

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 28 January 2025

DOCKET NUMBER: AR20240007553

APPLICANT REQUESTS:

- amend depression disorder to post-traumatic stress disorder (PTSD)
- in effect, amend DA Form 199 (Informal Physical Evaluation Board (PEB) Proceedings) to show:
  - an increase in disability rating for bilateral pes planus, plantar fasciitis, foot strain, and osteoarthritis
  - his obstructive sleep apnea as a medical condition determined to be unfitting

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

- DD Form 149 (Application for Correction of Military Record)
- DA Form 3947 (Medical Evaluation Board (MEB) Proceedings)
- Department of Veterans Affairs (VA) Form 21-0819 (VA/Department of Defense (DOD) Joint Disability Evaluation Board Claim)
- Physical Disability Evaluation System Fort Drum Consolidated Narrative Summary
- Army Board for Correction of Military Records (ABCMR) Decision in Docket Number AR20230008241
- Two Letters from the VA to the Applicant
- Letter from the VA to the PEB, subject: Request for Reconsideration of Disability Evaluation System (DES) Rating Decision dated 2 July 2013 in the case of [Applicant]

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 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 the error has denied him Combat Related Special Compensation (CRSC) which he had a line of duty and was attached to the wounded

warrior transition unit. He was performing duties as a truck driver in combat. He has been going back and forth with the Defense Finance and Accounting Service and U.S. Army Human Resources Command for years.

3. The applicant provides a VA/DOD Disability Evaluation Board Claim, dated 1 December 2009, which shows the applicant indicated his left foot and ankle, pes planus, and right knee as medical conditions to be considered as the basis of fitness for duty determination.

4. The applicant also provides correspondence with the VA concerning his appeal and request for CRSC as well as a request from his decision review officer with the VA request reconsideration of his DES rating decision to reflect 30 percent for left ankle degenerative joint disease and ankle equinus, 20 percent for bilateral pes planus, plantar fasciitis, foot strain and osteoarthritis, and 20 percent for right knee degenerative joint disease.

5. The applicant enlisted in the Army National Guard on 7 May 1990.

6. He entered active duty for training on 28 June 1991 and was released on 19 September 1991. He earned the military occupational specialty 54B (Chemical Operations Specialist).

7. He entered active duty on 1 October 2001 in support of Operation Noble Eagle. He was honorably released on 27 September 2002.

8. He entered active duty on 21 January 2003 in support of Operation Enduring Freedom/Iraqi Freedom. He served in Kuwait/Iraq from 31 March 2003 to 20 November 2003. He was honorably released on 3 January 2004.

9. He entered active duty on 1 December 2009 in support of Operation Iraqi Freedom. He served in Iraq from 1 December 2009 to 12 July 2010.

10. On 27 September 2012, a MEB convened to evaluate the applicant. The relevant DA Form 3947 shows:

a. After consideration of clinical records, laboratory findings, and physical examination, the MEB found the applicant had the following medical conditions/defects:

- Osteoarthritis left foot and ankle; fails to meet retention standards in accordance with Army Regulation 40-501 (Standards of Medical Fitness), Chapter 3-14c; 2009; did not incur while entitled to base pay; existed prior to service; permanently aggravated by service

- Pes planus; fails to meet retention standards in accordance with Army Regulation 40-501, Chapter 3-13b(2); 2009; did not incur while entitled to base pay; existed prior to service; was not permanently aggravated by service
- Right knee degenerative joint disease; fails to meet retention standards in accordance with Army Regulation 40-501, Chapter 3-14c; incurred while entitled to base pay; did not exist prior to service
- Obstructive sleep apnea
- Myopia
- Longstanding esotropia right eye
- Right ankle sprain
- Insomnia
- Depression due to foot/ankle injuries, surgeries, and immobility

b. The board recommended that the applicant be referred to a PEB.

11. The applicant provides a Physical DES Consolidated Narrative Summary, dated 1 October 2012. The narrative summary outlines the conditions which fail to meet retention standards and those diagnoses that meet medical retention standards. The medical records of the applicant will be further reviewed and discussed by the Army Review Boards Agency's medical staff.

