Form 199, Physical Evaluation Board (PEB) Proceedings, 26 October 2009
- Physical Disability Information Report, 24 November 2009
- DD Form 214, Certificate of Release or Discharge from Active Duty, 7 February 2010
- DD Form 215, Correction to DD Form 214, 13 May 2013
- VA memorandum, 14 February 2014
- VA Disability claim decision, unknown date

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, in effect, by law the Physical Disability Board of Review (PDBR) may not recommend a lower disability rating for any case reviewed. She contends that during her disability separation processing the PDBR rated her eye condition at 20%; however, the VA rated her same condition at 40% and 10%. This is a huge discrepancy in the comparison between the PDBR rating and the VA rating for the same medical condition/conditions. This discrepancy made her ineligible for a medical retirement.

3. The applicant's record shows she enlisted in [REDACTED] Army National Guard ([REDACTED] ARNG) on 15 January 1993.
4. While serving in an Active Guard Reserve (AGR) status the applicant was flagged for adverse action on 1 October 2009.
5. On 26 October 2009, a PEB evaluated her eye condition using the VA Schedule for Rating Disabilities (VASRD) under codes 6099 and 6011.
 - a. The DA Form 199 states, in effect, "Retinal scars or irregularities with visual impairment listed on the DA Form 3947, Medical Evaluation Board (MEB) Proceedings, as decreased visual acuity secondary to retinal degeneration and Salzmann's Nodular Degeneration. This is not a battle injury or caused by an instrumentality of war condition and did not occur in a combat theater. Condition rated as analogous to retinal irregularities IAW VASRD 4.20. Soldier with retinal vein abnormal retinal blood vessel formation suggestive of previous vascular occlusion, possibly related to heterozygous thalassemia but list of possible causes is lengthy. Soldier reported the visual impairment after gynecologic surgery. Ophthalmology opined Soldier may have suffered retinal vascular occlusion during that surgery. A true retinal detachment was found in the left eye. Soldier also has complicating bilateral dry eye syndrome, surface keratopathy, and secondary scarring and irregular astigmatism." Initially her condition was found to be fitting but upon appeal the PEB determined, in accordance with VASRD 4.76 and 4.84, the applicant's condition was unfitting and recommended a disability percentage of 20%.
 - b. The PEB also determined that the applicant's asthma, bilateral plantar fasciitis, and one other condition (identified as "MEB Dx4") were not unfitting.
 - c. The applicant's case had been reconsidered in accordance with paragraph 4-21t, Army Regulation (AR) 635-40, Personnel Separations-Physical Evaluation for Retention, Retirement, or Separation, based on the additional information provided and that the DA Form 199, 12 August 2009 was superseded by the current DA Form 199.
 - d. The PEB recommended the applicant be separated with severance pay if otherwise qualified.
 - e. On 2 November 2009, the applicant concurred with the PEB recommendation and waived a formal hearing.
6. On 7 February 2010, the applicant was discharged in accordance with AR 635-40, chapter 4, by reason of disability, non-combat-related, with severance pay. She completed 9 years, 4 months, and 19 days of net active service.

7. The adverse flag was favorably closed and removed effective 7 February 2010. This action was reported on a DA Form 268, Report to Suspend Favorable Personnel Actions (Flag), 14 May 2013.

8. The applicant provides:

a. A VA letter, 14 February 2014, which informed her that she may be eligible to have her Department of Defense disability rating reviewed by the PDBR.

b. Her VA Rating Decision, date not legible, wherein the applicant highlighted the following entries:

(1) Bilateral Salzmann's nodular degeneration status post repaired right retinal tear and repaired left retinal break (claimed as bilateral eye condition status post-surgery) with a rating of 40%, effective 8 February 2010 (VASRD 6011-6066).

(2) Bilateral dry eye syndrome, with a rating of 10%, effective 8 February 2010 (VASRD 6099-6018).

