

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 12 December 2023

DOCKET NUMBER: AR20230001470

APPLICANT REQUESTS:

- personal appearance before the Board
- correction of his DA Form 18 (Revised Physical Evaluation Board (PEB) Proceedings) dated 17 December 2012, to show, in effect, for all unfitting conditions as "Yes" in item 10 (If Retired because of Disability, the Board Makes the Recommended Finding that):
 - item 10A: The Soldier's Retirement is Based on Disability from Injury or Disease received in the Line of Duty (LOD) as a Direct Result of Armed Conflict or Caused by an Instrumentality of War and Incurring in the LOD during a Period of War as Defined by Law, and
 - item 10C: Disability did Result from a Combat-Related Injury as Defined in Title 26, U.S. Code

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

- DD Form 149 (Application for Correction of Military Record)
- self-authored statement
- two DA Forms 2823 (Sworn Statement), both dated 10 March 2008
- Dwight David Eisenhower Army Medical Center (DDEAMC) memorandum (Delegation to Act as Final Approval Authority for Line of Duty Investigations (LODI)), dated 9 July 2008
- DDEAMC memorandum (LODI approval), dated 1 July 2009
- Department of Veterans Affairs (VA) Form 21-0819 (VA/DOD Joint Disability Evaluation (DES) Board Claim), dated 4 May 2010
- VA Form 21-4138 (Statement in Support of Claim), dated 4 May 2010
- Joint DoD/VA Disability Evaluation Pilot Referral, dated 4 May 2010
- DA Form 2173 (Statement of Medical Examination and Duty Status), dated 30 August 2010
- Standard Form 600 (Chronological Record of Medical Care) 2 pages, dated 19 November 2010
- DA Form 3947 (Medical Evaluation Board (MEB) Proceedings), dated 2 February 2011

- eight Headquarters, U.S. Army Medical Department Activity (MEDDAC), Fort George G. Meade memoranda, dated between 17 February 2011 and 14 December 2012
- DA Form 199 (PEB Proceedings), dated 24 March 2011
- U.S. Army PEB letter, dated 24 March 2011
- partial VA memorandum, dated 7 April 2011
- DA Form 3349 (Physical Profile), dated 15 April 2011
- DA Form 199, dated 26 April 2011
- DA Form 751 (Telephone or Verbal Conversation Record), dated 7 June 2011
- undated email correspondence
- seven Soldiers' PEB Counsel memoranda, dated between 27 June 2011 and 5 December 2012
- email correspondence (written appeal for [applicant]), dated 29 June 2011
- U.S. Army Physical Disability Agency (USAPDA) Legal Advisor's memorandum, titled, "Disabilities Resulting from: Armed Conflict, Instrumentality of War, Conditions Simulating War, and Disabilities Incurred in a Combat Zone", dated 24 October 2011
- National Capital Region (NCR) PEB memorandum, dated 27 December 2011
- DA Form 199, dated 4 January 2012
- DA Form 199, dated 13 February 2012
- applicant Formal Election Statement of Understanding memorandum, dated 14 February 2012
- NCRPEB letter, dated 15 February 2012
- applicant rebuttal letter to NCRPEB, dated 27 February 2012
- DA Form 199, dated 11 May 2012
- DA Form 18, dated 7 September 2012
- applicant letter to USAPDA, dated 4 December 2012
- Johns Hopkins Medicine doctor's letter, dated 12 December 2012
- DA Form 18, dated 17 December 2012
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- VA Adult Psychiatric Nurse Practitioner's (NP) letter, dated 5 February 2014
- Hunter Holmes McGuire VA Medical Center (VAMC) doctor's letter, dated 12 May 2017

FACTS:

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

2. The applicant states:

a. His final DA Form 18, dated 17 December 2012, needs to be corrected to apply the "Yes" codes to items 10 A/C/D. He only recently became aware that applying to the Board was a remedy available to him as a process for correcting the errors on his DA Form 18, which occurred during his PEB appeal.

b. The conditions listed on his DA Forms 199 and DA Forms 18, under paragraphs 10A/C/D shows the PEB did not accurately reflect what conditions had been incurred in theater. He has attached all documents reflecting his appeals before the USAPDA. The LODI from the beginning demonstrated that the High Mobility Multipurpose Wheeled Vehicle (HMMWV) was an instrumentality of war. His multiple DA Forms 199 and DA Forms 18 show the USAPDA failed to consider his conditions as qualifying under paragraph 10 A/C/D, despite communications from his legal counsel and himself, as demonstrated in the attached documents for the Board's review.

3. The applicant's DA Form 5016 (Chronological Statement of Retirement Points) shows after multiple prior periods of honorable service in the Regular Army and U.S. Army Reserve (USAR) between 6 July 1981 and 14 December 1993, the applicant enlisted in the USAR on 17 December 2004, after a break in service.

4. A DD Form 214 shows the applicant was ordered to active duty in support of Operation Iraqi Freedom on 22 August 2005, with service in Iraq from 17 November 2005 through 11 May 2006. On 11 May 2006, he was honorably released from active duty due to completion of required service and transferred back to his USAR unit. He was credited with 7 months and 20 days of net active service this period.

5. A second DD Form 214 shows the applicant entered a period of active duty on 10 December 2006. He served in support of Operation Iraqi Freedom with service in Iraq from 12 January 2007 - 10 October 2007. Records indicate he applicant subsequently remained on active duty, for medical care and DES processing.

6. The applicant provided two DA Forms 2823, both dated 10 March 2008, and written while he was assigned to the Warrior Transition Unit (WTU), which show the following:

a. The first form shows the applicant states on an unspecified date while at Camp Victory, Iraq, he was riding his bicycle to work when he was hit and run over from behind by a military police HMMWV vehicle, causing him to fall on the road and injuring multiple body parts. This happened while they were receiving hostile fire, rocks, mortar fire, and incoming rounds, onto Camp Victory. He hurt his right hand, elbow, wrist, left elbow and wrist, badly hurt his head, neck, and back, hip, knees, and chest area. He was hurting everywhere he could think of. He already had an injury to his right shoulder for which he had surgery in May 2000, and he previously hurt his neck during lane training for his first deployment while mobilizing for Iraq. The motor vehicle accident (MVA) aggravated his conditions. He was taken to the Troop Medical Clinic (TMC)

Goby, where he received treatment then was medically evacuated (MEDIVAC'd) to Landstuhl, Germany, for treatment, then transfer to a Medical Treatment Facility (MTF) in the States at Jacksonville Naval Medical Base. He was later transferred to Fort Stewart, GA for treatment and two surgeries, tonsillectomy and a Nissen Fundoplication (treatment for gastrointestinal conditions such as hiatal hernia and gastroesophageal reflux disease (GERD)).

b. The second form shows the applicant states on or about May 2007, he was hit by the hatch of the HMMWV that he was operating. While waiting to pick up the Deputy Commander, Task Force (TF) 134 at the Baghdad Airport, the hatch came loose and hit him. He was taken to the Goby TMC where he was treated and then MEDIVAC'd out from Baghdad, Iraq, to Landstuhl, Germany. While at Landstuhl, he received treatment for his migraine headaches that were aggravated by being hit with the hatch of the HMMWV. He saw Dr. F_____ of Neurology and told him his migraines were getting worse because of all the incoming fire, and daily mortars and rockets. Dr. F_____ put him on a treatment plan with new medications and he was then sent back into the theater to TF 134, in Baghdad, Iraq.

