

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 15 October 2024

DOCKET NUMBER: AR20240001543

APPLICANT REQUESTS: an increase to his Army physical disability rating base on an increase to his service-connected condition of left lower extremity radiculopathy by the Department of Veterans Affairs.

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

- DD Form 149 (Application for Correction of Military Record)
- DA Form 199 (Informal Physical Evaluation Board (PEB) Proceedings), dated 26 July 2023
- DD Form 214 (Certificate of Release or Discharge from Active Duty) covering the period ending 29 October 2023
- Department of Veterans Affairs (VA) Rating Decision, dated 22 November 2023
- VA letter, dated 24 November 2023

FACTS:

1. The applicant states he is requesting an increase to his Army physical disability rating. The correction should be made due to the fact that the VA increased his left lower extremity radiculopathy condition rating from 10 percent (the PEB rating) to 80 percent, per his final rating letter and that condition is one of the three conditions that make up his Army disability rating.
2. The applicant enlisted in the Regular Army on 21 April 2020, and was awarded the Military Occupational Specialty (MOS) 11B (Infantryman).
3. The applicant's DA Form 3349 (Physical Profile), DA Form 7652 (Disability Evaluation System (DES) Commander's Performance and Functional Statement), Medical Evaluation Board (MEB) Narrative Summary (NARSUM), DA Form 3947 (MEB Proceedings), VA Compensation and Pension (C&P) Exam, and VA Proposed Rating Decision for DES purposes are not in his available records for review and have not been provided by the applicant.
4. A DA Form 199 shows:

a. An Informal PEB convened on 26 July 2023, where the applicant was found physically unfit with a recommended rating of 50 percent and that his disposition be permanent disability retirement.

b. The applicant's medical conditions determined to be unfitting are:

(1) Lumbar spine degenerative disc disease (DDD)/spinal stenosis (MEB Diagnosis (DX) 1); 40 percent. The case file indicates the applicant first sought treatment for this condition on 15 February 2022, while stationed at Fort Liberty, NC, after experiencing an insidious onset of lower back pain. Although he attributes this condition to airborne operations in November 2022, there is insufficient supporting documentation within the available case file to substantiate the assertion. He is unfit because the DA Form 3349 shows functional activity limitations associated with this condition make him unable to reasonably perform his required duties.

(2) Left lower extremity radiculopathy (MEB Dx 2); 10 percent. The case file indicates the applicant first sought treatment for this condition on 15 February 2022, while stationed at Fort Liberty, NC, after experiencing an insidious onset of lower back pain. Although he attributes this condition to airborne operations in November 2022, there is insufficient supporting documentation within the available case file to substantiate the assertion. He is unfit because the DA Form 3349 shows functional activity limitations associated with this condition make him unable to reasonably perform his required duties.

(3) Right lower extremity radiculopathy (MEB Dx 3); 10 percent. The case file indicates the applicant first sought treatment for this condition on 15 February 2022, while stationed at Fort Liberty, NC, after experiencing an insidious onset of lower back pain. Although he attributes this condition to airborne operations in November 2022, there is insufficient supporting documentation within the available case file to substantiate the assertion. He is unfit because the DA Form 3349 shows functional activity limitations associated with this condition make him unable to reasonably perform his required duties.

c. The applicant's medical conditions determined not to be unfitting are MEB Dx 4 - 23.

d. The applicant signed the form on 7 August 2023, indicating he had been advised of the findings and recommendations of the Informal PEB and concurred, waiving a formal hearing of his case. He also indicated he did not request reconsideration of his VA ratings.

5. The applicant's DD Form 214 shows he was retired on 29 October 2023, under the provisions of Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or

Separation) due to permanent disability with corresponding separation code SEJ. He was credited with 3 years, 6 months, and 9 days of net active service.

6. A VA Rating Decision, dated 22 November 2023, shows the applicant was granted the following service-connected disability ratings for the following conditions effective 30 October 2023:

- radiculopathy, left lower extremity with left foot drop, 80 percent
- unspecified anxiety disorder, unspecified depressive disorder, and traumatic brain disorder (TBI), 70 percent
- bilateral pes planus and plantar fasciitis, 50 percent
- lumbar spine DDD, 40 percent
- asthma, 30 percent
- migraine headaches, 30 percent
- cervical strain, 20 percent
- left (non-dominant) shoulder strain, 20 percent
- radiculopathy, left (non-dominant) upper extremity, 20 percent
- radiculopathy, right (dominant) upper extremity, 20 percent
- right (dominant) shoulder strain, 20 percent
- bilateral shin splints, 10 percent
- gastroesophageal reflux disease (GERD), 10 percent
- left (non-dominant) wrist tendinitis, 10 percent
- left ankle strain, 10 percent
- left knee sprain, 10 percent
- radiculopathy, right lower extremity, 10 percent
- right (dominant) wrist tendinitis, 10 percent
- right ankle strain, 10 percent
- right knee sprain, 10 percent
- tinnitus, 10 percent

7. A VA letter, dated 24 November 2023, shows the applicant has a 100 percent VA service-connected disability rating for the conditions as outlined in the VA Rating Decision dated 22 November 2023.

