

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 8 May 2024

DOCKET NUMBER: AR20230003163

APPLICANT REQUESTS: through counsel,

- correction of his records to show he was medically retired instead of medical discharge with severance pay; or, in the alternative, direct the U.S. Army to refer all conditions to the Integrated Disability Evaluation System (IDES) to determine his overall disability rating.
- a personal appearance before the Board.

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

- DD Form 149 (Application for Correction of Military Record)
- Legal Brief, 16 December 2022
- Enclosure 1: Power of Attorney, 4 September 2020
- Enclosure 2: Orders Number D97-31, 15 May 1992
- Enclosure 3: DD Form 214 (Certificate of Release or Discharge from Active Duty), 29 June 1990 and DD Form 215 (Correction to DD Form 214), dated 24 October 1990
- Enclosure 4: Medical Evacuation (MEDEVAC) Summary, 5 February 1989
- Enclosure 5: Radiology Report, 5 June 1989
- Enclosure 6: SF 600 (Chronological Record of Medical Care), 15 August 1989
- Enclosure 7: Consultation Sheet, 29 August 1989
- Enclosure 8: Consultation Sheet, 26 November 1989
- Enclosure 9: Statement of G_M_ [Applicant]
- Enclosure 10: Compensation and Pension (C&P) Exam Report, 28 January 1993

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AC95-07649 on 16 August 1995.

2. The applicant's legal counsel states:

a. The applicant was medically retired from service in 1990 and placed on the Temporary Disability Retirement List (TDRL) due to spinal cord injuries and resulting neurological symptoms. In May 1992, the applicant was erroneously removed from the TDRL and discharged from service after a formal Physical Evaluation Board (PEB) downgraded his disability percentage to 10 percent. The downgrading of the applicant's disability rating and his subsequent removal from the TDRL was done despite the fact that he was never reevaluated by a competent medical authority nor physically present for the hearing. The applicant was not only deprived of his right to be present at the hearing, but he was also deprived of assistance from counsel. His removal from the TDRL was the culmination of numerous regulatory violations and was unsupported by the available medical evidence existing at that time. This is the applicant's first attempt at correcting the errors and injustices and he has exhausted all administrative remedies available to him.

b. The applicant was improperly removed from the TDRL despite never being afforded the opportunity to be physically present for the proceedings that directed his removal from the retirement list. He was deprived assistance of counsel despite making that election when he demanded a formal board. He informed the board that he was running late and in doing so indicated his desire to be present. The Board was required to hold the proceedings in abeyance when it convened and neither the applicant nor his requested counsel were present. Additionally, his symptoms were of sufficient severity to justify his continued placement on the TDRL or transfer to the Permanent Disability Retirement List (PDRL). He was suffering from lower extremity weakness, radiculopathy, a decreased range of motion in his spine, and numerous other symptoms at the time of his removal from the TDRL despite undergoing a L5-S1 discectomy in February 1989 to address these very symptoms. Had his request to reschedule his reevaluation not been egregiously ignored and his condition appropriately evaluated, he would have never been removed from the TDRL. The failure to hold proceedings in abeyance, as well as the failure to provide the applicant with the requested counsel, are direct violations of Army Regulation (AR) 635-40 (Physical Evaluation for Retention, Retirement, or Separation).

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

3. Counsel provides the following:

a. Orders Number D97-31, issued by the U.S. Total Army Personnel Command, Alexandria, VA on 15 May 1992, which shows the applicant was removed from the TDRL and discharged from the service effective 15 May 1992 because of permanent physical disability, with a rating of 10 percent. The additional instructions state he was entitled to severance pay provided he completed over six months service.

b. A MEDEVAC summary report, which shows the applicant was admitted to Bethesda Naval Hospital on 5 February 1989 and underwent a L5-S1 discectomy on 6 February 1989. The report states he had a many-year history of low back pain, and a greater than one year history of left leg pain that radiated to his knee. Computed tomography (CT) scan any myelogram in September 1988 confirmed a large central L5-S1 herniated nucleus pulposus, and the applicant failed the long course of non-operative treatment and was admitted for discectomy. Post surgery he complained of some buttock aching, but his leg pain was markedly decreased. On 9 February 1989, he had a biopsy of a nasal mass. He was discharged on 10 February 1989 with a discharge diagnosis of herniated nucleus pulposus, left L5-S1 and nasal mass.

