IN THE CASE OF: [redacted]

BOARD DATE: 7 March 2023

DOCKET NUMBER: AR20220007660

APPLICANT REQUESTS: a physical disability discharge or retirement in lieu of expiration of term of service discharge.

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

- DD Form 149 (Application for Correction of Military Record)
- Counsel's brief
- Inspector General (IG) letter, 8 January 2018
- Congressional letter, 28 June 2019
- DD Form 214 (Certificate of Discharge or Release from Active Duty)
- Inverted Rope Decent/The Slide for Life diagram
- Hospital Discharge Instructions, 31 May 1993
- Medical Record
- Emergency Medical Care/Incapacitation Data Report, 31 May 1993
- Line of Duty determination, dated 17 July 1992
- DA Form 2173 (Statement of Medical Examination and Duty Status), 31 May 1993
- NGB Form 22 (National Guard Bureau Report of Separation and Record of Service)
- Orders D-12-982854
- Screening and Crisis Intervention Program medical records
- Nursing Discharge Summary, 6 July 1996
- Emergency Room record, 29 June 1999
- Dr. [redacted] letter of support, 4 January 2008
- Dr. [redacted] letter of support, 4 October 2018
- Dr. [redacted] letter of support, 9 March 2004
- Dr. [redacted] letter of support, 25 June 2005
- Dr. [redacted] letter of support, 24 October 2006
- Dr. [redacted] letter of support, 31 October 2007
- Neurology Consult Results, 21 October 2013
- [redacted] ARNG Memorandum for Record, 12 July 2018
- handwritten sequence of events
- email, 1 April 2019

- IG letter, 8 November 2022
- Memorandum: Medical Review, 14 November 2022

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. Counsel states:

a. The applicant's discharge by expiration of term of service (ETS) should be amended to reflect a medical discharge/retirement based on a fall the applicant sustained on 31 May 1993 while on a period of annual training (AT) with his [redacted] Army National Guard ([redacted]ARNG) unit.

b. The applicant attended basic training and one station unit training (OSUT) at Fort Benning, GA and separated from active duty later that year to serve in a drilling status with the Guard. he was ordered to active duty for annual training from 22 May 1993 through 5 June 1993 at Fort Dix, NJ. On the morning of 31 May 1993, his unit was conducting training on the Obstacle Course. Around 1130 hours the applicant was on the Inverted Rope Descent/The Slide for Life" when he fell from the rope and hit the ground 40 feet below him. Unfortunately, this obstacle course did not have a safety net (as depicted in supporting documents) in place that would have stopped his fall. He lost consciousness and was transported to the emergency department at [redacted] Hospital [redacted] His spinal injuries were so severe that he was admitted to the hospital and remained there for approximately 3 days. The applicant received incapacitation pay through the National Guard for two months following his injury. his injuries were approved as in the line of duty and a DA Form 2173 was completed by his company commander.

c. The applicant was never able to fully return to his civilian position as a Certified Nursing Assistant and was forced to quit his job in December 1993. He was never able to fully function again as an Infantryman and was transferred to the Inactive Ready Reserve (IRR) in June 1994 and eventually discharged from the IRR in October 1995. Despite his requests to be medically evaluated as he was having continued issues from the 1993 injury, the applicant was later discharged from the US Army Reserve in 1999.

d. The applicant has been rated at 100 percent by the Department of Veteran Affairs (VA) since 2010. He first applied for benefits with the VA in 2008, so earlier medical documentation from the VA does not exist. The injuries he sustained in the fall were so severe and permanent that he was effectively rendered unfit for continued service and

should have been referred to a medical evaluation board. Had that happened, he would have been medically retired and would have been in receipt of additional benefits that he would not otherwise be entitled to. Specifically, he would have been a retiree and entitled to both medical, financial, and other ancillary benefits for approximately the past 25 years.

e. The applicant has suffered since 1993. He continues to receive care from the musculoskeletal injuries stemming from the fall. He reports debilitating headaches and other cognitive dysfunctions. In July 1996, he experienced such debilitating headache pain his behavioral health deteriorated. He was admitted to the hospital for behavioral concerns. He asserts this was due to the injuries from the fall. In June 1999, he was on drill weekend and experienced pain severe enough he went to the emergency room for treatment. He was diagnosed with heat stroke with dizziness and vomiting. The applicant believes this incident is related to his fall.

