

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 3 November 2023

DOCKET NUMBER: AR20220011285

APPLICANT REQUESTS: in effect, a physical disability retirement in lieu of separation with severance pay.

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

- ARBA online application
- DD Form 149 (Application for Correction of Military Record)
- Counsel's Brief
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- Orders D083-02
- VA Form 21-0781a (Statement in Support of Claim for Service Connection for Post-Traumatic Stress Disorder (PTSD) Secondary to Personal Assault)
- VA Form 21-2507(311) (Request for Physical Examination)
- Mental Health Progress Notes
- P_A_P_F_ statement of support
- Medical Record (9 pages)
- DA Form 199 (Physical Evaluation Board (PEB) Proceedings)
- DA Form 3947 (Medical Evaluation Board Proceedings)
- DA Form 3349 (Physical Profile)
- Department of Veteran Affairs (VA) Compensation and Pension (C&P) Exam Inquiry
- VA Personal Trauma Development Checklist
- VA Request for Medical Opinion of Post-Traumatic Stress Disorder (PTSD)
- VA Rating Decision Summary
- VA Rating Decision
- VA Medical Opinion Disability Benefits Questionnaire

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 served in the Army Reserve from 21 December 2001 to 15 April 2007 as a Civil Affairs Specialist. After suffering through multiple stressors, both from sexual assaults and combat deployment, the applicant was medically separated with a 10 percent rating for anxiety disorder. A closer examination of her documented symptoms at the time of her separation shows that the frequency and severity of these symptoms actually fit the criteria for a 30, or even a 70, percent disability rating. The evidence clearly demonstrates that the applicant should have been medically retired for an anxiety disorder at a rating of at least 30 percent, rather than medically separated with a 10 percent rating and a severance payment.

b. The applicant first discovered she should have been medically retired when the National Veterans Legal Services Program received her C-File on 17 September 2021 and advised her of such an error.

c. The applicant deployed to Iraq from August 2004 to August 2005. While on deployment, the applicant experienced traumatic events which led to the deterioration of her mental health, which she later detailed in a PTSD screening for the VA. Specifically, the applicant was sexually assaulted by multiple Soldiers in 2002, and sexually assaulted by a soldier in 2005 while on deployment in Iraq. She did not report either incident at the time as she felt an incredible amount of shame and guilt and reports that it took some time for her to identify the incidents described below as rape. Notably, however, the applicant did report experiencing Military Sexual Trauma (MST) to a military mental health provider on 31 October 2006.

d. In November 2002 on her first weekend pass, a large group of Soldiers (including the applicant) participating in Advanced Individual Training rented several hotel rooms and consumed alcohol. The applicant acknowledges consenting to sexual intercourse with one of the Soldiers, but, without her knowledge or consent, that Soldier invited six other Soldiers to the hotel room to watch and then to have sexual intercourse with the applicant without her consent and while she was in an out of consciousness. Her lack of consciousness was evidenced by one of the Soldiers telling the others that she was not awake, and that they should stop.

e. In 2005, while deployed in Iraq as a Specialist (E-4), the applicant became involved in a consensual sexual relationship with a Sergeant (E-5) who lived one Corrugated Housing Unit (CHUT) away from the applicant. During one of their encounters, the applicant clearly indicated that she did not want to have sexual intercourse with the Sergeant at that time because his roommates were present in his CHUT, which is about the size of a shipping container and offers little to no privacy. In spite of her refusal and without her consent, the Sergeant, who, notably, was of higher

rank at the time, pulled them blanket over himself and applicant, held down her wrists, and forced himself on her with his roommates present in the CHUT. The applicant attempted to struggle against the Sergeant, a bodybuilder nearly twice her size, when the attack began, but she could not make him stop and so she laid there lifeless while he penetrated her.

