

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 17 September 2024

DOCKET NUMBER: AR20240000112

APPLICANT REQUESTS: in effect -

a. correction of his DD Form 214 (Certificate of Release or Discharge from Active Duty), ending 30 July 2015, to show the following entries in -

- block 26 (Separation Code (SPD)) - "SFJ, Permanent Disability Retired" instead of "SEK, "Disability, Temporary (Enhanced)"
- block 28 (Narrative Reason for Separation) - "Disability, Permanent" instead of "Disability, Temporary (Enhanced)."

b. correction of his separation orders, to read:

- "SPD: SFJ" instead of "SPD: SEK1"
- Disability is based on an injury or disease received in line of duty as a direct result of armed conflict or caused by an instrumentality of war and incurred in the line of duty during a period of war as defined by law: "Yes" vice "No,"
- Disability resulted from a combat related injury or disease as defined in 26 United States Code 104: "Yes" instead of "No."

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

- DD Form 149 (Application for Correction of Military Record)
- Department of Veterans Affairs (VA), Disability Evaluation System Proposed Rating, 4 June 2015
- Orders 202-0020, Department of the Army, Directorate of Human Resources, Military Personnel Division, 21 July 2015
- DD Form 214
- VA, Decision Review Officer Decision, 22 September 2017
- 6-page My HealthVet Personal Information Report, 17 August 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 he makes his request to properly finalize his Army Combat-Related Special Compensation (CRSC) claim which requires the reopening of his Defense Finance and Accounting Service account and then the submittal of a VA Form 2-651 (Election of Compensation in Lieu of Retired Pay or Waiver of Retired Pay to Secure Compensation from VA) to waive retirement compensation. The U.S. Army Human Resources Command (AHRC) informed him of the required changes needed to proceed. [His application also notes his request is related to post-traumatic stress disorder (PTSD)].

3. The applicant enlisted in the Regular Army on 3 August 2010. He served in military occupational specialty 13B (Cannon Crewmember). Evidence shows he served in Afghanistan from 22 March to 26 November 2012 (8 months and 5 days).

4. The applicant's DA Form 199 (Informal Physical Evaluation Board (PEB) Proceedings) shows he was considered by an initial informal PEB that convened on 10 June 2015. The PEB found him physically unfit with a rating of 70 percent, and that the applicant's disposition be placed on the Temporary Disability Retirement List (TDRL) with reexamination in March 2016. The medical condition which was unfitting was an unspecified anxiety disorder onset in 2011 at Joint Base Lewis McChord which continued to be unfitting and was aggravated in a combat zone, and not due to instrumentality of war. He was found medically fit for 9 other conditions.

a. The PEB found:

(1) the disability disposition was not based on disease or injury incurred in the line of duty (LOD) in combat with an enemy of the United States and as a direct result of armed conflict or caused by an instrumentality of war and incurred in the LOD during a period of war;

(2) the evidence of record shows the applicant was not a member or obligated to become a member of an armed force or Reserve thereof; and,

(3) his disability did not result from a combat-related injury.

(4) The PEB recommends placement on Temporary Disability Retired List (TDRL) because at least one unfitting compensable condition is unstable. Medical evidence indicates that this condition will probably change enough within the next five years to change the disability rating.

b. The applicant concurred with the PEB findings and waived formal hearing on 16 June 2015.

5. Orders 202-0020, published by Department of the Army, Directorate of Human Resources, Military Personnel Division, on 21 July 2015 shows the applicant was reassigned for separation processing to the transition center with a report date of 30 July 2015; this date is also recorded as his retirement date and note he was placed on the Temporary Disability Retirement List (TDRL). Additionally, his SPD code is recorded as "SEK1." The orders stated:

- Disability is based on injury or disease received in the line of duty as a direct result of armed conflict or caused by an instrumentality of war and incurred in the line of duty during a period of war as defined by law: No
- Disability resulted from a combat related injury as defined in 26 USC 104: No

6. The applicant retired honorably on 30 July 2015, under the provisions of Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation), chapter 4. The DD Form 214 he was issued shows he completed 4 years, 11 months, and 28 days of net active service and shows in:

- block 23 "Retirement"
- block 26 (Separation Code), "SEK"
- block 27 (Reentry Code), "4"
- block 28 "Disability, Temporary (Enhanced)"

7. A TDRL evaluation PEB convened at Joint Base Lewis McChord on 31 January 2017 and found based on his condition, he remained unfit for military duties. The PEB rated his condition at 100 percent and recommended he receive a permanent disability retirement.

a. The PEB found:

(1) the disability disposition was not based on disease or injury incurred in the LOD in combat with an enemy of the United States and as a direct result of armed conflict or caused by an instrumentality of war and incurred in the LOD during a period of war; the evidence of record shows the applicant was not a member or obligated to become a member of an armed force or Reserve thereof; and his disability did not result from a combat-related injury.