c. A radiology report dated 5 June 1989, and shows three views of the lumbosacral spine revealed a narrowed L5-S1 disk space consistent with degenerative disk disease. There was sclerosis of the facet joints at the same level, consistent with osteoarthritis.

d. Chronological Record of Medical Care dated 15 August 1989, which states the applicant indicated he had trouble bending over and would fall over due to pain and a lack of strength.

e. A consultation sheet dated 29 August 19889, which states surgery of the lumbar spine was done and the applicant still had persistent pain, trouble bending over, weakness in his left lower extremity, and experienced a "catch" in his spine when he attempted to stand after prolonged sitting.

f. A consultation sheet dated 26 November 1989, which shows he was referred to neurosurgery for increasing back pain following his surgery.

g. A statement from the applicant, which states, in effect:

(1) When he was scheduled to go before the PEB his wife worked at Rotorex in Walkersville, MD and his family only had one vehicle at the time, and he had to drop her off at work prior to the start of the formal board. The trip from his home in Waynesboro, PA to Washington, DC typically took one to one-half hours with little or no traffic. After dropping his wife off, he recalls traffic being heavy that day. He remembers feeling anxiety and stress while stuck in traffic. The next thing he recalls was getting lost and frustrated. When he determined he would not make the appointment on time, he called Walter Reed to request to speak with the PEB. He wanted to inform them that he was lost and to make them aware of the traffic situation, and he wanted to reschedule the appointment. The lady he spoke with stated that she could only take a message and pass it on to the PEB. He called back a second time and he was informed that the message had been passed on to the board.

(2) On the original forms that he filled out and sent to the Medical Evaluation Board (MEB), he stated that he requested legal counsel to assist him. Despite making this selection, he never received legal counsel during the entire process. No one from the legal office ever reached out to him to discuss his case or prepare him for the formal hearing. If he had been afforded legal counsel, it would have provided him with the resources to make informed decisions. He felt that he was left on his own, and the military neglected to give him counsel. If he had been provided legal counsel, he would have had someone to call when he got lost trying to find Walter Reed. Counsel would have recognized that his condition had not improved and had gotten progressively worse. They could have advocated on his behalf. He was eventually informed that his hearing had proceeded without him or the requested counsel present, and he had been removed from the retirement list and issued severance pay.

h. A C&P exam report dated 28 January 1993, which states:

(1) The applicant was flat footed and had chronic knee pain which he related as also service connected. He had difficulty walking and squatting, mostly because of the knee pain. Examination of the applicant's back showed a surgical scar which measured approximately 10cm in the lumbar sacral area which was well healed. The musculature of the back showed bilateral spasm upon examination and localized tenderness. He had limitation of his range of motion and was only able to flex toward approximately 85 degrees. His extension backwards was only to about 10 degrees and lateral flexion was 25 degrees to the right and 25 degrees to the left. Rotation was also limited to about 15 to 20 degrees, right and left. Examination of the sacroiliac joints were uninvolved.

(2) Neurological findings: He was able to walk on his heels and toes. The examining physician believed his muscle strength was intact 5/5. His gait was symmetrical with a minimal limp to the left. Cranial nerves were intact and cerebral exam was negative.

(3) Examination of his reflexes: He had patellar reflexes 2+. The examining physician was unable to elicit the Achilles tendon reflex on both sides. He was negative for Babinski. The sensory deficit was located in an external dermatome which was the external aspect of the left leg extending from the hip to the anterior mid-thigh and to approximately just below the knee on the left. The applicant described numbness and paresthesia in the area.

(4) Diagnosis: Intervertebral disc disease, status-post surgery, status-post laminectomy with residual deficit. Paresthesia of the left leg and recurrent lumbar strain.

