

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 2 August 2024

DOCKET NUMBER: AR20230001833

APPLICANT REQUESTS:

- medical retirement
- a video/telephonic appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Self-Authored Statement
- Three DD Forms 214 (Certificate of Release or Discharge from Active Duty), 27 August 2001, 5 January 2004, and 28 January 2006
- Medical Protection System (MEDPROS) Individual Medical Readiness
- Department of Veterans Affairs (VA) Rating Decisions
- Redeployment Health Assessment, 2 February 2003
- Five Letters from VA, 3 February 2003, 28 October 2010
- Three DA Forms 3349 (Physical Profile) 6 February 2003, 30 January 2010, and 31 June 2012
- Page 2 of Post Deployment Health Assessment, 8 December 2003
- Post Deployment Health Reassessment, 5 January 2007
- DA Form 4187 (Personnel Action), 4 February 2010
- Three DA Forms 67-9 (Officer Evaluation Report (OER)), 31 July 2010, 31 July 2011, and 31 July 2012
- Request for Authorization to Release Medical Records or Health Information, 20 June 2011
- Two Authorizations for Release of Health Information Pursuant to HIPPA, 20 June 2011 and 24 September 2012
- Memorandum Inability to Clear Medical Readiness, 15 August 2011
- Orders 236-1034 Transfer Orders, 24 August 2011
- Duty Military Occupational Specialty (MOS) Provider Evaluation, 13 June 2012
- NGB Form 23B (Army National Guard (ARNG) Retirement Points History Statement), 14 August 2012
- Memorandum Notification of Medical Disqualification, 30 August 2012

- Statement of Understanding and Medical Disqualification Election, 9 October 2012
- Document Entitled Your Rights and Entitlement when you Elect Separation
- Orders 073-1155 Separation Orders with Amendment, 14 March 2013
- Orders 103-1003 Transfer Orders, 13 April 2013
- NGB Form 22 (Report of Separation and Record of Service), 25 April 2013
- Honorable Discharge Certificate, 25 April 2013

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 is requesting the Board grant a retroactive medical retirement from the ARNG based on his documented disabilities, at the time of his separation. He believes he should have been placed in the Physical Disability Evaluation System (PDES) as he requested and he would have received a medical retirement from service in 2013.

b. He is appealing for the Board to review his case because he believes the PDES would have, at the very least, granted a medical retirement for his well-documented asthma and separate disability medical determinations would have been made for his liver disease and left knee injury which would have likely resulted in his medical retirement in April 2013.

c. He is also including, for the Board's consideration, his Operation Enduring Freedom (OEF) burn pit-related sinusitis/rhinitis as this would have been submitted as a separate appeal and impacts his breathing and asthma issues.

d. He served 18 years in the U.S. Army, having joined the Army on 29 May 1995 as a West Point Cadet and ultimately being separated on 25 April 2013. At multiple points of separation from active duty deployments and ultimately his medical separation from the ARNG, he had multiple service-connected disabilities that should have been considered for medical retirement.

e. In 2001, while on active duty, he was given a permanent military profile for moderate asthma, prior to separation, and granted a 30 percent VA disability rating for moderate asthma, which he believes alone should have qualified him for the Permanent Disability Retired List on separation.

f. In December 2008, he was diagnosed with non-alcoholic steatohepatitis (NASH) liver disease as part of a predeployment physical at the Syracuse VA Medical Center. He deployed to Thailand in January 2009 with this liver condition, but on his return, he was rated as nondeployable in 2010 and eventually evaluated medically unfit to continue serving.

g. At this point, he was a top block officer, and in line for promotion to lieutenant colonel and projected for battalion command. During this period, he was informed, in writing, that he was referred to a medical board, but he never received the outcome. Instead, he later received a notification of medical separation, to which he formally requested a PDES board, but it was never granted/submitted by the New York ARNG (NYARNG).

h. He was verbally told later that he no longer qualified to request PDES since the VA, at that time, ruled that his NASH liver disease was not service-connected, and he was medically discharged without PDES.

i. At the time, his unit was preparing to deploy to OEF, and he was holding the battalion operations officer position. He believes he was rushed out to get in a replacement for him.