f. In addition to the MST, the applicant suffered numerous combat-related stressors related to her work in civil affairs which required her to leave base multiple times a week while deployed to Iraq from August 2004 to August 2005 which led to the deterioration of her mental health, which she later detailed in a PTSD screening for the VA. While driving a convoy vehicle in Samarra, Iraq, she heard a large explosion and saw U.S. Soldiers running and shooting in the rear-view mirror. She was focused so narrowly on the act of driving, it almost felt like she was somewhere else, which she later realized was a way to dissociate in order to deal with the stress. After returning from that incident to their forward operating base, the Soldiers found an unexploded rocket-propelled grenade (RPG) in the wall of their shelter, which was often an abandoned school or other building. She recalls, she felt a huge adrenaline rush and from that day until the end of her deployment, she felt like she was in an adrenaline induced dream state. In another incident, after three members of her unit were injured in Samarra, the applicant recalled, she felt herself fall apart on the inside, while maintaining a calm exterior. There was no crying. No shouting. Just the calm report from their First Sergeant. And they just went back to work. It broke her. The applicant experienced guilt and shame over her presence in Iraq after a civilian was badly hurt, and later when two interpreters were killed for having worked with the U.S. Soldiers.

g. As a result of these incidents, the applicant has found it difficult to remain employed because she has experienced or fears experiencing sexual harassment. The applicant has also struggled with alcoholism and normal sexual function. Her husband stated that the applicant couldn't be in closed doors with other men, causing it to be difficult to work with a group. He also reported that it was difficult for the applicant to feel safe even in consensual sexual encounters, and that she needed to see his face to know that it was him who she is having the interaction with and is quick to feel forced or trapped. Her pre-existing bulimia recurred and worsened after these incidents as evidenced by Dr. B_'s diagnosis in January 2007. She was also diagnosed with an anxiety disorder with panic attacks, post-traumatic stress symptoms, generalized anxiety symptoms, and obsessive-compulsive symptoms, as well as exhibiting borderline traits during this January 2007 medical appointment. On 12 February 2020, the applicant reported that she continues to struggle with panic attacks from perceived sexual harassment from colleagues as a result of these incidents and could only work remotely for the six years prior to that date because she is unable to work in office with men. She also stated that she would not be homeless and would not struggle with having sex if these incidents had not occurred.

h. Additionally, upon the applicant's immediate return from deployment, she noted sleeping difficulties, depressed mood and difficulty adjusting to certain situations. She did not immediately seek care, but became increasingly anxious and experienced sleep deterioration and regular panic attacks. By February 2006, she was experiencing panic attacks several times daily. In an attempt to manage her stress, the applicant sold her home and dropped out of school, but her panic worsened to the point where she began having daily thoughts of suicide, feeling that was the only way out.

i. In February 2006, she took several pills in a suicide attempt but woke up the next morning feeling sick. She sought help in March 2006, beginning with counseling and later starting on psychotropic medications Zoloft and Depakote. At her fitness for duty evaluation on 16 October 2006, she reported symptoms including frequent panic attacks as frequently as daily, tearfulness, bad dreams, poor sleep, excessive guilt, excessive worry, low energy, poor concentration, persistent thoughts of death and bad things happening to people in her life, increase startle, hypervigilance, avoidance, difficulty driving, difficulty crossing streets, and bingeing and purging behaviors along with persistent thoughts of suicide and obsessive and compulsive behavior. These symptoms worsened when she attended drill as part of her Reserve duties, communicated with members of the military or considered the possibility of deploying again.

j. The provider for her fitness evaluation diagnosed the applicant with anxiety disorder with post-traumatic stress and obsessive-compulsive symptoms and found that the condition had significant impact on her military duties. The provider concluded that the applicant failed to meet retention criteria in accordance with Army Regulation (AR) 40-501, para. 3-33. The applicant was given a permanent Physical Profile for her anxiety disorder on 17 October 2006. On 11 February 2007, the Medical Evaluation Board (MEB) confirmed that the applicant failed medical retention standards for her anxiety disorder and referred her to the Physical Evaluation Board (PEB).

