

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 18 October 2024

DOCKET NUMBER: AR20240000582

APPLICANT REQUESTS: reconsideration of his previous request for correction of his DA Form 199 (Physical Evaluation Board (PEB) Proceedings) to show additional conditions as unfitting resulting in a 30% or higher disability rating and his retirement for physical disability (vice separation with severance pay).

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

- personal statement in lieu of DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Certificate of Release or Discharge from Active Duty) for the period 17 May 2007 to 14 June 2012
- Department of Veterans Affairs (VA) Rating Decision, dated 2 June 2014
- VA Rating Decision, dated 10 January 2020

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20150011321 on 1 November 2016.

2. The applicant states:

a. He is requesting a reevaluation by the Army PEB with the purpose of achieving his medical retirement. He was awarded an overall rating of 20% for 2 conditions that he was medically evaluated for after 18 1/2 years of service in the Army. However, he does not believe that an accurate evaluation was completed by considering all of the physical disabilities/conditions resulting from the 2 conditions that he was medically evaluated for, which he believes would have earned a minimum overall rating of 30%.

b. The PEB assigned a 10% rating for each of the following conditions: history of pulmonary embolus and recurrent deep vein thrombosis (DVT) right leg (claimed as pulmonary embolism and DVT) and right knee patellofemoral chondromalacia (limitation of extension). Based on those two conditions, he was medically released because of an overall rating of 20%. But he does not believe he was fairly evaluated and rated properly

because other conditions should have been included since they were caused by his right knee issue. Conditions that should have been included or evaluated as part of the medical board are the following secondary conditions, which directly relate to the two conditions for which he was discharged:

- right knee instability (10%)
- right knee joint osteoarthritis with meniscal tear (10%)
- left knee patellar chondromalacia (10%)
- radiculopathy, right upper extremity (non-dominant) (20%)
- radiculopathy, left upper extremity (non-dominant) (30%)

c. The above listed conditions he believes should have been included as part of his medical board because right and left knee conditions are all due to the injury that occurred to his right knee. The radiculopathy on both the left and right also should have been considered because they affected him.

d. He never thought he was going to be medically separated from the Army, especially after 18 years of service. After serving 13 years in the enlisted ranks and being selected for the rank of sergeant first class, he was selected for Officer Candidate School, which he successfully completed and was commissioned in May 2007. He thought he would continue his military career as an officer and retire after 25 years of total service. He completed a deployment to Iraq and completed the required time as a company commander prior to medical separation. He hopes this letter and the VA rating decision provided is sufficient to support a reevaluation by the Army PEB for medical retirement consideration.

3. Following over 13 years of enlisted service in the Regular Army, the applicant was appointed as a Regular Army commissioned officer on 17 May 2007. He served in Iraq from 26 March 2009 to 3 March 2010.

4. On 14 December 2011, a PEB found the applicant unfit for further military service due to pulmonary embolus and recurrent deep vein thrombosis (10% disability rating) and right knee chondromalacia (10% disability rating). The PEB recommended a combined 20% disability and the applicant's separation with severance pay.

5. The PEB determined the applicant's diagnoses of hypertension, chest wall pain with costochondritis, left patellofemoral syndrome, allergic rhinitis, and prostatitis were not unfitting and therefore not ratable because the medical treatment facility indicated the conditions met retention standards, were not listed on the physical profile as limiting any of the Soldier's functional activities, the commander did not consider the conditions to hinder the Soldier's performance, and the case file did not contain evidence that the diagnoses independently, or combined, rendered the Soldier unfit for assigned duties.

6. Orders issued on 6 February 2012, as amended, directed the applicant's discharge from the service with entitlement to severance pay effective 14 June 2012. The orders show he was assigned a percentage of disability of 20%.

7. The applicant's DD Form 214 shows he was discharged on 14 June 2012 under the provisions of Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation), chapter 4, by reason of disability, severance pay, non-combat (enhanced), Separation Code JEB. The DD Form 214 also shows he completed 5 years and 28 days of active service this period and that he had 13 years, 5 months, and 24 days of prior active service.

