ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [redacted]

BOARD DATE: 19 December 2023

DOCKET NUMBER: AR20230002438

APPLICANT REQUESTS:

- a physical disability retirement in lieu of his honorable resignation
- a personal appearance before the Board

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

- Online application
- DD Form 149 (Application for Correction of Military Record) with memorandum to the Board
- ARBA failure to exhaust letter, dated 25 October 2021
- Colorado Army National Guard (COANG) denial letter, dated 11 January 2023
- DA Form 67-8 (US Army Officer Evaluation Report), for the period covering 15 March 1996 to 14 March 1997
- NGB Form 22 (National Guard Bureau Report of Separation and Record of Service)
- Department of Veterans Affairs (VA) Rating Decision, dated 30 March 2015
- Board of Veterans' Appeals, dated 28 October 2019
- VA Rating Decision, dated 17 February 2021
- VA Rating Decision, dated 19 February 2021
- medical records (40 pages)

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 he believe his discharge was unfair and unjust:

a. He was never counseled on the necessity of a review of his medical conditions by the Medical Evaluation Board (MEB) and Physical Evaluation Board (PEB). By not

being allowed to exercise this right, he missed the opportunity to be properly medically retired.

b. The medical conditions identified by the Board of Veteran's Appeals clearly support the presence of disabling medical conditions connected to his military service prior to discharge. Army Regulation (AR) 635-200 (Personnel Separations - Enlisted Personnel), paragraph 1-33, indicates he was entitled to a medical review when a commander and/or physician was aware of potentially unfit medical information. A medical discharge takes precedence except in cases of other than honorable discharge. The records are replete with both physician and commander's knowing of disabling conditions.

c. The Colorado Army National Guard (COARNG) denied his appeal stating the discharge was appropriate. They did not address the medical disabilities noted in his record. His last active-duty assignment at Patrick Air Force Base was in March 2007, a few months prior to his discharge. The record indicates his hospitalization for pancreatitis and Cholecystitis. He was discharged, sent home, and had emergency surgery afterward to remove the gall bladder and drain pancreatic pseudocysts. In addition to recovery from surgery, he developed long term residual health issues as noted in the VA medical records enclosed. This coupled with longer term back injuries incurred in service made him unfit medically for continued duty. These conditions in his service record in1997 would have qualified for a greater than 30 percent disability rating.

d. AR 40-501 (Standards of Medical Fitness) details several medical conditions that mirror the findings in his military medical history. The combination of these medical conditions presumes unfitness for military duty. These conditions existed prior to or right after discharge:

- 3-16(3)(4) irritable bowel syndrome
- 3-20(e) Herniation of nucleus pulposus
- 3-20(h) non-radicular pain involving cervical disc with degenerative disc
- 3-21(2)(b) Range of motion not meeting standards
- 3-23(a) Arthritis in lumbar region
- 3-29(d)(2) Type 2 Diabetes
- 4-14(2) Cholelithiasis
- 4-14(3) Cholecystectomy
- Complications from pancreatitis and surgery

e. AR 635-200, paragraph 1-33, indicates he was entitled to a medical review when a commander and/or physician was aware of potentially unfit medical information. A medical discharge takes precedence except in cases of other than honorable discharge.

The records are replete with both physician and commander's knowing of disabling conditions.

f. He had no awareness of medical protocol from the reserve side regarding PEB/MEB. It was not until he met with his county Veteran Service Officer (VSO) in 2011. He became somewhat aware. He recommended he apply for VA disability and if granted then apply for a medical discharge and retirement. His VA disability was not granted until 28 October 2019. He received a 50 percent rating.

3. The applicant underwent a medical examination on 13 October 1993 for commissioning in the Army National Guard. His Standard Form (SF) 88 (Report of Medical Examination) shows at the time of the exam he was a member of the United States Coast Guard Reserve. He was found qualified for service without significant defect 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.

