

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 27 August 2024

DOCKET NUMBER: AR20240001910

APPLICANT REQUESTS: This case comes before the Army Board for Correction of Military Records (ABCMR) on remand from the United States Court of Federal Claims (hereinafter refer to as The Court). The Court directs the ABCMR to:

- Reconsider the merits of the claims asserted by the applicant in this case
- Address in its decision the underlying adherence of the Medical Evaluation Board (MEB) and Physical Evaluation Board (PEB) to Army Regulation (AR) 635-40 (Physical Evaluation for Retention, Retirements, or Separation) and Department of Defense Instruction (DoDI) 1332.38 regarding the PEB's finding of chronic low back pain described as post-laminectomy syndrome, lumbar region as the applicant's sole unfitting medical condition
- Determine and explain whether the applicant is entitled to any relief, including the correction of records or other relief, based upon any errors or injustices the Correction Board might find

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

- Complaint
- Joint Motion for Voluntary Remand
- Remand Order
- Remand Brief Final
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- DA Form 3947 (Medical Evaluation Board Proceedings)
- DA Form 199 (Physical Evaluation Board Proceedings)
- ABCMR Record of Proceedings (ROP), 10 November 2010
- Narrative Summary (NARSUM), 20 January 2009
- Discharge Summary, 6 November 2006
- Department of Veterans Affairs Rating Decision, 30 November 2009
- Notice of Disagreement Form 21-4138, 19 January 2010
- Order by Board of Veterans' Appeals - 24 December 2013
- Department of Veterans Affairs Rating Decision, 26 October 2015
- Medical Records (Tabs 1-17) – 19 pages
- All about L5-S1 (Lumbosacral Joint) (Peer Reviewed)

- Department of Veterans Affairs Rating Decision, 1 September 2010
- AR20210008652 Letter and ROP
- Physical Disability Evaluation System Commanders Performance and Function Statement

FACTS:

1. The Court's Order for Remand filed on 9 February 2024, states the parties have filed a joint motion, ECF No. 18, to remand this case to the Army Board for Correction of Military Records (the "Correction Board") and to stay the case pending the Correction Board's new decision. Courts "have broad discretion to grant or deny an agency's motion to remand." *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 436 (D.C. Cir. 2018). Here, both parties agree that remand is appropriate to fully address the applicant's concerns.

a. When an agency proceeding is remanded, "the Court has discretion to retain jurisdiction over the case or to dismiss the action without prejudice." *Ctr. for Biological Diversity v. U.S. Army Corps of Engineers*, No. 20-cv-103 (RDM), 2021 WL 14929, at \*2 (D.D.C. 2021) (citing *Cobell v. Norton*, 240 F.3d 1081, 1108–09 (D.C. Cir. 2001)). The cases over which "courts most often retain jurisdiction," include "cases in which the court has issued specific instructions to guide the agency on remand." *Id.* The applicant argues that the Court should retain jurisdiction here to guard against potential interruption to the "thoughtfully negotiated timeline to which the parties agreed." ECF No. 19 at 2. And Defendant does not oppose that position. Thus, the Court finds that there is a "purpose that would be served if the Court were to retain jurisdiction during the remand." *Id.* at \*3.

b. Accordingly, it is hereby ORDERED that the Joint Motion, ECF No. 18, is GRANTED. It is further ORDERED that Defendant shall submit the matter to the Correction Board for further consideration.

c. It is further ORDERED that the Correction Board shall:

(1) Reconsider the merits of the claims asserted by the applicant in this action;

(2) Address in its decision the underlying adherence of the Medical Evaluation Board and Physical Evaluation Board to Army Regulation 635-40 and Department of Defense Instruction 1332.38 regarding the Physical Evaluation Board's finding of chronic low back pain described as post-laminectomy syndrome, lumbar region as the applicant's sole unfitting medical condition;

(3) Afford the applicant thirty days to file with the Correction Board any new or supplemental arguments or evidence in support of his claims;

(4) Consider and address any evidence or argument contained in such a submission; and

(5) Determine and explain whether the applicant is entitled to any relief, including the correction of records or other relief, based upon any errors or injustices the Correction Board might find.

d. It is further ORDERED that upon issuing its new decision, the Correction Board shall forward that decision to counsel for both the applicant and Defendant, and that, within 14 days of receiving that decision, counsel for Defendant shall file a notice of receipt with the Court.

e. It is further ORDERED that within 30 days of receiving the Correction Board's decision, the parties shall file a Joint Status Report advising the Court whether the case is moot.

f. It is further ORDERED that, absent any extension of time granted by the Court, the Correction Board's decision on remand shall be completed within 160 days of this Order. It is further ORDERED that the case is STAYED until further order of the Court.

2. 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 AR20210008652 on 17 September 2021.