k. The PEB convened on 3 March 2007 and gave the applicant a 10 percent rating for anxiety disorder secondary to deployment to Iraq during which time she was exposed to intense situations manifested by nightmares, emotionally numbing and avoidance of situations that remind her of the traumatic incident. The 10 percent rating was pursuant to Diagnostic Code (DC) 9413, 38 C.F.R. §4.130. The PEB further noted that the applicant was on anti-depressant and antianxiety medications with some improvement of her symptoms. Finally, the PEB found that her condition only had a mild impact on her industrial and social capabilities. The applicant was medically separated from the Army Reserve with a 10 percent rating for anxiety disorder on 15 April 2007.

l. The applicant requests that she be medically retired for her anxiety disorder with at least a 30 percent rating for this condition

m. Under 38 C.F.R. §4.130, a 10 percent disability rating is characterized by: occupational and social impairment due to mild or transient symptoms which decrease work efficiency and ability to perform occupational tasks only during periods of significant stress, or symptoms controlled by continuous medication. After reviewing the medical evidence of record, the PEB convened on 12 March 2007, and gave the applicant a 10 percent rating for anxiety disorder pursuant to DC 9413, 38 C.F.R. §4.130. Accordingly, the applicant was medically separated from the Army Reserve with a 10 percent rating for anxiety disorder on 15 April 2007. A closer analysis of the medical evidence of record shows that per the general schedule for rating mental disorders contained in 38 C.F.R. §4.130, the frequency and severity of the applicant's symptoms did not correspond with any part of the 10 percent rating, but closely aligned with a 30, or even a 70 percent, rating.

n. A 10 percent rating corresponds with mild symptoms, but the applicant's symptoms, panic attacks as often as daily, poor sleep, excessive guilt and worry, hypervigilance, bingeing and purging behaviors, persistent thoughts of suicide, and obsessions and compulsions, were far from mild, ranging from moderate to even severe. In fact, the MEB examination documented the applicant's Axis V Global Assessment of Functioning (GAF) Score (which indicates the patient's current level of function) at approximately 60. A 60 GAF score is assigned for moderate symptoms or moderate difficulty in social occupational or social functioning. Further, when the applicant sought treatment in August of 2006, the clinical specialist diagnosed the applicant with an Axis V GAF Score of 45. A score of 45 is characterized by serious symptoms or any serious impairment in social occupational or school functioning. Two assessments of the applicant's symptoms contemporaneous with her separation clearly indicate that her symptoms were far more severe than mild.

o. To warrant a 10 percent disability rating, symptoms can either be mild or transient which means they decrease work efficiency and ability to perform occupational tasks only during periods of significant stress. During the period preceding her PEB evaluation, the applicant had dropped out of her dream school, Cornell, and sold her home in New York to move in with her grandparents in order to decrease the stress she was facing and alleviate her symptoms. Despite these sacrifices, she continued to have to have panic attacks as frequently as daily, tearfulness, bad dreams, poor sleep, excessive guilt, excessive worry, low energy, poor concentration, persistent thoughts of death. The applicant's MEB examination noted that even with the subtraction of these stressors, her panic worsened. In March of 2006 the applicant began seeing a counselor, but her symptoms persisted. The fact that the applicant's symptoms persisted despite the removal of stressors and treatment by a counselor indicates that her symptoms were certainly not transient.

p. The PEB assigned the applicant a 10 percent rating based on its observation that the applicant was on anti-depressant and anti-anxiety medications with some

improvement in her symptoms. Not only does a finding of some improvement with medication not reach the standard of controlled by medication, it is an overstatement of the effect medications were having on the applicant, the applicant's MEB examination found the veteran's condition is only minimally improved despite treatment. As a twenty-two year old woman, the applicant was on 50 mg a day of Zoloft and 500 mg twice a day of Depakote with some benefit. Clearly, the applicant's medications were not controlling her symptoms.

q. Because the applicant's symptoms were moderate to severe (not mild), present even without stressors (not transient), and only somewhat improved by medications (not controlled by medication), then under the standard utilized by the PEB, the evidence does not support a 10 percent rating.