7. A Headquarters, Dwight David Eisenhower Army Medical Center memorandum, dated 1 July 2009, shows an LOD Investigation found an unspecified condition, illness, or injury to have been approved as in the LOD.

8. A VA Form 21-0819, dated 4 May 2010, shows the following:

a. The applicant listed the following conditions to be considered as the basis of a fitness for duty determination:

- irritable bowel syndrome (IBS)
- bilateral ulnar neuropathy
- chronic neck pain
- migraine headaches

b. As additional conditions, other than those referred for the fitness for duty determination, the applicant listed the following conditions he felt were also incurred in or aggravated by his active military service:

- high blood pressure
- high cholesterol
- right testicular hydro seal
- cyst on right kidney
- two ulcers
- uvala in right of neck after tonsillectomy
- carpal tunnel syndrome, bilateral

- bilateral knee pain
- bilateral wrist pain
- thyroid condition
- malabsorption pain
- murmur head
- dyschromia (skin mottling)
- myalgia and myositis (muscle pain and inflammation)
- chronic serous otitis media (middle ear inflammation)
- eustachian tube dysfunction
- focal torsion dystonia (involuntary sustained muscle contractions leading to abnormal postures)
- insomnia

9. A VA Form 21-4138, also dated 4 May 2010, shows the following additional conditions the applicant listed as incurred in or aggravated by his military service, that did not fit in the appropriate block on the above VA Form 21-0819:

- presbyopia (progressive loss of near eye focusing due to aging)
- myopia (eye condition where a person can see only near objects clearly)
- skin condition
- dysphagia (difficulty swallowing food or liquid)
- hemorrhoids
- polyuria (frequent urination)
- spermatocele (fluid filled cyst in the epididymis above the testicles)
- TMJ (temporomandibular joint dysfunction)
- medial epicondylitis (painful inflammation of tendons around elbow)
- achalasia (difficulty for food and liquid to pass through the food pipe into the stomach)
- herpes of the mouth
- right shoulder condition
- upper back condition
- adjustment disorder with anxiety
- panic disorder without agoraphobia
- ulnar nerve palsy of left arm
- ulnar nerve palsy of right arm
- lower back pain
- chronic reflux esophagitis
- refractive bilateral eye condition

10. A DA Form 2173 shows the following:

a. The Patient Administrator signed the form on 30 August 2010, that applicant was seen as an outpatient at Walter Reed Medical Center for an injury to his right shoulder, recurrent, dislocation, from an MVA in Iraq in July 2007. The applicant was in an active-duty status in Iraq when he was riding his bicycle to work and was hit and run over by a Military Police HMMWV, while receiving incoming hostile fire at Camp Victory, Iraq. He fell to the road, injuring his right shoulder, knees, hands, elbows, hip, neck, back, head and chest area. He was taken to the Goby TMC in theater for treatment then MEDEVAC and transferred to an MTF for further evaluation and treatment.

b. On 30 August 2010, the applicant's unit commander signed the form indicating a formal LOD investigation was not required, and the injury was considered to have been incurred in the LOD.

11. A Standard Form 600, dated 19 November 2010, shows the applicant was seen at National Naval Medical Center (NNMC) Bethesda, Behavioral Health Clinic on the date of the form for evaluation and treatment of mood and anxiety symptoms. He related multiple incidents from deployment to Iraq to include mortar attacks and witnessing the death and severe wounding of fellow Soldiers. He was diagnosed with PTSD, and it is noted that the existence of his PTSD symptoms appear to have aggravated other medical conditions, especially his gastro-intestinal (GI) symptoms.

12. The applicant's DA Form 3349 dating before his MEB, DA Form 7652 (DES Commander's Performance and Functional Statement), MEB Narrative Summary (NARSUM), VA Compensation and Pension (C&P) Exam, and VA Rating Decision are not in his available records for review and have not been provided by the applicant.

13. A DA Form 3947 shows the following:

a. An MEB convened on 2 February 2011, where the following conditions were found medically unacceptable and incurred while entitled to base pay:

- PTSD
- mood disorder, not otherwise specified (NOS)
- GERD
- IBS
- bilateral ulnar neuropathy
- cervical strain
- headache syndrome
- fibromyalgia
- myofascial pain syndrome
- generalized myalgias

b. The following conditions were found medically acceptable:

- somatoform disorder
- personality disorder
- non-obstructive coronary artery disease
- hypertension
- hyperlipidemia
- hemorrhoids
- impotence
- hyperactive bladder
- spastic bladder
- spermatocele
- renal cyst
- right shoulder rotator cuff injury
- bilateral chondromalacia
- bilateral wrist strain
- recurrent otitis media
- tinnitus
- TMJ syndrome
- acne
- herpes simplex
- presbyopia
- lumbar degenerative disease
- periodic limb movement disorder
- benign prostatic hypertrophy
- bilateral carpal tunnel syndrome

c. On 16 February 2011, the applicant signed the form indicating he did not agree with the MEB's findings and recommendation, and his appeal was attached. His appeal is not in his available records for review.

14. A Fort George G. Meade MEDDAC memorandum, dated 17 February 2011, and signed by the MEB physician, responds to the applicant's informal appeal of the MEB, addressing the medical acceptability determinations for the diagnoses of TMJ syndrome, lumbar degenerative disc disease, and carpal tunnel syndrome and has been provided in full to the Board for review. Upon review, TMJ syndrome, lumbar degenerative disc disease, and carpal tunnel syndrome remained medically acceptable.

15. The DA Form 3947 shows the appeal was considered on 24 February 2011, and the applicant's case was referred to a PEB. The applicant again signed the form on 28 February 2011, indicating he reviewed the response to his appeal and still disagreed with the findings.

16. The first of multiple DA Forms 199, shows the following:

a. An initial informal PEB convened on 24 March 2011, where the applicant was found physically unfit with an undetermined combined rating and undetermined recommended disposition, as the VA Rating was still pending.

b. Item 10 shows: If retired because of disability, the Board makes the recommended finding that:

(1) 10A: The Soldier's retirement is based on disability from injury or disease received in the LOD as a direct result of Armed conflict or caused by an instrumentality of war and incurring in the LOD as a direct result of armed conflict or caused by an instrumentality of war and incurring in LOD during a period of war as defined by law.

(2) 10B: Evidence of record reflects the Soldier was not 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) 10C: Disability did result from a combat related injury as defined in Title 26, U.S. Code, section 104 and for purposes of Title 10 U.S. Code, section 10216(G).

