

IN THE CASE OF: ████████████████████████████████████████████████████████████

BOARD DATE: 27 July 2023

DOCKET NUMBER: AR20230001902

APPLICANT REQUESTS: This case comes before the Army Board for Correction of Military Records (ABCMR) on joint motion by the applicant's Counsel and the Secretary of the Army for voluntary remand and stay of proceedings, filed in the U.S. Court of Federal Claims on 17 October 2022 and issued by the Court on 14 February 2023 in Case Number 22-1527 C. In support of this motion, the parties state the following:

a. The applicant seeks review of the ABCMR's alleged failure to take final action and to issue a substantive decision on his application to change his discharge to physical disability retirement.

b. The applicant is a Vietnam veteran who received an honorable discharge from the Army on 14 March 1968 and alleges the Army should change his discharge to reflect he should have been retired due to a medical disability, based on a service-connected diagnosis residuals of gunshot wounds by the Department of Veterans Affairs (VA) effective 15 March 1968. Specifically:

- left arm, with fracture, shaft of humerus with retained multiple foreign bodies
- right calf with fascial defect, muscle group XI
- left leg with some fascial defects and muscle hernia and retained multiple foreign bodies
- muscle group I, near insertion of deltoid muscle and left maxilla
- scar, right arm, muscle group VII

c. The parties have agreed to remand the present case to the ABCMR and to stay proceedings before the Court of Federal Claims under the following conditions:

(1) Reconsider its 22 February 2022 decision to uphold the Fort Campbell, Blanchfield Army Community Hospital DES Medical Evaluation Board's determination that Plaintiff was not entitled to a medical board at the time of his discharge from the Army.

(2) Afford Plaintiff the opportunity to file within 30 days of this Order, or such other time that the ABCMR may deem appropriate, an amended application and/or any

additional documents, evidence, or arguments that Plaintiff wishes the ABCMR to consider during the remand proceedings, including but not limited to the applicability of any Department of Defense instructions, Army Regulations, or any other instructions, regulations, or statutes.

(3) Consider requesting new advisory opinions addressing the issues set forth in Defendant's Motion (ECF No. 11), including whether Plaintiff was fit to perform the duties of his office, grade, rank, and rating; and if the ABCMR does request new advisory opinions, provide Plaintiff an opportunity to comment upon any new advisory opinions.

(4) Issue, within 180 days of this Order, a decision (Remand Decision) deciding Plaintiff's application or amended application.

(5) Promptly forward by email its Remand Decision to Plaintiff's counsel of record and to counsel of record for the United States.

(6) Promptly forward two copies of its Remand Decision to the Clerk of Court of the United States Court of Federal Claims, pursuant to Rule 52.2(d)

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

- Supplemental Remand Brief, 29 March 2023
- U.S. Court of Federal Claims Order, Case No. 22-1527 C, issued 14 February 2023
- Defendant's Unopposed Motion for a Voluntary Remand and for a Stay of Court Proceedings Pending the Remand Results, Case No. 22-1527 C, issued 13 February 2023
- U.S. Court of Federal Claims Complaint, Case No. 22-1527 C, filed 17 October 2022
- ABCMR Case AR20180009707, including:
  - Decision Letter, 22 February 2022
  - Memorandum for the Office of the Surgeon General, 11 June 2022
  - Decision Letter, 10 June 2021
  - Record of Proceedings, 9 February 2021
  - Memorandum, subjected ABCMR MTF Decision Memorandum
  - Memorandum, subjected Medical Evaluation Board Determination

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20180009707 on 9 February 2021.

2. In the U.S. Court of Federal Claims Complaint, Case No. 22-1527 C, Counsel states:

a. The applicant brings this case against the United States of America, for military disability retirement pay based on the U.S. Army's arbitrary, capricious, unlawful and factually unsupported decision that he was able to perform the duties of his grade, rank, and rating despite his combat-incurred physical disabilities.

b. The Army found the applicant to be fit for discharge, despite never revoking his temporarily restricted duty status after he suffered gunshot wounds in all of his extremities and noting the abnormal, and movement limiting, wounds on both his arms and legs during his discharge examination.

c. Despite this evidence, the Army did not find that the applicant was directly eligible for disability retirement under Title 10 United States Code (USC) Section 1201 and did not provide him with disability processing pursuant to the Disability Evaluation System (DES), which would have included an evaluation by the Medical Evaluation Board (MEB) and the Physical Education Board (PEB).

d. The Army Board for the Correction of Military Records (ABCMR) arbitrarily denied the applicant's application to correct his military records to find directly that his injuries were unfitting or to provide him with disability processing to which he is entitled. The Army's failure to do so was arbitrary, capricious, unsupported by substantial evidence, and contrary to law.

e. The applicant joined the Army in October 1965. He was trained as an Artillery Crewman and was ultimately deployed to Vietnam with the 4th Battalion, 42nd Field Artillery.

f. In 1966, the applicant's battalion was ambushed. As a result, the applicant sustained gunshot wounds in each of his extremities. Due to the heavy gunfire, he laid wounded for hours and could not be medically evacuated until the following morning. He was awarded the Purple Heart. He was hospitalized for three months on a hospital ship and at the 106th General Hospital in Japan.

g. In March 1967, the applicant returned to Fort Knox, KY, where he was placed on temporary restricted duty for his upper extremity injuries. On 17 March 1968, he was separated from active duty for completing his term of service. No evidence exists suggesting the applicant was removed from restricted duty and able to participate fully with his unit. His separation physical performed in January 1968 found him fit for discharge, despite noting abnormal gunshot wounds on both his legs and arms.

h. Following his discharge, the applicant applied for Veteran's Administration (VA) benefits. Upon examination, the VA rated injuries to his left arm, left leg, and right calf at

20 percent based on residuals of gunshot wounds. The VA also rated injuries to the muscle group near the insertion of his deltoid muscle and the left maxilla at 10 percent based on residuals of gunshot wounds. The VA's award of benefits was effective 15 March 1968.

i. The Army incorrectly discharged the applicant without providing him with disability processing, including an evaluation by the MEB and the PEB. Because of the Army's failure, he applied to the ABCMR to correct his military record. Despite several factual findings that he would have been unable to continue serving as an artillery crewman due to the injuries he sustained in Vietnam, the ABCMR concluded that he would not have been entitled to an MEB at the time of his discharge. Thus, he has been denied disability processing and disability retirement.

