

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 15 May 2024

DOCKET NUMBER: AR20230002562

APPLICANT REQUESTS: through counsel,

- correction of her records to show she was medically retired, due to physical disability with a 100 percent disability rating
- added to the permanent disabled retired list (PDRL), as of 13 September 2012
- reinstatement of her rank to specialist (SPC/E-4), with back pay
- granted Combat Related Special Compensation (CRSC) disability at a 100 percent rating, effective 13 September 2012
- change narrative reason for separation on her DD Form 214 (Certificate of Release or Discharge from Active Duty) to "retired disabled" or "Secretarial Authority"
- any additional and further relief as the Board deems just, fair, and equitable to honor the service and sacrifice of the applicant
- a video/telephonic appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Letter from Counsel, 29 November 2022
- Legal Brief, undated
- Personal Statement of Applicant, 29 November 2022
- Exhibit 1: DD Form 214
- Exhibit 2: Honorable Discharge Certificate from the U.S. Army, 13 September 2012
- Exhibit 3: Combat Action Badge (CAB), 25 September 2011
- Exhibit 4: Army Achievement Medal (AAM), 2 August 2011
- Exhibit 5: North Atlantic Treaty Organization (NATO) Medal, 31 October 2011
- Exhibit 6: Service Medical Records During Deployment and Post Deployment for Severe Migraines and Seizures, multiple dates
- Exhibit 7: DA Form 4856 (Developmental Counseling Form), September 2011
- Exhibit 8: Service Treatment Records, Chronological Record of Medical Care, 28 March 2012

- Exhibit 9: DA Form 3349 (Physical Profile), 18 May 2012 and 23 May 2012
- Exhibit 10: List of Medications, 27 March 2012 and 25 July 2012
- Exhibit 11: Statement of Sergeant First Class (SFC) D\_Z\_, 21 August 2012
- Exhibit 12: Army Discharge Review Board (ADRB) Decision with Cover Letter, 20 July 2021
- Exhibit 13: Title 10 U.S. Code (USC), section 1177
- Exhibit 14: Excerpt from the U.S. Government Accountability Office (GAO), Report to Congressional Committees, May 2017
- Exhibit 15: Department of Veterans Affairs (VA) Rating Decision, reference Eligibility for VA Benefits due to Insanity, 10 February 2021
- Exhibit 16: VA Administrative Decision, reference Character of Discharge Determination, 8 June 2021
- Exhibit 17: VA Medical Opinion, 1 February 2021
- Exhibit 18: VA Disability Benefits Letter, 24 February 2022
- Exhibit 19: VA Rating Decision – Code Sheet, 14 September 2012
- Exhibit 20: VA Notification Letter and Rating Decision, 8 June 2021 and 9 June 2021
- Exhibit 21: VA Notification Letter and Rating Decision, 24 July 2021 and 27 July 2021
- Exhibit 22: VA Seizure Disorders Disability Benefit Questionnaire (DBQ), 20 May 2021
- Exhibit 23: VA Medical Opinion of DBQ, reference: Seizure Disorder, 20 May 2021
- Exhibit 24: VA Headache DBQ, 20 May 2021
- Exhibit 25: VA Medical Opinion of DBQ, reference: Migraines, 20 May 2021
- Exhibit 26: Medical Literature, reference: Connection Between Post Traumatic Stress Disorder (PTSD) and Seizures, 2004
- Exhibit 27: Medical Literature, reference: Connection Between PTSD and Seizures, 2012
- Exhibit 28: Initial PTSD DBQ, 1 February 2021
- Exhibit 29: Initial PTSD DBQ, 17 May 2021
- Exhibit 30: VA Medical Opinion, DBQ, reference: Traumatic Brain Injury (TBI), 6 July 2021
- Exhibit 31: VA Medical Opinion, DBQ, reference: Low Back, 19 July 2021
- Exhibit 32: Service Treatment Records, reference: Low Back, 27 July 2012
- Exhibit 33: VA Medical Opinion, DBQ, reference: Neck, 23 June 2021
- Exhibit 34: VA Medical Opinion, DBQ, reference: Foot, 23 June 2021

FACTS:

1. The applicant's legal counsel states:

a. The errors and injustice in the applicant's military records should be corrected to reflect retirement and eligibility for retired pay, pursuant to Title 10, USC, chapter 61 and specifically, Title 10 USC, Section 1201, due to permanent disability (combined rating of 100 percent, including PTSD and TBI 70 percent, seizures 80 percent, migraines 50 percent and back, neck, and foot injuries) incurred while on active duty with the U.S. Army, 10th Mountain Division on combat deployment to Afghanistan from 2010 to 2011. The applicant served honorably during deployment and was awarded the AAM and CAB, and suffered the invisible and physical wounds of war, having been "blown up" when a mortar landed within 60 feet of her location, and having witnessed fellow Soldiers dead and dying.

b. At discharge the applicant was suffering from combat PTSD and other mental and physical conditions that rendered her unfitting. VA rated her 100 percent for service-connected disabilities, total and permanent, effective 14 September 2012, the day she was separated, which is evidence that she was 100 percent disabled during service. The applicant's service records, and service treatment records show it was an error not to have referred her to the Disability Evaluation System (IDES) for a Medical Evaluation Board (MEB)/Physical Evaluation Board (PEB), and medically retired with at least a 30 percent disability rating.

c. Despite the Army's awareness of the applicant's mental health problems and physical disabilities, the Army failed to properly diagnose her PTSD and TBI prior to her discharge. There is no evidence that the Army screened her for PTSD prior to separation with an Other Than Honorable (OTH) discharge, as required by Army regulations and applicable law. The Army chain of command referred her briefly to the Army Substance Abuse Program (ASAP), but instead of helping her, returned her to duty to be administratively separated, wrongfully using inadmissible "restricted" treatment samples to prosecute her.

d. Had the applicant's chain of command acted properly and equitably, she would have been medically retired for her disabilities and added to the PDRL. She would have been entitled to retired pay and would have received CRSC from and after 13 September 2012. Instead of assisting a Soldier struggling with mental and physical health issues, her chain of command punished her and administratively separated her. Service treatment records, service personnel records and VA records support correction of the applicant's military record. The ADRB granted her a discharge upgrade to honorable but did not have the authority to grant her a chapter 61 retirement or other remedies sought in this application.

e. These errors and injustice suffered by the applicant resulted in her being homeless and denied VA benefits for almost 10 years. She continues to bear the scars of her service. Her PTSD and other injuries from service have adversely impacted her

post service life, rendering her chronically homeless, unable to reconnect to society, and unemployable.

f. Counsel's complete brief is available for the Board to review.