(4) Of note, there is no item 10D on this form, although 10D is referenced in the disability descriptions.

c. The applicant's unfitting conditions were as follows:

- PTSD; MEB diagnosis (Dx) 1-2; this is a battle injury and was caused by an instrumentality of and did occur in theater (10A/C/D – Yes)
- GERD; MEB Dx 3; this is not a battle injury nor caused by an instrumentality of war and did not occur in a combat theater (10A/C/D – No)
- IBS; MEB Dx 4; this is not this is not a battle injury nor caused by an instrumentality of war and did not occur in a combat theater (10A/C/D – No)
- left ulnar neuropathy; MEB Dx 5; this is not a battle injury nor caused by an instrumentality of war, but did originate in Iraq (10D – Yes)
- right ulnar neuropathy; MEB Dx 5; this is not a battle injury nor caused by an instrumentality of war but did originate in Iraq (10D – Yes)
- cervical strain; MEB Dx 6; this is not a battle injury nor was it caused by an instrumentality of war and did not occur in a combat theater (10A/C/D – No)
- headache syndrome; MEB Dx 7; this is not a battle injury nor caused by an instrumentality of war and did not occur in theater (10A/C/D – No)
- fibromyalgia; MEB Dx 8; this is not a battle injury nor caused by an instrumentality of war and did not occur in theater (10A/C/D – No)
- myofascial pain syndrome; MEB Dx 9; this is not a battle injury nor caused by an instrumentality of war and did not occur in theater (10A/C/D – No)

- generalized myalgias; MEB Dx 10; this is not a battle injury nor caused by an instrumentality of war and did not occur in theater (10A/C/D – No)
- d. MEB Dx 12, personality disorder, does not constitute a physical disability and is not ratable in the absence of an underlying ratable causative disorder.
- e. MEB Dxs 11, and 13-34 were not found unfitting as they are not listed on the Physical Profile as limiting any of the Soldier's functional activities, are not commented upon by the commander as hindering the Soldier's performance, and the case file contains no evidence that these Dxs independently or combined render the Soldier unfit for his assigned duties.
- f. Disability was incurred in a combat zone or incurred during the performance of duty in combat-related operations as designated by the Secretary of Defense.
- g. Soldier was psychiatrically injured while deployed to Iraq from 2006 – 2007, during a period of war.

17. A 24 March 2011 letter from the U.S. Army PEB to the VA requested they provide a disability rating percentage with rationale for the applicant's referred medically unacceptable conditions listed above (MEB Dx 1-10).

18. The applicant provided a partial VA memorandum, dated 7 April 2011, which advised the U.S. Army PEB of their proposed VA DES Rating Decision. The portion of the memorandum containing the proposed ratings is not in the applicant's available records for review.

19. A physical profile is used to classify a Soldier's physical disabilities in terms of six factors or body systems, as follows: "P" (Physical capacity or stamina), "U" (Upper extremities), "L" (Lower extremities), "H" (Hearing), "E" (Eyes), and "S" (Psychiatric) and is abbreviated as PULHES. Each factor has a numerical designation: 1 indicates 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.

20. A DA Form 3349, shows on 15 April 2011, the applicant was given a permanent physical profile rating of "3" in factors P, U, L, and S with a rating of 1 in all other factors, due to PTSD, depression, reflux disease, irritable bowel, ulnar neuropathy, chronic neck pain, headache syndrome, and diffuse muscle pain, which limited him in most functional activities.

21. A second DA Form 199 shows the following:

a. A PEB convened on 26 April 2011, where the applicant was found physically unfit with a recommended combined rating of 90 percent and that his disposition be placement on the Temporary Disability Retired List (TDRL) with reexamination during January 2012.

b. Item 10 shows: If retired because of disability, the Board makes the recommended finding that:

(1) 10A: The Soldier's retirement is based on disability from injury or disease received in the LOD as a direct result of Armed conflict or caused by an instrumentality of war and incurring in the LOD as a direct result of armed conflict or caused by an instrumentality of war and incurring in LOD during a period of war as defined by law.

(2) 10B: Evidence of record reflects the Soldier was not 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) 10C: Disability did result from a combat related injury as defined in Title 26, U.S. Code, section 104 and for purposes of Title 10 U.S. Code, section 10216(G).

(4) Of note, there is no item 10D on this form, although 10D is referenced in the disability descriptions

c. The applicant's unfitting conditions were as follows:

- GERD/IBS; MEB Dx 3-4; 60 percent; this is not a battle injury nor caused by an instrumentality of war and did not occur in a combat theater (10A/C/D – No)
- PTSD; MEB diagnosis Dx 1-2; 50 percent; this is a battle injury and was caused by an instrumentality of and did occur in combat theater (10A/C/D – Yes)
- left ulnar neuropathy; MEB Dx 5; 10 percent; this is not a battle injury nor caused by an instrumentality of war, but did occur in combat theater (10D – Yes)
- right ulnar neuropathy; MEB Dx 5; 10 percent; this is not a battle injury nor caused by an instrumentality of war but did occur in combat theater (10D – Yes)
- cervical strain; MEB Dx 6; 10 percent; this is not a battle injury nor was it caused by an instrumentality of war and did not occur in a combat theater (10A/C/D – No)

- headache syndrome; MEB Dx 7; 0 percent; this is not a battle injury nor caused by an instrumentality of war and did not occur in theater (10A/C/D – No)
- fibromyalgia/myofascial pain syndrome/generalized myalgias; MEB Dx 8-10; 0 percent; this is not a battle injury nor caused by an instrumentality of war and did not occur in theater (10A/C/D – No)

d. MEB Dx 12, personality disorder, does not constitute a physical disability and is not ratable in the absence of an underlying ratable causative disorder.

e. MEB Dxs 11, and 13-34 (somatoform disorder, non-obstructive coronary artery disease, hypertension, hyperlipidemia, hemorrhoids, impotence, hyperactive bladder, spastic bladder, spermatocele, renal cyst, right shoulder rotator cuff injury, bilateral chondromalacia, bilateral wrist strain, recurrent otitis medica, tinnitus, TMJ syndrome, acne, herpes simplex, presbyopia, lumbar degenerative disease, periodic limb movement disorder, and benign prostatic hypertrophy) meet retention standards/were not found unfitting as they are not listed on the Physical Profile as limiting any of the Soldier's functional activities, are not commented upon by the commander as hindering the Soldier's performance, and the case file contains no evidence that these Dxs independently or combined render the Soldier unfit for his assigned duties.

f. Disability was incurred in a combat zone or incurred during the performance of duty in combat-related operations as designated by the Secretary of Defense.

g. Soldier was psychiatrically injured while deployed to Iraq from 2006 – 2007, during a period of war.

h. On 11 May 2011, the applicant signed the form indicating he did not concur with the PEB's findings and demanded a formal hearing with personal appearance. He also indicated he requested a regularly appointed counsel to represent him with his PEB formal hearing.

22. A DA Form 751 reflects a telephone conversation record, dated 7 June 2011, wherein the applicant withdrew his demand for a formal hearing before the Washington PEB and agreed with the informal PEB decision. The form is signed by the applicant's PEB legal counsel and the PEB President.

23. A memorandum from the applicant's PEB legal counsel to the President of the Washington PEB, dated 27 June 2011, shows the following:

a. The purpose of this memorandum is to request reconsideration of the applicant's informal adjudication pertaining to his diagnoses of right shoulder degeneration, bilateral carpal tunnel syndrome, and thoraco-lumbar strain and a focus on whether his cervical

strain, rated at 10 percent, qualifies for 10A/C status. It is the applicant's contention that these three conditions, all of which were rated by the VA, constitute separately unfitting conditions for Military Occupational Specialty (MOS) 31B (Military Policeman (MP)).

b. Right shoulder degeneration: the applicant suffered from recurrent shoulder dislocation for over a decade and underwent surgical repair of the right rotator cuff in 2000. An MRI from February 2011 shows the source of his constant right shoulder pain is a large labral tear. Medical note from May 2011 states the time has come to replace the right shoulder because of the advanced state of deterioration and he was not to do anything to exacerbate the shoulder pain, such as wear load bearing equipment (LBE). His U3 permanent profile from June 2011 shows in Functional Limitations, "Patient has significant degenerative joint disease in his right shoulder and should not do sustained overhead activities, pushing, pulling, lifting, and pushups. This renders him unfit as an MP; therefore, the VA rating of 20 percent should be adopted for an unfitting right shoulder.

