

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 18 December 2024

DOCKET NUMBER: AR20240004059

APPLICANT REQUESTS:

- a permanent physical disability retirement rating of 70 in lieu of 30 percent
- personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Department of Veterans Affairs (VA) letter, 6 November 2007
- VA letter, 6 November 2023

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:
 - a. His percentage for his permanent retirement was left at 30 percent, but he was informed it would be 70 percent. He was medically retired for asthma and the VA rating for the same disability is 100 percent.
 - b. He was informed during his last physical at Fort Benning, GA he was going to be rated at 70 percent and placed on the Permanent Disability Retired List (PDRL).
3. 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).

4. A Standard Form 88 (Report of Medical Examination) shows the applicant underwent medical examination on 25 June 1998 for the purpose of Army National Guard (ARNG) enlistment and was found qualified for enlistment with a PULHES of 111111.
5. A National Guard Bureau (NGB) Form 22 (Report of Separation and Record of Service) shows the applicant enlisted in the ARNG on 25 June 1998, and was honorably discharged on 8 May 2000, for the purpose of Regular Army enlistment. He was credited with 1 year, 10 months, and 14 days of net service this period.
6. A DD Form 4 (Enlistment/Reenlistment Document) shows the applicant enlisted in the Regular Army on 9 May 2000.
7. The applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he deployed to Southwest Asia from 14 January 2003 through 6 July 2003.
8. The complete facts and circumstances surrounding the applicant's physical disability retirement are unknown as 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), VA Compensation and Pension (C&P) Exam, and VA Proposed Rating Decision for DES purposes are not in his available records for review and have not been provided by the applicant.
9. Headquarters, U.S. Army Field Artillery Center, and Fort Sill Orders 064-0119, 4 March 2004, released the applicant from assignment and duty because of physical disability incurred while entitled to basic pay and under conditions that permit his placement on the Temporary Disability Retired List (TDRL) effective 19 March 2004, with a disability rating of 30 percent.
10. The applicant's DD Form 214 shows he was honorably released from active duty on 18 March 2004, under the provisions of Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation), due to temporary disability, with corresponding separation code SFK.
11. It is unclear from the available service records on what date the applicant underwent TDRL reexamination, if he was subsequently placed on the PDRL, and if so, with what disability percentage he was placed on the PDRL.

12. A VA letter, 6 November 2007, shows the applicant was granted an increase to his service-connected compensation effective 1 September 2006. His VA service-connected disability rating and the rated service-connected disabilities are not listed on this letter.

13. A second VA letter, 6 November 2023, shows:

- service connection for the applicant's diabetes mellitus, type II was granted at 20 percent effective 9 August 2023
- his 100 percent service-connected disability rating for asthma remained unchanged
- his combined rating was 100 percent

14. 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.

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

16. MEDICAL REVIEW:

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

b. The applicant is applying to the ABCMR requesting an increase in his military disability rating. He states:

"My percentage for my permanent retire {sic} was left at 30% but was informed it would be 70%. I was medical retired for asthma and the VA rating in 100% for the same disability."

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. His DD 214 shows he entered the regular Army on 9 May 2000 and was placed on the temporary disability retirement list (TDRL) on 19 March 2004 under provisions provided in paragraph 4-24b(2) of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (1 September 1990). Orders published by Headquarters US Army Field Artillery Center and Fort Sill placed him on the TDRL with a 30% disability rating on 19 March 2004 and stated that his disability was not combat related.

d. On 30 December 2003, a medical evaluation board determined the applicant's asthma failed the medical retention standards in paragraphs 3-27a(2) and 3-27a(3) of AR 40-501, Standards of Medical Fitness. There were no other conditions listed on his Medical Evaluation Board Proceedings (DA Form 3947). The applicant disagreed with the MEB but his appeal was not available for review. His appeal was considered, apparently denied, and his case, along with his appeal, was forwarded to a physical evaluation board (PEB) for adjudication.

e. On 5 February 2004, the applicant's informal PEB found his asthma to an unfitting medical condition for continued service.

f. U.S law requires the military services to use the VASRD when rating military disabilities. Paragraph B-1 of Appendix B of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (1 September 1990) states:

Schedule for Rating Disabilities (VASRD)

a. Congress established the VASRD as the standard under which percentage rating decisions are to be made for disabled military personnel. Such decisions are to be made according to Title IV of the Career Compensation Act of 1949 (Title IV is, now mainly codified in 10 USC 61.)

b. Percentage ratings in the VASRD represent the average loss in earning capacity resulting from these diseases and injuries. The ratings also represent the residual, effects of, these health impairments on civil occupations.

g. Using the VA Schedule for Rating Disabilities (VASRD), the PEB derived and applied a rating disability rating of 30%. The PEB determined the condition was not sufficiently stable for final adjudication and so recommended he be placed on the TDRL. On 12 February 2004, after being counseled on the Board's findings and

recommendation by his PEB liaison officer, he concurred with the PEB and waived his right to a formal hearing.

h. His first TDRL reevaluation was performed at Martin Army Community Hospital, Fort Benning, GA, on 15 November 2005. On 4 April 2006, the PEB found his asthma remained unfitting for military service, continued to be insufficiently stable for final adjudication, and the applicant remained on the TDRL.

i. His second TDRL reevaluation was performed at Martin Army Community Hospital, Fort Benning, GA, on 7 May 2007. The provider diagnosed the applicant with mild intrinsic asthma. Pulmonary function testing showed an FEV1 (forced expiratory volume at 1 second) of 69% and an FEV-1 / FVC (forced vital capacity) of 86. The applicant received a copy of the MEB narrative summary and on 3 June 2007 and selected the option "I acknowledge receipt of basic correspondence and accept the findings and recommendations of the Medical Examination."