8. During the processing of the applicant's previous case, the Army Review Boards Agency (ARBA) medical advisor provided a medical advisory opinion. The medical advisor reviewed the applicant's electronic medical record and determined his medical conditions were duly considered during his medical separation process.

a. The medical reviewer stated the applicant's DD Form 199 noted that he received a medical discharge from the Army with a 20% disability rating based on determinations of a formal PEB on 14 December 2011. A VA memorandum, dated 13 December 2011, with request from VA Decision Review Officer to U.S. Army PEB, requested reconsideration of the proposed DES rating decision, dated 7 July 2011, of evaluation of right knee patellofemoral chondromalacia proposed at 10% and reconsideration of his history of pulmonary embolus with recurrent DVT right leg proposed at 10%. The applicant did not meet medical retention standards in accordance with Chapter 3, Army Regulation 40-501 (Standards of Medical Fitness), and following the provisions set forth in Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation) that were applicable to the applicant's era of service. His medical conditions were duly considered during medical separation processing. [The applicant responded to this medical review and provided a self-authored letter and an email from his physician, wherein his current medical conditions and expected long-term outcome are detailed.

b. The Board considered the medical review and the applicant's response. The Board denied his request and stated:

(1) The applicant contends he should have been medically retired based on his right knee condition not being properly evaluated at the time of his PEB. The evidence of record shows a PEB reviewed the applicant's diagnoses and found him physically unfit due to pulmonary embolus with recurrent DVT and right knee chondromalacia patella. The PEB recommended a combined disability rating of 20% and separation with severance pay.

(2) Following his discharge from the Army by reason of disability, the VA increased his disability rating for his right knee condition and awarded service-connected disability ratings for several other conditions. He now contends the Army did not give him sufficient ratings for his medical conditions. The evidence of record does not support his contentions. A disability rating assigned by the Army is based on the level of disability at the time of the Soldier's separation and can only be accomplished through the PDES. It appears the applicant was properly rated at 20%.

9. The applicant provided VA rating decisions showing he was granted service-connected disability compensation for various conditions that include his knee conditions and radiculopathy.

10. 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.

11. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. Documentation reviewed included the applicant's ABCMR application and accompanying documentation, the military electronic medical record (AHLTA), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and/or the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant has applied to the ABCMR requesting additional medical conditions be determined unfitting for continued military service; an increase in his military disability rating; and a subsequent change in his current disability separation disposition from separated with disability severance pay to permanent retirement for physical disability. The applicant states in part:

"The board awarded a 10% rating for each of the following conditions:

- History of pulmonary embolus with recurrent deep vein thrombosis (DVT) right leg (claimed as pulmonary embolism and DVT)
- Right knee patellofemoral chondromalacia (limitation of extension)

Based on those 2 conditions, I was medically released because of an overall rating of 20%. But I do 't believe I was fairly evaluated and rated properly because of condition that I was rate, for that should have been included since they were because of my right knee issue.

Conditions that should have been included or evaluated as part of the medical board for which I was rated for included the following secondary conditions directly relate to the two conditions for which I was discharged:

- Right knee instability (10%)
- Right knee joint osteoarthritis with meniscal tear (10%)
- Left knee patellar chondromalacia (10%)
- Radiculopathy, right upper extremity (non-dominant) (20%)
- Radiculopathy, left upper extremity (non-dominant) (30%)

The above listed conditions I believe should have been included as part of my medical board because right and left knee conditions are all due to the injury that occurred tom right knee. The radiculopathy on both the left and right also should have been considered because they affected me.”

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 17 May 2007 and was separated with \$248,827.80 of disability severance pay on 14 June 2012 under provisions provided in Chapter 4 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (20 March 2012). This request was previously denied by the ABCMR on 1 November 2016 (AR20150011321). Rather than repeat their findings here, the board is referred to the record of proceedings for that case.

d. A Soldier is referred to the IDES when they have one or more conditions which appear to fail medical retention standards as documented on a duty liming permanent physical profile. At the start of their IDES processing, a physician lists the Soldier's 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 conditions they believe to be service-connected disabilities in block 8 of section II or a separate Statement in Support of Claim (VA form 21-4138).

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. All conditions are then rated by the VA prior to the Soldier's discharge. The physical evaluation board (PEB), after adjudicating the case sent them by the medical evaluation board (MEB), applies the applicable VA derived ratings to the Soldier's unfitting condition(s), thereby determining their 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.

f. On 21 September 2010, the applicant was referred to the IDES for "Multiple thrombotic episodes requiring life-long anticoagulation."

g. A medical evaluation board (MEB) determined his referred condition and "Right chondromalacia patella with dislocation of right patella" failed the medical retention standards of AR 40-501, Standards of Medical Fitness. They determined eight additional medical conditions met medical retention standards, to include left knee patellofemoral syndrome, right shoulder strain, and cervical strain with minimal degenerative joint disease. There were no upper extremity radiculopathies identified.

h. On 20 April 2011, the applicant concurred with the MEB's findings and recommendation and his case was forwarded to a physical evaluation board (PEB) for adjudication.

