IN THE CASE OF: [redacted]

BOARD DATE: 8 February 2024

DOCKET NUMBER: AR20220002700

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

- addition of constrictive bronchiolitis as an unfitting condition
- in effect, an increase in his disability rating

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- Self-Authored Statement
- Permanent Disability Retirement Memorandum, 19 October 2015
- Orders D 292-03, 19 October 2015
- Department of Veterans Affairs (VA) Rating Decision, 22 June 2015
- Surgical Pathology Report, 13 January 2016
- Dr. [redacted] Clinic Notes, 6 May 2016
- Decision Review Officer Decision (two copies), 26 September 2017
- Physician (Dr. [redacted]) Statement, 24 July 2020

FACTS:

1. The applicant did not file within the three-year time frame provided in Title 10, United States 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 he is requesting the addition of constrictive bronchiolitis, with a VA disability rating of 60%, to his list of unfitting conditions.

a. He believes the condition was not addressed or evaluated during his medical evaluation board (MEB). The diagnosis can only be made based on a Video Assisted Thoracic Surgery. His condition was longstanding and difficult to be diagnosed over several years during his processing through MEB/PEB. He was assured that he would be medically retired before it could be fully evaluated. He was referred to the MEB/PEB for breathing issues related to a sulfur fire in Northern Iraq the summer of 2003 and was

in the process of being diagnosed with a surgical biopsy during his MEB/PEB; however, since he already had submitted a VA Claim, it was not considered during that time as it was under appeal.

b. He was informed by the Soldier's MEB Counsel that if he pushed for the constrictive bronchiolitis to be diagnosed and rated, he would have his entire MEB cases dismissed as the burn pits, environment air issues, and actual diagnosis of constrictive bronchiolitis was a political issue. He underwent a surgical biopsy on 13 January 2016 and was formally diagnosed with constrictive bronchiolitis. It was subsequently added to his rating in September 2017 with an effective date of 24 March 2014. He was also medically retired from his civilian occupation following his MEB/PEB. He is requesting the condition be added to his current ratings.

3. The applicant provides:

a. The below listed documents to be referenced in the service record.

- Permanent Disability Retirement Memorandum dated 19 October 2015
- Orders D 292-03 dated 19 October 2015

b. A VA Rating Decision, dated 22 June 2015, notified the applicant he was granted service connected disability effective 29 May 2014 for the following:

- headache residuals of traumatic brain injury (TBI) – 30%
- idiopathic peripheral neuropathy, right upper extremity – 20%
- idiopathic peripheral neuropathy, left upper extremity – 20%
- idiopathic peripheral neuropathy, right lower extremity – 10%
- idiopathic peripheral neuropathy, left lower extremity – 10%
- hypertension – 0%
- cervical spondylitic disease and degenerative disc disease (DDD) – 0%
- dermatitis resolved with residual left cheek scar – increased from 0% to 30% effective 9 September 2014
- cognitive residuals of TBI and post-traumatic stress disorder (PTSD) with depressive disorder – increased from 30% to 40%
- irritable bowel syndrome (IBS) – continued at 30%
- tinnitus – continued at 10%
- 8 additional medical conditions denied

c. A Surgical Pathology Report, dated 13 January 2016, is illegible; however, provided to the Board for review.

d. Dr. [redacted] Clinic Notes, dated 6 May 2016, indicated he fully supported the applicant's request to include constrictive bronchiolitis as part of his disability profile.

The condition is clearly related to his deployment as documented by published studies. His normal x-rays and pulmonary function test are consistent with small airway disease. The U.S. Defense Health Board has acknowledged that constrictive bronchiolitis in this setting has usually been associated with normal x-rays and pulmonary function testing.

e. A Decision Review Officer Decision (two copies), dated 26 September 2017, includes the following:

- constrictive bronchiolitis – 60% effective 24 March 2014
- PTSD with TBI – 40%
- IBS – 30%
- posttraumatic headaches – 30%
- facial dermatitis scarring – 30%
- left upper extremity, peripheral neuropathy – 20%
- right upper extremity, peripheral neuropathy – 20%
- tinnitus – 10%
- right lower extremity, peripheral neuropathy – 10%
- left lower extremity, peripheral neuropathy – 10%
- fibromyalgia – 10%
- cervical degenerative disc and joint disease – 0%
- hypertension – 0%
- 14 additional medical conditions denied

f. A statement from Dr. [redacted], dated 24 July 2020, states the applicant is his patient related to the constrictive bronchiolitis due to his 2003 deployment to Northern Iraq. He was exposed to the Mishraq Sulfur Mine fire, burn pits, and dust storms. A second deployment followed in 2011 to Afghanistan where he was again exposed to burn pits. His shortness of breath began with his 2003 deployment. His surgical lung biopsy demonstrated constrictive bronchiolitis. He believes, more likely than not, the exposures of his 2003 deployment were the cause for his constrictive bronchiolitis. Please consider the 2003 date as the date of onset for his constrictive bronchiolitis and not the biopsy date of 2016. The applicant had no prior history of lung disease or exposure which would have placed him at risk for constrictive bronchiolitis.

g. The applicant also listed additional enclosures which were not included with the application.