3. The applicant enlisted in the Army National Guard [redacted] on 18 June 1991. He was ordered to initial active duty for training and entered active service on 2 August 1991. He completed his training and was awarded the military occupational specialty (MOS) 11B (infantryman). He was honorably released from active duty for training on 1 November 1991.

4. A DA Form 2173 shows at approximately 1115 hours on 31 May 1993, at the confidence course at Fort Dix, NJ, the company was at the course doing obstacle course training when the applicant was at the top of the Slide for Life when he fell 40 feet from the tower. He was taken to [redacted] Medical Facility [redacted] for further treatment. His injury was determined to be in the line of duty.

5. The applicant was honorably discharged from the [redacted] ARNG and transferred to the IRR on 17 June 1994 for expiration of active Guard commitment. His NGB Form 22 shows in block 18 (Remarks): individual assigned to USAR control group for remaining 5 years' service obligation.

6. The applicant enlisted in [redacted] ARNG on 14 October 1994 for a period of 4 years 8 months 3 days.

7. The applicant was honorably discharged from the [redacted] ARNG and transferred to the IRR on 13 October 1995 for expiration of active Guard commitment. His NGB Form 22 shows in block 18: individual assigned to USAR control group for remaining 3 years 8 months 3 days' service obligation.

8. Orders C-04-913653 show the applicant reassigned to 1079 USAR Garrison Support Unit, Building 5428, Fort Dix, NJ 08640 effective 27 April 1999. Orders D-12-982854 show the applicant honorably discharged from the USAR effective 21 December 1999.

9. The applicant petitioned the ABCMR (AR20160002323) on 8 October 2013 concerning his rank/grade. Counsel provided an email, dated 1 April 2019, from ARBA confirming receipt of his documents.

10. The applicant petitioned the ABCMR (AR20210006358) on 8 October 2020 requesting his ETS discharge be changed to a disability related discharge or retirement. His request was returned without action for failure to exhaust all administrative remedies to correct the alleged error or injustice in his record. Counsel provided a letter from the IG of the [redacted]ANG, dated 8 November 2022, and a memorandum subjected: Medical Review, dated 14 November 2022, showing the applicant has now exhausted all administrative remedies.

11. Counsel provided:

a. The applicant's handwritten list of approximate timeframes of his contacting a variety of individuals and organizations.

b. A Line of Duty determination, dated 17 July 1992, an approved determination for the applicant to his unit. The date of this document is prior to the injury the applicant incurred on 31 May 1993.

c. Inverted Rope Decent/The Slide for Life diagram showing a safety net.

d. Hospital Discharge Instructions, dated 31 May 1993, showing the diagnosis as concussion and sinusitis. It shows no strenuous activity or contact sports until clinic visit. He was to report problems with fainting, dizzy spells or fever over 102 degrees.

e. An Emergency Medical Care/Incapacitation Data Report, dated 31 May 1993, reporting the applicants injury during a period of active training (AT) from 22 May 1993 to 5 June 1993. He was at the obstacle course on the Slide for Life tower when he fell. Multiple trauma cervical spine/ spine trauma/concussion/trauma. Further medical treatment is expected, and follow-up care will be required.

f. Screening and Crisis Intervention Program treatment records (8 pages) showing the applicant was receiving in-patient behavioral health care from 5 July 1996 to 6 July 1996.

g. A Nursing Discharge Summary, dated 6 July 1996, showing the applicant was discharged home from the hospital.

h. An Emergency Room record dated 29 June 1999, which is partially legible showing a diagnosis of dehydration accompanied by vomiting.

