

IN THE CASE OF: [REDACTED]

BOARD DATE: 21 October 2024

DOCKET NUMBER: AR20240000376

APPLICANT REQUESTS:

- correction of Orders 010-0637, issued by Department of the Army, Headquarters, 101st Airborne Division (Air Assault) and Fort Campbell, 10 January 2013, to show that his 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 and that his disability resulted from a combat related injury as defined in 26 U.S. Code 104; and
- a personal appearance hearing before the Board.

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- VA Form 21-10210 (Lay/Witness Statement)
- DA Form 199 (Informal Physical Evaluation Board (PEB) Proceedings),
- Orders 010-0637, Headquarters, 101st Airborne Division (Air Assault) and Fort Campbell, 10 January 2013

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 discovered the error while filing a Department of Veterans Affairs disability claim.
3. The applicant enlisted in the Regular Army on 20 October 2009. He served in military occupational specialty 91B (Wheeled Vehicle Mechanic). Evidence shows he served in Afghanistan from 24 August 2010 to 4 August 2011.

4. The applicant's DA Form 199 shows he was considered by an informal PEB that convened on 27 December 2012. The PEB found him physically unfit with a rating of 40 percent, and that the applicant's disposition be Permanent Disability Retirement. The medical condition which was unfitting was lumbar spine fusion. The condition began in 2011 during his deployment to Afghanistan when he was knocked off a turret while replacing the seal, injuring his back during maintenance operations. The PEB considered other Medical Evaluation Board (MEB) diagnoses both individually and in combination with other conditions; however, these conditions were not associated with profile limitations and did not impact his ability to perform any one of the ten functional activities.

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 line of duty 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.

b. His case was adjudicated as part of the Integrated Disability Evaluation System (IDES) under the 19 December 2010 Policy and Procedure Directive-type Memorandum 11-015.

c. The applicant concurred with the PEB findings and waived formal hearing on 3 January 2012.

5. The U.S. Army Physical Disability Agency (USAPDA) and approved the findings and recommendations on behalf of the Secretary of the Army on 7 January 2013.

6. On 10 January 2013, Headquarters, 101st Airborne Division, Fort Campbell, published Orders 010-0637 retiring the applicant from active duty due to disability effective 30 January 2013. The retirement orders state:

- The disability is based on injury or disease in the line of duty (LOD) as a direct result of armed conflict or caused by an instrumentality of war: NO
- Disability resulted from a combat related injury as defined in Title 10, U.S. Code, section 104: NO

7. The applicant retired honorably on 30 January 2013, 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 3 years, 3 months, and 11 days of net active service and shows in:

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

8. The applicant provides VA Form 21-10210; however, no statement was attached. He also provides Orders 010-0637, Headquarters, 101st Airborne Division (Air Assault) and Fort Campbell, 10 January 2013, which states 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.

9. Directive-Type Memorandum (DTM) 11-015 (IDES), 19 December 2011, Attachment 8 (IDES Separation Program Designator (SPD) Codes) identifies reasons for and types of separation from active duty. The separation code "SEJ" is the code for Soldiers separating under Army Regulation 635-40, chapter 4, for mandatory retirement resulting from permanent physical disability (IDES).

10. 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.

11. MEDICAL REVIEW:

1. The Army Review Boards Agency (ARBA) Medical Advisor reviewed the supporting documents, the Record of Proceedings (ROP), and the applicant's available records in the Interactive Personnel Electronic Records Management System (iPERMS), the Health Artifacts Image Management Solutions (HAIMS) and the VA's Joint Legacy Viewer (JLV). The applicant requests for his retirement papers to reflect that his injury was caused by an instrumentality of war.

2. The ABCMR ROP summarized the applicant's record and circumstances surrounding the case. The applicant entered the Regular Army 20Oct2009. His MOS was 91B, Wheeled Vehicle Mechanic. He was deployed in Afghanistan 20100824 to 20110804. He was permanently retired 31Jan2013 under provisions of AR 635-40, chapter 4 due to medical disability. His service was characterized as honorable.