9. On 19 December 2023, the Headquarters, U.S. Army Physical Disability Agency (PDA), Legal Advisor provided an advisory opinion regarding the applicant's contention that she should have been rated higher for her unfitting conditions. This official noted the applicant refers to the discrepancy in rating between the PDBR and the VA. The PDA assumed for the purpose of this analysis that the applicant mistakenly referred to the PDBR instead of the PEB insofar as the PDBR is limited to reviewing actions involving service members who were medically separated with a combined disability rating of 20% or less between 11 September 2001 and 31 December 2009. The applicant was separated on 7 February 2010. Given the unique circumstances and timing of her case, and the significant discrepancy between the PEB and VA ratings, the PEB found the request to have sufficient merit as a matter of equity to warrant further medical review, and possible corrective action by the ABCMR.

a. The applicant's PEB proceeding convened on 26 October 2009. The PEB rated her 20% for "retinal scars or irregularities with visual impairment... secondary to retinal degeneration and Salzmann's Nodular Degeneration." The PEB also noted, among other things, retinal detachment in the left eye as well as bilateral dry eye syndrome, surface keratopathy, and secondary scarring and irregular astigmatism. Additionally, the PEB narrative referred to atrophic retinal holes of the right eye and a hole in the macula of the left eye. The applicant reported no significant improvement of her vision after multiple procedures. The PEB referenced codes 6099 and 6011, and rated visual acuity at 20% under VASRD 4.76, and rated visual field at 10% pursuant to VASRD 4.84. The PEB did not rate her dry eye condition. The PEB gave an overall rating of 20% for her visual condition.

b. Subsequently, on 4 June 2010, the VA separately rated the applicant at 40% for bilateral Salzmann's Nodular degeneration status post repaired right retinal tear and repaired left retinal break. The VA also rated her at 10% for bilateral dry eye syndrome.

c. Public Law 100-181, section 1644, 28 January 2008 (also known as the National Defense Authorization Act for Fiscal Year 2008, or NDAA 2008), authorized the implementation of pilot programs to improve the disability evaluation system for members of the Armed services. Following the completion of the pilot program, Directive-Type Memorandum (DTM) 11-015, Integrated Disability Evaluation System (IDES), was issued on 19 December 2011. DTM 11-015 described the then-newly established IDES process, which "featur[ed] a single set of disability medical examinations appropriate for fitness determination by the Military Departments and a single set of disability ratings provided by VA for appropriate use by both departments." Prior to DTM 11-015, and except for the limited number of pilot programs established pursuant to NDAA 2008, the PEB's rating determinations had not been previously tied to the VA's examination and rating process. See Under Secretary of Defense for Personnel and Readiness Memorandum, "Implementing Disability-Related Provisions of the National Defense Authorization Act of 2008 (Pub. L. 110-181)," 13 March and 14 October 2008; and Under Secretary of Defense for Personnel and Readiness Memorandum, "Policy and Procedural Update for the Disability Evaluation System (DES) Pilot Program," 11 December 2008 (subsequently cancelled pursuant to DTM 11-015).

d. The applicant's case was processed after the passage of NDAA 2008 but not in one of the pilot locations. Therefore, the PEB that reviewed her conditions was not tied to the VA process that determined a significantly higher rating (50% versus 20%). In the applicant's case, the difference in the ratings affects whether she should remain separated or, in the alternative, permanently retired due to disability. In hindsight, it is clear that although the linking of the VA rating process to the DES process was only experimental at the time she was separated, that process was later implemented on a DoD-wide basis. Had her case been initiated in a pilot program location, or after full implementation of the IDES process, the outcome of her case may have been different.

e. In assessing this case, the PDA did not have access to the underlying objective medical evidence relied upon by the PEB or VA. However, on the face of the DA Form 199 and VA Rating Decision documents, it appears that there was essential agreement on the underlying medical impairments at issue. Moreover, both assessments occurred within months of each other so it may be reasonably assumed that there was no appreciable difference in her medical condition. Nonetheless, the PEB derived a rating of 20% while VA assessed a rating totaling 50% for her eye conditions. This disparity in ratings suggests that a subsequent review of the available medical evidence may be helpful in determining which set of ratings is more accurate. In any event, given that random factors (i.e., the location of the pilot programs and the timing of the applicant's

separation) may have possibly precluded her from having the benefit of the higher VA ratings, an equitable application of the VA ratings after-the-fact may be justified.

f. Based on the evidence available and the unique circumstances and timing of her case, including the significant discrepancy between the PEB and VA ratings, we find her request to have sufficient merit as matter of equity to warrant further medical review, and possible corrective action, at the Army Review Boards Agency (ARBA).

10. The applicant was provided with a copy of the advisory opinion and afforded the opportunity to submit a response; she did not respond.