i. The applicant's 18 July 2011 Physical Evaluation Board (PEB) Proceedings (DA form 199) shows his informal PEB found the applicant had two medical condition which were unfitting medical condition for continued service: "Pulmonary embolus and recurrent deep vein thrombosis (DVT)" and "Right knee chondromalacia patella." They determined the remaining medical conditions were not unfitting for continued military service. The PEB applied the VBA derived ratings of 10% and 10% respectively, and because the applicant's combined military disability rating was less than 30%, the PEB recommended the applicant be separated with disability severance pay. After being counseled on the informal PEB's findings and recommendation by his PEB Liaison Officer (PEBLO), he concurred with the informal PEB's findings and waived his right to a formal hearing. The applicant did request a VA reconsideration of his disability ratings.

j. A DA 199 dated 14 December 2011 shows the VBA maintained the 10% ratings for both conditions. On 27 January 2012, after being counseled on the informal PEB's findings and recommendation along with the VBA's no change decision by his PEB

Liaison Officer (PEBLO), he concurred with the informal PEB's findings and waived his right to a formal hearing.

k. The applicant's final officer evaluation report was thru 30 November 2011 and shows he was a highly successful Officer. He passed his Army Physical Fitness Test on 25 May 2011 and met Army height and weight standards. His rater top-blocked him with "Outstanding Performance, Must Promote," opining:

"CPT [Applicant] is one of the most outstanding officers in the Group. He takes his role as a leader and mentor to heart, making himself available at all hours of the day or night, to not only the Soldiers in his section but throughout the entire Group HQ's."

l. His senior rater top-blocked him with "Best Qualified" stating:

"CPT [Applicant] is an outstanding officer who is clearly in the top five of all O-3s that I senior rate. He performed at the Major level on a daily basis, with stellar results. Enrique's devotion to training Soldiers at subordinate units and those of his own staff in all matters relating to human resources (HR) increased unit readiness across the formation ... Enrique has unlimited potential and should be promoted to Major ahead of his peers. Send to the Captain's Career Course now."

m. There is no significant probative evidence the applicant had any additional medical condition(s) which would have failed the medical retention standards of chapter 3 of AR 40-501, Standards of Medical Fitness, prior to his discharge; or which prevented the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his discharge.

n. Paragraph 3-1 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (20 March 2012) states:

"The mere presence of an 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 Soldier reasonably may be expected to perform because of their office, grade, rank, or rating."

o. JLV shows he has been awarded multiple VA service-connected disability ratings, including ratings for bilateral upper extremity radiculopathies effective 31 December 2013, limited flexion of the right knee effective 31 December 2013 and limited flexion of the left knee effective 15 June 2012. 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. 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.

p. 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:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition, and executed a comprehensive review based on law, policy, and regulation. Upon review of the applicant's petition, available military records, and the medical review, the Board concurred with the advising official finding the applicant's Department of Veterans Affairs rating determinations are based on the roles and authorities granted by Congress to the Department of Veterans Affairs and executed under a different set of laws.

a. The evidence shows a Physical Evaluation Board (PEB) convened on 12 November 2014 and determined two conditions were unfitting for continued military service; pulmonary embolus and recurrent deep vein thrombosis and right knee chondromalacia patella. The PEB then applied the Department of Veterans Affairs Schedule for Rating Disabilities (VASRD) derived ratings of 10 percent and 10 percent respectively to these conditions.

b. The Board noted the applicant's contention of additional conditions rated by the VA. However, the awarding of a additional VA ratings and/or conditions does not establish prior error or injustice. A military disability rating is intended to compensate an individual for interruption of a military career after it has been determined that the individual suffers from an impairment that disqualifies him or her from further military service. The rating derived from the VASRD reflects the disability at the point in time the VA examinations were completed. The military's Disability Evaluation System (DES) does not compensate service members for anticipated future severity or potential complications of conditions incurred during or permanently aggravated by their military service. The VA has those roles and authorities according to their laws. Therefore, the

Board found no error or injustice in his military disability rating or those conditions rating by the PEB at the time. The Board determined an increase in his military disability rating was not warranted.

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 amendment of the ABCMR decision rendered in Docket Number AR20150011321 on 1 November 2016.

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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, 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 Disability Evaluation System (DES) 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 (Disability Evaluation for Retention, Retirement, or Separation).

2. Army Regulation 635-40 establishes the Army DES 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.

a. The disability evaluation assessment process involves two distinct stages: the Medical Evaluation Board (MEB) and PEB. The purpose of the MEB is to determine whether the service member's injury or illness is severe enough to compromise his or 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 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.

b. Service members whose medical condition did not exist prior to service 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. 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 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 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 his or her office, grade, rank, or rating in such a way as to reasonably fulfill the purpose of his or her employment on active duty.

d. 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.

3. 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%.

4. Title 38, U.S. Code, 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.

5. Title 38, Code of Federal Regulations, Part IV is the **VASRD**. 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.

6. Section 1556 of Title 10, U.S. 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 ABCMR applicants (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//