

IN THE CASE OF: [REDACTED]

BOARD DATE: 31 January 2025

DOCKET NUMBER: AR20240006883

APPLICANT REQUESTS: correction of his military records to show he was retired due to disability.

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

- DD Form 149, Application for Correction of Military Record
- Personal Statement
- Orders A-08-310945
- Medical Records
- DD Form 214, Certificate of Release or Discharge from Active Duty
- Orders 16-336-00032
- DD Form 215, Correction to DD Form 214
- Department of Veterans (VA) correspondence

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 indicates that his request is related to post-traumatic stress disorder (PTSD). He states:
 - a. While deployed to Afghanistan he was injured on 4 July 2013. An Army doctor found him to be unfit for duty and assigned his condition a permanent P3 physical profile and recommended a Medical Evaluation Board (MEB). He was sent to the Brigade Surgeon and then medically evacuated to Fort Polk, Louisiana for continued care and MEB Proceedings.
 - b. He further contends that his commander initiated a line of duty investigation. The applicant was found to have scoliosis with a curvature of 30 degrees or more and unfit for duty with a PULHES 113111. Eighteen months prior to separation, the VA granted him a 70 percent service-connected disability rating for PTSD with Individual

Unemployability. His command did not initiate the MEB, and he was eventually honorably discharged without receiving an MEB.

3. The applicant enlisted in the Regular Army on 13 August 2008.
4. His record is void of physical disability processing records and there are no Line of Duty documents.
5. On 10 December 2011, he was honorably released from active duty by reason of completion of required active service and transferred to a U.S. Army Reserve unit. His DD Form 214 indicates that he served in Iraq from 9 November 2009 to 25 July 2010; and Afghanistan from 26 July 2010 to 12 January 2011. He completed 3 years, 3 months, and 21 days of active service.
6. The applicant was ordered to active duty in support of Operation Enduring Freedom from 2 November 2012 to 19 October 2013. He served in Afghanistan from 30 December 2012 to 3 August 2013. His DD Form 214 indicates he was medically evacuated to Landstuhl, Germany.
7. On 1 December 2016, he was discharged from the U.S. Army Reserve with an honorable characterization of service.
8. On 19 November 2018, the applicant was issued a DD Form 215 which added the Purple Heart to his authorized awards.
9. The applicant provides:
 - a. Medical records, for the period 2008 to October 2013, which show the applicant was treated for several conditions to include anxiety, panic disorder without agoraphobia, adjustment disorder, adjustment insomnia, midback pain, thoracic sprain, and scoliosis. These records include:
 - (1) A permanent physical profile for moderate spine pain, low-impact profile on 19 July 2013. The profiling officer found the applicant did not meet retention standards in accordance with Army Regulation 40-501, Medical Services-Standards of Fitness, chapter 3 and recommend the applicant be evaluated by an MEB.
 - (2) A medical note, 5 August 2013, states that the applicant was an activated Reservist that was medically evacuated from Afghanistan to the Fort Polk, Louisiana Warrior Transition Unit (WTU) for evaluation and treatment for scoliosis. The applicant had been in a motor vehicle accident in January 2013 while in the theater and complained of back pain.

- b. VA correspondence that shows the applicant has been granted a service-connected disability rating of 70% for PTSD.
- 10. The Board may consider the applicant's overall record and provided statement in accordance with the published equity, injustice, or clemency determination guidance.

11. By regulation:

- a. The mere presence of impairment does not of itself justify a finding of unfitness because of physical disability. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the member reasonably may be expected to perform because of their office, rank, grade, or rating.
- b. Scoliosis with severe deformity with over 2-inch deviation of tips of spinous process from the midline, or of lesser degree if recurrently symptomatic and interfering with military duties is cause for referral to an MEB.
- c. 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.
- d. Permits for permanent retirement when the disability is rated at 30 percent or more under VASRD, or the Soldier has at least 20 years of active Federal service.