(2) unspecified anxiety disorder: Soldier continues to suffer from this behavioral health condition. The Soldier exhibits total occupational and social impairment as evidenced by near-continuous depression and anxiety that affects the ability to function

effectively, difficulty in adapting to stressful circumstances, suicidal ideation and behavior, difficulty establishing and maintaining effective social relationships, and chronic sleep impairment. Soldier is competent for pay purposes. Soldier has not improved significantly enough to permit return to duty. This condition is now considered permanent and stable for final rating of 100%.

b. The applicant concurred with the PEB findings and waived formal hearing on 31 January 2017.

7. The U.S. Army Physical Disability Agency (USAPDA) authenticated and approved the findings and recommendations on behalf of the Secretary of the Army on 14 February 2017.

8. Order D 033-05, USAPDA, 2 February 2017, removed him from the TDRL due to permanent physical disability and permanently retired him in the rank/grade of sergeant/E-5. The orders state, in effect, that his disability was not based on injury or disease received in the LOD as a direct result of armed conflict or caused by an instrumentality of war period as defined by law. It further states, in effect, his disability did not result from a combat related injury as defined in 26 U.S. Code 104.

9. The applicant provides a/an:

a. VA, Disability Evaluation System Proposed Rating, 4 June 2015, in which he highlights that his MEB Narrative Summary reported his mental health symptoms were related to combat situations and his diagnosis was due to an instrumentality of war.

b. Orders 202-0020, Department of the Army, Directorate of Human Resources, Military Personnel Division, 21 July 2015, in which he highlights his placement on the TDRL, SPD (Separation Program Designator): SEK1, and that his disability was not based on injury or disease received in the LOD as a direct result of armed conflict or caused by an instrumentality of war and incurred in the LOD during a period of war as defined by law and that the disability did not result from a combat related injury as defined in 26 U.S. Code 104.

c. VA, Decision Review Officer Decision, 22 September 2017, which states his evaluation of post-traumatic stress disorder (PTSD) with bruxism (referred as unspecified anxiety disorder and claimed as adjustment disorder with nightmares, depression, anxiety, and suicidal thoughts), currently 70 percent disabling, is increased to 100 percent effective 31 July 2015, based on a De Novo Review of his claim folder.

d. 6 pages of his My HealthVet Personal Information Report dated 17 August 2023, which includes self-reported information, information from his VA health record, and

military service information from the Department of Defense. He highlighted the Retirement Code for Permanent Disability Retirement List (PDRL).

10. Army Regulation 635-5-1 (SPD Codes), Rapid Action Revision, 4 August 2011, states that separation codes are three-character alphabetic combinations, which identify reasons for and types of separation from active duty. The separation code "SFK" is the code for Soldiers separating under Army Regulation 635-40, paragraph 4-24b(2) for disability, temporary. The separation code "SFJ" is the code for Soldiers separating under Army Regulation 635-40, paragraph 4-24b(1), for disability, permanent.

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 applicant's contentions, the military record, and regulatory guidance were carefully considered

a. Narrative Reason for Separation: Deny. The evidence shows a PEB found the applicant's condition unfitting, but at the time, it was not stable enough for final adjudication. The medical evidence indicated that her condition would probably change enough within the next five years to change the disability rating. Since the medical condition was not ready for final adjudication, the Board determined the PEB's determination to place her on the TDRL due to temporary disability in 2015 is not in error or unjust. It wasn't until 2017 when the TDRL PEB determined she did not improve significantly enough to permit return to duty and that her condition was considered permanent and stable for final rating.

