

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 30 July 2024

DOCKET NUMBER: AR20230013312

APPLICANT REQUESTS: reconsideration of his previous request for retirement due to physical disability.

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

- DD Form 149 (Application for Correction of Military Record)
- U.S. Army Human Resources Command (AHRC) memorandum dated 28 August 2023, subject: LOD Determination (for applicant)
- medical records (10 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 AR20220000366 on 30 June 2022.

2. The applicant states he was discharged/early retired from the Army. He had originally asked to be medically retired due to his back injury. His request was not granted because there was never a line of duty (LOD) determination submitted for his injury. His injury was also misdiagnosed. He needs the LOD determination added to his records so that he can receive an immediate medical retirement. He was misdiagnosed by the medical facility and the LOD determination was never done because of this. He had X-rays taken that show his back injury was not just a "strain that will go away in 6 months."

3. Following service in the Regular Army, the applicant enlisted in the Army National Guard (ARNG) on 8 January 2013.

4. On 25 October 2019, a formal Physical Evaluation Board (PEB) found the applicant unfit for further military service due to social phobia, non-duty related. The PEB recommended the referral of the applicant's case for disposition under Reserve Components regulations. The DA Form 199-1 (Formal PEB Proceedings) shows in section VII (Instructions and Advisory Statements) the following:

a. During the formal proceedings, the applicant contended he was unfit for his current non-duty related condition of social phobia. He also contended he was unfit for back strain and that the condition was duty-related. Regarding his social phobia, the findings of the informal proceedings remained unchanged. Regarding his back condition, the applicant contended he incurred his back injury during annual training, he was unfit to perform his duties in his military occupational specialty (MOS) 25B (Information Technology Specialist), and that it was incurred in the LOD. He did not have any limitations on his DA Form 3349 (Physical Profile) associated with his back condition and he has not received consistent extensive medical treatment for this condition.

b. He sought treatment on 12 June 2019 and 23 October 2019. The formal PEB did not have any documentation indicating his back condition impacted his ability to perform the duties of his MOS and had no evidence to support the back condition was unfitting. The applicant requested his case be returned in order to make an LOD determination, but it is not the practice of the PEB to request LOD determinations for conditions that the Soldier has no DA Form 3349 physical profile limitation for or further evidence that the condition is unfitting. In summary, the applicant's social phobia condition was maintained as unfitting and his back condition was considered not unfitting.

5. The applicant's National Guard Bureau Form 22 (National Guard Report of Separation and Record of Service) shows he was discharged from the ARNG on 4 February 2020 under the provisions of National Guard Regulation 600-200 (Enlisted Personnel Management), paragraph 6-35l(8), by reason of medically unfit for retention per Army Regulation 40-501 (Standards of Medical Fitness). He was credited with 15 years and 3 days of total service for retired pay.

6. On 5 March 2020, the applicant was issued a Notification of Eligibility for Retired Pay for Non-Regular Service (15 Year Letter). This letter informed him that he competed at least 15 years but fewer than 20 years of qualifying service and will be eligible for retired pay upon application at age 60. His eligibility is based on no longer meeting the qualifications for membership in the Selected Reserve solely because he was unfit due to a physical disability.

7. Orders issued on 3 April 2020 transferred the applicant to the Retired Reserve effective 4 February 2020.

8. During the processing of the applicant's previous case, the Army Review Boards Agency (ARBA) medical staff provided a medical advisory opinion. The medical advisor opined that neither an affirmative LOD determination nor a referral of his case to the Army Disability Evaluation System (DES) was warranted. However, if the ARNG would like to re-open the applicant's LOD investigation, the medical advisor was unaware of

anything preventing such an action. *The complete medical advisory opinion was provided to the Board for their review and consideration.*

9. In the applicant's previous case, the Board determined the evidence presented was sufficient to warrant a recommendation for partial relief. As a result, the Board recommended the correction of the applicant's records by referring this medical record to the National Guard Bureau for further evaluation to determine whether the additional medical documents provided by the applicant as part of his application impacted the findings of the previously issued LOD investigation findings, as well as his disability ratings.

