

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 16 July 2024

DOCKET NUMBER: AR20230012833

APPLICANT REQUESTS: reconsideration of his previous request for permanent disability retirement vice discharge with entitlement to severance pay.

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

- DD Form 149 (Application for Correction of Military Record)
- Department of Veterans Affairs Rating Decision, 13 December 2004
- MRI of the Spine, Imaging Services, 28 April 2004

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 AR20080007607, on 4 December 2008. The applicant's case was also considered by the Department of Defense Physical Disability Board of Review in Docket Number AR20090012048.

2. The applicant states he believes he should have received a medical retirement instead of a medical discharge. This is based on the fact that the VA awarded him 40% service-connection for his back at the time of discharge. He believes his case was reviewed prior to the 2008 change in the law and therefore warrants reconsideration.

3. Review of the applicant's service records shows:

a. The applicant completed the Chaplain Officer Basic Course from January to February 2000. He executed an oath of office and was appointed a Reserve commissioned officer of the Army on 11 June 2002.

b. He entered active duty on 6 August 2002 and was assigned to Fort Sill, OK, as a unit chaplain. He was promoted to captain/O-3 in March 2003. He served in Kuwait from 20 March to 10 June 2003.

c. On 13 August 2004, a medical evaluation board (MEB) considered his records, medical history, lab work, and other medical records. The MEB reported no specific

injury to the applicant's back, only that he first reported low back pain in 2002 while deployed to Kuwait. He reported that while sleeping on a cot, he began having low back pain which progressively worsened.

(1) On examination, the applicant and/or medical provided noted discomfort in the lumbar spine with full forward flexion, as well as with extension. Range of motion was measured with a goniometer at forward flexion 80 degrees, extension 15 degrees, left side bending 30 degrees, right side bending 30 degrees, right rotation 35 degrees, and left rotation 35 degrees. Waddell signs were positive for axial loading, as well as distracted straight left raise testing. Deep tendon reflexes were 2/4 bilaterally. No neurologic deficit was noted on examination. Sensation to light touch and pinprick was intact throughout. No radicular signs were noted. He was able to heel walk and toe walk. No gross structural deformity or muscle spasm was noted of the back. No edema, effusion or muscle atrophy was noted of the extremities. He demonstrated a normal gait on examination.

(2) An MRI performed in April 2004 of his lower back showed the conus medullaris and cauda equine as normal in shape, size, and signal. The lumbar alignment and vertebral body heights and signal were normal; there were no lytic lesions in the lumbar vertebrae. The L1/2 through L4/5 was unremarkable. At the L5/S1 there was a mild 5 millimeter central protrusion. This protrusion caused mild spinal canal stenosis and mild to moderate bilateral lateral recess stenosis. There was no evidence for spondylolysis or spondylolisthesis.

(3) The MEB found his condition of chronic low back pain medically unacceptable and recommended that his medical conditions be referred to a physical evaluation board (PEB). On 19 August 2004, the applicant was counseled and concurred with the MEB's findings and recommendations.

d. On 24 August 2004, an informal PEB convened and found his medical condition unfitting due to chronic subjective low back pain, without neurologic abnormality, thoracolumbar range of motion limited by pain, with 2/5 Waddle's sign.

(1) The informal PEB rated his condition at 10% under the VA Schedule for Rating Disabilities (VASRD) Code 5237. Based on a review of the medical evidence of record, the PEB concluded that his medical condition prevented performance of his duty in his grade and specialty. Because he was rated less than 30% and he had less than 20 years of active service, his disposition would be separation with severance pay if otherwise qualified.

(2) On 25 August 2004, following his counseling by a PEB Liaison Officer, the applicant concurred with the PEB's findings and waived a formal hearing of his case.

e. On 25 October 2004, the applicant was discharged from active duty. His DD Form 214 (Certificate of Release or Discharge from Active Duty) show she was discharged under the provisions of Army Regulation (AR) 635-40 ((Physical Evaluation for Retention, Retirement, or Separation), paragraph 4-24b(3) by reason of disability with severance pay. He completed 2 years, 2 months, and 20 days of active military service and he received \$16,108.80 in severance pay.

