

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 20 December 2024

DOCKET NUMBER: AR20240001564

APPLICANT REQUESTS: correction of his DA Form 199 (Informal Physical Evaluation Board (PEB) Proceedings) by adding additional conditions as unfitting resulting in his retirement for physical disability.

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) for the period 26 February 2003 to 25 February 2004
- Performance Improvement Plan, dated 4 June 2020 (civilian employment)
- Performance Improvement Plan - Extension, dated 30 July 2020 (civilian employment)
- Vitlink Psychiatric Services Initial Psychiatric Assessment, dated 28 June 2022
- Department of Veterans Affairs (VA) Medical Opinion Disability Benefits Questionnaire (DBQ), dated 9 August 2022
- VA Medical Opinion DBQ, dated 14 August 2022
- Psychological File Review, dated 31 March 2023
- VA Medical Opinion DBQ, dated 1 May 2023
- VA Intestinal Conditions DBQ, dated 1 May 2023
- VA Review Post-Traumatic Stress Disorder (PTSD) DBQ, dated 6 July 2023
- DA Form 199, dated 25 October 2023

FACTS:

1. The applicant states all of the below disabilities were incurred during his deployment in support of Operation Enduring Freedom. Documented medical evidence and psychological evaluations were provided to the VA for all claims. His DD Form 214 shows his active-duty status as evidence. His quality of life has changed, and the service-connected disabilities may shorten his life expectancy. He would like the

opportunity to receive his pension now. Therefore, his DA Form 199 should be corrected to reflect the following conditions as unfitting with the corresponding disability rating:

- PTSD-70%
- irritable bowel syndrome-30%
- gastroesophageal reflux disease-10%
- bilateral tinnitus-10%
- allergic rhinitis-30%
- chronic sinusitis 10%
- continuous positive airway pressure (CPAP)-50% (interpreted to mean a breathing disorder)
- lumbar degenerative disc disease-20%

2. The applicant enlisted in the U.S. Army Reserve on 17 January 2001.

3. Orders published on 25 February 2003 ordered the applicant to active duty for the purpose of mobilization in support of Operation Enduring Freedom with duty at Fort Jackson, SC. His DD Form 214 shows he entered active duty on 26 February 2003 and was released from active on 25 February 2004 upon completion of required active service.

4. On 16 May 2006, the applicant was appointed as a Reserve Warrant Officer of the Army.

5. On 25 October 2023, a PEB found the applicant unfit for further military service due to the following conditions:

a. Lumbar degenerative disc disease with spondylosis. The PEB stated:

The Soldier first sought treatment for these conditions while on active duty at Fort Jackson, South Carolina in September 2003 after experiencing lower back pain from weightlifting. These conditions recurred episodically since onset and became intractable to conservative management in November 2022

b. PTSD (non-compensable). The PEB stated:

The Soldier was diagnosed with this condition while a drilling member in Raleigh, North Carolina on 28 June 2022 complaining of insomnia, anxiety, and depression. Although the Soldier attributes this condition to racial mistreatment, exposure to simulated war sounds, and knowledge of the death of a Soldier during a live fire training accident at Fort Jackson, South Carolina from 2003 to 2004, the available evidence indicates onset of the condition did not occur while the Soldier was on an

Active-Duty status for more than 30 days or entitled to base pay, and there is no Line of Duty investigation for this condition. Additionally, there is no evidence within the Soldier's available case file indicating military service has aggravated the condition. Therefore, the condition is not compensable because the evidence overcomes both the presumption of soundness and the presumption of permanent service aggravation.

6. The PEB recommended a 20% disability rating and the applicant's separation with severance pay. The DA Form 199 contains the following entries in section VI (Instructions and Advisory Statements):

a. In accordance with Department of Defense Instruction 1332.18, Section 11.c.(3),(4), a Selected Reserve Soldier with at least 15 and less than 20 years of qualifying service who would otherwise be qualified for nonregular retirement may waive separation with or without severance pay to request early qualification for retired pay under the provisions of Title 10, U.S. Code, section 12731 b. When the Soldier is eligible for, and elects acceptance of disability severance pay, the Soldier forfeits all rights to a nonregular retired status based on their current qualifying service. There are no provisions under Title 10, U.S. Code to repay disability severance pay to then receive nonregular retired pay.

b. This case was adjudicated as part of the Integrated Disability Evaluation System (IDES).

c. As documented in the VA memorandum dated 2 October 2023, the VA determined the specific VA Schedule for Rating Disabilities code(s) to describe the Soldier's condition(s). The PEB determined the disposition recommendation based on the proposed VA disability rating(s) and in accord with applicable statutes and regulations.

7. On 7 December 2023, the applicant indicated he did not concur with the PEB's findings and recommendations and demanded a formal hearing. He did not request reconsideration of his VA ratings. He also indicated he was submitting a written appeal; however, his written appeal is not available and there is no evidence indicating that a formal PEB hearing took place.

8. The DA Form 199 further shows the applicant elected transfer to the Retired Reserve in lieu of being separated for disability with entitlement to disability severance pay.