3. Counsel provided a Supplemental Remand Brief in Support of Application for Correction of Military Record, dated 29 March 2023, stating in part:

a. The applicant was wounded in Vietnam while serving in the Army as an Artillery Crewman. He suffered gunshot wounds in all of his extremities, causing movement-limiting wounds on both his arms and legs. The Army found the applicant to be fit for discharge, despite never revoking his temporarily restricted duty status and noting his duty-limiting injuries during his discharge examination. Under Army Regulation 40-501 (1963), the applicant should have been found unfit for his upper left and bilateral lower extremity gunshot wound residuals. But the applicant was separated without any disability processing. The applicant therefore requested that the ABCMR provide him with disability processing, in the form of an evaluation by the MEB and the PEB, or to directly find the applicant's injuries unfitting. However, the ABCMR did neither. Instead, the ABCMR denied the applicant's application to correct his military records to find that the applicant's injuries were unfitting or to provide him with disability processing to which he is entitled. The ABCMR's failure to do so was arbitrary, capricious, unsupported by any evidence, and contrary to law.

b. The applicant joined the Army in October 1965. He was trained as an Artillery Crewman and was ultimately deployed to Vietnam. In 1966, the applicant sustained gunshot wounds in each one of his arms and each one of his legs, was hospitalized for three months on a hospital ship, and placed on temporary restricted duty for his upper extremity injuries. On 14 March 1968, the applicant was separated from the active Army for completing his service. No evidence exists to suggest that the applicant was removed from restricted duty prior to his separation so that he could participate fully with his unit. His separation-physical performed in January 1968 found him fit for discharge, despite noting abnormal gunshot wounds on both his legs and arms.

c. Following his discharge, the applicant applied for Veteran's Administration (VA) benefits. The VA ultimately rated the applicant's injuries a combined rating of 60

percent, effective 15 March 1968. Accordingly, the Army incorrectly discharged the applicant without providing him with disability processing, including an evaluation by the MEB and the PEB.

d. Because of the Army's failure, the applicant applied to the ABCMR to correct his military record on 25 June 2018.<sup>1</sup> At the request of the ABCMR, the Army Review Boards Agency (ARBA) Medical Advisor reviewed the applicant's application and concluded that the preponderance of the evidence supports the contention that the applicant would have been unable to continue serving as an artillery crewman due to the injuries sustained in November 1966 and that referral of the applicant's case was warranted. Despite this unequivocal determination, the ABCMR deferred to the Office of the Surgeon General to determine if the disability evaluation he received from the Army accurately depicted his conditions as they existed at the time. Then, the Office of the Surgeon General endorsed the erroneous conclusion of the Fort Campbell, Blanchfield Army Community Hospital IDES Medical Evaluation Board (Hospital) that it would not have sufficient objective data to establish an unfitting disability at the time of the applicant's discharge without resorting to mere conjecture. The Hospital concluded that the applicant's injuries from the numerous gunshot wounds he suffered would have met retention standards at the time of discharge and that he would not have been entitled to a medical board at the time of discharge. The Hospital made no attempts to reconcile its finding with the completely opposite finding made by the ARBA Medical Advisor. The ABCMR then upheld the conclusion of the Hospital (as endorsed by the Office of the Surgeon General) and arbitrarily and capriciously denied the applicant's application.

e. The applicant subsequently filed a lawsuit in the United States Court of Federal Claims, alleging that the ABCMR's decision was arbitrary, capricious, unlawful and factually unsupported and seeking military disability retirement pay. The Government moved for voluntary remand, which the Court granted. The applicant submits this Supplemental Remand Brief in support of his application for the correction of his military record.

f. The applicant was born in [REDACTED]. The applicant was raised in [REDACTED] in an intact, large family of nine children. The applicant finished the 11th grade at [REDACTED] High School in [REDACTED] before dropping out to start working because [of financial hardship].

g. The applicant married before he was drafted and has been married for over forty years. Upon returning from Vietnam, the applicant received his high school diploma at Ahrens Trade School in Louisville. He also earned his Associate's degree in Business in the early 1970s. The applicant began working for Ford Motor Company in 1968 and worked there for about 30 years until 1998, when he retired at about age 53. The applicant has an adult son and daughter and one grandson.

h. The applicant was drafted into the Army on 11 October 1965 and served as an Artillery Crewman until 14 March 1968. The applicant completed training at Fort Knox and completed advanced infantry training at Fort Lewis. The applicant was almost immediately deployed to Vietnam with the 4th Battalion, 42nd Field Artillery. He described his Battalion as close, like a family.

i. On 12 November 1966, near the Cambodian border, the applicant's battalion was ambushed and he was wounded in each extremity by small arms fire. According to the applicant, they were just lining up to eat and incoming rounds hit him in both legs and both arms. He laid out there for 3 or 4 hours before a medic came. He remembers crawling to a foxhole and flipped over and laid in the foxhole. He could hear somebody saying, "█████ is dead, █████ is dead!" And the fire was so bad the helicopters couldn't land. they couldn't med evac them until the next morning. The attack lasted through the night. When the medic finally got to the applicant, the only thing he could do for him was to give him a good shot of morphine.

j. Following the ambush, the applicant was hospitalized for approximately three months on a hospital ship and at the 106th General Hospital in Japan. In March 1967, after his hospitalization, the applicant returned to Fort Knox, where he was placed on temporarily restricted duty for his upper extremity injuries.