j. The VA later reversed its decision, granting him a 10 percent service connection for this disability. Working with the New York State Department of Veteran's Services, he was informed he should have received a medical retirement rather than separation for the asthma and knee injury regardless of the VA status of his liver disease, at the time, which is why he is appealing now.

k. At the time of separation from his initial period of active duty, he had a diagnosis of mild-moderate persistent asthma in 2001. He was diagnosed, during Ranger School training and subsequently disqualified from being able to attend Ranger School with a permanent profile for persistent asthma. He transitioned from active duty at Fort Carson, Colorado and transferred to the NYARNG as part of the ARNG Combat Reform Initiative. On separation, his exit physical had him submit a VA disability application for service-connected moderate asthma, and he was granted 30 percent service-connected disability effective on his discharge date, 28 August 2001.

l. In 2003, his ARNG unit was deployed to Operation Noble Eagle II. His permanent profile and PULHES (physical capacity/stamina (P), upper extremities (U), lower extremities (L), hearing and ears (H), eyes (E), and psychiatric (S)) 211111 were rerecorded, during the predeployment physical on 6 February 2003. This 30 percent rating and permanent profile have been with him demobilizing after every period of active duty and his ultimate separation from the ARNG. This would have been considered at a PDES and should have been considered each time he left active duty service.

m. He was deployed to the Operation Cobra Gold training exercise in January 2009. He went to the Syracuse VA Medical Center to make up a missed predeployment physical, and during that physical, they identified severely elevated liver enzymes. He underwent multiple exams and liver biopsy that eventually confirmed a diagnosis of NASH. With the diagnosis, it was medically determined that he "could not live in austere conditions" due to this disease, and he was initially given a temporary profile of PULHES 333111 on 30 January 2010. On 4 February 2010, he was classified 999m (nondeployable, flagged for all personnel actions).

n. In August 2010, he relocated from New York to California for a civilian work opportunity with his employer. He paid out of pocket to continue drilling in New York with his unit to prepare them for a deployment for OEF to Afghanistan. He was the S-3 battalion operations officer, at the time, and was recognized for his commitment to the unit on his OERs. He simultaneously worked with civilian and military healthcare providers to improve his medical condition, including medications, diet, and clinical trials, but he was eventually given a permanent profile on 29 June 2012, PULHES 311111. This profile also advised that he needed a medical review board. He was never given a board, but a month later, he received a personnel action letter of medical disqualification, 30 August 2012.

o. In September 2012, he requested a transfer to the rear detachment or the Individual Ready Reserve (IRR) to continue working on clearing his medical conditions. Due to the 999M nondeployable status, he was denied. Instead, he requested a PDES in October 2012 to determine service-connected disability rating, retention in his military occupational specialty and/or separation. He continued drilling as an active unit member through March 2013 waiting for this board.

p. In March 2013, he was informed by the NYARNG Headquarters Personnel Branch that he could not get a PDES as "the VA found his liver disease to be non-service connected," and he was told he would be medically discharged immediately. Three days later, he received orders separating him from the ARNG with an effective date of separation of 11 March 2013 (backdated).

q. It was later determined the VA incorrectly reviewed his disability compensation claim as a lab abnormality, and their decision was reversed at a later date, and he was granted a 10 percent service-connected disability rating for NASH. Since he did not appeal his initial filing within the required one year period the effective date of his NASH 10 percent rating is 27 December 2021. If he had been given a PDES as requested, he believes he would have been granted a medical retirement for at least the 30 percent asthma rating and 10 percent NASH.

r. He was deployed from the ARNG to active duty to Afghanistan in support of OEF from October 2005 through January 2005 with 3rd Special Forces Group (Airborne) to

close out their rotational deployment. While in theater, he injured his left knee and was diagnosed with a patella fracture. This was documented on his post deployment physicals, and he was advised to file immediately with the VA on his return to both military and VA medical officials. He finally filed for disability consideration years later. He was assigned a 10 percent disability rating for painful motion of the knee due to fractured patella, but the effective date was the date of filing, which was 8 November 2020 instead of the date of discharge from active duty. Had he been granted a PDES, he believes this injury would have been considered, at the time.