- MEB Proceedings dated 4 November 2014
- New England Journal of Medicine Article dated 21 July 2011
- Appeal (2 pages) dated 24 March 2015
- Appeal (2 pages) by MEB Counsel dated 13 July 2015
- Applicant's Appeal (1 page) dated 13 July 2015

- Response to Appeal dated 27 July 2015
- VA Memorandum for Response to Appeal dated 1 October 2015

4. A review of the applicant's service record shows:

a. Having had prior enlisted service in the U.S. Army Reserve (USAR), the applicant served two periods of active duty:

- 13 June 1989 to 1 September 1989 for active duty training (ADT)
- 16 January 1995 to 14 February 1997 for ADT

b. The service record includes the applicant's medical evaluations for the purposes of commissioning with the applicant indicating he was generally in good health. The applicant was marked qualified for service.

- Standard Form (SF) 88 (Report of Medical Examination) dated 7 November 1995
- SF 93 (Report of Medical History) dated 7 November 1995

c. Orders 020-003, dated 30 January 1997, honorably discharged the applicant as a Reserve of the Army and appointed him in the Army National Guard (ARNG) effective 14 February 1997.

d. He was appointed as a Reserve commissioned officer and executed an oath of office on 14 February 1997.

e. Orders 045-032, dated 14 February 2003, ordered the applicant to active duty for a period not to exceed 365 days with a report date of 19 February 2003.

f. He served in Iraq from 29 March 2003 to 27 March 2004.

g. Orders 091-58, dated 31 March 2004, released the applicant from active duty, not by reason of physical disability, with an effective date of 25 April 2004.

h. He was honorably released from active duty on 25 April 2004. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 1 year, 2 months, and 7 days of active service. He was assigned separation code LBK and the narrative reason for separation listed as "Completion of Required Active Service."

i. Orders BN-074-0002, dated 15 March 2011, deployed the applicant in a Temporary Change of Station (TCS) status in support of Operation Enduring Freedom for a period not to exceed 358 days with an approximate proceed date of 18 March 2011. He entered active duty on 11 March 2011.

j. He served in Afghanistan from 19 March 2011 to 4 September 2011.

k. Orders 346-2250, dated 12 December 2011, released the applicant from active duty, not by reason of physical disability, with an effective date of 7 January 2012.

l. He was honorably released from active duty on 7 January 2012. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 9 months and 27 days of active service. He was assigned separation code MBK and the narrative reason for separation listed as "Completion of Required Active Service."

m. A DA Form 199 showed on 21 August 2015 an informal PEB convened and found the applicant physically unfit. The PEB recommended a combined rating of 60% and that the applicant's disposition be permanent disability retirement. On 2 September 2015, the applicant concurred with the findings and waived a formal hearing of his case. He did request reconsideration of his VA ratings. Additionally, the PEB made the following findings in Section V (Administrative Determinations) the disability disposition was based on disease or injury incurred in the line of duty in combat with an enemy of the United States and as direct result of armed conflict, and the disability did result from a combat related injury as defined under the provisions of 26 USC 104 or 10 USC 10216.

(1) His unfitting conditions listed in Section III (Medical Conditions Determined to be Unfitting):

- PTSD and major depression, single episode, with residuals of TBI (VASRD Codes 8045-9411) – 40%
- left upper extremity neuropathy/radiculopathy (VASRD Code 8512) – 20%
- right upper extremity neuropathy/radiculopathy (VASRD Code 8512) – 20%

(2) Other medical conditions listed in Section IV (Medical Conditions Determined Not to Be Unfitting):

- hypertension
- bronchiolitis due to exposure to sulfa fire with normal pulmonary function test (PFT)
- obstructive sleep apnea
- IBS
- mild cervical spondylotic disease and DDD
- patellofemoral syndrome, right knee
- patellofemoral syndrome, left knee strain
- bilateral ankle sprain
- scars, left cheek, residual of facial dermatitis