r. The applicant's anxiety symptoms exceeded the criteria for a 10 percent rating, and actually corresponded with 30 and 70 percent ratings. A 30 percent rating is associated with occupational and social impairment due to symptoms such as depressed mood, anxiety, suspiciousness, panic attacks (weekly or less often), chronic sleep impairment, mild memory loss. The applicant's MEB examination noted that when the applicant returned from Iraq, she experienced panic attacks that manifested as palpitations, hyperventilating, and feeling as though she was falling from a plane. The applicant continued to have to have panic attacks as frequently as daily, tearfulness, bad dreams, poor sleep, excessive guilt, excessive worry, low energy, poor concentration, persistent thoughts of death. The applicant's symptoms, which align almost exactly with those of a 30 percent rating, caused her occupational and social impairment including dropping out of her dream school, selling her home, and moving in with her grandparents. A side-by-side comparison of the applicant's symptoms and the characterization of a 30 percent rating are practically an exact match.

s. An argument could even be made that the applicant should have been rated 70 percent disabled at the time of her separation. A 70 percent rating is characterized by occupational and social impairment due to symptoms such as suicidal ideation, obsessional rituals that interfere with routine activities, and impaired impulse control. When the applicant sought treatment in August of 2006, her chief complaint was she's not sure what's going on with her, she's still having problems and it's been about a year. Under the suicide risk checklist, the specialist wrote: suicide ideation, suicide plan, history of previous attempts or gestures. Further, where asked to document the patient's thought content on the form, the specialist writes obsessions and details: excessive worrying about insignificant things. Finally, the specialist noted the applicant had impaired judgment. These symptoms, which exceed those typical of 30 percent rating, demonstrate just how insufficiently a 10 percent rating captured the applicant's state at the time of her separation.

t. Furthermore, the applicant continues to struggle with her mental health. She was rated 100 percent disabled for service-connected PTSD in a 7 July 2020 rating decision, effective 12 September 2019.

u. In addition, the PEB applied the wrong standard in assessing the applicant's condition. Military service branches must strictly apply the VASRD, 38 C.F.R. Part 4, when making medical separation and retirement decisions. This largely stems from the requirements for a disability retirement outlined in 10 U.S.C. §1201. Section 1201(b) provides that a disability retirement is warranted if the disability is at least 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs at the time of the determination (emphasis added). Despite the language in §1201, the DoD at that time instructed the service branches to rely on the provisions of Department of Defense Instruction (DoDI) 1332.39 when assigning a disability rating to an unfitting condition. DoDI 1332.39 classifies disability ratings for a mental health condition based on terms such as mild, definite, and considerable. At the time of the veteran's discharge, the VASRD did not base ratings on classifications such as mild or definite. The PEB improperly assigned a 10 percent rating based on its erroneous finding that her anxiety disorder had a mild impact on her industrial and social capabilities.

v. It is clear that the PEB used the wrong standard contained in DoDI 1332.39 to evaluate the veteran's anxiety disorder. Had the PEB properly analyzed her condition under 38 C.F.R. §4.130, the veteran would have been assigned a disability rating of at least 30 percent for her anxiety disorder. Since the National Defense Authorization Act of 2008, the PEBs as well as the BCMRs have been instructed to strictly apply the VASRD and are not allowed to use DoDI 1332.39.

w. The evidence demonstrates that the applicant's 10 percent disability rating at the time of her discharge is a gross mischaracterization of the frequency and severity of her symptoms. At the time of her separation, the applicant's symptoms easily match the criteria for a 30, or even a 70, percent disability rating. Furthermore, the PEB use the wrong standard to evaluate the applicant's condition, which reaffirms the impropriety of the 10 percent rating handed down. The record is clear, the applicant should have been medically retired for an anxiety disorder at a rating of at least 30 percent, rather than medically separated with a 10 percent rating and a severance payment.

3. The applicant underwent a medical examination on 20 December 2001 for enlistment. He DD Form 2808 (Report of Medical Examination) shows she had visual defects but was found qualified for service and assigned a physical profile of 111121. She enlisted in the United States Army Reserve the same day for a period of 8 years.

