

IN THE CASE OF: [REDACTED]

BOARD DATE: 16 November 2023

DOCKET NUMBER: AR20230003444

APPLICANT REQUESTS:

- in effect, duty-related physical disability retirement from the Army National Guard (ARNG) in lieu of transfer to the Retired Reserve subsequent to non-retention due to a Selective Retention Board (SRB) recommendation
- personal appearance before the Board

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

- two DD Forms 149 (Application for Correction of Military Record)
- Counsel's letter
- Table of Contents
- Counsel's brief
- 129 pages of documents contained in enclosures labeled 1-21

FACTS:

1. Counsel states:

a. The applicant retained Counsel to represent him for his application to correct his military records. The applicant was forced out of his position as a dual-status technician in the [REDACTED] ARNG ([REDACTED] ARNG). Before his retirement and removal from the ARNG, the applicant exhausted his administrative avenues for relief.

b. The applicant suffered error and injustice in his military records and seeks corrective action, as follows:

(1) Direct his placement on the Permanent Disability Retired List (PDRL) and award a physical disability retirement effective 31 December 2022, with a disability rating of 100% for injuries and illnesses he sustained in the line of duty (LOD).

(2) Alternatively, direct an in the LOD determination and refer his medical records to the Army's Office of the Surgeon General for entry into either the Legacy or

Integrated Disability Evaluation System (DES), or require the ■ ARNG to conduct a Formal Physical Evaluation Board (FPEB).

c. The applicant never expected his 20-year ARNG career to end the way it did, nor should any Soldier, active duty, Reserve, or Guard. As a Guardsman, he volunteered to defend his home ■ and his nation for 20 years. As a dual-status technician, he devoted his professional life to military service. Despite the blood and sweat he poured into his career, the chain of command and military health care officials neglected him and his medical conditions. His last command denied him the chance to present his case to an FPEB after the Informal PEB (IPEB) denied him a physical disability retirement. The applicant did his duty to the State and nation. Now it is time for the Army to do its duty for this honorable and retired Soldier.

d. The applicant's experience is yet one more example of a committed service member soldiering on while enduring painful and debilitating medical conditions. While he was preparing to deploy in March 2003 for Operation Enduring Freedom, he received a smallpox vaccination that caused him to suffer a severe allergic reaction. He was told that the rash on his body was temporary, but the condition did not go away- it worsened. His medical chart documents his multiple medical visits over the years for the rash.

e. The injury occurred in 2003, but it took years before the Army correctly and formally documented it. In 2015, a medical provider completed a Standard Form 600 (Chronological Record of Medical Care) memorializing the applicant's ongoing and unabated reaction to the vaccination. The next year, the Army determined that his vaccine injury occurred in the line of duty (LOD). This determination was small solace for the applicant because he continued to suffer the effects of his injury and experienced daily pain.

f. In 2022, the applicant learned that he had mastocytosis [a disorder where mast cells, which fight infections and cause inflammation, grow abnormally in the body] and began treatment. Meanwhile, the ■ ARNG notified him in July that he was disqualified for further military service for medical reasons not incurred in the LOD. The applicant elected to have his case heard at a non-duty related-PEB.

g. The Board convened in November 2022, and failed to conduct a thorough review of his medical records. The Board found that he was no longer fit to serve. The applicant appealed the Board's findings to a FPEB. Before his hearing, however, the ■ ARNG canceled his FPEB processing and discharged him on 31 December 2022. The Adjutant General had adopted the recent Selective Retention Board's recommendation to non-retain the applicant.

h. The applicant lost his livelihood abruptly, unfairly, and unceremoniously. He now asks this Board to correct the error and injustice that occurred during his Army career and grant him a medical retirement or refer his medical records to the Integrated or Legacy Disability Evaluation System (DES).

i. Applicants have the burden of proving that an error or injustice occurred in their case by a preponderance of the evidence. Further, the Board presumes administrative regularity in each case it considers. The Board should give the applicant's petition liberal consideration. The applicant has a Department of Veterans Affairs (VA) disability rating of 100 percent for "unspecified trauma and stressor related disorder with traumatic brain injury (TBI) " based on many symptoms. The VA could not distinguish the TBI from the mental disorder. The applicant also has a service-connected disability for migraine headaches "secondary to the service-connected disability of unspecified trauma and stressor related disorder with TBI and dizziness." The Board should therefore liberally consider the applicant's petition.

j. While on Title 10 orders in support of Operation Enduring Freedom on or about 30 May 2003, the applicant received the smallpox vaccine. The day after the vaccination, he developed a severe rash. He went to a nearby VA clinic for emergency treatment. The Army did not initiate an LOD or refer his case to a Medical Evaluation Board (MEB).

k. Twelve years later, the Army finally approved an LOD for the vaccine injury. During a routine physical in November 2015, a provider began the LOD after assessing the applicant's persistent skin condition caused by the adverse vaccination reaction. The ARNG completed the LOD in February 2016 and found that the applicant's long-term sequelae from the smallpox vaccine occurred while he was in the line of duty supporting Operation Enduring Freedom.

l. In April 2022, the applicant had two skin lesions removed from his back and tested for mastocytosis. Testing confirmed a diagnosis of indolent systemic mastocytosis and showed he had an elevated tryptase level at 61.7. He had a bone marrow biopsy on 20 July 2022, and was referred for further treatment for mastocytosis.

m. According to information from the Mayo Clinic, systemic mastocytosis occurs when excess mast cells build up in skin, bone marrow, digestive tract, or other body organs. These mast cells produce similar symptoms as an allergic reaction. Severe inflammation of these cells can cause organ damage. The triggers for reactions differ from person to person. Common signs and symptoms include flushing, itching, hives, abdominal pain, and bone and muscle pain, among others. Systemic mastocytosis can become cancerous.

n. As the applicant was fighting for his health, he learned that he would also have to fight for his Army career. He received notification on or about 11 July 2022 of his medical disqualification for further retention in the ARNG. The notification asserted that the medical disqualification was non-duty related and that there was no evidence to support an in the LOD determination. The applicant received extensions to respond to the notification. On 1 September 2022, he elected to have his file reviewed by a non-duty related PEB for fitness determination only. He was put on notice that the PEB's finding could result in his discharge with a 20-year retirement, among other things.