k. The applicant was separated from the active Army and transferred to Army Standby Reserve on 14 March 1968 and ultimately removed from the Army Standby Reserve on 10 October 1971. The applicant's separation examination-performed on 16 January 1968-noted that he received abnormal wounds on both his arms and legs. Nothing indicates that the applicant was removed from restricted duty prior to his separation. On 12 November 1966, the applicant was awarded the Purple Heart for the wounds he received in Vietnam. The applicant was also awarded the National Defense Service Medal.

l. Despite the fact that the applicant sustained significant and abnormal, gunshot wounds while serving in Vietnam that restricted his ability to fully serve, he was separated from the Army without any DES processing.

m. Upon his separation from the active Army on 14 March 1968, the applicant applied for VA benefits. In a medical examination on July 5, 1968 (less than four months after his separation), the VA determined that there was some bony deformity in the left humerus in its distal third and approximately 10 degrees of limitation of full flexion of the left forearm and the left arm. The VA further determined that the applicant does have 10 to 15 degrees of limitation of adduction of left femur and left fifth joint compared to the right. Based on these limitations and various muscle and facial injuries, the VA issued the following ratings:

- 20 percent - Residuals of gunshot wound, left arm, with fracture, shaft of humerus with retained multiple foreign bodies
- 20 percent - Residuals of gunshot wound of left leg with some fascial defects and muscle hernia and retained multiple foreign bodies
- 20 percent - Residuals of gunshot wound from right calf with fascial defect, muscle group XI
- 10 percent - Residuals of gunshot wound, muscle group I, near insertion of deltoid muscle and left anaxilla
- 10 percent - Scar residuals of gunshot wound, right arm, muscle group VII
- 60 percent - Combined

n. The effective date for the VA's award of benefits was 15 March 1968, the day after he was discharged. The applicant has stated that his muscle injuries impacted his ability to work. Specifically, he had a lack of strength for overhead work like changing light bulbs. When asked if he has problems in any of the areas where he was wounded, the applicant stated his arm the majority and his leg sometimes. He further stated that he has intermittent weakness in his left arm when he tries to lift and that there is intermittent pain in the left antecubital fossa. The pain can be sharp, can occur with lifting or when his arm is at rest. The applicant further stated that he has left leg pain in the back of his distal posterior thigh. The pain comes and goes; can occur at rest or while walking. The applicant also stated that he has occasional pain in the right calf.

o. On 25 August 1992, the applicant received a VA rating stating that the rating he received in March 1968 failed to take into consideration a 5.9 percent bilateral factor for his disabilities which would have resulted in a combined evaluation of 70 percent. The Director of Compensation and Pension Services concurred with the proposal to establish the combined 70 percent evaluation. The applicant received VA ratings reflecting this increase to a combined 70 percent evaluation.

p. On 25 June 2018, the applicant filed an Application for Correction of Military Record to the ABCMR to provide him with disability processing in the form of an evaluation by the MEB and PEB, or to find directly that the applicant's injuries were unfitting, including a Brief in Support and Exhibits.

q. On 9 February 2021, the ABCMR issued its Record of Proceedings (ROP) in the applicant's case. According to the ROP, the ABCMR asked the ARBA Medical Advisor to review the applicant's ABCMR application and accompanying documentation. Upon review, the ARBA medical advisor indicated that though VA disability ratings do not directly correspond with MEB or PEB findings, they can yield some information on a Veteran's conditions. Looking at the VA Schedule for Rating Disabilities (VASRD) code and ratings for his service connected disabilities ... the 20 percent rating (for his bilateral calf muscles and his dominant arm) equates to moderately severe damage and the 10 percent rating for his shoulder equates to moderate damage.

r. The ARBA Medical Advisor then found that moderately severe damage to both his right and left calf muscle would almost certainly have prevented the applicant from effectively running, hiking, prolonged walking, and performing other activities requiring calf muscle strength and endurance. The ARBA Medical Advisor further found that the applicant's moderately severe damage to the muscles in his anterior upper arm coupled with the moderate damage to some of his shoulder musculature would certainly [have] limited his ability to lift and carry items of significant weight. This would have negatively affected his capabilities as an artillery crewman. Ultimately, the ARBA Medical Advisor concluded that the preponderance of the evidence supports the contention that the applicant would have been unable to continue serving as an artillery crewman due to the injuries sustained in November 1966. There has traditionally been the requirement that when a Soldier has a medical condition or conditions which could fail medical retention standards, he or she is referred to the Disability Evaluation System. It was the opinion of the ARBA Medical Advisor that referral of the applicant's case to the DES evaluation is warranted.

s. Despite the clear and unequivocal determination by the ARBA Medical Advisor that the applicant's physical limitations, as documented by the VA, and his corresponding VA ratings, indicated he could not reasonably perform the duties of his office, grade, rank or rating, the ABCMR arbitrarily, capriciously, and unlawfully failed to correct the identified error and injustice in the applicant's records. Instead of correcting the indisputable error, the ABCMR ignored the ARBA Medical Advisor and shifted its responsibility to correct the applicant's records to the Office of the Surgeon General (OSG) to determine if the disability evaluation he received from the Army accurately depicted his conditions as they existed at the time. According to the ABCMR, if review by the OSG determines the evidence supports amendment of the applicant's disability evaluation records, the applicant will be afforded due process through the DES for consideration of any additional diagnoses (or changed diagnoses) identified as having not met retention standards prior to his discharge.

t. A mere two days later, on 11 February 2021, contrary to the findings of fact presented in the ABCMR's review, the Hospital issued a Decision Memorandum concluding that the applicant would not have been entitled to a medical board at the time of discharge. The Hospital, ignoring the clear limitations uncovered by the applicant's medical records and VA examinations, erroneously concluded that it would not have sufficient objective data to establish: an unfitting disability at the time of the applicant's discharge without resorting to mere conjecture. Therefore, the Hospital concluded that the applicant's injuries from the numerous gunshot wounds he suffered would have met retention standards at the time of discharge and that he would not have been entitled to a medical board at the time of discharge. The Hospital found that no change in the applicant's narrative reason for separation is warranted in this case. In its



decision, the Hospital made no attempt to reconcile its finding with the completely opposite finding made by the ARBA Medical Advisor.