12. On 21 August 2013, a PEB convened. The relevant DA Form 199 shows:

a. Section II (Recommended Disposition): The board found the applicant is physically unfit and recommended a rating of 40 percent and that the applicant's disposition be permanent disability retirement.

b. Section III (Medical Conditions Determined to be Unfitting):

- Left ankle degenerative joint disease and ankle equinus, 20 percent
- Right knee degenerative joint disease, 10 percent
- Bilateral pes planus, plantar fasciitis, foot strain, and osteoarthritis, 10 percent

c. Section IV (Medical Conditions Determined Not to be Unfitting): obstructive sleep apnea.

d. Section V (Administrative Determinations):

- The disability disposition is not based on disease or injury incurred in the line of duty in combat with an enemy of the United States and as a direct result of armed conflict or caused by an instrumentality of war and incurred in the line of duty during a period of war

- Evidence of record reflects the applicant was not a member or obligated to become a member of an armed force or Reserve thereof
- The disability did not result from a combat-related injury

e. Section VI (Instructions and Advisory Statements):

- The ratings were combined in accordance with VASRD paragraph 4.25 and 4.26
- Bilateral factor: 20 percent combined with 10 percent = 28 percent combined with 10 percent = 35 percent plus 3.5 percent bilateral factor = 38.5 percent which rounds to 39 percent; 39 percent which rounds to 40 percent
- The voting membership of the PEB in this case included an officer of the Reserve Component

f. Section IX (Soldier's Election):

- He did not concur and demanded a formal hearing
- His written request was attached
- He requested a personal appearance
- He requested regularly appointed counsel
- He requested VA reconsideration of his VA disability ratings
- He authenticated the form on 4 September 2013 with his signature

13. On 2 February 2014, he was honorably retired under the provisions of Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation). His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows his narrative reason for separation as disability, permanent (enhanced). He completed 4 years, 2 months, and 2 days of active service with 2 years, 1 month, and 29 days of prior active service.

14. The applicant petitioned the ABCMR to show he completed 23 years, 8 months, and 26 days of prior inactive service. On 16 January 2024, the Board denied the applicant's request finding no error or injustice.

15. 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.

16. Title 38, USC, 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.

## 17. 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 they reverse the United States Army Human Resources Command's (USA HRC) previous determinations that his mental health condition, foot injury, and back condition were not combat related and therefore not eligible for Combat Related Special Compensation (CRSC). He is also requesting that his sleep apnea be determined to have been an additional unfitting condition with a corresponding increase in his military disability rating.

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. His DD 214 for the period of Service under consideration shows the former USAR Soldier entered active duty on 1 December 2009 and was permanently retired for physical disability on 2 February 2014 under the authority provided in chapter 4 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (20 March 2012).

d. On 10 October 2012, the applicant's medical evaluation board (MEB) determined he had three conditions which failed the medial retention standards in AR 40-501, Standards of Medical Fitness: "Osteoarthritis Left Foot and Ankle," "Pes Planus" (aka flat feet), and "Right Knee Degenerative Joint Disease." The determined six additional conditions met medical retention standards, including obstructive sleep apnea.

e. From the MEB narrative summary for his sleep apnea:

"Obstructive Sleep Apnea: SM [service member] had Sleep Study performed on 8/12 at Poly Tech. Medical Center in Philadelphia. Report was not available to examiner at the time of his exam. As of his visit with VA C&P examiner, SM had not received his CPAP [continuous positive airway pressure] machine. The MEB can find no evidence in the medical record that this condition significantly interferes with the satisfactory performance of duty and thus IAW AR 40-501, Chapter 3-41c feels {sic}that this condition meets retention standards."

f. Paragraph 3-41c of AR 40-501 states the circumstances under which sleep apnea fails medical retention standards:

