

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 29 September 2023

DOCKET NUMBER: AR20230002559

APPLICANT REQUESTS: in effect,

- upgrade of his under other than honorable conditions (UOTHC) discharge in lieu of trial by court-martial to honorable
- physical disability retirement

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

- DD Form 149 (Application for Correction of Military Record)
- deployment dates Memorandum for Record (MFR)
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- Memorandum for Secretaries of the Military Departments with an Attachment
- Department of Veterans Affairs (VA) benefits letter
- VA medical records (approximately 2,025 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 is seeking a disability retirement based on a memorandum submitted to the Secretaries of the Military Departments from the Office of The Under Secretary of Defense, subject: Clarifying Guidance to Military Discharge Review Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment, dated 25 August 2017. Additionally, he states:
 - a. He is an Iraq war veteran; he deployed to Iraq from March 2004 to March 2005. During this [Iraq] deployment in August 2004, he was sent to the 1st Cavalry Division Mental Health Hospital for a mental health evaluation. Upon his return [to the U.S.] he began to display symptoms related to posttraumatic stress disorder (PTSD) and traumatic brain injury (TBI). The symptoms associated with these two diagnoses caused

behavioral changes that exacerbated his marital and military lives, and caused flashbacks of traumatic events, depression, and substance abuse after being pulled off prescription benzodiazepines. These behavioral problems led to his divorce and ultimately an UOTHC discharge. He respectfully requests this injustice be corrected by upgrading his discharge to honorable service with a disability retirement.

b. The correction in question should be made due to the clarifying guidance that has come down to military review boards from the Pentagon about invisible wounds that have caused great havoc on Soldiers lives, the life of their families, and on the public at times.

c. These invisible wounds have caused many to commit suicide which has been an initiative to stop the 22 a day that was taking place. He has faced invisible wounds alone since his return to the United States from Iraq until 2010. Then he began 13 years of therapy, substance abuse programs, family court for custody that would not be granted because of his PTSD label and his behavioral issues. This upgrade should be made to correct the wrong that has left him alone to deal with battle wounds of the Sadr City 2004 engagements that left him questioning his place in the world and how he viewed the world he lives in after seeing imminent danger for an extended period.

3. The applicant provided:

a. An MFR, dated 4 May 2005, showing the applicant served in Baghdad, Iraq in support of Operation Enduring Freedom from 12 March 2004 to 9 March 2005.

b. A VA Benefits Letter, dated 27 October 2021, showing he currently has one or more service-connected disabilities with a combined service-connected evaluation of 90 percent (%).

c. More than 2,000 VA Medical Records, dated between 2009 and 2021 showing that in 2010 he was granted a 70% disability rating for PTSD and a 40% disability rating for TBI. His VA records show that he alleged he suffered from combat stress in Iraq and he was diagnosed with PTSD in 2005 while at Fort Hood, TX.

4. The applicant served honorably in the Regular Army (RA) from 30 August 2001 to 23 December 2004. He reenlisted in the RA on 24 December 2004 for 5 years, in pay grade E-4.

5. A DD Form 458 (Charge Sheet) shows on 2 June 2006, court-martial charges were preferred against the applicant for:

- being AWOL from his unit at Fort Hood, TX, from 3 January to 5 June 2006, 8 to 14 June 2006, and from 16 to 21 June 2006