3. Counsel complaint from 15 September 2023, a former Army Sergeant First Class (SFC) and combat veteran, under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, challenging a final decision by the ABCMR, which decides applications on behalf of Defendant, the Secretary of the United States Army (Army). The ABCMR erred when, in direct conflict with its own July 2021 advisory opinion, it denied the applicant's petition seeking to correct his record to reflect his award of a medical retirement at the time of his discharge. The ABCMR's decision was arbitrary, capricious, contrary to law, and unsupported by substantial evidence.

a. On 5 July 2009, the Army honorably discharged the applicant for medical reasons after the Physical Evaluation Board (PEB) found him unfit for just his chronic low back pain described as "post laminectomy syndrome" of the lumbar region. In making its fitness determinations, the Army failed to separately find the applicant's bilateral lower extremity radiculopathy unfitting despite the fact that it was identified as a separate condition failing medical retention standards in the applicant's Medical Evaluation Board (MEB) Proceedings.

b. The applicant first applied to the ABCMR to correct his military record to reflect a medical retirement in 2010 pro se. This request was denied and in September of 2021,

with the assistance of counsel, The applicant sought reconsideration, asking that his bilateral radiculopathy be found unfitting and his VA rating from the time of discharge be adopted, from which a medical retirement would flow.

c. In July 2021, the U.S. Army Physical Disability Agency (USAPDA) issued an advisory opinion recommending a change in the applicant's discharge status due to an error on the part of the PEB in not separately finding the applicant's right leg radiculopathy unfitting and ratable. Nevertheless, the ABCMR denied his petition for relief again.

d. Relief was denied because once the applicant responded to the advisory opinion that agreed the applicant's right leg radiculopathy was unfitting, the ABCMR, unbeknownst to the applicant, solicited another medical opinion from the Army Review Boards Agency. This advisory opinion opined that the PEB did not err because, contrary to the explicit MEB findings and the findings of USAPDA, the applicant's lower extremity radiculopathy did not fail medical retention standards.

e. Despite being faced with contradictory advisory opinions and the legal mandate that the applicant be given the benefit of the doubt, the ABCMR determined that the "preponderance of the evidence," supported no correction be made to the applicant's military record.

f. If the ABCMR had properly applied the standard of fitness set forth in Department of Defense Instruction (DoDI) 1332.38 or simply weighed the two advisory opinions, giving the veteran the requisite benefit of the doubt, it would have resulted in the applicant's lower right extremity radiculopathy being found unfitting and his award of a 30% combined disability rating, qualifying the applicant for disability retirement.

g. The applicant suffered a legal wrong because of the ABCMR's final agency action. The applicant was adversely affected by that agency action, and thus is entitled to judicial review under the APA. 5 U.S.C. § 702. The APA authorizes this Court to set aside any agency decision that is arbitrary, capricious, unsupported by substantial evidence, or contrary to law. 5 U.S.C. § 706(2)(A). The Secretary's determination that there was no error in how the PEB rated the applicant's unfitting radiculopathy is arbitrary, capricious, unsupported by substantial evidence, or otherwise not in accordance with law.

h. Counsel's substantive allegations includes Service History & Medical Problems:

(1) The applicant began his active duty with the Army on 5 January 1998, qualifying and serving as an Army Diver. He is a Gulf War veteran having served in Kuwait and Iraq during Operation Iraqi Freedom and was awarded several medals and citations during his service, including an Army Commendation Medal with Valor after

taking direct fire while on a reconnaissance mission in Mosul, Iraq. By the end of his career the applicant had also been awarded the Army Achievement Medal (3rd award), Combat Action Badge, First Class Diver Badge, and the Army Good Conduct Medal.

(2) The applicant's back and chronic radicular pain issues first began in 1999 after he injured his back lifting and twisting a heavy object while working underwater to repair a military vessel. As a result of that injury, he underwent an L4-5 discectomy in 2000. Later, due to continued pain, the applicant had further surgery in 2002. This time, in addition to a second L4-5 discectomy, he also had a L5-S1 discectomy.

(3) Between 2003 and 2005, when the applicant was deployed to Iraq, Hawaii, Micronesia and Vietnam, he reinjured his back on multiple occasions while completing various missions, including, among others, the construction of a personnel pontoon bridge used by Iraqis to cross a river as part of Objective Chamberlain. Throughout this time he regularly sought medical treatment and was prescribed medication, including Motrin for pain relief and Flexeril for back and sciatic pain. Sciatic pain is one type of radiculopathy, which is an injury or damage to nerve roots in the area where they leave the spine. This condition regularly results in pain that radiates from the sciatic nerve root down the back to the buttocks and/or legs.

(4) As a result of the demands of his missions and despite three previous surgeries, the applicant's back pain and radicular pain of his lower extremities progressively worsened. On 2 November 2006, he was admitted to the hospital for degenerative disk disease (DDD) of L4-5 and L5-S1 with radiculopathy. This diagnosis resulted in him undergoing a transforaminal lumbar interbody fusion. The applicant's pain following the surgery required control with intravenous morphine via a PCA pump and Roxicet.

(5) In late 2008, his condition had become so severe that a MEB was convened to evaluate his injuries. A MEB is a board of two or more physicians that evaluates whether a service member meets retention standards and, if appropriate, refers its findings to the PEB. In turn, the PEB is responsible for determining the fitness of each of a service member's medical conditions, and where unfitting, assign disability ratings based on the VASRD. 10 U.S.C. § 1216a(b).