2. The applicant states, in effect:

a. She enlisted on 19 November 2009 and served on active duty from 23 March 2010 to 13 September 2012, including a 12-month combat deployment to Combat Outpost (COP) Sultan Kheyl in Wardak Province, Afghanistan with the 94th Brigade Support Battalion, 4th Infantry Brigade Combat Team, 10th Mountain Division from Fort Polk, LA.

b. She did her best to serve her Nation faithfully and honorably, as a Soldier. She felt she was not adequately trained prior to deployment because her Advanced Individual Training (AIT) was shortened and she was never fully trained in any Military Occupational Specialty (MOS), but she did her best to do her duty. While deployed she did her best to adapt and to do whatever duties she was asked to do. She returned from deployment physically and mentally injured from a mortar explosion near her position and from intense combat stress from attacks and threat of attacks on the COP. After returning from deployment, she struggled to keep going, but she was broken physically and mentally. Instead of being separated for medical disability, she was disciplined and separated with an OTH discharge.

c. On 30 June 2021, the ADRB upgraded her character of service to honorable and the VA has found her to be 100 percent service-connected disabled. She states she was 100 percent disabled when she was separated and should have been referred to a MEB and PEB for medical disability retirement and placed on the PDRL.

d. She was born in Houston, TX in 1975. Growing up she moved around a lot, living with different relatives in Texas, Oklahoma, and California. Mostly, she lived with her grandmother in Houston, her brothers, and some cousins. She is one of six children and the only girl. Growing up she bounced around in schools and because of her unstable living situation, she was a mediocre student. When she was 19, she had her first child, her second child was born the next year, and her third child the following year. She was a single mom during her time in the military. She got married when she was 24 years old, and the relationship was abusive and dangerous. Her husband often got violent, choking, and punching her. She finally gathered enough courage to leave him after 10 years and thought the Army was a perfect way to escape him and empower herself.

e. She joined the Army when she was 34 years old. Because she had a commercial driver's license (CDL) she came into the Army as a SPC/E-4, with an MOS of 88M (Motor Transport Operator) through the Army Civilian Acquired Skills Program. Her AIT

was shortened, because she had a commercial driver's license. She processed into AIT then she was tasked out to serve in operations for two weeks before going to Fort Polk, LA. When she arrived at Fort Polk, she was tasked to perform duties as a supply clerk because the unit was overstrength 88Ms. She spent three months learning the supply clerk job before deploying to Afghanistan for 12 months.

f. Deployment was a high stress, hostile, and dangerous environment. There were frequent attacks on patrols and the base was constantly under threat of attack. During the deployment, attacks by the Taliban increased in number and intensity. She felt like she was floundering with no direction and without the skills she needed to feel secure. She was placed in an environment without the benefit of AIT training. She was happy to perform whatever jobs she was assigned but she was worried that her lack of training in warrior tasks and skills could put her and her fellow Soldiers at risk. She felt like she had slipped through the cracks, and she talked to her chain of command about her concerns, and worked hard at whatever she was asked to do. "Drive on, Soldier, is what I was told." She spent most of her deployment working in the laundry point, dining facility, computer lab, and the barbershop, but she also served anywhere she was told, which included cook, fueler, guarding the front gate, or sitting in an M-wrap for 19 hours guarding fields.

g. In April 2011, about halfway through the deployment, when they were scheduled to go outside the wire on mounted patrol, she woke up with the worst headache of her life and started having seizures that have been diagnosed as "tonic clonic" or pseudo-seizures. She was evaluated and briefly, medically evacuated to Forward Operating Base (FOB) Shank and then Bagram, and returned to duty at the COP. She has continued to suffer from migraines and seizures since then.

h. In late April 2011, she saw the first dead Soldier, who had been decapitated by a rocket-propelled grenade round during a foot patrol. The COP's aid station and morgue were across from the laundry point, and she saw his body when they brought him in. It was very upsetting and increased her sense of constant danger. Despite her lack of training and her migraines and seizures, she tried to focus on her job and support her fellow Soldiers.

i. In August and September 2011, the enemy attacks on the COP and on patrols from the COP became intense, and they took casualties. Her very dear friend D\_J\_ was killed in action when the COP was under attack. He was squashed by his tank when it was blown up during an attack on the COP. She tried to help at the aid station, and saw his head was squashed flat and his leg was off. He had just turned 20.

j. On 17 September 2011, the enemy attacked the base with mortars. She was on duty at the laundry point when she heard a whistle and a mortar shell exploded less than 60 feet from the Conex building that she was in. The blast threw her against the

metal wall of the Conex and knocked her unconscious. When she came to, she did not know what was going on and she remembers waking up to dust. She could see holes in the side of the Conex and shrapnel was everywhere. She could not hear, and she had ringing in her ears. Her head, neck, and back hurt where she must have hit the building wall and floor. When she went outside there was smoke and she saw Soldiers covered with dust and blood, holding their own body parts. Her memory and her nightmares are mixed up here. She remembers seeing severed legs and guts hanging out. She sees this over and over in her nightmares. At the time, all hands-on deck was called to the aid station, and she went to the aid station to try to help. She was awarded the CAB in connection with this attack. A few days later during a firefight, the enemy shot a bazooka which hit her lieutenant's tank and trapped and burned him to the size of a football. She saw them bring his body back to the aid station.

k. Getting blown up and experiencing constant threat of attacks and witnessing the horrible deaths of Soldiers that she cared about was too much and it changed her permanently. During the deployment she began having migraines, anxiety attacks and seizures due to the stress of the attacks and the stress of going outside the wire. In late October 2011, she returned from deployment, and she continued to suffer from migraines and seizures, insomnia and depression, and nightmares. She knows now that she was suffering from PTSD. She also suffered from pain in her foot, neck, back and head, which started with the mortar explosion. She was told not to complain. She asked for help and her sergeant told her that if she said something was wrong with her, she would not get her 30 days of leave. She could only think about self-preservation and how she needed to get away, so she told them she was fine. She was not able to think clearly or make good decisions. She was suffering from constant pain, anxiety, and depression. While on leave she self-medicated with marijuana even though she knew she would be drug tested when she returned. At that point she was not thinking straight and just wanted to get away from her racing thoughts and pain.

l. In January 2012, when she returned from block leave, she tested positive for marijuana. She received nonjudicial punishment (NJP) in February 2012. She went to ASAP for help with her issues. As a result of the NJP, she was put on restriction and extra duty, and reduced in rank. Her chain of command counseled her about performance, but no one was helping her with her mental health and constant pain.

m. In February 2012, she had surgery on her left foot and was on crutches and given prescriptions but was still on extra duty. Her long list of medical issues became overwhelming. They included depression, anxiety disorder, insomnia, migraine-triggered seizures, headache syndromes, herniated intervertebral disc, back and spine issues, bunion, and other medical issues. She was given a temporary profile which limited her to light duty from 18 May 2012 to 16 August 2012. Her chain of command punished her by increasing the tasks that she was required to perform. She was denied parking

accommodations and told to “park and hop” and that “there are no disabled Soldiers in the Army.”