i. A letter of support from Dr. [redacted] dated 19 March 2004, stating the applicant had sought his care on 19 March 2004 for persistent symptoms related to his 31 May 1993 fall during a training exercise. He notes that over the years since this trauma, he has experienced progressive deterioration in his physical condition. He has used various methods of self-treatment, including topical analgesics and over the counter medication. He has also undergone a course of acupuncture. The applicant reported he experiences frequent neck pain and stiffness which radiates into his left arm with numbness and weakness of the left hand. He rated the pain 8/10. He reported frequent mid back pain and stiffness which radiates across the left ribcage and into the chest wall. He rated the pain 8/10. He reported frequent low back pain radiated into the left leg, with numbness and weakness. He rated the pain 7/10. He has difficulties with activities involving standing, sitting, lifting, bending, carrying, driving, sleeping, writing, and typing.

j. A letter of support from Dr. [redacted] dated 25 June 2005, stating the applicant has been under chiropractic care at a frequency of approximately one visit per week since his initial evaluation [19 March 2004]. Treatment has proved beneficial, with some reduction in pain and increase in range of motion. However, his conditions have not resolved and remain easily exacerbated.

k. A letter of support from Dr. [redacted] dated 24 October 2006, stating the applicant's physical examinations over the last few years have consistently revealed significant muscle spasms, tenderness to palpation, restricted ranges of motion of the cervical, thoracic and lumbar spine, as well as the bilateral shoulders, hips and right elbow. Orthopedic and neurologic examination procedures are indicative of cervical disc herniations, thoracic disc herniations, lumbar disc herniations, cervical, thoracic and lumbar spinal dysfunction, tendonitis of both shoulders, possible rotator cuff tears of both shoulders and tear of the right bicep's tendon. It is his opinion that the applicant's headaches and spinal complaints are directly resultant from the fall that occurred in 1993. The resultant spinal dysfunctions have secondarily caused shoulder, hip and elbow complaints/injuries during normal activities of daily living due to necessary compensation. He has tried a variety of health care approaches in an effort to deal with his chronic injuries. These include medication, acupuncture, and chiropractic. While he is afforded some relief, it is short-lived. It is obvious that his complaints are chronic and permanent. He will require on-going care on an as needed basis to control symptomatology. If this his spondylolisthesis becomes unstable, surgical fixation may be necessary. Other invasive procedures may prove necessary as more definite diagnoses are arrived at with additional advanced imaging procedures and electrodiagnostic tests.

l. A letter of support from Dr. [redacted] dated 31 October 2007, states as a direct result of the impact of the fall, the applicant has suffered a concussive force through the head and neck. This has resulted in post-concussive and cervicogenic headaches, as

well as a whiplash-like syndrome of neck pain, stiffness and nerve impingement affecting the upper extremities. Also, as a direct result of the concussive force to the lower back, the patient suffered soft-tissue injury to the lumbosacral spine, with resultant low back pain, muscle spasms and limitation of motion. As previously noted, this fall also likely fractured the lamina of the LS vertebra, which allowed forward misalignment, visible upon subsequent MRI examination. The trauma of the fall also, no doubt, damaged and weakened the lumbar discs, leaving the L4 disc prone to herniation, which ultimately occurred, as per subsequent MRI examination. The concussive force of the fall directed to the mid back also resulted in thoracic spine dysfunction, with concomitant muscle spasms, limitation of motion and chronic pain. Secondary to this chronic injury, the applicant has developed post-traumatic degenerative changes of the thoracic spine, which are visible upon x-ray examination. He also complaints of bilateral knee pain and stiffness, as well as bilateral shoulder pain, which are likely compensatory injuries, resulting from overuse, secondary to postural deformities and altered spinal biomechanics. Obviously, he has suffered a very severe trauma, which has resulted in significant, multi-region chronic injuries. These injuries continue to produce severe pain and limitation and show evidence of degenerating over the passage of time, as well as rendering the applicant prone to additional injury. The long term prognosis for complete resolution is poor.

