

IN THE CASE OF: [REDACTED]

BOARD DATE: 18 July 2024

DOCKET NUMBER: AR20230012912

APPLICANT REQUESTS:

- correction of his DA Form 199 (Informal Physical Evaluation Board (PEB) Proceedings) and retirement orders to show his disability resulted from a combat-related injury
- personal appearance before the Board

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

DD Form 149 (Application for Correction of Military Record)

FACTS:

1. The applicant states:

a. He is requesting correction of his records to show that participation in war simulation activities was the reason for his amputation. In 2017, while leading a team in location, he was involved in war simulation activities where explosions and gun fire surrounded them. During the incident, as they were clearing homes amidst the chaos, he sustained a fractured ankle and severe nerve damage. Although he reported the injury to medical personnel in the field, it was unfortunately not properly documented in his medical records.

b. He did not know he could request this correction. After speaking with a representative of the Disabled American Veterans, he was advised to submit this request. It is imperative that his military records correctly represent his service-related disability, as this information can have a significant impact on various aspects of his life. He was injured in a combat-like scenario, and should receive the benefits as such.

2. The applicant enlisted in the Regular Army on 22 November 2016.

3. A DA Form 199 shows that on 18 September 2019, a PEB found the applicant unfit for further military service due to left lower extremity complex regional pain syndrome with peroneal and tibia neuropathy and osteopenia of foot and ankle, status post ankle

surgery. The PEB recommended a 40% disability rating and the applicant's permanent disability retirement. The DA Form 199 contains the following entries in Section V (Administrative Determinations):

a. The disability disposition is not based on disease or injury incurred in the line of duty in combat with an enemy of the United States and as a direct result of armed conflict or caused by an instrumentality of war and incurred in the line of duty during a period of war (This determination is made for all compensable cases but pertains to potential benefits for disability retirees employed under Federal Civil Service.)

b. The disability did not result from a combat-related injury as defined in Title 26, U.S. Code, section 104 or Title 10, U.S. Code, section 10216.

4. On 30 September 2019, the applicant concurred with the PEB's findings and recommendations and waived a formal hearing of his case.

5. Orders issued on 16 October 2020 directed the applicant's release from assignment and duty because of physical disability and his permanent physical disability retirement effective 30 November 2020. The orders contain the following entries:

a. Disability is based on injury or disease received in line of duty as a direct result of armed conflict or caused by an instrumentality of war and incurred in the line of duty during a war period as defined by law: No

b. Disability resulted from a combat-related injury as defined in Title 26, U.S. Code, section 104: No

6. The applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was retired on 30 November 2020 under the authority of Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation), chapter 4, by reason of disability, permanent.

7. During the processing of this case, an advisory opinion was obtained from the U.S. Army Physical Disability Agency (USAPDA). It states:

a. The applicant is requesting that his disability be found to have been incurred under conditions simulating war. However, while the record supports a finding that he suffered a left ankle sprain in August 2017, there is no evidence, other than his own unsworn statement accompanying his Army Review Boards Agency (ARBA) request, that supports a conclusion that the disability was caused under conditions simulating war. In his ARBA application, he states that he was involved in "war simulation activities where explosions and gun fire surrounded us ... [and] sustained a fractured ankle and severe nerve damage." He further states that the injury was treated at the time but not

documented. Compare Merge File, p. 179, C&P Final Report ("Pt [patient] states had left ankle sprain in 2017 which required a modified left Burnstrom reconstruction June 2018 at Fort Meade (s/p left ankle mini fracture and lateral ligament reconstruction). Pt states either from the procedure or anesthesia (intragluteal nerve block) developed complex regional pain syndrome with symptoms burning, paresthesia, shooting pains involving stocking distribution mid-calf distally").

b. At the time the applicant concurred with the PEB findings, he had the right to request a formal hearing and to present additional evidence regarding the conditions under which his disability was incurred. Notwithstanding the right to present additional evidence, he declined to do so. Presumably, if the injury was caused during a military exercise, he would have been able to present corroborative evidence to that effect from military leadership, fellow servicemembers, or treatment providers. No such evidence, or any other persuasive evidence, was presented and, as such, he has failed to demonstrate that administrative correction of the record is warranted under the totality of the circumstances. Based on the evidence presented, the USAPDA find the request to be legally insufficient.

