

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 21 August 2024

DOCKET NUMBER: AR20240000760

APPLICANT REQUESTS:

- in effect, his medical condition be deemed as combat incurred
- an increase of his disability rating
- placement on the Permanent Disability Retirement List (PDRL)

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

- DD Form 149 (Application for Correction of Military Record)
- Department of Veterans Affairs (VA) Medical Records (1962 pages)

FACTS:

1. The applicant states he was medically separated in 2013 due to a back injury related to his deployment to Afghanistan in 2008-2009. His body was unable to bear the weight and demands of his service, resulting in a herniated disc in the L5-S1 and two bulging discs. He was also diagnosed with two traumatic brain injuries (TBIs), which prevented him from functioning effectively on a second deployment, while part of the 110th Military Police (MP) Company. Despite being on a profile, his unit transferred him to the 148th MP Company, where he was subjected to heavy lifting, equipment movement, and working in a police station without any accountability. This exacerbated his condition, and he continues to experience severe back pain, requiring ongoing treatment through the VA since his separation in 2013. During his Physical Evaluation Board, he received a 20% disability rating, and his DD Form 214 indicates a "noncombat disability severance." However, his injuries are directly related to actual combat in Afghanistan, including an improvised explosive device (IED) blast that hit his truck and caused his back pain and one of his TBIs. He believes his rating should be higher, and his status should be considered for the PDRL.

2. The applicant provides his VA medical records (1962 pages) for treatment received from approximately 25 February 2013 through 30 October 2023.

3. A review of the applicant's service record shows:

a. He enlisted in the Regular Army on 23 August 2007.

b. The available service record is void of the facts and circumstances surrounding the applicant's discharge, in addition to his Enlisted Record Brief.

c. He was honorably discharged on 24 February 2023. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 5 years, 6 months, and 2 days of active service. Block 18 (Remarks) lists service in Afghanistan from 1 January 2009 through 14 December 2009. He was assigned separation code JEB and the narrative reason for separation listed as "Disability, Severance Pay, Non-Combat (Enhanced)," with reentry code 3. It also shows he was awarded or authorized:

- Army Commendation Medal (2nd Award)
- Army Achievement Medal (2nd Award)
- Army Good Conduct Medal
- National Defense Service Medal
- Afghanistan Campaign Medal with two campaign stars
- Global War on Terrorism Service Medal
- Noncommissioned Officer Professional Development Ribbon
- Army Service Ribbon
- Overseas Service Ribbon
- NATO Medal
- Combat Action Badge
- Certificate of Achievement

4. By regulation (AR 40-501), medical evaluation of certain enlisted military occupational specialties and officer duty assignments in terms of medical conditions and physical defects are causes for rejection or medical unfitness for these specialized duties. If the profile is permanent the profiling officer must assess if the Soldier meets retention standards. Those Soldiers on active duty who do not meet retention standards must be referred to a medical evaluation board. Once a determination of physical unfitness is made, disabilities are rated using the VA schedule of disability rating.

5. By regulation (AR 635-40), the mere presence of a medical impairment does not in and of itself justify a finding of unfitness. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier may reasonably be expected to perform because of his or her office, grade, rank, or rating. Physical disability evaluation will include a decision and supporting documentation regarding whether the injury or disease that makes the Soldier unfit or that contributes to unfitness was incurred in combat with an enemy of the United States, was the result of armed conflict, or was caused by an instrumentality of war during a period of war. Paragraph 3-4 states Soldiers who sustain or aggravate physically-

unfitting disabilities must meet the following line-of-duty criteria to be eligible to receive retirement and severance pay benefits:

a. The disability must have been incurred or aggravated while the Soldier was entitled to basic pay or as the proximate cause of performing active duty or inactive duty training.

b. The disability must not have resulted from the Soldier's intentional misconduct or willful neglect and must not have been incurred during a period of unauthorized absence.

c. Armed Conflict. The fact that a Soldier may have incurred a medical impairment during a period of war, in an area of armed conflict, or while participating in combat operations is not sufficient to support a finding that the disability resulted from armed conflict. There must be a definite causal relationship between the armed conflict and the resulting unfitting disability.

d. Combat related. Covers those injuries and diseases attributable to the special dangers associated with armed conflict or the preparation or training for armed conflict. A physical disability will be considered combat related if it causes the Soldier to be unfit or contributes to unfitness and was incurred under any of the following circumstances:

- As a direct result following armed conflict.
- While engaged in hazardous service.
- Under conditions simulating war.
- Caused by an instrumentality of war

6. 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.