- small right plantar calcaneal spur
- chronic tear of anterior talofibular ligament, right ankle
- mild left metatarsal phalangeal degenerative joint disease (DJD)
- large plantar calcaneal bone spur
- tibiotalar SJD, left ankle
- memory loss
- headaches
- idiopathic peripheral neuropathy, bilateral lower

n. On 19 October 2015, the applicant was notified the U.S. Army Physical Disability Agency (USAPDA) found him to have a disability and he would be permanently retired with a disability rating of 60%.

o. Orders D 292-03, dated 19 October 2015, released the applicant from assignment because of physical disability incurred while entitled to basic bay and under conditions that permitted his retirement for permanent physical disability with an effective date of 23 November 2015.

p. Orders 299-081, dated 26 October 2015, released the applicant from the ARNG with an effective date of 22 November 2015 and placed him on the Permanent Disability Retired List (PDRL).

q. He was honorably discharged from the ARNG on 22 November 2015. His NGB Form 22 (National Guard Report of Separation and Record of Service) shows he completed 12 years, 9 months, and 12 days of net service.

5. On 16 May 2022, the USAPDA legal advisor rendered an advisory opinion in the processing of this case. She opined:

a. The applicant states his bronchiolitis condition "was not considered at my MEB/PEB Chapter 61 Retirement." This is contrary to the available record. A 4 November 2014 MEB determined that the bronchiolitis met retention standards. Upon request for a re-evaluation specific to bronchiolitis, the 6 February 2015 Independent Medical Review confirmed the determination that the condition met retention standards. A 21 August 2015 PEB determined the condition was not unfitting. The evidence strongly supports these findings. The applicant’s permanent profile for bronchiolitis was downgraded to a P2 on 4 November 2014 "as there is no clear evidence of an incapacitating P condition." The 29 July 2014 Commander's Statement notes that he did not perform to MOS duties and did not recommend retention. However, the Statement only addresses the applicant’s behavioral health condition, specifically his PTSD. There is absolutely no mention of bronchiolitis or duty restrictions due to bronchiolitis.

b. In accordance with 10 U.S.C. Chapter 61, military members will be compensated only for those conditions failing retention standards and which render a member unfit for continued duty. The record supports that the applicant's bronchiolitis condition did not fail retention standards and did not make him unfit for continued service. The findings of the MEB/PEB are supported by the evidence. The applicant has not provided any evidence to substantiate a change to the PEB disposition. Recommend no change be made to the PEB determination. We therefore find the applicant's request to be legal insufficient.

6. On 27 May 2022, the advisory opinion was forwarded to the applicant for acknowledgment and/or response. The applicant provided the following in his rebuttal:

a. A self-authored statement which indicates he had several years of failed respiratory diagnostic evaluations; however, he had increased breathing issues following his return from Afghanistan in 2011. His 22 June 2015 rating decision concluded his conditions were "Gulf War Syndrome," to include his conditions of asthma, fibromyalgia, and chronic fatigue. His evaluation for breathing issues was adjudicated until a Decision Review Officer Decision dated 26 September 2017 following his Vide Assisted Thoracic Surgical Biopsy in January 2016. His MEB did not take into consideration his constrictive bronchiolitis as it was on appeal as of 22 June 2015 and his appeal was deferred by his counsel on 2 March 2015. His MEB was further extended on numerous occasions due to the lack of diagnosis for bronchiolitis and was not adjudicated by the MEB because he did not have definitive diagnosis. He contends that if the diagnosis of constrictive bronchiolitis was confirmed during his MEB, as progressively worsening fatal lung disease, it should have been considered.

b. A VA Rating Decision, dated 18 March 2013, notified the applicant he was granted service connection for the following disabilities effective 16 September 2010:

- IBS – 30%
- PTSD and depressive disorder – 30%
- tinnitus – 10%

c. A memorandum dated 2 March 2015, from the Soldiers' MEB Counsel requesting additional time for the applicant to submit an appeal to the findings of his 4 November 2014 MEB. The additional time was required for the applicant to draft an appeal.

d. The below listed documents previously referenced as part of the applicant's attachments with the initial application:

- VA Decision Review Officer Decision dated 26 September 2017
- Physician (Dr. [redacted]) Statement dated 24 July 2020

7. By regulation (AR 635-40), the Army disability system 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 or her office, grade, rank, or rating. The regulation states 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.

8. 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.

9. Title 38, United States Code, 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.

10. Title 38, Code of Federal Regulations, Part IV is the VA's schedule for rating disabilities. 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/her 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.