- wrongfully using and possessing cocaine on or about 21 June 2006
6. A memorandum, dated 22 June 2006, shows the applicant was ordered into pretrial confinement pending disposition of the above court-martial charges against him. He was advised of his rights.
 7. On 18 July 2006, the applicant voluntarily requested a discharge for the good of the service in lieu of trial by court-martial under the provisions of chapter 10, Army Regulation (AR) 635-200 (Personnel Separations - Enlisted Personnel). He consulted with legal counsel and was advised of the basis for the trial by court-martial, his available rights and of the basis for voluntarily requesting a discharge under the provisions of chapter 10, AR 635-200. There is no evidence that he submitted statements in his own behalf.
 8. On 28 June 2006, the Commander, Headquarters, 1st Cavalry Division 761st Tank Battalion, approved the applicant's request with the issuance of an UOTHC discharge.
 9. Orders 221-0141, dated 9 August 2006, assigned him to the U.S. Army Transition Point, Fort Hood, TX, effective 9 August 2006 for separation processing.
 10. On 9 August 2006, he was discharged accordingly. His DD Form 214 shows he was discharged from active duty under the provisions of chapter 10, AR 635-200, in lieu of trial by court-martial with an UOTHC characterization of service. He completed 4 years, 5 months, and 9 days of net active service during this period with lost time from 3 January to 4 June 2006, 8 to 13 June 2006, and from 16 to 20 June 2006. He was awarded or authorized the Army Commendation Medal, Army Good Conduct Medal, National Defense Service Medal, Global War on Terrorism Expeditionary Medal, Global War on Terrorism Service Medal, Army Service Ribbon, and Combat Infantryman Badge.
 11. A VA Benefits Letter, dated 27 October 2021, shows he currently has one or more service-connected disabilities with a combined service-connected evaluation of 90%. He provided more than 2,000 VA Medical Records, dated between 2009 and 2021 showing in 2010 he was granted a 70% disability rating for PTSD and a 40% disability rating for TBI. His VA records show he alleges he suffered from combat stress in Iraq and he was diagnosed with PTSD in 2005 while at Fort Hood, TX. *His submissions were provided to the Board in their entirety.*
 12. Clemency guidance to the Boards for Correction of Military/Navy Records (BCM/NR) does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority to ensure each case will be assessed on its own merits. In determining whether to grant relief BCM/NRs shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy

changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment. This includes consideration of changes in policy, whereby a service member under the same circumstances today would reasonably be expected to receive a more favorable outcome.

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

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:

a. The applicant requests an upgrade of his UOTHC discharge to honorable and physical disability retirement. He contends his request is related to PTSD and TBI.

b. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Pertinent to this advisory are the following: 1) The applicant served honorably in the Regular Army from 30 August 2001 to 23 December 2004 and reenlisted in the Regular Army on 24 December 2004; 2) on 2 June 2006, court-martial charges were preferred against the applicant for being AWOL from 3 January to 5 June 2006, 3 June to 14 June 2006, 16 June to 21 June 2006, and wrongful use and possessing cocaine on or about 21 June 2006; 3) On 18 July 2006, the applicant voluntarily requested a discharge for the good of the service in lieu of trial by court-martial under the provisions of chapter 10, Army Regulation (AR) 635-200; 4) On 28 June 2006, the Commander, Headquarters, 1st Cavalry Division 761st Tank Battalion, approved the applicant's request with the issuance of an UOTHC discharge; 5) On 9 August 2006, he was discharged accordingly under the provisions of chapter 10, AR 635-200, in lieu of trial by court-martial with an UOTHC characterization of service.

c. The military electronic medical record (AHLTA), VA electronic medical record (JLV), ROP, and casefiles were reviewed. A review of AHLTA showed the applicant's first BH related engagement occurred at Fort Hood TX, on 25 March 2005 whereby he was seen for a reverse SRP where he was diagnosed with Anxiety Disorder NOS, Relational Problems, and Occupational Problems. The provider determined that although the applicant suffered a traumatic event and reported PTSD symptoms, he did not meet full criteria at the time of the screening. The provider noted that the applicant did not meet full criteria for PTSD, due to his recent return and recommended reevaluation in 4 to 6 weeks. Records showed that on 16 August 2005 the applicant was referred to the Family Advocacy Program (FAP). The encounter note was void of specific detail but showed the applicant diagnosed with Other Specified Family Circumstances. Records suggest the applicant was enrolled into FAP for group treatment and he attended 6 sessions between 16 August 2005 and 18 October 2005.

d. Record showed the applicant began engagement with a social worker/care manager on 29 August 2005, secondary to his post-deployment examination. The applicant was noted as reporting anxiety, irritability, hypersensitivity, insomnia, personality changes, marital problems, communication problems, and lethargy. He was diagnosed with Other Specified Family Circumstances and scheduled for follow-up. During his 22 September 2005 visit with his social worker, his diagnosis was amended to include Adjustment Disorder with Depressed Mood. It was further amended on 26 September 2005 to include a diagnosis of Chronic PTSD. It is unclear what information informed the social workers decision to amend the applicant's diagnosis, as no details were provided in the encounter documentation.