b. Separation Code: Deny. The Board found no mitigating factors that would merit a change to her Separation Code. The narrative reason for separation is governed by specific directives. The applicant was placed on the TDRL under the provisions of Chapter 4, AR 635-40. The narrative reason specified by Army Regulations for a temporary retirement under this paragraph for an enlisted Soldier is "Disability (Temporary)." Enlisted Soldiers retired due to temporary retirement at the time were assigned the Separation Code SEK. AR 635-8 governs preparation of the DD Form 214 and dictate that entry of the narrative reason for separation, entered in block 28, and separation code, entered in block 26, will be entered exactly as listed in AR 635-5-1, Separation Program Designator (SPD) Codes. There is no provision for any other reason to be entered under this regulation. In view of the foregoing, the Board determined that the reason for discharge and associated Separation Code were both proper and equitable and there is no reason to change it.

c. Combat relation: Deny. The evidence shows the PEB determined the applicant's condition which had failed medical retention standards was unfitting for continued military service. The PEB made the administrative determination that this disability was

not combat related: The PEB found no evidence that this condition was the direct result of armed combat; was related to the use of combat devices (instrumentalities of war); the result of combat training; incurred while performing extra hazardous service though not engaged in combat; incurred while performing activities or training in preparation for armed conflict in conditions simulating war; or that he was a member of the military on or before 24 September 1975. To determine combat relation, the Board considered the onset of the condition: The unfitting medical of unspecified anxiety disorder onset was in 2011 at Joint Base Lewis McChord which was aggravated in a combat zone, and not due to instrumentality of war. Therefore, the Board found insufficient probative evidence upon which to reverse the U.S. Army Physical Disability previous non-combat related determinations for the applicant's unfitting medical condition.

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 40-501 (Standards of Medical Fitness) governs medical fitness standards for enlistment, induction, appointment, retention, and separation, including retirement. Chapter 3 provides the various medical conditions and physical defects which may render a Soldier unfit for further military service and which fall below the standards required for the individual in paragraph 3-2, below. These medical conditions and physical defects, individually or in combination:

- significantly limit or interfere with the Soldier's performance of duties
- may compromise or aggravate the Soldier's health or well-being if the Soldier remains in the military – this may involve dependence on certain medications, appliances, severe dietary restrictions, frequent special treatments, or a requirement for frequent clinical monitoring
- may compromise the health or well-being of other Soldiers
- may prejudice the best interests of the government if the individuals were to remain in the military service

3. Army Regulation 635-40 establishes the Army Disability Evaluation System (DES) in accordance with Title 10, U.S. Code, Chapter 61, and the Department of Defense Instruction 1332.18 (DES). It 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. If a Soldier is found unfit because of physical disability to reasonably perform their duties it provides for the disposition of the Soldier according to applicable laws and regulations. Public law defines physical DES as a system or process of the Department of Defense for evaluating the nature and extent of disabilities affecting members of the armed forces. It is comprised of MEBs, PEBs, counseling of Soldiers, and mechanism for final disposition.

a. The Soldier is issued a permanent profile in accordance with Army Regulation 40-501 and the profile contains a numerical designator of P3/P4 in any of the serial factors for a condition that appears to not meet medical retention standards. A Soldier must be assigned a P3/P4 profile to refer a Soldier to the DES.

b. An MEB is convened to determine whether a Soldier's medical condition(s) meets medical retention standards per Army Regulation 40-501. An MEB may determine that a Soldier's condition(s) meet medical retention standards and recommend the Soldier be returned to duty. The MEB must not provide conclusions or recommendations regarding fitness determinations.

c. The PEB determines fitness for purposes of a Soldier's retention, separation, or retirement.

(1) All cases will be initially adjudicated by the Informal PEB. The Informal PEB conducts a documentary review of the case file without the presence of the Soldier to make an initial decision on the Soldier's fitness for continued service. The decision will be document on a DA Form 199.

(2) The Soldier can accept the Informal PEB decision thereby waiving their right to a formal hearing. The Soldier can non-concur with the Informal PEB decision and demand or request a formal hearing.

d. The USAPDA will review the PEB before the PEB recommendations and finding are approved for or by the Secretary of the Army (SECARMY) or higher authority, as applicable. The USAPDA has the authority to approve disability cases for the SECARMY and issues disposition instructions.

e. Subparagraph j (Armed conflict – instrumentality of war) shows certain advantages accrue to Soldiers who are retired for physical disability. The specific circumstances are:

(1) The disability resulted from injury or disease received in the LOD as a direct result of armed conflict and which itself renders the Soldier unfit. A disability may be considered a direct result of armed conflict if –

(a) The disability was incurred while the Soldier was engaged in armed conflict, or in an operation or incident involving armed conflict or the likelihood of armed conflict; while the Soldier was interned as a prisoner of war or detained against his will in the custody of a hostile or belligerent force; or while the Soldier was escaping or attempting to escape from such prisoner of war or detained status.

