

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 30 May 2025

DOCKET NUMBER: AR20250000039

APPLICANT REQUESTS:

a. This case comes before the Army Board for Correction of Military Records (ABCMR) on a voluntary remand from the U.S. Court of Federal Claims (Court) in (Applicant) v. United States, case number 1:24-cv-00926-RTH, dated 17 June 2024. The Court directs the ABCMR to consider the applicant's request and directs the following:

- consider all of the plaintiff's claims in light of the allegations in the complaint
- weigh the probative value of, and discuss, all evidence in the administrative record bearing upon the question of plaintiff's disability ratings at the time of his discharge (including the Department of Veteran's Affairs (VA) rating decisions and any other evidence relied upon by the plaintiff)
- determine and explain why any percentage rating determined is most appropriate for a particular disability when compared to the next higher percentage rating (if any) and next lower percentage rating (if any) under the VA Schedule for Rating Disabilities (VASRD) in use
- if plaintiff has argued for a different rating, explain why the rating percentage determined is more appropriate than the rating percentage sought by plaintiff
- consider whether plaintiff has demonstrated through preponderant record evidence the existence of whether an error or injustice that would warrant a correction of his military record to reflect a disability retirement at a higher rating; and, if not,
- determine whether any error alleged by plaintiff is harmless in light of the board's other findings

b. The remand period shall terminate on 18 June 2025, and all proceedings remain stayed until that date.

c. The government shall file a joint status report every 90 days, with the first due on 20 March 2025, apprising the Court of the status of the remand proceedings.

d. Within 30 days of the ABCMR's decision, the parties shall file a joint status report advising the Court whether: (1) the remand affords a satisfactory basis for disposition

of the case; or (2) further proceedings are required and, if so, the nature of such proceedings.

e. The Court Order:

(1) First, it is appropriate and just for Applicant to have an opportunity to provide the ABCMR with any further argument, evidence, and comments that were not considered previously by the Army.

(2) Second, it is appropriate for the ABCMR to have an opportunity, in the first instance, to review the allegations of Applicant in the complaint and any additional argument, evidence, and comments that were not considered by the Army previously.

(3) Third, unlike this Court, the ABCMR is empowered “to correct an error or remove an injustice,” 10 U.S.C. § 1552(a), so the board can consider the equities of (Applicant's) situation along with his legal rights. Thus, even if the board ultimately finds no legal error, the board nevertheless may determine that, given the circumstances his claim presents, relief is necessary to “remove an injustice.”

(4) Fourth, during the proposed remand, the ABCMR potentially could provide Applicant with all the relief he currently seeks, which would moot this action and obviate the need for any further litigation in this Court. Even if the ABCMR does not provide Applicant with all the relief he seeks, a remand would facilitate any further judicial review by creating a record and a decision on fact-intensive matters that were not considered previously by the Army.

(5) The government’s Motion requested the Court direct Applicant to “submit any additional argument and evidence to the ABCMR by December 20, 2024” and “file a status report by that same date to advise the Court when he has transmitted his submission to the ABCMR.”

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

- Applicant’s complaint to The U.S. Court of Federal Claims, Case 24-926C
- U.S. Court of Federal Claims Order, Number 24-926, 23 December 2024

FACTS:

1. The U.S. Court of Federal Claims Remand Order comes in place of a DD Form 149 (Application for Correction of Military Record) and as such this Record of Proceeding is in response to the Court directed review of the applicant's new requests and issues, and is not a Board reconsideration of his issues.

2. The applicant states through counsel:

a. This action is a claim for an increase in the military disability retirement pay that Applicant is due as a result of the retroactive award of an increase in his previously found unfitting conditions.

b. Under the Integrated Disability Evaluation System (IDES), a joint program between the Department of Defense (DoD) and the VA, the DoD service component, in this case, the Army, determines whether a Soldier's conditions are unfitting, and applies the VA ratings assigned to each of these conditions to determine total military disability rating.

c. The Army appropriately applied the VA supplied ratings for his polyneuropathies. However, during the IDES process the Applicant disagreed with his VA ratings and appropriately appealed those ratings. Ultimately, the Applicant's ratings during the IDES process remained unchanged, but he continued to appeal his ratings, and the VA ultimately determined that it had failed to meet its statutory duty to assist by using an incorrect diagnostic code to rate his facial polyneuropathies based on its failure to complete the required exams to appropriately rate this condition.