c. Bilateral carpal tunnel syndrome: this condition manifests as a recurrent pain condition since 2007. His current U3 permanent profile states, "Patient has bilateral carpal tunnel syndrome which limits his ability to carry objects, do fine manipulation, or fire a weapon for a prolonged period of time." These limitations are clearly unfitting for an MP; therefore, the VA rating of 10 percent for bilateral carpal tunnel syndrome should be adopted.

d. Thoraco-lumbar strain: the applicant injured his back as a victim in an MVA while deployed to Iraq in 2007. His current L3 permanent profile states, "Patient should not wear LBE, protective gear, Kevlar, ride in military vehicle for greater than 2 hours, patient should not lift/twist while carrying a load; he should not lift or carry greater than 25 pounds for a duration of greater than 5 minutes. These restrictions clearly prohibit him from functioning as an MP and render him unfit for duty; therefore, the VA rating of 10 percent awarded for low back pain should be adopted.

e. Cervical herniation/strain: this condition arose from an accident that occurred during lane-training at Fort McCoy, Wisconsin, while his unit was training for combat prior to deployment to Iraq. Specifically, while wearing full battle rattle during lane-training, he dove for cover during an immediate action drill and accidentally struck his head against a tree. This incident caused neck pain, later diagnosed as cervical herniation/strain. LOD and Commander's Statement are attached. He is currently diagnosed with left disc protrusion at C4/5 with mass effect (compression/impingement) on the left C5 nerve root. This injury qualifies the applicant for a positive Yes 10A/C determination, based on participation in training under conditions simulating combat.

24. Email correspondence from the applicant's PEB legal counsel, dated 29 June 2011, advised the PEB that he was submitting two appeals on behalf of the applicant, the first

appealing two VA Ratings and the second appealing three diagnoses to the Washington PEB. The appeals are largely based on medical information that came from medical appointments scheduled after the date of the formal hearing, which was waived, and the applicant's case is highly complex due to a multitude of diagnosed conditions.

25. A USAPDA memorandum for the President, U.S. Army PEB, dated 8 July 2011, returned the applicant's case to the PEB, noting the applicant's request for a VA reconsideration. Upon completion of the PEB Proceedings, all documents and any new proceedings should be returned to the USAPDA for further processing.

26. A third DA Form 199, shows the following:

a. A PEB convened on 4 January 2012, where the applicant was found physically unfit with a recommended combined rating of 90 percent and that his disposition be placement on the TDRL with reexamination during July 2012.

b. Item 10 shows: If retired because of disability, the Board makes the recommended finding that:

(1) 10A: The Soldier's retirement is based on disability from injury or disease received in the LOD as a direct result of Armed conflict or caused by an instrumentality of war and incurring in the LOD as a direct result of armed conflict or caused by an instrumentality of war and incurring in LOD during a period of war as defined by law.

(2) 10B: Evidence of record reflects the Soldier was not 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) 10C: Disability did result from a combat related injury as defined in Title 26, U.S. Code, section 104 and for purposes of Title 10 U.S. Code, section 10216(G).

(4) Of note, there is no item 10D on this form, although 10D is referenced in the disability descriptions.

c. The applicant's unfitting conditions were as follows:

- GERD/IBS; MEB Dx 3-4; 60 percent; this is not a battle injury nor caused by an instrumentality of war and did not occur in a combat theater (10A/C/D – No)
- PTSD; MEB diagnosis Dx 1-2; 50 percent; this is a battle injury and was caused by an instrumentality of and did occur in combat theater (10A/C/D – Yes)

- left ulnar neuropathy; MEB Dx 5; 10 percent; this is not a battle injury nor caused by an instrumentality of war, but did occur in combat theater (10D – Yes)
- right ulnar neuropathy; MEB Dx 5; 10 percent; this is not a battle injury nor caused by an instrumentality of war but did occur in combat theater (10D – Yes)
- cervical strain; MEB Dx 6; 10 percent; this is not a battle injury nor was it caused by an instrumentality of war and did not occur in a combat theater (10A/C/D – No)
- fibromyalgia/myofascial pain syndrome/generalized myalgias; MEB Dx 8-10; 10 percent; this is not a battle injury nor caused by an instrumentality of war and did not occur in theater (10A/C/D – No)
- headache syndrome; MEB Dx 7; 0 percent; this is not a battle injury nor caused by an instrumentality of war and did not occur in theater (10A/C/D – No)

d. MEB Dx 12, personality disorder, does not constitute a physical disability and is not ratable in the absence of an underlying ratable causative disorder.

e. MEB Dxs 11, and 13-34 (somatoform disorder, non-obstructive coronary artery disease, hypertension, hyperlipidemia, hemorrhoids, impotence, hyperactive bladder, spastic bladder, spermatocele, renal cyst, right shoulder rotator cuff injury, bilateral chondromalacia, bilateral wrist strain, recurrent otitis media, tinnitus, TMJ syndrome, acne, herpes simplex, presbyopia, lumbar degenerative disease, periodic limb movement disorder, and benign prostatic hypertrophy) meet retention standards/were not found unfitting as they are not listed on the Physical Profile as limiting any of the Soldier's functional activities, are not commented upon by the commander as hindering the Soldier's performance, and the case file contains no evidence that these Dxs independently or combined render the Soldier unfit for his assigned duties.

f. This case was informally reconsidered and supersedes DA Form 199, dated 26 April 2011.

g. Disability was incurred in a combat zone or incurred during the performance of duty in combat-related operations as designated by the Secretary of Defense.

h. Soldier was psychiatrically injured while deployed to Iraq from 2006 – 2007, during a period of war.

i. On 23 January 2012, the applicant signed the form indicating he did not concur with the PEB's findings and demanded a formal hearing with personal appearance. He also indicated he requested a regularly appointed counsel to represent him with his PEB formal hearing.

27. A fourth DA Form 199 shows the following:

a. A formal PEB convened on 13 February 2012, where the applicant appeared in person and was represented by regularly appointed counsel and was found physically unfit with a recommended combined rating of 90 percent and that his disposition be permanent disability retirement.

b. Item 10 shows: If retired because of disability, the Board makes the recommended finding that:

(1) 10A: The Soldier's retirement is based on disability from injury or disease received in the LOD as a direct result of Armed conflict or caused by an instrumentality of war and incurring in the LOD as a direct result of armed conflict or caused by an instrumentality of war and incurring in LOD during a period of war as defined by law.

(2) 10B: Evidence of record reflects the Soldier was not 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) 10C: Disability did result from a combat related injury as defined in Title 26, U.S. Code, section 104 and for purposes of Title 10 U.S. Code, section 10216(G).