11. Upon separation from military service for medical disability and consistent with Board for Corrections of Military Records (BCMR) procedures of the Military Department concerned, the former Service member (or his or her designated representative) may request correction of his or her military records through his or her respective Military Department BCMR if new information regarding his or her service or condition during service is made available that may result in a different disposition.

12. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Applicants do not have a right to a hearing.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found relief is warranted.

2. The Board concurred with the conclusion of the advisory official that the applicant would have had a higher disability rating if she had been processed through IDES instead of the legacy Disability Evaluation System, and she would have been retired for disability rather than discharged with severance pay. Based on a preponderance of the evidence, the Board determined it would be appropriate to correct the applicant's record to show her disabling condition was rated at 40%, and she was retired for disability.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

■	■	■	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board determined the evidence presented is sufficient to warrant a recommendation for relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by showing her Army disability rating was 40% and by showing she was retired for disability instead of being discharged for disability with severance pay.

3/29/2025

X

CHAIRPERSON

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. The Directive-type Memorandum (DTM) on Implementing Disability-Related Provisions of the National Defense Authorization Act of 2008 (NDAA 2008), 13 March 2008 provided supplemental and clarifying guidance on implementing those disability related provision of the NDAA 2008 (Public Law 110-181) which were time

sensitive and impacted immediate decisions pertaining to the rating of conditions and the calculation of separation severance pay. This DTM revised paragraph 3.8 of DODD 1332.18, Disability Evaluation System (DES).

3. DTM 11-015, 19 December 2011, explains the Integrated Disability Evaluation System (IDES). It states:

a. The IDES is the joint Department of Defense (DOD)-Department of Veterans Affairs (VA) process by which DOD determines whether wounded, ill, or injured Service members are fit for continued military service and by which DOD and the VA determine appropriate benefits for Service members who are separated or retired for a service-connected disability. The IDES features a single set of disability medical examinations appropriate for fitness determination by the Military Departments and a single set of disability ratings provided by the VA for appropriate use by both departments. Although the IDES includes medical examinations, IDES processes are administrative in nature and are independent of clinical care and treatment.

b. Unless otherwise stated in this DTM, DOD will follow the existing policies and procedures promulgated in DOD Directive 1332.18 and the Under Secretary of Defense for Personnel and Readiness Memoranda. All newly-initiated, duty-related physical disability cases from the Departments of the Army, Air Force, and Navy at operating IDES sites will be processed in accordance with this DTM and follow the process described in this DTM unless the Military Department concerned approves the exclusion of the Service member due to special circumstances. Service members whose cases were initiated under the legacy DES process will not enter the IDES.

c. IDES medical examinations will include a general medical examination and any other applicable medical examinations performed to VA C&P standards. Collectively, the examinations will be sufficient to assess the member's referred and claimed condition(s) and assist the VA in ratings determinations and assist military departments with unfit determinations.

d. Upon separation from military service for medical disability and consistent with Board for Corrections of Military Records (BCMR) procedures of the Military Department concerned, the former Service member (or his or her designated representative) may request correction of his or her military records through his or her respective Military Department BCMR if new information regarding his or her service or condition during service is made available that may result in a different disposition. For example, a veteran appeals the VA's disability rating of an unfitting condition based on a portion of his or her service treatment record that was missing during the IDES process. If the VA changes the disability rating for the unfitting condition based on a portion of his or her service treatment record that was missing during the IDES process and the change to the disability rating may result in a different disposition, the Service member may

request correction of his or her military records through his or her respective Military Department BCMR.

e. If, after separation from service and attaining veteran status, the former Service member (or his or her designated representative) desires to appeal a determination from the rating decision, the veteran (or his or her designated representative) has 1 year from the date of mailing of notice of the VA decision to submit a written notice of disagreement with the decision to the VA regional office of jurisdiction.

4. Army Regulation (AR) 635-40, Personnel Separations-Physical Evaluation for Retention, Retirement, or Separation, governs the evaluation for physical fitness of Soldiers who may be unfit to perform their military duties because of physical disability.

a. 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. Under the provisions of Title 10, U.S. Code, section 61 these ratings are assigned from the Department of Veterans Affairs Schedule for rating disabilities (VASRD).

b. 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. When an unlisted condition is encountered, it is rated under a closely related disease or injury in which not only the functional, but the anatomical localization and symptomatology are closely analogous.

c. 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. Any non-ratable defects or conditions will be listed in item 8 of DA Form 199, but will be annotated as non-ratable.

d. 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.