8. 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.

9. Title 38, CFR, Part IV is the VA's schedule for rating disabilities. The VA awards disability ratings to veterans for service-connected conditions, including those conditions

detected after discharge. As a result, the VA, operating under different policies, may award a disability rating where the Army did not find the member to be unfit to perform his duties. Unlike the Army, the VA can evaluate a veteran throughout his or her lifetime, adjusting the percentage of disability based upon that agency's examinations and findings.

10. 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 an increase in his military disability rating. He states:

"This correction should be made due to the fact that the VA increased my left lower extremity radiculopathy rating from 10% (PEB rating) to 80% (Final rating letter) and that condition is one of the 3 that my make up my Army disability rating."

c. The Record of Proceedings details the applicant's service and the circumstances of the case. His DD 214 for the period of Service under consideration shows entered the regular Army on 6 October 1999 and was permanently retired for physical disability on 12 July 2022 under provisions provided in Chapter 4 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (17 January 2017).

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 limiting 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 27 January 2022, his informal PEB determined three medical conditions were unfitting for continued military service; Lumbar spine degenerative disc disease/spinal stenosis; Left lower extremity radiculopathy; and Right lower extremity radiculopathy. The PEB then applied the VBA derived ratings of 40%, 10%, and 10% respectively (VA Disability Evaluation System Proposed Ratings, 11 July 2023).

g. The applicant's combined military disability rating was 50% and so the PEB recommended the applicant be permanently retired for physical disability. On 7 August 2023, after being counseled on the informal PEB's findings by his PEB Liaison Officer, the applicant concurred with the informal PEB's findings, waived his right to a formal hearing, and declined to request a VA reconsideration of his disability ratings.

h. JLV shows the VA increased their disability rating for his left lower extremity radiculopathy to 80% effective 30 October 2023.

i. The awarding of a higher VA rating does not establish prior error or injustice. A 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 VA Schedule for Rating Disabilities reflects the disability at the point in time the VA exams were completed.

j. The DES has neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions incurred during or permanently aggravated by their military service. These roles and authorities are granted by Congress to the Department of Veterans Affairs and executed under a different set of laws.

k. 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 warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered.

a. The evidence shows an informal PEB convened on 27 January 2022 and determined three medical conditions were unfitting for continued military service; Lumbar spine degenerative disc disease/spinal stenosis; Left lower extremity radiculopathy; and Right lower extremity radiculopathy. The PEB then applied the VBA derived ratings of 40%, 10%, and 10% respectively (VA Disability Evaluation System Proposed Ratings, 11 July 2023). The PEB recommended the applicant be permanently retired for physical disability at a combined disability rating of 50%. After being counseled on the informal PEB's findings by his PEB Liaison Officer, the applicant concurred with the informal PEB's findings, waived his right to a formal hearing, and declined to request a VA reconsideration of his disability ratings.

b. The applicant contends that since the VA increased his service-connected disability rating for one of those conditions to a higher rating, the Army should do the same. However, the awarding of a higher VA rating 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 VA Schedule for Rating Disabilities reflects the disability at the point in time the VA exams 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. The Board agreed with the medical reviewer's determination that neither an increase in his military disability rating nor a referral of his case back to the DES is 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 correction of the records of the individual concerned.

■

■ ■

■
■

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 physical disability evaluation system (DES) and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with DOD Directive 1332.18 (Discharge Review Board (DRB) Procedures and Standards) 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 a Medical Evaluation Board (MEB); when they receive a permanent medical profile rating of 3 or 4 in any factor and are referred by an Military Occupational Specialty (MOS) Medical Retention Board (MMRB); 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 Physical Evaluation Board (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.

2. Army Regulation 635-40 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.

a. 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. 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. 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 Department of Veterans Affairs (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 their office, grade, rank, or rating in such a way as to reasonably fulfill the purpose of their employment on active duty. 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 percent.

4. 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.

5. 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.

6. 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//