u. Over a year later, on 14 February 2022, the OSG issued a Memorandum that served as an endorsement of the opinion provided by the Hospital regarding concerns presented by the applicant. The OSG stated that medical evidence based on the review of the applicant's medical records indicate that a medical evaluation board (MEB) was not warranted at the time of his separation. Again, no attempt was made to reconcile the advisory opinion obtained by the ABCMR or to explain, how in light of the applicant's documented limitations he could have met the requisite retention standards.

v. On 22 February 2022, the ABCMR sent the applicant a letter informing him that it had abrogated its responsibility and that his application was referred to the OSG to determine if the applicant should have been retired or discharged by reason of physical disability through the Disability Evaluation System. This letter further stated that after review of his medical records, it was determined that he did not require disability processing at the time of separation.

w. The applicant filed his complaint in the United States Court of Federal Claims on 17 October 2022. The applicant filed suit under 10 USC § 1201 for pay and benefits of medical retirement due to the applicant's physical condition at the time of his discharge, as well as the correction of the record regarding the nature of the applicant's disability rating above the necessary 30 percent to entitle him to medical retirement. The statute is money mandating and thus provided the applicant a cause of action under the Tucker Act.

x. On 13 February 2023, the Government filed a motion for voluntary remand, which the United State Court of Federal Claims granted the following day. In remanding the matter to the ABCMR, the United States of Federal Claims ordered that the ABCMR:

- reconsider its 22 February 2022 decision to uphold the Hospital's determination that the applicant was not entitled to a medical board at the time of his discharge from the Army
- afford the applicant the opportunity to file within 30 days of this Order, or such other time that the ABCMR may deem appropriate, and amended application and/or any additional documents, evidence, or arguments that the applicant wishes the ABCMR to consider during the remand proceedings, including but not limited to the applicability of any Department of Defense instructions, Army Regulations, or any other instructions, regulations, or statutes
- consider requesting new advisory opinions addressing the issues set forth in the Governments motion for voluntary remand, including whether the applicant was fit to perform the duties of his office, grade, rank, and rating;

- and if the ABCMR does request new advisory opinions, provide the applicant an opportunity to comment upon any new advisory options
- issue, within 180 days of the order, a decision (Remand Decision) deciding the applicant's application or amended application
  - promptly forward by email its Remand Decision to the applicant 's counsel of record and to counsel of record for the Government
  - promptly forward two copies of its Remand Decision to the Clerk of Court of the United States Court of Federal Claims

y. The initial denial of the applicant's application was procedurally improper and contrary to law because it was not made by the Secretary acting through boards of civilians of the executive part of that military department but rather by the OSG. In this case, 10 USC § 1552(a)(1) expressly requires that the Secretary, when exercising his discretion to correct military records, must act through boards of civilians. Here the ABCMR is the relevant board of civilians. In this case, the ABCMR did not render a final decision on the applicant 's application. Rather, the ABCMR, after receiving an opinion from the ARBA Medical Advisor that the applicant's case be referred for DES evaluation, purported to correct the applicant's military records by referring them to the OSG. After the OSG found, a mere two days later, that the applicant would not have been entitled to a medical board at the time of discharge, that finding never returned to the ABCMR for review, analysis, or consideration. Instead, the ABCMR sent the applicant a letter stating that the OSG's decision in this case is final.

z. While the ABCMR may seek and consider the comments of medical authorities of the United State in considering the entire record, that clearly is not what occurred. Rather, the ABCMR impermissibly delegated its decision making function to the OSG, who rendered an opinion that was directly binding on the applicant without further review, analysis, or action by the ABCMR. The ABCMR may not rely solely upon medical advisory opinions or recommendations from the Surgeon General's office when none of the persons who made the recommendation had ever seen or examined the applicant. The ABCMR acted arbitrarily and capriciously in refusing to grant plaintiff hearing or correct his record, when it acted upon recommendation of OSG which had not examined plaintiff, holding that ABCMR acts arbitrarily when it follows an ex parte opinion of the Surgeon General which is inaccurate and contrary to the evidence and entitling plaintiff to recover disability retirement pay.

aa. In summary, after the ARBA Medical Advisor concluded that the preponderance of the evidence supports the contention that the applicant would have been unable to continue serving as an artillery crewman due to the injuries sustained, the ABCMR did not refer the applicant's case to the DES for evaluation as it should have, but instead impermissibly deferred the matter to the OSG in violation of 10 USC § 1552(a)(1). The applicant requests that the ABCMR, not the Office of the Surgeon General, render a final decision on the applicant's application.

bb. The applicant requests that the ABCMR: (1) adequately compare the applicant's disability to the retention standards set forth in Army Regulation 40-501 (1963); (2) adequately consider the actual duties performed by an Artillery Crewman; and (3) consider the record evidence as a whole, including the applicant's VA disability ratings.

cc. A failure to adequately consider the actual duties being performed by a service member in the context of the member's office, grade, rank, or rating may be error. Similarly, cherry-picking evidence supportive of the Board's conclusion and ignoring contrary evidence in the record fails the substantial evidence standard. Indeed, the essence of reasoned decision-making is a willingness to consider facts and arguments that run counter to a decision-maker's favored outcome. Accordingly, courts have long held that the substantiality of evidence must take into account whatever in the record fairly detracts from its weight. An agency must consider the whole record ... pro and con, before reaching a conclusion. An agency's decision cannot stand absent a satisfactory showing on the record that its determination was based upon a balanced consideration of all the evidence available and presented.