e. On 13 October 2005 the applicant was seen in the BH Clinic whereby he complained of post deployment stress, hypervigilance, nightmares, and flashback. He also reported marital conflict that resulted in his wife leaving after a physical altercation last week. He further reported becoming intoxicated and getting into a fight with a friend that required the applicant receive stitches. He was diagnosed with Partner Relational Problems and Adjustment Disorder with Anxiety and Depressed Mood. On 19 October 2005 the applicant was seen for a psychiatric intake and complained of PTSD symptoms that had reportedly worsen over the past several weeks. The applicant reported hyperarousal, increased irritability, reexperiencing, avoidance and difficulty functioning in occupational and social settings. He was prescribed psychotropic medication and scheduled for continued outpatient treatment. Encounter note dated 12 December 2005 showed the applicant presented to his appointment after turning himself in from being AWOL. The provider noted the applicant with a history of 3 prior AWOL and non-compliance with medication. The applicant reported that while AWOL he was again non-compliant with medication, drank alcohol extensively, and wrote bad checks. The provider noted discussing with the applicant and his commander that the applicant was and continued to be mentally responsible. The provider further informed the applicant's commander that he remained an AWOL risk and at risk for dangerous behavior due to his personality traits.

f. A review of JVL showed the applicant 90 percent SC overall, 70 percent SC for PTSD, and 30 percent SC for TBI. The initial PTSD DBQ and C&Ps associated with the SC diagnoses were not available for review. However, the PTSD review, dated 24 June 2015, and TBI review dated 9 June 2015 showed the applicant continued meeting criteria for PTSD, Opioid Dependence in remission, Alcohol Use Disorder in remission and TBI. Records showed that on 29 September 2009, the applicant represented for BH assessment and reported struggling since returning from Iraq. He reported daily intrusive thoughts, hyper-vigilance, irritability and anger, avoidance and periods of self-medication. He reported multiple traumatic experiences during deployment, to include multiple direct fire engagements, being “blown up” on several occasions, and the loss of fellow soldiers. The provider noted the applicant was tearful during the assessment and voiced his frustration with difficulty getting help from the Army and VA. He was diagnosed with PTSD and referred for outpatient treatment. On 30 September 2009 the applicant underwent a neuropsychological examination to assess with complaints of headache, vision problems, sensitivity to light, forgetfulness, fatigue, sleep disturbance, anxiety, irritability, and poor frustration tolerance. The provider noted a reported history of mTBI associated with an RPG attack in 2004. The provider concluded that the “applicant’s cognitive functioning reflected deficits in timed concentration tasks, but his memory was normal. He endorsed significant levels of depression, generalized anxiety, and PTSD. It is unlikely that his current cognitive deficits are related to the 2004 injury. Rather, his relatively recent sobriety and notable emotional distress are more likely related to his cognitive inefficiency”.

g. Encounter note dated 12 November 2009 showed the applicant reported upon returning from combat he lost his wife and children to divorce and was ridiculed by his new unit. He reported it all eventually took a toll on him, and he resorted using drugs and was “let go”. He reported very little support was available at the time and he went AWOL 3 times after he was transferred to his new unit. He reported being hospitalized for 5-days in Iraq secondary to an RPG attack and had several other close calls with death. He reported his worst experience during deployment occurred on the first day in theater when he and team members were ambushed by a large force. He reported 86 killed and wounded that day and that the battle ensued for 180 days. He reported he began to use alcohol right away after deployment and began using cocaine after his wife left him. He reported after being discharged he attended drug Rehab at Bath (De Paul) and then went to Hope Heaven in Batavia (as civilian), for 30 Days. He subsequently attended AT Water Community Residence for about 5 to 6 months and successfully completed Rehab from April 2009 to October 2009. The applicant diagnoses were amended to include Depressive Disorder NOS.

