

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 7 February 2025

DOCKET NUMBER: AR20240006116

APPLICANT REQUESTS:

- physical disability retirement in lieu of physical disability separation with severance pay
- personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Certificate of Release or Discharge from Active Duty) covering the period ending 27 June 2006
- Department of Veterans Affairs (VA) letter, 28 October 2015
- DA Form 199 (Informal Physical Evaluation Board (PEB) Proceedings), 30 October 2015
- DA Form 4037 (Officer Record Brief (ORB), 9 November 2015
- DA Form 67-10-2 (Field Grade Plate (O4-O5; Chief Warrant Officer Three (CW3) – CW5) Officer Evaluation Report (ORB)) covering the period ending 25 November 2015
- DD Form 214 covering the period ending 1 February 2016

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. He was given a Medical Evaluation Board (MEB) against his will and forced out of the military with 15 years of service and no retirement. He was preparing for a

deployment to Afghanistan with his command when he was flagged on his physical, which began the MEB process.

b. He could have simply been issued a permanent physical profile, as many others were, but he was instead given a medical discharge with a 10 percent rating instead. His colonel and commander tried to fight it, but he was informed it was a waste of time to appeal.

c. He was given an immediate rating of 90 percent by the VA, which includes other medical issues that were considered to render him non-deployable, but these medical issues were not given consideration at the time of his separation, so his separation disability percentage was only 10 percent. He would like to have his separation disability rating increased to at least 30 percent so he can receive his retirement.

3. A DD Form 214 shows:

a. The applicant enlisted in the Regular Army on 23 March 2000, and was awarded the Military Occupational Specialty (MOS) 25F (Network Switching Systems Operator/Maintainer).

b. He deployed to the following locations during the following time periods:

- Afghanistan, 12 June 2002 – 11 December 2002
- Iraq, 1 November 2004 – 15 November 2005

c. After 6 years, 3 months, and 5 days of active service, the applicant was honorably discharged on 27 June 2006, for the purpose of accepting a commission or warrant in the Army.

4. A DA Form 71 (Oath of Office) shows the applicant was appointed an officer in the Army in the rank of Warrant Officer One (WO1) on 28 June 2006.

5. The applicant deployed to the following additional locations during the following time periods:

- Romania, 20 April 2007 – 20 November 2008
- Iraq, 22 January 2010 – 22 July 2010
- Iraq, 29 August 2011 -29 October 2011
- Liberia, 21 October 2014 – 21 March 2015

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), VA Compensation and Pension (C&P) Exam, and VA Rating Decision are not in his available records for review and have not been provided by the applicant.

7. A VA letter, 28 October 2015, shows the VA proposed that the applicant's following claimed disabilities be considered service-connected with the following proposed ratings:

- obstructive sleep apnea, 50 percent
- post-traumatic stress disorder (PTSD), 50 percent
- right great toe gout, 20 percent
- left (non-dominant) shoulder sprain, 10 percent
- degenerative disc disease L4-5 and L5-S1 with bilateral facet arthrosis and foraminal narrowing, 10 percent
- tinnitus, 10 percent
- right leg radiculopathy, 10 percent
- left leg radiculopathy, 10 percent
- left knee patellofemoral syndrome, 0 percent
- residual epididymal pain status post vasectomy, 0 percent
- keloid scar to chest of undetermined etiology, 0 percent
- pilonidal cyst removal with residual pain, 0 percent

8. A DA Form 199 shows:

a. An informal PEB convened on 30 October 2015, where the applicant was found physically unfit with a recommended rating of 10 percent and that his disposition be separation with severance pay.

b. His medical condition determined to be unfitting is bulging disc, L4-L5, L5-S1 (MEB diagnosis (Dx) 1); 10 percent. This condition was determined to be unfitting because the DA form 3349 functional activity limitations associated with this condition rendered him unable to reasonably perform the duties of his area of concentration.

c. He was found fit for the conditions listed as MEB Dx 2-15 (sensorineural hearing loss, left ear; subjective tinnitus; residual epididymal pain, status post vasectomy; mild sleep apnea; right knee patella femoral syndrome; left knee patellofemoral syndrome; keloid scar to chest; left shoulder sprain and crepitus with range of motion; right great toe gout; medical epicondylitis, left elbow; pilonidal cyst removal with residual pain; PTSD; right lower extremity radiculopathy; and left lower extremity radiculopathy. These conditions were not unfitting because the MEB indicated they met retention standards, did not cause profile limitations of functional activities, and no performance issues were due to these conditions.

d. The applicant signed the form on 2 November 2015, indicating he had been advised of the findings and recommendations of the informal PEB and concurred, waiving a formal hearing of his case. He also indicated he did not request reconsideration of his VA ratings.