n. She felt like the Army was failing to help her with her medical and mental health care and instead was punishing her for asking for help. She had a complete nervous breakdown. She gave up and went absent without leave (AWOL) for a month. She was desperate and because of all the medications she could not think straight. Her chain of command knew exactly where she was when she was AWOL. She was home just three miles down the road. When she finally got herself together, she turned herself in. She asked for help and attended the ASAP.

o. Instead of providing her with treatment or referring her to a medical board for medical disability separation, her chain of command wrongfully separated her with an OTH discharge. On June 30, 2021, the ADRB granted her an upgrade of her discharge to a fully honorable. The ADRB found the Army wrongfully used a restricted test sample from the ASAP program against her in violation of Army regulations.

p. She states, because she deployed to Afghanistan and suffered PTSD and TBI, her chain of command was required by law to send her for screening for PTSD and TBI by a mental health professional prior to separating her with an OTH. The list of mental and physical disabilities shown in her service records and verified in VA disability ratings, prove that while on active duty, she was unfit for service and should have been medically separated due to her physical and mental disabilities.

q. Her service-connected disabilities have been completely disabling since her separation from the Army. She has been unable to work since 2013. When she first got out of the Army she tried to work as a hairdresser for a few months but could not keep employment due to her seizures and her inability to stand for long periods of time. Sometimes she would pass out. Since then, she has applied for jobs but have been turned down.

r. She got divorced in 2013 and have not remarried. She is suspicious of others and always on guard. She was a single mother, and her children were taken away from her because she was not able to care for them or herself. For brief periods of time, she stayed with her mother and was chronically homeless from 2013 to 2021, when she was finally able to obtain VA temporary housing. Before that, she mostly lived in her car because she was too anxious to stay in a shelter. She was finally able to receive VA benefits in 2021, but even then, she had a difficult time staying inside at VA housing. She has never been in trouble with the law. Now that she is receiving VA disability compensation, she lives on her own in rural Texas. Except for her mother, she only interacts with others when necessary because she has a hard time socializing or engaging others due to anxiety. Her children are adults now, and she does not see them much.

3. Counsel provides the following information:

a. Permanent Orders Number 268-05, dated 25 September 2011, issued by Headquarters, 4th Infantry Brigade Combat Team, 10th Mountain Division, FOB Shank, Afghanistan, and shows the applicant was awarded the CAB for personally engaging or being engaged by the enemy on 17 September 2011.

b. The AAM certificate and recommendation, which shows the applicant was awarded the AAM for her exceptionally meritorious service while deployed to Afghanistan from 1 November 2010 to 31 October 2011.

c. A certificate which certified that the applicant was awarded the NATO medal for service with NATO in relation to the International Security Assistance Forces (ISAF) during the period 31 October 2010 to 31 October 2011.

d. The applicant's service medical records during deployment and post deployment, which shows:

(1) She was seen at the medical treatment facility at FOB Shank and evacuated to Bagram. On 20 April 2011, she was seen for severe onset retroorbital migraine, left sided. Medical notes show that a witness stated they saw her face in a tensed up tonic position. In the aid station she was noted to have had a third episode of tonic-clonic seizure activity lasting for approximately 30 seconds and witnessed by medics. The physician annotated tonic clonic type seizure and she was diagnosed with migraine and seizure disorder. She was prescribed valium for seizure activity and ibuprofen.

(2) On 21 October 2011, she was seen for a post deployment examination. She was referred to neurology. It shows she was prescribed rizatriptan for migraine triggered seizures and Ambien for insomnia.

(3) On 2 December 2011, she was seen for insomnia, migraine-triggered seizures, patient counseling, screening for malignant cervical neoplasm, and pain in lower extremities

(4) On 12 January 2012, she was seen for severe migraine headaches. At the emergency room she was told that since she had taken her Maxalt there was nothing else they could do and was scheduled an appointment to be seen at family practice, despite her unstable condition and severe pain. Medical notes from 12 January 2012 also show that she was referred for a psychology consult for depression.

(5) On 27 March 2012, she was seen in the emergency room for migraine headaches and given quarters.

e. On 4 October 2011, the applicant was counseled for the month of September. The counseling shows that she was performing laundry duties and continuing to do physical training (PT) even on profile. September was eventful for the applicant with the COP attacks. She had a mortar land within 20 meters of herself. She was counseled concerning her stress level and sent to speak with combat stress. Her NCO stated he would be recommending that she see behavioral health upon returning from deployment.

f. A Chronological Record of Medical Care dated 28 March 2012, for her Post-Deployment Health Reassessment (PDHRA) medical processing. The medical care provider's notes states that the applicant was under care for lower back pain and recent foot surgery. She had been evaluated by behavioral health and had no TBI concerns. Her problem list consisted of:

- (1) Adjustment disorder with disturbance of emotions
- (2) Anxiety disorder
- (3) Insomnia related to axis 1/11 mental disorder
- (4) Lower back pain
- (5) Occupational problem
- (6) Therapy noncompliance due to lack of comprehension due to anxiety
- (7) A tremor was seen
- (8) Depression
- (9) Bunion
- (10) Migraine-triggered seizures
- (11) Migraine headache
- (12) Patient counseling
- (13) Acute postoperative pain

g. A physical profile dated 18 May 2012, which shows she was given a temporary profile for back pain radiating to legs. She was unable to perform the 2-mile run, Army Physical Fitness (APFT) sit ups, APFT pushups, and she could not bend or lift weight or

walk long distance. The doctor noted that she needed a sitting job with frequent breaks and no overnight work. The profile dated 23 May 2012, shows she was given a temporary profile with no APFT and light duty. She could not lift or push more than 20 pounds. She could otherwise do light duty involving lifting, desk duty or cleaning. She could work overnight, however, if she sat for prolonged periods, she must be given frequent breaks.

h. A list of medications prescribed to the applicant, dated 27 February 2012 and 25 July 2012.

i. A statement from SFC D\_Z\_, dated 21 August 2012, which states that applicant was assigned to the unit prior to the deployment to Afghanistan. She was excited about being there and was looking forward to new opportunities in advancing her career. After returning from deployment, she stated that she was not trained in her primary duty MOS and “she was tossed into the fire” during her deployment. She explained that the deployment experience left her mentally and physically hurt and she could not cope with military life. She also stated that no one in the company wanted to help her. He noticed that she was a different Soldier from the first meeting he had with her. He stated that he believed it would be more advantageous to the U.S. Army and the Soldier [applicant] to be discharged from the military instead of being court martialled.

j. Title 10, USC, section 1177, which states that members diagnosed with or reasonably asserting PTSD or TBI must receive a medical examination before administrative separation.

k. An excerpt from GAO report to congressional committees, dated May 2017, which shows:

(1) GAO’s analysis of Department of Defense (DOD) data show that 62 percent, or 57,141 of 91,764 servicemembers separated for misconduct from fiscal years 2011 through 2015 had been diagnosed within the 2 years prior to separation with PTSD, TBI, or certain other conditions that could be associated with misconduct. Of the 57,141 servicemembers, 23 percent received an “other than honorable” characterization of service, making them potentially ineligible for health benefits from the VA.