s. His asthma worsened from frequent burn pit exposure, and nasal breathing issues developed. During his post deployment VA OEF Behavioral Consult, he disclosed his worsening asthma and breathing issues from burn pit exposure on 11 January 2007 and was recommended for an environmental exposure exam. Upon the burn pit presumptive condition approval, he applied for and received a 30 percent VA service-connected disability rating for rhinitis with polyp complications and a 10 percent VA service-connected disability for sinusitis effective 10 December 2021. Since his asthma remained classified as moderate, no additional service-connected disability was assigned despite worsening symptoms.

t. He has other VA service-connected disabilities such as left hand and right foot injuries from AD, but since they were not symptomatically present, at the time of discharge in April 2013, he excluded them from consideration in this request.

3. The applicant provides:

a. A MEDPROS Snapshot - Individual Medical Readiness shows his PULHES Code as 211111 and the source as a physical exam on 7 April 2001.

b. VA rating decision, 28 January 2003, shows he received 30 percent service-connected disability for asthma.

c. DA Form 3349, 6 February 2003 shows he had a permanent profile for mild persistent asthma with a PULHES of 211111.

d. Page 2 of Predeployment Health Assessment, 8 December 2003, shows he was in very good health, he was on a profile for asthma.

e. Post Deployment Health Assessment, 12 August 2003, shows he was in excellent health, he was deployable, he had back pain, difficulty breathing, and was exposed to vehicle or truck exhaust fumes while deployed.

f. Post Deployment Health Assessment, 6 January 2007, shows he was in good health; he was deployable; he was constantly on guard, watchful, or easily startled; he

wanted to schedule a visit with a healthcare provider; he was interested in receiving information or assistance for a stress, emotional, or alcohol concern; he was interested in receiving assistance for a family or relationship concern; his health was somewhat worse than it was before he deployed; during deployment he was wounded, injured assaulted, or otherwise physically hurt and was still having problems related to it; and he had a health concern or condition he felt was related to deployment which included problems sleeping, increased irritability, taking more risks such as driving faster, and left knee fracture. He was referred to the VA Medical Center.

g. DA Form 3349, 6 January 2007, shows he had a temporary profile for hepatitis due to chemical injury. His PULHES code was 333111.

h. Letter from VA, 28 October 2010, shows service connection could not be granted for elevated liver enzymes and his compensation payment would continue unchanged.

i. Memorandum Inability to Clear Medical Readiness, 15 August 2011, advises the chain of command that lack of meaningful improvement had been made in his current medical condition and indicated that he would remain medically nondeployable. He requested to be moved to the rear detachment so he could focus on resolving his medical eligibility as a member in the NYARNG.

j. Orders 236-1034, published by Joint Force Headquarters, 24 August 2011, transferred him to the rear detachment effective 15 August 2011.

k. Duty MOS Provider Evaluation, 13 June 2012, shows he had been diagnosed with elevated liver enzymes but he was unrestricted in his MOS. He could not live in an austere environment without worsening the medical condition.

l. DA Form 3349, 21 June 2012, shows he was on a permanent profile for NASH. His PULHES was 311111 and that he needed board review.

m. Memorandum Notification of Medical Disqualification, 30 August 2012, states it had been determined the applicant no longer met the Army medical standards for retention. Based on the determination, he must choose to be discharged or request a PDES board. If he chose not to respond, he could be medically discharged 45 days after the suspense date of 14 October 2012 with no appeal except to the Board.

n. Self-Authored Memorandum for Record, Officer Separation into the IRR, 5 September 2012, states he requested transfer from the NYARNG to the IRR. He had been diagnosed with liver injury that had made him undeployable. He also transferred to California as part of his civilian employment. He requested a transfer to the IRR until he was able to clear his medical condition and relocated back to New York. The entire memorandum is available for the Board's review.

o. Statement of Understanding and Medical Disqualification Election, 9 October 2012 shows he elected PDES to determine service connected disability rating, retention in an available MOS, and/or separation. He understood if he choose to be separated with less than 15 years of creditable service from the ARNG he would not be entitled to retirement pay or any other service member benefit. The entire form is available for the Board's review.