m. A letter of support from Dr. [redacted] dated 4 January 2008, stating the applicant was seen for complaints of fatigue. weight gain: and chronic pain on 16 November 2007. At that time, additional lab studies were ordered and the results of previous studies/reports were requested and since reviewed. During active military duty the applicant was injured when he fell on the dorsal aspect of his spine from a height of greater than 40 feet. His medical workup since the initial injury revealed cervical sprain/strain, lumbar strain/sprain. grade I spondylolisthesis with bilateral pars defects, L4-5 disc protrusion. and degenerative changes in the thoracic spine. Since accident. the applicant has suffered with recurrent cervicogenic headaches, limited motion and chronic aching pain in his knees. shoulders, neck. thoracic spine. and lumbar spine. His pain increases with excessive movement and extended immobility. Nonprescription analgesics have not decreased his pain. He notes intermittent paresthesia down both legs. He states that he has not been able to exercise due to chronic musculoskeletal pain that worsens during exercise. He received chiropractic treatments but has not pursued further medical care due to a lack of medical benefits. The applicant noted that he has had significant weight gain since the accident. He denies incontinence, saddle paresthesia, and fever. He believes with a reasonable degree or medical certainty that the applicant's accident permanently injured his cervical, thoracic, and lumbar spine and is causality related to the development of chronic neck pain, chronic back pain, and dysmetabolic syndrome X (hypertension, truncal weight gain, dyslipidemia).

n. Neurology Consult Results, dated 21 October 2013, showing his chief complaint as having black-out episodes since 1993 after falling 50 feet and hitting the back of his

head, losing consciousness and hospitalized for 1 week while in the Army. The applicant stated he has been having blacking-out episodes since accident. Veteran i s not clear whether he is having seizures or not, stated he has blacking out episodes several times a week where he would be doing something then become unaware of what he was doing.

o. A letter of support from Dr. [redacted] dated 4 October 2018, states the applicant has been under his care since May 2011 for treatment of chronic musculoskeletal injuries stemming from a fall in 1993 while serving in the military wherein he reportedly suffered head trauma, traumatic brain injury and multiple spinal and pelvic injuries. In May of 2012, he performed a Residual Functional Capacity Questionnaire on behalf of the applicant and a copy of that document is included. Unfortunately, at this time, the results of a similar query would be identical for the majority of topics. Regarding the applicant's future well-being in the workforce, he sees complications in two respects. Primarily, traumatic brain injury survivors frequently suffer cephalgia, depression disorder, panic disorder and brain fog with no predictable pattern of onset. Secondly, spondylolisthesis at the lumbosacral joint is a structural mechanical disorder that precludes the patient from repetitive lifting, lifting moderate or bulky weight infrequently and prolonged sitting.

p. A [redacted]ARNG Memorandum for Record, dated 12 July 2018, states based on the limited medical documentation, the applicant was injured in a fall on 31 May 1993 while in a duty status. He fell approximately 30 feet. He complained of loss of consciousness, shoulder pain, back pain, and headaches. He received follow up care at Patterson Army Hospital during the month of June 1993. Based on his NGB Form 22 he was transferred to the IRR in June of 1994. In October 1995 he was discharged from the IRR. No medical records showing that he was Returned to Duty or was referred to a Medical Board were located. Due to the lack of documentation, it would be appropriate to error in favor of the applicant's request to be medically retired.

q. Inspector General (IG) letter, dated 8 January 2018, states after a review of the applicant's records from the State Archives Office, the G-1, Office of Enlisted Personnel is unable to amend his discharge records as there was no documentation indicating that he should have received a medical discharge.

r. A congressional letter, dated 28 June 2019, showing the applicant was referred to the ABCMR as the statutory authority to change his record.

12. Based on the applicant's contention the Army Review Boards Agency (ARBA) medical staff provided a medical review for the Board members. See "MEDICAL REVIEW" section.