dd. As the United States Court of Federal Claims has long held, the VA rating, assigned after medical examination and based on the VASRD scale, should be considered strong evidence of unfitness. Plaintiffs' VA ratings, while not determinative on the issue of his fitness for duty at the time of discharge or of his eligibility for disability pay...are nevertheless entitled to great weight in these regards when based on a medical examination, as was the case here. Indeed, contrary to its claim, the OSG did not need to resort to mere conjecture. Although not binding, the ABCMR is required to consider a VA disability rating as relevant evidence in determining unfitness for duty. Holding that the ABCMR erred by failing to consider a VA disability rating at separation; noting that correction board is required to consider a relevant VA evaluation in the context of the whole record. Remanding because the ABCMR did not provide any explanation for why the Army should not reconsider its disability rating based on the higher disability rating provided to applicant by the VA for precisely the same diagnosis just two months after his separation. Regardless of how a correction board weighs the VA rating, the board is required to consider all relevant evidence, including VA ratings, but it is not bound by them. The ABCMR's failure to do so reveals the lack of a balanced analysis of the medical evidence.

ee. As noted above, the retention standards in Army Regulation 40-501 (1963) are not met when conditions obviously preclude the individual's satisfactory performance of duty, when injuries cause more than moderate loss of function, which precludes the satisfactory performance of duty following surgical corrections, and pursuant to any other neurological condition, regardless of etiology, when after adequate treatment there remain residual such as ... weakness or paralysis of important muscle groups, deformity, incoordination, pain or sensory disturbance of such a degree as to definitely

interfere with satisfactory performance of duty. A Soldier further fails retention standards in the following circumstances: e. Fractures: (1) Malunion of fractures. When after appropriate treatment, there is more than moderate malunion with marked deformity and more than moderate loss of function and (3) Bone fusion defect. When manifested by more than moderate pain and loss of function. The OSG never actually applied these retention standards in denying the applicant's application, instead merely claiming that they were reviewed.

ff. Moreover, an understanding and analysis of the duty of an Artillery Crewman is critical to a proper application of these retention standards. The duties of an Artillery Crewman at the time of the applicant's discharge from the Army included a host of physically demanding aerobic and strength tasks involving carrying and lifting objects ranging in weight from 35 to 270 pounds, including: (1) conducting tactical movement and engaging in foot march; (2) employing hand grenades; (3) preparing for a fighting position by filling and placing sandbags; (4) dragging a casualty to immediate safety; (5) transferring ammunition with a carrier; and (6) placing and maneuvering artillery weapons. Again, the OSG did not consider these duties of an Artillery Crewman in its perfunctory denial of the applicant's application.

gg. As noted above, the VA ultimately rated the applicant's injuries at a combined evaluation of 70 percent. The OSG focused only on certain narrative aspects of the VA's 22 July 1968 Rating Decision and did not consider objective measurements that were in fact available—the VA's actual ratings. Indeed, the applicant's injuries caused him limited range of motion in his left arm and left leg. The applicant expressed that he has problems with his arm and leg, specifically stating that he has intermittent weakness and pain when he tries to lift. The applicant stated that he felt he had a lack of strength or overhead work like changing light bulbs. All of this evidence, undoubtedly supports the ARBA's Medical Advisor's conclusions that: (1) the moderately severe damage that the applicant suffered in both of his calf muscles would almost certainly have prevented him from effectively running, hiking, prolonged walking, and performing other activities requiring calf muscle strength and endurance; and (2) the moderately severe damage to his arm muscle coupled with the moderate damage to his shoulder would certainly limited his ability to lift and carry items of significant weight. This would have negatively affected his capabilities as an artillery crewman. The ARBA's Medical Advisor therefore did what the OSG clearly did not but should have considered the applicable retention standards and the duties of an Artillery Crewman and applied them to the record as whole.

hh. The applicant's injuries precluded him from satisfactory performance of his duties as an Artillery Crewman, and generally limited his ability to function. This not only demonstrates that he failed the medical retention standards set forth in Army Regulation 40-501, but also shows that his injuries rendered him unfit for continued service under DoDI 1332.18 (1962). This is precisely why the ARBA's Medical Advisor determined that

the preponderance of the evidence supports the contention that the applicant would have been unable to continue serving as an artillery crewman due to the injuries sustained in November 1966. The ABCMR should heed the opinion of the ARBA Medical Advisor that referral of the applicant's case to the DES for evaluation was warranted.

ii. The ABCMR should award the applicant disability retirement.

jj. Under 10 USC § 1201(a), a member of the armed forces may be retired with pay upon a determination that the member is unfit to perform the basic duties of the member's office, grade, rank, or rating because of physical disability incurred while entitled to basic pay. In relevant part, 10 USC § 1201(b) provides that a determination under 10 USC § 1201(a) is a determination that: (1) based upon accepted medical principles, the disability is of a permanent nature and stable (2) the disability is not the result of the member's intentional misconduct or willful neglect and was not incurred during a period of unauthorized absence; (3) the disability is at least 30 percent under standard schedule of rating disabilities used by the VA at the time of determination; and (4) the disability is the proximate result of performing active duty.

kk. The applicant satisfies all the elements for disability retirement under 10 USC § 1201(a) and (b). First, as threshold matters, the applicant's disability is clearly not the result of intentional misconduct or willful neglect but rather was sustained while the applicant was serving in Vietnam. Second, the applicant's disability is of a permanent nature and stable. A disability is of a permanent nature and stable when: (1) it has become stable so that, with reasonable expectation, the compensable percentage rating will remain unchanged during the following 5 year period; or (2) the compensable percentage rating is at least 80 percent and the disability will probably not improve so as to be ratable at less than 80 percent during the following 5 years. The applicant first received his diagnosis and rating of cumulative 60 percent effective 15 March 1968, the day after his discharge. Besides increasing to cumulative 70 percent in 1992, it has remained unchanged through 2016. Third, the applicant's injury to his left arm alone is cumulative 30 percent under the VA rating schedule. The VA issued the following ratings for the injuries to the applicant's left arm: (1) 20 percent - Residuals of gunshot wound, left arm, with fracture, shaft of humerus with retained multiple foreign bodies; and (2) 10 percent - Residuals of gunshot wound, muscle group I, near insertion of deltoid muscle and left axilla. Of course, the VA rated all of the applicant's injuries at cumulative 70 percent, well above the 30 percent requirement in 10 USC § 1021.