4. The applicant was commissioned in the Minnesota Army National Guard at the rank of captain effective 6 April 1994. He was appointed a Reserve Commissioned Officer effective 29 June 1994. An interstate transfer was processed, and he was commissioned in the COARNG effective 1 August 1995.

5. The applicant's DA Form 67-8 covering the period 6 April 1994 to 5 April 1995 shows he passed his Army Physical Fitness Test (APFT) in May 1994. He had a non-rated period from 6 April 1995 – 31 July 1995. The subsequent DA Form 67-8 for the period 1 August 1995 to 14 March 1996 he passed his APFT in June 1995. His DA Form 67-8 for the period 15 March 1996 to 14 March 1997 passed his APFT in April 1996.

6. A DA Form 1059 (Service School Academic Evaluation Report) shows he completed phase 1 of 3 of the EO Advisor Reserve Components Course 97-A from 2 March 1997 through 14 March 1997.

7. The applicant was honorably discharged from the COARNG and the Reserve of the Army on 1 June 1997 under National Guard Regulation (NGR) 635-100 (Personnel Separations – Termination of Appointment and Withdrawal of Federal Recognition), paragraph 5A(3), Section 5 for resignation, conditional. His NGB Form 22 shows he was

credited 1 year, 10 months, and 1 day net service this period, 14 years, 9 months, and 15 days prior reserve component service, and 16 years, 7 months, 16 days total service for pay.

8. The ABCMR attempted to obtain the applicant's records from the National Archives and Records Administration (NARA), however, they were not available.

9. A review of Army Human Resources Command (AHRC) Soldier Management Services (SMS) the applicant's last physical was conducted 1 September 1995 and his physical profile was 111111 and had no reported limitations. A transaction record dated 12 February 2004 shows an AHRC representative returned a voicemail from the applicant advising him he voluntarily resigned his commission from the National Guard at 16 years as he knew he would be passed over as he had not completed OAC (officer advanced course). He was also advised he was not eligible for a 15-year letter as he was not put out of the unit due to downsizing. As he was 49 and based solely on his comments, only needs 4 years to qualify for retirement, he could enlist.

10. The applicant provided:

a. A VA rating decision dated 30 March 2015 showing he was denied service connection for pancreatitis as it existed prior to service and there is no evidence that the condition permanently worsened as a result of military service.

b. A Board of Veterans' Appeals decision letter dated 28 October 2019, showing entitlement to service connection for pancreatitis and lumbar spine disability based on aggravation of a preexisting disorder.

c. A VA rating decisions dated 17 February 2021 and 19 February 2021 showing he has a combined rating evaluation of 90 percent effective 3 September 2020. He is granted the following:

- 20 percent for diabetes mellitus type II with diabetic nephropathy and hypertension as secondary to the service-connected disability of pancreatitis status post cholecystectomy
- 20 percent for left upper extremity peripheral neuropathy of the radial, median and ulnar nerves as secondary to the service-connected disability of diabetes mellitus type II with diabetic nephropathy and hypertension
- 20 percent for right upper extremity peripheral neuropathy of the radial, median and ulnar nerves as secondary to the service-connected disability of diabetes mellitus type II with diabetic nephropathy and hypertension
- 20 percent for right lower extremity radiculopathy and diabetic peripheral neuropathy of the sciatic nerve is continued

d. 40-pages of medical records in support of his claim.

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

12. Army Regulation 15-185 (Army Board for Correction of Military Records) prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR. Paragraph 2-11 states applicants do not have a right to a formal hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

13. The Army rates only conditions determined to be physically unfitting at the time of discharge, which disqualify the Soldier from further military service. The Army disability rating is to compensate the individual for the loss of a military career. The VA does not have authority or responsibility for determining physical fitness for military service. The VA may compensate the individual for loss of civilian employability.