7. MEDICAL REVIEW:

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

b. The applicant is applying to the ABCMR requesting additional conditions be determined to have been unfitting for continued service, a corresponding increase in his military disability rating, and that his disability discharge disposition be changed from separated with disability severance pay to permanent retirement for physical disability. He is also requesting that his sole unfitting disability be determined combat related. He states:

"I was medically separated due to a back injury related to my deployment to Afghanistan in 2008-2009. My body could not handle the weight/demands placed on it and my back gave out. I was on a cane for over 6-weeks, diagnosed with a herniated disc in the L5-S1, with two additional discs bulging.

In addition, I had two TBIs and could not function on a second deployment, to which I was slated while assigned to the 110th MP CO. When on profile, my unit transferred me to the 148th MP CO and I was further injured with zero accountability to the unit forcing me to do heavy lifting, movement of equipment/firearms, working in a police station where those under arrest had to be detained or moved.

I continue to have severe back pain and receive treatment through the VA since my separation in 2013. During my PEB, I was award[ed] a 20% DOD rating. My DD214 reflects a "noncombat disability severance". My injuries are correlated to actual combat in Afghanistan, including a IED blast that hit my truck - starting the back pain and one of my TBI's."

c. The Record of Proceedings details the applicant's service and the circumstances of the case. The applicant's DD 214 for the period of Service under consideration shows he entered the Regular Army on 23 August 2007 and was discharged with \$30,358.80 of disability severance pay on 24 February 2013 under provisions provided in Chapter 4 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (20 March 2012). It shows Service in Afghanistan from 1 January 2009 – 14 December 2009.

d. A Soldier is referred to the Integrated Disability Evaluation System (IDES) when they have one or more conditions which appear to fail medical retention standards reflected on a duty limiting permanent physical profile. At the start of their IDES processing, a physician lists the Soldiers referred medical conditions in section I the VA/DOD Joint Disability Evaluation Board Claim (VA Form 21-0819). The Soldier, with the assistance of the VA military service coordinator, lists all other conditions they believe to be service-connected disabilities in block 8 of section II of this form, a separate Statement in Support of Claim (VA Form 21-4138), or on a separate

Application for Disability Compensation and Related Compensation Benefits (VA Form 21-526EZ).

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

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

g. The applicant was referred to the DES for "L5-S1 Herniation" on 26 July 9 July 2012. The applicant claimed seventeen additional conditions on a VA Form 21-4138, to include "Traumatic Brain Injury with scalp scar formation."

h. The medical evaluation board (MEB) determined he had two related spine conditions which did not meet the medical retention standards of AR 40-501, Standards of Medical Fitness: "Lumbar spondylosis with disc herniation of L5-S1 and myofascial pain syndrome with lumbar strain" and "Bilateral sacroiliac joint sprain/strain." They determined ten additional conditions met medical retention standards, to include "TBI without residuals per VA Examiner's evaluations."

i. The onset of his spine condition as noted in his MEB narrative summary:

"Onset. The Soldier's electronic medical records revealed his first visit on 12 July 11 for complaints of right sciatic pain."

j. Review of EMR shows the applicant was not seen for a spine condition during his deployment to Afghanistan. It shows he was first seen for low back pain on 5 May 2010. The provider wrote:

"Pain in midthoracic spine/paraspinous area x 1 month with prolonged sitting or standing; over past week lower back pain when running the 2-mile PT run. no prior problem before deployment."

k. While earlier than the date of onset noted during his DES processing, the applicant's DD214 shows his service in Afghanistan was only thru 14 December 2009 while this EMR encounter shows the onset was around 1 April 2010.

l. His TBI as addressed in his MEB narrative summary:

"TBIs without residuals per VA Examiner's evaluations. (FACET scores were all 0 by Dr. S and Dr. M.)"

m. VA disability examinations for residuals of TBI look at 10 facets of cognitive, emotional behavioral, and physical function and rate each on a scale from 0 = normal, to 3 = severe/total impairment.

n. On 29 August 2012, he agreed with the MEB's findings and recommendation and his case was forwarded to a physical evaluation board (PEB) for adjudication.

o. When the informal PEB convened on 29 November 2012, they determined that his lower spine condition – "Lumbar spondylosis with disc herniation of L5-S1, myofascial pain, and lumbar and bilateral sacroiliac joint sprain/strain" was the sole unfitting condition for continued military service. They determined the remaining ten conditions were not unfitting for continued military service.

