

IN THE CASE OF: [REDACTED]

BOARD DATE: 25 July 2024

DOCKET NUMBER: AR20230014521

APPLICANT REQUESTS: in effect, physical disability retirement in lieu of physical disability separation with severance pay

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

- DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States)
- DA Form 199 (Physical Evaluation Board (PEB) Proceedings), 3 June 2008
- Installation Management Command Orders 172-0010, 20 June 2008
- DD Form 214 (Certificate of Release or Discharge from Active Duty), ending 8 September 2008
- Department of Veterans Affairs (VA) Rating Decision, 12 January 2009

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 he is requesting a disability percentage higher than 20 percent. His initial VA Rating for post-traumatic stress disorder (PTSD) was 50 percent, while the Army only awarded him 10 percent.
3. The applicant enlisted in the Regular Army on 20 March 2003, and was awarded the Military Occupational Specialty (MOS) 11B (Infantryman).
4. The applicant deployed to Iraq from 1 November 2005 through 31 October 2006.
5. The applicant's DA Form 3349 (Physical Profile), DA Form 7652 (Disability Evaluation System (DES) Commander's Performance and Functional Statement), Medical Evaluation Board (MEB) Narrative Summary (NARSUM), DA Form 3947 (MEB Proceedings), and VA Compensation and Pension (C&P) Exam are not in his available records for review and have not been provided by the applicant.

6. A DA Form 199 shows:

a. A PEB convened on 3 June 2008, where the applicant was found physically unfit with a recommended combined rating of 20 percent and that his disposition be separation with severance pay.

b. The applicant's unfitting conditions were:

(1) PTSD; MEB diagnosis (Dx) 1; 10 percent. The onset of the condition was November 2007, when he was preparing to redeploy to Iraq after a prior tour to Iraq from December 2005 through October 2006, where he was exposed to combat and carnage. His symptoms included sleep disturbance, irritability, depression, and avoidance. He was treated with medication and counseling and admitted himself to a psychiatric facility in December 2007 after being told he was to be deployed. He was unfit for further military service due to the risk of decompensation in combat.

(2) Low back pain evaluated as back strain; MEB Dx 2; 10 percent. Atraumatic onset of low back pain first present to clinic in 2007. Pain and physical profile prevent him from performing the duties associated with his primary MOS.

c. MEB Dxs 4-8 were determined to meet retention standards. These conditions were found to be not unfitting and therefore not ratable.

d. On 6 June 2008, the applicant signed the form indicating he had been advised of the findings and recommendations of the PEB and concurred, waiving a formal hearing of his case.

7. Installation Management Command Orders 172-0010, dated 20 June 2008, discharged the applicant with severance pay and a disability rating of 20 percent, effective 8 September 2008.

8. The applicant's DD Form 214 shows the applicant was honorably discharged under the provisions of Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation) due to disability with severance pay, combat-related, with corresponding separation code. He was credited with 8 years, 5 months, and 19 days of total active service.

9. A VA Rating Decision, dated 12 January 2009, shows the applicant was awarded a combined service-connected rating of 80 percent effective 9 September 2008, for the following conditions:

- PTSD, 50 percent

- thoracolumbar spine spondylolysis with PARS Defect and spondylolisthesis, 20 percent
- right shoulder subacromial bursitis with impingement syndrome status post-surgery, 10 percent
- left knee infrapatellar tendonitis, 10 percent
- left wrist tenosynovitis, 10 percent
- right knee infrapatellar tendonitis, 10 percent
- tinnitus, 10 percent
- right index finger scar with hypoesthesia, 10 percent
- bilateral temporomandibular joint disease (TMJ), 10 percent
- costochondritis, 0 percent
- bilateral hearing loss, 0 percent
- status post left inguinal hernia, 0 percent
- status post right inguinal hernia, 0 percent
- acne, 0 percent
- migraines, 0 percent

10. An Army Review Boards Agency (ARBA) letter, dated 5 April 2024, advised the applicant that while the ABCMR can consider his request, he also has the option to apply to the Department of Defense Physical Disability Board of Review (PDBR), which was established by law to reassess the accuracy and fairness of the disability ratings of Soldiers discharged since 11 September 2002, as unfit for continued service with a combined rating of 20 percent or less and found ineligible for disability retirement. He was advised his application would be held open for a period of 15 days to allow time to make a decision. If he did not provide ARBA with a response within that time period, the ABCMR would proceed with the processing of his application. The applicant did not provide a response to the ARBA letter.

11. 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.

12. 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/or 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 and a subsequent change in his disability separation disposition from separated with disability severance pay to permanent retirement for physical disability. He states:

“I request a disability separation percentage higher than 20 percent. My initial VA rating for PTSD was 50 percent while the Army only awarded me 10 percent.”

c. The Record of Proceedings details the applicant’s military service and the circumstances of the case. His DD 214 for the period of Service under consideration shows the former Infantryman entered the Regular Army on 20 March 2000 and was separated with \$46,272.60 of disability severance pay on 8 September 2008 under provisions provided in paragraph 4-24b(3) of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (8 February 2006).

d. On 3 June 2008, the applicant’s informal physical evaluation board (PEB) found his PTSD and low back pain to be unfitting for continued service. Using the VA Schedule for Rating Disabilities (VASRD), they derived and applied ratings of 10% and 10% respectively and recommended the applicant be separated with disability severance pay. The 10% rating for his PTSD was clearly inappropriate given what the PEB had written in their rationale:

e. Soldier served a combat tour in Iraq, Dec 05 - Oct 06, where he was exposed to combat and carnage. Symptoms include sleep disturbance, Irritability, depression, and avoidance. Treated with medication and counseling, the Soldier admitted himself to psychiatric facility, Dec 07, after being told he was to be deployed. Soldier is unfit for further military service due to the risk of decompensation in combat ... Rated 10 for symptoms controlled with continuous medication.