h. Encounter note dated 16 April 2010 showed the applicant reported vacillating mood characterized by having “tons of energy”, not needing sleep, followed by crashing and feeling depressed. He reported finding himself getting really angry about small things and experiencing increased anxiety. He reported a recent DWI that resulted in

him being incarcerated for 30-days. He noted completing rehabilitation in October 2009 and having been scheduled to start PTSD treatment in November 2009 but instead started working and didn't attend therapy. The provider noted the applicant appeared to be motivated for treatment at this time. He further noted the applicant presented with signs and symptoms of PTSD, Depression, and underlying anxiety, that over the years he self-medicated with drugs and alcohol. The applicant was scheduled for outpatient treatment. Records showed that between April 2010 and December 2022 the applicant engaged in outpatient and residential treatment for PTSD and outpatient and residential treatment for alcohol and methamphetamine use disorder. The applicant was also psychiatrically hospitalized in June 2021 and June 2022 secondary to paranoia and auditory hallucination characterized by hearing gunshots. He was diagnosed on these occasions with Stimulant Induced Psychotic Disorder and Stimulant Use Disorder amphetamine type severe. JLV was void any BH-documentation subsequent 28 December 2022.

i. The applicant request upgrade of his UOTHC discharge to honorable. He contends his misconduct was related to PTSD. Review of the records showed the applicant with in-service diagnosis of Anxiety Disorder NOS, Other Specified Family Circumstances, Adjustment Disorder with Depressed Mood, and PTSD Chronic and SC diagnosed of PTSD (70 percent) and TBI (30 percent). As there is an association between PTSD and avoidance, and PTSD and comorbid substance abuse, there is a nexus between the applicant's diagnosis of PTSD and his misconduct characterized by AWOL and wrongful use of cocaine such that the misconduct is mitigated by the disorder.

j. Based on the available information, it is the opinion of the Agency BH Advisor that there is sufficient evidence that the applicant had an experience or condition during his time in service that mitigated his misconduct.

Kurta Questions:

(1) Does any evidence state that the applicant had a condition or experience that may excuse or mitigate a discharge? Yes. The applicant is 70 SC for PTSD and 30 percent SC for TBI.

(2) Did the condition exist or experience occur during military service? Yes.

(3) Does the condition or experience actually excuse or mitigate the discharge? Yes. A review of the records showed the applicant 70 SC for PTSD and 30 percent SC for TBI. As there is an association between PTSD and avoidance, and PTSD and comorbid substance abuse, there is a nexus between the applicant's diagnosis of PTSD and his misconduct characterized by AWOL and wrongful use of cocaine such that the misconduct is mitigated by the disorder.

BOARD DISCUSSION:

The Board carefully considered the applicant’s request, supporting documents, evidence in the records and published DoD guidance for consideration of discharge upgrade requests. The Board considered the applicant's statement, record of service, the frequency and nature of the misconduct, the reason for separation and whether to apply clemency. The Board found sufficient evidence of in-service mitigating factors for the misconduct and determined the evidence presented sufficient to warrant a recommendation for a portion of the requested relief.

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 sufficient to warrant a recommendation for a portion of the requested relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by amending the applicant’s DD Form 214 for the period ending 9 August 2006 showing:

- Characterization of Service: Honorable
- Separation Authority: No change
- Separation Code: No change
- Reentry (RE) Code: No change
- Narrative Reason for Separation: No change

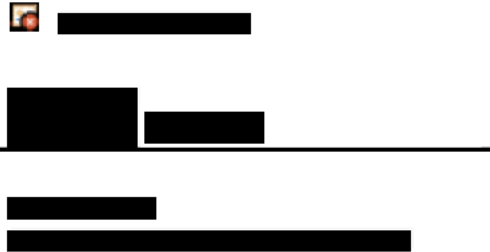
2. The Board further determined the evidence presented is insufficient to warrant a correction to that portion of the request for a physical disability retirement without consideration by the Office of The Surgeon General. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by referring his records to the Office of The Surgeon General for review to determine if he should have been referred to the Disability Evaluation System.

a. If a review by the Office of The Surgeon General determines he should have been referred to the Disability Evaluation System, the individual concerned will be afforded due process through the Disability Evaluation System for consideration of any diagnoses identified as having not met retention standards prior to his discharge.

b. In the event that a formal PEB becomes necessary, the individual concerned will be issued invitational travel orders to prepare for and participate in consideration of his case by a formal PEB. All required reviews and approvals will be made subsequent to completion of the formal PEB.

c. Should a determination be made that the applicant should be retired for disability, these proceedings serve as the authority to issue him the appropriate separation retroactive to his original separation date, with entitlement to all back pay and allowances and/or retired pay, less any entitlements already received.

3. The Board further determined the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to any other relief not stated above.