p. The Board made the administrative determination the condition was not combat related under provisions in Section b(3) of 26 U.S. Code § 104. For such a finding, the statute requires there be a cause and effect relationship between the disability and one or more of the defined combat related circumstances; the disability 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.

q. They applied the Veterans Benefits Administration's (VBA) derived ratings of 20% and recommended the applicant be separated with disability severance pay. On 3 December 2012, after being counseled on the informal PEB's findings by her PEB Liaison Officer, the applicant concurred with the informal PEB's findings, waived his right to a formal hearing, and declined a VA reconsideration of his disability rating.

r. Medical documents submitted with the application are VA medical records from 25 February 2013 thru 30 October 2023 and are thus non-contemporaneous to his service and not probative in this case.

s. Review of his ePEB case file and records in EMR revealed no material discrepancies or errors.

t. There is no 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. Thus, there was no cause for referral to the Disability Evaluation System. Furthermore, there is no evidence that any additional medical condition(s) prevented the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his discharge.

u. JLV shows he has been awarded multiple VA service-connected disability ratings, including PTSD (70%) and traumatic brain disease (0%). However, the DES compensates an individual only for service incurred 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 authority were granted by Congress to the Department of Veterans Affairs and are executed under a different set of laws.

v. It is the opinion of the ARBA medical advisor that an increase in his military disability rating, a referral of his case back to the DES, and/or a finding of spine condition to be combat related are all unwarranted.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation. Upon review of the applicant's petition, available military records and medical review, the Board concurred with the advising official finding an increase to the applicant's military disability rating, a referral of his case back to the DES, and/or a finding of spine condition to be combat related are all unwarranted. The opine noted, the applicant's record is absent any evidence he had any additional medical condition(s) which would have failed the medical retention standards, prior to his discharge.

2. The Board determined there is insufficient evidence to support the applicant's contentions for his medical condition to be deemed as combat incurred nor an increase of his disability rating. Furthermore, the Board found placement on the Permanent Disability Retirement List (PDRL) is without merit. The Board agreed there is no

evidence that any additional medical condition(s) prevented the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his discharge. Based on the preponderance of evidence and the advising official opine, the Board denied relief.

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 (including officer procurement programs), retention, and separation (including retirement). The Department of Veterans Affairs Schedule for Rating Disabilities (VASRD) is used by the Army and the VA as part of the process of adjudicating disability claims. It is a guide for evaluating the severity of disabilities resulting from all types of diseases and injuries encountered as a result of or incident to military service. This degree of severity is expressed as a percentage rating which determines the amount of monthly compensation.

3. 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. 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. Physical disability evaluation will include a decision and supporting documentation regarding whether the injury or disease that makes the Soldier unfit or that contributes to unfitness was incurred in combat with an enemy of the United States, was the result of armed conflict, or was caused by an instrumentality of war during a period of war.

a. Paragraph 3-2 states disability compensation is not an entitlement acquired by reason of service-incurred illness or injury; rather, it is provided to Soldiers whose service is interrupted and who can no longer continue to reasonably perform because of a physical disability incurred or aggravated in military service.

b. Paragraph 3-4 states Soldiers who sustain or aggravate physically-unfitting disabilities must meet the following line-of-duty criteria to be eligible to receive retirement and severance pay benefits:

(1) The disability must have been incurred or aggravated while the Soldier was entitled to basic pay or as the proximate cause of performing active duty or inactive duty training.

(2) The disability must not have resulted from the Soldier's intentional misconduct or willful neglect and must not have been incurred during a period of unauthorized absence.

c. Armed Conflict. The fact that a Soldier may have incurred a medical impairment during a period of war, in an area of armed conflict, or while participating in combat operations is not sufficient to support a finding that the disability resulted from armed

conflict. There must be a definite causal relationship between the armed conflict and the resulting unfitting disability.

d. Combat related. Covers those injuries and diseases attributable to the special dangers associated with armed conflict or the preparation or training for armed conflict. A physical disability will be considered combat related if it causes the Soldier to be unfit or contributes to unfitness and was incurred under any of the following circumstances:

- As a direct result following armed conflict.
- While engaged in hazardous service.
- Under conditions simulating war.
- Caused by an instrumentality of war

4. Title 10, U.S. Code, chapter 61, provides the Secretaries of the Military Departments with authority to retire or discharge a member if they find the member unfit to perform military duties because of physical disability. The U.S. Army Physical Disability Agency is responsible for administering the Army physical disability evaluation system and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with DOD Directive 1332.18 and Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation).