5. The applicant provides an MRI to the :eft Spine Report, dated 28 April 2004. It states:

a. Findings: MRI of the L-spine shows the conus medullaris and cauda equina are normal in shape, size, and signal. The lumbar alignment and vertebral body heights and signal are normal; there are no lytic lesions in the lumbar vertebrae. L1/2 through L4/5 are unremarkable. At LS/S1 there is a 5 mm central protrusion, which indents the anterior aspect of the thecal sac and abuts both passing intraspinal S1 nerve roots; left more than right. This protrusion thus causes mild spinal canal stenosis and mild to moderate bilateral lateral recess stenosis. There is no evidence for spondylolysis or spondylolisthesis

b. Impression: L5/S1 mild spinal canal stenosis and mild to moderate bilateral lateral recess stenosis is sue to a 5 mm central protrusion, which abuts both passing intraspinal S1 nerve roots and the anterior aspect of the thecal sac. Th protrusion is slightly larger on the left than the right.

6. He previously provided a copy of a physical examination he underwent at QTC Medical Services, Lawton, OK on 16 September 2004, prior to his discharge. Examination of the thoracolumbar spine reveals no complaints of radiating pain on movement. Mild muscle spasm was present throughout the lumbar spine. There was tenderness noted on examination. There was negative straight leg raising on the right and left. Range of motion was at forward flexion was measured at 15 degrees, extension at 13 degrees, left lateral flexion at 18 degrees, right lateral flexion at 25 degrees, right rotation at 20 degrees, and left rotation at 30 degrees. His range of motion was limited by pain and pain had the major functional impact. His range of motion was not additionally limited by fatigue, weakness, lack of endurance or in coordination. There was no ankylosis of the spine and no signs of intervertebral disc syndrome present. He was diagnosed with degenerative joint disease with spinal canal stenosis, L5-S1.

7. On 13 December 2004, the VA awarded the applicant service-connection for degenerative disc disease with spinal canal stenosis, L5-S1, rated as 40%.

8. On 4 December 2008 (ABCMR Docket Number AR2008007607) in response to the applicant's request to increase his PEB rating and a medical retirement as a result of the increased rating, the Board denied his request and stated:

a. The medical evidence of record supports the determination that the applicant's unfitting back condition was properly diagnosed, and his disability was properly rated by the PEB in accordance with the above regulations. His separation with severance pay, was in compliance with law and regulations. His rights were fully protected during the disability process. He concurred with both the MEB and PEB and was properly counseled regarding his rights during the physical disability process.

b. Based on the available medical evidence at the time of the applicant's discharge, his back condition was properly rated in accordance with VASRD Code 5237, after a thorough examination by competent military medical authorities. At the time of his discharge, his back condition did not meet the criteria under VASRD Code 5237 for a higher rating. The rating he received correctly captured his physical condition at the time of his discharge. The above explanation of the VASRD code 5237 shows why the applicant's back condition did not meet the criteria for a higher rating. In order to have received a 30% disability rating and a medical disability retirement, the applicant's medical evidence would have had to have shown that he had forward flexion of the cervical spine of 15 degrees or less or, favorable ankylosis of the entire cervical spine. His medical evidence did not show he met the criteria. Further, the applicant has not furnished any new substantive medical evidence to support that he was entitled to at least a 30 percent disability rating under VASRD Code 5237.

c. The applicant provided a copy of a physical examination he had by a civilian medical examiner on 16 September 2004 prior to his discharge, and only a month after his MEB examination. This examination conflicts with the MEB examination regarding the measurements of the applicant's range of motion, diagnosis, as well as reporting of muscle spasms and tenderness to touch which was not present in August 2004. It also noted that his range of motion was limited by pain and that pain had the major functional impact and it did not include any explanation on whether his reduced range of motion was due to evidence of mechanical back pain as opposed to subjective pain. Finally, the applicant concurred with the PEB and did not request a formal hearing of his case to place into evidence the civilian examination and he has provided no additional medical evidence that the Army's rating was in error.

d. It appears that the VA based its rating of the applicant's back condition on the September 2004 civilian examination and rated his back as being 40% disabling because his forward flexion of the thoracolumbar spine was 30 degrees or less. However, the VA's rating does not change the medical evidence available for review by the PEB at the time it convened in August 2004 when it determined that the applicant

met the criteria for a 10% disability rating. The applicant provided no evidence that an injustice was committed in his rating by the Army.