13. 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.

14. Title 38, U.S. 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.

15. Title 38, CFR, 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 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.

16. 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, the Army Aeromedical Resource Office (AERO), and/or the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

a. The applicant is applying to the ABCMR requesting, in essence, a referral to the Disability Evaluation System (DES) and a medical retirement. He states through counsel: "The evidence supports that Mr. {Applicant} suffered a very bad fall in 1993 while serving in a duty status. The medical evidence overwhelmingly supports that his current symptoms have persisted since that fall some 27 years ago. Currently, his discharge reflects that he existed the military service due to an expiration of his term of service, but this is inaccurate. Granting this request would remedy the injustice created by the [redacted] National Guard when they discharged Mr. {Applicant} as a result of the expiration of his term of service. Granting Mr. {Applicant}'s request would allow his documentation to mirror the nature of his service and the reason that it ended. Granting this request would also restore both medical and financial benefits that Mr. {Applicant} has not been afforded as a result of the error in his discharge."

b. The Record of Proceedings details the applicant's military service and the circumstances of the case. The applicant's Report of Separation and Record of Service (NGB Form 22) for the period of Service under consideration shows the former drilling Guardsman enlisted in the Army National Guard on 18 June 1991 and was honorably discharged from the [redacted] National Guard ([redacted] ARNG) on 17 June 1994 under the provisions of paragraph 8-27t of NGR 600-200, Enlisted Personnel Management (1 February 1990): Expiration of Active Guard Commitment. It shows the applicant had 3 years, 0 months, and 0 days of total service for retired pay.

c. Medical documentation shows the applicant sustained a concussion and other injuries when he fell "35-40" feet on 31 May 1993 while negotiating an obstacle course during annual training.

d. Civilian medical documentation shows he was briefly hospitalized (approximately two days) for depression in July 1996 after he requested and was subsequently discharged.

e. From a 4 January 2008 civilian summary of care: "During active military duty, {Applicant} was injured when he fell on the dorsal aspect of his spine from a height of greater than 40 feet. His medical workup since the initial injury revealed cervical sprain/strain, lumbar strain/sprain, grade I spondylolisthesis with bilateral pars defects, L4-5 disc protrusion, and degenerative changes in the thoracic spine. Since {the} accident, {Applicant} has suffered with recurrent cervicogenic headaches, limited motion and chronic aching pain in his knees, shoulders, neck, thoracic spine. and lumbar spine. His pain increases with excessive movement and extended immobility. Nonprescription analgesics have not decreased his pain. He notes intermittent paresthesias down both legs. {Applicant} states that he has not been able to exercise due to chronic musculoskeletal pain that worsens during exercise. {Applicant} received chiropractic treatments but, has not pursued further medical care due to a lack of medical benefits."

f. From a 12 July 2018 memorandum from the Office of the [redacted] ARNG State Surgeon:(1) "1. Based on the limited medical documentation, PFC {Applicant} was injured in a fall on 31 May 1993 while in a duty status. He fell approximately 30 feet. He complained of loss of consciousness, shoulder pain, back pain, and headaches. He received follow up care at Patterson Army Hospital during the month of June 1993; (2) Based on his NGB Form 22, he was transferred to the IRR in June of 1994. In October 1995 he was discharged from the IRR; and (3) I cannot find any medical records showing that he was Returned to Duty or was referred to a Medical Board. Due to the lack of documentation, I feel that we should error in favor of the Soldier request to be medically retired."

g. In a 14 November 2022 Memorandum from COL [redacted] the [redacted]ARNG State Surgeon, SUBJECT: Medical Review for SPC {Applicant} [redacted] (1) As it pertains to SPC {Applicant}, the State Surgeon and I have carefully reviewed this case and have exhausted all medical resources (systems) and regulations; (2) IAW AR 40-501 Chapter 3, the Soldier would have to complete a medical board; (3) From an administrative position it appears based on the information provided, the Soldier was in a "medical hold" status for a period of a year and was separated by way of Expiration Term of Service (ETS); and (4) Due to the administrative separation, that confirms that for some reason the Soldier did not complete with the Integrated Disability Evaluation System."