(2) GAO found that the military services’ policies to address the impact of PTSD and TBI on separations for misconduct are not always consistent with the DOD policy.

(3) GAO also found that the Army and Marine Corps may not have adhered to their own screening, training, and counseling policies for PTSD and TBI. For 11 of the 48 separation packets included in GAO’s analysis of Army servicemembers who requested separation in lieu of trial by court-martial, there was no documented

evidence, or the evidence was unclear as to whether the servicemembers received counseling.

l. VA rating decision dated 10 February 2021, which shows that although the applicant's period of service from 23 March 2010 through 13 September 2012 was not determined honorable, it should not be a bar to benefits for VA purposes because she was found to be medically insane at the time of commission of the offenses leading to her discharge. The VA obtained an opinion and the examiner endorsed that the behavior that led to her discharge was due to a psychiatric disability (PTSD and secondary cannabis use disorder) and that she was insane (based on VA regulations) at the time of the misconduct that led to her discharge in lieu of court-martial. The examiner argued that at the time of her misconduct, she was experiencing combat-related PTSD symptoms (mortar explosion in Afghanistan) as well as depression, possible TBI per records, and painful health problems leading her to experience said "insanity" (per VA definition). The medications she was taking at the time made her unable to function; so, she went off them and resorted to smoking marijuana to self-medicate to deal with the symptoms.

m. VA administration decision dated 8 June 2021, which states her character of service from 23 March 2010 to 13 September 2012 is considered Honorable for VA purposes, and entitlement is established to all benefits administered by the VA for any disability incurred or aggravated during active military, naval, or air service in line of duty during this period of service.

n. VA medical opinion dated 1 February 2021, which shows it was the opinion of the evaluating physician that the applicant's behavior that led to her discharge was due to a psychiatric disability (PTSD and secondary cannabis use disorder), she was insane at the time of the misconduct that led to her discharge in lieu of court-martial.

o. VA disability benefits letter, dated 24 February 2022, which shows her service-connected disabilities are as follows and her combined rating of 100 percent:

- Seizure disorder, unspecified, rated at 80 percent.
- PTSD, with cannabis use disorder (mild), and TBI, rated at 70 percent.
- Migraine including migraine variants, rated at 30 percent.
- Cervical degenerative arthritis and cervical spinal stenosis with intervertebral disc syndrome (IVDS) and right upper extremity radiculopathy, rated at 30 percent.
- Bilateral pes planus, rated at 30 percent.
- Spinal stenosis with degenerative disc disease, rated at 20 percent.
- Right foot hallux valgus, rated at 10 percent.
- Left foot, hallux valgus, post-surgical with degenerative joint first metatarsophalangeal (MTP) joint, rated at 10 percent.

- Tinnitus, rated at 10 percent.
- Gastroesophageal reflux disease (GERD), rated at 10 percent.
- Scar, linear left medical 1st toe scar, rated at 0 percent.

p. VA seizure disorders DBQ and medical opinion, dated 20 May 2021, which states the claimed condition was at least as likely as not (50 percent of greater probability) incurred in or caused by the claimed in-service injury, event, or illness. The applicant had a witnessed seizure on 20 April 2011. She was treated for “migraine-triggered seizures.” Her treatment records show she was seen and diagnosed with seizures. Last documented note for seizures was 26 April 2013. The applicant was lost to care in 2013 due to homelessness for 10 plus years.

q. VA headache DBQ and medical opinion, dated 20 May 2021, which shows the applicant entered service on 23 March 2010 with no complaints of migraines. No separation exam was found in records. She was seen with migraine headaches while in service on 27 March 2012 and 5 July 2012. Service treatment records show chronicity of care while in service up to 2013. She reported that she self-medicated with BC powder. There is evidence of chronicity, and a nexus was established.

r. Medical literature from 2004, which shows a critical review of traumatic events and PTSD in patients with psychogenic nonepileptic seizures.

s. Medical literature from 2012, which shows a study that was completed explaining the connection between PTSD and seizures.

t. An initial PTSD DBQ, dated 1 February 2021 and 17 May 2021, which shows the psychiatrist/psychologist diagnosed and noted the applicant had depressed mood, anxiety, suspiciousness, panic attacks that occur weekly or less often, chronic sleep impairment, mild memory loss, such as forgetting names, directions or recent events, flattened affect, circumstantial, circumlocutory or stereotyped speech, impaired judgment, disturbances of motivation and mood, difficulty in establishing and maintaining effective work and social relationships, difficulty in adapting to stressful circumstances, including work or a work-like setting, inability to establish and maintain effective relationships. She had impaired impulse control, such as unprovoked irritability with periods of violence, neglect of personal appearance and hygiene, intermittent inability to perform activities of daily living, including maintenance of minimal personal hygiene. The doctor noted that the applicant’s symptoms were due to PTSD, and she used cannabis to alleviate her symptoms. Cannabis use disorder is secondary to PTSD.

u. VA TBI DBQ and medical opinion dated 6 July 2021, which states in the physician’s opinion, the applicant has a diagnosis of a TBI that is at least as likely as not (50 percent or greater probability) incurred in or caused by the explosion while deployed during service. Records showed that there was a history of exposure to mortar rounds

explosion when the veteran was deployed to Afghanistan in 2011. Their records showed she was seen for a TBI exam on 30 May 2013, and she was given a provisional diagnosis of personal history of TBI and memory problems. During the in-person exam that was conducted in June 2021, she showed mild memory problems that were more than likely related to TBI.

v. VA low back DBQ and medical opinion dated 19 July 2021, which states the reviewer opined that the applicant has a diagnosis of degenerative disc disease of the lumbar and spinal stenosis that are at least as likely as not incurred in or caused by the low back pain during the active military service. Citation of the medial evidence refers to multiple documentations of low back pain. In addition, a magnetic resonance imaging (MRI) was performed confirming the findings of degenerative disc disease of the lumbar spine in addition to spinal stenosis.

w. VA neck DBQ and medical opinion dated 23 June 2021, which shows the applicant had no issues related to the claimed neck nerve damage with pain prior to military service. The diagnosis of IVDS, cervical spinal stenosis, and RUE radiculopathy are related to the mortar explosion and treatment of neck pain during service. There is evidence of chronicity, and a nexus was established.

x. VA foot DBQ and medical opinion dated 23 June 2021, which states the applicant had no issues with her bilateral pes planus and her right foot hallux valgus prior to active-duty service. Bilateral pes planus was noted on her enlistment exam as asymptomatic, and so bilateral pes planus is pre-existing. However, the right foot hallux valgus was not noted on enlistment. The claimed condition right foot hallux valgus was at least as likely as not (50 percent or greater possibility) incurred in or caused by the foot pain.