d. After a higher-level review, the VA determined that his combined ratings for the U.S. Army Physical Evaluation Board (PEB) found unfitting conditions should have been 75 percent (%). The VA increased the ratings for these conditions effective the date after his retirement from the Army. This suit seeks redress in the form of an increase in the plaintiff's military disability retirement pay retroactive to the date of his retirement.

e. This complaint alleges money damages in excess of \$10,000.00.

f. While the applicant was attending the U.S. Army War College, he suffered a viral infection. He began suffering from diffuse polyneuropathies which caused tingling, numbness, weakness, and pain in his hands, feet, and face. Due to the pain, he was unable to sleep for more than a few hours a night.

g. After completion of his studies at the War College, he was later placed on orders to a Soldier Readiness Unit (SRU), where he underwent continued treatment for his conditions. The goal of the SRU is to provide Reserve Component Soldiers with complex medical conditions incurred in the line of duty (LOD) the opportunity to be treated and to either return to duty or be referred to the IDES.

h. After more than a year of his symptoms worsening and failure of treatment to return him to a full duty status, the Applicant was referred to an Army Medical Evaluation Board (MEB), the first stage of the IDES. On June 28, 2022, the MEB convened and found that his face polyneuropathy, bilateral hand polyneuropathy, and

bilateral foot polyneuropathy, listed as five disabilities, failed to meet retention standards. His case was referred to the PEB for adjudication.

i. On September 21, 2022, the Informal PEB convened and found the Applicant unfit to perform the duties. The unfitting conditions and rating were determined to be at a combined rating of 50%.

j. The applicant requested a reconsideration of his disability ratings on 4 October 2022.

k. On November 26, 2022, he was permanently retired from the Army.

l. On February 23, 2023, he requested a higher level review from the VA.

m. On May 4, 2023, the VA conceded they failed to meet their duty to assist by not conducting the necessary exams to properly rate the applicant's facial nerves.

n. On November 27, 2023, the VA issued a decision, again acknowledging that it failed to meet its duty to assist and increasing the rating for the Applicant's facial polyneuropathy by considering the disability to each affected cranial nerve. This resulted in six 10% ratings for the Applicant's unfitting facial polyneuropathy. The combined rating of 75% results in an 80% rating. The VA also determined that the Applicant is 100% permanently and totally disabled in the same decision letter.

o. As 75% is the maximum rate payable for military disability retirement calculations, the defendant owes the Applicant the difference in his military retirement between the 50% and 75% rates.

3. The counsel for the applicant submitted legal arguments consisting of five pages dated 20 December 2024. In addition, the entire administrative record from the court case, consisting of 7002 pages, was included in the supporting documents and available to the ABCMR board members.

4. A review of the applicant's service records show the following:

a. On 11 March 1999, the applicant was appointed a Reserve Commissioned Officer in the Army National Guard.

b. On 10 April 1999, he applied for Federal Recognition as a first lieutenant in the Judge Advocate (JAG) Corps.

c. On 20 June 2000, he was appointed a Reserve commissioned officer in the JAG Corps.

d. On 24 June 2020, he was ordered to active duty, following promotions to colonel and completion of multiple periods of active duty service.

e. On 21 September 2022, an informal PEB found the applicant physically unfit and recommended a rating of 50% and that his disposition be permanent disability retirement.

(1) The PEB determined the following medical conditions to be unfitting:

- Idiopathic polyneuropathy, right (dominant) hand, 20%
- Idiopathic polyneuropathy, left hand, 20%
- Idiopathic polyneuropathy, right foot, 10%
- Idiopathic polyneuropathy, left foot, 10%
- Idiopathic polyneuropathy, face, 0%

(2) The ratings were combined in accordance with VASRD, paragraph 4.25 and 4.26.

(3) The combined rating was 53% which was rounded to 50%.

(4) The voting membership of the PEB included an officer of the Reserve component.