e. The VA rating decision provided by the applicant does not establish entitlement to medical retirement or disability separation from the Army. Operating under different law and its own policies and regulations, the VA, which has neither the authority, nor the responsibility for determining medical unfitness for military service, awards ratings because a medical condition is related to service, i.e., service connected. Furthermore, the VA can evaluate a veteran throughout his lifetime, adjusting the percentage of disability based upon that agency's examinations and findings. The Army must find unfitness for duty at the time of separation before a member may be medically retired or separated.

f. Given the above, the applicant has submitted insufficient evidence to establish error in the disability rating given in his PEB or to entitlement to medical disability retirement. In order to justify correction of a military record the applicant must show or it must otherwise satisfactorily appear, that the record is in error or unjust. The applicant did not submit sufficient evidence that would satisfy this requirement.

9. On 8 June 2009, the DOD PDBR also found insufficient evidence to re-characterize his discharge. The PDBR weighed the probative values of all of the back exams, descriptions of back treatments and back-related complaints in-Service and the VA back examination and history and found the Army MEB examination to be substantially weightier. There was a majority decision to recommend no change in the original PEB rating (code 5299-5237 at 10%). The single voter for dissent (recommended adopting the VA rating 5242 at 40%) elected not to submit a minority opinion.

10. On 17 July 2009, the Deputy Assistant Secretary of the Army - Review Boards (DASA (RB)) informed the applicant that the DOD PDBR reviewed his application and recommended no change to the characterization of his separation from the Army or his separation disability rating. The DASA RB) reviewed the Board's recommendation and record of proceedings and accepted its recommendation. His separation based on the report of the Army PEB shall be treated and recorded as final as of the date of his separation with severance pay. This decision is final. Recourse within the Department of Defense or the Department of the Army is exhausted; however, he has the option to seek relief by filing suit in a court of appropriate jurisdiction.

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 (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:

The applicant is applying to the ABCMR requesting an increase in his military disability rating for his unfitting back condition and a change in his disability discharge disposition from separated with severance pay to permanent retirement for physical disability.

b. The Record of Proceedings details the applicant's military service and the circumstances of the case. His DD 214 shows he entered the regular Army on 6 August 2002 and was discharged with \$16,108.80 of disability severance pay on 25 October 2004 under provisions in paragraph 4-24b(3) of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (1 September 1990).

c. The applicant's sole unfitting medical condition – Chronic subjective lower back pain - was reviewed by the Physical Disability Board of Review (PDBR) in 2009. On 4 June 2009, they recommended no recharacterization of his separation. Their recommendation was approved by the Deputy Assistant Secretary of the Army Review Boards on 17 July 2009. DoD PDBR decisions are final and the issues considered by the PDBR cannot afterward be considered by the Army Board for Correction of Military Records.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. The evidence shows the applicant was found medically unfit. The only unfitting medical condition (Chronic subjective lower back pain) was reviewed by the Physical Disability Board of Review (PDBR) in 2009, which recommended no recharacterization of his separation. Their recommendation was approved by the Deputy Assistant Secretary of the Army Review Boards on 17 July 2009. DoD PDBR decisions are final, and the issues considered by the PDBR cannot afterward be considered by the Army Board for Correction of Military Records. Therefore, the Board determined there is no effective relief that the Board can grant.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
█	█	█	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis to amend the decision of the ABCMR set forth in Docket Number AR20080007607, on 4 December 2008.



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. Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation) in effect at the time, establishes the Army physical 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. It provides for medical evaluation boards, which are convened to document a Soldier's medical status and duty limitations insofar as duty is affected by the Soldier's status. A decision is made as to the Soldier's medical qualifications for retention based on the criteria in Army Regulation 40-501 (Standards of Physical Fitness), chapter 3. If the MEB determines the Soldier does not meet retention standards, the board will recommend referral of the Soldier to a PEB.

2. 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 at less than 30%.
3. Section 1556 of Title 10, United States Code, 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.
4. Title 38, U.S. Code 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.
5. Title 38 U.S. Code 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.

//NOTHING FOLLOWS//