12. The ABCMR begins its consideration of each case with the presumption of administrative regularity. The ABCMR will decide cases on the evidence of record. It is not an investigative body. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

13. 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/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 in essence requesting a referral to the Disability Evaluation System (DES). He states:

"July 2013 while in Afghanistan, SM [service member] was injured and given a P3 permanent profile and referral to MEB [medical evaluation board] and found unfit for duty under AR 40-501 [Standards of Medical Fitness] 3-20g with a scoliotic curve of 30 degrees or greater. SM was redeployed to Ft. Polk W TU [Warrior Transition Unit] for MEB proceedings. SM never received MEB and was on permanent P3 profile over a year. SM was discharged instead of MEB."

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. The DD 214 for the period of service under consideration shows the former USAR Soldier entered active duty in support of Operation Enduring Freedom on 2 November 2012 and was honorably discharged on 19 October 2013 at the completion of his required active service under authority provided in chapter 4 of AR 635-200, Active Duty Enlisted Administrative Separations (17 December 2009).

d. On 13 July 2013, a provider in theater recommended the applicant be evacuated from theater and an MEB be considered for his back pain:

"The patient returned to the clinic today as directed to do so. Have not received response back regarding inquiry to [REDACTED] on recommendations. Had frank discussion with the patient that his condition will likely not improve. The patient reports concern that his pain has transformed from being intermittent with activity to being consistent and worsened with activity. Will initiate theater release on the patient and recommended MEB due to condition."

e. A permanent duty limiting physical profile was initiated for this condition on 19 July 2013. However, it appears it was never approved and thus he was not entered into the DES; and there is no case file in ePEB.

f. A 30 July 2013 MRI of his lumbar spine obtained at Ft. Polk, LA was significant for scoliosis of the thoracolumbar spine.

g. The applicant had his initial visit with his Ft. Polk nurse case manager on 6 August 2013 at which time he stated he had been experiencing back pain since high school for which he had used narcotics and that he was currently pain free:

"Initial nurse case management visit with complaining of pain to back: Soldier verbalizes pain to back started approx.. five years ago while in high school. Soldier verbalizes pain is intermittent and pain free at this time.

Soldier verbalizes pain treated with Tramadol and later prescribed Percocet. Soldier verbalizes tramadol is medication of choice as Percocet is addictive.

h. On 12 August 2013, the applicant was evaluated at the Bayne-Jones Army Community Hospital on Ft. Polk after which he was diagnosed with anxiety, panic disorder with agoraphobia, adjustment disorder, and adjustment insomnia. He was directed to follow-up with his primary care manager the next day.

i. A 13 August 2013 psychology encounter states the applicant was evacuated from theater for a back injury and was being seen by behavioral health for severe panic attacks:

"SM is a 23-year-old Reservist male who presented as a walk in to DBH [Division Behavioral Health] today accompanied by his father. He has nearly 5 years TIS [time in service]. MOS 12B [combat engineer]. He was medvac'd from theater about 2 weeks ago for back pain/injury. SM stated his home unit is out of Hot Springs. AR.

SM has completed high school and was taking college classes in MS before being activated. SM has had 3 deployments. History is significant for past treatment of anxiety and depression through the VAMC in 2011 and lasted for 5-6 months (medication and therapy).

j. The applicant had preexisting scoliosis which had been symptomatic and treated with narcotics since high school. He experienced a pain flare-up while in theatre and a provider profiled him and recommended he be evacuated from theater for this pain without orthopedic consult. Evaluation at Ft. Polk identified his preexisting scoliosis. On 6 August 2013, he reported he was pain free.

k. There is no evidence the applicant had a duty incurred or permanently service aggravated medical 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 was no cause for referral to the Disability Evaluation System.

I. JLV shows the applicant has several VA service-connected disability ratings, including ratings for PTSD, migraine headaches, and sinusitis. He does not have one related to his preexisting scoliosis. The DES compensates an individual only for service incurred medical condition(s) which have been determined to disqualify him or her from further military service. 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. These roles and authorities are granted by Congress to the Department of Veterans Affairs and executed under a different set of laws.

m. It is the opinion of the ARBA medical advisor that a referral of his case to the Disability Evaluation System is not warranted.

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 Board carefully considered the applicant's record of service, documents submitted in support of the petition, and executed a comprehensive 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 official finding that the applicant's Department of Veterans Affairs rating determinations are based on the roles and authorities granted by Congress to the Department of Veterans Affairs and executed under a different set of laws. Based on this, the Board determined a referral of his case to the Disability Evaluation System (DES) is not warranted.