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

15. Title 38, CFR, Part IV is the VA’s schedule for rating disabilities. The VA awards disability ratings to veterans for service-connected conditions, including those conditions detected after discharge. As a result, the VA, operating under different policies, may award a disability rating where the Army did not find the member to be unfit to perform his duties. Unlike the Army, the VA can evaluate a veteran throughout his or her lifetime, adjusting the percentage of disability based upon that agency's examinations and findings.

16. MEDICAL REVIEW:

1. The Army Review Boards Agency (ARBA) Medical Advisor reviewed the supporting documents, the Record of Proceedings (ROP), and the applicant's available records in the Interactive Personnel Electronic Records Management System (iPERMS), the Health Artifacts Image Management Solutions (HAIMS) and the VA's Joint Legacy Viewer (JLV). The applicant believes that he should have been medically retired. He listed medical conditions he contends existed prior to or right after discharge. It should be stated that the applicant’s records are filled with multiple and varied opinions concerning service connection and etiology for conditions listed below and others; however, this review will focus on whether conditions identified by the applicant meet or do not meet retention standards without regard to etiology or service connection. If the evidence supports that a condition did NOT meet retention standards, a discussion

concerning the applicant's military status at the time at the time of diagnosis and related details will follow.

2. The applicant's service record was summarized in the ABCMR ROP. Of pertinence, he was commissioned into the Minnesota Army National Guard on 19940412. He was transferred to Colorado Army National Guard 19950801. His final period of active service was 19970302 thru 19970314 for active-duty training at Patrick Air Force Base, FL. At the time, his MOS was 92A Automated Logistical Specialist. He was discharged from the COARNG 19970601. He was discharged under provisions of NGR 635-100 Section 5 resignation, conditional. His service was characterized as honorable.

3. The applicant essentially reasons in his 25Jan2023 Memorandum for ABCMR that because he had what he regards as emergency surgery (to remove the gall bladder and drain pancreatic pseudocysts) soon after discharge from service, suffered complications from the surgery, and in addition had chronic back issues with aggravation in service; that these combined alone would have made him medically unfit for service with resultant medical retirement (disability rating greater than 30%). He went on to list the following medical conditions he stated existed prior to or right after discharge. He contends that he should have been medically retired due to them and in the application, he provided related AR 40-501 chapter 3 paragraphs. It should be stated that it appears the applicant used the AR 40-501 effective 27Jun2019 as a guideline for causes for referral to the DES. The version that was more proximate to the time of the applicant's separation processing appears to be AR 40-501 effective 30Aug1995 (for causes for referral to a MEB). Since there were no substantive differences between the versions for the specified conditions, for continuity and simplicity, the version effective in 2019 is mostly discussed below.

a. Irritable Bowel Syndrome (IBS) with diarrhea
Service treatment records or summaries of such in VA records, were not found for this condition. The ARBA Medical Reviewer did not note a VA rating for IBS. The following post military service records were found in JLV.

1) 24Apr2007 Black Hills Dermatology Center for Complete Skin Care Patient Evaluation and Treatment Form (outside record). He selected 'no' for diarrhea.
2) 15Jan2014 General Surgery Winn ACH. He was being seen for preoperative gastrointestinal exam for outpatient colonoscopy. A history of polyps was noted. There were no gastrointestinal symptoms reported. Exam: Normal abdomen.
3) The VA examiner wrote in the 16Mar2015 Gallbladder and Pancreas Conditions DBQ: "I note one of the above records I reviewed mentioned a 20-year history of irritable bowel syndrome."
4) 01Mar2021 VA C&P Intestinal DBQ. Diagnosis: Irritable Bowel Syndrome with Diarrhea. The date of the diagnosis was unknown. The applicant described having bowel leakage twice per day for 5 years. The VA examiner wrote "There was an expert medical opinion by the Ellis Clinic noting that after

cholecystectomy he has continuous drainage of bile into his intestines causing a laxative effect leading to diarrhea.” The condition had not resulted in weight loss or malnutrition. The condition did not require continuous medication.