4. A review of the applicant's service record shows:

a. DD Form 4 (Enlistment Document) shows she enlisted in the Regular Army on 23 March 2010.

b. Orders Number PK-280-0168, dated 7 October 2010, issued by Headquarters, Joint Readiness Training Center and Fort Polk, Fort Polk, LA, shows she was ordered to deploy in support of Operation Enduring Freedom, with a proceed date of 13 October 2010.

c. DA Form 2624 (Specimen Custody Document – Drug Testing), dated 9 January 2012, shows the applicant's urine specimen tested positive for Tetrahydrocannabinol (THC).

d. On 2 February 2012, she was counseled for failing the urinalysis. She was informed that if the conduct continued, action may be initiated to separate her from the Army under Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations), chapters 5, 9, 13, or 14.

e. On 23 March 2012, she accepted NJP under the provision of a Field Grade Article 15, Uniform Code of Military Justice (UCMJ), for wrongful use of marijuana, a schedule I controlled substance, on or about 10 December 2011 and 9 January 2012. Her punishment included reduction to the rank/grade of private/E-1, forfeiture of \$745.00 pay for two months, extra duty and restriction for 45 days.

f. An electronic copy of DA Form 2624, dated 18 April 2012, shows the applicant's urine specimen that was collected on 10 April 2012, tested positive for THC.

g. On 7 May 2012, she was counseled for failing the urinalysis and informed that she was being recommended for UCMJ action.

h. DD Form 2624, dated 17 May 2012, shows the applicant tested positive for THC during a urinalysis, test coded RO (Rehabilitate Testing).

i. On 23 May 2012, she accepted NJP under the provision of a Field Grade Article 15, UCMJ, for wrongful use of marijuana, on or about 10 March 2012 and 10 April 2012. Her punishment included forfeiture of \$745.00 pay for two months, extra duty and restriction for 45 days.

j. DA Form 4187 (Personnel Action), shows the applicant's duty status changed on the following dates:

- Present for Duty (PDY) to AWOL – 24 May 2012
- AWOL to Dropped from Rolls (DFR) – 25 June 2012
- DFR to PDY – 26 June 2012

k. An electronic copy of the DD Form 2624, dated 13 July 2012, shows the applicant's urine specimen collected on 26 June 2012 tested positive for THC.

l. Patient [Applicant] past appointments and list of medications from October 2011 to July 2012

m. A memorandum dated 26 July 2012, which shows the applicant was evaluated by a mental health professional on 25 July 2012. As a result of the evaluation, she was placed on Unit Watch for both support and safety.

n. DA Form 3881 (Rights Warning Procedure/Waiver Certificate), dated 10 August 2012, shows the applicant signed the document stating she understood her rights and she was willing to discuss the offenses of suspected/accused wrongful use of marijuana and AWOL.

o. DA Form 2823 (Sworn Statement), dated 10 August 2012, shows the applicant provided the following responses when questioned by investigator:

(1) The applicant went home while she was AWOL and she slept.

(2) She went AWOL because she had a nervous breakdown.

(3) She returned to the unit after being AWOL for 31 days because she wanted to get the rest of the process for getting out of the military over with.

(4) She stated that upon returning from Afghanistan she told her platoon leader and squad leader that she wanted out of the military because she was thrown into the fire with no consideration of the training or knowledge that she had. She decided to get out and did not feel like a Soldier. She smoked marijuana on block leave in December 2011. The Army failed her, saying she would be trained and proficient in her warrior tasks and drills and she was not. She felt the Army breeched her contract and had no regard to what happened to her once deployed; just to make the numbers for deployment. She stated that she was an 88M with no training and made to stay in the military for no reason.

p. Court-martial charges were preferred against the applicant on 17 August 2012. Her DD Form 458 (Charge Sheet) shows she was charged with:

- Charge I, specification 1, wrongful use of marijuana between on or about 17 April 2012 and on or about 17 May 2012
- Charge I, specification 2, wrongful use of marijuana between on or about 27 May 2012 and on or about 26 June 2012
- Charge II, specification, being AWOL from her organization, Echo Company, 2d Battalion, 4th Infantry Regiment, 4th Brigade Combat Team, 10th Mountain Division (Light Infantry), from on or about 24 May 2012 to 26 June 2012

q. On 21 August 2012, the applicant voluntarily requested discharge in lieu of trial by court-martial, under AR 635-200, chapter 10. In doing so, she acknowledged that the charges preferred against her under UCMJ, authorized the imposition of a bad conduct or dishonorable discharge.

r. On 22 August 2012, the immediate commander recommended approval of the chapter 10, in lieu of trial by court-martial.

s. On 23 August 2012, the intermediate commander recommended disapproval and on 5 September 2012, the senior intermediate commander recommended disapproval.

t. On 7 September 2012, the separation authority notified the applicant that effective upon her discharge from the active duty, she was ordered not reenter or be found within the limits of the U.S. Military Reservation at Fort Polk, LA. He stated he was taking this action as the result of the following misconduct committed by the applicant: wrongful use of marijuana on two separate occasions and following these two incidents she went AWOL for more than 30 days.

u. The applicant was discharged on 13 September 2012. Her DD Form 214 shows she was discharged under the provisions of AR 635-200, chapter 10, in the rank/grade of private (PV1)/E-1, and her service was characterized as under other than honorable conditions. She completed 2 years, 5 months, and 21 days of net active service during the covered period. Additionally, her DD Form 214 shows in:

- Block 12f (Foreign Service): 11 months and 20 days
- Block 13 (Decorations, Medals, Badges, Citations and Campaign Ribbons Awarded or Authorized):
  - Army Achievement Medal
  - NATO Medal
  - National Defense Service Medal
  - Afghanistan Campaign Medal with two campaign stars
  - Global War on Terrorism Service Medal
  - Army Service Ribbon
  - Overseas Service Ribbon
  - Combat Action Badge
- Block 18 (Remarks): Service in Afghanistan from 28 October 2010 to 17 October 2011. Member has not completed first full term of service.
- Block 28 (Narrative Reason for Separation): In Lieu of Trial by Court-martial

5. On 26 May 2021, the ADRB reviewed the applicant's case and determined the discharge was inequitable based on the circumstances surrounding the discharge (OBHI and PTSD diagnoses) and the Limited Use violation. Therefore, the Board voted to grant relief in the form of an upgrade of the characterization of service to Honorable.