A physical profile, as reflected on a DA Form 3349 (Physical Profile) or DD Form 2808, is derived using six body systems: "P" = physical capacity or stamina; "U" =

upper extremities; "L" = lower extremities; "H" = hearing; "E" = eyes; and "S" = psychiatric (abbreviated as PULHES). Each body system has a numerical designation: 1 meaning a high level of fitness; 2 indicates some activity limitations are warranted, 3 reflects significant limitations, and 4 reflects one or more medical conditions of such a severity that performance of military duties must be drastically limited. Physical profile ratings can be either permanent or temporary.

4. The applicant's enlistment documents indicate she enlisted under the Alternate Training Program and attended initial active duty for training (IADT) on or about 20 June 2002 at Fort Jackson, SC. Orders 03-190-00005 show she completed her advanced individual training (AIT) on or about 9 July 2003 at Fort Bragg, NC and was awarded the military occupational specialty (MOS) 38A (civil affairs specialist).
5. The applicant was ordered to active duty in support of Operation Iraqi Freedom and served on active duty from 11 August 2005 to 9 August 2005. Her DD Form 214 she was awarded the Iraqi Campaign Medal.
6. The applicant completed a Functional Capacity Certificate on 2 August 2006 indicating she has medical condition that might prevent her from deploying; anxiety disorder, depression, and bulimia. She indicated had been treated for mental health condition in the past 5 years; anxiety disorder, PTSD, and depression. The examiner's findings concurred that the applicant's anxiety and depression and possible PTSD contribute to the physical limitations claimed. Those limitations were expected to be temporary with a duration limitation of 365 days.
7. The applicant underwent a medical examination on 2 August 2006 for the purpose of retention. The applicant reported the following medical history:
 - self-diagnosed bronchitis in fall 2005 and winter 2006
 - wearing contacts
 - knee pain for several months in spring 2005, self-diagnosed as runner's knee
 - stress fracture in ankles discovered between basic training and AIT
 - development of severe acne while in Iraq from 2004 to 2005
 - a fainting spell resulting in stitches on chin in summer 2003
 - anxiety/panic attacks from March 2006 to present
 - frequent trouble sleeping from August 2005 to November 2005 and March 2006 to present
 - counseling for acute stress disorder, PTSD, depression, and anxiety disorder from March 2006 to present
 - attempted suicide by taking a bottle of over the counter sleep aids; no treatment or hospitalization; still have suicidal thoughts
 - preservice marijuana use
 - yeast infection, fall of 2004

- she left school due to extreme anxiety and stress
- bulimia, consistent bingeing and purging since March 2005; preservice occasional binge/purge in early teens
- receiving counseling at VA for anxiety and depression; prescribed Prozac, discontinued use after one week

8. The corresponding DD Form 2808 shows she was found qualified for service and assigned a physical profile of 111113. It identifies depression as a significant or disqualifying defect. Summary of Defects and Diagnosis shows anxiety, depression, possible PTSD, suicidal gesture, and bulimia. It was recommended she undergo evaluation by military psychiatrist.

9. A DA Form 3349 (provided by counsel), dated 16 October 2006, shows the applicant was assigned a permanent physical profile of 111114 for anxiety disorder NOS with panic, generalized anxiety, PTSD, and obsessive compulsive symptoms. An additional DA Form 3349, dated 26 October 2006, shows she was assigned a permanent physical profile of 111113 for depression.

10. A memorandum, subjected: Results of Retention Physical Examination, dated 1 November 2006, states the [applicant] is physical fit for retention under the provisions of AR 40-501, Standards of Fitness. Results of physical examination requires command surgeon to review and/or take appropriate action. The [applicant] has one or more abnormal findings as indicated on the DD Form 2080, Report of Medical Examination; and requires follow-up with a civilian medical provider. In accordance with paragraph 9-3, AR 40-501, this is the [applicant]'s responsibility and is to be done at no expense to the Army Reserve. The service member will provide copies for the military health record of any documentation from a civilian medical provider pertaining to the follow-up. The following abnormal findings require follow up: Over MAW and PAP result.