AR 40-501 chapter 3-16c. Small and large intestine.
(3) Intestinal stricture (large or small intestine) with repeated symptoms of pain or obstruction not relieved by medication, surgery, or endoscopic intervention meet the definition of a disqualifying medical condition or physical defect as in paragraph 3–1.
(4) Irritable bowel syndrome or other functional gastrointestinal disorder meet the definition of a disqualifying medical condition or physical defect as in paragraph 3–1 when they cause 6 months of symptoms resulting in prolonged absences from work despite optimal medical therapy or require geographic assignment limitations.

[AR 40-501 chapter 3-1. This chapter lists the various disqualifying medical conditions and/or physical defects which may render a soldier unfit for further military service in general terms (e.g., limits performance of duty, requires medication that has to be monitored, restricts performance of functional activities, may compromise the soldier’s or fellow soldier’s health or well-being or may prejudice the interest of the government). The standards apply for all individuals listed in paragraph 3–2 (essentially all commissioned and warrant officers and all enlisted soldiers).

Opinion/Rationale
There were no service treatment records for this condition that were available for review. There was no history of abdominal lumen obstruction or stricture. Diarrhea after cholecystectomy is common because there is no longer a storage organ for the bile. Diarrhea after gallbladder removal is generally short lived and/or manageable with diet restrictions (avoidance of high fat foods) and/or medication. It should be stated that AR 40–501-chapter 3 effective 30Aug1995, did not have criteria for referral for a MEB for IBS (also known as ‘functional bowel syndrome’ or ‘irritable colon’). Therefore, based on available records, evidence was insufficient to support that IBS with diarrhea failed retention standards of AR 40-501 chapter 3 at the time of discharge from service.

b. Degenerative Disc Disease, Lumbar Spine to include herniation of nucleus pulposus with resultant non-radicular pain and decreased range of motion (ROM). Associated VA Rating(s): Degenerative Arthritis of the Spine, Lumbar Spine 20%, Paralysis of Sciatic Nerve 20%; Paralysis of Sciatic Nerve 20%.

1) 05May1985 Chronological Record of Medical Care (Ft. McCoy, WI). The applicant reported a 3-week history of low back pain for which he was currently under the care of a physician. He was taking a muscle relaxant and Naproxen. He presented reporting increased back pain during participation in field training exercise. Back ROM was described as “very limited” without degrees being documented. He reported that pain had radiated into the right leg earlier in the morning. Gait was within normal limits. Records show a temporary profile was given which expired 20May1985.

2) 22Aug1994 Center for Diagnostic Imaging MRI of the Lumbar Spine (outside record). Impression: Degenerative Disc Disease of L5-S1 Disc with moderately severe dehydration and disc space narrowing L5-S1. There was also central bulging of the disc annulus and mild to moderate bilateral lateral stenosis at L5-S1 without significant compression of the right L5 nerve root.
3) 01Oct1994 General Counseling Form. He had been prescribed 3 weeks of intensive physical therapy at Sister Kenny Institute. An inability to perform APFT was also noted.
4) 19Nov1994 Annual Medical Certificate recorded that he was on pain medication for low back pain associated with Herniated and Degeneration of the L-5 Disc.
5) 16Jun2014 Winn ACH lumbar spine film. The Reason for Order: "59-year-old male with chronic LBP, no radicular symptoms". The film showed severe disc space narrowing at L5-S1, worsened from the previous exam dated 27Mar2013.

AR 40-501, chapter 3-20 Spine and sacroiliac joints.
e. Herniation of nucleus pulposus. More than mild symptoms following appropriate treatment or remedial measures, with sufficient objective findings to meet the definition of a disqualifying medical condition or physical defect as in paragraph 3–1.
h. Nonradicular pain involving the cervical, thoracic, lumbosacral, or coccygeal spine. Whether idiopathic or secondary to degenerative disc or joint disease that fails to respond to adequate conservative treatment and necessitates significant limitation of physical activity. Controlled substances are not "adequate conservative treatment" if given chronically.