o. Meanwhile, the Calendar Year 2022 (CY22) Selective Retention Board convened on 29 August 2022. The Board selected the applicant for non-retention. The Adjutant General set a separation date of no later than 31 December 2022. The applicant acknowledged receipt of his non-selection on 21 November 2022.

p. The IPEB convened on 22 November 2022. Although the IPEB found the applicant physically unfit for duty, the written findings glossed over his long-term sequelae from the smallpox vaccination. The IPEB's findings further fail to mention his mastocytosis diagnosis. Instead, the IPEB grossly misapprehended and understated the applicant's disability, characterizing it as "low back pain."

q. The applicant was notified of the IPEB's findings and recommendations and he did not concur with the IPEB outcome. He attached a written appeal and requested a formal hearing, but the ■ ARNG never gave him his hearing. Instead, the ■ ARNG terminated his PEB processing and forced him out of his dual-status technician position on 31 December 2022.

r. The applicant experienced permanent scarring from his vaccination reaction, reminders of the injury he sustained in service of his country. The rash still breaks out from time to time over his entire body. To this day, he has pain and discomfort primarily in his lower back and abdominal area. He served 22 total years in the ■ ARNG. For almost 20 years, he served with severe and painful symptoms that would flare up, for example, when he would wear his uniform with an Improved Outer Tactical Vest (IOTV).

s. The applicant has a 100 percent VA disability rating for multiple conditions, including his allergic reaction rash. He also has a rating for unspecified trauma and stressor related disorder with TBI and dizziness.

t. Before the ■ ARNG sought to discharge the applicant for medical disqualification, the command should have reviewed his medical records for referral to the DES for the purpose of a physical disability retirement. He reported his injury in 2003 and sought further treatment for recurrent and chronic symptoms. It still took more than 10 years for him to even get an LOD determination. Even after that determination, the ■ ARNG still

failed to refer him to the DES. When he received a diagnosis of mastocytosis, the ■ ARNG should have also evaluated him for the DES.

u. Title 10, U.S. Code, Chapter 61, gives the Secretaries of the Military Departments the authority to retire or discharge service members if they find them unfit to perform duties because of physical disability. In the Army, the U.S. Army Physical Disability Agency administers the service's physical disability evaluation system and implements the Secretary's decisions.

v. Soldiers are referred to the DES a few ways. First, they may undergo an MEB when they no longer meet medical retention standards of Army Regulation (AR) 40-501 (Standards of Medical Fitness), chapter 3, which establishes the Army's DES policy. Second, Soldiers are referred to a Military Occupational Specialty Medical Retention Board [sic; MOS Administrative Retention Review (MAR2))] when they receive a medical profile rating of 3 or 4. Finally, commanders may refer Soldiers for a fitness for-duty medical examination.

w. AR 40-501, Chapter 3, lists various disqualifying medical conditions or physical defects which may render a Soldier unfit or unsuitable for service. Under the Army regulation, medical conditions and physical defects, individually or in combination, which may render a Soldier unfit for further military service are those that:

(1) Significantly limit or interfere with the Soldier's performance of their duties as substantiated by the Soldier's commander or supervisor;

(2) Require medication for control which requires frequent monitoring by a physician due to debilitating or serious side effects, medical care, or hospitalization with such frequency as to interfere with satisfactory duty performance;

(3) Restrict performance of any of the profile function activities listed in Section 4 of DA Form 3349 (Physical Profile), prevent the performance of all aerobic events of the APFT (Army Physical Fitness Test), have met a clinic medical retention determination point, or have been temporarily profiled for more than 365 days;

(4) May compromise or aggravate the Soldier's health or well-being if they were to remain in military service. This may involve dependence on certain medications, appliances, severe dietary restrictions, frequent special treatments, or a requirement for frequent clinical monitoring;

(5) May compromise the health or well-being of other Soldiers; and

(6) May prejudice the best interests of the U.S. Government if the individual were to remain in military service.

x. Chapter 3 provides a list, mainly by body systems, of physical or behavioral health conditions or defects that may render a Soldier unfit for further military service; however, "[m]any of the conditions listed in [chapter 3] fall below retention standards only if the condition has precluded or prevented successful performance of duty as described in paragraph 3-1" of AR 40-501, paragraph 3-3d.

y. The Army's DES policies and procedures are found in AR 635-40 (Disability Evaluation for Retention, Retirement, or Separation). In determining whether a Soldier is unfit because of physical disability to reasonably perform the duties of his office, grade, rank, or rating, the Army considers the unfitting conditions or defects and those which contribute to unfitness in arriving at the rated degree of incapacity warranting retirement or separation for disability. Furthermore, paragraph 3-2 states disability compensation is not an entitlement acquired by reason of service-incurred illness or injury; rather, the Government compensates 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.

z. Soldiers become eligible for retirement or severance pay benefits for service-connected disabilities in certain circumstances. They must meet LOD criteria. The criteria are:

(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.

aa. The applicant had an LOD determination approved in 2016. His subsequent skin condition stemmed from his injury in 2003. His head trauma is service-connected and should also have been evaluated for LOD consideration.

bb. Erythema multiforme, a condition the applicant suffers from, is a disqualifying condition. When this condition is more than moderate and recurrent or chronic, a referral to the DES is appropriate. Johns Hopkins Medicine describes erythema multiforme as "a skin disorder that's considered to be an allergic reaction to medicine or an infection." One cause of the condition may be certain vaccines.

cc. The applicant received a disability rating from the VA for erythema multiforme over different parts of his body. The VA and military disability rating systems serve different purposes, to be sure. Here, though, the VA rating proves that he had the condition while serving in the ■ ARNG. His symptoms were recurrent and chronic for

many years, but he was never referred to the DES to determine fitness for duty, even though erythema multiforme is a cause for referral to the DES when the condition is "more than moderate and recurrent or chronic."

