

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 29 January 2025

DOCKET NUMBER: AR20240003230

APPLICANT REQUESTS: in effect,

- correction of her DA Form 199-1 (Formal Physical Evaluation Board (PEB) Proceedings) by adding additional conditions as unfitting
- personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- two DA Forms 2173 (Statement of Medical Examination and Duty Status)
- three pages of medical records
- DD Form 214 (Certificate of Release or Discharge from Active Duty) for the period 28 January 2016 to 22 September 2020
- Department of Veterans Affairs (VA) Rating Decision, 26 February 2024

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 she was placed on the Temporary Disability Retired List (TDRL). During this time, she has been getting worse and continues to go through financial hardship. Some of her diagnoses while in the Army were not acknowledged because she was already in the Warrior Transition Unit. They would only acknowledge the initial permanent profile that prompted her medical board. When she was informed that she needed to do a reevaluation, she informed the Army that she was going through court proceedings and had no income. She did not have a phone and still does not. She can barely make her medical appointments. She made several mistakes trying to juggle everything. She even stopped her VA payments because she requested the wrong thing. Nonetheless, she had reevaluations with the VA done and completed. When she emailed the TDRL group, they said she was administratively removed. They said this was her only option. She has always complied and fulfilled her obligations. This

has been hard to handle. She lost custody of her children as well. She can only check her emails when in public WiFi range.

3. The applicant enlisted in the U.S. Army Reserve on 23 March 2000. She served in Iraq from 28 February to 3 July 2003 and in Kuwait/Iraq from 14 March to 9 September 2006. She served on active duty in support of Operation Enduring Freedom from 28 January 2016 to 23 January 2017 and she was retained on active duty for medical processing.

4. On 24 June 2020, a formal PEB found the applicant unfit for further military service due to post-traumatic stress disorder, lumbosacral strain and degenerative arthritis of the lumbar spine, and right intervertebral disc syndrome. The PEB recommended a 90% disability rating and the applicant's placement on the TDRL with reexamination during December 2021.

5. The PEB found the applicant's 27 additional conditions were not unfitting because the Medical Evaluation Board indicated the conditions met retention standards in accordance with Army Regulation 40-501 (Standards of Medical Fitness), the conditions were not listed on the DA Form 3349 (Physical Profile) as preventing her from performing one or more functional activities, and there was no evidence indicating that performance issues, if any, were due to these conditions. The DA Form 199-1 contains the following entries in section VI (Instructions and Advisory Statements):

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

b. As documented in the VA memorandum dated 16 June 2020, 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.

6. Orders published on 31 July 2020 ordered the applicant's release from assignment and duty because of physical disability and her placement on the TDRL effective 22 September 2020.

7. The applicant's DD Form 214 shows she was retired on 22 September 2020 by reason of disability, combat related.

8. The applicant provided:

a. Two DA Forms 2173 showing she was suffering from adjustment disorders, knee and back pain, lumbago with sciatica, other spondylosis, lumbosacral region, and

valgus deformity. The forms also show the conditions were deemed to have been incurred in the line of duty.

b. Medical records showing she was evaluated for traumatic brain injury and diagnosed with various medical conditions.

c. A VA Rating Decision showing she was granted service-connected disability compensation for a number of conditions.

9. 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.

#### 10. MEDICAL REVIEW:

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

b. The applicant is applying to the ABCMR in essence requesting reversal of the United States Army Physical Disability Agency's action of removing her from the Temporary Disability Retirement List (TDRL) for failure to complete her TDRL reevaluation examinations with the three years as required by regulation. She states:

"I was placed on TDRL. During this time I have gotten worse and continue to go through financial hardships ...

When I was informed I needed to do a re-evaluation I informed the Army that I was going through court proceedings and had no income. I had No phone and still do not. I can barely make my medical appointments. I made several mistakes trying to juggle everything. I even stopped my VA payments because I requested the wrong thing.

Nonetheless, I had re-evaluations with the VA done and completed. When I emailed TDRL group they said I was administratively removed. They said this was my only

option. I have always complied and fulfilled my obligations. This has been hard to handle. I lost custody of my children as well. I can only check my emails when in public WiFi range.”

c. The Record of Proceedings details the applicant’s military service and the circumstances of the case. Orders published by the United States Army Physical Disability Agency on 29 September 2023 show the applicant was removed from the TDRL without disability benefits effective 23 September 2023:

“Removal is based upon failure to complete physical examination and three years maximum tenure on the Temporary Disability Retired List in accordance with AR 635-40 para 4-33, and DODI 1332.38, section E3.P6 2.6.”

d. On 24 June 2020, the applicant’s formal physical evaluation board (PEB) determined she had three conditions unfitting for continued service: PTSD, Lumbosacral strain and degenerative arthritis of the lumbar spine, and right intervertebral disc syndrome. With one or more of these disabilities not being stable enough for a final disability rating, they recommended and she was subsequently placed on the TDRL with a combined rating of 90% effective 22 September 2020.

e. By law, Soldier’s on the TDRL may be so for no more than three years. From the United States Army Human Resources Command’s website:

‘In accordance with the National Defense Authorization Act (NDAA) of 2017, tenure for Soldiers placed on TDRL beginning January 1, 2017 is three years. Soldiers placed on prior to this date are grandfathered and will remain at the five-year tenure.