p. VA Rating Decision, 4 January 2021 shows he had service connected disability for residuals, fracture, third metacarpophalangeal joint, 10 percent, effective 18 November 2020 and broken left patella, 10 percent, effective 18 November 2020.

q. Letter from the VA, 6 January 2021, shows his combined service connected rating was 40 percent effective 18 November 2020.

r. VA Rating Decision, 27 December 2021, shows service connection for NASH was granted at 10 percent effective 10 August 2021.

s. Letter from the VA, 28 December 2021, shows his combined service connected rating was 50 percent effective 10 August 2021.

t. VA Rating Decision, 9 June 2022 shows service connection for rhinitis at 30 percent and service connection for sinusitis at 10 percent effective 10 December 2021.

u. Letter from VA, 10 June 2022, shows his combined service connected rating was 70 percent effective 10 December 2021.

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

a. He served in the Regular Army from 29 May 1999 to 27 August 2001. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 2 years, 2 months, and 29 days of active service. He was honorably released from active duty to complete the remainder of his service obligation in the ARNG.

b. He commissioned in the NYARNG on 28 August 2001.

c. DD Forms 214 show he was ordered to active duty, as a member of the ARNG on:

(1) 30 January 2003 and honorably released on 5 January 2004. He was ordered to active duty for Operation Noble Eagle.

(2) 1 October 2005 and honorably released on 28 January 2006. He was ordered to active duty in support of OEF. He served in Afghanistan from 15 October 2005 to 20 January 2006.

c. DA Form 4187, 4 February 2010 shows his status was changed from deployable to 999M nondeployable.

d. DA Form 2173 (Statement of Medical Examination and Duty Status), 18 August 2011, shows he had a contusion of his right elbow and was examined on 10 May 2011. The injury occurred during combative training.

e. Memorandum Line of Duty (LOD) Investigation [applicant], 9 September 2011 shows the injury - contusion right elbow was found to be in the LOD.

f. NGB Form 22 (Report of Separation and Record of Service) shows he was honorably discharged from the ARNG on 25 April 2013. He completed 13 years, 10 months, and 27 days total service for pay. He was discharged pursuant to National Guard Regulation 635-100 (Termination of Appointment and Withdrawal of Federal Recognition) paragraph 5, section 14, medical disqualification.

g. His record is void of a Medical Evaluation Board or a Physical Evaluation Board.

5. Based on the applicant's assertion he suffered from medical issues due to his service and the VA documentation provided, the Army Review Boards Agency Medical Section provided a medical review for the Board's consideration.

#### 6. 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 (EMR – AHLTA and/or MHS Genesis), 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 has applied to the ABCMR in essence requesting referral to the Disability Evaluation System (DES). He states in part:

"In DEC2008, I was diagnosed with Non-Alcoholic Steatohepatitis (NASH) liver disease as part of a pre-deployment physical at the Syracuse VAMC. I deployed to Thailand in JAN2009 with this liver condition, but on my return, I was rated non-



deployable in 2010 and was eventually evaluated as medically unfit to continue serving.

At this point, I was a "top-block" officer, rated one of the best Majors in the 27th Brigade Combat Team, and recommended for promotion to Lieutenant Colonel and projected to take Battalion command.

During this period, I was informed in writing that I was referred to a medical board, but I never received this board. Instead, I received a notification of medical separation, to which I formally requested a Physical Disability Evaluation System (PDES) board, but it was never granted/ submitted by NYRANG.