(4) Of note, there is no item 10D on this form, although 10D is referenced in the disability descriptions.

c. During the formal board, the applicant requested the PEB award 10C for his cervical strain, which was a result of simulated combat training. He further requested the PEB find the following conditions unfitting: right shoulder rotator cuff injury, lumbar degenerative disease, bilateral chondromalacia, and bilateral carpal tunnel syndrome. The PEB thoroughly reviewed his entire case file and his formal testimony and largely concurred with the applicant's contentions. Changes to prior PEB determinations with regard to additional unfitting conditions and changes to ratings and/or 10A/C are in bold below.

d. The applicant's unfitting conditions were as follows:

- GERD/IBS; MEB Dx 3-4; 60 percent; this is not a battle injury nor caused by an instrumentality of war and did not occur in a combat theater (10A/C/D – No)
- PTSD; MEB Dx 1-2; 50 percent; this is a battle injury and was caused by an instrumentality of and did occur in combat theater (10A/C/D – Yes)

- **right shoulder, recurrent, dislocation (Major)**; MEB Dx 22; 20 percent; this is not a battle injury, was not caused by an instrumentality of war, and did not occur in theater (10A/C/D – No)
- **ligament damage, right wrist**; MEB Dx 24 & 34; 10 percent; this condition is not a battle injury nor was it caused by an instrumentality of war; this condition did not occur in a combat theater (10A/C/D – No)
- **ligament damage, left wrist**; MEB Dx 24 & 34, 10 percent; this condition is not a battle injury nor was it caused by an instrumentality of war; this condition did not occur in a combat theater (10A/C/D – No)
- **left ulnar neuropathy**; MEB Dx 5; 10 percent; this is not a battle injury nor caused by an instrumentality of war, but did occur in combat theater (10D – Yes)
- **right ulnar neuropathy**; MEB Dx 5; 10 percent; this is not a battle injury nor caused by an instrumentality of war but did occur in combat theater (10D – Yes)
- **cervical strain**; MEB Dx 6; 10 percent; this is not a battle injury but was caused by activities simulating which did not occur in a combat theater war and did not occur in a combat theater (**10A/C – Yes; 10D – No**)
- **fibromyalgia/myofascial pain syndrome/generalized myalgias**; MEB Dx 8-10; 10 percent; this is not a battle injury nor caused by an instrumentality of war and did not occur in theater (10A/C/D – No)
- **thoracolumbar Musculo-ligamentous strain**; MEB Dx 31; 10 percent; this is not a battle injury, was not caused by an instrumentality of war, but did occur in theater (10A/C – No; 10D – Yes)
- **headache syndrome**; MEB Dx 7; **10 percent**; this is not a battle injury nor caused by an instrumentality of war and did not occur in theater (10A/C/D – No)
- **chondromalacia, bilateral**; MEB Dx 23; 0 percent; this is not a battle injury nor caused by an instrumentality of war and did not occur in theater (10A/C/D – No)

e. The remaining MEB Dxs meet retention standards/were not found unfitting as they are not listed on the Physical Profile as limiting any of the Soldier's functional activities, are not commented upon by the commander as hindering the Soldier's performance, and the case file contains no evidence that these Dxs independently or combined render the Soldier unfit for his assigned duties.

f. Disability was incurred in a combat zone or incurred during the performance of duty in combat-related operations as designated by the Secretary of Defense.

g. Soldier was psychiatrically injured while deployed to Iraq from 2006 – 2007, during a period of war.

28. A Fort Gorge G. Meade MEDDAC memorandum signed by the Chief, Musculoskeletal Clinic, dated 24 February 2012, has been provided to the Board for review. It shows in pertinent part the applicant was injured in an MVA while serving in Iraq in July 2007, which resulted in a multitude of medical issues that require surgical intervention as a result of this incident. The applicant did not reach maximal medical care prior to the beginning of MEB/PEB proceedings. His required surgeries involve right shoulder, right and left upper extremity nerve conditions, and carpal tunnel release.

29. On 27 February 2012, the applicant signed the fourth DA Form 199 indicating he did not concur with the formal PEB's findings from 13 February 2012 and submitted a statement of rebuttal.

30. The applicant's statement of rebuttal, addressed to the NCRPEB President, dated 27 February 2012, shows the following:

a. He generally concurred with the findings and recommendations that were made by the formal PEB regarding the additional conditions on the DA Form 199. However, he identified some small errors that need to be corrected.

b. There are six medical conditions for which the 10 A/C/D was not awarded. He was MEDEVAC for GERD/IBS, hiatal hernia and severe abdominal pains, which resulted in two stomach surgeries (Nissen Fundoplication), from which he nearly died in October 2008 and for severe migraine headaches that started in theater as a result of incoming mortar rounds and rockets on a daily basis. Therefore, 10D should have been awarded for the above medical condition that were incurred while performing the duties of an MP in a combat theater in 2007.

c. The remainder of the medical conditions for which a 10D was not granted were right shoulder rotator cuff injury, recurrent dislocation; ligament damage, bilateral wrist damage; bilateral chondromalacia pain, all of which were either the result of or aggravated by an MVA which occurred in the combat theater in 2007. All of these injuries and illnesses were found to be in the LOD and while performing the duties of an MP in a combat theater in July 2007.

d. He hand-delivered his most recent permanent Physical Profile to all the formal PEB members and additional medical documents, indicating the following conditions do not meet medical retention standards: right shoulder rotator cuff injury, bilateral chondromalacia pain, bilateral wrist pain, lumbar degenerative disease. They should be removed from the fitting conditions block as they are already listed in the unfitting block. Additionally, the diagnosis of hypertension should be service connected as it occurred during military service and did not exist prior to service (EPTS) as seen on his entrance physical dated 18 February 1981.

31. A memorandum from the applicant's PEB legal counsel through the NCRPEB President for the VA, dated 27 February 2012, shows the following:

a. The purpose of this memorandum is to request that the VA Rating Authority amend upwards its proposed disability ratings for migraine headaches and fibromyalgia, originally rated at 0 percent and 0 percent respectively. The medical evidence of record shows that both conditions are recalcitrant to medical treatment and accordingly, ratings of 30 percent and 40 percent should be respectively awarded. (Medical documentation attached). More corroborating evidence now exists to support the higher ratings including a headache diary, yet the medical evidence initially furnished was sufficient to support these higher ratings.

b. If the Rating Authority addresses the two above-referenced conditions, it is further requested, as a matter of administrative convenience, that the diagnoses of hypertension (MEB Dx 14), impotence/erectile dysfunction (MEB Dx 17) and bilateral chondromalacia (MEB Dx 23) be evaluated as compensable conditions based on new medical information. (Medical documentation attached).

c. Finally, it appears MEB Dx 27 for TMJ syndrome, which was rated at 10 percent, was omitted when calculating the combined disability rating. If so, please recalculate.

32. Two Fort Gorge G. Meade MEDDAC memoranda signed by the Chief, Musculoskeletal Clinic, dated 30 March 2012 and 10 April 2012, have been provided in full to the Board for review. In pertinent part they state the applicant does not meet medical retention standards for his right shoulder and bilateral knee conditions, which are the result of or were aggravated by an MVA while serving in Iraq in July 2007.

33. A USAPDA memorandum, dated 24 April 2012, shows the applicant's case was being returned to the VA for reconsideration as requested by the applicant's attorney. The initial PEB findings were that the applicant was fit for the following six conditions: right shoulder condition, back condition, bilateral knee condition, bilateral wrist condition. The formal PEB found the applicant was unfit for these six conditions. The applicant requests the VA reconsider these ratings. Notwithstanding that he has already requested VA reconsideration of the other conditions, the applicant is entitled to request VA reconsideration of these six conditions because they are now unfitting and because he has not previously requested VA reconsideration of these specific conditions. Please coordinate this VA reconsideration and take additional action as required to address the applicant's request.

34. A fifth DA Form 199 shows the following:

a. A formal PEB reconsideration convened on 11 May 2012, where the applicant was found physically unfit with a recommended combined rating of 100 percent and that his disposition be permanent disability retirement.

b. Item 10 shows: If retired because of disability, the Board makes the recommended finding that:

(1) 10A: The Soldier's retirement is based on disability from injury or disease received in the LOD as a direct result of Armed conflict or caused by an instrumentality of war and incurring in the LOD as a direct result of armed conflict or caused by an instrumentality of war and incurring in LOD during a period of war as defined by law.

