

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 4 October 2024

DOCKET NUMBER: AR20230014545

APPLICANT REQUESTS: reconsideration of his previous request for correction of his records to show he was separated due to a service-incurred medical disability.

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

- personal statement in lieu of DD Form 149 (Application for Correction of Military Record)
- DD Form 4 (Enlistment Record – Armed Forces of the United States)
- Department of Veterans Affairs (VA) Progress Notes, dated 25 July 2023
- Operative Report, dated 29 August 2023
- Orthopedic Patient Care Summary, dated 13 September 2023

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 AR20220005020 on 28 November 2022.

2. The applicant states he is providing relevant documents that were not previously considered by the Board. Maybe now his 1972 claim (interpreted to mean a VA claim for service-connected disability compensation) will be considered.

3. The applicant stated in his previous application that he broke and dislocated his right ankle during a major campaign of war and the condition continues to worsen. He contended that he should have received a disability rating when he was discharged from the Army in June 1970.

4. The applicant enlisted in the Regular Army on 16 June 1967. His DA Form 20 (Enlisted Qualification Record) shows he served in Vietnam from 1 August 1968 to 1 April 1969. The DA Form 20 also shows he was in a patient status from 23 March to around 30 June 1969.

5. A Standard Form 539 (Abbreviated Clinical Record), dated 26 March 1969, shows the applicant injured his leg and ankle sustaining a fracture of the distal fibular on

21 March 1969 as a result of falling 5-6 feet out of a helicopter. He had a closed reduction of the fracture under general anesthesia followed by a long leg cast application.

6. A DA Form 3349 (Medical Condition – Physical Profile Record) shows the applicant was issued a permanent "2" profile for healed bimalleolar fracture, right ankle. The form also shows he was medically qualified for limited duty.

7. A Standard Form 88 (Report of Medical Examination) shows the applicant underwent a medical examination on 27 February 1970 for the purpose of separation. The examiner noted the applicant had swelling around the right ankle, but that it was non-tender, had full range of motion, and good muscle strength around the joint. The examiner found the applicant qualified for separation.

8. The applicant's DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge) shows he was released from active duty and transfer to the USAR on 15 June 1970 by reason of expiration of term of service. The DD Form 214 also shows he was a reenlistment code of 1 (fully qualified for reenlistment).

9. During the processing of the applicant's previous case, the Army Review Boards Agency (ARBA) medical staff provided a medical advisory opinion. The ARBA Medical Advisor noted the applicant has been awarded multiple VA service-connected disability ratings, including a 20% rating for "Limited Motion of the Ankle." However, the Army Disability Evaluation System (DES) compensates an individual only for service incurred medical condition(s) which have been determined to disqualify him or her from further military service. The DES has neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions which were incurred or permanently aggravated during their military service; or which did not cause or contribute to the termination of their military career. These roles and authorities are granted by Congress to the VA and executed under a different set of laws.

10. The ARBA Medical Advisor opined that referral of the applicant's case to the Army DES was not warranted.

11. The applicant provides:

a. VA Progress Notes, dated 25 July 2023, was treated for bilateral hand osteoarthritis and for mild bilateral De Quervains syndrome. The applicant also pointed out the entry "A metallic left palmar foreign body is apparent" and indicated shrapnel from mortal round in Vietnam.

b. Operative Report, dated 29 August 2023, showing he underwent surgery for right ankle tibial exostosis.

c. Orthopedic Patient Care Summary, dated 13 September 2023, showing he was treated for osteoarthritis of joint of right ankle and/or foot.

12. 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.

#### 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 Board carefully considered the applicant's record of service, documents submitted in support of the petition, and executed a comprehensive review based on law, policy, and regulation. Upon review of the applicant's petition, available military records, and the medical review, the Board concurred with the advising official finding that the applicant's Department of Veterans Affairs rating determinations are based on the roles and authorities granted by Congress to the Department of Veterans Affairs and executed under a different set of laws. Based on this, the Board determined referral of his case to the Disability Evaluation System (DES) is not warranted.

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 amendment of the ABCMR decision rendered in Docket Number AR20220005020 on 28 November 2022.

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 40-501 (Standards of Medical Fitness) provides that for an individual to be found unfit by reason of physical disability, he or she must be unable to perform the duties of his or her office, grade, rank or rating. Performance of duty despite impairment would be considered presumptive evidence of physical fitness.

2. Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation) 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 or her office, grade, rank, or rating. It provides that a Medical Evaluation Board is 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.

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 service.

b. The mere presence of impairment does not of itself justify a finding of unfitness because of physical disability. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the member reasonably may be expected to perform because of his or her office, rank, grade, or rating. The Army must find that a service member is physically unfit to reasonably perform his or her duties and assign an appropriate disability rating before he or she can be medically retired or separated.

c. When a member is being processed for separation for reasons other than physical disability (e.g., retirement, resignation, relief from active duty, administrative separation, discharge, etc.), his or her continued performance of duty, until he or she is referred to the DES for evaluation for separation for reasons indicated above, creates a presumption that the member is fit for duty.

3. Title 38, U.S. Code, Sections 1110 and 1131, permit the VA to award compensation for disabilities which were incurred in or aggravated by active military service. However, an award of a VA rating does not establish an error or injustice on the part of the Army.

4. Title 38, Code of Federal Regulations, Part IV is the VASRD. The VA awards disability ratings to veterans for service-connected conditions, including those conditions detected after discharge. As a result, the VA, operating under different policies, may award a disability rating where the Army did not find the member to be unfit to perform

his duties. Unlike the Army, the VA can evaluate a veteran throughout his or her lifetime, adjusting the percentage of disability based upon that agency's examinations and findings.

5. Section 1556 of Title 10, United States Code, requires the Secretary of the Army to ensure that an applicant seeking corrective action by the 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//