AR 40-501 chapter 3-21 b. Joint range of motion. Range of motion (ROM) which do not equal or exceed the following measurements. (The regulation goes on to list specific ROM requirements for various joints but no criterion is listed for the back.)

AR 40-501 chapter 3-23 b. Arthritis. Due to trauma, when surgical treatment fails or is contraindicated and there is functional impairment of the involved joints so as to meet the definition of a disqualifying medical condition or physical defect as in paragraph 3–1.

Opinion/Rationale
The May 1985 annotation that the applicant's back ROM was very limited was noted; however, there were no ROM criteria for referral to the DES for the back in AR 40-501 chapter 3 effective in June 2019 or for referral for a MEB in the version effective August 1995. The specific pain medication was not noted in the applicant's 1994 Annual Medical Certificate or how long he had been taking it. It was also not noted when he had completed the intensive physical therapy or the status of the back condition afterwards. It is known he passed the Army Physical Fitness Test (APFT) in June 1995. In the 20Sep1995 Report of Medical History, the applicant reportedly endorsed being in excellent health. The item for recurrent back pain was checked "no". He reported that he race-walked three or four times a week for 30 minutes and swam two or three times a week. The PULHES was 111111. He also passed the APFT in April 1996. Despite

the significant pathology noted in the lumbar MRI in 1994, the evidence suggests its impact on performance was limited. Based on available records, evidence was insufficient to support that the applicant's lumbar condition failed retention standards.

c. Cholelithiasis status post cholecystectomy; ERCP with complication Pancreatitis and Pseudocysts; and Diabetes Mellitus, rated by the VA as a residual of Pancreatitis. Associated VA Rating(s): Residuals of Gallbladder Removal 30% and Diabetes Mellitus 20%. The following sequence of events was extracted from records submitted by the applicant, and the 16Mar2015 Gallbladder and Pancreas Conditions DBQ.

1) December 1996 Denver General Hospital. The applicant was seen for abdominal pain and elevated liver enzymes.
2) 13Feb1997 He underwent ERCP for continued symptoms which resulted in a 7-day hospitalization for the surgical complication of pancreatitis.
3) Early March 1997 the applicant went on active duty for 2-week training in Florida
4) 05Mar1997 45 Medical Group Hospital. He was admitted to Patrick AFB hospital for Pancreatitis and Pancreatic Pseudocyst. The admission notes related the recent history of the post ERCP pancreatitis and hospitalization in Denver. He had been doing well until the night prior to admission when he had eaten a fatty meal and then developed abdominal pain. Of pertinence, the 07Mar1997 abdominal ultrasound showed gallbladder stones (cholelithiasis) and pancreatic pseudocyst. The hospital records show his symptoms improved and he was discharged 07Mar1997 back to duty. He was advised to follow up on Monday or Tuesday the next week. The applicant stated he did complete the training. He returned home to Denver and was not seen until March 18 and 25th.
5) 18Mar1997 DG Hepatitis Ambulatory Service (outside record). The prior history of right upper quadrant pain and elevated liver tests in December 1996 was recounted in the note. The note also indicated the work up to discover his diagnosis included an ERCP (Endoscopic retrograde cholangiopancreatography) on 14Feb1997. He had to be admitted for 7 days because he developed pancreatitis after the ERCP (a not uncommon serious complication). The provider's assessment: 1. Elevated liver function tests. 2. Pancreatic Pseudocysts, Symptomatic. The plan was to follow him clinically (checking labs, abdominal CT), and Tylox (narcotic). If his symptoms worsened, they would consider surgical endoscopic management.
6) 21Mar1997 DG Surg-Gen & Minor Ambulatory Service. He had persistent abdominal pain due to the cysts therefore the decision was made to drain them. Surgery was scheduled for 10Apr1997.
7) 25Mar1997 DG Hepatitis Ambulatory Service. He was seen in follow up for his Pancreatitis with Pseudocyst. His liver tests had normalized. His pancreatic amylase was markedly elevated 519 (normal 0 - 43). His condition was stable.
8) 10Apr1997 he underwent open cholecystectomy (removal of gallbladder), drainage of pseudocyst by cystogastrostomy and liver biopsy. The surgery staff

physician endorsed that the pancreatic pseudocysts were secondary to ERCP pancreatitis. He was admitted from 10-14Apr1997.