9. Orders published on 25 January 2024 directed the applicant's assignment to the Retired Reserve effective 18 February 2024. The orders show he was credited with 20 years of total service for nonregular retirement. He is eligible to receive retired pay upon attaining age 60.

10. The applicant provided several medical documents showing he was diagnosed with various conditions including PTSD.

11. 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.

MEDICAL REVIEW:

12. 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:

The applicant has applied to the ABCMR requesting an increase in his military disability rating with a subsequent revocation of his retirement, currently under 10 U.S. Code § 1209 - Transfer to inactive status list instead of separation, be changed to a retirement under 10 U.S. Code § 1201 - Regulars and members on active duty for more than 30 days: retirement; and to be then permanently retired for physical disability. He states:

“Update DA Form 199 [Informal Physical Evaluation Board (PEB) Proceedings] to recognize PTSD at a rating of 70% and the following service-connected disability ratings listed below. IBS [irritable bowel syndrome] 30%, GERD [gastroesophageal reflux disease] 10%, Bilateral Tinnitus 10%, Allergic Rhinitis 30% Chronic Sinusitis 10%, CPAP [continuous positive airway pressure used to treat sleep apnea] 50%, Lumbar Degenerative disc 20%.”

The Record of Proceedings details the applicant's service and the circumstances of the case. Orders published on 25 January 2024 by the Department of the Army show the applicant was transferred to the USAR Retired Reserve effective 18 February 2024 after having completed 20 or more years of qualifying service for retired pay at age 60 (a non-regular retirement). It shows 20 years, 00 months, and 00 days of total service.

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, or on a separate Application for Disability Compensation and Related Compensation Benefits (VA Form 21-526EZ).

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.

All conditions, both claimed and referred, are rated by the VA 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 VA.

On 3 May 2023, the applicant was referred to the IDES for "Lower back injury/pain" and PTSD. The applicant claimed eight additional conditions on his separate Application for Disability Compensation and Related Compensation Benefits (VA Form 21-526EZ). The MEB determined the applicant had two conditions failed the medical retention standards of AR 40-501, Standards of Medical Fitness: "Lumbar Degenerative Disc Disease with Spondylosis", and "Post-Traumatic Stress Disorder." They determined the former was related to his military service while the later had existed prior to service and had not been permanently aggravated by his military service, i.e., not incurred in the line of duty and therefore non-compensable. They determined ten other medical conditions met medical retention standards.

The applicant appealed the initial medical evaluation board (MEB) findings which had determined his PTSD had not been incurred in the line of duty. The appeal was denied with the appellate review physician stating in part:

"As evidence he maintains that he experienced stressors when another trainee was accidentally killed during a nighttime life fire exercise while he was on active duty at Fort Jackson South Carolina in December 2003.

As Dr. P. notes in his narrative summary, this officer was first diagnosed with a psychiatric condition in June 2022 by an outside civilian psychologist in Raleigh

North Carolina. He states, 'applicant first documented behavioral health encounter.'

He was not on active duty or drilling at that time.

The soldier told VA C&P initial PTSD DBQ examiner that 'in 2003 and 2004 (Ft Jackson) he had racial mistreatment, verbally berated, long work hours with minimal days off and excessive exposure to simulated war sounds. He found out the soldier was killed during a nighttime live fire training accident.'

I was able to review all contemporaneous 2003-2004 treatment records from Moncrieff/Ft Jackson.

The first record available is a 15 April 2003 TMC [troop medical clinic] note.

The soldier's behavioral health screen was negative ...

The next note is from to September 2003, again from the Moncrieff Army Community Hospital/TMC.

The soldier's behavior health screen was again negative ...

The next document of probative value is a May 2006 DA form 2807, report of medical history.

Of note, the soldier's psychiatric review of systems is completely negative.

His mental status during this examination was within normal limits.

Finally, there is 11 January 2008 DA 2807.

Again, the soldier's psychiatric review of systems is completely negative as was the soldier's mental status.

The PTSD diagnosis was reviewed by the personnel at the Army Reserve Medical Management Center, most likely reviewing the above records I just discussed.

They too concluded that the soldier's PTSD is not compensable.

Finally, I reviewed an additional 450 pages of medical records after the soldier's Fort Jackson service and found no evidence to support any permanent service aggravation.

I agree with Dr. P. that the soldier's PTSD is not compensable."

The case, including his appeal and independent medical review request along with the results for each was then forwarded to a physical evaluation board (PEB) for adjudication.

On 11 June 2020, the applicant's informal PEB found the two conditions which failed retention standards to also be unfitting for continued military service. They likewise found his PTSD to be non-compensable for the reasons noted above adding:

“... the available evidence indicates onset of the condition did not occur while the Soldier was on an Active-Duty status for more than 30 days or entitled to base pay, and there is no Line of Duty investigation for this condition. Additionally, there is no evidence within the Soldier's available case file indicating military service has aggravated the condition. Therefore, the condition is not compensable because the evidence overcomes both the presumption of soundness and the presumption of permanent service aggravation.”