The law requires that a final determination be made before the third or fifth anniversary of placement on the TDRL. However, you may be removed from the TDRL at an earlier date whenever a periodic examination discloses that your medical condition has stabilized for rating purposes. The law also directs the termination of Army retired pay and all retiree benefits if a final determination is not made at the end of the three or five years. This cannot be waived.”

(<https://www.hrc.army.mil/content/TEMPORARY%20DISABILITY%20RETIRED%20LIST%20TDRL%20FREQUENTLY%20ASKED%20QUESTIONS>)

f. From 29 September 2023 TDRL Over-Tenure Analyst’s request for the applicant’s administrative request for removal from the TDRL:

“The enclosed case of MSG [Applicant] has been reviewed and appropriate action has been taken to ensure the individual’s final examination was accomplished. The Service Member has failed to report for the MTF [medical treatment facility] exam.

MSG [Applicant] was placed on the TDRL 23 September 2020. Positive contact was made with the Service Member (SM) on 6 May 2022 via email. SM responded with her current mailing address, phone number, and email address. On 10 May 2022, the case was sent to Madigan MTF for a final TDRL examination; case was returned to PTDA [Physical Disability Agency] for non-compliance 23 June 2022.

Last chance letters were mailed to SM’s verified address on 10 February 2023 via US Post Office and 25 September 2023 via FedEx and returned to the USAPDA [United States Army Physical Disability Agency]. As of 29 September 2023, SM has not responded to the TDRL Branch through email or phone calls and has no way of contacting the SM. I am requesting that she be administratively removed from TDRL due to noncompliance.”

g. The request was approved.

h. It is the opinion of the ARBA Medical Advisor that reversal of her removal from the TDRL without benefits is not possible and so unwarranted.

#### BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation. Upon review of the applicant’s petition, available military records and the medical review, the Board concurred with the advising opinion of the ARBA Medical Advisor that reversal of her removal from the TDRL without benefits is not possible and so unwarranted. The Board determined there is insufficient evidence to support the applicant’s contentions for correction of her DA Form 199-1 to include additional conditions as unfitting.

2. The Board found a formal Physical Evaluation Board (PEB), convened on 24 June 2020, and determined the applicant was unfit for continued military service due to three conditions: post-traumatic stress disorder (PTSD), lumbosacral strain and degenerative arthritis of the lumbar spine, and right intervertebral disc syndrome. The PEB determined these conditions warranted a combined disability rating of 90%, and the applicant was placed on the Temporary Disability Retired List (TDRL) effective 22

September 2020. Furthermore, the records shows the PEB reviewed 27 additional medical conditions and found they met retention standards under Army Regulation 40-501. However, these conditions were not listed on the physical profile as limiting functional activities, nor was there evidence of occupational impairment attributable to them.

4. The Board acknowledged the applicant’s submission of medical records, DA Forms 2173, and VA rating decisions; however, under Army policy, only conditions determined to be physically unfitting at the time of separation are rated for disability compensation. The VA evaluates conditions for civilian employability, not military fitness. Additionally, the Board noted that Soldiers placed on the TDRL after 1 January 2017 are subject to a three-year tenure limit per the National Defense Authorization Act (NDAA) of 2017. The applicant was placed on the TDRL on 22 September 2020 and was required to undergo a final medical examination to determine the stability of her conditions.

5. The Board determined, despite positive contact in May 2022 and a scheduled exam at Madigan Army Medical Center, the applicant failed to report. Multiple follow-up attempts, including certified mail and FedEx correspondence, were unsuccessful. As of 29 September 2023, the U.S. Army Physical Disability Agency (USAPDA) had no further contact with the applicant and approved her administrative removal from the TDRL due to noncompliance. The Board agreed, with the PEB’s findings, the lack of evidence supporting additional unfitting conditions, and the applicant’s failure to comply with TDRL reexamination requirements. The Board found the original determination was consistent with applicable regulations and standards. Therefore, the Board denied relief.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
XXX	XXX	XXX	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.

X //SIGNED//

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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, 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 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).
3. 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. 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.

d. 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. 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 his or her lifetime, adjusting the percentage of disability based upon that agency's examinations and findings.

7. Army Regulation 15-185 (ABCMR) provides Department of the Army policy, criteria, and administrative instructions regarding an applicant's request for the correction of a military record. Paragraph 2-11 states applicants do not have a right to a hearing before

the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

8. Section 1556 of Title 10, U.S. Code, 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//