dd. The applicant also received a VA disability rating for "unspecified trauma and stressors related disorder with TBI and dizziness." This service-connected disability should have been assessed for DES referral under AR 40-501, paragraph 3-31. Additionally, his more recent diagnosis of mastocytosis should have been considered by the IPEB under paragraph 3-35(b). A "service-connected" disability is one which the Service member incurred or aggravated in the LOD.

ee. The evidence in the record shows that the mastocytosis diagnosis occurred when the applicant still served in the ■ ARNG. A formal LOD investigation is required when an ARNG Soldier on orders for fewer than 30 days becomes disabled due to disease. Otherwise, Soldiers are presumed in the LOD in the case of disease.

ff. Finally, the applicant had a numerical designation 3 for lower extremities in the military physical profile serial system (PULHES). This permanent profile continued to show on his most recent Officer Record Brief (ORB) The profile rating was entered on 23 January 2022. This was a permanent profile, and the applicant should have received a LOD determination followed by a physical disability retirement.

gg. The ■ ARNG failed to refer the applicant to the DES until the tail end of his career. The organization then ran the clock out on him, denying him the opportunity to present his case at a formal PEB. The organization used the SRB and non-duty related PEB to force him into retirement without medical benefits or other entitlements. Furthermore, his IPEB lacked complete information and documentation to decide his case. The unit's oversight was an error that prejudiced the proceedings and resulted in the unfair and unjust end of his dual-technician career.

hh. The Board should refer the applicant's medical records to the Office of the Surgeon General for referral to the DES. If the Board declines to grant him a physical disability retirement, it should still refer his records for further DES processing. The applicant has presented sufficient evidence showing that the ■ ARNG was at best negligent in its handling of his medical disabilities. Once he qualified for a non-regular (Reserve) retirement, he was forced out of his position without any medical benefits. His disabilities should have been addressed through the DES for medical retirement consideration. His multiple VA disability ratings prove that his body and brain absorbed injuries and illnesses during his career. This Board can fix the ■ ARNG's error and at least refer the applicant's records to the DES or to a formal PEB.

ii. The IPEB relied on incomplete medical information and should have referred the medical records for LOD determination. An IPEB's purpose is to conduct a documentary

review of a Soldier's case file to determine his or her fitness for continued service. The Board may obtain additional documentation and add it to the case file. In the applicant's case, the non-duty related IPEB did not consider all relevant medical information or records. The IPEB should have also returned to the case to the unit for re-referral under the IDES process.

jj. First, the IPEB report does not mention mastocytosis. The Board instead characterizes the applicant's disability as "low back pain (non-compensable)." This characterization was an understatement, a catch-all term for one symptom among several underlying the real disability of mastocytosis. The IPEB 's focus on the symptom and not the disease is telling. The █ ARNG Medical Branch failed to request all medical documents in support of the LOD determination the applicant received in 2016. The Branch also did not obtain blood tests confirming the diagnosis for mastocytosis.

kk. Second, the IPEB 's incomplete review is apparent in the narrative on the DA Form 199 (Informal PEB Proceedings). The case file did not include the mode of injury, but nothing prevented the Board from requesting more information from the referring organization. The IPEB 's write-up also noted that there was no LOD investigation for the condition. The absence of a LOD should have been a red flag. Had the IPEB made the effort, it would have or should have seen the LOD from 2016 and directed another one in 2022 for the mastocytosis diagnosis. The IPEB president had this authority under AR 635-40.

ll. Third, the IPEB did not consider or know that the Physical Profile Record for the applicant was incomplete. As he pointed out in his IPEB appeal, his Physical Profile Record did not include all DA Forms 7809 (Summary of Care by Non-Military Medical Provider).

mm. Fourth, although the IPEB found the applicant was physically unfit for military service, it should have also concluded that his disability did not exist prior to service (EPTS) and was permanently service aggravated. His disability has changed his daily functions and limited his activities. He must avoid exertion or intense exercise or else risk a whole-body reaction. This condition severely restricted his ability to perform his military duties.

nn. Finally, the IPEB, at minimum, should have referred his case for preparation of an Integrated DES Referral Memorandum (IRDM). The fact that the IPEB overlooked or ignored the applicant's recent and serious diagnosis of mastocytosis and his 20 years of rashes and reactions to the smallpox vaccine is inexcusable. The █ ARNG compounded the error when it prevented him from appealing his case to an FPEB and forced him to retire instead. No Soldier, not one, should ever leave the service in this manner.

oo. The ■ ARNG should have allowed the PEB processing to continue. Before the CY22 SRB convening date of 29 August 2022, the ■ ARNG notified the applicant in July that he was subject to a not in the LOD discharge. One option made available to the applicant in response to the not in the LOD discharge was to elect a PEB. Because the ■ ARNG identified the PEB as an option before the SRB convening date, it should have allowed the PEB process to conclude before discharging the applicant.

pp. Although the SRB occurred before the command ordered the PEB, the SRB should have known about or been made aware of the applicant's option to elect a PEB. The command gave the applicant an extension to respond to the not in the LOD discharge. The commander may not have realized that the extension would put the applicant past the SRB convening date. Still, the oversight prejudiced the applicant. The ■ ARNG should have realized that he was pending an FPEB and allowed him to continue serving past 31 December 2022, and until his FPEB concluded. Instead, their misinterpretation of the regulation forced the applicant out of his job before he was afforded full due process.

qq. After the IPEB, the applicant and his counsel appealed the findings and recommendations to an FPEB, but he never got the chance to present his case to the FPEB. The ■ ARNG terminated his medical processing based on the SRB outcome. The ■ ARNG hurried the applicant out of the service and out of his job, running out the clock on his Army career.

rr. The applicant served his Nation and his home state honorably and consecutively for 22 total years. While preparing for deployment and serving on mobilization orders, he sustained an injury that affects him to this day. The ARNG failed to give his injury and subsequent illnesses, mastocytosis and erythema multiforme, sufficient consideration for a physical disability retirement. Medical providers also failed to screen him for traumatic brain injuries or mental health conditions.

ss. The ARNG has already determined that the applicant could not meet medical retention standards, but the command and medical authorities erred when they did not fully consider his complete medical history at the IPEB. They further failed the applicant when they prevented him from having his appeal heard at an FPEB. He respectfully requests that the Board correct the error and injustice that occurred in his case.