11. A DA Form 3947 (provided by counsel), dated 11 February 2007, shows a MEB convened and found the applicant had the following conditions: Anxiety Disorder NOS and Bulimia Nervosa, purging type, which do not meet retention standards. These conditions were incurred while entitled to base pay, did not exist prior to service and were permanently aggravated by service. The MEB recommended referral to the PEB.

12. A DA Form 199 (provided by counsel) shows:

a. An Informal PEB convened on 12 March 2007, wherein the applicant was found physically unfit with a recommended rating of 10 percent and that her disposition be separation with severance pay.

b. The applicant was found unfit for anxiety disorder, NOS, secondary to deployment to Iraq during which time she was exposed to intense situation manifested

by nightmares, emotionally numbing and avoidance of situation that reminder her of the traumatic incident. [She] is on anti-depressant and anti-anxiety medications with some improvement of her symptoms. [Her] commander stated that she has an excellent work ethic but that her performance of duties have been limited by her medical condition. [She] is competent to make legal, medical and financial decisions. Her psychological conditions has a mild impact on her industrial and social capabilities.

c. Bulimia nervosa, purging type, does not constitute a physical disability and is not ratable in the absence of an underlying ratable causative disorder as specified in DODI 1332.38, ES.1.3.9.5, November 14, 1996. This condition existed prior to the [applicant]'s entrance onto active duty.

d. The PEB made the following administrative determinations:

(1) The disability disposition is based on disease or injury incurred in the line of duty in combat with an enemy of the United States and as a direct result of armed conflict or caused by an instrumentality of war and incurred in the line of duty during a period of war as defined by law.

(2) Evidence of record reflects the individual was a member or obligated to become a member of an Armed Force or Reserve thereof, or the NOAA or the USPHS on 24 September 1975.

(3) The disability did result from a combat-related injury under in 26 USC 104.

13. Orders D083-02 show the applicant's effective date of separation as 15 April 2007. It states she is entitled to disability severance pay with a disability rating of 10 percent. The disability did not result from a combat-related injury.

14. A memorandum for commander, subjected: Physical Disability Separation, dated 27 March 2007, directing action be taken by the applicant's unit to ensure she is paid severance pay. She is credited 7 months and 19 days of active service and 4 years, 9 months, 27 days of service for basic pay.

15. A memorandum, subjected: Medical Physical Status, dated 6 November 2007, states the applicant was discharged prior to the medical review. Therefor a medical retention determination will not be made and a temporary disqualification code has been placed.

16. Counsel provided:

a. A statement of support from P_A_P_F_, the applicant's spouse attesting to her impairment.

b. A VA Form 21-0781a (Statement in Support of Claim for Service Connection for Post-Traumatic Stress Disorder (PTSD) Secondary to Personal Assault) completed on 12 February 2020, detailing the two (2) incidents of sexual assault and how they impacted her.

c. A VA Form 21-2507(311) (Request for Physical Examination), dated 6 May 2020, requesting a general medical examination with special attention for her claimed PTSD due to MST.

d. A VA Request for Medical Opinion of Post-Traumatic Stress Disorder (PTSD) directing the applicant be provided an examination in order to develop a medical opinion to be used to determine her diagnosis of PTSD.

e. The applicant's VA Rating Decision Summary and VA Rating Decision, both dated 7 July 2020, showing she was awarded a rating of 100 percent for PTSD effective 12 December 2019.

f. The applicant's medical records as follows:

- Mental Health Progress Notes
- Medical Record (9 pages)
- Department of Veteran Affairs (VA) Compensation and Pension (C&P) Exam Inquiry
- VA Personal Trauma Development Checklist
- VA Medical Opinion Disability Benefits Questionnaire

17. On 6 March 2023, the ABCMR requested the Army Criminal Investigation Command conduct a search and provide a redacted CID or MP reports related to the applicant. On 10 March 2023, the Army Criminal Investigation Division advised their search revealed no records pertaining to the applicant.