8. The USAPDA advisory opinion was provided to the applicant and given the opportunity to provide additional evidence or comments. No response was received.

BOARD DISCUSSION:

After reviewing the application and all supporting documents, the Board determined relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. Based upon the available documentation, the findings of the USAPDA advisory opinion and the lack of any rebuttal of those findings submitted by the applicant, the Board concluded there was insufficient evidence of an error or injustice warranting a change to the applicant's record.

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.

1/6/2025


XCHAIRPERSON


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 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. Paragraph 5-24 (Determination for Purposes of Federal Civil Service Employment) the physical disability evaluation will include a decision and supporting documentation regarding whether the injury or disease that makes the Soldier unfit or that contributes to unfitness was incurred in combat with an enemy of the United States, was the result of armed conflict, or was caused by an instrumentality of war during a period of war. These determinations impact the eligibility of certain military retirees for certain benefits when employed under the Federal Civil Service System.

(1) The determinations will be recorded on the record of proceedings of the Soldier's adjudication.

(2) Armed Conflict: The fact that a Soldier may have incurred a medical impairment during a period of war, in an area of armed conflict, or while participating in combat operations, is not sufficient to support a finding that the disability resulted from armed conflict. There must be a definite causal relationship between the armed conflict and the resulting unfitting disability.

b. Paragraph 5-25 (Determination for Federal Tax Benefits) physical disability evaluation will include a determination and supporting documentation on whether the Soldier's disability compensation is excluded from Federal gross income under the provisions of Title 26, U.S. Code, section 104. The entitlement to this exclusion is based

on the Soldier having a certain status on 24 September 1975 or being retired or separated for a disability determined to be combat related as set forth in this paragraph. The determination will be recorded on the record of proceedings of the Soldier's adjudication.

c. Combat related: This standard covers those injuries and diseases attributable to the special dangers associated with armed conflict or the preparation or training for armed conflict. A physical disability will be considered combat-related if it causes the Soldier to be unfit or contributes to unfitness and was incurred under any of the following circumstances:

(1) As a direct result of armed conflict.

(2) While engaged in hazardous service. Such service includes, but is not limited to, aerial flight duty, parachute duty, demolition duty, experimental stress duty, and diving duty.

(3) Caused by an instrumentality of war. Occurrence during a period of war is not required. A favorable determination is made if the disability was incurred during any period of service as a result of such diverse causes as wounds caused by a military weapon, accidents involving a military combat vehicle, injury, or sickness caused by fumes, gases, or explosion of military ordnance, vehicles, or material. However, there must be a direct causal relationship between the instrumentality of war and the disability. For example, if a Soldier is on a field exercise and is engaged in a sporting activity and falls and strikes an armored vehicle, the injury will not be considered to result from the instrumentality of war (the armored vehicle), because it was the sporting activity that was the cause of the injury, not the vehicle. On the other hand, if the individual was engaged in the same sporting activity and the armored vehicle struck the Soldier, the injury would be considered the result of an instrumentality of war (the armored vehicle).

2. Title 26, U.S. Code, section 104, states that for the purpose of this subsection, the term "combat-related injury" means personal injury or sickness which is incurred as a direct result of armed conflict, while engaged in extra hazardous service, or under conditions simulating war; or which is caused by an instrumentality of war.

3. Army Regulation 15-185 (Army Board for Correction of Military Records (ABCMR)) provides Department of the Army policy, criteria, and administrative instructions regarding an applicant's request for the correction of a military record.

a. Paragraph 2-9 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 evidence.

b. Paragraph 2-11 states applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

4. Section 1556 of Title 10, U.S. Code, requires the Secretary of the Army to ensure that an applicant seeking corrective action by 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//