(1) The Board determined that the available record confirmed the government introduced into the discharge packet the results of a biochemical test conducted on

17 May 2012, which was coded RO (Rehabilitation Testing) and that it was part of the applicant's ASAP treatment plan. This is limited use information as defined in AR 600-85 (The Army Substance Abuse Program) and is protected evidence because the test was administered as part of the applicant's rehabilitation program. Use of this information mandates award of an honorable characterization of service.

(2) The Board considered that the applicant had a condition or experience that may excuse or mitigate the discharge and occurred during military service. The Board arrived at this finding based upon the medical advisor's review of the Armed Forces Health Longitudinal Technology Application (AHLTA) and Joint Legacy Viewer (JLV). AHLTA records reflect in-service diagnoses of Anxiety Disorder NOS, Adjustment Disorder, Antisocial Personality Disorder, and Cannabis Abuse. Post-service, the VA lists a diagnosis of PTSD related to an IED blast while deployed; however, the validity is in question. While Intimate Partner Violence (IPV) is referenced, documentation does not clarify if the applicant was a victim, offender, or both.

(3) Based on the liberal consideration the Board considered the VA diagnosis valid. The Board accepted the diagnosis, trauma symptoms which can result in avoidant behaviors such as substance use and removing oneself from associated or triggering environments and/or people. As such, the basis for separation is mitigated. The diagnosis of trauma outweighs the basis for separation.

## 6. MEDICAL REVIEW:

1. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. Documentation reviewed included the applicant's ABCMR application and accompanying documentation, the military electronic medical record (AHLTA), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and/or the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

2. The applicant is applying to the ABCMR with multiple requests through counsel:

"Errors and injustice in my military records should be corrected to reflect my retirement (and eligibility for retired pay) pursuant to Chapter 61 of the United States Code (10 USCA Subt.A. Pt II, Ch 61), specifically 10 USC section 1201, due to permanent disability (combined rating 100%, including PTSD and TBI 70%, Seizures 80%, Migraines 50% and back, neck and foot injuries) incurred while on active duty with US Army 10th Mountain Division on combat deployment to a combat outpost in Afghanistan 2010-2011, including injuries sustained when a mortar round exploded within less than 60 feet of my position.

It was error not to have been referred to the Disability Evaluation System (DES) for a Medical Evaluation Board/Physical Evaluation Board and medically retired with at least a 30% disability rating. As more specifically set forth in the attached Memorandum of Points and Authorities, I request correction of my military records as follows:

(1) to grant me medical disability retirement and eligibility for retired pay under Chapter 61 at a disability rating of 100%, and add me to the Permanent Disabled Retired List, as of 9/13/2012;

(2) to grant me rank reinstatement to E-4, the rank I held on return from deployment, with back pay;

(3) to grant me Combat Related Special Compensation at a 100% rating, effective as of 9/13/2012; and

(4) to correct my DD214 to say "retired disabled" or "Secretarial Authority."

3. On her DD 149, she has indicated that PTSD, TBI, and other mental health issues are conditions related to her requests.

4. The Record of Proceedings details the applicant's military service and the circumstances of the case. The new DD 214 issued on 23 August 2021 shows she entered the regular Army on 23 March 2010 and was honorably discharged on 13 September 2012 under the separation authority provided chapter 10 of AR 635-200, Active Duty Enlisted Administrative Separations (17 December 2009): Discharge in Lieu of Trial by Court-Martial.

5. Review of the EMR for her final year of service found:

a. Migraine Headaches: The applicant was evaluated by neurology and treated for migraine headaches during her final year of service. She was evaluated by a neurologist on 1 February 2012 at which time several studies were ordered and she was started on prophylactic therapy.

b. Her neurology follow-up encounter was on 7 March 2012. The provider documented a normal examination and noted that her brain MRI, brain MRI angiography, electroencephalogram (EEG), and all laboratory studies were normal; and she was doing well on her current oral treatment:

"The patient has been maintained on Propranolol. She states that she is doing well ... She has had no side effects from the medication. Whenever she has a migraine type headache at the onset, she takes Maxalt which helps tremendously.

Impression: History of migraine type headaches with questionable tremor, (?) seizure type activity although the description is not quite typical of primary epileptic seizures ... EEG is completely negative. She has done quite well on Propranolol and the same may be continued. Will see her for reevaluation and follow-up in two months."

c. The applicant was seen on two more occasions for treatment of acute migraines.

d. Paragraph 3-30g of AR 40-501, Standards of Medical Fitness (4 August 2011), addresses the retention standards for headaches:

"Migraine, tension, or cluster headaches, when manifested by frequent incapacitating attacks. All such Soldiers will be referred to a neurologist, who will ascertain the cause of the headaches. If the neurologist feels a trial of prophylactic medicine is warranted, a 3-month trial of therapy can be initiated.

If the headaches are not adequately controlled at the end of the 3 months, the Soldier will undergo an MEB for referral to a PEB. If the neurologist feels the Soldier is unlikely to respond to therapy, the Soldier can be referred directly to MEB."

e. The neurology encounter above shows her headaches were under adequate control with oral therapy.

6. Left foot bunionectomy (10 February 2012): The applicant was noted to be doing well at her 21 March 2012 post-op evaluation:

"Pt [patient] seen in clinic today for 4-week post op evaluation, Left Base Bunionectomy. Pt ambulating well with crutches and CAM boot today. She denies pain at this time. States she's been doing well. She continues ROM [range of motion] exercises to the hallux. States she's tried walking around the house without the CAM boot and feels she did ok."

7. The applicant had two more follow-up encounters and the record then falls silent.

a. Low back pain: She was evaluated for an exacerbation of low back pain o 5 March 2012. She was diagnosed with lumbosacral muscle spasm and started on conservative management. MRI on 28 March 2012 revealed "IMPRESSION: Degenerative disc disease and spondyloarthropathy of the lower lumbar spine, most noted at the L5-S1 level without nerve root impingement. Moderate spinal canal

stenosis at the L5-S1 level as described above.” She was seen in follow-up on 13 April 2012 and provided with tramadol to take as needed for low back pain.

b. The applicant continued to have intermittent symptoms and initiated physical therapy in July 2012. There are no further clinical encounters.

c. Paragraph 3-39h of AR 40-501 (4 August 2011) covers the MEB referral criteria for referral of non-radicular spinal pain:

“Non-radicular 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.”

d. There is no indication the applicant had such limitations and as seen below, was able to perform extra-duty as punishment for misconduct.