2. The applicant states:

a. He served in the ■ ARNG for 22 years and earned the rank of Chief Warrant Officer Four (CW4). He was originally a 45K (Tank Turret Repairer), and then a 913A (Armament Systems Warrant Officer) and concluded his career as a 915E (Senior Ground Ordnance Warrant Officer). He received numerous awards to include, but not limited to, the General Douglas MacArthur Leadership Award (■), Samuel Sharp

Ordnance Award, and Meritorious Service Medal. During his military career, he mobilized for Operation Enduring Freedom and Operation Iraqi Freedom. He worked on the entire rolling stock of the Army, to include Abrams tanks and the arsenal of weapons systems including heavy machine guns.

b. He is proud of his military service and 20 full time years as a dual-status technician, but he strongly disagrees with how the ARNG treated him in the end. He did his duty to the best of his ability for two decades. He now feels discarded and mistreated by the organization he devoted his career to serving just because he sought medical treatment for an injury he sustained while in support of Operation Enduring Freedom.

c. He requests that the Board grant him a medical disability retirement or refer his case to the DES. While still a member of the ARNG, he did not get the chance to present his case for medical retirement or DES referral. Instead, he believes he was singled out and targeted for separation on the SRB for submitting medical documentation and requesting a PEB.

d. In March 2003, he was on Title 10 orders in support of Operation Enduring Freedom. He received the smallpox vaccination and the next morning, he was covered in a severe rash. This rash has never subsided. As his medical file shows, he saw doctors many times over the years about the recurring and painful skin condition.

e. On 14 June 2015, an Army provider completed a Standard Form 600. The form documented continuous reaction from smallpox vaccination to initiate an LOD. An O-6, Colonel (COL) [REDACTED], approved his LOD on 18 February 2016, on behalf of the Secretary of the Army. He applied for VA disability rating and received a 100 percent service-connected disability in January 2022.

f. The VA tested his rash and determined it was indolent systemic mastocytosis in 2022. His treatment notes described elevated tryptase levels and results from the bone marrow biopsy. The biopsy showed evidence of mast cell aggregate. He received a dual energy x-ray absorptiometry (DEXA) scan and a computerized tomography (CT) scan and referred him to Barnes Hospital in St. Louis for specialist review and treatment for mastocytosis.

g. He requested a permanent profile numerous times to accurately reflect his LOD, based off the function capacity forms submitted by his primary doctor at the VA and Oncologist. The [REDACTED] Medical Branch (CW4 [REDACTED]) told him at one point, "I know what you are trying to do, and it will not work." Army medical refused to include anything in his not in the LOD packet that showed the mastocytosis diagnosis.

h. He has dealt with the adverse reaction to the smallpox vaccination for over two decades now and finally got a diagnosis and treatment plan through the VA. He submitted all medical documentation through his unit at the time, but nothing ever made it to his physical profile and a not in the LOD packet was produced by the State. He rebutted the not in the LOD packet, so he was separated through the SRB. He was the youngest Soldier to go in front of the SRB and had never been in trouble at any time in his career.

i. Before he was separated, an IPEB reviewed his medical records. The IPEB's decision did not mention mastocytosis. The board only focused on "low back pain (non-compensable)." He does not believe the board considered all his medical records. His records and approved LOD connected the mastocytosis to his military service. In his view, the IPEB went through the motions, but purposefully neglected to include anything involving his LOD or mastocytosis to ensure he did not receive a service-connected medical discharge. After the IPEB, he non-concurred and requested an FPEB, but the [REDACTED] ARNG terminated medical processing and kicked him out based on the SRB decision.

j. The smallpox vaccination in 2003 caused a lifelong disease that affects him daily. While applying mitigation factors, he has continuously had daily pain centralizing on his core and back. Even after providing [REDACTED] with all of the medical documentation, they did everything they could to conceal this mistreatment and separate him from not only the [REDACTED] ARNG, but also from his full-time position as a dual-status technician at the Combined Support Maintenance Shop as the Armament Supervisor.

k. He has a 100 percent VA disability rating for multiple conditions. He has seven ratings for erythema multiforme for the allergic rash covering different parts of his body. The VA also rated him for "unspecified trauma and stressor related disorder with TBI and dizziness", which are all symptoms of mastocytosis. As he mentioned earlier, he worked on ordnance during his career. He has "brain fog" from the countless times that artillery, tanks, and heavy machine gun percussions shook him to his core. He gets forgetful, dizzy, and lost at points.

l. He respectfully requests that the Army Board for Correction of Military Records (ABCMR) find error or injustice in his military records. He feels he should have left the ARNG with a medical disability retirement. At minimum, though, he should have gone through DES processing given the severity of his documented skin condition and mastocytosis. Thank you for considering his application, statement, and exhibits in support of his requested relief.

3. The applicant enlisted in the ARNG on 5 October 2000. A DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he entered active duty training (ADT) on 21 August 2001, and was awarded the Military Occupational Specialty (MOS) 45K.

He was honorably released from ADT after 8 months and 11 days, on 1 May 2002 and transferred back to his ■ ARNG unit.

4. A second DD Form 214 shows the applicant was ordered to active duty in support of Operation Enduring Freedom on 7 February 2003, with no foreign service. He was honorably released from active duty on 10 October 2003, due to completion of required active service, and transferred back to his ■ ARNG unit. He was credited with 8 months and 4 days of net active service this period.

5. A third DD Form 214 shows the applicant was ordered to active duty in support of Operation Iraqi Freedom on 5 May 2005, with service in Kuwait/Iraq from 26 June 2005 through 16 June 2006. He was honorably released from active duty on 11 July 2006, due to completion of required active service, and transferred back to the ■ ARNG. He was credited with 1 year, 2 months, and 7 days of net active service this period.

6. On 19 May 2008, after 7 years, 7 months, and 15 days of enlisted ARNG service, the applicant was honorably discharged from the ARNG and as a Reserve of the Army in order to accept an appointment as a Reserve Warrant Officer of the Army and appointment in the ARNG in the rank of Warrant Officer One (WO1), effective 20 May 2008.