(6) DoDI 1332.38 sets out the general criteria for determining unfitness due to disabilities. "In making a determination of a member's ability to so perform his/her duties, the following criteria may be included in the assessment: whether the medical condition represents a decided medical risk to the health of the member or to the welfare of other members were the member to continue on active duty or in Active Reserve status; whether the medical condition imposes unreasonable requirements on the military to maintain and protect the member; and the Service member's established

duties during any remaining period of reserve obligation.” DoDI 1332.38, Encl. 3 Part 3.2.

(7) Determining whether a member can reasonably perform the duties of their office, grade, rank or rating includes consideration of whether the service member can : (1) Perform common military tasks, such as whether the member is routinely required to fire a weapon, perform field duty or wear loading bearing equipment; (2) Pass the required physical fitness test; (3) Deploy; or (4) Perform specialized duties.

(8) A service member can be found unfit when a single medical condition leaves them unable to reasonably perform the duties of their office, grade, rank or rating, or where the “combined effect” of two or more disabilities precludes such performance. DoDI 1332.38, Encl. 3 Part 3.4.4. In January 2009, as part of This MEB a military examiner prepared a Narrative Summary (NARSUM), which included findings regarding The applicant’s then-existing physical conditions based on military medical records, previous physical examinations, and the MEB’s own physical examination. The NARSUM detailed the long history of his back problems. It also detailed his right leg radiculopathy in both the “History” section (“pain radiates down to the second and third toes on his right lower extremity”) and the “Physical Exam” section (“His straight leg raise was positive on the right at approximately 35° and radiated to the second, third and fourth toes on the right foot. On light touch and pinprick, his sensation was decreased in the dorsal surface of the foot and great toe on the right foot, and the lateral side of the right calf.”). The NARSUM summarized his unacceptable conditions as: “Post laminectomy syndrome lumbar, with chronic pain.”

(9) The MEB was referring to his radiculopathy when referring to “chronic pain” by listing two distinct medical conditions as failing retention standards on his MEB Proceedings (DA Form 3947) dated 29 January 2009. These conditions were annotated separately by the board as medically unacceptable according to AR 40-501 (Standards of Medical Fitness), paragraphs 3-39 and 3-41, respectively.

(10) Thus, the MEB referred him to a PEB.

(11) Even though the MEB referred him for two conditions, on 4 September 2009, the PEB conflated the his two conditions together, finding only one condition – Chronic low back pain described as post laminectomy syndrome lumbar region – to be unfitting and assigned The applicant a disability rating of 20%.

(12) Based on the PEB’s conclusions, the Army medically separated the applicant on 5 July 2009.

i. VA Service-Connected Disability Claim

(1) On 23 April 2009, while still on active duty, the applicant filed his initial disability claim with the Department of Veterans Affairs (VA). The VA, like the DoD, is required to use the VASRD rating schedule for disabilities. In his initial rating decision, the VA assigned him a disability rating of 10% for DDD of the lumbar spine status post laminectomy with spondylolisthesis. The VA at first denied his claim for radiculopathy, but soon thereafter awarded him a 10% rating “for radiculopathy of the right lower extremity” (with a 21 January 2010 effective date).

(2) Plaintiff timely appealed the 10% disability rating for his back, and the Board of Veterans’ Appeals (BVA) found in his favor, which eventually led to the VA assigning him the same 20% rating for his back that the Army had assigned (effective back to July 2009). In short, faced with the same facts and applying the VASRD (as the PEB was required to do), the VA separately rated Plaintiff’s back and radiculopathy conditions, demonstrating that the Army’s determination was incorrect.

j. Counsel states the ABCMR decision on 10 January 2010, the applicant filed a pro se application with the ABCMR seeking a correction to his “Narrative Reason for Separation” to reflect permanent disability retirement for both (1) Post laminectomy Syndrome Lumbar Region and (2) Chronic Pain. That appeal was denied on 10 November 2010.

(1) On 14 November 2020, the applicant, with the assistance of counsel, sought reconsideration from the ABCMR.

(2) His reconsideration request included critical evidence that had not previously been considered by the ABCMR, including but not limited to his MEB Proceedings and the MEB NARSUM, both of which refer to the applicant’s chronic radicular pain as a separate potentially unfitting condition from his postlaminectomy syndrome. The reconsideration materials also included, for the first time, his full chronological medical history and the VA ratings history outlined above establishing that the VA had rated both his back and his radiculopathy.

(3) In May 2021, the ABCMR sought an advisory opinion from the USAPDA (hereinafter, the “USAPDA Opinion”). The USAPDA Opinion stated: “It is clear from the NARSUM and the DA Form 3947 that the MEB was referring to [Plaintiff’s] radiculopathy when it referred to the ‘chronic pain’ condition” and that the PEB had erred when it “conflated the back condition with the ‘chronic pain’ condition” with respect to Plaintiff’s right leg radiculopathy. The USAPDA Opinion then explained: “[i]n an apparent attempt to avoid pyramiding, the PEB assigned the highest rating to the back condition based upon range of motion (ROM), which due to his lack of forward flexion equated to 20%. The minimum rating of 10% for painful motion was not assigned. This was correct in its application as to pain associated with the back conditions. It was,

however, an error as the ‘chronic pain’ was referring to a separately ratable condition of RLE radiculopathy.”