8. Anxiety disorder: The applicant underwent a command directed mental status evaluation on 24 February 2012 for a possible misconduct discharge (14-12 of AR 635-200). The provider documented a normal examination, diagnosed her with “occupational problem,” and psychiatrically cleared her for administrative action:

“She has no previous or current treatment history for major mental illness. She reported current anxiety and feelings of being overwhelmed concerning occupational and family issues. She is unhappy with being in the military and has no feeling of support with her unit. She is currently separated from an abusive husband of 9 years. SI/HI [suicidal intentions/homicidal intentions], plan, intent, and previous attempts are denied. She is currently being considered for Ch. 14-12 separation for positive urinalysis for marijuana. She is psychiatrically cleared for administrative action.”

9. She was seen in follow-up on 14 March 2012 at which time she stated she was smoking marijuana in order to be discharged from the Army:

“Reports she told them at 5 months and 11 months and while she was deployed and recently that the Army is not for her and to keep her sanity she needs to get out. SM [service member] endorses smoking MJ [marijuana] in an effort to be discharged. She completed the ASAP [Army Substance Abuse Program] class but no diagnosis.”

a. She was diagnosed with anxiety disorder not otherwise specified (NOS) and started on oral therapy.

b. When seen at a follow-up appointment on 25 July 2012, she requested a diagnosis of PTSD:

“SM [service member] asking for dx [diagnosis] PTSD for possible MEB [medical evaluation board] purpose as unit is currently attempting to separate with Court Martial proceedings related to 5 positive drug screens and 30 days AWOL [absence without leave].

SM does not accept accountability for the consequences of her actions and remarked ‘Why can’t they just go back and see why I smoked the MJ? I was stressed after Afghanistan.’ SM attempted to use having a MJ card from CA as permission to use. SM crying and wailing that no one would take care of her or help her with her issues. ‘The VA rep said I would have 80% disability and if I lose my benefits, I will not be eligible.’

SM reports she has been on 45 days of extra duty with about 30 completed ...

SM is supposed to be confined to post during this time but endorses she goes home in the evening to feed her children 15,16, and 17. At last visit children were with mother in Houston, but SM is adamant they are here and staying alone at night in their off-post housing.

When I explained to SM that she would need to come to tx [treatment] on regular basis and follow-up as scheduled she asked ‘Is this over with?’ SM was not getting responses she wanted in terms of dx and recommendation to CoC [chain of command].

I contacted CPT B., CDR [commander], after session to determine if CoC knew that children were staying alone as SM claimed they did, CDR indicated that children with grandmother in Houston.

SPEECH: Clear & Well-modulated

AFFECT: anxious

MOOD: anxious crying and screaming. Reports she is confused and needs help, but when encouraged to review her decisions and avoid repeating same, SM

ignored HCP [health care provider]. Attempted to say that making bad decisions makes her sick and not capable of caring for self.

I explained that her decisions are criminal in nature not mental illness.

THOUGHT PROCESSES: Clear and goal directed.

c. The provider diagnosed her with adjustment disorder with disturbance of emotions and antisocial personality disorder. Personality disorders are deeply ingrained, rigid ways of thinking and behaving that result in impaired relationships with others and often cause distress for the individuals who experience them. These are lifelong conditions, and while they may show some response to treatment, it is often limited and there is “no growing out of it” or “cure.” People with antisocial personality disorder display a pattern of disregarding or violating the rights of others. A person with antisocial personality disorder may not conform to social norms, may repeatedly lie or deceive others, and may act impulsively and/or aggressively.

d. The applicant was evaluated at her battalion aid station on 26 July 2012 during which she became violent and destructive after the diagnosis was adult antisocial behavior:

“36-year-old active-duty female complaining of vision loss this morning upon waking. Pt states she is having difficulties opening her eyes and complains of light sensitivity. Pt visited the E.R. on the night prior due to possible seizures that began while she was on extra duty washing windows.

Pt was diagnosed with vasovagal syncope and was treated with fluids and Toradol. Pt was discharged later that night. Pt denies any pain but described a numb and dull feeling around her eyes and cheeks.

Physical examination - Due to inconclusive exam findings for the original complaint of 'loss of vision,' which later changed to the 'inability to open the eyes due to swelling,' for an appropriate disposition, I the attending P.A. [physician assistant], consulted telephonically with the Behavior Health specialist who had seen the pt on the day prior, who in turn, staffed the case with a Psychiatrist and the ER Physician.

During her entire approximate 6-hour visit, the pt was permitted to sleep which seemed to suit the pt for the first four hours or so. The pt was checked on

repeatedly while she slept and was kept informed after she had awakened. At approx.. 1140, she had awakened and regained the ability to open her eyes ...

The pt was offered lunch and was brought potato salad, a hamburger, and French fries which she refused reportedly "because of her braces.' The pt had requested chicken. Pt's eyes were flushed with sterile water, at her request. During the remainder of the visit pt was allowed to smoke on the back dock area, and talk on her cell phone, all without assistance.

At 1220, she was informed that her case was being staffed for proper disposition by the Behavior specialist, and two other Physicians. At this time, pt complained of a H/A and the need to have her valium. Immediate action to arrange to have her medication brought to the aid station was taken.

At approx. 1300, pt became agitated and tired of waiting. Pt lost control and began crying, shouting, and trashed the exam room. Pt resisted restraint by attending medics.

She eventually was calmed and escorted to her Co HQ's by her NCO without being released by the PA. It is also noted on lab results from ER that the pt tested positive for Cannabinoids on the day prior. Unit CO was briefed on the incident in the exam room, and the recommended disposition of "24-hour buddy watch" determined by Behavior Health and ER staff."

e. Behavioral health noted that day the applicant's diagnosis was antisocial personality disorder, that she did not need to be hospitalized, made the recommendation the applicant be placed on Special Unit Watch, and scheduled to see her the following day. From that encounter on 27 July 2012:

"SM on Special Unit Watch as recommended yesterday. At onset of interview, calm[?] drug a large bag on the floor with all of her medications into the interview accompanied by 1SG Washington. 1SG indicated continued watch is imposition for the unit and legal could not support pretrial confinement related to the fact SM turned self in from AWOL so she is not a flight risk.

I explained my concerns about safety and SM driving impaired and using Valium for other than indicated symptoms. SM reported directions indicated she could use every 8 hours for back spasm. I explained the positive urine drug screen for MJ in ER and SM denied use since JUN and when [she] saw + [positive] report from ER, continued to lie.

f. The applicant was discharged to her unit with the diagnoses of antisocial personality disorder and adult antisocial behavior.

g. When seen in follow-up on 7 August 2012, the applicant was reported to be doing well because she was being separated from the Army:

“SM reports her anxiety and anger continue to wax and wane. She is calm today at this visit. Reports using Buspar this AM as she felt anxious about her MHE [mental health evaluation] for her Chapter via tele BH. Reports went well and she is very happy that she is getting out and getting on with her life. She did not realize the Court Martials would place her in jail and then return her to her unit for processing out. Pleased that CDR is going with CHPT 14.

