

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 9 April 2025

DOCKET NUMBER: AR20240000076

APPLICANT REQUESTS: in effect, a review of his disability processing which occurred in 2009, to include adding additional injuries to his record. He further requests a personal appearance hearing before the Board via video or telephone.

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

- DD Form 149 (Application for Correction of Military Record)
- 27 Pages of Medical Records
- DA Form 199 (Physical Evaluation Board (PEB) Proceedings)
- Department of Veterans Affairs (VA) Rating Decision, 22 August 2018
- VA Rating Decision, 31 May 2019
- Letter, VA, 14 January 2020
- 2-page Response to Advisory Opinion, 2 October 2024

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, in effect:

a. Review his Medical Evaluation Board (MEB) to include the addition of injuries not considered. The MEB was initiated to address his inability to deploy due to sleep apnea. Injuries which should have been included are a knee injury, Dysphagia, post-traumatic stress disorder (PTSD), traumatic brain injury (TBI), migraines, tinnitus, and gastroesophageal reflux disease with irritable bowel syndrome.

b. Only considering sleep apnea as it affected deployment served no purpose because he had already spent 12 months deployed with diagnosed sleep apnea. There was a list of other injuries in his medical records prior to the MEB which should have been included. These injuries are 100 percent service-connected by the VA.

c. Considering the totality of circumstances regarding his health would have provided a much clearer view of his ability to deploy and serve in the Army during his MEB process. An MEB reviewing the health of an individual rated 100 percent disabled by the VA, would have come to a different conclusion if presented this information. This information should be reconsidered because his injuries directly impacted the length of his military career and lifestyle upon discharge.

3. Having 6 months and 3 days total prior active service, the applicant entered active duty in the Regular Army on 31 May 2007, serving in military occupational specialty 88M (Motor Transport Operator).

4. On 4 September 2009, the applicant appeared before a PEB. Based on a detailed review of the evidence of record, the PEB concluded his obstructive sleep apnea did not have any functional impairment which prevented satisfactory performance of duty. The PEB found him fit for duty in his current grade and specialty as an 88M. The PEB noted his 13 July 2009 profile for obstructive sleep apnea appeared overly restrictive in that it did not allow him to carry and fire his assigned weapon especially since both the 5 May 2009 and 17 June 2009 profiles included with his MEB allowed him to perform all functional and Army Physical Fitness Test activities. A Pulmonologist on 3 September 2009 stated his obstructive sleep apnea was responsive to CPAP. The NARSUM noted that he stated he had not missed any duty time because of daytime somnolence, and he did not indicate in Block 17d of his DD Form 2807-1 (dated 18 May 2009) that he had frequent trouble sleeping. The use of a breathing device at night to improve his sleep does not automatically make him unable to perform his duties and potential difficulties in some deployment areas cannot be used as a sole basis to find him unfit. On 9 September 2009, the applicant concurred with the findings and recommendations of the formal PEB.

5. On 29 October 2010, he was honorably released from active duty upon the completion of his required active service. The following day he enlisted in the Army National Guard of Texas. On 31 December 2011, he was transferred to the U.S. Army Reserve Control Group (Reinforcement).

6. The applicant provides, in part:

a. Medical records from 24 November 2008 thru 4 June 2009, are provided in full for the Board's review and for consideration. These documents note other medical conditions in addition to sleep Sleep Apnea.

b. DA Form 199 which convened on 17 August 2009 and found based on a detailed review of the evidence of record, the PEB concluded his obstructive sleep apnea did not have any functional impairment which prevented satisfactory performance of duty. The PEB found him fit for duty in his current grade and specialty and that his disposition be

returned to duty as fit. The PEB further noted deployability is a commander's decision and non-deployability, moreover, is not an unfitting condition. His profile appeared to be overly restrictive and the PEB recommended it be reviewed and updated to reflect his true capabilities.

c. VA Rating Decisions dated 22 August 2018 and 31 May 2019, and a letter from the VA dated 14 January 2020, which notes the applicant is receiving a combined service-connected evaluation of 100 percent. It appears the applicant receives service-connection for:

(1) PTSD with alcohol use disorder (previously rated as adjustment disorder with depressed mood and insomnia disorder, also claimed as sleep disturbances).

(2) Thoracolumbar spine strain with degenerative changes (also claimed as scoliosis previously rated under DC 5237).

(3) Gastroesophageal reflux disease with irritable bowel syndrome.

(4) Tinnitus.

(5) Migraine variants (claimed as migraine headaches).

