

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 7 August 2024

DOCKET NUMBER: AR20230015113

APPLICANT REQUESTS:

- in effect, physical disability retirement in lieu of physical disability separation with severance pay
- personal appearance before the Board

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 (Informal Physical Evaluation Board (PEB) Proceedings), 3 March 2017
- Department of Veterans Affairs (VA) Behavioral Health Follow-Up (Psychiatry), 20 May 2019
- VA letter, 8 January 2021
- Patient Health Summary, 27 September 2023

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:

a. The Board should grant a change to his disability separation to reflect disability retirement with corresponding separation code due to errors in military medical reviews and examinations as well as work environment difficulties created by his unit during medical reviews and transition.

b. He was forced to medically separate due to his mental health but was in the process of trying to medically retire. At the time of his medical examinations, his unit made his work environment hostile and unsafe, forcing him to pursue a shorter exiting

route than previously desired. During his medical evaluation board (MEB), it was explained to him that his mental health evaluation would be done by the VA, after his discharge from service, when it should have been done by the Army medical board evaluators.

3. The applicant enlisted in the Regular Army on 27 July 2005, and was awarded the military occupational specialty (MOS) 11B (Infantryman).

4. The applicant deployed to Afghanistan during the following time periods:

- from 5 May 2008 through 13 March 2009
- from 27 July 2010 through 25 July 2011
- from 3 November 2012 through 19 June 2013

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), VA Compensation and Pension (C&P) Exam, and VA Rating Decision are not in his available records for review and have not been provided by the applicant.

6. A DA Form 199 shows:

a. On 3 March 2017, an informal PEB convened, where the applicant was found physically unfit with a recommended rating of 10 percent and that his disposition be separation with severance pay.

b. The applicant's unfitting condition is left patellar degenerative joint disease (MEB diagnosis (Dx) 1), 10 percent. He reported the onset of this condition in 2015, when he fell and hit his knee on the corner of the concrete during a company run while stationed in Korea. He is unfit because this condition prevents him from being able to perform required activities in his MOS.

c. The applicant is fit for MEB Dx 2-5 (mild medial tibial stress syndrome; thoracolumbar strain; right rotator cuff tendinopathy; and right patellar strain because there is no indication any of these conditions prevent him from performing any functional activities or that any performance issues are due to these conditions.

d. On 21 March 2017, the applicant signed the form indicating he had been advised of the findings and recommendations of the PEB and legal rights pertaining thereto, he concurred with the findings and recommendations, and waived a formal hearing of his case. He also indicated he did not request reconsideration of his VA ratings.

7. Headquarters, III Corps and Fort Hood Orders 115-0120, dated 25 April 2017, discharged the applicant with a disability rating of 10 percent and authorized disability severance pay effective 20 June 2017.

8. The applicant's DD Form 214 shows he was honorably discharged on 20 June 2017 under the provisions of Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation) due to disability, severance pay, non-combat (enhanced) with corresponding separation code JEB, effective 20 June 2017. He was credited with 11 years, 10 months, and 24 days of net active service.

10. A Behavioral Health Follow-Up (Psychiatry) medical record, dated 20 May 2019, shows:

- The applicant was seen to follow-up for depression and anxiety and reported perceived sleep behaviors with Prazosin.
- He was diagnosed with mild post-traumatic stress disorder (PTSD).
- Therapy was recommended and he politely declined.
- Prazosin was discontinued and if sleep disturbances continued, a sleep medicine referral should be considered. Paroxetine dosing was shifted due to grogginess.

11. A VA letter, dated 8 January 2021, shows the applicant has a combined service-connected disability rating of 70 percent effective 1 December 2020. He is paid at the 100% rate because his is unemployable due to his service-connected disability and is considered to be totally and permanently disabled due to his service-connected disabilities.

12. A Patient Health Summary, dated 27 September 2023, shows:

a. The applicant's active problems include:

- acute lateral meniscus tear of left knee, noted 6 April 2021
- anxiety, noted 21 April 2021
- degenerative tear of left medial meniscus, noted 6 April 2021
- insomnia, noted 21 April 2021
- left anterior cruciate ligament (ACL) tear, noted 6 April 2021
- tobacco abuse, noted 21 April 2021

b. His procedures include:

- laryngeal mask airway (LMA) insertion, 19 May 2021
- arthroscopy knee with meniscus repair medial and lateral, 19 May 2021
- arthroscopically aided ACL repair and reconstruction, 19 May 2021

c. Multiple radiological images of his left knee reveal complete ACL tear, displaced bucket-handle tear of the medial meniscus with full-thickness radial tear of the posterior root, complex tearing of the lateral meniscus posterior horn and body with vertical longitudinal tear at the posterior horn, tibial and femoral bone contusions and lateral compartment impaction fractures.

13. 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.