“Obstructive sleep apnea or sleep-disordered breathing that causes daytime hypersomnolence or snoring that interferes with the sleep of others and that cannot be corrected with medical therapy, surgery, or oral prosthesis. The diagnosis must be based upon a nocturnal polysomnogram and the evaluation of a pulmonologist, neurologist, or a provider with expertise in sleep medicine. A 12-month trial of therapy with nasal continuous positive air pressure may be attempted to assist in weight reduction or other interventions, during which time the individual will be profiled as T3. Long-term therapy with nasal continuous positive air pressure requires referral to an MEB.”

g. The applicant had not even started treatment for the condition and there is no evidence the condition failed medical retention standards based on these criteria.

h. His 21 August 2013 Informal Physical Evaluation Board (PEB) Proceedings (DA 199) shows the PEB found the three conditions which failed retention standards were also unfitting for continued military service. They determined the remaining six conditions were not unfitting. The PEB made the administrative determination that none of these disabilities was combat related: Due to the direct result of armed combat; was related to the use of combat devices (instrumentalities of war); the result of combat training; incurred while performing extra hazardous service though not engaged in combat; incurred while performing activities or training in preparation for armed conflict in conditions simulating war; or that he was a member of the military on or before 24 September 1975.

i. The PEB recommended the applicant be permanently retired for physical disability with a combined military disability rating of 40%. On 10 September 2013, 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 request a VA reconsideration of his disability ratings.

j. The VA confirmed his disability ratings on 1 October 2013.

k. Combat-related disability for CRSC is defined in 10 U.S.C. § 1413a(e) as a disability that is "attributable to an injury for which the member was awarded the Purple Heart" or was incurred "as a direct result of armed conflict," "through an instrumentality of war," "while engaged in hazardous service," or "in the performance of duty under conditions simulating war."

l. In a 19 July 2024 letter to the applicant, the applicant was informed that his “Mood Disorder and Depression, rated at 70%, was found combat related due to armed conflict and eligible for CRSC effective December 2022. They maintained there was still no evidence his “Right Foot, Pes Planus With Plantar Fasciitis & Foot Strain” was combat related.

m. Paragraph 631001 of in Chapter 63, Volume 7B of DoD 7000.14R, Financial Management Regulation, provides the documentary requirements and criteria for determining a condition as combat related for the purposes of CRSC entitlement:

“631001. Basis for Determination

A. Determinations of whether a disability is combat-related will be based on the preponderance of available documentary information where quality of information is more important than quantity. All relevant documentary information is to be weighed in relation to known facts and circumstances, and determinations will be made on the basis of credible, objective documentary information in the records as distinguished from personal opinion, speculation, or conjecture.

B. The burden of proof that a disability is combat-related rests with the applicant and the member is required to provide copies of documents in his or her possession to the best of his or her ability. A record submitted by a member may be used in support of his or her application if that record appears regular on its face and is consistent with Military Service documents and procedures in use at the time, based on the best information available. Military Departments may compile a list of typical documents used in various time periods. If necessary, the Military Departments, under agreement with VA may request copies of certain documents (i.e., DD 214 “Certificate of Release or Discharge From Active Duty”, medical records, final VA ratings) from VA to support CRSC determinations.

n. No supporting evidence was submitted with the application. There are no theater AHLTA encounters and no AHLTA encounters showing his lumbar condition or pes planus was combat related.

o. From a note in paragraph 630502 of DoD FMR 7000.14R:

“An uncorroborated statement in a record that a disability is combat-related will not, by itself, be considered determinative for purposes of meeting the combat-related standards for CRSC prescribed herein. CRSC determinations must be made based on the program criteria.”

p. It is the opinion of the ARBA Medical Advisor there is insufficient probative documentation upon which to support a reversal of USA HRC's determination the applicant's lumbar condition or pes planus are not combat related under DoD FMR 7000.14R for the purpose of entitlement to CRSC.

BOARD DISCUSSION:

After reviewing the application and all supporting documents, the Board determined relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. Based upon the available documentation and the findings and recommendations outlined in the medical review, the Board concluded there was insufficient evidence of an error or injustice warranting a change to the previous medical rating reflected in the applicant's HRC determination.