(5) The applicant's disability retirement was due to a disability incurred in the LOD in a combat zone or as the result of performing combat related operations.

f. On 27 September 2022, the PEB Liaison Officer advised the applicant of the findings and recommendations of the Informal PEB, explained to him the result of the findings and recommendations, and advised him of his legal rights pertaining thereto.

g. On 4 October 2022, the applicant concurred with the findings and recommendations and waived a formal hearing of his case. Under the additional election for Soldiers determined unfit under IDIS upon the Soldier's review of the VA disability rating for the conditions determined to be unfitting, he requested one-time reconsideration of his disability ratings. He understood that the VA would reconsider ratings if new evidence was received or if he was able to provide sufficient justification to warrant reconsideration.

h. On 3 November 2022, a representative for the Secretary of the Army approved the findings of the Informal PEB.

i. Orders 313-0018, issued by the Headquarters, U.S. Army Garrison, Fort Carson placed him on the retired list, effective 27 November 2022, with a 50 % disability.

j. On 26 November 2022, he was honorably retired by reason of combat related disability. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 2 years, 5 months, and 3 days of net active service this period; with 5 years, 7 months, and 3 days of prior active service; and 14 years, 5 months, and 1 day of total prior inactive service.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered.
2. The Board determined the VA failed to conduct the necessary exams of the applicant's cranial nerves to properly rate the applicant's facial neuropathy while he was going through the Integrated Disability Evaluation System (IDES). The VA corrected its error by conducting exams and re-rating the applicant after he medically retired. Since the VA ratings of unfitting conditions determine the Army ratings in IDES, it would be an injustice if the Army does not correct the related Army records.
3. The applicant's unfitting conditions should be rated in accordance with the VA's corrected rating decision, dated 27 November 2023, with a combined rating of 80 percent for his unfitting conditions effective as of the date of his placement on the permanent disability retired list.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board determined that the evidence presented was sufficient to warrant correction of the applicant's military record. The Board recommends that all Department of the Army records of the individual concerned be corrected by showing he was retired for permanent disability with an 80 percent disability rating effective 26 November 2022, with placement on the Permanent Disability Retired List the following day. The Board

recommends that the record show the ratings of the applicant's unfitting conditions as follows:

- Idiopathic polyneuropathy, right hand – 20 percent
- Idiopathic polyneuropathy, left hand – 20 percent
- Idiopathic polyneuropathy, right foot – 10 percent
- Idiopathic polyneuropathy, left foot – 10 percent
- Idiopathic polyneuropathy, face, left fifth cranial nerve – 10 percent
- Idiopathic polyneuropathy, face, left seventh cranial nerve – 10 percent
- Idiopathic polyneuropathy, face, right fifth cranial nerve – 10 percent
- Idiopathic polyneuropathy, face, left tenth cranial nerve – 10 percent
- Idiopathic polyneuropathy, face, right seventh cranial nerve – 10 percent
- Idiopathic polyneuropathy, face, right tenth cranial nerve – 10 percent

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

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. 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. The ABCMR may in its discretion, hold a hearing (sometimes referred to as an evidentiary hearing or an administrative hearing) or request additional evidence or opinions. Applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

2. Title 10, USC, 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 and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with DOD Directive 1332.18 and Army Regulation 635-40 (Disability 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; 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 (Disability Evaluation for Retention, Retirement, or Separation) establishes the Army Disability Evaluation System (DES) 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. The Integrated Disability Evaluation System features a single set of disability medical examinations that may assist the DES in identifying conditions that render the Soldier unfit. Disabilities determined to be unfitting and compensable will be rated in accordance with the VA Schedule for Rating Disabilities. This rating will generally be determined by the VA and the DES applies the ratings to the unfitting conditions to determine the Soldier's Army rating.

4. Army Regulation 40-501 (Standards of Medical Fitness) provides information on medical fitness standards for induction, enlistment, appointment, retention, and related policies and procedures. Soldiers with conditions listed in chapter 3 who do not meet the required medical standards will be evaluated by an MEB and will be referred to a PEB as defined in Army Regulation 635-40 with the following caveats:

5. Title 10, USC, 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%. Title 10, USC, 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%.

6. Title 38, Code of Federal Regulations, Part IV is the VASRD. The VA awards disability ratings to veterans for service-connected conditions, including those conditions detected after discharge. As a result, the VA, operating under different policies, may award a disability rating where the Army did not find the member to be unfit to perform his duties. Unlike the Army, the VA can evaluate a veteran throughout his or her lifetime, adjusting the percentage of disability based upon that agency's examinations and findings.

7. DoD Manual 1332.18 states that the Services shall correct the records upon former Service members' successful appeal of disability ratings received in the DES and Service members may also appeal post-discharge to the VA and their respective Military Department Board for Correction of Military Records.

//NOTHING FOLLOWS//