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

19. 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.

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.

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.

20. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. Documentation reviewed included the applicant's ABCMR application and accompanying documentation, the military electronic medical record (AHLTA), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant is applying to the ABCMR requesting an increase in her military disability ratings with a subsequent change in her disability disposition from separated with disability severance pay to permanently retired for physical disability. Counsel states "The Physical Evaluation Board erred in making a 10 percent disability determination for [REDACTED] anxiety, which merited at least a 30 percent rating."

c. The Record of Proceedings details the applicant's service and the circumstances of the case. Discharge orders published by the United States Army Physical Disability Agency show the former USAR Soldier was separated with disability severance pay on 15 April 2007 under provisions provided in Chapter 4 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (8 February 2006). The orders show the condition was determined not combat related.

d. On 11 October 2006, the applicant was placed a permanent duty limiting physical profile for "Anxiety disorder NOS [not otherwise specified] with panic, generalized anxiety, PTSD, and obsessive-compulsive symptoms. Her subsequent medical evaluation board (MEB) determined her "Anxiety Disorder NOS" and "Bulimia Nervosa, purging type" did not meet the medical retention standards of AR 40-501, Standards of Medical Fitness; and her case was forwarded to a physical evaluation board (PEB) for adjudication.

e. When the informal PEB convened on 12 March 2007, they determined her “Anxiety disorder, NOS, secondary to deployment to Iraq during which time she was exposed to intense situations” was unfitting for continued military service. They correctly determined the bulimia nervosa did not constitute a physical disability and was not ratable in the absence of an underlying ratable causative disorder as specified in DODI 1332.38 [Subject: Physical Disability Evaluation (14 November 1996)] E5.1.3.9.5.; and that the condition had existed prior to service. The Board made the administrative determination the mental health condition was combat related:

“The Soldier’s retirement is based on disability from injury or disease received in the line of duty as a direct result of armed conflict or caused by an instrumentality of war and incurring in line of duty during a period of was as defined by law.

The disability did result from a combat related injury as defined in 26 U.S.C. 104

f. The VA Schedule for Rating Disabilities (VASRD) is the document used by the military services to rate unfitting military disabilities. Paragraph B-1a and B1b of Appendix B to AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (8 February 2006):

B–1. Purpose of the Department of Veterans Affairs Schedule for Rating Disabilities (VASRD)

Congress established the VASRD as the standard under which percentage rating decisions are to be made for disabled military personnel. Such decisions are to be made according to Title IV of the Career Compensation Act of 1949 (Title IV is now mainly codified in 10 USC 61.)

Percentage ratings in the VASRD represent the average loss in earning capacity resulting from these diseases and injuries. The ratings also represent the residual effects of these health impairments on civil occupations.

g. Using the VASRD, the PEB derived and applied a rating of 10% and recommended the applicant be separated with disability severance pay. The elections page of the Informal Physical Evaluation Board (PEB) Proceedings (DA 199) was not completed.

h. Based on her examination of record, the 10% rating appears to have been inappropriately low. The applicant’s 16 October 2006 MEB behavior health narrative summary notes her functioning/symptoms at the time of evaluation:

“More recently, she has been started on the psychotropic medications Zoloft and Depakote with some benefit. At this time, she continues to have panic attacks as frequently as daily, tearfulness, bad dreams, poor sleep, excessive guilt, excessive worry, low energy, poor concentration, persistent thoughts of death.”

- i. The provider documented a fairly normal mental status evaluation:

MENTAL STATUS EXAMINATION:

Appearance/Dress: Neat and well-groomed

Fully alert, cooperative, and oriented.

Mood described as anxious; affect is congruent.

Speech is fluent.

Thought processes are generally linear and goal directed with some tangentiality.