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.

//SIGNED//  
X  
\_\_\_\_\_

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 physical disability evaluation system (DES) and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with DOD Directive 1332.18 (Discharge Review Board (DRB) Procedures and Standards) and Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation).

a. Soldiers are referred to the disability system when they no longer meet medical retention standards in accordance with Army Regulation 40-501 (Standards of Medical Fitness), chapter 3, as evidenced in a Medical Evaluation Board (MEB); when they receive a permanent medical profile rating of 3 or 4 in any factor and are referred by an Military Occupational Specialty (MOS) Medical Retention Board (MMRB); and/or they are command-referred for a fitness-for-duty medical examination.

b. The disability evaluation assessment process involves two distinct stages: the MEB and Physical Evaluation Board (PEB). The purpose of the MEB is to determine whether the service member's injury or illness is severe enough to compromise his/her ability to return to full duty based on the job specialty designation of the branch of service. A PEB is an administrative body possessing the authority to determine whether or not a service member is fit for duty. A designation of "unfit for duty" is required before an individual can be separated from the military because of an injury or medical condition. Service members who are determined to be unfit for duty due to disability either are separated from the military or are permanently retired, depending on the severity of the disability and length of military service. Individuals who are "separated" receive a one-time severance payment, while veterans who retire based upon disability receive monthly military retired pay and have access to all other benefits afforded to military retirees.

c. The mere presence of a medical impairment does not in and of itself justify a finding of unfitness. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier may reasonably be expected to perform because of his or her office, grade, rank, or rating. Reasonable performance of the preponderance of duties will invariably result in

a finding of fitness for continued duty. A Soldier is physically unfit when a medical impairment prevents reasonable performance of the duties required of the Soldier's office, grade, rank, or rating.

3. Army Regulation 635-40 establishes the Army Disability Evaluation System and sets forth policies, responsibilities, and procedures that apply in determining whether a Soldier is unfit because of physical disability to reasonably perform the duties of his office, grade, rank, or rating. Only the unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability.

a. Disability compensation is not an entitlement acquired by reason of service-incurred illness or injury; rather, it is provided to Soldiers whose service is interrupted and who can no longer continue to reasonably perform because of a physical disability incurred or aggravated in military service.

b. Soldiers who sustain or aggravate physically-unfitting disabilities must meet the following line-of-duty criteria to be eligible to receive retirement and severance pay benefits:

(1) The disability must have been incurred or aggravated while the Soldier was entitled to basic pay or as the proximate cause of performing active duty or inactive duty training.

(2) The disability must not have resulted from the Soldier's intentional misconduct or willful neglect and must not have been incurred during a period of unauthorized absence.

c. The percentage assigned to a medical defect or condition is the disability rating. A rating is not assigned until the PEB determines the Soldier is physically unfit for duty. Ratings are assigned from the Department of Veterans Affairs (VA) Schedule for Rating Disabilities (VASRD). The fact that a Soldier has a condition listed in the VASRD does not equate to a finding of physical unfitness. An unfitting, or ratable condition, is one which renders the Soldier unable to perform the duties of their office, grade, rank, or rating in such a way as to reasonably fulfill the purpose of their employment on active duty. There is no legal requirement in arriving at the rated degree of incapacity to rate a physical condition which is not in itself considered disqualifying for military service when a Soldier is found unfit because of another condition that is disqualifying. Only the unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability.

4. Title 10, U.S. Code, section 1201, provides for the physical disability retirement of a member who has at least 20 years of service or a disability rating of at least 30 percent. Title 10, U.S. Code, section 1203, provides for the physical disability separation of a member who has less than 20 years of service and a disability rating of less than 30 percent.

5. Title 38, U.S. Code, section 1110 (General – Basic Entitlement) states for disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

6. Title 38, U.S. Code, section 1131 (Peacetime Disability Compensation – Basic Entitlement) states for disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during other than a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

7. Title 10, U.S. Code, section 1556 requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//