9. 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).

10. The applicant's ORB, 9 November 2015, shows his PULHES was 113111 effective 1 October 2014, with the rating of 3 in factor L.

11. The applicant's OER, covering the period from 1 July 2015 through 25 November 2015, shows:

- he passed his Army Physical Fitness Test (APFT) on 29 December 2014
- he was rated as proficient by his rater and highly qualified by his senior rater, with comments including "exceptional performance" and "indispensable asset to the division."

12. The applicant's DD Form 214, issued on 10 November 2015, shows:

a. He was honorably discharged on 1 February 2016, under the provisions of Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation) due to disability with severance pay, combat-related (enhanced) with corresponding separation code JEA.

b. He was credited with 9 years, 7 months, and 4 days of net active service this period and 6 years, 3 months, and 5 days of total prior active service.

c. Item 18 (Remarks) shows he received disability severance pay in the amount of \$167, 347.20.

13. A DD Form 215 (Correction to DD Form 214) was issued on 29 February 2015 correcting his DD Form 214 covering the period ending 1 February 2016, to reflect he received disability severance pay in the amount of \$169, 526.40.

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. 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 (EMR – AHLTA and/or MHS Genesis), 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 requesting an increase in his military disability rating and that his disability discharge disposition be changed from separated with disability severance pay to permanent retirement for physical disability. He states:

"I was given a MEB [medical evaluation board] against my will and forced out to the military at 15 years with no retirement. I was preparing for a deployment to Afghanistan with my command and I was flagged on my psychical which then began a MEB.

I could've simply been issued a Permanent Profile, as many others were, but was given a medical discharge with 10% rating instead. My Colonel and my Commander tried to fight it. I was informed that it was a waste of my time to appeal.

I was given an immediate rating by the VA of 90% with other medical issues that were considered "non-deployable" but these medical issues were not given consideration upon separation so my separation percentage was only 10%. I would like to have my separation rating increased to at least 30% so that I can receive my retirement."

c. The Record of Proceedings details the applicant's service and the circumstances of the case. His DD 214 for the period of Service under consideration shows he entered the regular Army on 28 June 2006 and was discharged with \$167,347.20 of disability severance pay under provisions in chapter 4 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (8 February 2006).

d. A Soldier is referred to the Integrated Disability Evaluation System (IDES) when they have one or more conditions which appear to fail medical retention standards reflected on a duty limiting permanent physical profile. At the start of their IDES processing, a physician lists the Soldiers referred medical conditions in section I the VA/DOD Joint Disability Evaluation Board Claim (VA Form 21-0819). The Soldier, with the assistance of the VA military service coordinator, lists all other conditions they believe to be service-connected disabilities in block 8 of section II of this form, or on a separate Application for Disability Compensation and Related Compensation Benefits (VA Form 21-526EZ).

e. Soldiers then receive one set of VA C&P examinations covering all their referred and claimed conditions. These examinations, which are the examinations of record for the IDES, serve as the basis for both their military and VA disability processing. The medical evaluation board (MEB) uses these exams along with AHLTA encounters and other information to evaluate all conditions which could potentially fail retention standards and/or be unfitting for continued military service. Their findings are then sent to the physical evaluation board for adjudication.

f. All conditions, both claimed and referred, are rated by the VA using the VA Schedule for Rating Disabilities (VASRD). The physical evaluation board (PEB), after adjudicating the case, applies the applicable ratings to the Soldier's unfitting condition(s), thereby determining his or her final combined rating and disposition. Upon discharge, the Veteran immediately begins receiving the full disability benefits to which they are entitled from both their Service and the VA.

g. On 16 August 2015, the applicant was referred to the IDES for "Herniated Disc L4-L5, L5-S1." The applicant claimed twenty additional conditions. A medical evaluation board (MEB) determined the referred condition was the only condition which failed the medical retention standards of AR 40-501, Standards of Medical Fitness. The MEB determined fourteen additional conditions met medical retention standards. The remaining eight claimed conditions "could not be substantiated by VA C&P exam." On 21 October 2015, the applicant agreed with the MEB findings and recommendation and his case was forwarded to a physical evaluation board (PEB) for adjudication.