Poor insight into her actions and need for instant gratification i.e. "I tore up the aide station, but I was so tired of all this and just wanted out." Reports she is looking forward to life working in beauty salon."

h. The applicant underwent a command directed mental status evaluation 8 August 2012 after which the diagnoses were cannabis abuse, adjustment disorder with disturbance of emotions, insomnia related to mental disorder, and antisocial personality disorder. She was released without limitations.

i. The provider received a call from legal the following day to discuss. She informed him the applicant did not require inpatient treatment because "her decisions are related to antisocial personality disorder and are criminal in nature."

j. Her final behavioral health encounter was on 1 September 2012 after which she was release without limitations:

Patient came into the BHC [behavioral health clinic] to clear. Pt stated that she has not been seen by BH in the past. Pt stated that she has cancelled her remaining appointments. Pt denied the desire for future tx. Pt's record was reviewed and pts statements verified to be factual. Pt was notified on how to contact BH from VA. Pt stated that she is Chaptering. Pt denied being on BH related medications."

k. An evaluation for obstructive sleep apnea on 21 August 2012 found "no evidence of significant sleep disordered breathing."

10. There is insufficient evidence the applicant had one or more medical service incurred medical condition(s) would have failed the medical retention standards of chapter 3, AR 40-501 prior to his administrative separation. Thus, there would have been no cause for referral to the Disability Evaluation System at that time. Furthermore, there is no evidence that any medical condition prevented the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his discharge.

11. Paragraph 3-1 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (20 March 2012) states:

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

12. Review of her records in JLV shows he was awarded numerous VA service-connected disability ratings, including seizure disorder (80%), PTSD (70%), and migraine headaches (50%). However, the DES only compensates an individual for service incurred medical condition(s) which have been determined to disqualify him or her from further military service and consequently prematurely ends their career. The DES has neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions which were incurred or permanently aggravated during their military service; or which did not cause or contribute to the termination of their military career. These roles and authorities are granted by Congress to the Department of Veterans Affairs and executed under a different set of laws.

13. It is the opinion of the ARBA Medical Advisor that a referral of her case to the DES is not warranted.

#### BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that partial relief was warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation. One potential outcome was to deny relief based on concurring with the advising opine who found insufficient evidence to support the applicant's contentions.

However, upon review of the applicant's petition, available military records and medical review, the Board concurred with the advising official finding that a referral of her case to the DES is not warranted. The Board noted insufficient evidence the applicant had one or more medical service incurred medical condition(s) would have failed the medical retention standards. During deliberation, the Board determined the applicant's counsel did not demonstrate an error or injustice occurred. The Board recognized the applicant's period of deployment and opine review, determining there is sufficient evidence for partial relief to restore of her rank to specialist (SPC/E-4) without back pay. Therefore, the Board granted partial relief.

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

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

:	:	:	GRANT FULL RELIEF
:	■	■	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
■	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined the evidence presented is sufficient to warrant a recommendation for partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by amending the applicant DD Form 214 for the period ending 13 September 2012 to show reinstatement of her rank to specialist (SPC/E-4) without back pay.

2. 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 additional and further relief the Board deems just, fair, and equitable to honor the service and sacrifice of the applicant
- correction of the applicant's records to show she was medically retired, due to physical disability with a 100 percent disability rating and added to the permanent disabled retired list (PDRL)
- Combat Related Special Compensation (CRSC) disability at a 100 percent rating or
- change narrative reason for separation on her DD Form 214 to secretarial authority.

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. Army Regulation 40-501 (Standards of Medical Fitness), governs medical fitness standards for enlistment, induction, appointment, retention, and separation. It states

medical evaluation of certain enlisted military occupational specialties and officer duty assignments in terms of medical conditions and physical defects are causes for rejection or medical unfitness for these specialized duties. If the profile is permanent the profiling officer must assess if the Soldier meets retention standards. Those Soldiers on active duty who do not meet retention standards must be referred to a medical evaluation board.

3. Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation) prescribes 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.

a. The objectives are to maintain an effective and fit military organization with maximum use of available manpower; provide benefits to eligible Soldiers whose military service is terminated because of a service-connected disability; provide prompt disability evaluation processing ensuring the rights and interests of the Government and Soldier are protected; and, establish the Military Occupational Specialty Administrative Retention Review (MAR2) as an Army pre-DES evaluation process for Soldiers who require a P3 or P4 (permanent profile) for a medical condition that meets the medical retention standards of Army Regulation 40-501.

b. Public Law 110-181 defines the term, physical DES, as a system or process of the DoD for evaluating the nature and extent of disabilities affecting members of the Armed Forces that is operated by the Secretaries of the military departments and is composed of medical evaluation boards, physical evaluation boards, counseling of Soldiers, and mechanisms for the final disposition of disability evaluations by appropriate personnel.

c. The DES begins for a Soldier when either of the events below occurs:

(1) The Soldier is issued a permanent profile approved in accordance with the provisions of Army Regulation 40-501 and the profile contains a numerical designator of P3/P4 in any of the serial profile factors for a condition that appears not to meet medical retention standards in accordance with AR 40-501. Within (but not later than) 1 year of diagnosis, the Soldier must be assigned a P3/P4 profile to refer the Soldier to the DES.

(2) The Soldier is referred to the DES as the outcome of MAR2 evaluation.

d. A medical evaluation board is convened to determine whether a Soldier's medical condition(s) meets medical retention standards per Army Regulation 40-501. This board may determine a Soldier's condition(s) meet medical retention standards and

recommend the Soldier be returned to duty. This board must not provide conclusions or recommendations regarding fitness determinations.

e. The physical evaluation board determines fitness for purposes of Soldiers' retention, separation, or retirement for disability under Title 10, U.S. Code, chapter 61, or separation for disability without entitlement to disability benefits under other than Title 10, U.S. Code, chapter 61. The physical evaluation board also makes certain administrative determinations that may benefit implications under other provisions of law.

f. Unless reserved for higher authority, the U.S. Army Physical Disability Agency approves disability cases for the Secretary of the Army and issues disposition instructions for Soldiers separated or retired for physical disability.

4. 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 (PDES) 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 AR 635-40 (Disability 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.

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

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

7. On 25 August 2017, the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to DRBs and BCM/NRs when considering requests by Veterans for modification of their discharges due in whole, or in part, to: mental health conditions, including PTSD; TBI; sexual assault; sexual harassment. Boards were directed 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 that misconduct which led to the discharge.

8. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. Boards

for Correction of Military/Naval Records may grant clemency regardless of the court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice. This guidance does not mandate relief but provides standards and principles to guide Boards in application of their equitable relief authority.

a. In determining whether to grant relief on the basis of equity, injustice, or clemency grounds, Boards 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.

9. Section 1556 of Title 10, United States Code, 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.

10. Army Regulation 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR 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//