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.

5/12/2025

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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. Army Regulation (AR) 40-501, Medical Services-Standards of Medical Fitness states:
 - a. The current deviation or curvature of the spine from normal alignment, structure or function does not meet the retention standard if:
 - (1) It prevents the individual from following a physically active vocation in civilian life.
 - (2) It interferes with the proper wearing of a uniform or military equipment.
 - (3) It is symptomatic.
 - (4) There is lumbar scoliosis greater than 20 degrees, thoracic scoliosis greater than 30 degrees, or kyphosis and lordosis greater than 55 degrees when measured by the Cobb method.
- b. Scoliosis with severe deformity with over 2-inch deviation of tips of spinous process from the midline, or of lesser degree if recurrently symptomatic and interfering with military duties is cause for referral to an MEB.
3. AR 635-40, Personnel Separations-Physical Evaluation for Retention, Retirement, or Separation, establishes the PDES and sets forth the policies, responsibilities, and procedures that apply in determining whether a Soldier is unfit because of physical disability to reasonably perform the duties of their office, grade, rank, or rating. It states that after establishing the fact that a Soldier is unfit because of a physical disability, and that the Soldier is entitled to benefits, the PEB must decide the percentage rating for each unfitting disability. The VASRD, as modified in the regulation, is used to establish this rating. This regulation states:
 - 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 service.

- b. The mere presence of impairment does not of itself justify a finding of unfitness because of physical disability. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the member reasonably may be expected to perform because of their office, rank, grade, or rating.
- c. Rating disabilities which are neither unfitness nor contribute to the physical unfitness of a Soldier is prohibited.
- d. A condition listed in the VASRD does not equate to a finding of physical unfitness. An unfitness, 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.
- e. 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.
- f. Permits for permanent retirement when the disability is rated at 30 percent or more under VASRD, or the Soldier has at least 20 years of active Federal service.
- g. The following presumptions will apply to physical disability evaluation before and during active service.
 - (1) A Soldier was in sound physical and mental condition upon entering active service except for physical disabilities noted and recorded at the time of entry.
 - (2) Any disease or injury discovered after a Soldier entered active service, with the exception of congenital and hereditary conditions, was not due to the Soldier's intentional misconduct or willful neglect and was incurred in line of duty (LD).
 - (3) If the foregoing presumptions are overcome by a preponderance of the evidence, any additional disability or death resulting from the preexisting injury or disease was caused by military service aggravation. (Only specific findings of "natural progression" of the preexisting disease or injury, based upon well-established medical principles are enough to overcome the presumption of military service aggravation.)
 - (4) The foregoing presumptions may be overcome only by a preponderance of the evidence, which differs from personal opinion, speculation, or conjecture. When reasonable doubt exists about a Soldier's condition, an attempt should be made to resolve the doubt by further clinical investigation and observation and by consideration of any other evidence that may apply. In the absence of such proof by the preponderance of the evidence, reasonable doubt should be resolved in favor of the Soldier.

h. Under the laws governing the Army PDES, Soldiers who sustain or aggravate physically unfitting disabilities must meet the following LD 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 (IDT).

(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.

4. Title 10, U.S. Code, section 1203, provides for the physical disability separation with severance pay of a member who has less than 20 years of service and a disability rated at less than 30 percent.

5. Title 38, U.S. Code section 1110, General - Basic Entitlement: 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: 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. The Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records on 25 July 2018, regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. Boards for Correction of Military/Naval Records may grant clemency regardless of the court-martial forum. However, the guidance applies to more than clemency from a sentencing in a

court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds.

a. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. In determining whether to grant relief on the basis of equity, injustice, or clemency grounds, Boards shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment.

b. Changes to the narrative reason for discharge and/or an upgraded character of service granted solely on equity, injustice, or clemency grounds normally should not result in separation pay, retroactive promotions, and payment of past medical expenses or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded service characterization.

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. AR 15-185, Boards, Commissions, and Committees-Army Board for Correction of Military Records, 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 ABCMR will decide cases on the evidence of record. It is not an investigative body. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

//NOTHING FOLLOWS//