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

a. He enlisted in the Regular Army on 3 July 1973. He completed his initial training and was awarded military occupational specialty (MOS), 36K (Tactical Wire Operations Specialist).

b. An Operation Report shows the applicant underwent surgery on 6 February 1989. His operative diagnosis was left herniated nucleus pulposus, L-5/S-1. CT scan confirmed the diagnosis of a large central and left-sided herniated nucleus pulposus and a discectomy of the L-5/S-1 was performed.

c. Operation Report, dated 9 February 1989, shows he underwent a biopsy, left nasal mass and the mass was forwarded to the laboratory for examination. On 14 February 1989, the microscopic diagnosis showed polypoid fragments of nasal mucosa with acute and chronic inflammation, focal surface ulceration and squamous metaplasia.

d. DA Form 3349 (Physical Profile) shows he was put on a temporary profile on 30 August 1989 for postop laminectomy. His assignment limitations consisted of no physical training (PT), no Army Physical Fitness Test (APFT), no running or jumping, with no substitutions, no pushups, no sit-ups, no standing more than 30 minutes at a time, no bending repeatedly, no overhead work, and no lifting more than 20 pounds.

e. A memorandum, dated 23 February 1990, shows the applicant exceeded the weight for height by 51 pounds and exceeded the body fat standards by 4.26 percent. His unit commander requested that a medical evaluation be conducted. The applicant was examined and found to be unfit for participation in a weight control/physical exercise program. The cause of his overweight condition was due to a medical condition. The examining health care personnel recommended that he receive medical treatment for pathological medical disorder.

f. On 12 March 1990, a MEB referred the applicant to a PEB for the following diagnosis:

- Residual radiculopathy, L5-S1, with pain in back and legs
- Postop laminectomy, L5-S1
- Degenerative joint disease of both knees
- Obesity, secondary to lack of exercise

g. On 22 March 1990, a PEB found the applicant physically unfit by reason of residual radiculopathy L5-S1, with pain in back and legs, status post laminectomy, L5-S1. The other two conditions noted by the MEB were determined not to be unfitting conditions. The PEB concluded that his medical condition prevented satisfactory performance of duty in his grade and primary MOS. His condition had not stabilized to the point that a permanent degree of severity could be determined. The PEB

recommended a combined disability rating of 40 percent and that he be placed on the TDRL. He was further informed that:

(1) Although his disability was rated at 40 percent, he would actually be in receipt of 50 percent of his retired pay base per month until removed from his temporary retired status.

(2) Failure to report for a scheduled examination would result in the suspension of retired pay.

h. The applicant was counseled regarding the findings and recommendations of the PEB, and on 2 April 1990 he concurred and waived a formal hearing of his case.

i. On 3 May 1990, it was found that the applicant's injury was incurred in the line-of-duty.

j. On 15 May 1990, the applicant's request to remain on active duty was denied and his case was forwarded for further processing.

k. Orders Number D102-11, dated 21 May 1990, issued by the U.S. Total Army Personnel Command, Alexandria, VA, shows he was relieved from assignment and duty because of physical disability which incurred while he was entitled to basic pay and under conditions which permitted his placement on the TDRL, with 40 percent disability. His effective date of retirement was 29 June 1990, and he was placed on the TDRL, effective 30 June 1990.

l. Orders Number 109-7, issued by Headquarters, First U.S. Army and Fort George G. Meade, Fort George G. Meade, MD, dated 6 June 1990 and amended on 12 June 1990, shows he was assigned to the U.S. Army Transition Center, Fort Ritchie, MD with a reporting date of 30 June 1990.

m. His DD Form 214 shows he was honorably discharged on 29 June 1990, by reason of retirement physical disability/temporary, in the rank and pay grade of staff sergeant (SSG)/E-6. He completed 16 years, 11 months, and 27 days of net active service.

n. DD Form 215, issued on 24 October 1990, shows item 23 (Type of Separation) was corrected to show Retirement.

o. Letter Orders Number D10-134, dated 10 July 1991, issued by the U.S. Total Army Personnel Command, shows the applicant was attached to Kimbrough Army Clinic, Fort Meade, MD, effective October 1991 for the purpose of a periodic physical examination.

p. A Medical Record Report, dated 14 January 1992, shows:

(1) The following diagnosis was made during the examination: residual radiculopathy L5-S1 on the left with pain in the back and legs, status post laminectomy L5-S1, with restricted back range of motion, bilateral chondromalacia patellae of the knees, and left maxillary sinusitis, chronic.

(2) The applicant had nearly continuous pain in his back that worsened with any kind of prolonged sitting, standing, or any kind of jarring activity. He used a cane on a regular basis and often wore a brace. He had several emergency room visits for his back pain and had requirement for bedrest several times. The numbness in his left leg was worse, and there was evidence of sensory deficit. His back had restrictive range of motion, and x-ray demonstrated degenerative changes. He had continued chronic maxillary sinusitis with accompanying headaches, which required antibiotic therapy.