11. MEDICAL REVIEW:

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:

a. The applicant has applied to the ABCMR requesting an additional medical condition be determined unfitting for continued military service and a corresponding increase in his combined military disability rating. He states:

"I am requesting the addition of constrictive Bronchiolitis (VA Rating of 60%) (6699-6602) to my list of unfitting conditions as it was not addressed or evaluated during my Medical Evaluation Board. The diagnosis can only be made based on a Video Assisted Thoracic Surgery. As this was a longstanding condition and a difficult pathway to be diagnosed over several years, when I was in the Medical / Physical Evaluation Board Process I was assured that I would not be medically retired before I was fully evaluated."

b. The Record of Proceedings details the applicant's service and the circumstances of the case. His National Guard Report of Separation and Record of Service (NGB Form 22) for the period of Service under consideration shows the former drilling officer (a physician assistant) entered the Army National Guard on 11 February 2003 and was honorably discharged from the [redacted] Army National Guard ([redacted] ARNG) on 22 November 2015 under provisions provided in paragraph 5b(1) of NGR 635-100, Termination of Appointment and Withdrawal of Federal Recognition: Separation or discharge from the State appointment as an officer of the Army National Guard. Orders Published by the United States Army Physical Disability Agency show the applicant was permanently retired for physical disability effective 23 November 2015 with a combined military disability rating of 60%.

c. A Soldier is referred to the IDES when they have one or more conditions which appear to fail medical retention standards as documented on a duty liming permanent physical profile. At the start of their IDES processing, a physician lists the Soldier's 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 conditions they believe to be service-connected disabilities in block 8 of section II or a separate Statement in Support of Claim (VA form 21-4138).

d. 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. All conditions are then rated by the VA prior to the Soldier's discharge. The physical evaluation board (PEB), after adjudicating the case sent them by the medical evaluation board (MEB), applies the applicable VA derived ratings to the Soldier's unfitting condition(s), thereby determining their 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.

e. On 18 August 2014, the applicant was referred to the IDES for "PTSD", "Asthma", and "Chronic inflammatory demyelinating polyneuropathy." He claimed fifteen additional conditions on his VA Form 21-0819. A medical evaluation board (MEB) determined his "Post Traumatic Stress Disorder" and "Major Depression" failed the medical retention standards of AR 40-501, Standards of Medical Fitness. They

determined that nineteen additional medical conditions met medical retention standards, including “Bronchiolitis due to exposure to sulfa fire with normal PFT {pulmonary function tests}, stable.” The applicant non-concurred, maintaining that his bronchiolitis should be determined to fail medical retention standards in combination with his lower extremity neurological issues, and he requested an independent medical review (IMR). The reviewing physician found the condition to meet medical retention standards both individually and in combination with other medical conditions:

> “BRONCHIOLITIS (EXPOSURE TO SULFA FIRE). Meets retention standards. The SM {Service Member} reported that his symptoms have worsened and that he is treated with steroids 3-4 times a year. Pulmonary function tests dated 17 September 2013 were normal. In constrictive bronchiolitis, PFTs may be normal or show obstructive changes with air trapping and tends to be progressive and less responsive to therapy. In proliferative bronchiolitis, a restrictive pattern is the most common and tends to be more responsive to therapy.

A high-resolution computed tomography study impression, dated 19 April 2013, was a normal unenhanced CT examination of the chest. In chest imaging, the most consistent abnormalities on HRCT are expiratory air trapping and bronchial wall thickening. In addition, a pattern of diffuse ground glass opacity and a mosaic pattern of attenuation. Cylindric bronchial dilation or bronchiectasis can be seen with constrictive bronchiolitis, particularly in cases related to transplantation, collagen vascular disease, inhalation of toxic fumes, and previous infection.

AR 40-501 Chapter 3, paragraph 3-41e1, Miscellaneous conditions and defects. Conditions and defects not mentioned elsewhere in this chapter are causes for referral to an MEB, if the conditions (individually or in combination) result in interference with satisfactory performance of duty as substantiated by the individual's commander or supervisor. Any medical condition, injury or defect (individually or in combination) that prevents the Soldier from performing any of the functional activities listed under item number 5 on DA Form 3349 (Physical Profile). The SM believes that in combination that all of his lower extremity conditions and Bilateral Upper/Lower Idiopathic Peripheral Neuropathy should fail retention standards. He reports that he has problems with no proprioception in his hands. numbness in his feet, falls and mobility issues.
His case, with the appeal and IMR, was forwarded to a physical evaluation board (PEB) for adjudication.