7. During the processing of this case, on 13 June 2024, an advisory opinion was obtained from the Legal Advisor, U.S. Physical Disability Agency (USAPDA). The advisory official found the applicant's request to be legally insufficient, stating:

a. On 9 September 2009, the formal PEB found [the applicant] fit for obstructive sleep apnea (OSA). [The applicant], with the assistance of counsel, concurred with the findings. Notably, in an undated letter to the PEB, [the applicant] explained why he believed his OSA was unfitting. He did not address any other conditions. Additionally, on 31 August 2009, he had previously submitted a rebuttal to the informal PEB findings explaining in detail his belief that his OSA was unfitting. Again, no other condition was addressed.

b. The case file also includes a report of medical history, dated 18 May 2009, in which [the applicant] explained that he: 1) wears glasses; 2) has knee pain; 3) has a history of hernia and umbilical surgery; 4) has a history of personality disorder; and 5) has trouble sleeping. No other medical condition was referenced at that time. Finally, the record includes "buddy statements" in 2009 that report concerns with [the applicant's] driving abilities due to fatigue.

c. Army Regulation 15-185, paragraph 2-9, states that, with respect to the allegations of errors related to military records, there is a presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence. Moreover, Army Regulation 15-185, paragraph 2-4, states that applicants must file an application for the correction of military records within 3 years after an alleged error or injustice is discovered or reasonably should have been discovered. [The applicant] has failed to overcome the presumption of administrative regularity or otherwise demonstrate error or injustice that was not known, or should have been known, at the time of his disability proceedings.

d. As outlined in the factual background, above, [the applicant] received the full benefit of due process, including: 1) assistance of counsel; 2) rebuttal of the informal proceedings; and 3) full presentation of argument and evidence to the formal board. Despite being represented during these proceedings, he concurred with the findings. He has not presented any new evidence not available in 2009 sufficient to overcome the presumption of regularity.

8. On 2 October 2024, the applicant responded stating, in effect:

a. The background section of the opinion letter notes that injuries were listed by the applicant and counsel to the PEB on the dates of 9 September, 31 August, and 18 May of 2009. The list of injuries was accompanied by "buddy statements" reporting concerns of fatigue effecting his ability to drive. This is true but the nature of the TBI he had been diagnosed with is not being considered in the opinion. A cursory search of TBI and its side effects will show that TBI causes long term cognitive impairment including memory loss, confusion, disorientation, difficulty concentrating, and trouble thinking. TBI is also an invisible wound that counsel would not have been able to see or know about unless they read through his medical record thoroughly. He disagrees with the opinion letters assertion that his agreement of the findings was made in good faith while suffering from cognitive impairment and being represented by counsel that had incomplete information. A commercial driver diagnosed with sleep apnea cannot drive in the United States without their C-PAP machine due to issues of fatigue. All parties to the PEB should have reasonably had the same expectation for him as a deployed Soldier whose job it was to drive.

b. In the analysis portion of the opinion letter regulations for timeliness of request for change of record are addressed. The specific statement is that Army Regulation 15-185 paragraph 2-4 states applicants must file an application for the correction of military records within 3 years after an alleged error or injustice is discovered or reasonably been discovered and that he has failed to overcome the presumption of administrative regularity. How was he to reasonably know an error existed? He was uneducated and had been diagnosed with a condition that causes cognitive issues. A review of his requests to the VA for increase in disability rating will show he had no knowledge of TBI

in the record. From 2010 to 2019 he filed requests for increase in disability rating with the VA. It wasn't until 2019 that he discovered the TBI in his record and filed a claim for that condition. It is his assertion that he did file this request for change of military record within a reasonable timeframe after learning that he had a TBI because the TBI was discovered in 2019. He understands 2019 is more than 3 years before his filing but he also did not know an office exists for requesting change to his military record. He filed the request approximately 1 year after learning of the existence of the ABCMR.

c. The opinion statement continues to sight Army Regulation 15-185 paragraph 2-4 which addresses the demonstration of the error or injustice that was not known or should have been known at the time of the disability proceedings. He would like to respond to this statement by saying that recent actions on the part of the Army to change the PEB and MEB processes demonstrate a recognition of the PEB failures such as his. Current practices are to have a Soldier going through a PEB or MEB attend a general medical review examination. This general medical examination ensures that all conditions affecting the Soldier are taken into consideration. If he had been subjected to a records review and general medical examination during his PEB, as is the current practice, he believes his TBI diagnosis would have been addressed in the appropriate manner.

d. The opinion letter states that his request is legally insufficient but has not considered the information provided in the paragraphs above. He believes that he has provided evidence that he and his counsel were not in possession of the tools required to make an informed concurrence with the PEB findings. He further asserts that his request was filed in a timely manner considering the obstacles he had to overcome and that the Army's own change in practice demonstrates acknowledgment of errors in previous cases similar to his and an attempt to fix those errors. He is not trying to place blame on anyone involved in his PEB process but suggests the process itself was insufficient for the task at the time and changes have been made to remedy the errors.

9. Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation) 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

10. 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.

11. 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

12. Title 38, USC, 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.

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. Title 38, CFR, Part IV is the VA's schedule for rating disabilities. 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.

15. Army Regulation 15-185 (ABCMR) states an applicant is not entitled to a hearing before the ABCMR. Hearings may be authorized by a panel of the ABCMR or by the Director of the ABCMR.

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 the USAPDA advisory, the Board concurred with the advising official noting the applicant received the full benefit of due process, including: 1) assistance of counsel; 2) rebuttal of the informal proceedings; and 3) full presentation of argument and evidence to the formal board. Despite being represented during these proceedings, he concurred with the findings. He has not presented any new evidence not available in 2009 sufficient to overcome the presumption of regularity. Based on this, the Board determined the applicant's PEB decision at the time was appropriate and a change is not warranted.

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:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
XXX	XXX	XXX	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.

X //SIGNED//

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. 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, under the operational control of the Commander, U.S. Army Human Resources Command (AHRC), is responsible for administering the Army Physical Disability Evaluation System (PDES) and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with Department of Defense Directive 1332.18 and Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation).

a. Soldiers are referred to the PDES 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, when they receive a permanent medical profile, P3 or P4, and are referred by an MOS Medical Retention Board, when they are command-referred for a fitness-for-duty medical examination, and when they are referred by the Commander, (AHRC).

b. The PDES assessment process involves two distinct stages: the MEB and the 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 are either 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 retirement payments 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.

3. 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.

4. Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation) establishes the PDES 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 their office, grade, rank, or rating. It provides that an MEB 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. 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.

a. Paragraph 2-1 provides that 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 their office, rank, grade, or rating. The Army must find that a service member is physically unfit to reasonably perform their duties and assign an appropriate disability rating before they can be medically retired or separated.

b. Paragraph 2-2b(1) provides that when a member is being processed for separation for reasons other than physical disability (e.g., retirement, resignation, reduction in force, relief from active duty, administrative separation, discharge, etc.), his or her continued performance of duty (until he or she is referred to the PDES for evaluation for separation for reasons indicated above) creates a presumption that the member is fit for duty. Except for a member who was previously found unfit and retained in a limited assignment duty status in accordance with chapter 6 of this regulation, such a member should not be referred to the PDES unless his or her physical defects raise substantial doubt that he or she is fit to continue to perform the duties of his or her office, grade, rank, or rating.

c. Paragraph 2-2b(2) provides that when a member is being processed for separation for reasons other than physical disability, the presumption of fitness may be overcome if the evidence establishes that the member, in fact, was physically unable to adequately perform the duties of his or her office, grade, rank, or rating even though he or she was improperly retained in that office, grade, rank, or rating for a period of time and/or acute, grave illness or injury or other deterioration of physical condition that

occurred immediately prior to or coincidentally with the member's separation for reasons other than physical disability rendered him or her unfit for further duty.

d. Paragraph 4-10 provides that MEBs 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 qualification for retention based on criteria in Army Regulation 40-501, chapter 3. If the MEB determines the Soldier does not meet retention standards, the board will recommend referral of the Soldier to a PEB.

e. Paragraph 4-12 provides that 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. All evidence in the case file must be closely examined and additional evidence obtained, if required.

f. The regulation states that after the Soldier has been processed through the PDES and a PEB has determined that the Soldier is qualified for disability retirement but for the fact that their disability is determined not to be of a permanent nature and stable can be placed on the temporary disability retired list (TDRL). The 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.

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, sections 1110 and 1131, permits the VA to award compensation for medical conditions incurred in or aggravated by active military service. The VA, however, is not empowered by law to determine medical unfitness for further military service. The VA, in accordance with its own policies and regulations, awards compensation solely on the basis that a medical condition exists and that said medical condition reduces or impairs the social or industrial adaptability of the individual concerned. Consequently, due to the two concepts involved, an individual may have a medical condition that is not considered medically unfitting for military service at the time of processing for separation, discharge, or retirement, but that same condition may be sufficient to qualify the individual for VA benefits based on an evaluation by that agency.

7. 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.

8. Army Regulation 15-185 prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires. The ABCMR considers individual applications that are properly brought before it. The ABCMR will decide cases on the evidence of record. It is not an investigative body. The ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

//NOTHING FOLLOWS//