7. A Standard Form 600, signed by a certified physician assistant (PA-C) on 14 June 2015, shows the following:

a. The applicant received a smallpox vaccination in 2003, at the Fort McCoy mobilization site for medical readiness prior to deployment. The applicant was seen on the date of the form for follow up documentation and assessment before entering the VA medical system for permanent scarring and red rash over trunk diffusely, upper and lower extremities, face, neck, essentially everywhere on his body. The rash was called a reaction to the smallpox vaccination and was supposed to go away, but never changed. It has been permanent scarring for the whole time.

b. The applicant was assessed with generalized vaccine permanent scarring with erythema multiforme presentation with diffuse 85 percent to 90 percent total skin surface permanent scarring for hypersensitive reaction.

c. The plan shows the applicant was to seek VA treatment with dermatologist referral and start the LOD process due to military involvement because of the smallpox vaccination reaction.

8. A DA Form 2173 (Statement of Medical Examination and Duty Status) shows the following:

a. The applicant was seen by a doctor as an outpatient at the VA [REDACTED] Health Care System [REDACTED] on 30 May 2003, while in an active duty status for an adverse effect of smallpox vaccines, initial encounter, rash and other nonspecific skin eruption.

b. The details of the accident show the applicant received a smallpox vaccine in 2003 while on mobilization orders in support of Operation Enduring Freedom. He reported a rash from the vaccine and was seen by the VA emergency room in May 2003. Symptoms still exist in 2015.

c. On 7 November 2015, the applicant was instructed by the physician during his periodic health assessment (PHA) to have an LOD initiated due to the continued existence of the rash. This LOD was submitted late due to a lack of medical documentation.

d. On 31 December 2015, the unit commander or unit advisor signed the form indicating a formal LOD was not required and the injury is considered to have been incurred in the LOD.

9. A National Guard Bureau (NGB) memorandum, dated 18 February 2016, shows the above referenced DA Form 2173 for the applicant's long term sequelae from the smallpox vaccine that occurred during Operation Enduring Freedom was approved as in the LOD.

10. A fourth DD Form 214 shows the applicant was ordered to active duty on 3 April 2020, in support of COVID-19 under Presidential Proclamation 9994 for Project Code X10. This was not a contingency operation. He was honorably released from active duty after 2 months and 3 days on 5 June 2020, due to completion of required active service.

11. A fifth and final DD Form 214 shows the applicant was ordered to active duty for 4 days on 26 January 2021, in support of Operation Capitol Response II. This was not a contingency operation. He was honorably released from active duty on 29 January 2021, due to completion of required active service.

12. A VA Rating Decision, dated 12 February 2021, shows the applicant received a service-connected disability rating effective 6 June 2020, for the following:

- erythema multiforme, allergic reaction/rash, with residual scarring of the head and neck (claimed as a skin condition as a result of a smallpox vaccination), 30 percent
- erythema multiforme, allergic reaction/rash with painful tender scars, 10 percent
- erythema multiforme, allergic reaction/rash with residual scarring anterior trunk, 10 percent

- erythema multiforme, allergic reaction/rash with residual scarring left lower extremity, 10 percent
- erythema multiforme, allergic reaction/rash with residual scarring left upper extremity, 10 percent
- erythema multiforme, allergic reaction/rash with residual scarring posterior trunk, 10 percent
- erythema multiforme, allergic reaction/rash with residual scarring right lower extremity, 10 percent
- erythema multiforme, allergic reaction/rash with residual scarring right upper extremity, 10 percent

13. A VA Rating Decision, dated 10 January 2022, shows the following:

a. Service-connection for the following conditions with the following ratings was granted effective 6 June 2020:

- unspecified trauma and stressor related disorder with TBI and dizziness (claimed as sleep loss and irritability), 100 percent
- migraine headaches, 30 percent
- irritable bowel syndrome to include gastroesophageal reflux disease, 30 percent

b. Service-connection for the following conditions was denied:

- left knee condition
- right knee condition

c. Service-connection for the following conditions was deferred:

- degenerative disc disease of the cervical spine
- lumbosacral strain
- undiagnosed illness presenting as joint and muscle pain

14. A physical profile is used to classify a Soldier's physical disabilities in terms of six factors or body systems, as follows: "P" (Physical capacity or stamina), "U" (Upper extremities), "L" (Lower extremities), "H" (Hearing), "E" (Eyes), and "S" (Psychiatric) and is abbreviated as PULHES. Each factor has a numerical designation: 1 indicates a high level of fitness, 2 indicates some activity limitations are warranted, 3 reflects significant limitations, and 4 reflects one or more medical conditions of such a severity that performance of military duties must be drastically limited. Physical profile ratings can be either permanent or temporary.

15. The applicant's DA Form 3349 (Physical Profile) is not in his available records for review and has not been provided by Counsel.

16. The applicant's DA Form 4037 (Officer Record Brief (ORB)) shows he had a physical profile rating of "3" in factor L with a physical profile rating of "1" in all other factors effective 23 January 2022.

17. The applicant's DA Form 67-10-2 (Field Grade Plate (O4-O5; CW3-CW5) Officer Evaluation Report) shows for the period from 23 March 2021 through 22 March 2022, he was rated as "Proficient" by his Rater and "Highly Qualified" by his Senior Rater.

18. A memorandum titled "Service Member Request for Physical Evaluation Board and Legal Counseling" shows on 11 July 2022, the applicant was notified of his non-duty related medical disqualification for further retention in the ARNG and/or entry on active duty per AR 40-501.

19. The NGB CY22 SRB convened on 29 August 2022, wherein the SRB selected the applicant for non-retention.

20. The above-referenced memorandum titled "Service Member Request for Physical Evaluation Board and Legal Counseling" additionally shows the applicant acknowledged the following on 1 September 2022:

a. He acknowledged receipt of the notification of medical disqualification for further retention in the ARNG and/or entry on active duty per AR 40-501, chapter 3. He reviewed his case with his unit commander and first sergeant and the full-time readiness noncommissioned officer for the purpose of LOD determination and acknowledges it was determined there is no evidence to support an in the LOD determination.

b. He indicated as a result of his non-duty related medical condition, he understood he was required to elect one of the following rights, labeled "a-d," by initialing next to his election.

c. The applicant initialed next to election option "d", indicating he requested his file be reviewed by a non-duty related PEB for fitness ruling only. Electing this option would start the process for the non-duty related PEB to determine retention or non-retention of military duties.

d. If he elected option "d," he further acknowledged the following statements by initialing all statements labeled "a-e."