f. On 26 June 2015, the applicant’s informal PEB found his “Posttraumatic stress disorder and major depression, single episode with residuals of traumatic brain Injury” to be the sole unfitting medical condition for continued service. They determined the remaining eighteen conditions, including his bronchiolitis, were not unfitting for continued service. The applicant non-concurred with the Board’s findings, maintaining that his “bilateral upper extremity idiopathic peripheral neuropathy, bilateral lower

extremity idiopathic peripheral neuropathy, and irritable bowel syndrome" were also unfitting conditions for continued military service.

g. The applicant's appeal was considered, and on 21 August 2015, the PEB determined his "Left upper extremity neuropathy/radiculopathy" and "Right upper extremity neuropathy/radiculopathy" were also unfitting medical conditions. The PEB then applied the Veterans Benefits Administration (VBA) derived ratings of 40%, 20%, and 20% respectively, and recommended the applicant be permanently retired for physical disability with a combined military disability rating of 60%. On 1 September 2015, after being counseled on the informal PEB's findings by his PEB Liaison Officer (PEBLO), the applicant concurred with the informal PEB's findings and requested a VA reconsideration of his PTSD disability rating. From the VA 1 October 2015 response: "The evaluation of PTSD and major depression with residuals of TBI is continued at 40% disabling."

h. Medical documentation submitted with the application shows the applicant has been diagnosed with biopsy confirmed constrictive bronchiolitis. Review of the applicant's records in JLV show the applicant has a 60% service-connected disability rating for bronchial asthma. When the PEB evaluated his respiratory condition, then diagnosed simply as bronchiolitis, they determined it was not an unfitting condition, individually or in combination, for continued military service, i.e., it did not prevent the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his discharge. Thus, the applicant's new and more defined biopsy confirmed diagnosis of constrictive bronchiolitis would not have affected this fitness determination.

i. The VA Schedule for Rating Disabilities (VASRD) uses very similar criteria for rating these types of non-infectious respiratory conditions, to include Chronic bronchitis (diagnostic code (DC) 6600), bronchial asthma (DC 6002), pulmonary emphysema (DC 6603), and chronic obstructive pulmonary disease (6604). There is no DC for bronchiolitis per se, so it was rated as analogous to bronchial asthma. These rating are based on the results of PFT and medication(s) required to treat the condition. The criteria warranting a 60% rating for asthma:

"FEV-1 of 40 to 55 percent predicted, or; FEV-1/FVC of 40 to 55 percent, or; at least monthly visits to a physician for required care of exacerbations, or; intermittent (at least three per year) courses of systemic (oral or parenteral) corticosteroids"
Given his normal pulmonary function tests while he was in the DES process, the 60% rating for this condition strongly suggest this respiratory condition has progressed since his permanent retirement for physical disability. However, the DES compensates an individual only for 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. That role and authority is granted by Congress to the Department of Veterans Affairs and executed under a different set of laws.

g. Given no evidence of error or injustice, it is the opinion of the Agency Medical Advisor that neither an increase in his military disability rating nor a referral of his case to the DES is warranted.

BOARD DISCUSSION:

1. The Board carefully considered the applicant's request, supporting documents, evidence in the records, a medical review, and published Department of Defense guidance for liberal consideration of requests for changes to separations.

2. The Board concurred with the conclusion of the USAPDA legal advisor and the ARBA Medical Advisor that the applicant's diagnosis of constrictive bronchiolitis was properly considered during his DES processing and was properly found not to be unfitting. The Board noted his VA rating for this condition, but also noted that a finding of service-connected by the VA is reached using a different standard that the standard used by a PEB in determining if a condition is unfitting for continued military service. Based on a preponderance of the evidence, the Board determined there was no error or injustice in the PEB's determination that the applicant's bronchiolitis was not unfitting and his overall disability rating upon retirement was correct.

BOARD VOTE:

Mbr 1	Mbr 2	Mbr 3	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
[redacted]	[redacted]	[redacted]	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.

6/3/2024

X [redacted]

CHAIRPERSON

[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. Title 10, United States 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 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 (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 an MEB; when they receive a permanent medical profile rating of 3 or 4 in any factor and are referred by an 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 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 (Physical Evaluation for Retention, Retirement, or Separation) 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.

4. Army Regulation 40-501 (Standards of Medical Fitness) governs medical fitness standards for enlistment, induction, appointment (including officer procurement programs), retention, and separation (including retirement). The Department of Veterans Affairs Schedule for Rating Disabilities. VASRD is used by the Army and the VA as part of the process of adjudicating disability claims. It is a guide for evaluating the severity of disabilities resulting from all types of diseases and injuries encountered as a result of or incident to military service. This degree of severity is expressed as a percentage rating which determines the amount of monthly compensation.

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. Section 1556 of Title 10, United States Code, 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//