

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 21 August 2025

DOCKET NUMBER: AR20240010398

APPLICANT REQUESTS: correction of his DA Form 199 (Informal Physical Evaluation Board (PEB) Proceedings) to reflect:

- physical disability retirement in lieu of physical disability separation with severance pay
- his disability was a direct result of armed conflict or caused by an instrumentality of war and incurred in the line of duty (LOD) during a period of war and resulted from a combat-related injury

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

- DD Form 149 (Application for Correction of Military Record)
- DA Form 199 (Informal Physical Evaluation Board (PEB) Proceedings), 9 June 2020
- National Guard Bureau (NGB) Form 22 (National Guard Report of Separation and Record of Service), covering the period ending 19 November 2020
- Department of Veterans Affairs (VA) Disability Ratings printout, 9 August 2024
- VA letter, 9 August 2024

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.

2. The applicant states:

a. He is respectfully requesting his medical discharge be changed to a medical retirement. At the time of his medical discharge on 19 November 2020, he was only rated at 20 percent for his lumbosacral strain, lumbar disc disease. On 21 December 2021, a claim decision was made by the VA to adjust his rating from 20 percent to 40 percent.

b. On 21 December 2021, he also received additional ratings for left/right lower extremity radiculopathy, sciatic nerve, due to damage from lumbar disc disease (40 percent for the right and 40 percent for the left nerve). He's not certain if the reason listed on the DA Form 199 for injury can be updated or makes a difference, but the injury was sustained during a combat mission and medical records should verify this. He requested this to be updated during the PEB, but it did not happen.

3. The applicant enlisted in the Army National Guard (ARNG) on 19 November 2005.

4. A DD Form 214 (Certificate of Release or Discharge from Active Duty) shows the applicant was ordered to active duty in support of Operation Enduring Freedom on 31 July 2012, with duty in Afghanistan from 28 October 2012 through 12 July 2013. He was honorably released from active duty on 25 August 2013, due to completion of required active service.

5. A DA Form 199 shows:

a. An informal PEB convened on 9 June 2020, where the applicant was found physically unfit with a recommended rating of 20 percent and that his disposition be separation with severance pay.

b. His unfitting medical condition was lumbosacral strain, lumbar disc disease to include spinal stenosis status post-surgery (Medical Evaluation Board (MEB) diagnoses (Dx) 1,2); 20 percent.

c. His medical conditions determined not to be unfitting were MEB Dx 3-15:

- post-traumatic stress disorder (PTSD)
- tension headaches
- sensorineural hearing loss, left ear
- normal hearing, right ear
- tinnitus, left ear
- tinnitus, right ear
- gastroenteritis
- right wrist ganglion cyst, status post-surgery
- left lower extremity radiculopathy, sciatic nerve
- right lower extremity radiculopathy, sciatic nerve
- knee strain, left
- knee instability, right
- patellar dislocation, right knee

d. Section V (Administrative Determinations) shows:

- his disability disposition was not based on disease or injury incurred in the LOD in combat with an enemy of the U.S. and as a direct result of armed conflict or caused by an instrumentality of war and incurred in the LOD during a period of war
- his disability did not result from a combat-related injury under the provisions of Title 26, U.S. Code, section 104 or Title 10, U.S. Code, section 10216
- his disability severance pay was awarded for disability incurred in a combat zone or incurred while performing combat-related operations as designated by the Secretary of Defense

e. The applicant signed the form on 22 September 2020, indicating he had been advised of the PEB findings and recommendations; he concurred, waiving a formal hearing of his case; and he did not request reconsideration of his VA Ratings.

6. The applicant's NGB Form 22 shows he was honorably discharged from the ARNG on 19 November 2020, due to medical unfitness for retention per Army Regulation 40-501 (Standards of Medical Fitness). He was credited with 15 years and 1 month of net service.

7. A VA letter, 9 August 2024, shows the applicant has one or more service-connected disabilities rated at 100 percent effective 1 December 2023, and that he is considered to be totally and permanently disabled due solely to his service-connected disabilities effective 16 March 2021.

8. A VA Disability Ratings printout, presumably pertaining to the applicant although his name is not on the form, shows he has a combined disability rating of 100 percent for the following service-connected disabilities:

- left lower extremity radiculopathy, femoral nerve, 0 percent effective 14 January 2022
- right lower extremity radiculopathy, femoral nerve, 0 percent effective 14 January 2022
- left lower extremity radiculopathy, sciatic nerve, 40 percent effective 21 December 2021
- lumbosacral strain, lumbar disc disease to include stenosis status post-surgery, 40 percent, effective 21 December 2021
- right lower extremity radiculopathy, sciatic nerve, 40 percent effective 21 December 2021
- scar, status post spinal surgery, 0 percent effective 21 December 2021
- left ankle lateral collateral ligament strain, 10 percent effective 16 March 2021
- right ankle lateral collateral ligament strain, 10 percent effective 16 March 2021
- left shoulder tendonitis with impingement syndrome and bursitis, 20 percent effective 16 March 2021