(1) The applicant initialed statement “a” indicating he understood the PEB evaluates his physical condition against the physical requirement of his particular office, grade, rank, or rating. The PEB makes findings and recommendations to establish his eligibility to be retained due to fitness, separation, or retirement from the service because of physical disability.

(2) He initialed statement “b” indicating he understood he was requesting a referral to an informal PEB, where his records would be reviewed.

(3) He initialed statement “c” indicating he understood that his unit was responsible for completing and forwarding his non-duty related PEB packet through channels.

(4) He initialed statement “d” indicating he understood the PEB findings would be one of the following:

- return to duty within the limits of his profile
- discharge with a 20-year retirement
- discharge with a 15-year retirement
- discharge without retirement

e. He was advised the Office of Soldiers Counsel was available to ensure he was aware of his rights, options, and possible outcomes to help him decide whether to fight to return to duty in the ARNG or pursue a medical separation.

21. An ■ ARNG memorandum, dated 26 September 2022, shows the following:

a. National Guard Regulation 635-102 (Officers and Warrant Officers Selective Retention) provides that an officer who is considered for retention and fails to be selected will be processed for withdrawal of Federal recognition.

b. The applicant was considered for retention in accordance with the above procedures and was not selected. Accordingly, his Federal recognition would be withdrawn and he would be separated from the ■ ARNG by 30 November 2022.

c. Upon discharge from the ARNG of the United States, he would become a member of the Ready Reserve by operation of law and his default assignment would be to the Retired Reserve, as he was eligible for either regular or non-regular retirement.

22. Counsel provided photographs of the applicant and multiple medical records dated between July and October 2022, all of which have been provided to the Board in full for review, which show in pertinent part the following:

a. The applicant was seen for evaluation and management of his diagnosed mastocytosis and skin rash secondary to mastocytosis. He had biopsies of the two separate skin lesions from his back on 1 April 2022, which showed features consistent with mastocytosis. He was referred to the Hematology Oncology Clinic to further evaluate and rule out systemic mastocytosis and the Dermatology for further evaluation of his chronic rash.

b. According to the applicant, he received a smallpox vaccine in 2003 for military deployment and developed a maculopapular rash on his trunk and proximal extremities which has been persistent since then.

23. An [REDACTED] ANRG memorandum, dated 18 November 2022, notified the applicant of his eligibility for retired pay for non-regular service (20 years). He was informed he completed the required years of service and will be eligible for retired pay upon his application at age 60, based upon the enclosed National Guard Bureau (NGB) Form 23A (ARNG Current Annual Statement).

24. An NGB Form 23A, dated 18 November 2022, shows the applicant completed 22 years of creditable service for retired pay.

25. A DA Form 4856 (Developmental Counseling Form), shows the following:

a. On 21 November 2022, the applicant was counseled by COL [REDACTED], regarding the SRB and non-duty related PEB.

b. The SRB timeline is as follows:

(1) On 14 April 2022, the applicant was notified of the CY22 SRB via email from the Officer Personnel Management Branch (OMB) Chief.

(2) Suspense for acknowledgment of receipt and response was 31 May 2022.

(3) Suspense for SRB packet due to the G1 for Board review and action was 14 August 2022.

(4) Several email correspondences occurred at all echelons regarding the attempts to obtain the necessary documentation for Board consideration and the applicant failed to provide a packet to the G1 for SRB consideration by the suspense date.

(5) The SRB convened on 29 August 2022 where the applicant's Army Military Human Resource Record (AMHRR) was reviewed by the Board.

(6) As of the SRB convening date on 29 August 2022, the applicant was not enrolled in nor ordered to an MEB/PEB; as such the results of the SRB are given precedence.

(7) The SRB recessed on 29 August 2022 and submitted their recommendations to The Adjutant General for review and endorsement.

c. The applicant's medical timeline is as follows:

(1) On 8 July 2022 the applicant was sent a notification of intent to separate for failure to meet medical retention standards/packet for a non-duty related medical disqualifying condition.

(2) Suspense date for acknowledgment was 25 August 2022.

(3) On 17 August 2022, the applicant requested extension until 9 September 2022.

(4) The applicant's appeal to the non-duty related PEB was submitted to Medical Branch on 6 September 2002; however he failed to submit the signed Acknowledgment of Notification and DA Form 4856 and did not respond until after his SRB convened.

(5) In accordance with National Guard Regulation 635-102, paragraph 3-2b(3), all officers considered by the SRB are presumed fit as of the start date of the Board unless otherwise identified by an MEB/PEB and the MEB/PEB must have been ordered prior to the convening date of the Board.

(6) The applicant made an election to appeal to the non-duty related PEB on 6 September 2022; according to AR 635-40 and the Joint Base San Antonio representatives, his appeal packet would continue to move forward for further review.

(7) The applicant was considered for retention in accordance with National Guard Regulation 635-102 and was non-selected for retention. The Adjutant General selected a separation date of not later than 31 December 2022.

26. The applicant's DA Form 3349, DA Form 7652 (Disability Evaluation System (DES) Commander's Performance and Functional Statement), and non-duty related PEB referral memorandum, dated 9 September 2022, are not in his available records for review and have not been provided by the applicant.

27. A DA Form 199 (Informal IPEB Proceedings), shows the following:

a. An informal PEB convened on 22 November 2022, where the applicant was found physically unfit and that his disposition be referral for case disposition under Reserve Component regulations.

b. The applicant's listed disability is low back pain (non-compensable).

c. Non-duty related: the clinical records provided indicate the applicant sought treatment for this condition in June 2021. The case file for this condition does not include a mode of injury. The condition is not compensable because at the time the applicant was diagnosed with this condition he was not in an active duty status for more than 30 days or entitled to base pay and there is no LOD investigation for this condition. Additionally, there is no evidence within the applicant's available case file that indicates military service has aggravated the condition. In accordance with AR 635-40, the applicant is unfit because his DA Form 3349, shows functional activity limitations associated with this condition make him unable to reasonably perform required duties. The documents used at arriving at this determination are the non-duty related memorandum, dated 9 September 2022, DA Form 7652, DA Form 3349, and medical documentation.

d. On 6 December 2022, the applicant indicated he did not concur with the findings and recommendations of the informal PEB, demanded a formal hearing, requested personal appearance, regularly appointed counsel, and attached a written appeal.