9) 21Apr1997 Denver Health Outpatient Encounter Record, Purple Surgery. He was seen for follow up after the surgery. He was doing well. His appetite was improving. He was to return as needed.
10) 02May1997 Denver Health Outpatient Encounter Record/DG Med. He was no longer on Tylox analgesic. He had lost 20 lbs. Abdomen was nontender.
11) 27Jun1997 follow up CT of the abdomen showed no pancreatic pseudocysts.
12) 11Jul2014 CT of Abdomen Winn ACH. The pancreas was normal.
13) During the March 2015 DBQ examination, he reported sometimes having loose and frequent stools after eating certain high fat or high protein foods. He had not sought medical attention for this. Otherwise, he did not have any signs, symptoms or residual(s) related to the treatment of his gallbladder condition. He did not have any signs or symptoms of a pancreatic condition or residual(s) of treatment for a pancreatic condition (to include pancreatitis or pseudocysts). His abdomen was soft, and non-tender. The surgical scars were asymptomatic.

AR 40-501 chapter 4-14 (2) Cholelithiasis
AR 40-501 chapter 4-14 (3) Cholecystectomy
Criteria was provided for Medical Fitness Standards for Flying Duty only (Chapter 4). AR 40-501 chapters 4 and 5 include medical standards in addition to those listed in chapter 3, that are required for continued service in designated specialties.

AR 40-501 chapter 3-16 Abdominal organs and gastrointestinal system
e. Pancreas. (1) Chronic pancreatitis.

AR 40-501 chapter 3-5 i (effective 30Aug1995). Abdominal and gastrointestinal defects and diseases. Causes for referral to an MEB included: Pancreatitis, chronic, with frequent abdominal pain of a severe nature; steatorrhea or disturbance of glucose metabolism requiring hypoglycemic agents.

Opinion/Rational
The regulation effective 29Jun2019 AR 40-501 chapter 4 concerns Medical Fitness Standards for Flying Duty. The applicant's MOS 92A during the active duty training period was not related to flying duty responsibilities. There was insufficient evidence to support that the Pancreatitis (which predated the March 1997 active duty training and resulted in the development of pancreatic pseudocysts), failed retention standards of AR 40-501 chapter 3. Making a determination that a condition may require surgery does not make it medically unfitting. The applicant's abdominal pain resolved after the gallbladder removal surgery. The bowel changes after the cholecystectomy were apparently manageable with self-care as he had not sought medical professional intervention. The pancreatic condition was resolved after the pancreatic pseudocysts were drained/removed. Follow up 27Jun1997 abdominal CT showed no pancreatic

pseudocysts. At the time of the March 2015 DBQ examination, there were no residuals of the pancreatitis/pseudocysts. He was not on any medication for the condition. It should be stated that the VA rated Diabetes Mellitus as a residual from the gallbladder surgery in April 1997. However, Denver General Hospital notes in 1996 indicated the applicant had developed pancreatitis as a result of the ERCP procedure. Elevated amylase and pancreatic amylase enzymes at the time confirmed the diagnosis. The applicant then went on to develop pancreatic pseudocysts (diagnosed during active duty training in Florida) as a result of the pancreatitis. The pancreatic pseudocysts were drained, and the gallbladder was removed—there were no complications noted from the surgery. Diabetes Mellitus was not diagnosed while in service. He was first treated for Prediabetes in March 2015, eighteen years after active service. Evidence is insufficient to support that the Cholelithiasis and Pancreatitis with Pseudocysts condition should have failed medical retention standards at the time of his separation. He had an acute flare of his condition while on active duty manifested by abdominal pain which resolved enough to complete training.