10. Based on the Board's decision, AHRC reviewed the applicant's records and issued a memorandum, dated 28 August 2023, subject: LOD Determination (for applicant), indicating the applicant's back condition was considered to have been incurred in LOD by the preponderance of evidence.

11. Based on the Board's decision and the AHRC's new LOD determination, a formal PEB convened on 12 February 2024. The PEB determined the applicant's back condition was not unfitting at the time of his discharge. In a letter to the applicant, the U.S. Army Physical Disability Agency (USAPDA) informed him the following:

a. On 30 June 2022, the ABCMR found the evidence presented was sufficient to warrant partial relief, directing further evaluation to determine whether the additional medical documents you provided may impact the previously issued LOD investigation findings and a possible disability rating.

b. Based on this directive, a review of the previously issued LOD determination from the AHRC found your spinal conditions were in LOD. Despite this determination the Department of Veterans Affairs (VA) Compensation and Pension (C&P) examination review proximal to the date of your original discharge and in accordance with Department of Defense (DOD) Instructional Directive 1332, to include combined overall effect, the back condition at the time of your original discharge was not unfitting notwithstanding AHRC's indication that the condition was incurred in LOD.

c. Without a disability rating from the VA's C&P examination, both the informal PEB and the formal PEB have no recourse but to find you fit for duty, and the PEB determinations were upheld by Headquarters Review Team.

12. The DA Form 199-1, dated 12 February 2024, shows the applicant's PEB Liaison Officer (PEBLO) indicated she had informed him on 12 February 2024 of the findings and recommendations of the PEB and explained to him the result of the findings and recommendations and his legal rights pertaining thereto. On 26 February 2024, the

applicant's PEBLO provided a memorandum for the PEB president, subject: Failure to Elect – PEB Proceedings (applicant), stating the following:

a. The applicant is currently undergoing disability processing. As part of this process, he is required to make an election on the PEB Proceedings. He was counseled on his PEB proceedings on 12 February 2024 in accordance with Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation) and informed of his election rights.

b. As of the date of this memorandum, the Soldier has either failed or refused to make an election on the PEB proceedings. The assigned PEBLO attests that all efforts were made to obtain said election. In accordance with Army Regulation 635-40, the Soldier has exceeded the allotted election window and the case is returned to the PEB as a failure to elect.

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 applicant served in the ARNG from 8 January 2013 to 4 February 2020. He was separated from the ARNG due to being medically unfit for retention and he was issued a 15-Year Letter. Following his discharge, he petitioned this Board regarding an LOD for his back condition. The Board granted him partial relief and referred his medical record for further evaluation to determine whether the additional medical documents he provided as part of his application impacted the findings of the previously issued LOD investigation findings, as well as his disability ratings. HRC reviewed the applicant's records and issued a memorandum indicating the applicant's back condition was considered to have been incurred in LOD by the preponderance of evidence. Based on the Board's decision and the HRC's new LOD determination, a formal PEB convened and determined the applicant's back condition was not unfitting at the time of his discharge. The applicant's PEBLO counseled him and informed him of the findings and recommendations of the PEB and explained to him his legal rights. He has either failed or refused to make an election on the PEB proceedings. Therefore, the Board found insufficient evidence to grant the requested relief.

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.

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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, 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 USAPDA is responsible for administering the Army Disability Evaluation System (DES) and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with DOD Instruction 1332.18 and Army Regulation 635-40.

2. Army Regulation 35-40 establishes the Army DES 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 Medical Evaluation Board (MEB) and PEB. The purpose of the MEB is to determine whether the service member's injury or illness is severe enough to compromise their 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 their 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 VA Schedule for Rating Disabilities (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 their office, grade, rank, or rating in such a way as to reasonably fulfill the purpose of their 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.

3. National Guard Regulation 600-200, paragraph 6-35I(8) states commanders who suspect that a Soldier may not be medically qualified for retention, will direct the Soldier to report for a complete medical examination per Army Regulation 40-501. Commanders who do not recommend retention will request the Soldier's discharge. When medical condition was incurred in line of duty, the procedures of Army Regulation 600-8-4 (Line of Duty Policy, Procedures, and Investigations) will apply. Discharge will not be ordered while the case is pending final disposition.

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//