(2) 10B: Evidence of record reflects the Soldier was not 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) 10C: Disability did result from a combat related injury as defined in Title 26, U.S. Code, section 104 and for purposes of Title 10 U.S. Code, section 10216(G).

(4) Of note, there is no item 10D on this form, although 10D is referenced in the disability descriptions.

c. During the formal board, the applicant requested the PEB award 10C for his cervical strain, which was a result of simulated combat training. He further requested the PEB find the following conditions unfitting: right shoulder rotator cuff injury, lumbar degenerative disease, bilateral chondromalacia, and bilateral carpal tunnel syndrome. The PEB thoroughly reviewed his entire case file and his formal testimony and largely concurred with the applicant's contentions. Changes to prior PEB determinations with regard to additional unfitting conditions and changes to ratings are in bold below.

d. The applicant's unfitting conditions were as follows:

- GERD/IBS; MEB Dx 3-4; 60 percent; this is not a battle injury nor caused by an instrumentality of war and did not occur in a combat theater (10A/C/D – No)
- PTSD; MEB Dx 1-2; 50 percent; this is a battle injury and was caused by an instrumentality of and did occur in combat theater (10A/C/D – Yes)
- **migraine headaches**; MEB Dx 7; **30 percent**; this is not a battle injury nor caused by an instrumentality of war and did not occur in theater (10A/C/D – No)
- ligament damage, right wrist; MEB Dx 24 & 34; 10 percent; this condition is not a battle injury nor was it caused by an instrumentality of war; this condition did not occur in a combat theater (10A/C/D – No)

- ligament damage, left wrist; MEB Dx 24 & 34, 10 percent; this condition is not a battle injury nor was it caused by an instrumentality of war; this condition did not occur in a combat theater (10A/C/D – No)
- left ulnar neuropathy; MEB Dx 5; 10 percent; this is not a battle injury nor caused by an instrumentality of war, but did occur in combat theater (10D – Yes)
- right ulnar neuropathy; MEB Dx 5; 10 percent; this is not a battle injury nor caused by an instrumentality of war but did occur in combat theater (10D – Yes)
- **right shoulder, recurrent, dislocation (Major)**; MEB Dx 22; **10 percent**; this is not a battle injury, was not caused by an instrumentality of war, and did not occur in theater (10A/C/D – No)
- cervical strain; MEB Dx 6; 10 percent; this is not a battle injury but was caused by activities simulating which did not occur in a combat theater war and did not occur in a combat theater (10A/C – Yes)
- fibromyalgia/myofascial pain syndrome/generalized myalgias; MEB Dx 8-10; 10 percent; this is not a battle injury nor caused by an instrumentality of war and did not occur in theater (10A/C/D – No)
- thoracolumbar Musculo-ligamentous strain; MEB Dx 31; 10 percent; this is not a battle injury, was not caused by an instrumentality of war, but did occur in theater (10A/C – No; 10D – Yes)
- **chondromalacia, bilateral**; MEB Dx 23; **10 percent**; this is not a battle injury nor caused by an instrumentality of war and did not occur in theater (10A/C/D – No)

e. The remaining MEB Dxs meet retention standards/were not found unfitting as they are not listed on the Physical Profile as limiting any of the Soldier's functional activities, are not commented upon by the commander as hindering the Soldier's performance, and the case file contains no evidence that these Dxs independently or combined render the Soldier unfit for his assigned duties.

f. This DA Form 199 supersedes the DA Form 199, dated 13 February 2012 and reflects the VA rating reconsideration dated 11 May 2012.

g. Disability was incurred in a combat zone or incurred during the performance of duty in combat-related operations as designated by the Secretary of Defense.

h. Soldier was psychiatrically injured while deployed to Iraq from 2006 – 2007, during a period of war.

i. The applicant's signed election is not included on the provided form. The form contains multiple hand-written remarks made by the applicant reflecting his

disagreement with various determinations, including 10 A/C/D determinations and has been provided in full to the Board for review.

35. A memorandum from the applicant's PEB legal counsel to the USAPDA, dated 30 July 2012, shows the following:

a. The purpose of this memorandum is to provide supplemental matter to clarify portions of the appeal now pending which was previously filed with the NCRPEB by the applicant, who is now rated at 100 percent disabled as a result of unfitting injuries primarily incurred in Iraq during deployment when the applicant, while riding a bicycle, was struck from behind by an oncoming MP HMMWV, an instrumentality of war. Issues to be addressed are nine 10 A/C/D determinations and the correction of one rating incorrectly recorded.

b. Attached is the current DA Form 199. In reference to 10 A/C/D determinations, the applicant addressed each diagnosis ad seriatim, stating whether a 10 A/C/D determination is relevant to the injury. This is hand-written in the right-hand columns adjacent to each of the 12 diagnoses. According to the applicant, there are nine conditions that require redress; three conditions reflect correct 10 A/C/D adjudications. This technique will make the applicant's position more easily to follow.

c. There was one mistake made during transcription from the VA ratings awarded under IDES. The VA adjudicators had recommended 20 percent for the recurrent right shoulder dislocation injury (MEB Dx 22), but instead the rating is reflected as 10 percent. This is a Scribner's error which applicant asks to be administratively corrected.

d. Also attached are three current medical statements pertaining to previously canceled surgeries. There is ample precedent now for allowing surgeries to go forward following award of ratings based on improving quality of life. The applicant desires to proceed with a right shoulder Bankart procedure with carpal tunnel release and left ulnar nerve transposition with carpal tunnel release. These surgeries were scheduled for January and June 2011 respectively but were canceled by the recommendation of Dr. C____, who has since departed.

36. An initial DA Form 18, shows the following:

a. An administrative correction to the previously issued DA Form 199, dated 11 May 2012, was issued on 7 September 2012, to correct the disability rating for the applicant's right shoulder recurrent dislocation and the disability description.

b. The correction shows the unfitting condition of right shoulder, recurrent, dislocation (Major); MEB Dx 22; **20 percent** (in lieu of the previously shown 10 percent);

it still shows this is not a battle injury, was not caused by an instrumentality of war, and did not occur in theater (10A/C/D – No).

c. This administrative correction did not change any other aspect of the applicant's unfitting conditions, fitting conditions, 10A/C determinations, his overall rating or disposition. The applicant remained found to be physically unfit with a recommended combined rating of 100 percent for the same unfitting conditions and his recommended disposition was permanent disability retirement.

37. A memorandum from the applicant's PEB legal counsel to the USAPDA, dated 21 September 2012, shows the following:

a. Not all of the LODs, sworn statements, MEDEVAC orders were contained in the applicant's PEB file; therefore, he is presenting them as additional material evidence that will support his request to correct all of the current errors contained in his DA Form 199.

b. The applicant fully understands he is maxed-out on his disability ratings from both the Army and the VA; therefore, disability ratings are no longer at issue. What is still to be addressed is the matter of designating unfitting conditions as 10A/C Yes or not.

c. The argument advanced by the applicant is relatively simple. All his unfitting injuries either arose from or were aggravated by one MVA where he was struck from the rear by an approaching MP HMMWV during an insurgent attack on Camp Victory, in Baghdad, Iraq. His sustained injuries resulted in two MEDEVACs.

d. Attached are the LODs and MEDEVAC orders which substantiate the claim that under these facts all unfitting conditions should be awarded either a 10A Yes or a 10A/C Yes, as they were all battle injuries incurred during a period of war as defined by law and most were also caused by an instrumentality of war, a HMMWV.