28. A self-authored memorandum from the applicant to the PEB President, dated 9 December 2022, shows he would like his medical packet reviewed again. He believes he was singled out and targeted by the [REDACTED] ARNG for not accepting the not in the LOD decision they made to separate him from service. He requested his permanent profile to be updated and reviewed countless times, to no avail. Mastocytosis was caused from the smallpox vaccine and causes his body to attack itself when he gets hot. Since the initial reaction to smallpox, he adjusted his entire life to accommodate and minimize the daily pain and irritation of the mastocytosis that was always claimed by the Army would be temporary. Despite applying mitigating factors, he has continuously had daily pain centralizing on his core and back. The [REDACTED] Medical Branch did not request all medical documents supporting the LOD submitted and blood tests confirming mastocytosis, including the following:

- a Standard Form 600 dated 14 June 2015, documenting continuous reaction from the smallpox vaccination and to request an LOD
- 18 February 2015 approval of his LOD
- 8 January 2022, rated 100 percent service-connected disabled from the VA
- not all DA Forms 7809 (Summary of Care by Non-Military Medical Provider) were considered in producing his Physical Profile Record
- 1 April 2022, skin lesions from his back were tested from mastocytosis

- 14 April 2022, blood tests confirmed mastocytosis
- 20 July 2022, bone marrow biopsy was done
- DEXA scan and CT scan were done and subsequent referral to [REDACTED] Hospital for treatment of mastocytosis was made

29. An Office of Soldier's Counsel request for PEB reconsideration memorandum, dated 9 December 2022, shows the following:

a. The applicant reviewed his PEB findings, non-concurs with the Board's findings, and requests a formal board. He requests the formal PEB find his mastocytosis duty-related, or alternatively return his case for issuance of a Reserve Component Integrated DES Referral Memorandum (IDRM).

b. A review of the applicant's service record documents an approved LOD determination for long-term sequelae from the small pox vaccine. Noted in the LOD notes from the presiding doctor are the applicant had a hyper intensive reaction to the small pox vaccine administered to him by the Army. He received a nearly full body rash that resulted in permanent scarring.

c. The applicant's rash never subsided and as a result he was referred to dermatology for further examinations. Treatment notes, dated 16 August 2022, document a confirmed diagnosis of indolent systemic mastocytosis. Specifically, the treatment notes state elevated tryptase levels and results from the bone marrow biopsy showing evidence of mast cell aggregate.

d. Enclosed are two photographs provided by the applicant documenting the rash that covers nearly all of his upper body. He has stated that this rash becomes irritated and painful when wearing his uniform with his IOTV gear.

e. In the personal statement provided by the applicant, it is noted that his mastocytosis causes his body to attack itself. When he becomes hot, such as during times of exercise, he is subject to full body muscle and joint pain.

f. In accordance with Federal law and DoD directives and regulations, the PEB is authorized to make determinations of fitness/unfitness and determinations regarding whether an unfitting condition is duty related.

g. The applicant's medical records and the approved LOD establish a clear relationship between his mastocytosis and his military service. Likewise, the treatment records establish the applicant's limitations in physical performance stemming from his indolent systemic mastocytosis diagnosis.

h. Given the applicant's current diagnosis, he must continue to follow-up with lab work to monitor liver function and address any flareups he may have. He has had to change his routine and avoid over exertion or intense exercise as it trigger body wide reactions. His physical profile reflects back pain. This pain is a symptom of his mastocytosis and is so severe it limits his ability to perform his military duties.

i. Based on the foregoing, the applicant requests the PEB find his mastocytosis was not EPTS, was permanently aggravated by service, or return his case for completion of an IDRMM memorandum.

30. A second DA Form 4856 shows the applicant was provided retirement counseling on 20 December 2022.

31. On 20 December 2022, the applicant's battalion commander recommended approval of the applicant's discharge and retirement due to completion of 20 years' service.

32. On 28 December 2022, the applicant's brigade commander recommended approval of the applicant's retirement discharge with an effective date of 31 December 2022.

33. An [REDACTED] ARNG memorandum signed by the not in the LOD Medical Branch, dated 30 December 2022, requested to administratively terminate the non-duty related PEB case for the applicant due to The Adjutant General concurring with the State to move forward with the SRB decision. The applicant will be discharged on 31 December 2022 and will not be eligible for PEB.

34. The applicant's NGB Form 22 (National Guard Report of Separation and Record of Service), shows the applicant was transferred to the Retired Reserve on 31 December 2022, due to completion of 20 years' service, active or inactive. He was credited with 22 years, 2 months, and 26 days of total service for retired pay.

35. On 5 January 2023, The Adjutant General for [REDACTED], Commander, [REDACTED] ARNG approved the applicant's retirement effective 31 December 2022.

36. [REDACTED] ARNG Orders 0003899088.00, dated 19 January 2023, transferred the applicant to the Retired Reserve effective 1 January 2023, with Assignment Loss Code CC (Completion of 20 years' service, active or inactive).

37. A VA letter dated 3 February 2023, shows the applicant is considered to be totally and permanently disabled due to his service-connected disabilities effective 6 June 2020 and that his service-connected evaluation is 100 percent.

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

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

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

41. 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/or the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. Through counsel, the applicant has applied to the ABCMR requesting his discharge with transfer to the retired reserve be revoked and either to be permanently retired for physical disability with a military disability rating of 100% or referral to the Disability Evaluation System (DES).

