

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 2 August 2024

DOCKET NUMBER: AR20230014922

APPLICANT REQUESTS:

- medical discharge that shows "Total Disability Medical Retirement"
- change the "Narrative Reason for Separation" of her DD Form 214 (Certificate of Release or Discharge from Active Duty) to reflect "100% Permanent and Total Disability"

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:
DD Form 149 (Application for Correction of Military Record)

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 she feels and believes she did not receive a full and fair hearing, nor was she provided the opportunity to state or demand a full and fair hearing as stated by the "10 U.S. Code § 1214- Right to full and fair hearing, which states, "No member of the armed forces may be retired or separated for physical disability without a full and fair hearing if he demands it." She feels that both 40% disability rating that was given as part of her "Temporary Disability Retirement" dated 1 June 2007 and the 70% for "Permanent Retired Disability dated 5 February 2009, was totally unfair for the condition and their severity that totally affected her ability to perform her duties in the Army. She feels the Army/U.S. Army Physical Disability Agency/DOD should have given her or allowed her to appeal the 40% proposed rating decision for her temporary retired pay as well as the 70% given for her permanent retired pay that was adopted by the DOD. The Department of Veterans Affairs (VA) rating decision dated November 13, 2007, says, "You served in the Army from November 17, 1993, to May 31, 2007. You filed an original disability claim that was received on May 8, 2007. Based on review of the evidence listed below, we have made the following decision(s) on your claim." As evidence the VA used in making their decision was a "VA Examination" by VA Medical Center, Shreveport., LA, dated August 27, 2007, August 31, 2007, and September 27,

2007." She believes the U.S. Army Physical Disability Board should have stated as to what claim(s), or rating decision were used to grant her the 40% "Temporary Medical Disability Retirement and what claim(s) were used.

3. The applicant annotated "PTSD" and "Sexual Assault/Harassment" on her application.

4. A review of the applicant's service record shows:

a. The applicant enlisted in the Regular Army on 17 November 1993 and held military occupational specialty 42L, Administrative Specialist (and later 25B, Information Systems Operator).

b. The applicant does not provide, and her service record does not contain, the medical evaluation board proceedings, narrative summary, or the physical evaluation board proceedings that placed her on the temporary disability retired list. However, other evidence shows:

(1) Orders 127-0311, issued by Headquarters, Joint Readiness Training Center, Fort Polk, LA on 7 May 2007, retired her from active duty on 31 May 2007 and placed her on the TDRL on 1 June 2007, at a combined disability rating of 40%.

(2) DD Form 214 (Certificate of Release or Discharge from Active Duty) that shows she was retired on 31 May 2007 due to temporary disability, in accordance with Chapter 4 of Army Regulation (AR) 635-40 (Physical Evaluation for Retention, Retirement or Separation). She completed over 13 years and 6 months of active service.

- Block 26 (Separation Code) shows SFK
- Block 28 (Narrative Reason for Separation) shows Disability Temporary

d. On 12 January 2009, an informal TDRL PEB convened. Based on review of the TDRL examination, the PEB finds that the applicant remains unfit to reasonably perform the duties required by previous grade and military specialty. The applicant's current condition is considered sufficiently stable for final adjudication. The TDRL PEB assigned the following VASRD (VA Schedule of Disability Rating) Codes:

- 5242, Degenerative Arthritis, Lumbar Spine, 40%
- 7301, Peritoneal Adhesions, 30%
- 5099/5003, Right knee patellofemoral pain syndrome, 10%
- 5099/5003, Left knee pain, 10%

e The TDRL PEB assigned a combined of 70% and the applicant's disposition as permanent disability retirement.

f. The applicant was counseled. She concurred with the TDRL PEB's findings and recommendation and waived her right to a formal PEB.

g. On 5 February 2009, the U.S. Army Physical Disability Agency published Orders D036-03 removing the applicant from the TDRL on 5 February 2009 and permanent retiring the applicant due to disability at a disability rate of 70%. The orders listed the statute authorizing retirement as 10 USC section 1201.

5. On 24 February 2024, by letter, the applicant was asked to provide a copy of her medical documents that support her mental health issues (PTSD) and that her application would be held for 30 days pending receipt of such documents. There is no evidence the applicant responded to this letter.

6. On 28 February 2024, the U.S. Army Criminal Investigation Command (CID) responded to the agency's request for sanitized copies of Law Enforcement Reports, from the Department of the Army, Criminal Investigation Division, related to the applicant's claim of Sexual Assault. A search of the Army criminal file indexes utilizing the information provided revealed no Sexual Assault Redacted records pertaining to the applicant. Records at this center are Criminal Investigative and Military Police Reports and are indexed by personal identifiers such as names, social security numbers, dates and places of birth and other pertinent data to enable the positive identification of individuals.

7. 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/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 her military disability rating for the time she was on the Temporary Disability Retirement List (TDRL) as well as the final rating she received when she was permanently retired for physical disability. She asserts he was not given an opportunity to appeal these ratings. She has indicated on her DD 149 that PTSD, Other mental health conditions, and Sexual assault/harassment are issues related to his requests.