ll. The applicant satisfies all the elements under 10 USC § 1021 for disability retirement, and the ABCMR should award it to him. At the very least, the ABCMR should clearly grant the applicant DES processing.

mm. The applicant requests that the ABCMR correct the applicant's military records to reflect the medical retirement to which he is entitled effective on the date of his discharge 14 March 1968, including back pay, and award the applicant back pay. In the alternative, the applicant requests that the ABCMR provide the applicant DES processing, complete with a MEB and a PEB for a proper determination of his fitness for duty, including the hearing as guaranteed by 10 USC § 1214.

nn. *The entire Brief is available for the Board's review.*

4. The applicant underwent a preinduction medical examination on 16 August 1965. His Standard Form (SF) 89 (Report of Medical History) shows the applicant reported he was in good health. The corresponding SF 88 (Report of Medical Examination) shows he was found qualified for service and assigned a physical profile of 111111.

A physical profile, as reflected on a DA Form 3349 (Physical Profile) or DD Form 2808, is derived using six body systems: "P" = physical capacity or stamina; "U" = upper extremities; "L" = lower extremities; "H" = hearing; "E" = eyes; and "S" = psychiatric (abbreviated as PULHES). Each body system has a numerical designation: 1 meaning a high level of fitness; 2 indicates some activity limitations are warranted, 3 reflects significant limitations, and 4 reflects one or more medical conditions of such a severity that performance of military duties must be drastically limited. Physical profile ratings can be either permanent or temporary.

5. The applicant was inducted into the Army of the United States on 11 October 1965 for a period of 2 years on active duty. He completed his required training and was assigned the military occupational specialty (MOS) 13A (Field Artillery Crewman).

6. A Western Union Telefax, dated 15 November 1966, states the applicant was slightly wounded in Vietnam on 12 November 1966 as a result of hostile action. He sustained metal fragment wounds to both shoulders, both legs and both arms when engaged hostile force employing mortars, grenades and small arms fire while on perimeter defense. He was treated at 18th Surgical Hospital, APO San Francisco 96318 and is being held for further treatment. Since he is not, repeat, not seriously wounded no further report will be furnished.

7. The applicant was awarded the Purple Heart on 7 January 1967 for his wounds received in action.

8. A Clinical Record Cover Sheet, dated 21 March 1967, shows the applicant was transferred from the 106th General Hospital, Japan to Ireland Army Hospital, Fort Knox, KY for additional treatment for an open fracture of shaft of left humerus and malaria. He was assigned a physical profile of 1T31111. The nature of disposition states temporarily restricted duty.

9. The applicant was convicted on 16 August 1967 by special court-martial for being absent without leave (AWOL) from 22 March 1967 until 21 July 1967.

10. A Personnel Action, dated 2 October 1967, shows a request to have the applicant retested in the Army Classification Battery for reconstruction of his DA Form 20 for reassignment purposes.

11. The applicant underwent a separation medical examination on 16 January 1968. His SF 89 shows the applicant reported he was in good health and indicated he had been in the Ireland Army Hospital, Fort Knox for wounds to his legs and arms. The corresponding SF 88 documents his wounds received in Vietnam on both legs and arms. He was found qualified for separation and assigned a physical profile of 111111.

12. A Statement of Medical Condition, dated 14 March 1968 shows the applicant indicated there had been no change in his medical condition since his last examination.

13. The applicant was honorably released from active duty on 14 March 1968 and transferred to the Standby Reserve. He was honorably discharged from the Standby Reserve on 10 October 1971.

14. On 9 February 2021, the ABCMR determined the evidence presented is sufficient to warrant a recommendation for partial relief. The Board recommended that all Department of the Army records be corrected by referring his records to the Office of The Surgeon General (OTSG) for review to determine if the disability evaluation he received from the Army accurately depicted his conditions as they existed at the time.

15. In connection with the processing of the prior case (AR20180009707), a medical advisory opinion was obtained from the Army Review Boards Agency (ARBA) medical advisor. The ARBA Medical Advisor made the following findings and recommendations:

a. The applicant is applying to the ABCMR requesting in essence a referral to the Disability Evaluation System and a medical retirement for injuries sustained in Vietnam. He states through counsel:

Rather than being allowed to separate due to the completion of required service, Private [Applicant] should have been provided disability processing. Had he been provided such processing, a review of Private [Applicant]'s records, as evidenced below, would have resulted in the MEB finding that Private [Applicant]'s limited left arm range of motion and bilateral lower extremity and left deltoid fascial defects failed the medical retention standards set forth in AR 40. Subsequently, the PEB would have likely found that his limited left arm range of motion and

bilateral lower extremity and left deltoid fascial defects prevented his further service as a 43B.

b. The Record of Proceedings details the applicant's military service and the circumstances of the case. His DD 214 shows he entered the regular Army on 11 October 1965 and received an honorable discharge on 14 March 1968 under the provisions provided AR 635-200, Personnel Management – Enlisted Personnel (1 June 1967). The authority noted the reason as SPN 201 denoting "Enlisted Personnel - Expiration of term of service."

c. Because of the period of service under consideration, there are no encounters in AHLTA and no documents in iPERMS.

d. Counsel states that in November 1996 while in Vietnam, the applicant received several gunshot wounds during an ambush. He was medically evacuated and spent 3 months on a hospital ship. He returned to Fort Knox in March 1967 and was "placed on temporary restricted duty for his upper extremities." From counsel's brief:

On March 14, 1968, Private [Applicant] was separated from the active army for completing his term of service. There is no evidence that Private [Applicant] was removed from restricted duty prior to his separation so that he could participate fully with his unit. His separation physical performed in January 1968 found him fit for discharge, despite noting "abnormal" gunshot wounds on both his legs and arms ...