The PEB found the ten remaining medical conditions not unfitting for continued service.

The PEB applied the Veterans Benefits Administration (VBA) derived ratings of 20% and recommended the applicant be separated with disability severance pay. After being counseled by his PEB Liaison Officer (PEBLO) on the PEB's findings and recommendations, he non-concurred with the PEB's findings and demanded a formal hearing with the assistance of regularly appointed counsel, maintaining that his PTSD should be compensable. However, on 9 January 2024, he withdrew his request for a formal hearing:

“He submits this withdrawal in order to cancel the formal PEB hearing scheduled for 12 January 2024 and understands that the case will be forwarded for further processing without a formal hearing. CW4 [Applicant] understands that this constitutes a permanent waiver of his request for a formal PEB hearing but does not constitute a waiver of any rights to post-discharge relief. CW4 [Applicant] also understands that after 16 Jan 2024, he will furnish copies of his updated RPAM (Retirement Points Accounting Management) statement and a copy of his 20-year letter to the PEB.

Because the PEB had recommended the applicant be separated with disability severance pay for a disability rating of less than 30% and he had 20 years of qualifying service for retirement, the applicant was offered and elected for retirement under 10 U.S. Code § 1209 rather than be separated with disability severance pay.

Paragraph 4-27d(1) of AR 635–40, Physical Evaluation for Retention, Retirement, or Separation (19 January 2017):

“10 United States Code 1209 election. Under the provisions of 10 USC 1209, Ready Reserve Soldiers who have completed at least 20 qualifying years of Reserve service and who would otherwise be qualified for retirement for non-regular service may forfeit disability severance pay and request transfer to the Inactive Status List for the purpose of receiving non-disability retired pay at age 60 or at the age otherwise authorized by law. The USAPDA extends this election to the Ready Reserve Soldier being separated without entitlement to severance pay with 20 qualifying years. The Soldier will be afforded the opportunity to make their election when making elections to PEB or USAPDA findings.”

Paragraph 4-27c(1) of AR 635–40, Physical Evaluation for Retention, Retirement, or Separation (19 January 2017):

(1) Permanent disability retirement. This disposition is directed under 10 USC 1201 or 10 USC 1204, as applicable, when the Soldier is determined unfit for continued service and has a compensable disability in accordance with the standards of this regulation, and—

(a) The disability(ies) are permanent and stable or, subject to the requirements in chapter 5 concerning certain mental diagnosis, the disability rating will not improve to less than 80 percent or -

(b) The Soldier has at least 20 years of {active federal} service as computed under 10 USC 1208 (see DA Pam 635–40 for explanation of this computation) or -

(c) The Soldier has a combined disability rating of at least 30 percent.

Paragraphs 4-27d(1)(b)1 and 4-27d(1)(b)2 of AR 635–40, Physical Evaluation for Retention, Retirement, or Separation (19 January 2017) states show this action results in the forfeiture of a non-regular retirement and that this election is irrevocable:

(b) The PEBLO will advise the Soldier that they —

1. Forfeit all rights to future non-regular retired pay and a retired status when disability severance pay is accepted.

2. The election becomes irrevocable on the date of the Soldier’s separation.

Review of the DES case file in ePEB and his records in the EMR show the findings throughout his DES process are consistent with the medical evidence in the case file. No material errors, discrepancies, or omissions were identified.

It is the opinion of the Agency Medical Advisor that neither an increase in his military disability rating nor a referral of his case to the DES is warranted.


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 request, available military records and medical review, the Board concurred with the advising official finding that neither an increase in his military disability rating nor a referral of his case to the DES is warranted. The Board noted, the applicant indicated he did not concur with the PEB's findings and recommendations and demanded a formal hearing. However, the applicant did not request reconsideration of his VA ratings. Evidence indicated the applicant was submitting a written appeal; however, his written appeal is not available and there is no evidence indicating that a formal PEB hearing took place.

2. The Board determined based on the advising opine and evidence in the applicant's record, there is insufficient evidence to support correction of his DA Form 199 by adding additional conditions as unfitting resulting in his retirement for physical disability. As such, 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.



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, 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 (DOD) 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. Soldiers who sustain or aggravate physically-unfitting disabilities must meet the following line-of-duty criteria to be eligible to receive retirement and/or 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.

d. 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.

e. 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.

f. 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. Directive-type Memorandum (DTM) 11-015, dated 19 December 2011, explains the IDES. It states:

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 DOD and 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 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 requirements promulgated in DODI 1332.18 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.

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

d. Upon separation from military service for medical disability and consistent with the Board for Correction of Military Records (BCMR) procedures of the military department concerned, the former service member 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 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.

e. If, after separation from service and attaining veteran status, the former service member desires to appeal a determination from the rating decision, the veteran has one year from the date of mailing of notice of the VA decision to submit a written notice of disagreement with the decision to the VA regional office of jurisdiction.

5. 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.

6. 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 their lifetime, adjusting the percentage of disability based upon that agency's examinations and findings.

7. 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//