(3) The medical examiner stated that the applicant did not meet retention standards, per AR 40-501 (Standards of Medical Fitness), chapter 3, paragraph 3-39c. He recommended a permanent profile. He noted that there had been some deterioration in the symptomatology of the applicant, and he may require further surgical intervention to ameliorate his back symptoms. The physician stated his case should be presented to the PEB for further adjudication.

q. On 27 January 1992, the applicant was issued a permanent profile for his medical condition.

r. On 29 January 1992, the applicant concurred with the findings and recommendations of the report of TDRL medical examination and did not desire to appeal.

s. On 4 March 1992, following the TDRL medical examination, an informal PEB found him physically unfit due to residual radiculopathy L5-S1, with pain in back and legs, status post laminectomy L5-S1. The PEB recommended a combined disability rating of 10 percent and that his disposition be separation with severance pay. The PEB stated the rating of 10 percent more accurately reflected his current degree of severity of his condition. The PEB considered his condition to have improved so as to be ratable to less than 30 percent. A rating of less than 30 percent for Soldiers with less than 20 years retirement service, required separation with severance pay in lieu of retirement.

t. On 17 March 1992, the applicant nonconcurred with the findings and recommendations of the PEB and demanded a formal, in person appearance, hearing of his case, and requested a regularly appointed counsel to represent him.

u. On an unspecified date, the applicant wrote to the President, PEB, and stated that he had previously submitted documents stating that he did not concur with the decision of 10 percent rating with severance pay. It was his understanding from the Physical Evaluation Board Liaison Officer (PEBLO) was that he would be "reviewing" two times his base pay for up to a total of 12 years in severance pay. He asked that the President, PEB, disregard his previous decision.

v. A letter addressed to the applicant and signed by an official of the PEB, Walter Reed Army Medical Center, Washington, DC, dated 26 March 1992, shows a formal PEB was scheduled for the applicant at 0830 hours, 17 June 1992. The letter stated:

(1) If for any reason he would be late, or unable to attend, he was to notify his appointed counsel. Counsel would present this information to the Board President who may grant a delay. If not, the hearing would proceed as scheduled. His interests would be represented by counsel. Since he requested regularly appointed military counsel, his case had been assigned to the Soldier's legal counsel office at Forest Glen Annex, Walter Reed Army Medical Center. He was informed that he must contact the counsel's office within three days after receipt of the letter and prior to signing the attached acknowledgment. He was provided with the legal counsel's office telephone number.

(2) The letter authorized (verbal order commanding officer) temporary duty and travel to and from the applicant's residence in Waynesboro, PA. The letter stated he was to begin travel on or about 16 June 1992. Period of temporary duty was approximately three days. He was provided with the PEB recorder and the noncommissioned officer in charge telephone numbers.

w. On 5 May 1992, the findings and recommendations of the informal PEB were approved for the Secretary of the Army.

x. Orders Number D97-31, issued by the U.S. Total Army Personnel Command, show the applicant was removed from the TDRL and discharged on 15 May 1992, with entitlement to disability severance pay.

5. The ABCMR considered the applicant's request to have his military records corrected to show he was retired with all military benefits in ABCMR Docket Number AC95-07649 on 16 August 1995. The Board denied the applicant's request and determined that he failed to submit sufficient relevant evidence to demonstrate the existence of probable error or injustice.

6. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. Documentation reviewed included the applicant's ABCMR application and

accompanying documentation, the military electronic medical record (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 the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant has applied to the ABCMR requesting an increase in his military disability rating with a subsequent change in his disability discharge disposition from separation with severance pay to permanently retired for physical disability, or a referral to the Disability Evaluation Process. His counsel states the applicant was unable to attend his formal physical evaluation board (FPEB) and was thus able to receive an increased disability rating:

“In 1992, Mr. [Applicant]'s case was scheduled for review for purposes of removing him from the TDRL [Temporary Disability Retirement List]; however, he was unable to attend on the date the board was scheduled due to getting lost while trying to get to the board. He called the board notifying them of his predicament, and he made it clear that he intended to attend the hearing but through no fault of his own was unable to do so.

Rather than reschedule the FPEB, they instead finalized his discharge at 10% without providing him an opportunity to present his case or ever providing him legal assistance. This denial of due process dramatically reduced Mr. [Applicant]'s benefits since he had 17 years of service and was pushed out with severance as opposed to having full consideration for a medical disability retirement to which he was entitled.”