Upon his separation from the active Army on March 14, 1968, Private [Applicant] applied for VA benefits. According to the Rating Decision issued after his medical examination, the VA determined that there was "some bony deformity in the left humerus in its distal third" and "approximately 10 degrees of limitation of full flexion of the left forearm and the left arm[.]" The VA further determined that Private [Applicant] "does have 10 to 15 degrees of limitation of adduction of left femur and left fifth joint compared to the right." Based on these limitations and various muscle and facial injuries, the VA issued the following ratings effective 15 March 1968:

- 20 percent - Residuals of gunshot wound, left arm, with fracture, shaft of humerus with retained multiple foreign bodies
- 20 percent - Residuals of gunshot wound of left leg with some fascial defects and muscle hernia and retained multiple foreign bodies
- 20 percent - Residuals of gunshot wound from right calf with fascial defect, muscle group XI
- 10 percent - Residuals of gunshot wound, muscle group I, near insertion of deltoid muscle and left axilla



- 10 percent - Scar residuals of gunshot wound, right arm, muscle group VII

When asked if [he] has problems in any of the areas where he was wounded, he stated "my arm the majority and my leg sometimes." Private [Applicant] further stated that "he has intermittent weakness in his left arm when he tries to lift [and that] there is intermittent pain in the left antecubital fossa. The pain can be sharp, can occur with lifting or when [his] arm is at rest." Private [Applicant] further stated that "he has left leg pain [in] the back of his distal posterior thigh. The pain comes and goes; can occur at rest or while walking." Private [Applicant] also stated that "he has occasional pain in the right calf.

e. Medical documentation submitted with the application shows the applicant sustained an open left humeral shaft fracture from enemy small arms fire on 12 November 1966. There is no other medical documentation. Though VA disability ratings do not directly correspond with MEB or PEB findings, they can yield some information on a Veteran's conditions. Looking at the VA Schedule for Rating Disabilities (VASRD) codes and ratings for his service connected disabilities:

(1) 5305: Residuals of Gunshot Wound, Left Arm, With Fracture 20 percent

- VASRD: Group V Function: Flexion and supination of elbow, stabilization of shoulder
- this group includes all the muscles in the anterior aspect of the upper arm, e.g. biceps
- the 20 percent rating equates to "Moderately severe" damage in his non-dominant arm

(2) 5311: Residuals of Gunshot Wound, Right Calf with Fascial Defect, Muscle Group XI 20 percent

- VASRD: Group XI Function: Propulsion, plantar flexion of foot; stabilization of arch; flexion of toes; flexion of knee"
- this group includes all the muscles in the calf
- the 20 percent rating equates to "Moderately severe" damage

(3) 5317: Residuals of Gunshot Wound, Left Calf with Fascial Defect 20 percent

- this code is quite likely a typo as 5317 is for a muscle group in the upper thigh. Given that the narrative is left calf, it should be 5311, the same as the right calf
- the 20 percent rating equates to "Moderately severe" damage

(4) 5301: Residuals of Gunshot Wound, Muscle Group I, Near Insertion of Deltoid Muscle and Left Axilla 10 percent

- VASRD: Group I Function: Upward rotation of scapula; elevation of arm above shoulder level
- the 10 percent rating equates to “Moderate” damage in his non-dominant arm

(5) 5307: Scar Residuals of Gunshot Wound, Right Arm, Muscle Group VII 10 percent

- VASRD: Group VII. Function: Flexion of wrist and fingers
- the 10 percent rating equates to “Moderate” damage in his dominant arm

f. The moderately severe damage to both his right and left calf muscles would almost certainly have prevented the applicant from effectively running, hiking, prolonged walking, and performing other activities requiring calf muscle strength and endurance.

g. The moderately severe damage to the muscles in his anterior upper arm coupled with the moderate damage to some of his shoulder musculature would certainly limited his ability to lift and carry items of significant weight. This would have negatively affected his capabilities as an artillery crewman.

h. The preponderance of the evidence supports the contention that the applicant would have been unable to continue serving as an artillery crewman due to the injuries sustained in November 1966. There has traditionally been the requirement that when a Soldier has a medical condition of conditions which could fail medical retention standards, he or she is referred to the Disability Evaluation System. This is reflected in paragraph 7-1 of the current version of AR 40-400, Patient Administration, which states in part: “If the Soldier does not meet retention standards, an MEB is mandatory and will be initiated by the physical evaluation board liaison officer (PEBLO).”

i. While acknowledging the challenges of processing this case, it is the opinion of the ARBA Medical Advisor that referral of the applicant’s case to the DES for evaluation is warranted.

16. In accordance with the Board’s 9 February 2012 decision, the applicant’s records were referred to the OTSG for review to determine if the disability evaluation he received from the Army accurately depicted his conditions as they existed at the time. If that review determined the evidence supports amendment of his disability evaluation records, the applicant was to be afforded due process through the Disability Evaluation

System for consideration of any additional diagnoses (or changed diagnoses) identified as having not met retention standards prior to his discharge.