38. The applicant provided numerous additional memoranda and letters from his PEB legal counsel, Fort George G. Meade MEDDAC doctors, and a Johns Hopkins doctor, all dated between 27 September 2012 and 14 December 2012, all of which have been provided to the Board in full. They primarily concern themselves with logistical timelines, planned surgeries, and requested continuation on active duty for additional medical care, and do not have a bearing on the requested amendment of items 10A/C in the PEB Proceedings.

39. A second and final DA Form 18, shows the following:

a. An administrative correction to the previously issued DA Form 18, dated 21 September 2012, was issued on 17 December 2012, where the applicant was found physically unfit with a recommended combined rating of 100 percent and that his disposition be permanent disability retirement.

b. Item 10 shows: If retired because of disability, the Board makes the recommended finding that:

(1) 10A: The Soldier's retirement is based on disability from injury or disease received in the LOD as a direct result of Armed conflict or caused by an instrumentality of war and incurring in the LOD as a direct result of armed conflict or caused by an instrumentality of war and incurring in LOD during a period of war as defined by law.

(2) 10B: Evidence of record reflects the Soldier was not 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) 10C: Disability did result from a combat related injury as defined in Title 26, U.S. Code, section 104 and for purposes of Title 10 U.S. Code, section 10216(G).

(4) Of note, there is no item 10D on this form and 10D is no longer referenced in the disability descriptions.

c. The applicant's unfitting conditions were as follows; changes to the prior DA Form 18 to include ratings and 10A/C determinations are in bold:

- **right shoulder, recurrent, dislocation (Major)**; MEB Dx 22; **100 percent; this this occurred in a combat theater and was caused by an instrumentality of war (10A/C – Yes)**
- GERD/IBS; MEB Dx 3-4; 60 percent; this is not a battle injury nor caused by an instrumentality of war (10A/C – No)
- PTSD; MEB Dx 1-2; 50 percent; this is a battle injury and was caused by an instrumentality of and did occur in combat theater (10A/C – Yes)
- migraine headaches; MEB Dx 7; 30 percent; this is not a battle injury nor caused by an instrumentality of war and did not occur in theater (10A/C – No)
- **ligament damage, right wrist**; MEB Dx 24 & 34; 10 percent; **this occurred in a combat theater and was caused by an instrumentality of war (10A/C – Yes)**
- **ligament damage, left wrist**; MEB Dx 24 & 34, 10 percent; **this occurred in a combat theater and was caused by an instrumentality of war (10A/C – Yes)**
- **left ulnar neuropathy**; MEB Dx 5; 10 percent; **this occurred in a combat theater and was caused by an instrumentality of war (10A/C – Yes)**

- **right ulnar neuropathy**; MEB Dx 5; 10 percent; **this occurred in a combat theater and was caused by an instrumentality of war (10A/C – Yes)**
- cervical strain; MEB Dx 6; 10 percent; this is a battle injury and was caused by activities simulating combat (10A/C – Yes)
- fibromyalgia/myofascial pain syndrome/generalized myalgias; MEB Dx 8-10; 10 percent; this is not a battle injury nor caused by an instrumentality of war (10A/C – No)
- **thoracolumbar musculo-ligamentous strain**; MEB Dx 31; 10 percent; **this condition occurred in a combat theater and was caused by an instrumentality of war (10A/C – Yes)**
- **chondromalacia, left knee**; MEB Dx 23; 10 percent; **this occurred in a combat theater and was caused by an instrumentality of war (10A/C – Yes)**
- **chondromalacia, left knee**; MEB Dx 23; 10 percent; **this occurred in a combat theater and was caused by an instrumentality of war (10A/C – Yes)**

d. The remaining MEB Dxs meet retention standards/were not found unfitting as they are not listed on the Physical Profile as limiting any of the Soldier's functional activities, are not commented upon by the commander as hindering the Soldier's performance, and the case file contains no evidence that these Dxs independently or combined render the Soldier unfit for his assigned duties.

e. The applicant's signed election is not included on the provided form.

40. The applicant's DD Form 214 shows he was retired due to permanent disability on 26 December 2012.

41. A letter from a VA Adult Psychiatric NP, dated 5 February 2014, which shows the applicant has a 100 percent service-connected disability rating for a number of medical and mental health issues. He continues to receive treatment for his anxiety, PTSD, and depressive symptoms related to his HMMWV accident injuries and traumatic memories from deployment.

42. A letter from a Hunter Holmes McGuire VAMC doctor, dated 12 May 2017, shows the applicant was receiving continued treatment for multiple service-connected disabilities rated at 100 percent. A recent right shoulder surgery and multiple injuries resulting from combat in Iraq required him to receive assistance from his wife with multiple activities of daily living.

43. 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.

44. Title 38, USC, Sections 1110 and 1131, permit the VA to award compensation for disabilities which were incurred in or aggravated by active military service. However, an award of a VA rating does not establish an error or injustice on the part of the Army.

45. 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.

46. 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/or 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 reversal of the United States Army Physical Disability Agency's (USAPDA) determination that three of his disabilities were not combat related. He states:

"The conditions listed in DA Form 199/18 under Paragraph 10, A/C/D shows that the Physical Evaluation Board (PEB) did not accurately reflect what conditions had occurred in theater. I have attached documents reflecting my appeals before the Physical Disability Agency (PDA), The Line of Duty from the beginning demonstrated that the Humvee was an instrumentality of war.

The corrections reflect that my final DA Form 199/18 from the PDA failed to consider my conditions as qualifying under Paragraph 10, A/C/D despite communications from my legal counsel and myself as demonstrated in the attached documents included for you careful review."

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. His DD 214 for the period of Service under consideration shows the applicant entered the Regular Army on 10 December 2006 and was

permanently retired for physical disability under provisions provided in chapter 4 of AR 635–40, Physical Evaluation for Retention, Retirement, or Separation (20 March 2012).

d. The combat related determinations at the time were noted as 10A, 10B, and 10C:

10A: The Soldier's retirement is based on disability from injury or disease received in the LOD [line of duty] as a direct result of Armed conflict or caused by an instrumentality of war and incurring in the LOD as a direct result of armed conflict or caused by an instrumentality of war and incurring in LOD during a period of war as defined by law.

10B: Evidence of record reflects the Soldier was a member or obligated to become a member of an Armed Force or Reserve thereof, or the NOAA [National Oceanic and Atmospheric Administration] or the USPHS [U.S. Public Health Service] on 24 September 1975.

10C: Disability resulted from a combat related injury as defined in Title 26, U.S. Code, section 104 and for purposes of Title 10 U.S. Code, section 10216(G).

e. The 10D referenced by the applicant is referring to what is commonly now known as "V4." This administrative determination notes that a disability(s) was incurred in a combat zone or combat zone tax exclusion area is a benefit added to the U.S. Code on 28 January 2008, in section 1646 of public law 110-181: Enhancement of Disability Severance Pay for Members of the Armed Forces (10 USC 1212 NDAA 2008 Sec 1646). V4 eliminates the VA recoupment of the Soldier's disability severance pay from their VA compensation; and sets the minimum years of service for calculating their severance pay at 6 years, benefitting Soldiers with less than six years of time in service. Because the applicant was permanently retired for physical disability and not separated with disability severance pay, V4/10D does not apply.

f. The applicant's Revised Physical Evaluation Board (PEB) Proceedings (DA Form 18) dated 17 December 2012 shows the board determined he had thirteen conditions unfitting for continued service. The made the administrative determinations that ten conditions were combat related, noted as 10 A/C – Yes, and three were combat related, noted as 10 A/C No.