(4) The USAPDA Opinion concluded: “The facts of the case do point to error on the part of the PEB in its mistaken belief that ‘chronic pain’ was referring to [Plaintiff’s] back condition. Based upon the evidence in the case file, it does appear that [Plaintiff] should have been found unfit for his back and [right leg] radiculopathy.”

(5) The opinion was shared with the applicant in a letter dated 13 July 2021. The applicant concurred with the decision in regard to the right leg radiculopathy.

(6) The ABCMR then, without explanation and unbeknownst to the applicant, sought another opinion from the Army Review Boards Agency (ARBA) Medical Advisor (“ARBA Opinion”). Unlike with the first advisory opinion, the applicant was not given an opportunity to respond to the ARBA Opinion and instead learned of it upon receipt of the ABCMR’s decision where it was summarized. The ARBA Opinion concluded that the MEB did not support the applicant’s radiculopathy as unfitting, because neither Army Regulation 40-501, paragraphs 3-39 and 3-41, which the MEB found that the applicant failed, addressed his “chronic pain.” In support of this assertion the ARBA Opinion concluded that if the MEB intended for the applicant’s chronic pain to fail retention standards it would have listed retention standard paragraph 3-30j, which is a “catchall” provision for neurological conditions. This ignores that the explicit wording of paragraph 3-41 itself is also a catch-all, addressing conditions “not mentioned elsewhere” in the regulations, such as radicular pain. The ARBA Opinion’s conclusion also fails to consider what other condition, outside of radiculopathy, the MEB could have been referring to when invoking paragraph 3-41, as “chronic pain,” as it is the only other medical condition discussed in the NARSUM.

(7) The ABCMR denied his request for reconsideration in a cursory three sentence “Discussion” without any indication of its reasoning or delineating any basis for its decision. The ABCMR relied entirely on the ARBA Opinion, without ever discussing the USAPDA Opinion or the required prongs of fitness.

(8) The 17 September 2021, decision by the ABCMR exhausted the applicant’s remedies with the DoD.

(9) The ABCMR’s conclusion that the PEB did not err when it failed to find his radiculopathy an unfitting condition was arbitrary, capricious, and not supported by substantial evidence.

(10) To begin, the ABCMR’s conclusion that the applicant’s radiculopathy was not unfitting is arbitrary, capricious, unsupported by substantial evidence, or otherwise not in accordance with law for at least five separate reasons. First, the AR reflects, and



the USAPDA opinion supports, that his radiculopathy failed retention standards. Second, the record clearly indicates his radiculopathy, independently and in combination with his unfitting back condition, made him unable to reasonably perform the duties of his MOS, deploy or pass the required physical fitness test. Third, the ABCMR's reliance on the ARBA Opinion was flawed. There is simply no support that radiculopathy can only fail retention standards where AR 40-501, para. 3-30j and not AR 40-501, para. 3-41, is invoked. Fourth, in reaching its decision, the ABCMR never grappled with or explained why it rejected the USAPDA Opinion that set out detailed reasoning of how the PEB had erred. Further, if the ABCMR choses to exclude factors from consideration it must explain its rationale for doing so. Fifth, The ABCMR failed to elaborate on the duties required by Plaintiff's office, grade, rank or rating. Such explanation is required when determining whether or not an applicant's condition prevents him from reasonably performing such duties. *Nyan v. United States*, 154 Fed. Cl. 463 (2021).

(11) The ABCMR's actions were arbitrary, capricious, unsupported by substantial evidence, and unlawful, resulting in his inaccurate medical separation. Rather than being medically separated for only his back condition, he should have been medically retired with a combined 30% disability rating for both his back and radiculopathy conditions.

k. The applicant hereby incorporates by reference the allegations set forth above, as if fully set forth herein.

(1) The 17 September 2021, decision by the ABCMR refusing to change the applicant's disability status is subject to judicial review as a final "agency action" under the APA. 5 U.S.C. §§ 551(13), 701, 704. His appeal to the ABCMR was the final administrative option available to him for review of his disability rating.

(2) Under the APA, 5 U.S.C. § 706(2)(A), this Court is required to hold unlawful and set aside a final agency action that is arbitrary, capricious, unsupported by substantial evidence, or otherwise not in accordance with law.

(3) The ABCMR decision to uphold the PEB's finding that the applicant's radiculopathy was a fitting condition was arbitrary, capricious, unsupported by substantial evidence, or contrary to law, as it failed to: (1) Evaluate the applicant's disability pursuant to the required fitness standards set forth in DoDI 1332.38; (2) Define his duties when determining reasonable performance; (3) Grapple with all relevant evidence, including the contradictory USAPDA decision; or (4) Address the flaws in the ARBA Opinion.