17. On 11 February 2021, the Fort Campbell Chief of Soldier Readiness (IDES/MEB) responded to the ABCMR stating in part:

a. The applicant makes the point that in March 1967, when he returned to the Continental United States, he was placed on temporary restrictive duty. He points out through counsel that, "Nothing indicates that Private McFarland was removed from his restrictive duty prior to his separation" however, temporary restrictive duty is a status that automatically expires. Temporary duty restrictions must be renewed by a medical provider or a soldier automatically returns to full duty within 90 days or less. Without documentation of a significant ongoing disability the MEB would need to use pure conjecture to find the soldier failed retention standards based on a temporary profile written at the time of his re-deployment. That profile would naturally expire unless it was changed to a permanent profile.

b. The applicant also points out a decrease in 10° of full flexion of the left forearm (ostensibly at the elbow) as part of his disability. The elbow joint flexes to 150°; a decrease of 10° would limit the flexion to 140° which would have no significant functional impact on his military service. To fail retention standards flexion has to be less than 100°. The applicant also had some limitation of left hip adduction of 10-15°. Adduction is bringing the leg past the midline. The MEB finds that limiting the amount a soldier can cross his legs past the midline would not create a major functional limitation in his Army service. Hip adduction was not part of the Army retention standards at that time and is not part of the retention standards now. The MEB notes these limitations were measured by the VA examiner near the time of discharge.

c. The ARBA Medical Advisor makes some inferences about the amount of disability that may have been caused by what the VA later termed "*moderately severe damage to both his right and left calf muscle,*" and what the VA called "*moderately severe damage to the muscles of the anterior upper arm coupled with the moderate damage to some of his shoulder musculature.*" The MEB is not able to establish a disability that would fail retention standards, at the time of discharge, without resorting to mere conjecture. The objective measurements available do not corroborate a finding of significant disability. The soldier's fascial defect documented by the VA and his other upper extremity and lower extremity injuries all met retention standards at the time of discharge based on the objective data.

d. After full consideration of the data. The Fort Campbell MEB Convening Authority finds that the applicant would not have been entitled to a medical board

at the time of discharge from the Army; no change in the applicant’s narrative reason for separation is warranted in this case. The case is return to the ABCMR for final disposition.

18. On 14 February 2022, the OTSG endorsed the MEB opinion stating, “a medical evaluation board (MEB) was not warranted at the time of [the applicant’s] separation.”

**BOARD DISCUSSION:**

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found relief is warranted.
  
2. The Board concurred with the rationale and reasoning of the medical advisory opinion provided by the ARBA Medical Advisor. The Board concurred that the applicant should be afforded entry into the Disability Evaluation System. Thus, the Board determined that the evidence presented was sufficient to warrant a recommendation for relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by directing the applicant be entered into the Disability Evaluation System (DES) and a Medical Evaluation Board (MEB) convened to determine whether the applicant’s conditions, to include gunshot and /or shrapnel wounds and residuals of those wounds, and any behavioral health conditions, including PTSD, met medical retention standards at the time of his service separation.

**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:

1. The Board determined the evidence presented is sufficient to warrant a recommendation for relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by directing the applicant be entered into the DES and a MEB be convened to determine whether the applicant's conditions, to include gunshot and /or shrapnel wounds and residuals of those wounds, and any behavioral health conditions, including PTSD, met medical retention standards at the time of his service separation.
2. If a formal physical evaluation board (PEB) becomes necessary, the individual concerned will be issued invitational travel orders to prepare for and participate in consideration of their case by a formal PEB. All required reviews and approvals will be made subsequent to completion of the formal PEB.
3. Should a determination be made that the applicant should have been separated or retired under the DES, these proceedings will serve as the authority to void their administrative separation and to issue them the appropriate separation retroactive to their original separation date, with entitlement to all back pay and allowances and/or retired pay, less any entitlements already received.

X

CHAIRPERSON

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, 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 DOD Directive 1332.18 and Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation).

a. Soldiers are referred to the disability system when they no longer meet medical retention standards in accordance with Army Regulation 40-501 (Standards of Medical Fitness), chapter 3, as evidenced in an MEB; when they receive a permanent medical profile rating of 3 or 4 in any factor and are referred by an MOS Medical Retention Board; and/or they are command-referred for a fitness-for-duty medical examination.

b. The disability evaluation assessment process involves two distinct stages: the MEB and PEB. The purpose of the MEB is to determine whether the service member's injury or illness is severe enough to compromise his/her ability to return to full duty based on the job specialty designation of the branch of service. A PEB is an administrative body possessing the authority to determine whether or not a service member is fit for duty. A designation of "unfit for duty" is required before an individual can be separated from the military because of an injury or medical condition. Service members who are determined to be unfit for duty due to disability either are separated from the military or are permanently retired, depending on the severity of the disability and length of military service. Individuals who are "separated" receive a one-time severance payment, while veterans who retire based upon disability receive monthly military retired pay and have access to all other benefits afforded to military retirees.

c. The mere presence of a medical impairment does not in and of itself justify a finding of unfitness. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier may reasonably be expected to perform because of his or her office, grade, rank, or rating. Reasonable performance of the preponderance of duties will invariably result in a finding of fitness for continued duty. A Soldier is physically unfit when a medical impairment prevents reasonable performance of the duties required of the Soldier's office, grade, rank, or rating.

2. Title 38 USC, 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.

3. Title 38 USC, 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.

4. AR 635-40 (Physical Evaluation for Retention, Retirement, or Separation) establishes the Army Disability Evaluation System and sets forth policies, responsibilities, and procedures that apply in determining whether a Soldier is unfit because of physical disability to reasonably perform the duties of his office, grade, rank, or rating. Only the unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability. Once a determination of physical unfitness is made, all disabilities are rated using the Department of Veterans Affairs Schedule for Rating Disabilities (VASRD).

a. Disability compensation is not an entitlement acquired by reason of service-incurred illness or injury; rather, it is provided to Soldiers whose service is interrupted and who can no longer continue to reasonably perform because of a physical disability incurred or aggravated in military service.

b. Soldiers who sustain or aggravate physically-unfitting disabilities must meet the following line-of-duty criteria to be eligible to receive retirement and severance pay benefits:

(1) The disability must have been incurred or aggravated while the Soldier was entitled to basic pay or as the proximate cause of performing active duty or inactive duty training.

(2) The disability must not have resulted from the Soldier's intentional misconduct or willful neglect and must not have been incurred during a period of unauthorized absence.

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

6. 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.

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

8. 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.

//NOTHING FOLLOWS//