5. Title 38, Code of Federal Regulations, contains the schedule for rating disabilities. The rating schedule is primarily a guide in the evaluation of disability resulting from all types of diseases and injuries encountered as a result of or incident to military service. The percentage ratings represent as far as can practicably be determined the average

impairment in earning capacity resulting from such diseases and injuries and their residual conditions in civil occupations. Generally, the degrees of disability specified are considered adequate to compensate for considerable loss of working time from exacerbations or illnesses proportionate to the severity of the several grades of disability. For the application of this schedule, accurate and fully descriptive medical examinations are required, with emphasis upon the limitation of activity imposed by the disabling condition. Over a period of many years, a veteran's disability claim may require reratings in accordance with changes in laws, medical knowledge and his or her physical or mental condition. It is thus essential, both in the examination and in the evaluation of disability, that each disability be viewed in relation to its history.

6. The VASRD shows -

a. CODE 6011: Retinal scars, atrophy, or irregularities is rated with the following percentages:

- localized scars, atrophy, or irregularities of the retina, unilateral or bilateral, that are centrally located and that result in an irregular, duplicated, enlarged, or diminished image 10
- alternatively, evaluate based on the General Rating Formula for Diseases of the Eye, if this would result in a higher evaluation.

b. CODE 6018: Conjunctivitis, other chronic: active: evaluate under the General Rating Formula for Diseases of the Eye, minimum rating 10. Inactive: evaluate based on residuals, such as visual impairment and disfigurement (diagnostic code 7800-scars of the head, face or neck)

c. CODE 6066: Visual acuity in one eye 10/200 (3/60) or better:

- Vision in one eye 10/200 (3/60):
 - In the other eye 10/200 (3/60) 90
 - In the other eye 15/200 (4.5/60) 80
 - In the other eye 20/200 (6/60) 70
 - In the other eye 20/100 (6/30) 60
 - In the other eye 20/70 (6/21) 50
 - In the other eye 20/50 (6/15) 40
 - In the other eye 20/40 (6/12) 30
- Vision in one eye 15/200 (4.5/60):
 - In the other eye 15/200 (4.5/60) 80
 - In the other eye 20/200 (6/60) 70

- In the other eye 20/100 (6/30) 60
- In the other eye 20/70 (6/21) 40
- In the other eye 20/50 (6/15) 30
- In the other eye 20/40 (6/12) 20

- Vision in one eye 20/200 (6/60):
 - In the other eye 20/200 (6/60) 70
 - In the other eye 20/100 (6/30) 60
 - In the other eye 20/70 (6/21) 40
 - In the other eye 20/50 (6/15) 30
 - In the other eye 20/40 (6/12) 20

- Vision in one eye 20/100 (6/30):
 - In the other eye 20/100 (6/30) 50
 - In the other eye 20/70 (6/21) 30
 - In the other eye 20/50 (6/15) 20
 - In the other eye 20/40 (6/12) 10

- Vision in one eye 20/70 (6/21):
 - In the other eye 20/70 (6/21) 30
 - In the other eye 20/50 (6/15) 20

- Vision in one eye 20/50 (6/15):
 - In the other eye 20/40 (6/12) 10
 - In the other eye 20/50 (6/15) 10
 - In the other eye 20/40 (6/12) 10
 - Vision in one eye 20/40 (6/12):
 - In the other eye 20/40 (6/12) 0

d. VASRD CODE 6099 refers to an unlisted disability of the eye. Where the schedule does not provide a zero percent evaluation for a diagnostic code, a zero percent evaluation shall be assigned when the requirements for a compensable evaluation are not met. Title 38 Combined Federal Regulation, section 4.31.

7. 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.

8. Title 38, USC, section 1110, General - Basic Entitlement: 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.

9. Title 38, USC, section 1131, Peacetime Disability Compensation - Basic Entitlement: 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.

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

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 on the basis of equity, injustice, or clemency grounds, Boards 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.

11. Title 10, U.S. Code, section 1556 of 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.

12. Title 10, U.S. Code, section 1552, the law which provides for the Board, states that The Secretary may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due to the claimant on account of his or another's service in the Army, Navy, Air Force, Marine Corps or Coast Guard, as the case may be.

13. AR 15-185, ABCMR, states 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. Applicants do not have a right to a formal hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

//NOTHING FOLLOWS//