I was verbally told seven months later that I no longer qualified to request PDES since the VA (at that time) ruled that my NASH liver disease was not service-connected, and I was to be medically discharged without PDES. The VA later reversed its decision, granting me a service connection for this disability."

c. The Record of Proceedings details the applicant's service and the circumstances of the case. His Report of Separation and Record of Service (NGB 22) for the period of Service under consideration shows he entered the Army National Guard on 28 August 2001 was separated from the New York Army National Guard (NYARNG) effective 25 April 2013. It shows he had 12 years, 00 months, and 00 days of total service for retired pay.

d. In February 2003, the applicant was placed on a non-duty limiting permanent physical profile for mild asthma IAW paragraph 3-27a(4) of AR 40-501, Standards of Medical Fitness (28 March 2002). The applicant had no limitations and took the standard Army Physical Fitness Test (APFT).

e. The applicant states he was found to have Non-Alcoholic Steatohepatitis (NASH) during a pre-deployment examination in December 2008. From the Stanford Medicine website:

"Nonalcoholic steatohepatitis (NASH) is liver inflammation and damage caused by a buildup of fat in the liver. It is part of a group of conditions called nonalcoholic fatty liver disease. You may be told you have a 'fatty liver.' Many people have a buildup of fat in the liver, and for most people it causes no symptoms and no problems. But in some people, the fat causes inflammation and damages cells in the liver. Because of the damage, the liver doesn't work as well as it should.

NASH can get worse and cause scarring of the liver, which leads to cirrhosis. But the disease doesn't always get worse.

NASH is similar to the kind of liver disease that is caused by long-term, heavy drinking. But NASH occurs in people who don't abuse alcohol."

(<https://stanfordhealthcare.org/medical-conditions/liver-kidneys-and-urinary-system/nonalcoholic-steatohepatitis-nash.html>)

f. In a 15 August 2011 memorandum to his commander, he requested to be transferred to the rear detachment because the NASH was not improving:

"The purpose of this memorandum is to advise the chain of command that lack of meaningful improvement in my current medical condition indicates that I will remain medically nondeployable for the foreseeable future. Accordingly, I respectfully request I be moved to the rear detachment so that I may focus solely on resolving my medical eligibility as a member in the New York Army National Guard.

g. On 29 June 2012, the applicant was placed on a duty limiting permanent physical profile for NASH. The NYARNG informed him of this medical disqualification in a 30 August 2012 memorandum:

"It has been determined you no longer meet the Army medical standards for retention IAW AR 40-501, chapter 3. Based on this determination you must choose to be discharged or request a Physical Disability Evaluation System (PDES) board. If you choose not to respond you may be medically discharged 45 days after the above suspense date with no appeal except to the Army Board for Corrections IAW AR 15-185.

h. The NYARNG gave the applicant a suspense date for reply of 14 October 2012. The applicant appears to have declined an NDR PEB: In his 5 September 2012 response, he requested transfer into the Individual Ready Reserve (IRR). Then, on 9 October 2012, the applicant elected for PDES, selecting the option "Physical Disability Evaluation System (PDES) to determine service-connected disability rating (if any\*\*), retention in an available MOS [military occupational specialty], and/or separation."

i. The PDES is now called the DES. Both contain the very familiar duty-related process and the less familiar non-duty related process. There is no evidence the applicant's NASH was incurred during or permanent aggravated by his military service. Thus, he was not eligible for the duty related process but was eligible for the non-duty related process via a non-duty related physical evaluation board (NDR PEB).

j. An NDR PEB allows Reserve Component (RC) Service Members who are not currently on a call to active duty of more than 30 days and who are pending separation for non-duty related medical conditions but desire to remain in their component to enter the Disability Evaluation System (DES) for a determination of fitness. The NDR PEB affords these Soldiers the opportunity to have their fitness for duty determined under the

standards that apply to Soldiers who have the statutory right to be referred to the DES for a duty related medical condition. After 2014, these boards also look to see if the referred condition(s) were duty related. When there is some evidence one or more conditions was likely duty related, they return them to the sending organization for entrance into the duty related processes of the DES.

k. There is no additional probative documentation.

l. The applicant's Army National Guard Refitment Points History Statement prepared 14 August 2012 shows he was a continuously drilling member after 29 May 2006. Thus, his NASH was found while he was in a drilling status; and there is no probative evidence the applicant's profiled NASH, which resulted in his separation for a medically disqualifying condition, was incurred during or permanently service aggravated while in a qualified duty status. Hence, the condition is not related to his military service and not eligible for referral to the duty-related DES.

m. JLV shows he has been awarded multiple VA service-connected disability ratings, including ratings for asthma and residuals of hepatitis. However, the DES only compensates an individual for duty incurred medical condition(s) which have been determined to disqualify him or her from further military service and consequently prematurely ends their career. The DES has neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions which were incurred or permanently aggravated during their military service. 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 ARBA medical advisor the applicant's condition is not eligible for referral to the DES and therefore a referral to the DES is unwarranted.

#### BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition, and executed a comprehensive review based on law, policy, and regulation. Upon review of the applicant's petition, available military records, and the medical review, the Board concurred with the advising official finding that the applicant's Department of Veterans Affairs rating determinations are based on the roles and authorities granted by Congress to the Department of Veterans Affairs and executed under a different set of laws. Based on this, the Board determined referral of his case to the Disability Evaluation System (DES) is not warranted.

2. The applicant's request for a personal appearance hearing was carefully considered. In this case, 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.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

|   |   |   |                      |
|---|---|---|----------------------|
| : | : | : | 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.

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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, USC, chapter 61, provides the Secretaries of the Military Departments with authority to retire or discharge a member if they find the member unfit to perform military duties because of physical disability. The U.S. Army Physical Disability Agency is responsible for administering the Army physical disability evaluation system and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with Department of Defense Directive 1332.18 and Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation).

3. Army Regulation (AR) 635-40 (Disability Evaluation for Retention, Retirement, or Separation) establishes the Army Disability Evaluation System and sets forth policies, responsibilities, and procedures that apply in determining whether a Soldier is unfit because of physical disability to reasonably perform the duties of his office, grade, rank, or rating. Only the unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability.

a. Soldiers are referred to the disability system when they no longer meet medical retention standards in accordance with AR 40-501, chapter 3, as evidenced in an MEB; when they receive a permanent physical profile rating of "3" or "4" in any functional capacity factor and are referred by a Military Occupational Specialty Medical Retention Board; and/or they are command referred for a fitness for duty medical examination.

b. The disability evaluation assessment process involves two distinct stages: the MEB and physical evaluation board (PEB). The purpose of the MEB is to determine whether the service member's injury or illness is severe enough to compromise his or 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 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 are either 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 onetime 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 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 medical impairment prevents reasonable performance of the duties required of the Soldier's office, grade, rank, or rating.

4. Title 10, USC, section 1201, provides for the physical disability retirement of a member who has at least 20 years of service or a disability rating of at least 30 percent. Title 10, USC, section 1203, provides for the physical disability separation of a member who has less than 20 years of service and a disability rating of less than 30 percent.

5. Title 38, USC, sections 1110 and 1131, permits the VA to award compensation for disabilities that were incurred in or aggravated by active military service. However, an award of a higher VA rating does not establish error or injustice on the part of the Army. The Army rates only conditions determined to be physically unfitting at the time of discharge which disqualify the Soldier from further military service. The VA does not have the authority or responsibility for determining physical fitness for military service. The VA awards disability ratings to veterans for service-connected conditions, including those conditions detected after discharge, to compensate the individual for loss of civilian employability. These two government agencies operate under different policies. 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.

6. AR 135-180 (Retirement for Non-Regular Service) implements statutory authorities governing the granting of retired pay for non-regular service to Soldiers in the Army National Guard (ARNG), Army National Guard of the United States (ARNGUS) or the U.S. Army Reserve (USAR).

a. Paragraph 2-2 (Basic qualifying service requirements) states, to be eligible for retired pay at or after the age (60 years of age) specified in paragraph 2-1, an individual need not have military status at the time of application, but must have completed one of the following: (1) A minimum of 20 years of qualifying service computed under Title 10, USC, section 12732; or, (2) Fifteen (15) years of qualifying service, and less than 20, computed under Title 10, USC, section 12732, if the individual is to be separated because the Soldier has been determined unfit for continued Selected Reserve service, and none of the conditions in 10 USC 12731b(b) exist.