4. In counsel's brief he states this is a case seeking a medical retirement. The applicant served the U.S. Army from 5 January 1998 until his honorable discharge on 5 July 2009

at the rank of sergeant first class. He was assessed for a medical discharge in 2009 after suffering from both radicular pain of the right lower extremity (also referred to herein as “RLE radiculopathy”) and chronic lower back pain for almost his entire military career, despite multiple surgeries and attempts to manage the pain with medication. This radiculopathy was a result of a multiple back injuries sustained while performing his diving duties.

a. While the severity of the applicant’s lower back pain and RLE radiculopathy in 2009 entitled him to receive a medical retirement, that is not what happened. The PEB directed that he be discharged with severance pay after assigning a 20 percent rating to his lower back injury and failing to separately find his RLE radiculopathy unfitting. He applied pro se to the ABCMR in 2010, asking to correct his military record to reflect a medical retirement. This request was denied. In November 2020, with the assistance of counsel, the applicant sought reconsideration, asking that his bilateral radiculopathy be found unfitting, from which a medical retirement would flow. The ABCMR denied the claim again.

b. The applicant appealed to the United States District Court for the District of Columbia. The Government proposed, and he agreed, to request that the Court remand this matter to the ABCMR. The Court then ordered the remand of this matter for the Board to reconsider the merits of the claim asserted by the applicant and specifically ordered the Board to address in its decision the underlying adherence of the MEB and PEB to AR 635-40 and DoDI 1332.38 regarding the PEB’s finding of chronic low back pain described as post-laminectomy syndrome, lumbar region as his sole unfitting medical condition. See *Hayden v. Wormouth*, No. 23-2709 (TJK) (D.D.C. Feb. 9, 2024), ECF No. 20. The Court also ordered that the applicant be allowed to submit supplemental arguments or evidence in support of his claims.

c. In accordance with this remand order, the applicant respectfully submits this brief requesting that the Board correct his military records to reflect a finding that his right LE radiculopathy is an additional unfitting disability, assign a combined disability rating of at least a 30%, and award him a permanent medical retirement.

d. In the body of the 14-page brief counsel discusses the applicant’s background, initial dive injury in 1999 and multiple surgeries between 2000 and 2006, history of back pain and RLE radiculopathy from 2001-2009, the MEB’s assessment of the applicant in January 2009, and the VA’s evaluations of the applicant following separation. Counsel details the ABCMR’s first denial and second denial of the applicant’s request for medical retirement.

e. Counsel argues the governing legal standards, stating the statute providing for medical retirement, 10 U.S.C. § 1201 states that: “Upon a determination by the Secretary concerned that a member described in subsection (c) is unfit to perform the

duties of the member's office, grade, rank, or rating because of physical disability incurred while entitled to basic pay ... the Secretary may retire the member. . . if the Secretary also makes the determinations with respect to the member and that disability specified in subsection (b).” Medical retirement requires a 30% cumulative disability rating. 10 U.S.C. § 1201(b)(3)(B). Implementing this statutory criterion, Department of Defense Instruction 1332.38 (which was in effect in 2009) directed a finding of unfitness whenever “the evidence establishes that the member, due to physical disability, is unable to reasonably perform the duties of his or her office, grade, rank, or rating.” DoDI 1332.38, E3.P3.2.1. A service member can be found unfit when a single medical condition leaves them unable to reasonably perform the duties of their office, grade, rank or rating, or where the “overall effect” of two or more disabilities precludes such performance. DoDI 1332.38, E3.P3.4.4. Determining whether servicemembers can “reasonably perform” their duties, first requires considering whether a service member can:

- perform the common military tasks required of his or her office, grade, rank, or rating, such as firing a weapon, performing field duty, or wearing load-bearing equipment;
- complete a required physical fitness test;
- deploy individually or as part of a unit; or
- perform a servicemember's specialized duties

f. DoDI 1332.38, E3.P3.4.1. Department of Defense Instructions also provides additional criteria that must be evaluated in considering whether a servicemember is unfit—namely, whether his medical condition “represents a decided medical risk to [the member's] health ... or to the welfare [or safety] of other members.” DoDI 1332.38, E3.P3.2.2; see also *Yang v. United States*, 149 Fed. Cl. 277, 279 n.5 (2020).

g. The Board's prior decision failed to elaborate on the duties required by the applicant's office, grade, rank or rating or include a detailed discussion of which conditions were not unfitting when considering each referred condition individually. Such an explanation is required when determining whether or not an applicant's condition prevents him from reasonably performing such duties. *Nyan v. United States*, 154 Fed. Cl. 463, 467 (2021).

h. As an Army diver, now MOS 21D, the applicant's specialized duties included performance or supervision of SCUBA or Surface-Supplied diving operations for underwater reconnaissance, demolition, port construction and rehabilitation, harbor clearance, ship's husbandry, river crossing, hydrographic survey, and salvage operations.

i. Army regulations specific to the MOS of diver provide additional detailed physical fitness requirements relevant to a diver's “specialized duties” including barring a person

with symptoms such as “history of . . . radiculopathy”, history of chronic or recurrent orthopedic pathology that would interfere with diving duty, or “chronic joint pain of the thigh (719.45), lower leg (719.46), ankle and/or foot (719.47)” from the MOS.

j. When making fitness determinations, relevant evidence also includes an applicant’s disability ratings as determined by the VA.” Valles-Prieto v. United States, 159 Fed. Cl. 611, 617–618 (2022); Heisig v. United States, 719 F.2d 1153, 1157 (Fed. Cir. 1983) (stating that VA disability ratings are competent evidence to be considered in determining unfitness for duty).

