

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 11 June 2024

DOCKET NUMBER: AR20230012283

APPLICANT REQUESTS: in effect, correction of his DA Form 199 (Informal Physical Evaluation Board (PEB) Proceedings) by adding other medical conditions as unfitting resulting in a higher disability rating.

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

- DD Form 149 (Application for Correction of Military Record)
- Department of Veterans Affairs (VA) rated disabilities document
- My HealtheVet Personal Information Report (919 pages)

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 the reason for submitting this request is to have his service-connected injuries reevaluated (not just his back) because he departed the Army with multiple surgeries and other conditions that continue to affect his personal well-being today. He received a 10% disability rating from the Army for service-connected lumbar, multilevel degenerative disc disease. This injury has since evolved, along with other injuries, which were not observed during his medical board determination. He has been told by doctors that the only way to correct his disabilities is through surgery, but he is fairly too young for his back and neck corrective surgeries. The delay in response to his initial rating by the Army is due to lack of knowledge of the processes. He requests for the Board to seriously consider his request as his injuries while in Army garrison and deployed environments have taken a toll on his well-being, physically and mentally.
3. The applicant enlisted in the Regular Army on 12 February 2003.
4. On 26 July 2018, a PEB found the applicant physically unfit for further military service due to lumbar multilevel degenerative disc disease. The PEB recommended a 10% disability rating and the applicant's separation with severance pay. The PEB found

the following 9 additional conditions not unfitting because the Medical Evaluation Board (MEB) indicated these conditions meet medical fitness standards per Army Regulation 40-501 (Standards of Medical Fitness), none were listed on the DA Form 3349 (Physical Profile) as preventing him from performing one or more functional activities, and there was no evidence indicating that performance issues, if any, were due to these conditions.

- labral tear left shoulder
- herpes simplex virus
- headache
- right foot bunion fracture and first metatarsal stress fracture
- pseudo folliculitis barbae
- history of Brostrom repair, left, with incision and drainage of infected wound, healed
- patellofemoral pain syndrome
- cubital tunnel syndrome
- adjustment disorder with mixed anxiety and depressed mood

5. On 30 July 2018, the applicant concurred with the PEB's findings and recommendations and waived a formal hearing of his case. He did not request reconsideration of his VA ratings.

6. The applicant's DA Form 199 contains the following statements:

a. This case was adjudicated as part of the (Integrated Disability Evaluation System (IDES).

b. As documented in the VA memorandum dated 25 July 2018, the VA determined the specific VA Schedule for Rating Disabilities (VASRD) code(s) to describe the Soldier's condition(s). The PEB determined the disposition recommendation based on the proposed VA disability rating(s) and in accord with applicable statutes and regulations.

7. The applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged on 27 September 2018 under the provisions of Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation) by reason of disability, severance pay, combat related (enhanced).

8. The applicant provided a VA rated disabilities document showing he was granted service-connected disability compensation for various service -related conditions.

9. 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.

#### 10. 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 service, a corresponding increase in his military disability rating, and that his disability discharge disposition be changed from separated with disability severance pay to permanent retirement for physical disability. He states:

“My reason for submitting my request is to have my service-connected injuries re-evaluated and not just my back as I departed the Army with multiple surgeries and other conditions that continue to affect my personal well-being today. Upon my departure from the Army, I received 10% for a service-connected injury - lumbar, multilevel degenerative disc disease only.

This injury has sense evolved along with other injuries that were not observed during my Medical Board determination by the Army. I've had doctors state the only way to correct my disabilities is through surgery in which it's stated I'm fairly too young for the corrective surgery for both my back and neck.”

c. The Record of Proceedings details the applicant's service and the circumstances of the case. His DD 214 for the period of Service under consideration shows he entered the Regular Army on 12 February 2003 and was separated with \$122,298.00 of disability severance pay under provisions in paragraph 4-19 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (19 January 2017).

d. A Soldier is referred to the Integrated Disability Evaluation System (IDES) when they have one or more conditions which appear to fail medical retention standards reflected on a duty liming permanent physical profile. At the start of their IDES processing, a physician lists the Soldiers referred medical conditions in section I the VA/DOD Joint Disability Evaluation Board Claim (VA Form 21-0819). The Soldier, with

the assistance of the VA military service coordinator, lists all other conditions they believe to be service-connected disabilities in block 8 of section II of this form, or on a separate Application for Disability Compensation and Related Compensation Benefits (VA Form 21-526EZ).

e. Soldiers then receive one set of VA Disability Benefits Questionnaires (DBQ – aka C&P examinations) covering all their referred and claimed conditions. These examinations, which are the examinations of record for the IDES, serve as the basis for both their military and VA disability processing. The medical evaluation board (MEB) uses these exams along with AHLTA encounters and other information to evaluate all conditions which could potentially fail retention standards and/or be unfitting for continued military service. Their findings are then sent to the physical evaluation board for adjudication.

f. All conditions, both claimed and referred, are rated by the VA using the VA Schedule for Rating Disabilities (VASRD). The physical evaluation board (PEB), after adjudicating the case, applies the applicable ratings to the Soldier's unfitting condition(s), thereby determining his or her final combined rating and disposition. Upon discharge, the Veteran immediately begins receiving the full disability benefits to which they are entitled from both their Service and the VA.