b. Paragraph 2-3 (Other service requirements) states in pertinent part, additional Reserve Component (RC) service requirements include — (1) For Soldiers who completed the years of qualifying service on or after 5 October 1994, but before 25 April 2005, the last 6 years of qualifying service must have been in a component other than a regular component, the Fleet Reserve, or the Fleet Marine Corps Reserve. (2) For Soldiers who completed the years of qualifying service on or after 25 April 2005, there is no minimum RC service requirement. (3) The service required in paragraphs 2–3a(1) and 2–3a(2) do not need to be continuous years of qualifying service. (4) Any period of service as a member of a regular component between periods of Reserve service counted toward the 8 or 6 years requirement will be included in the determination of the Soldier's years of qualifying service in paragraph 2–2 toward eligibility for non-regular retired pay, but will not count toward the last 8 or 6 years. Any Reserve service served in conjunction with regular service will not count toward the last 8 or 6 years (that is, partial year credit). An applicant must (1) not be entitled to retired pay from the Armed Forces under any other provision of law; (2) not have elected to receive disability severance pay in lieu of non-regular retired pay. Reserve personnel involuntarily relieved from active service who are not eligible for retired pay at time of release, but who are paid readjustment pay are eligible to receive retired pay under this regulation provided they are otherwise qualified at a later date; (3) not be a person who is convicted of an offense under the Uniform Code of Military Justice (Title 10, USC, Chapter 47) and whose sentence includes death; or is separated pursuant to sentence of a court-martial with a dishonorable discharge, a bad conduct discharge, or (in the case of an officer) a dismissal, because Title 10, USC, section 12740 provides that such persons are not eligible for non-regular retired pay.

c. Paragraph 2-4 (Notification of Eligibility for Retired Pay at Age 60 (20 Year Letter)) states, (1) Under Title 10, USC, section 12731a RC Soldiers who complete the eligibility requirements in section I will be notified in writing within 1 year after completion of the required service in accordance with AR 140–185 or National Guard Regulation (NGR) 680–2. The Notification of Eligibility for Retired Pay at Age 60 (20 Year Letter) will be issued to Soldiers credited with 20 years of qualifying service and should be issued prior to discharge or transfer to the Retired Reserve. The Notification of Eligibility for Retired Pay at Age 60 (20 Year Letter) will be issued by: (a) HRC for all USAR Soldiers except for those who are within 2 years of qualifying for an active duty retirement and can remain on active duty to complete the required service. The Notification of Eligibility for Retired Pay at Age 60 (20 Year Letter) will be issued in the format determined by HRC. (b) The State Adjutant General (Military Personnel Management Office (MPMO/G1) for all Army National Guard (ARNG) Soldiers serving in an active status in the State, where the eligible Soldier was assigned at the time they become eligible. The Notification of Eligibility for Retired Pay at Age 60 (20 Year Letter) will be issued in the format shown in NGR 680–2. (2) After a Soldier has been notified of their eligibility for retired pay for non-regular service, the Soldier's eligibility for retired pay may not be denied or revoked on the basis of any error, miscalculation,

misinformation, or administrative determination of years of service performed, unless it resulted directly from the fraud or misrepresentation of the individual concerned.

However, the number of years of creditable service upon which retired pay is computed may be adjusted to correct any error, miscalculation, misinformation, or administrative determination, and when such a correction is made the person is entitled to retired pay in accordance with the number of years of creditable service, as corrected, from the date they are granted retired pay.

7. On 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRBs) and Service Boards for Correction of Military/Naval Records (BCM/NRs) to carefully consider the revised PTSD criteria, detailed medical considerations and mitigating factors when taking action on applications from former service members administratively discharged under other than honorable conditions and who have been diagnosed with PTSD by a competent mental health professional representing a civilian healthcare provider in order to determine if it would be appropriate to upgrade the characterization of the applicant's service.

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 (TBI); sexual assault; or sexual harassment. Standards for review should rightly consider the unique nature of these cases and afford each veteran a reasonable opportunity for relief even if the sexual assault or sexual harassment was unreported, or the mental health condition was not diagnosed until years later. 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. The guidance further describes evidence sources and criteria and requires Boards to consider the conditions or experiences presented in evidence as potential mitigation for misconduct that led to the discharge.

9. Army Regulation 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

10. 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.

//NOTHING FOLLOWS//