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. His DD 214 shows he entered the regular Army on 3 July 1973 and was placed on the TDRL on 30 June 1990 under provisions provided in AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (13 December 1985). Orders published by the U.S. Total Army Personnel Command on 15 May 1992 removed the applicant from the TDRL with entitlement to disability severance pay effective 15 May 1992.

d. The applicant's 6 February 1990 medical evaluation board (MEB) narrative summary shows he had initially done well following a discectomy for a large left paracentral herniated nucleus pulposus and was returned to duty. Unfortunately, his low back pain and left sided radicular symptoms returned, and after failing inpatient physical therapy, he was referred to the DES:

“Dr. W.S. operated on his back and did a discectomy for a large central, left-sided herniated nucleus pulposus L5-S1 disc space. The patient tolerated the procedure well and postoperatively he seemingly did well. He eventually returned to duty.

The patient, however, was unable to do physical training, and began gaining weight as a result of his inactivity. The patient is a USA SSG, and his duties were compromised as a result of his inability to perform. The patient had ongoing pain in his back that radiated in his left leg, however, the pain was noted not to be as great as that prior to the surgery on his back ...

The patient continued to have reduced symptoms of pain. He was admitted to the Orthopedic Surgery Service at Kimbrough Army Community Hospital in OCT 89 for a course of intensive physical therapy ... Physical therapy has helped, but the patient has continued to have symptoms of pain in his back and radicular pain in his left leg. The pain in the leg and back are just about equal. The patient had a positive EMG that showed residual radiculopathy at the L5-S1 dermatome.”

e. The applicant’s radiculopathy and low back pain were found to fail medical retention standards. The applicant concurred with the MEB’s findings and recommendation on 12 March 1990 and case was referred to a PEB for adjudication.

f. On 22 March 1990, his informal physical evaluation board (PEB) determined these two conditions were unfitting for continued service. Because the condition had not stabilized, placement on the TDRL is appropriate. Using the VA Schedule for Rating Disabilities (VASRD), they derived and applied a 40% disability rating and recommend he be placed on the TDRL with a combined disability rating of 40%. On 2 April 1990, after being counseled on the PEB’s findings and determination by his PEB liaison officer (PEBLO), he concurred with the board and waived his right to a formal hearing.

g. The applicant underwent his TDRL reevaluation examination on 14 January 1992. It was noted he continued to have “continued numbness in his left leg and nearly continuous discomfort in his back which causes him difficulty in standing up straight and is aggravated by weather changes and any prolonged sitting or standing. He gets regular muscle spasm and periodically requires bedrest.”

“PHYSICAL EXAMINATION: the patient has mild bilateral paraspinal spasms. There is decreased lumbar lordosis ... Gait [walk] is normal. The patient is able to forward bend to 60 degrees. There is decreased sensation to pinprick along the dorsum [top] of the left foot. Motor strength in both lower extremities is 5/5. Reflexes are 1+ and symmetric ...

Diagnoses: Residual radiculopathy L5-S1 on the left with pain in the back and legs, status post laminectomy L5-S1, with restricted back range of motion.”

h. The applicant concurred with the examination on 29 January 1992 and it was forwarded to a PEB for adjudication.

i. On 4 March 1992, his TDRL re-evaluation informal PEB determined the applicant’s “Residual radiculopathy L5-S1 with pain in back and legs, status post laminectomy L5-S1,” though improved, was still unfitting but was not stable. They derived and applied a 10% rating and recommended he be separated with disability severance pay.

j. On 17 March 1992, the applicant non-concurred and demanded a formal PEB with the assistance of regularly appointed counsel. In a 26 March 1992 memorandum, the United States Army Physical Disability Agency informed the applicant his FPEB was scheduled for 17 June 1992 and his case had been assigned to “the soldier’s legal counsel office at Walter Reed Army Medical Center” with the instructions:

“You must contact the counsel’s office within three days after receipt of this letter and prior to signing the attached acknowledgement. You can reach that office by calling collect: (301) 427-5214 or AUTOVON 291-5214. A postponement cannot be granted solely on the grounds that you have not contacted counsel. If you do not contact the legal counsel, your case may be heard by the Board with little or no argument on your behalf.”

k. In a signed undated memorandum to the president of the PEB in Washington, D.C., the applicant requested to concur with the informal PEB, waive his formal hearing, and receive severance pay:

“Dear Sir,

I’m writing to you concerning the final decision on my medical evaluation results. I previously submitted documents stating that I did not concur with the decision of 10% rating with severance pay.