k. Counsel also argues the MEB’s findings support that the applicant was unfit for both his post laminectomy syndrome and RLE radiculopathy. He also addresses why his RLE radiculopathy was unfitting.

l. In closing counsel restates the applicant’s request that the Board:

- Find that the applicant was “unfit” due to both his post laminectomy syndrome and right LE radiculopathy and correct his records to so indicate;
- Apply 10 USC § 1216a and correct his records to set his combined disability rating to at least 30%;
- Order that the applicant’s records—including, without limitation, his DD Form 214 and his retirement orders—be amended to reflect a permanent medical retirement;
- Grant any other relief the Board deems proper

m. The entire 14-page brief is available for the Board’s review as (Remand Brief Final).

5. The applicant enlisted in the Regular Army on 5 January 1998 for a 4-year period of service. He held military occupational specialty (MOS) 11B (Infantryman).

6. On 29 September 1999, the applicant completed diving school and was awarded MOS 00B10 (Diver). His MOS was converted to MOS 21D (Diver), and he served as a lead diver and diving supervisor.

7. He served in Kuwait from 30 March 2003 – 15 August 2003.

8. The applicant provides:

a. Discharge Summary (Exhibit H) - for the applicant, on 6 November 2006, showing a principal diagnosis of DDD of L4-5 and L5-S1 with radiculopathy.

b. Physical Disability Evaluation System Commanders Performance and Function Statement (Exhibit Q) - completed 8 December 2008, which his commander indicated "NO" when asked Soldier is performing duties in his/her MOS and Soldier can perform his/her assigned MOS duties in the unit.

c. Narrative Summary (Exhibit E) - 20 January 2009, where the examining physician states plainly "Post laminectomy syndrome, lumbar, with chronic pain," following a discussion of the radicular pain.

d. DA Form 3947 (Exhibit B) – showing an MEB convened on 26 January 2009 to consider two conditions, post-laminectomy syndrome lumbar region and chronic pain, both found to be medically unacceptable. The applicant was referred to a PEB and he concurred with the MEB findings and recommendation on 26 January 2009.

9. On 10 April 2009, a PEB convened and ultimately determined the applicant was physically unfit and recommended separation with severance pay. His unfitting condition was for chronic low back pain described as post-laminectomy syndrome, lumbar region. His disability was rated at 20%. Within the PEB proceedings, a brief history shows:

a. Soldier's low back pain reportedly began in approximately 1999 when he twisted his back lifting a heavy object while working underwater as an Army diver. He underwent an L4-5 diskectomy in 2000, and a re-do L4-5 operation and L5-S1 diskectomy in 2002. His low back pain continued, and in 2006 he underwent a transforaminal lumbar interbody fusion (TLIF) but has continued to experience moderate to severe back pain. Physical therapy and pain management have not improved his symptoms, and he is not a candidate for further surgery. A range of motion (ROM) study showed 60 degrees of forward flexion and a combined ROM of 150 degrees. Physical examination showed mild to moderate tenderness over the spinous processes from L2 to S1 and bilateral tender muscle spasms at L2 to LS. Waddell's signs were negative.

b. Chronic low back pain prevents performance of many basic Soldier tasks. The Soldier cannot perform his MOS duties of a diver because swimming exacerbates his back pain, and he cannot supervise other divers while he is using narcotic medications. Rated for forward flexion to 60 degrees and combined ROM of 150 degrees; and IAW VASRD 4.10, 4.40, 4.45 and 4.59, the rating includes consideration of functional loss due to factors such as pain, including pain on repeated use and painful motion, fatigability, incoordination, weakness with repetitive use and flare ups.

c. This case was reconsidered in accordance with (IAW) paragraph 4-21t, AR 635-40, based on the additional information provided.

d. On 13 April 2009, the applicant concurred with the PEB's findings and waived appearance before a formal hearing. Both the applicant and the PEB counselor signed the DA Form 199

10. Orders 107-0001, issued by United States Army Garrison, Fort Eustis, VA on 17 April 2009, shows he was to be separated on 5 July 2009, and received severance pay. In his orders it shows:

- Disability resulted from a combat related injury as defined in 26 USC 104: Yes
- Disability is based on injury or disease received in the line of duty as a direct result of armed conflict or caused by an instrumentality of war and incurring in the line of duty during a period of war as defined by law: Yes

11. Accordingly, he was honorably discharged on 5 July 2009. His DD Form 214 shows he was discharged in accordance with AR 635-40, chapter 4, due to disability, severance pay, non-combat related. He received severance pay in the amount of \$81,367.20. The DD Form 214 shows in:

- Block 23, Type of Separation: Discharge
- Block 25, Separation Authority: AR 635-40, chapter 4
- Block 26, Separation Code: JFO
- Block 27, Reentry Code: 3
- Block 28, Narrative Reason for Separation, Disability, Severance Pay, Non-Combat Related

12. The applicant provides:

a. U.S. Department of Veterans Affairs Rating Decision (Exhibit I) - 30 November 2009, provided ratings and additional details regarding the following decision:

- post void incontinence – 20%
- bilateral tinnitus – 10%
- DDD of the lumbar spine post-laminectomy with spondylolisthesis – 10%
- scars at right finger – 0%
- seven medical conditions – 0%
- seven medical conditions – denied

b. Notice of Disagreement Form 21-4138 (Exhibit J) - 19 January 2010, which the applicant appealed the rating for his back injury up to the Board of Veterans' Appeals BVA, arguing that the back injury should be increased at least to 20 percent.

c. US Dept of VA Rating Decision (Exhibit O) - 1 September 2010, responded to the applicant's notice of disagreement and noted service connection for radiculopathy of the right lower extremity was granted with an evaluation of 10% effective 21 January 2010.