f. The VA Schedule for Rating Disabilities (VASRD) is the document used by the military services to rate unfitting military disabilities. Paragraph B-1a and B1b of Appendix B to AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (8 February 2006):

“B–1. Purpose of the Department of Veterans Affairs Schedule for Rating Disabilities (VASRD)

a. Congress established the VASRD as the standard under which percentage rating decisions are to be made for disabled military personnel. Such decisions are to be

made according to Title IV of the Career Compensation Act of 1949 (Title IV is now mainly codified in 10 USC 61.)

b. Percentage ratings in the VASRD represent the average loss in earning capacity resulting from these diseases and injuries. The ratings also represent the residual effects of these health impairments on civil occupations.”

g. The VA’s Disability Ratings Activity Sites have personnel thoroughly trained in the derivation of disability ratings using the VASRD. Review of the applicant’s 12 January 2009 VA Ratings Decision shows the applicant’s PTSD was rated at 50% disabling and his thoracolumbar spine condition at 20%. Review of the VASRD by this VASRD trained physician shows these are correct. This yields a combined military disability rating of 60%.

h. It is the opinion of the ARBA Medical Advisor the applicant should be medically retired with a 60% disability rating effective 8 September 2008. While the applicant could be referred back to the DES, it is very likely, given the 16 years since his initial DES processing, the same contemporaneous ratings from 2009 would be used. It is more likely than not that the applicant will be permanently retired for physical disability and subsequently entitled to Combat Related Special Compensation (CRSC). However, CRSC is subject to a 6-year statute of limitations (31 U.S.C., Section 3702(b)). To receive the full retroactive CRSC entitlement, a claimant must file their CRSC claim within 6 years of any VA rating decision that could potentially make them eligible for CRSC or the date they become entitled to retired pay, whichever is more recent. If a claimant files a claim more than 6 years after initial eligibility, they are restricted to 6 years of any retroactive entitlement.

i. It is therefore recommended the Board consider authorizing the applicant to apply for CRSC beyond the 6-year statute of limitations, and if CRSC is granted, receive retroactive payments for this disability and other combat related disabilities he may have incurred IAW Chapter 63, Volume 7B of Department of Defense 7000.14R, Financial Management Regulation - Combat-Related Special Compensation (CSRC). This should also include interest and COLAs. Because one criterium for receiving CRSC is that the Veteran be in a retired status (e.g., length of Service, permanent disability, etc.), this authorization could only be used by the applicant if/when he was retired.

BOARD DISCUSSION:

After reviewing the application and all supporting documents, the Board determined relief was warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. Based upon the available documentation and the findings and recommendation in the medical review, the Board concluded there was sufficient evidence warranting a change to the applicant's narrative reason for separation, as requested. The Board recommended the applicant be medically retired with a 60% disability rating effective 8 September 2008.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

1. 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:

- revoke the current separation order for the applicant and generate a new separation order reflecting the applicant being placed on the Permanent Disability Retirement List (PDRL) with a disability rating of 60%
- changing the narrative reason for separation to reflect Medical Retirement, and changing the separation code to reflect appropriate medical retirement code
- granting an ETP, allowing the applicant to apply for CRSC based upon this ABCMR decision.

1/7/2025

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:

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. On 25 August 2017, the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to Discharge Review Boards (DRBs) and Boards for Correction of Military/Naval Records (BCM/NRs) when considering requests by veterans for modification of their discharges due in whole or in part to: mental health conditions, including post-traumatic stress disorder (PTSD), traumatic brain injury (TBI), sexual assault, or sexual harassment. Boards are to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based, in whole or in part, on those conditions or experiences.

3. 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 physical 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 Directive 1332.18 (Discharge Review Board (DRB) Procedures and Standards) and Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation).

a. Soldiers are referred to the disability system when they no longer meet medical retention standards in accordance with Army Regulation 40-501 (Standards of Medical Fitness), chapter 3, as evidenced in a Medical Evaluation Board (MEB); when they receive a permanent medical profile rating of 3 or 4 in any factor and are referred by an Military Occupational Specialty (MOS) Medical Retention Board (MMRB); and/or they are command-referred for a fitness-for-duty medical examination.

b. The disability evaluation assessment process involves two distinct stages: the MEB and Physical Evaluation Board (PEB). The purpose of the MEB is to determine whether the service member's injury or illness is severe enough to compromise his/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 or not 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. Service members who are determined to be unfit for duty due to disability either are separated from the military or are permanently retired, depending on the severity of the disability and length of military service. 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. Reasonable performance of the preponderance of duties will invariably result in a finding of fitness for continued duty. A Soldier is physically unfit when a medical impairment prevents reasonable performance of the duties required of the Soldier's office, grade, rank, or rating.

4. 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. 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.

a. Disability compensation is not an entitlement acquired by reason of service-incurred illness or injury; rather, it is provided to Soldiers whose service is interrupted and who can no longer continue to reasonably perform because of a physical disability incurred or aggravated in military service.

b. Soldiers who sustain or aggravate physically-unfitting disabilities must meet the following line-of-duty criteria to be eligible to receive retirement and severance pay benefits:

(1) The disability must have been incurred or aggravated while the Soldier was entitled to basic pay or as the proximate cause of performing active duty or inactive duty training.

(2) The disability must not have resulted from the Soldier's intentional misconduct or willful neglect and must not have been incurred during a period of unauthorized absence.

c. 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 Department of Veterans Affairs (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. 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.

5. 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 percent.

6. Title 38, U.S. Code, section 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.

7. Title 38, U.S. Code, section 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.

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 Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//