

IN THE CASE OF: ██████████

BOARD DATE: 8 August 2024

DOCKET NUMBER: AR20230014059

APPLICANT REQUESTS: correction of his records to show he was medically retired vice being honorably discharged for disability with severance pay.

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

- DD Form 149 (Application for Correction of Military Record)
- Disability Discharge Order, 9 August 2022
- Department of Veterans Affairs (VA) Rating Decision, 29 September 2023

FACTS:

1. The applicant states he appealed to the VA for a higher rating for his service connected disability and it was granted with an effective date of September of 2022. This increase in rating was prior to his discharge date on 8 October 2022, and should have moved him from a medical separation discharge to a medical retirement.
2. With prior U.S. Marine Corps service, the applicant enlisted in the ██████████ Army National Guard (ARNG) on 13 October 2015. He extended his enlistment in December 2020. He held military occupational specialty 11B, Infantryman, and attained the rank/grade of sergeant/E-5.
3. On 26 October 2021, an informal physical evaluation board (IPEB) convened and found the applicant physically unfit for Lumbosacral strain. His DA Form 199 (PEB Proceedings) shows:
 - a. The applicant was evaluated for this condition in April 2017, while on active duty orders at Fort Stewart, GA due to lower back pain after a ruck march. The Soldier was treated with lumbar facet steroid Injections. The Soldier reported daily back pain that was exacerbated by repetitive lifting, quick movements, and prolonged standing and walking. In accordance with Army Regulation (AR) 635-40 (Disability Evaluation for Retention, Retirement, or Separation) this Soldier is unfit because the DA Form 3349, Physical Profile Record, Section 4, functional activity limitations associated with this condition make him unable to reasonably perform required duties.

b. The IPEB recommended a 20% combined disability rating with his disposition as separation with entitlement to severance pay (if otherwise qualified).

c. The applicant elected not to concur and demanded a formal gearing of his case. He also elected not to have the VA reconsider his disability rating. However, according to the U.S. Army Physical Disability Agency (USAPDA), on 9 June 2022, he waived his right to a formal hearing. He subsequently requested reconsideration of his VA ratings.

4. On 9 August 2022, the USAPDA published Orders 221-23 which honorably discharged the applicant from his ARNG component due to disability, effective 8 October 2022, in accordance with AR 635-40, at a combined disability rating of 20%.

5. He was discharged from the ARNG on 8 October 2022 in accordance with National Guard Regulation 600-200 (Enlisted Administrative Separations), paragraph 6-35(L), medically unfit for retention in the ARNG. His NGB Form 22 (Report of Separation and Record of Service) reflects 5 years, 11 months, and 26 days of ARNG service.

6. He provides a copy of his VA rating Decision, dated 29 September 2023, that states, in pertinent part, "Evaluation of lumbosacral strain (previously rated as degenerative disc disease, degenerative joint disease of the lumbar spine), which is currently 20 percent disabling, is increased to 40 percent effective September 20, 2022."

7. The USAPDA provided an advisory opinion in the processing of the applicant's case. An advisory official stated on 26 October 2021, On 26 October 2021, an Informal Physical Evaluation Board (IPEB) found the applicant unfit for Lumbosacral strain, and a rating of 20% was assessed based on VA ratings. On 16 November 2021, he demanded a formal hearing. However, on 9 June 2022, he waived his rights to a hearing. He subsequently requested reconsideration of his VA ratings, resulting in a decision dated 29 July 2022 with no change in rating. The USAPDA notified the applicant of the ratings reconsideration decision on 2 August 2022. Per orders dated 9 August 2022, he was honorably discharged with severance pay, with 20% disability, effective 8 October 2022. On 27 September 2023, the VA reconsidered his ratings and increased his rating for the Lumbosacral condition from 20% to 40%, effective 20 September 2022 (the date the VA received the intent to file compensation claim). Based on the evidence of record, namely the VA's increase of his ratings to 40% effective prior to the date of discharge, the applicant has overcome the presumption of administrative regularity and the USAPDA finds his request to be legally sufficient.

8. The applicant was provided with a copy of this advisory opinion to give him an opportunity to submit comments/response.

9. 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 (AHLTA), 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 an increase in his military disability rating with a subsequent change of his disability discharge disposition from separate with severance pay to permanent retirement for physical disability. He states that the rating for his unfitting "Lumbosacral strain" was later increased from to 40% and dated prior to his separation and so the 40% should have been applied and he should have been permanently retired for physical disability. The Record of Proceedings details the applicant's service and the circumstances of the case. Orders published by the USAPDA show the applicant was to be separated with disability severance pay for a 20% military disability rating effective 8 October 2022.

c. Within the Integrated Disability Evaluation System, all the examinations and all the ratings are performed and completed by the Veterans Administration. On 26 October 2021, the applicant's informal PEB found his "Lumbosacral strain" to be the sole unfitting for continued military service. The PEB applied the Veterans Benefits Administration (VBA) derived rating of 20% and recommended the applicant be separated with disability severance pay.

d. The 18 July 2024 outside advisory from USAPDA correctly and nicely lays out the subsequent sequence of events. In the end, a VBA reevaluation of his lumbar spine rating increased the 20% rating to 40% effective prior to his date of separation and thus the applicant should now be permanently retired for physical disability.

e. It is the opinion of the ARBA Medical Advisor the applicant should be permanently retired for physical disability with a 40% disability rating effective 9 October 2022.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. The evidence shows an informal PEB (IPEB) found the applicant unfit for Lumbosacral strain. The IPEB recommended a 20% combined disability rating with his disposition as separation with entitlement to severance pay. According to the U.S. Army Physical

Disability Agency (USAPDA), on 9 June 2022, the applicant waived his right to a formal hearing and he subsequently requested reconsideration of his VA ratings. The VBA reevaluation of his lumbar spine rating increased the 20% rating to 40% effective prior to his date of separation. Based on this rating and in agreement with the USAPDA legal advisory as well as the medical reviewer’s finding, the Board determined he should be permanently retired for physical disability with a 40% disability rating effective 9 October 2022, instead of the separation with entitlement to severance pay..