Thought content is negative for any psychotic symptoms

Suicidal/Homicidal Ideation: She has persistent suicidal thoughts without plan. She has no homicidal ideation

- j. Mental health conditions are all rated using the same scale, one which is based upon how much the condition affects the Veterans occupational and social abilities:

General Rating Formula for Mental Disorders:

Total occupational and social impairment, due to such symptoms as: gross impairment in thought processes or communication; persistent delusions or hallucinations; grossly inappropriate behavior; persistent danger of hurting self or others; intermittent inability to perform activities of daily living (including maintenance of minimal personal hygiene); disorientation to time or place; memory loss for names of close relatives, own occupation, or own name100

Occupational and social impairment, with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood, due to such symptoms as: suicidal ideation; obsessional rituals which interfere with routine activities; speech intermittently illogical, obscure, or irrelevant; near-continuous panic or depression affecting the ability to function independently, appropriately and effectively;

impaired impulse control (such as unprovoked irritability with periods of violence); spatial disorientation; neglect of personal appearance and hygiene; difficulty in adapting to stressful circumstances (including work or a worklike setting); inability to establish and maintain effective relationships70

Occupational and social impairment with reduced reliability and productivity due to such symptoms as: flattened affect; circumstantial, circumlocutory, or stereotyped speech; panic attacks more than once a week; difficulty in understanding complex commands; impairment of short- and long-term memory (e.g., retention of only highly learned material, forgetting to complete tasks); impaired judgment; impaired abstract thinking; disturbances of motivation and mood; difficulty in establishing and maintaining effective work and social relationships50

Occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks (although generally functioning satisfactorily, with routine behavior, self-care, and conversation normal), due to such symptoms as: depressed mood, anxiety, suspiciousness, panic attacks (weekly or less often), chronic sleep impairment, mild memory loss (such as forgetting names, directions, recent events)30

Occupational and social impairment due to mild or transient symptoms which decrease work efficiency and ability to perform occupational tasks only during periods of significant stress, or; symptoms controlled by continuous medication10

k. It is this VASRD trained physician’s opinion that her behavioral health condition warranted a 30% rating based upon the contemporaneous examination. Though she did claim panic attacks as frequently as once a day - a criterion for a 50% rating - her mental status exam revealed none of the thought processing issues of a 50% rating. Given this lack of thought possessing issues and that her commander is noted to have said she had an excellent work ethic but that her performance of duties was limited by her condition, a 30% rating best represents the clinical picture at that time.

l. Ratings documentation shows she was first awarded a service connected disability rating for PTSD on 12 September 2019 (100%).

m. The awarding of a higher VA rating does not establish prior error or injustice. A disability rating is intended to compensate an individual for interruption of a military career after it has been determined that the individual suffers from an impairment that disqualifies him or her from further military service. The rating derived from the VA

Schedule for Rating Disabilities reflects the disability at the point in time the VA exams were completed. The DES has neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions incurred during or permanently aggravated by their military service. These roles and authorities are granted by Congress to the Department of Veterans Affairs and executed under a different set of laws.

n. It is the opinion of the Agency Medical Advisor the applicant should be permanently retired for physical disability with a 30% percentage of disability effective 15 April 2007; and the documentation should show her disability is combat related.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found relief was warranted. The Board carefully considered the applicant's request, supporting documents and evidence in the records. The Board noted that the applicant served a period of active duty in Iraq, afforded evaluation by an informal Medical Evaluation Board and determined to not meet medical retention standards. Subsequently, her case was forward for adjudication by a physical evaluation board. The Board determined that her mental health condition was combat related and for physical disability with a 30% percentage of disability effective 15 April 2007 and documentation should show her disability is combat related. After due consideration of the request the Board, the Board agreed that a recommendation for relief is warranted.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

█	█	█	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board determined the evidence presented is sufficient to warrant a recommendation for relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected to show she was permanently retired with a 30% combat-related physical disability effective 15 April 2007.

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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. Army Regulation (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, U.S. 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.

8. On 25 August 2017, the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to DRBs and BCM/NRs when considering requests by veterans for modification of their discharges due in whole or in part to: mental health conditions, including PTSD, traumatic brain injury, sexual assault, or sexual harassment. Boards are to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based, in whole or in part, on those conditions or experiences.

//NOTHING FOLLOWS//