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. Her DD 214 for the period of Service under consideration shows she entered the Regular Army on 17 November 1993 and was placed on the temporary disability retirement list (TDRL) on 31 May 2007 under provisions provided in paragraph 4-24b(2) of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (8 February 2006). Orders published by Headquarters Joint Readiness Training Center and Fort Polk placed her on the TDRL with a 40% disability rating.

d. Orders published by the United States Army Physical Disability Agency show she was removed from the TDRL and permanently retired for physical disability with a disability rating of 70% effective 5 February 2009.

e. On 12 January 2009, her informal TDRL physical evaluation board (PEB) determined she had four conditions which were unfitting for continued military Service: "Degenerative Arthritis, Lumbar Spine," "Peritoneal Adhesions," "Right Knee Patellofemoral Pain Syndrome," and "Left Knee Pain Persistent After Surgical Procedure." They also determined all conditions were now stable for rating purposes.

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

g. Using the VASRD, the PEB derived and applied 40%, 30%, 10%, and 10% disability ratings respectively for a combined military disability rating of 70% and recommended the applicant be permanently retired for physical disability. On 12 January 2009, the applicant concurred with the PEB's findings and recommendation and waived her right to a formal hearing.

h. 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 1 December 2015 VA ratings decision code sheet shows the VA rated her lumbar spine condition as just 10% rating gave a 0% rating for her right knee condition. The left knee condition and the peritoneal adhesions had the same 10% ratings. If these ratings were applied to the applicant's four unfitting conditions, her military disability rating would have been 30%.

i. No medical documentation was submitted with the application.

j. There is no evidence the applicant had any additional medical condition which would have failed the medical retention standards of chapter 3 of AR 40-501, Standards

of Medical Fitness, prior to her discharge. Thus, there was no cause for referral to the Disability Evaluation System.

k. JLV shows she has been awarded multiple VA service-connected disability ratings, including one for PTSD in August 2015. However, the DES has neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions incurred during or permanently aggravated by their military service. These roles and authorities are granted by Congress to the Department of Veterans Affairs and executed under a different set of laws

l. It is the opinion of the ARBA medical advisor that neither an increase in her military disability rating nor a referral of her case to the Disability Evaluating System is warranted.

BOARD DISCUSSION:

1. 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 an increase in the applicant's rating decision at the time of separation was appropriate and referral of her case to the Disability Evaluation System (DES) is not warranted.

2. The Board noted the applicant's request for amendment of her DD Form 214 to reflect "100% Permanent and Total Disability;" however, this language is specific to the Department of Veterans Affairs so the Board determined relief was not relevant.

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, 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. Army Regulation (AR) 635-40 (Physical Evaluation for Retention, Retirement, or Separation) in effect at the time (8 February 2006), establishes the Army physical 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. It provides for medical evaluation boards, which are 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 AR 40-501 (Standards of Physical Fitness), chapter 3. If the MEB determines the Soldier does not meet retention standards, the board will recommend referral of the Soldier to a PEB.

a. Paragraph 3–9. The temporary disability retired list. The temporary disability retired list (TDRL) is used in the nature of a “pending list”. It provides a safeguard for the Government against permanently retiring a Soldier who can later fully recover, or nearly recover, from the disability causing him or her to be unfit. Conversely, the TDRL safeguards the Soldier from being permanently retired with a condition that may reasonably be expected to develop into a more serious permanent disability. Requirements for placement on the TDRL are the same as for permanent retirement. The Soldier must be unfit to perform the duties of his or her office, grade, rank, or rating at the time of evaluation. The disability must be rated at a minimum of 30 percent, or the Soldier must have 20 years of service computed under Title 10, United States Code, Section 1208, (10 USC 1208). In addition, the condition must be determined to be temporary or unstable.

b. Paragraph 4-20. Informal physical evaluation board (PEB). Each case is first considered by an informal PEB. Informal procedures reduce the overall time required to process a case through the disability evaluation system. An informal board must ensure that each case considered is complete and correct. The rapid processing intended by the use of informal boards must not override the fundamental requirement for detailed and uniform evaluation of each case. All evidence in the case file must be closely examined and additional evidence obtained if required. The PEB will consider each case using the policies of chapter 3 and the criteria provided in paragraph 4–19. The findings and recommendations of the informal PEB are recorded on DA Form 199 according to the procedures described in appendix D. Soldier’s election: The DA Form

199, block 13, lists the election options available to the Soldier for informal determinations. These include the following:

- Concurrence with the findings and recommendations and waiver of a formal hearing.
- Nonconcurrence with the findings and recommendations; submission of a rebuttal explaining the Soldier's reasons for nonconcurrence; and waiver of a formal hearing.
- Demand for a formal hearing with or without personal appearance.
- Choice of counsel if a hearing is demanded.

Soldiers indicate their elections by checkmark in block 13 and sign and date the original and MTF copies of DA Form 199. The election must be received at the PEB within 10 days from the Soldier's receipt of the informal findings.

3. Section 1556 of Title 10, United States Code, 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//