j. On 6 June 2007, the PEB determined his asthma remained unfitting for military service. From his DA 199:

"Asthma with FEV-1 69% post bronchodilator; has had three er visits in the past year (not to the level of monthly visits for exacerbation); now requires home nebulizer. (TDRL eval, pulmonary function tests 7may07, VA records)

Based on review of the TDRL examination, the PEB finds that the Soldier remains unfit to reasonably perform the duties required by previous grade and military specialty."

k. Using the VASRD, the PEB derived and applied a 30% disability rating to the applicant's asthma, and with it now sufficiently stable for final adjudication, recommended he be permanently retired for physical disability.

l. The VASRD diagnostic code (DC) for migraine headaches is 6602:

m. 6602 Asthma, bronchial:

FEV-1 less than 40-percent predicted, or; FEV-1/FVC less than 40 percent, or; more than one attack per week with episodes of respiratory failure, or; requires daily use of systemic (oral or parenteral) high dose corticosteroids or immuno-suppressive medications 100

FEV-1 of 40- to 55-percent predicted, or; FEV-1/FVC of 40 to 55 percent, or; at least monthly visits to a physician for required

care of exacerbations, or; intermittent (at least three per year) courses of systemic (oral or parenteral) corticosteroids60

FEV-1 of 56- to 70-percent predicted, or; FEV-1/FVC of 56 to 70 percent, or; daily inhalational or oral bronchodilator therapy, or; inhalational anti-inflammatory medication30

FEV-1 of 71- to 80-percent predicted, or; FEV-1/FVC of 71 to 80 percent, or; intermittent inhalational or oral bronchodilator therapy10

n. The applicant's asthma severity and frequency warranted a 30% disability rating.

o. On 8 June 2007, after being counseled on the Board's findings and recommendation by his PEB liaison officer, he concurred with the PEB and waived his right to a formal hearing.

p. It is the opinion of the ARBA Medical Advisor that an increase in his military disability rating is 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 an increase in his military disability rating is unwarranted. The Board found insufficient evidence to support the applicant's contentions for an increase in his military disability rating.

2. The Board noted, the applicant was medically retired on 19 March 2004 and placed on the Temporary Disability Retired List (TDRL) with a 30% disability rating for asthma, as determined by the Physical Evaluation Board (PEB) in accordance with the VA Schedule for Rating Disabilities (VASRD). Subsequent TDRL reevaluations in 2005 and 2007 confirmed that his asthma remained unfitting for continued military service, but did not meet the criteria for a higher rating. Pulmonary function testing and clinical assessments supported the 30% rating, and the applicant concurred with the PEB findings and waived his right to a formal hearing. The Board acknowledges the applicant's current 100% disability rating from the Department of Veterans Affairs (VA); however, reiterates that VA ratings are based on civilian employability and do not govern military disability determinations.

3. Furthermore, the Board noted, the Army rates only those conditions that are unfitting for continued service at the time of separation, and compensation is intended to reflect the loss of a military career, not post-service deterioration or civilian impact. Based on the comprehensive review and the ARBA Medical Advisor's opine that an increase is unwarranted, the Board finds no error or injustice in the applicant's assigned military disability rating. As such, the request for relief is denied.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

: : : 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//

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. Army Regulation 635-40 (Disability 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. 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 Physical Evaluation Board (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.

d. The Temporary Disability Retired List (TDRL) is used in the nature of a “pending list.” It provides a safeguard for the Government against permanently retiring a Soldier who can later fully recover, or nearly recover, from the disability causing them to be unfit. Conversely, the TDRL safeguards the Soldier from being permanently retired with a condition that may reasonably be expected to develop into a more serious permanent disability.

e. Requirements for placement on the TDRL are the same as for permanent retirement. The Soldier must be unfit to perform the duties of their office, grade, rank, or rating at the time of the evaluation. The disability must be rated at a minimum of 30 percent, or the Soldier must have 20 years of service. In addition, the condition must be determined to be temporary or unstable.

f. Soldiers will be placed on the TDRL when they would be qualified for permanent disability retirement and the preponderance of evidence indicates one or more conditions will change within the next 5 years so as to result in a change in rating or a finding of fit. The Army Disability Evaluation System will re-evaluate each Soldier placed on the TDRL at least once every 18 months. Evaluation may be sooner. Once the PEB finds each condition is stable upon evaluation, the PEB will assign a final rating that includes the ratings for the disabilities determined to be permanent and stable when the Soldier was placed on the TDRL or during preceding TDRL adjudications.

g. A final determination of the case of each Soldier on the TDRL will be made at the latest upon the expiration of 5 years after the date when the Soldier was placed on the TDRL. If, at the time of that determination the physical disability for which the Soldier was placed on the TDRL still exists, it will be considered to be permanent and stable. Placement on the TDRL confers no right to remain on the TDRL for the entire 5-year period.

h. If upon reexamination, Soldiers whose disabilities have stabilized and who are not determined fit for duty and meeting medical retention standards for the conditions for which they were placed on the TDRL will be removed from the TDRL and placed on the Permanent Disability Retired List (PDRL) if the physical disability rating remains 30 percent or greater. If upon reexamination, the Solider is found unfit for duty and not meeting medical retention standards but the stabilized physical disability percentage is rated at below 30 percent, the Soldier will be removed from the TDRL and separated with severance pay if the Soldier has less than 20 years of active Federal service.

i. When the recommendation of the PEB is placement or retention on the TDRL, failure to report for a scheduled periodic examination or to inform U.S. Army Human Resources Command of a change in address will result in the suspension of retired pay.

3. 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.
4. 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.
5. 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.
6. 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.
 - a. Paragraph 2-11 states applicants do not have a right to a formal hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

b. 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//