3. Summary of available pertinent medical records

- a. 30Nov2009 Ft Jackson Trainer BAS. While in the 6th week of BCT, the applicant presented with a complaint of left low back pain, duration one week. He denied trauma. He also denied prior history of significant injury. He stated that he felt the pain doing warm-up activities for combatives which involved twisting the torso repeatedly. The pain was constant in his lower back, rated 2/10. He was placed on a profile for Lower Back Pain from 30Nov2009 to 14Dec2009. There was no further follow documented.
- b. 06Aug2011 SRP Health Clinic Blanchfield ACH. This was an SRP (Soldier Readiness Processing) Reintegration visit. He denied any major health concerns at the time. He denied pain. He was not taking any prescription or over-the-counter medications.
- c. 08Aug2011 Physical Therapy Blanchfield ACH/Chronological Record of Medical Care (Form SF 600). This was an SRP visit. The applicant was seen for back pain 6/10 which started in October 2010. He endorsed that there had been no treatment while deployed. Plain films were ordered to rule out Spondylolysis.
- d. 17Nov2011 LHC Physical Therapy. The applicant stated the pain started in February of this year when he fell off a MaxPro while on deployment. He stated the pain had been present ever since and had increased over the last few weeks with increased PT.
- e. 18Nov2011 lumbar spine film was read as normal.
- f. 07Feb2012 lumbar spine MRI revealed moderate L4-L5 and L5-S1 degenerative disc disease with L4-L5 annular tear.
- g. 13Aug2012 Orthopedics. Blanchfield ACH. He underwent L4-S1 lumbar fusion with cage implant on 31Apr2012 (Howell Allen Clinic, Nashville). The applicant did not believe that he would ever recover to a point that he could perform military duties; the surgery had helped his radicular pain, but his lower back was still hurting, and he had lost a lot of mobility. He was referred by primary care for MEB evaluation. Diagnosis: Lumbago. He did not meet retention standards per AR 40-501 Chapter 3-39 e and h.
- h. 12Sep2012 C&P Examination. The applicant reported that "he fell off a truck while deployed". He was working on a turret on a Max Pro vehicle. The turret spun around, and he fell onto his back and neck.
- i. 04Oct2012 MEB Proceedings (DA Form 3947) showed condition Status Post

Posterior Lumbar Compression with Cage Implant and Posterior Lumbar Fusion L4 to Sacrum with Chronic Pain and Limited Active Range of Motion was medically unacceptable. The date of origin was listed as 2011.

j. 20Aug2012 VTC (Tele-Medicine) updated 26Oct2012. MEB NARSUM (narrative summary) notes indicated that the applicant was initially seen for lower back pain beginning in August 2011. They endorsed that the low back pain condition started in February 2011 while deployed in Afghanistan: He fell off a 12-foot high MaxPro vehicle while replacing a seal on the turret. Another soldier unwittingly spun the turret around knocking the applicant off the vehicle. He landed on his back/neck. He had back surgery on 30Apr2012 which helped with radicular pain, but he still had lower back pain with loss of mobility. The applicant concurred with the MEB findings.

k. 27Dec2012 PEB. The PEB found that the Lumbar Spine Fusion condition was unfitting for continued military service. The narrative indicated that in 2011 while deployed in Afghanistan, the applicant was knocked off a turret while replacing the seal, injuring his back during maintenance operations. The PEB also found that the claimant's disability was not based on disease or injury incurred in combat as a direct result of armed conflict or caused by an instrumentality of war during a period of war or as a result of a combat related injury. The applicant concurred with the PEB findings and waived a formal hearing of his case.

4. Summary

Medical records indicated that the applicant first injured his back in November 2009 during basic training during warm up activities for combative training involving twisting his torso repeatedly. The pain was mild. A film was not ordered. Treatment consisted of a 2-week profile. There was no further follow up documented. Almost two years later, an August 2011 physical therapy treatment note indicated the back pain started in October 2010 (no method of injury was documented) and a November 2011 physical therapy treatment note indicated the back pain started in February 2011; however, there were no visits or films for either October 2010 or February 2011 time frames. Starting in November 2011, the providers and examiners consistently endorsed that the method of injury for the current unfitting back condition was a fall onto his neck/back from a MaxPro turret as it turned unexpectedly while he was performing maintenance on it, while deployed in Afghanistan.

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.

2. The Board carefully considered the applicant's statement, his record of service, the medical documentation associated with his injury to include the circumstances leading to his fall, the PEB decision, his medical retirement and the applicable military regulatory guidance and definitions. The Board considered the review and conclusions of the medical advising official regarding the reason for the injury. The Board found that the applicant sustained the injury while performing maintenance and that it was caused by the actions of another Soldier. The Board did not find that the applicant's injury was sustained as a direct result of armed conflict. Based on a preponderance of evidence, the Board determined that the contested entries on the applicant's retirement orders related to his injury were not in error or unjust and therefore deny relief.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

: : : GRANT FULL RELIEF

: : : GRANT PARTIAL RELIEF

: : : GRANT FORMAL HEARING

[REDACTED] [REDACTED] [REDACTED] 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.

4/28/2025

X

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. 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 his or her 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 his or her 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:

- 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.
- 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.
- 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), Combat Related Special Compensation Division, U.S. Army Human Resources Command, 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. DTM 11-015 IDES, 19 December 2011, Attachment 8 identifies reasons for and types of separation from active duty. The separation code "SEJ" is the code for Soldiers separating under Army Regulation 635-40, chapter 4, for mandatory retirement resulting from permanent physical disability (IDES).

8. Army Regulation 15-185 (ABCMR) 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.
9. 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.

//NOTHING FOLLOWS//