14. 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 a mental health condition be determined unfitting for continued service with a corresponding increase in his current military disability rating and subsequent change in his disability discharge disposition from separated with disability severance pay to permanently retired for physical disability. He states in part:

“Forced medical separation due to mental health in the process of trying to medically retire made the environment in which service member was conducting work hostile and unsafe forcing myself to pursue shorter exiting route then previously desired. Mental health evaluation was explained during medical evaluation to be done after service with veterans affairs when it should have been done with Army board medical evaluators.”

c. The Record of Proceedings details the applicant's service and the circumstances of the case. The DD 214 for the period of Service under consideration shows he entered the regular Army on 27 July 2005 and was separated with \$83,527.20 of disability severance pay on 20 June 2017 under provisions provided in chapter 4 of AR

635-40, Physical Evaluation for Retention, Retirement, or Separation (19 January 2017).

d. A Soldier is referred to the Integrated Disability Evaluation System (IDES) when they have one or more conditions which appear to fail medical retention standards reflected on a duty limiting permanent physical profile. At the start of their IDES processing, a physician lists the Soldiers referred medical conditions in section I the VA/DOD Joint Disability Evaluation Board Claim (VA Form 21-0819). The Soldier, with the assistance of the VA military service coordinator, lists all other conditions they believe to be service-connected disabilities in block 8 of section II of this form, or on a separate Application for Disability Compensation and Related Compensation Benefits (VA Form 21-526EZ).

e. Soldiers then receive one set of VA C&P examinations covering all their referred and claimed conditions. These examinations, which are the examinations of record for the IDES, serve as the basis for both their military and VA disability processing. The medical evaluation board (MEB) uses these exams along with AHLTA encounters and other information to evaluate all conditions which could potentially fail retention standards and/or be unfitting for continued military service. Their findings are then sent to the physical evaluation board for adjudication.

f. All conditions, both claimed and referred, are rated by the VA using the VA Schedule for Rating Disabilities (VASRD). The physical evaluation board (PEB), after adjudicating the case, applies the applicable ratings to the Soldier's unfitting condition(s), thereby determining his or her final combined rating and disposition. Upon discharge, the Veteran immediately begins receiving the full disability benefits to which they are entitled from both their Service and the VA.

g. On 3 November 2016, the applicant was referred to the IDES for "Left patellar DJD [degenerative joint disease]." The applicant claimed nine additional conditions, none of which were mental health related. A medical evaluation board (MEB) determined his "Left Patellar DJD" failed the medical retention standards of AR 40-501, Standards of Medical Fitness. The MEB determined the remaining four additional musculoskeletal conditions met medical retention standards. On 9 December 2016, the applicant agreed with the MEB findings and recommendation and his case was forwarded to a physical evaluation board (PEB) for adjudication.

h. On 3 March 2017, the applicant's informal PEB determined his Left Patellar DJD was the sole unfitting condition for continued military service. They found the four remaining medical conditions not unfitting for continued military service. The PEB

applied the Veterans Benefits Administration (VBA) derived ratings of 10% and recommended the applicant be separated with disability severance pay. On 21 March 2017, after being counseled on the PEB's findings and recommendation by his PEB liaison officer, the applicant concurred with the PEB, waived his right to a formal hearing, and declined to request a VBA reconsideration of his disability ratings (VARR).

i. The EMR contains only three encounters related to behavioral health. The first encounter is dated 8 March 2009 and was part of his redeployment assessment:

" SM [service member] reports being down or depressed, SM reports that this is no longer the case, reports that he is fine, and glad to be home. SM reports that he was just down about being deployed."

j. The second encounter was on 8 August 2009 at which time the applicant underwent the mental status evaluation required for all Soldiers seeking to enter sniper training. The provider documented a normal examination, the absence of behavioral health conditions, and opined:

"SM approached the testing in an open and forthright manner. His testing does not indicate issues with anxiety, depression, or any other psychopathology. Scores indicate that he prefers novel and exciting experiences and tends to get bored with routine. Testing also suggest that he tends to be optimistic and self-confident. Testing also suggest that he has no difficulty regulating his emotions and knows how to appropriately express his anger."

k. The final encounter occurred on 22 August 2011 and was part of his post-deployment processing. The applicant stated the deployment was good and he had no behavioral health related or other complaints. The provider documented a normal examination and the applicant was released without limitations. His final NCO Evaluation Report was an annual covering 2 June 2016 thru 1 June 2017. It shows he passed his Army physical fitness test in May 2017, met the Army height and weight standards, and "Met Standard" for all performance, professionalism, attributes, and competencies. His senior rater blocked him as qualified and noted he was number 4 of the 6 staff sergeants he rated.

l. There is no evidence the applicant had a mental health or other condition which would have failed the medical retention standards of chapter 3 of AR 40-501, Standards of Medical Fitness, prior to his discharge. Thus, there was no cause for referral to the Disability Evaluation System. Furthermore, there is no evidence that any medical

condition prevented the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his discharge.

m. JLV shows the applicant has been awarded several VA service-connected disability ratings, including a rating for PTSD initially effective 8 May 2018. However, the DES only compensates an individual for service incurred medical condition(s) which have been determined to disqualify him or her from further military service and consequently prematurely ends their career. 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 Department of Veterans Affairs and executed under a different set of laws.

n. Review of the submitted documentation, ePEB case file, and AHLTA record found no material errors of deficiencies.

o. It is the opinion of the ARBA medical advisor that neither an increase in his military disability rating nor a referral of his case back to the DES 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 and standard review based on law, policy and regulation. Upon review of the applicant's petition, available military records and medical review, the Board concurred with the advisory official finding there is no evidence the applicant had a mental health or other condition which would have failed the medical retention standards of chapter 3 of AR 40-501, prior to his discharge. Furthermore, there is insufficient evidence that any medical condition prevented the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his discharge. The applicant is advised the DD Form 214 shows circumstances as they were on the date prepared. The Board determined there is insufficient evidence that shows a retirement due to physical disability was warranted during his period of active service. As such, the Board denied relief.

2. The applicant's request for a personal appearance hearing was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

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. 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 his or her 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.

9. Army Regulation 15-185 (Army Board for Correction of Military Records (ABCMR)) prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR. Paragraph 2-11 states applicants do not have a right to a formal hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

//NOTHING FOLLOWS//