1. Right shoulder, Recurrent dislocation (MAJOR), (Claimed as Right Shoulder Condition). This condition occurred in a combat theater and was caused by an instrumentality of war (10A/C -Yes).

2. GERD/irritable bowel syndrome (IBS) ... This is not a battle injury and was not caused by an instrumentality of war (10A/C - No).
3. Posttraumatic stress disorder (PTSD) ... This is battle injury and was caused by an instrumentality of war (10A/C - Yes).
4. Migraine Headaches ... This is not a battle injury and was not caused by an instrumentality of war (10A/C - No).
5. Ligament Damage, Right Wrist ... This condition occurred in a combat theater and was caused by an instrumentality of war (10A/C -Yes).
6. Ligament Damage, Left Wrist ... This condition occurred in a combat theater and was caused by an instrumentality of war (10A/C -Yes).
7. Left ulnar neuropathy (Cubital Tunnel) ... This condition occurred in a combat theater and was caused by an instrumentality of war (10A/C -Yes).
8. Right ulnar neuropathy (Cubital Tunnel) ... This condition occurred in a combat theater and was caused by an instrumentality of war (10A/C -Yes).
9. Cervical Strain ... This is a battle injury and was caused by activities simulating combat (10A/C - Yes)
10. Fibromyalgia/myofascial pain syndrome/generalized myalgias ... This is not a battle injury and was not caused by an instrumentality of war (10A/C - No).
11. Thoracolumbar Musculo-Ligamentous strain ... This condition occurred in a combat theater and was caused by an instrumentality of war (10A/C -Yes).
12. Chondromalacia, Left Knee ... This condition occurred in a combat theater and was caused by an instrumentality of war (10A/C -Yes).
13. Chondromalacia, Right Knee ... This condition occurred in a combat theater and was caused by an instrumentality of war (10A/C -Yes).

g. When the PEB annotates that one or more of a Soldier's disabilities is combat related, the tax and other benefits associated with such a designation applies to the applicant's total combined military disability rating and subsequent retirement. A Soldier with numerous disabilities receives the same benefits whether just one or all their disabilities were designated combat related.

h. The three disabilities the PEB determined were not combat related were GERD/irritable bowel syndrome (IBS), Migraine Headaches, and Fibromyalgia/myofascial pain syndrome/generalized myalgias. The onset for these three conditions as stated in his medical evaluation board (MEB) narrative summary:

GERD/IBS: "The patient reports developing heartburn and abdominal pain in 2000. The patient states that he was diagnosed with GERD and was placed on varying H2 blockers and proton pump inhibitors following this diagnosis. The patient reports that he had progressive heartburn symptoms and increasing dysphagia prompting approximately 7 EGDs [esophagogastroduodenoscopy] between 2006 and 2008. In July 2008, the patient underwent a Nissen fundoplication surgery secondary to severe heartburn and dysphagia ...

The patient reports that following his Nissen fundoplication surgery, in July 2008, he shortly thereafter developed chronic loose stools and diarrhea. The patient has undergone two colonoscopies since that time with the last occurring in April 2010, and with both revealing no significant findings. The patient has subsequently been diagnosed with irritable bowel syndrome."

Migraine Headaches: The patient reports chronic headaches since 2000. The patient states that his headaches worsened in both frequency and intensity while deployed to Iraq in 2007. Review of the AHL TA record reveals that the patient was initiated on Botox injections for chronic, daily, headache at EAMC [Eisenhower Army Medical Center] in 2008. The patient continued this therapy with WRAMC [Walter Reed Army Medical Center] Neurology. On 22 October 2009, the patient was documented by Neurology to have "good" headache control following multiple Botox injections to the scalp."

Fibromyalgia/myofascial pain syndrome/generalized myalgias: The patient reports diffuse, generalized, muscle pain during his VA examination on 6 July 2010. The VA examiner reported that the patient noted pain "in virtually every muscle in his body." The pain was reported as increased by activity and decreased by rest. The VA examiner reported that there was no evidence of any loss of motion or function due to generalized muscle pain. The patient was diagnosed with generalized myalgias of mild to moderate degree.

i. Section b(3) of 26 U.S. Code § 104 requires there be a cause-and-effect relationship in order to establish the finding that a medical condition is combat related:

(3) Special rules for combat-related injuries: For purposes of this subsection, the term "combat-related injury" means personal injury or sickness—

- (A) which is incurred—
 - (i) as a direct result of armed conflict,
 - (ii) while engaged in extra-hazardous service, or
 - (iii) under conditions simulating war; or
- (B) which is caused by an instrumentality of war.

j. There is no medical evidence of such a cause-and-effect relationship for these three conditions. The applicant notes the onset of these condition was in Iraq when hit by a HWMMV in 2007, but the medical record has onsets of the first two condition well before the accident, and the third condition was well after the accident.

k. It is the opinion of the ARBA Medical Advisor there is insufficient probative evidence upon which to reverse the United States Army Physical Disability Agency's non-combat related determinations for his GERD/IBS, Migraine Headaches, or Fibromyalgia/myofascial pain syndrome/generalized myalgias.

BOARD DISCUSSION:

1. The applicant's request for a personal appearance hearing was carefully considered. The Board determined the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

2. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. The applicant entered the Regular Army on 10 December 2006 and was permanently retired for physical disability under the provisions of chapter 4 of AR 635-40, due to multiple disabilities, three of which were not combat related. The three disabilities the PEB determined were not combat related were GERD/irritable bowel syndrome (IBS), Migraine Headaches, and Fibromyalgia/myofascial pain syndrome/generalized myalgias. The onset for these three conditions as stated in his medical evaluation board narrative summary: The Board reviewed and agreed with the medical advisor's finding that there is no medical evidence of a cause-and-effect relationship for these three conditions. The applicant notes the onset of these condition was in Iraq when hit by a HWMMV in 2007, but the medical record has onsets of the first two condition well before the accident, and the third condition was well after the accident. Based on the evidence, the Board determined there is neither an error nor an injustice.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
■	■	■	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.



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

member unfit or contributes to unfitness and was incurred under any of the following circumstances:

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

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

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

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

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

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

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

e. Caused by an Instrumentality of War: Occurrence during a period of war is not a requirement to qualify. If the disability was incurred during any period of service as a result of wounds caused by a military weapon, accidents involving a military combat

vehicle, injury or sickness caused by fumes, gases, or explosion of military ordnance, vehicles, or material, the criteria are met. However, there must be a direct causal relationship between the instrumentality of war and the disability. For example, an injury resulting from a Service member falling on the deck of a ship while participating in a sports activity would not normally be considered an injury caused by an instrumentality of war (the ship) since the sports activity and not the ship caused the fall. The exception occurs if the operation of the ship caused the fall.

5. 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.

6. 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.

7. Title 10, U.S. Code, section 1556 requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

8. Army Regulation 15-185 (Army Board for Correction of Military Records (ABCMR)) prescribes the policies and procedures for correction of military records by the Secretary

of the Army acting through the ABCMR. Paragraph 2-11 states applicants do not have a right to a formal hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

//NOTHING FOLLOWS//