- residual of right wrist scar (painful), 10 percent effective 22 October 2020
- tinnitus, 10 percent effective 21 November 2019
- scar, right wrist (non-painful), 0 percent effective 16 December 2015
- patellar dislocation, right knee, limitation of flexion, 10 percent effective 16 December 2015
- ganglion cyst, right wrist, 10 percent effective 16 December 2015
- PTSD, 50 percent effective 26 August 2013

9. In the adjudication of this case, an advisory opinion was obtained from the U.S. Army Physical Disability Agency (USAPDA), 27 May 2025, which has been provided in full to the Board for review and in pertinent part shows:

a. The applicant's request for medical retirement in lieu of separation with severance pay is found to be legally insufficient.

b. An informal PEB, dated 6 September 2020, determined he was unfit for lumbar disc disease to include spinal stenosis status post-surgery and recommended a rating of 20 percent and that his disposition be separation with severance pay. Notably, the informal PEB's final determination was rendered following a rebuttal submitted by the applicant dated 22 June 2020, in which he noted his disagreement with the decision to find his PTSD and right and left lower extremity sciatica as not unfitting. He did not rebut the findings related to his lumbosacral condition.

c. The informal PEB did not change its determination after consideration of the applicant's rebuttal and ultimate, the applicant concurred with the findings and recommendations on 22 September 2000, declining to request reconsideration of his VA Ratings.

d. A document submitted in support of his petition for correction indicates a VA rating update for his back condition to 40 percent effective 21 December 2021, which post-dates the effective date of his separation. Because the effective date of the change to the applicant's VA Ratings is after the date of his discharge, the facts do not support medical retirement.

10. On 28 May 2025, the applicant was provided a copy of the USAPDA advisory opinion and given an opportunity to submit comments, but he did not respond.

11. 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.

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 USAPDA advisory, the Board concurred with the advising official. The Board also noted a change to his ratings occurred after the applicant's separation from service. Based on this, the Board determined the applicant's PEB decision at the time of separation was appropriate and a change in his retired status or change to his LOD IAW Title 26, USC, section 104 is not warranted.

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. 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. Department of Defense Instruction (DODI) 1332.38 (Physical Disability Evaluation), paragraph E3.P5.2.2 (Combat-Related), covers those injuries and diseases attributable to the special dangers associated with armed conflict or the preparation or training for armed conflict. A physical disability shall be considered combat related if it makes the member unfit or contributes to unfitness and was incurred under any of the following circumstances:

- as a direct result of armed conflict
- while engaged in hazardous service
- under conditions simulating war
- caused by an instrumentality of war

6. DODI 1332.38, paragraph E3.P5.2.2.3 (Under Conditions Simulating War), in general, covers disabilities resulting from military training, such as war games, practice alerts, tactical exercises, airborne operations, leadership reaction courses, grenade and live-fire weapons practice, bayonet training, hand-to-hand combat training, rappelling, and negotiation of combat confidence and obstacle courses. It does not include physical training activities, such as calisthenics and jogging or formation running and supervised sports.

7. Appendix 5 (Administrative Determinations) to enclosure 3 of DODI 1332.18 (Disability Evaluation System) (DES) currently in effect, defines armed conflict and instrumentality of war as follows:

a. Incurred in Combat with an Enemy of the United States: The disease or injury was incurred in the LOD in combat with an enemy of the United States.

b. Armed Conflict: The disease or injury was incurred in the LOD as a direct result of armed conflict (see Glossary) in accordance with sections 3501 and 6303 of Reference (d). The fact that a Service member may have incurred a disability during a period of war, in an area of armed conflict, or while participating in combat operations is not sufficient to support this finding. There must be a definite causal relationship between the armed conflict and the resulting unfitting disability.

c. Engaged in Hazardous Service: Such service includes, but is not limited to, aerial flight duty, parachute duty, demolition duty, experimental stress duty, and diving duty.

d. Under Conditions Simulating War: In general, this covers disabilities resulting from military training, such as war games, practice alerts, tactical exercises, airborne operations, and leadership reaction courses; grenade and live fire weapons practice; bayonet training; hand-to-hand combat training; rappelling; and negotiation of combat confidence and obstacle courses. It does not include physical training activities, such as calisthenics and jogging or formation running and supervised sports.

e. Caused by an Instrumentality of War: Occurrence during a period of war is not a requirement to qualify. If the disability was incurred during any period of service as a result of wounds caused by a military weapon, accidents involving a military combat vehicle, injury or sickness caused by fumes, gases, or explosion of military ordnance, vehicles, or material, the criteria are met. However, there must be a direct causal relationship between the instrumentality of war and the disability. For example, an injury resulting from a Service member falling on the deck of a ship while participating in a sports activity would not normally be considered an injury caused by an instrumentality of war (the ship) since the sports activity and not the ship caused the fall. The exception occurs if the operation of the ship caused the fall.

8. 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.

9. 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.

10. 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//