a. Soldiers are referred to the disability system when they no longer meet medical retention standards in accordance with Army Regulation 40-501 (Standards of Medical Fitness), chapter 3, as evidenced in an MEB; when they receive a permanent medical profile rating of 3 or 4 in any factor and are referred by an MOS Medical Retention Board; and/or they are command-referred for a fitness-for-duty medical examination.

b. The disability evaluation assessment process involves two distinct stages: the MEB and PEB. The purpose of the MEB is to determine whether the service member's injury or illness is severe enough to compromise his/her ability to return to full duty based on the job specialty designation of the branch of service. A PEB is an administrative body possessing the authority to determine whether or not a service member is fit for duty. A designation of "unfit for duty" is required before an individual can be separated from the military because of an injury or medical condition. Service members who are determined to be unfit for duty due to disability either are separated from the military or are permanently retired, depending on the severity of the disability and length of military service. Individuals who are "separated" receive a one-time severance payment, while veterans who retire based upon disability receive monthly military retired pay and have access to all other benefits afforded to military retirees.

c. The mere presence of a medical impairment does not in and of itself justify a finding of unfitness. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier may

reasonably be expected to perform because of his or her office, grade, rank, or rating. Reasonable performance of the preponderance of duties will invariably result in a finding of fitness for continued duty. A Soldier is physically unfit when a medical impairment prevents reasonable performance of the duties required of the Soldier's office, grade, rank, or rating.

5. Department of Defense (DoD) Directive-Type Memorandum (DTM) 11-015 (Disability Evaluation System) explains the Integrated Disability Evaluation System (IDES). The version in effect at the time defined the IDES process and procedures. The guidelines within the DTM were incorporated in the DoD Manual Number 1332.18 (DES Manual: General Information and Legacy DES Time Standards).

a. The IDES is the joint DoD-VA process by which DoD determines whether wounded, ill, or injured Service members are fit for continued military service and by which the DOD and the VA determine appropriate benefits for Service members who are separated or retired for a Service-connected disability. The IDES features a single set of disability medical examinations appropriate for fitness determination by the Military Departments and a single set of disability ratings provided by the VA for appropriate use by both departments. Although the IDES includes medical examinations, IDES processes are administrative in nature and are independent of clinical care and treatment.

b. Unless otherwise stated in this DTM, DOD will follow the existing policies and procedures promulgated in DOD Directive 1332.18 (Disability Evaluation System (DES)) and the Under Secretary of Defense for Personnel and Readiness Memoranda. All newly-initiated, duty-related physical disability cases from the Departments of the Army, Air Force, and Navy at operating IDES sites will be processed in accordance with this DTM and follow the process described in this DTM unless the Military Department concerned approves the exclusion of the Service member due to special circumstances. Service members whose cases were initiated under the legacy DES process will not enter the IDES.

c. IDES medical examinations will include a general medical examination and any other applicable medical examinations performed to VA compensation and pension (C&P) standards. Collectively, the examinations will be sufficient to assess the member's referred and claimed condition(s) and assist the VA in ratings determinations and assist military departments with unfit determinations.

d. Within 15 days of receiving the proposed disability ratings from the Disability Rating Activity Site (D-RAS), the PEB will apply the rating using the diagnostic code(s) provided by the D-RAS to the Service Member's unfitting conditions and publish the disposition recommendation. For example, if the PEB identifies a condition to the

D-RAS as “schizophreniform disorder”, but the D-RAS rates the condition as “psychotic disorder NOS (VASRD 9210), the PEB will apply the rating as “schizophreniform disorder rated as psychotic disorder NOS (VASRD 9210).

e. Upon separation from military service for medical disability and consistent with Board for Corrections of Military Records (BCMR) procedures of the Military Department concerned, the former Service member (or his or her designated representative) may request correction of his or her military records through his or her respective Military Department BCMR if new information regarding his or her service or condition during service is made available that may result in a different disposition. For example, a veteran appeals the VA's disability rating of an unfitting condition based on a portion of his or her service treatment record that was missing during the IDES process. If the VA changes the disability rating for the unfitting condition based on a portion of his or her service treatment record that was missing during the IDES process and the change to the disability rating may result in a different disposition, the Service member may request correction of his or her military records through his or her respective Military Department BCMR.

6. 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.

7. Title 38 U.S. Code, section 1110 (General - Basic Entitlement), states for disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

8. Title 38 U.S. Code, section 1131 (Peacetime Disability Compensation - Basic Entitlement) states for disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during other than a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be

paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

//NOTHING FOLLOWS//