(b) A direct causal relationship exists between the armed conflict or the incident or operation, and the disability.

(2) The disability is unfitting, was caused by an instrumentality of war, and was incurred in LOD during a period of war as defined by law. (The periods of war are defined in Title 38, U.S. Code, chapters 101 and 301.)

f. The Glossary, Section II (Terms) defines relevant terms, as follows:

a. Armed conflict: Any activity in which American military personnel are engaged with a hostile or belligerent nation, faction, or force. The activity may include a war, expedition, occupation, battle, skirmish, raid, invasion, rebellion, insurrection, guerrilla action, or similar situation.

b. Combat-related injury: A personal injury or sickness that a Soldier incurs under one of the following conditions: as a direct result of armed conflict; while engaged in extra hazardous service; under conditions simulating war; or which is caused by an instrumentality of war.

c. Instrumentality of war: A device designed primarily for military service and intended for use in such service at the time of the occurrence of the injury. It may also be a device not designed primarily for military service if use of or occurrence involving such a device subjects the individual to a hazard peculiar to military service. This use or occurrence differs from the use or occurrence under similar circumstances in civilian pursuits. There must be a direct causal relationship between the use of the instrumentality of war and the disability and the disability must be incurred incident to a hazard or risk of the service.

4. 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.

5. Title 26 (Internal Revenue Code), U.S. Code, section 104 (Compensation for injuries or sickness), provides, in general, except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include, in pertinent part, (a)(4) amounts received as a pension, annuity, or similar allowance for personal injuries or sickness resulting from active service in the armed forces of any country or in the Coast and Geodetic Survey or the Public Health Service, or as a disability annuity payable under the provisions of section 808 of the Foreign Service Act of 1980.

a. It also provides special rules for combat-related injuries. For purposes of this subsection, the term "combat-related injury" means personal injury or sickness which is incurred –

- as a direct result of armed conflict
- while engaged in extra-hazardous service
- under conditions simulating war, or
- which is caused by an instrumentality of war

b. It further shows the only amounts taken into account under subsection (a)(4) shall be the amounts received by reason of a combat-related injury.

6. The Special Compensation Branch (SCB), CRSC Division, AHRC, is responsible for verifying that claimants' injuries are directly connected to combat or combat-related operations. The SBC determines a combat-related injury through an instrumentality of war:

a. Incurrence during actual period of war is not required. However, there must be a direct causal relationship between instrumentality of war and disability. The disability must be incurred incident to a hazard or risk of the service.

b. An instrumentality of war is a vehicle, vessel, or device designated primarily for Military Service and intended for use in such Service at the time of the occurrence or injury. It may include such instrumentalities not designated primarily for Military Service if use of, or occurrence involving, such instrumentality subjects the individual to a hazard peculiar to Military Service. Such use or occurrence differs from the use or occurrence under similar circumstances in civilian pursuits.

c. A determination that a disability is the result of an instrumentality of war may be made if the disability was incurred in any period of service as a result of such diverse causes as wounds caused by a military weapon, accidents involving military combat vehicle, injury or sickness caused by fumes, gases, or explosion or military ordinance, vehicles, or material.

7. Army Regulation 635-8 (Separation Processing and Documents) prescribes the separation documents that must be prepared for Soldiers on retirement, discharge, release from active duty service, or control of the Active Army. The DD Form 214 is a summary of the Soldier's most recent period of continuous active duty. It provides a brief, clear-cut record of all current active, prior active, and prior inactive duty service at the time of release from active duty, retirement, or discharge. It establishes standardized policy for preparing and distributing the DD Form 214. It states:

- a. DD Form 214 will not be prepared for personnel removed from the TDRL;
 - b. in block 26 enter the proper SPD, representing the reason for separation in Army Regulation 635-5-1 (SPD Codes); and
 - c. in block 28 enter the reason for separation based on regulatory or other authority.
8. Army Regulation 635-5-1, Rapid Action Revision, 4 August 2011, states that separation codes are three-character alphabetic combinations, which identify reasons for and types of separation from active duty. The separation code "SEK" is the correct code for Soldiers separating under Army Regulation 635-40, for disability, temporary. The separation code "SFK" is the code for Soldiers separating under Army Regulation 635-40, for disability, permanent.

//NOTHING FOLLOWS//