

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 26 November 2024

DOCKET NUMBER: AR20240001974

APPLICANT REQUESTS: physical disability retirement in lieu of physical disability separation with severance pay

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States)
- DD Form 214 (Certificate of Release or Discharge from Active Duty) covering the period ending 6 July 2015
- Department of Veterans Affairs (VA) letter, 15 December 2015

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.

2. The applicant states: He went through a Medical Evaluation Board (MEB) and submitted his injuries through the MEB process on 3 November 2014. He received an update from the MEB that he was rated at 100 percent permanently and totally disabled and his Army rating was only 10 percent. He went through the MEB for his back and lower extremities and when he looks at the percentages given, that would have put him at 80 percent and allowed him to retire. He believes that looking at his injuries that were submitted for his back and lower extremities he would be retired. He was grateful at the time for the severance pay, but when he asked the MEB representative, she advised him it was final. After speaking with multiple people at the Defense Finance and Accounting Service (DFAS), VA, and the U.S. Army Human Resources Command (AHRC), he was advised to look into requesting an upgrade of his medical separation to a medical retirement. His injuries did not allow him to continue his service in the Army doing his Military Occupational Specialty (MOS) as a Flight Engineer on the CH/MH-47. He served a great 12 years and 8 months in the Army and his only regret is not retiring

from the greatest military on earth. He can only hope the Board also sees that his MEB discharge should be upgraded to a retirement.

3. The applicant enlisted in the Regular Army on 7 November 2002, and was awarded the MOS 15U (CH-47 Helicopter Repairer).

4. The applicant deployed to the following locations during the following timeframes: Iraq, from 25 July 2006 through 15 October 2007 and Afghanistan, from 10 December 2012 through 17 August 2013.

5. The complete facts and circumstances surrounding the applicant's discharge are not in his available records for review.

6. 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), DA Form 199 (Informal Physical Evaluation Board (PEB) Proceedings), DA Form 199-1 (Formal PEB Proceedings), Department of Veterans Affairs (VA) Compensation and Pension (C&P) Exam, VA Proposed Rating Decision for DES purposes, and VA Rating Decision are not in his available records for review and have not been provided by the applicant.

7. Headquarters, Third Infantry Division and Fort Stewart Orders 103-0011, 13 April 2015, discharged the applicant due to disability with severance pay in the pay grade E-5, effective 6 July 2015, with a rating of 10 percent.

8. Headquarters, Third Infantry Division and Fort Stewart Orders 153-0023, 2 June 2015, amended the above referenced orders to reflect the applicant was authorized disability severance pay in the grade of E-6 in lieu of E-5.

9. The applicant's DD Form 214 shows he was honorably discharged on 6 July 2015, under the provisions of Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation), due to disability with severance pay, combat zone (Enhanced), with corresponding separation code JEA. He was credited with 12 years and 8 months of net active service.

10. A physical profile is used to classify a Soldier's physical disabilities. PULHES is the acronym used in the Military Physical Profile Serial System to classify a Soldier's physical abilities in terms of six factors, as follows: "P" (Physical capacity or stamina), "U" (Upper extremities), "L" (Lower extremities), "H" (Hearing), "E" (Eyes), and "S" (Psychiatric) and is abbreviated as PULHES. Each factor has a numerical designation: 1 indicates a high level of fitness, 2 indicates some activity limitations are warranted, 3 reflects significant limitations, and 4 reflects one or more medical conditions of such a

severity that performance of military duties must be drastically limited. Physical profile ratings can be either permanent (P) or temporary (T).

11. The applicant's Enlisted Record Brief (ERB), 7 July 2015, shows his PULHES was 113111 based on his last physical exam on 15 April 2015.

12. The applicant provided a VA letter, 15 December 2015, which shows he has one or more service-connected disabilities with a combined evaluation of 100 percent and that he is considered totally and permanently disabled.

13. 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:

The Army Review Board Agency (ARBA) Medical Advisor reviewed the ROP and casefiles, supporting documents and the applicant's military service and available medical records. The applicant is applying to the ABCMR requesting additional medical conditions be found unfitting for continued military service with a subsequent increase in his current military disability rating and a change in his disability discharge disposition from separated with disability severance pay to permanently retired for physical disability. The DD 214 for the period of Service under consideration shows he was separated with \$92,710.80 disability severance pay on 6 July 2015. The PEB found him unfit for one condition related to his right ankle, applied the VA's 10%, and recommended he be separated with disability severance pay. After being counseled on the PEB's findings and recommendation by his PEB liaison officer, the applicant concurred with the PEB, waived his right to a formal hearing, and declined to request a VBA reconsideration of the ratings (VARR). Review of the ePEB case file found no significant discrepancies, omissions, or errors and it is therefore unlikely that further information and more thorough review of the case will lead to a recommendation to reverse USAPDAS's recommendation he be separated with disability severance pay.

#### BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. The applicant was separated due to disability and received severance pay. He requests the Board finds additional medical conditions to be unfitting for continued military service,

an increase in his current military disability rating, and a change in his disability discharge disposition from separated with disability severance pay to permanently retired for physical disability. The evidence shows a PEB found him unfit for one condition related to his right ankle, applied the VA's 10%, and recommended he be separated with disability severance pay. After being counseled on the PEB's findings and recommendation by his PEB liaison officer, he concurred with the PEB, waived his right to a formal hearing, and declined to request a VBA reconsideration of the ratings). The Board reviewed and agreed with the medical reviewer's determination finding no significant discrepancies, omissions, or errors and it is therefore unlikely that further information and more thorough review of the case will lead to a recommendation to reverse recommendation he be separated with disability severance pay. Therefore, based on a preponderance of available evidence, the Board determined that the disability rating percentage and disposition the applicant received upon separation were not in error or unjust.

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.2.

[REDACTED]

[REDACTED]

[REDACTED]

I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

REFERENCES:

1. Title 10, U.S. Code, section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.

2. 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.

3. 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.

4. 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.

5. 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.

6. 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.

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.

8. Army Regulation 15-185 (Army Board for Correction of Military Records (ABCMR)) prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR. The ABCMR begins its consideration of each

case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

//NOTHING FOLLOWS//