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:

- Amending Orders 221-23, issued by the USAPDA on 9 August 2022, to show the applicant was permanently retired due to disability at 40% disability, vice being honorably discharged effective 8 October 2022.
- If married, affording the applicant the opportunity to enroll in the Survivor Benefit Plan, retroactive to date of separation
- Payment of retired pay retroactive to date of separation, less any amount received as a result of his separation

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:

Army Regulation 635–40, Personnel Separations, Disability Evaluation for Retention, Retirement, or Separation, prescribes Army policy and responsibilities for the disability evaluation and disposition of Soldiers who may be unfit to perform their military duties due to physical disability.

a. Paragraph 4–1. Scope of the Disability Evaluation System: Public Law 110–181 defines the term, physical DES, in part, as a system or process of the DOD for evaluating the nature and extent of disabilities affecting members of the Armed Forces that is operated by the Secretaries of the military departments and is comprised of MEBs, PEBs, counseling of Soldiers, and mechanisms for the final disposition of disability evaluations by appropriate personnel. A Soldier may not be discharged or released from active duty because of a disability until they have made a claim for compensation, pension, or hospitalization with the VA or have signed a statement that their right to make such a claim has been explained, or have refused to sign such a statement

b. Paragraph 4-19. PEBs determine fitness for purposes of Soldiers retention, separation, or retirement for disability under 10 USC Chapter 61, or separation for disability without entitlement to disability benefits under other than 10 USC Chapter 61. The PEB also makes certain administrative determinations that may have benefit implications under other provisions of law. Chapter 5 addresses the standards for the PEB's adjudicative determinations.

c. Paragraph 4-22. All cases will be initially adjudicated by an IPEB. The IPEB conducts a documentary review of the case file without the presence of the Soldier to make an initial decision on the Soldier's fitness for continued service. The IPEB may obtain additional documents necessary for proper adjudication and will include them in the case file. If the IPEB discusses the case with personnel outside USAPDA to obtain information used in the adjudication, the presiding officer will ensure a memorandum for record regarding the discussion is included in the case file. This memorandum will be provided to the Soldier's legal counsel, if any.

(1) The PEB president will request preliminary VA ratings for each condition the PEB found to be unfitting. The request for preliminary VA ratings does not require the PEB to have determined that the unfitting condition is compensable. Once the PEB receives the VA disability rating percentages, it will apply them to the conditions determined compensable by the PEB, recommend a disposition, and generate the DA Form 199. Within three days of receiving the IPEB findings, the PEBLO (physical evaluation board liaison officer) will provide the Soldier the PEB findings, and a copy of the VA-proposed ratings and benefits estimate letter. The PEBLO will inform the Soldier

of the PEB and VA findings, the Soldier's election options, and the Soldier's right to consultation with legal counsel.

(2) Election options and impact of statement of appeals. The Soldier has the following election options to IPEB decisions.

(a) Accept the PEB decision, thereby waiving his or her right to a formal hearing. The presiding officer signs the PEB's findings and forwards the case to USAPDA for any required or quality assurance reviews and final processing.

(b) Non-concur with the PEB decision and demand or request, as applicable, a formal hearing with or without a statement of appeal (also called a statement of rebuttal). The IPEB may issue new IPEB findings as a result of the Soldier's appeal. If the PEB issues new findings, the Soldier will be given the opportunity to make an election in the same manner as for the initial informal decision. If the appeal does not result in new IPEB findings, the PEB must provide a written response to the Soldier that addresses in an orderly and itemized fashion the issues the Soldier presented in their appeal and why they did not cause a change in the informal decision. The case will be processed for formal hearing.

(c) Non-concur with the PEB decision with or without submitting a statement of appeal without demanding a formal hearing.

(d) Accept or request reconsideration of the VA preliminary ratings. The VA will only reconsider when there is new medical evidence or sufficient justification of an error to warrant reconsideration. When the Soldier demands, or is otherwise granted a formal hearing, the Soldier will defer submitting the request for ratings reconsideration until they have received the FPEB decision. This allows the VA to process a single request when the FPEB finds additional conditions unfitting. If a Soldier is initially found fit but is subsequently found unfit following a FPEB, the FPEB will forward the Soldier's case to the VA Disability Evaluation System Rating Activity Site (D-RAS) in order for the VA to issue ratings for all claimed and referred service-connected medical conditions.

d. Paragraph 4-27. Final Disposition by the USAPDA. One of the dispositions is Separation for disability without entitlement to disability severance pay. This disposition occurs under other than 10 USC Chapter 61 (10 USC 630, 10 USC 1165, 10 USC 1169 and 10 USC 12681) when the Soldier is determined unfit for a disability determined to be pre-existing and not permanently aggravated by service, or the Soldier is unfit for a disability incurred in an excess leave status other than for an emergency reason as determined by the Secretary of the Army.

//NOTHING FOLLOWS//