13. In his previous case (AR20100008479, 10 November 2010) the Board determined the applicant had not submitted any evidence or argument which would show that an error or injustice occurred in his case. The applicant's contentions do not demonstrate error or injustice in the disability rating assigned by the Army, nor error or injustice in the disposition of his case by his separation from the service. Therefore, the Board determined that the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned and denied his request.

14. The applicant also provides:

a. Order by Board of Veterans' Appeals (Exhibit K) - 24 December 2013, which ordered the applicant's claim be re-adjudicated with the additional evidence received.

b. US Department of Veterans Affairs Rating Decision (Exhibit L) 26 October 2015, noted the Board of Veterans Appeals remanded the case to their office and the claim for DDD was increased from 10% to 20%, in addition to other changes.

15. In another previous case (AR20210008652, 17 September 2021, the Board reconsidered the previous request. During the processing of this case an advisory opinion was received by USAPDA. The USAPDA opined:

a. It is clear from the NARSUM and the DA Form 3947 that the MEB was referring to the applicant's radiculopathy when it referred to the "chronic pain" condition. What is not so readily clear is whether the MEB intended for both the RLE and LLE radiculopathy to be referred to the PEB. Except for one reference to the LLE radiculopathy all of the discussion in the NARSUM is directed at the RLE radiculopathy. On the DA Form 3947, the MEB did not refer to the "chronic pain" condition as bilateral, which is typical when referring to a condition that impacts both sides of the body.

b. Further telling, shortly after being discharged, the applicant did not claim LLE radiculopathy in his VA appeal. It is not until almost 8 years later that the VA assigned a rating for the LLE radiculopathy. It does appear that the PEB, more likely than not, conflated the back condition with the "chronic pain" condition. In an apparent attempt to avoid pyramiding, the PEB assigned the highest rating to the back condition based upon range of motion (ROM), which due to his lack of forward flexion equated to 20%. The minimum rating of 10% for painful motion was not assigned. This was correct in its application as to pain associated with the back condition. It was, however, an error as the "chronic pain" was referring to a separately ratable condition of RLE radiculopathy.

c. The facts of the case do point to error on the part of the PEB in its mistaken belief that "chronic pain" was referring to the applicant's back condition. Based upon the evidence in the case file, it does appear that the applicant should have been found unfit for his back and RLE radiculopathy. Shortly after separation, the RLE radiculopathy was rated at 10% by the VA. Thus, a forensic determination can be made that the correct disposition of the applicant's case should have been medical retirement at 30% overall ( $20\% + 10\% = 28\%$  rounded to 30%) for his back condition and RLE radiculopathy. Therefore, the matter is legally insufficient as to the LLE radiculopathy being found unfit and legally sufficient as to the RLE radiculopathy being added as unfitting.

d. On 26 July 2021, counsel provided a response to the rebuttal wherein he stated they concurred with the advisory opinion in that the applicant was unfit for both his back and right lower extremity radiculopathy. They disagreed with the advisory opinion on the topic of his left lower extremity radiculopathy as the evidence in the record demonstrated the condition was unfitting at the time of his separation. Nevertheless, they acknowledged that such a finding was not necessary for the applicant to achieve his entitlement to military medical retirement and requested the applicant be granted such as the facts demonstrated he deserved it.

e. The 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 the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor opined given no evidence of error or injustice, 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.

f. The Board carefully considered the applicants request, supporting documents, evidence in the records, and regulatory guidance. The Board considered the applicant's statement, the medical records, and the review and conclusions of the advising official. Based upon a preponderance of the evidence, the Board concurred with the medical reviewer's findings and recommendation, and determined there is insufficient evidence to amend the previous Board's decision, as referral to DES for consideration of a medical retirement is not warranted. The Board determined 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 to amend the decision of the ABCMR set in Docket Number AR20100008479, 10 November 2010.

16. The applicant provides: Medical records in support of his claim as (Exhibit M) 19 pages and All about L5-S1 (Lumbosacral Joint) (Peer Reviewed) (Exhibit N) in support of his claim



17. 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.

18. Title 38, USC, 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.

19. 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.

#### BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was warranted. Counsel's contentions, the applicant's military records, and regulatory guidance were carefully considered.

a. The evidence shows on 26 January 2009, the applicant received and concurred with his medical evaluation board (MEB) findings that included two conditions not meeting retention findings: (1) Post Laminectomy Syndrome Lumbar Region and (2) Chronic Pain. Furthermore, on 13 April 2009, he received and concurred with his Physical Evaluation Board (PEB) findings of 20% for "Chronic low back pain described as post laminectomy syndrome lumbar region..."). This resulted in receiving separation with severance pay; not permanent disability retirement benefits.

b. The Board noted that at the time of the applicant's PEB, the military services were allowed to use the VASRD (VA Schedule for Rating Disabilities) as a guideline. Congress amended this practice in 2012 (or about) as the various military services had divergent ratings for similar conditions, which then required the services instead to adopt the VA rating subsequent to a C&P (Compensation & Pension) Examination. This explains why the PEB had a 20% low back rating, whereas at the time the VA's rating was 10%.

c. The Board found the applicant has demonstrated by a preponderance of evidence an error or injustice warranted amending the DA Form 199 to reflect 30% permanent disability retirement. The Board found substantial underlying incongruities

and procedural inequities, which independently and cumulatively failed to meet legal standards of review resulting in the grievous injustice and harm complained of. Specifically, the Board found the applicant met his burden of proof, with clear and convincing evidence, that the Chronic Back pain and Postlaminectomy Syndrome Lumbar Region conditions, both having failed to meet medical retention standards in accordance with the military evaluation board's determination, and were found unfit by the Physical Evaluation Board were erroneously conjoined for rating purposes and should have been separately considered with individually applied rating determinations. As a consequence, the Board unanimously agreed to amend the applicant's separation with severance pay and resultant DD Form 214 to reflect the 2009 separation was a result of receiving a 30% permanent disability retirement.

d. Based on the preponderance of evidence available for review, the Board determined the evidence presented was sufficient to warrant a recommendation for relief.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined the evidence presented is sufficient to warrant amendment of the ABCMR's decision in Docket Number AR20210008652 on 17 September 2021. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by

a. Amend Orders 107-0001, issued by United States Army Garrison, Fort Eustis, VA on 17 April 2009, to show he was medically retired (vice separated with severance pay) at a combined disability rate of 30% on 5 July 2009;

b. Amend the applicant's DD Form 214 to show he was honorably retired on 5 July 2009, in accordance with AR 635-40, chapter 4, due to disability as follows:

- Block 23, Type of Separation: Retirement
- Block 25, Separation Authority: AR 635-40, chapter 4
- Block 26, Separation Code: SFJ (Legacy) or JEB (IDES)
- Block 27, Reentry Code: 4
- Block 28, Narrative Reason for Separation, Disability, Permanent Non-Combat Related

c. If married, affording the applicant the opportunity to enroll in (or decline enrollment) in the Survivor Benefit Plan (SBP) by timely submitting the appropriate SBP form


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, provides that the Secretary of a Military Department may correct any military record of the Secretary's Department when the Secretary considers it necessary to correct an error or remove an injustice. With respect to records of courts-martial and related administrative records pertaining to court-martial cases tried or reviewed under the Uniform Code of Military Justice, action to correct any military record of the Secretary's Department may extend only to correction of a record to reflect actions taken by reviewing authorities under the Uniform Code of Military Justice or action on the sentence of a court-martial for purposes of clemency. Such corrections shall be made by the Secretary acting through boards of civilians of the executive part of that Military Department.

2. Title 10, U.S. Code, section 1552(h) provides that, in claims for review of a discharge or dismissal based in whole or in part on matters relating to posttraumatic stress disorder (PTSD) or traumatic brain injury (TBI) as supporting rationale, or as justification for priority consideration, and whose PTSD or TBI is related to combat or military sexual trauma (MST), the board shall review medical evidence of the Secretary of Veterans Affairs or a civilian health care provider that is presented by the claimant; and, review the claim with liberal consideration to the claimant that PTSD or TBI potentially

contributed to the circumstances resulting in the discharge or dismissal or to the original characterization of the claimant's discharge or dismissal.

3. 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.

4. 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.

a. Paragraph 3-1 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. The overall effect of all disabilities present in a Soldier whose physical fitness is under evaluation must be considered. All relevant evidence must be considered in evaluating the fitness of a Soldier. Findings with respect to fitness or unfitness for military service will be made on the basis of the preponderance of the evidence.

b. 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.

c. 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.

d. Paragraph 4-1 states that a Soldier charged with an offense under the Uniform Code of Military Justice (UCMJ) or who is under investigation for an offense chargeable under the UCMJ, which could result in dismissal or punitive discharge, may not be referred for, or continue, disability processing unless – (1) the investigation ends without charges; (2) the officer exercising proper court-martial jurisdiction dismisses the charges; or, (3) the officer exercising proper court-martial jurisdiction refers the charges for trial to a court-martial that cannot adjudge such a sentence.

e. Paragraph 4-2 states that a Soldier may not be referred for, or continue, disability processing if under sentence of dismissal or punitive discharge. If the sentence is suspended, the Soldier's case may then be referred for disability processing. A copy of the order suspending the sentence must be included in the Soldier's records. If action to

vacate the suspension is started after the case is forwarded for disability processing, the PEB serving the area must be promptly notified to stop disability processing. Disability processing may resume if the commander decides not to vacate the suspension.

5. 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.

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//