My understanding from the PEBLO office is that I will be receiving two times my base pay for up to a total of twelve years in severance pay. With this understanding, I have since changed my decision to concur with the rating and severance pay. So, I am asking that you disregard my previous decision and the one that I am stating now will be my decision.”

l. There is no indication in the case file the applicant failed to receive the due process provided to Soldiers throughout the DES.

m. It is the opinion of the ARBA Medical Advisor that neither the granting of a permanent retirement for physical disability nor a referral of his case to the DES for another reevaluation is warranted.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board through counsel 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. Upon review through counsel of the applicant's petition, available military records and medical review, the Board concurred with the advising official finding no indication in the case file the applicant failed to receive the due process provided to Soldiers throughout the DES. The Board found during the applicant's informal physical evaluation board (PEB) determined he had two conditions that were considered unfitting for continued service. Evidence in the record show the applicant concurred with the board findings and waived his rights to a formal hearing.

2. The Board determined the applicant's counsel has not demonstrated there is sufficient evidence to support correction of his records to show he was medically retired instead of medical discharge with severance pay; or, in the alternative, direct the U.S. Army to refer all conditions to the Integrated Disability Evaluation System (IDES) to determine his overall disability rating. The Board found relief is not warranted.

3. 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:

<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:

The Board found the evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis to amend the decision of the ABCMR set forth in Docket Number AC95-07649 on 16 August 1995.



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. 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.

2. Title 10, United States 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.

3. 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. Once a determination of physical unfitness is made, all disabilities are rated using the Department of Veterans Affairs Schedule for Rating Disabilities (VASRD).

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

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

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

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

c. Paragraph 4-33 (Temporary Disability Retired List (TDRL)), states:

(1) Under the provision of 10 USC 1202 and 10 USC 1205, Soldiers will be placed on the TDRL when they would be qualified for permanent disability retirement and the preponderance of evidence indicates one or more conditions will change within the next five years so as to result in a change in rating or a finding of fit. In accordance with 10 USC 1210, the Army DES will reevaluate each Soldier placed on the TDRL at least once every 18 months. The Secretary of the Army will make a final determination of the case of each Soldier whose name is on the TDRL upon the expiration of five years after the date when the Soldier's name was placed on that list. If, at the time of that determination, the physical disability for which the Soldier was placed on the TDRL still exists, it will be considered to be permanent and stable.

(2) Soldiers on the TDRL who disagree with the findings of the IPEB, other than a finding of retention on the TDRL, are entitled to a formal hearing without regard to whether the IPEB determined the Soldier fit or unfit. Soldiers on the TDRL are entitled to legal representation the same as for PEB adjudication before their placement on the TDRL.

d. Paragraph 4-27 (Final Disposition by U.S. Army Physical Disability Agency), states:

(1) Permanent disability retirement: This disposition is directed under 10 USC 1201 or 10 USC 1204, as applicable, when the Soldier is determined unfit for continued service and has a compensable disability in accordance with the standards of this regulation, and:

- the disability(ies) is permanent and stable, or the disability rating will not improve to less than 80 percent.
- the Soldier has at least 20 years of service as computed under 10 USC 1208.
- the Soldier has a combined disability rating of at least 30 percent.

(2) Placement on the temporary disability retired list: This disposition is directed under 10 USC 1202 or 10 USC 1205, as applicable, when the years of service or

percentage requirements for permanent disability retirement are met but the disabilities are not determined to be permanent and stable.

(3) Separation with disability severance pay: This disposition is directed under 10 USC 12023 or 10 USC 1206, as applicable, when the Soldier is unfit due to a compensable physical disability determined under the standards of this regulation, and:

- the Soldier has less than 20 years of service computed under 10 USC 1208.
- the Soldier's combined disability rating is less than 30 percent, to include a rating of zero percent.

(4) Revert to retired status with disability benefits. This disposition applies when a retiree for regular or non-regular service is determined unfit for a disability rated at least 30 percent. (Revert to retired status without disability benefits applies if the rating is less than 30 percent.)

4. 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.

5. 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.

6. 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.

7. 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.

8. 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//