4. There was no indication in the Officer Evaluation Reports that the applicant's performance was impacted by his medical conditions. After his hospitalization in Florida, he completed the training. The OER covering his final year in service (19960315 thru 19970314) indicated that he successfully accomplished all assigned missions. It should be stated that medical unfitness is not automatically presumed when a medical condition is diagnosed. Briefly, a condition is evaluated as it relates to the health and safety of the Soldier and its impact on performance of duty. It should also be stated that the Army does not compensate for conditions that were not found unfitting at the time of discharge, that worsen after discharge. Based on review of all available records, information was insufficient to support that there were any conditions which failed medical retention standards of AR 40-501 chapter 3. Referral for medical discharge processing is not recommended.

BOARD DISCUSSION:

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

2.. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. The evidence shows the applicant was commissioned in the ARNG in April 1994. He resigned his commission, and he was honorably discharged from the ARNG in June 1997. The Board considered the medical records, any VA documents provided by the applicant and the review and conclusions of the advising official. The Board concurred with the medical advisory opinion finding his performance was not impacted by his

medical condition(s). After his hospitalization in Florida, he completed the training. His OER for the rating period 19960315 thru 19970314 indicated that he successfully accomplished all assigned missions. Medical unfitness is not automatically presumed when a medical condition is diagnosed. Disability Evaluation System (DES) ratings are a snapshot in time. VA service connection of conditions can occur at any point in a Veteran's lifetime. The same is true of VA ratings; they can change of the course of a Veteran's lifetime. The VA has different statutory and policy requirements from the Army. These differences do not permit the VA to make determinations of whether a condition is fitting or unfitting for continued service. Only the Army can make the determination if a condition is unfitting or not. The Army does not compensate for conditions that were not found unfitting at the time of discharge, that worsen after discharge. Based on review of all available records, the Board determined there is insufficient evidence to support that there were any conditions which failed medical retention standards of AR 40-501 chapter 3. Thus, referral for medical discharge processing is not recommended.

BOARD VOTE:

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

BOARD DETERMINATION/RECOMMENDATION:

1 The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.

I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

REFERENCES:

1. NGR 635-100 (Personnel Separations – Termination of Appointment and Withdrawal of Federal Recognition) prescribes policies and procedures governing the appointment, assignment, temporary Federal Recognition, Federal Recognition, reassignment, transfers between States, branch transfers, area of concentration designation, utilization, branch detail, and attachment of commissioned officers of the Army National Guard (ARNG). Section 5 (Promotable Status) states in order to be considered in a promotable status the officer must be (1) assigned to the higher graded position, (2) a State Promotion is published, and (3) the officer's Federal Recognition packet is assigned to a scroll. The (P) designates that the officer is in a promotable status. This designator is only for use in the Officer Evaluation Report.
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 DOD Directive 1332.18 and Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation).

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

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

c. The mere presence of a medical impairment does not in and of itself justify a finding of unfitness. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier may reasonably be expected to perform because of his or her office, grade, rank, or rating.

Reasonable performance of the preponderance of duties will invariably result in a finding of fitness for continued duty. A Soldier is physically unfit when a medical impairment prevents reasonable performance of the duties required of the Soldier's office, grade, rank, or rating.

3. Title 38 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.

4. 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.

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

a. Paragraph 3-2 states 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. Paragraph 3-4 states Soldiers who sustain or aggravate physically-unfitting disabilities must meet the following line-of-duty criteria to be eligible to receive retirement and severance pay benefits:

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

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

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

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

8. Army Regulation (AR) 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 begins its consideration of each case with the presumption of administrative regularity, which is that what the Army did was correct.

a. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

b. 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.

//NOTHING FOLLOWS//