g. On 3 May 2018, the applicant was referred to the IDES for "Lower Back Pain (Degenerative Disc Disease L5-S1)." The applicant claimed eleven additional conditions on a separate Application for Disability Compensation and Related Compensation Benefits (VA Form 21-526EZ).

h. A medical evaluation board (MEB) determined his "Multilevel Degenerative Disc Disease" failed the medical retention standards of AR 40-501, Standards of Medical Fitness. The MEB determined nine additional medical conditions met medical retention standards. On 19 June 2018, the applicant concurred with the Board's decision and declined the opportunities to request an Impartial Medical Review and/or submit a written rebuttal. His case was referred to a physical evaluation board (PEB) for adjudication.

i. On 14 April 2020, the applicant's informal PEB found his lumbar spine condition was the sole unfitting condition for continued military service. They found the nine remaining medical conditions not unfitting for continued service. The PEB applied the Veterans Benefits Administration (VBA) derived rating of 10%. Because his final rating was less than 30%, the PEB recommended he be separated with disability severance pay. On 30 July 2018, after being counseled on the PEB's findings and recommendation by his PEB liaison officer, the applicant concurred with the Board's findings, waived his right to a formal hearing, and declined the opportunity to have the VA reconsider his disability rating.

j. Review of his PEB case file in ePEB along with his encounters in AHLTA revealed no substantial inaccuracies or discrepancies.

k. There is insufficient probative evidence the applicant had any additional duty incurred medical condition 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 a rereferral of his case to the Disability Evaluation System. Furthermore, there is no evidence that an additional medical condition prevented the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his separation.

l. JLV shows he has been awarded numerous VA service-connected disability ratings, including Eczema (60%), Sleep apnea (50%), and Chronic adjustment disorder (30%). 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.

m. It is the opinion of the ARBA medical advisor that neither an increase in his military disability rating nor a referral of his case back 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 applicant's contentions, the military record, and regulatory guidance were carefully considered.

a. The evidence shows a PEB found the applicant physically unfit for further military service due to lumbar multilevel degenerative disc disease. The PEB recommended a 10% disability rating and the applicant's separation with severance pay. The PEB found his 9 additional conditions not unfitting because the Medical Evaluation Board (MEB) indicated these conditions meet medical fitness standards per AR 40-501 (Standards of Medical Fitness), none were listed on the DA Form 3349 (Physical Profile) as preventing him from performing one or more functional activities, and there was no evidence indicating that performance issues, if any, were due to these conditions. The Board found no error or injustice in his disability separation processing.

b. The Board also reviewed and agreed with the medical reviewer's finding insufficient probative evidence the applicant had any additional duty incurred medical

condition which would have failed the medical retention standards of chapter 3 of AR 40-501, prior to his discharge. Thus, there was no cause for a re-referral of his case to the Disability Evaluation System. There is also no evidence that an additional medical condition prevented the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his separation.

c. Based on the available evidence, the Board determined that neither an increase in his military disability rating nor a referral of his case back to the disability evaluation system is warranted.

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 for correction of the records of the individual concerned.

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I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

REFERENCES:

1. Title 10, U.S. Code, section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.

2. Title 10, 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 Disability Evaluation System and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with Department of Defense (DOD) Directive 1332.18 and Army Regulation 635-40.

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.

a. The disability evaluation assessment process involves two distinct stages: the MEB and PEB. The purpose of the MEB is to determine whether the service member's injury or illness is severe enough to compromise his or her ability to return to full duty based on the job specialty designation of the branch of service. A PEB is an administrative body possessing the authority to determine whether a service member is fit for duty. A designation of "unfit for duty" is required before an individual can be separated from the military because of an injury or medical condition.

b. Service members whose medical condition did not exist prior to service who are determined to be unfit for duty due to disability are either separated from the military or are permanently retired, depending on the severity of the disability. 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.

d. 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 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 his or her office, grade, rank, or rating in such a way as to reasonably fulfill the purpose of his or her employment on active duty.

e. 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%.

5. Directive-type Memorandum 11-015, dated 19 December 2011, explains the IDES. It states:

a. The IDES is the joint DOD-VA process by which DOD determines whether wounded, ill, or injured service members are fit for continued military service and by which DOD and 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 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 requirements promulgated in DODI 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.

c. IDES medical examinations will include a general medical examination and any other applicable medical examinations performed to VA Compensation and Pension standards. Collectively, the examinations will be sufficient to assess the member's



referred and claimed condition(s) and assist VA in ratings determinations and assist military departments with unfit determinations.

d. Upon separation from military service for medical disability and consistent with the Board for Correction of Military Records (BCMR) procedures of the military department concerned, the former service member 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 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. If, after separation from service and attaining veteran status, the former service member desires to appeal a determination from the rating decision, the veteran has one 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.

6. Title 38, U.S. Code, Sections 1110 and 1131, 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.

7. Title 38, CFR, Part IV is the VASRD. 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.

8. 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 ABCMR applicants (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//