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

REFERENCES:

1. Title 10, U.S. Code, section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.

2. Clemency guidance to the Boards for Correction of Military/Navy Records (BCM/NR) does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority to ensure each case will be assessed on its own merits. In determining whether to grant relief BCM/NRs shall consider the prospect

for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment. This includes consideration of changes in policy, whereby a service member under the same circumstances today would reasonably be expected to receive a more favorable outcome.

3. AR 635-200 (Active Duty Enlisted Administrative Separations), in effect at the time, set policies, standards, and procedures to ensure the readiness and competency of the force while providing for the orderly administrative separation of Soldiers for a variety of reasons.

a. AR 635-200 states a Chapter 10 is a voluntary discharge request in-lieu of trial by court martial. In doing so, he would have waived his opportunity to appear before a court-martial and risk a felony conviction. An UOTHC is authorized and normally considered appropriate; however, a member may be awarded an honorable or general discharge, if during the current enlistment period of obligated service, he has been awarded a personal decoration or if warranted by the particular circumstances of a specific case.

b. An honorable discharge is a separation with honor and entitles the recipient to benefits provided by law. The honorable characterization is appropriate when the quality of the member's service generally has met the standards of acceptable conduct and performance of duty for Army personnel or is otherwise so meritorious that any other characterization would be clearly inappropriate.

c. A general discharge is a separation from the Army under honorable conditions. When authorized, it is issued to a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

4. On 25 August 2017, the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to Discharge Review Boards (DRBs) and BCM/NRs when considering requests by Veterans for modification of their discharges due in whole or in part to: mental health conditions, including PTSD; TBI; sexual assault; or sexual harassment. Boards are to give liberal consideration to Veterans petitioning for discharge relief when the application for relief is based in whole or in part to those conditions or experiences. The guidance further describes evidence sources and criteria and requires Boards to consider the conditions or experiences presented in evidence as potential mitigation for misconduct that led to the discharge.

5. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military DRBs and BCM/NRs regarding equity, injustice, or clemency

determinations. Clemency generally refers to relief specifically granted from a criminal sentence. BCM/NRs may grant clemency regardless of the type of court-martial. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to other corrections, including changes in a discharge, which may be warranted based on equity or relief from injustice.

a. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. In determining whether to grant relief on the basis of equity, injustice, or clemency grounds, BCM/NRs shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment.

b. Changes to the narrative reason for discharge and/or an upgraded character of service granted solely on equity, injustice, or clemency grounds normally should not result in separation pay, retroactive promotions, and payment of past medical expenses or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded service characterization.

6. Title 10, U.S. Code, chapter 61, provides the Secretaries of the Military Departments with authority to retire or discharge a member if they find the member unfit to perform military duties because of physical disability. The U.S. Army Physical Disability Agency is responsible for administering the Army physical disability evaluation system and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with DOD Directive 1332.18 and Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation).

a. Soldiers are referred to the disability system when they no longer meet medical retention standards in accordance with Army Regulation 40-501 (Standards of Medical Fitness), chapter 3, as evidenced in a Medical Evaluation Board (MEB); when they receive a permanent medical profile rating of 3 or 4 in any factor and are referred by an Military Occupational Specialty (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 Physical Evaluation Board (PEB). The purpose of the MEB is to determine whether the service member's injury or illness is severe enough to compromise his/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.

7. Army Regulation 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.

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.

c. The percentage assigned to a medical defect or condition is the disability rating. A rating is not assigned until the PEB determines the Soldier is physically unfit for duty. Ratings are assigned from the Department of Veterans Affairs (VA) Schedule for Rating

Disabilities (VASRD). The fact that a Soldier has a condition listed in the VASRD does not equate to a finding of physical unfitness. An unfitting, or ratable condition, is one which renders the Soldier unable to perform the duties of their office, grade, rank, or rating in such a way as to reasonably fulfill the purpose of their employment on active duty. There is no legal requirement in arriving at the rated degree of incapacity to rate a physical condition which is not in itself considered disqualifying for military service when a Soldier is found unfit because of another condition that is disqualifying. 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.

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

9. Title 38, U.S. Code, section 1110 (General – Basic Entitlement) states for disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

10. Title 38, U.S. Code, section 1131 (Peacetime Disability Compensation – Basic Entitlement) states for disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during other than a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

11. Title 10, U.S. Code, section 1556 requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized

by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//