h. Review of his records in JLV shows the applicant has been awarded multiple VA service-connected disability ratings. Several of these appear to be related to his injuries sustained in the fall, including ratings for both his cervical and lumbar spine as well as traumatic brain disease.

i. It is unknown why this Soldier was not referred to the Physical Disability Evaluation System after he sustained significant injuries from a fall more than one year prior to his separation, particularly given the fact there is no evidence he was ever returned to duty after the accident.

j. Paragraph 7-1 of AR 40-400, Patient Administration, states in part: "If the Soldier does not meet retention standards, an MEB is mandatory and will be initiated by the physical evaluation board liaison officer (PEBLO)." Note there is no mention of component or duty status. Paragraph 7-5b(5) is more direct for this case, stating that one of the situations which requires MEB consideration is "an RC member not on AD who requires evaluation because of a condition that may render him or her unfit for further duty."

k. Paragraph 2-9c of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (1 September 1990), identifies the errors made by his command: "The unit commander will – c. Refer a soldier to the servicing MTF for medical evaluation when the soldier is believed to be unable to perform the duties of his or her office, grade, rank, or rating."

l. It is the strong opinion of the ARBA Medical Advisor that a long overdue referral of his case to the DES is clearly warranted.

BOARD DISCUSSION:

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.

a. The evidence shows the applicant enlisted in the [redacted] ARNG on 18 June 1991 and was honorably discharged on 17 June 1994 due to expiration of term of service. The medical documentation shows the applicant sustained a concussion and other injuries when he fell "35-40" feet on 31 May 1993 while negotiating an obstacle course during annual training. The Office of the [redacted] ARNG State Surgeon stated in July 2018, the "Based on the limited medical documentation, the applicant was injured in a fall on 31 May 1993 while in a duty status. He fell approximately 30 feet. He complained of loss of consciousness, shoulder pain, back pain, and headaches. He received follow up care at Patterson Army Hospital during the month of June 1993. Based on his NGB Form 22, he was transferred to the IRR in June of 1994. In October 1995 he was discharged from the IRR. There are no medical records showing that he was Returned to Duty or was referred to a medical board. Due to the lack of documentation, an error may have occurred in his case.

b. The Board reviewed and agreed with the medical advisor's finding that the applicant should have been referred to the Physical Disability Evaluation System after he sustained significant injuries from a fall more than one year prior to his separation, particularly given the fact there is no evidence he was ever returned to duty after the accident. The Board determined that while a disability separation/retirement is premature, a referral of his case to the OTSG is appropriate.

BOARD VOTE:

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

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined that the evidence presented was sufficient to warrant a recommendation for partial relief. As a result, the Board recommends that all

Department of the Army records of the individual concerned be corrected by referring his records to The Office of the Surgeon General for review to determine if he should have been discharged or retired by reason of physical disability under the Legacy Disability Evaluation System (DES).

a. In the event that a formal physical evaluation board (PEB) becomes necessary, the individual concerned will be issued invitational travel orders to prepare for and participate in consideration of his case by a formal PEB. All required reviews and approvals will be made after completion of the formal PEB.

b. Should a determination be made that the applicant should have been separated under the DES, these proceedings will serve as the authority to void his administrative separation and to issue him the appropriate separation retroactive to his original separation date, with entitlement to all back pay and allowances and/or retired pay, less any entitlements already received.

2. The Board further determined that the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains changing his type of discharge without evaluation under the IDES.

3/7/2023

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, 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 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. 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.

4. 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.

5. AR 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. Once a determination of physical unfitness is made, all disabilities are rated using the Department of Veterans Affairs Schedule for Rating Disabilities (VASRD).

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.

6. AR 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). 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.

7. Section 1556 of Title 10, USC, 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//