h. On 30 October 2015, the applicant's informal PEB determined his "Bulging Disc L4-L5, L5-S1" was the sole unfitting condition for continued military service. They found the fourteen remaining medical conditions not unfitting for continued military service. The PEB applied the Veterans Benefits Administration (VBA) derived ratings of 10% and recommended the applicant be separated with disability severance pay. On 2 November 2015, 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 VA reconsideration of his disability rating (VARR).

i. Review of the EMR for his final year of service shows he was treated for lumbar spine pain, knee pain, a keloid scar, and testicular pain. There were five behavioral health encounters, mostly related to his back pain and processing thru the DES. His diagnoses were "Problems of adjustment to life-cycle transition" and/or PTSD being treated with citalopram. All of these conditions were addressed by the MEB.

j. The applicant's final Officer Evaluation Report covering 1 July 2015 thru 25 November 2015 shows he was a successful Officer. It shows he passed his Army Physical Fitness Test in December 2014. His rater stated:

"Exceptional performance by a dedicated and talented Warrant Officer. [Applicant] ranks in the top five percent of all Warrant Officers I have worked with in over 19 years of military service. His initiative and self-motivation are assets that made him an essential part of this section particularly in the preparation for two crucial Division exercises. [Applicant] is a great asset whose technical abilities and insightful guidance will be sorely missed."

k. His senior rater blocked him as highly qualified opining:

"An exceptional performance from a great warrant officer possessing outstanding technical and professional skills. CW3 [Applicant] ranks in the top 10% of all warrant officers I have worked with throughout my career. [Applicant] has been a superb mentor and coach providing essential guidance to superiors and subordinates alike displaying capabilities that made him an indispensable asset to the Division. Promote to Chief Warrant Officer 4 now and send to WOSSE [Warrant Officer Senior Service Education]."

l. Review of his PEB case file in ePEB along with his encounters in the EMR revealed no substantial inaccuracies or discrepancies.

m. There is insufficient probative evidence the applicant had an additional condition which would have failed the medical retention standards of chapter 3 of AR 40-501, Standards of Medical Fitness, prior to his discharge. Thus, there is no cause for referral to the Disability Evaluation System.

n. JLV shows the applicant has been awarded multiple VA service-connected disability ratings, including ratings for sleep apnea, PTSD, and intervertebral disc syndrome. However, the DES only compensates an individual for service incurred medical condition(s) which have been determined to disqualify him or her from further military service and consequently prematurely ends their career. The DES has neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions which were incurred or permanently aggravated during their military service; or which did not cause or contribute to the termination of their military career. These roles and authorities are granted by Congress to the Department of Veterans Affairs and executed under a different set of laws.

o. It is the opinion of the ARBA medical advisor that neither an increase in her military disability rating nor a referral of her case back to the DES is warranted.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation. Upon review of the applicant's petition, available military records and medical review, the Board concurred with the advising opinion of the ARBA medical advisor that neither an increase in her military disability rating nor a referral of her case back to the DES is warranted. The Board found insufficient evidence to support the applicant's contentions. The Board noted, an informal Physical Evaluation Board (PEB) determined the applicant was physically unfit due to a bulging disc at L4-L5 and L5-S1, assigning a 10 percent disability rating and recommending separation with severance pay. The applicant concurred with the findings, waived a formal hearing, and did not request reconsideration of his VA ratings.

2. The Board acknowledged the applicant's remaining medical conditions including PTSD, sleep apnea, radiculopathy, and other musculoskeletal and neurological issues were reviewed by the Medical Evaluation Board (MEB) and determined to meet retention standards. These conditions were not found to be unfitting, did not result in functional profile limitations, and were not cited as contributing to performance deficiencies. Furthermore, the applicant's Officer Evaluation Report during the relevant period described him as an "indispensable asset" and rated him as highly qualified, further supporting the conclusion that these conditions did not render him unfit for continued service at the time of separation. Based on the advising opinion and evidence

in the record, the Board found no error or injustice in the applicant's separation with severance pay and denied relief for DES referral.

3. The applicant's request for a personal appearance hearing was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

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//

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. On 25 August 2017, the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to Discharge Review Boards (DRBs) and Boards for Correction of Military/Naval Records (BCM/NRs) when considering requests by veterans for modification of their discharges due in whole or in part to: mental health conditions, including post-traumatic stress disorder (PTSD), traumatic brain injury (TBI), sexual assault, or sexual harassment. Boards are to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based, in whole or in part, on those conditions or experiences.

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 (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.

4. 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.

5. 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.

6. 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.

7. 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.

8. 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.

9. 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. 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.

//NOTHING FOLLOWS//