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. The applicant's Report of Separation and Record of Service (NGB Form 22) for the period of Service under consideration shows the former drilling Guardsman entered the Army National Guard on 20 May 2008 and was honorably discharged from the [REDACTED] Army National Guard ([REDACTED] ARNG) on 31 December 2022 under the provisions in NGR 600-100, Commissioned Officers Federal Recognition and Related Personnel Actions (22 November 2022) after having completed more than 20 years of Service. The NGB 22 shows 22 years, 2 months, and 26 days of total service for retired pay.

d. The applicant had received his Notification of Eligibility for Retired Pay for Non-Regular Service (20 Years) letter on 18 November 2022. Orders published by the ■ ARNG show the applicant was transferred to the Retired Reserve effective 1 January 2023.

e. The applicant was placed on a permanent duty limiting physical profile for “Lower back/Tailbone injury/Pain” on 21 June 2022. No other conditions were listed on the profile.

f. The ■ ARNG notified the applicant in an 8 July 2022 memorandum he was medically disqualified for further service due to his back pain. He was given his options:

- 1) Transfer to the Retired Reserve if they have 20 qualifying years of service.
- 2) Request a 15-year notice of eligibility for non-regular retired pay and transfer to the Retired Reserve if they have 15 by less than 20 years of qualifying service.
- 3) Request an honorable discharge if they have less than 15 years of qualifying service.
- 4) Request a Non-duty Related Physical Evaluation Board (NDR PEB).

g. He elected for an NDR PEB. This board allows Reserve Component (RC) Service Members who are not on a call to active duty of more than 30 days and who are pending separation for non-duty related medical conditions but desire to remain in their component to enter the Disability Evaluation System (DES) for a determination of fitness. A non-duty related physical evaluation board (NDR PEB) affords these Soldiers the opportunity to have fitness determined under the standards that apply to Soldiers who have the statutory right to be referred to the DES for a duty related medical condition. After 2014, these boards would also look to see if the referred condition(s) were duty related, and if so, return them to the sending organization for entrance into the duty related processes of the DES.

h. On 22 November 2022, his informal NDR PEB found his “Low back pain” to be unfitting for continued service and that it was not duty related.

“NDR: The clinical records provided indicate the Soldier sought treatment for this condition in June 2021. The case file for this condition does not include a mode of injury. The condition is not compensable because at the time the Soldier was diagnosed with this condition the Soldier was not in an Active-Duty status for more than 30 days or entitled to base pay, and there is no Line of Duty investigation for this condition. Additionally, there is no evidence within the Soldier’s available case file that indicates that military service has aggravated the condition.”

i. On 6 December 2022, the applicant non-concurred with the PEB's findings, supplied a written appeal, and requested a formal hearing with a personal appearance and representation by regularly appointed counsel. From his 9 December 2022 appeal memorandum:

"I would like my medical packet reviewed again. I believe that I was singled out and targeted by [REDACTED] Army National Guard for not accepting the NILOD [Not in line of duty] decision they made to separate me from service. I requested my permanent profile to be updated and reviewed countless times with no avail. Mastocytosis was caused from the smallpox shot and causes my body to attack itself when I get hot. Since the initial reaction to smallpox, I adjusted my entire life to accommodate and minimize the daily pain and irritation of the mastocytosis that was always claimed would be temporary from the Army. While applying mitigation factors, I have continuously had daily pain centralizing on my core and back."

j. A 3 October 2022 Hematology/Oncology evaluation for "management of recently diagnosed mastocytosis" stated "Currently, patient is completely asymptomatic." (page 46 of supporting documents)

k. The United States Army Physical Evaluation Board scheduled his formal PEB for 7 February 2022.

l. The applicant was notified in a 26 September 2022 memorandum from the Adjutant General (TAG) of the [REDACTED] ARNG that his federal recognition was to be withdrawn and he was to be separated from the [REDACTED] ARNG on 30 November 2022 following his non-selection by a Selective Retention Board.

m. On 30 December 2022, the [REDACTED] ARNG sent a memorandum to the PEB requesting administrative termination of the applicant's case because they were going to separate him the following day:

"The NILOD [sic – [REDACTED] ARNG] is requesting to administratively terminate the NDR PEB case for CW4 [Applicant], [REDACTED] due to the following, TAG has concurred with the State to move forward with the (SRB) Selective Retention Board decision.

CW4 [Applicant] will be discharged on 31 December 2022 and will not be eligible for PEB."

n. Paragraph 4-3f(3) of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (19 January 2017):

“For administrative separation actions other than those addressed in paragraphs 4–3f(1) and 4–3f(2), referral and disposition under the DES takes precedence over the administrative separation action.”

o. Neither referenced paragraph was applicable in this case: Paragraph 4–3f(1) addresses Soldiers who are approved for discharge in lieu of trial by court-martial and 4–3f(2) addresses Soldiers under processing for an administrative separation for fraudulent enlistment or misconduct.

p. The applicant was already in the DES when his case was administratively terminated. It is therefore the opinion of the ARBA Medical Advisor the applicant’s case should be reopened for the purpose of completing the process, to include the applicant’s previously scheduled formal PEB.

BOARD DISCUSSION:

1. The Board carefully considered the applicant's request, supporting documents, evidence in the records, a medical review, and published Department of Defense guidance for liberal consideration of requests for changes to discharges. The Board found partial relief is warranted.
2. The Board considered the applicant’s request to be retired for disability but found it would be not be appropriate to do so without the benefit of further consideration through the Disability Evaluation System as described below.
3. The Board concurred with the conclusion of the ARBA Medical Advisor and determined the evidence supports reopening the applicant’s case in the Disability Evaluation System so he may be afforded the formal PEB that was cancelled due to the approval of his administrative separation and subsequent transfer to the Retired Reserve.

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 that the evidence presented was 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 directing the applicant be entered into the Disability Evaluation System (DES) and a Medical Evaluation Board (MEB) convened to determine whether the applicant's condition(s), met medical retention standards at the time of service separation.

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

b. Should a determination be made that the applicant should have been separated or retired under the DES, these proceedings will serve as the authority to void their administrative separation and to issue them the appropriate separation retroactive to their original separation date, with entitlement to all back pay and allowances and/or retired pay, less any entitlements already received.

2/16/2024

X [REDACTED]

CHAIRPERSON
[REDACTED]

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. 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, traumatic brain injury, sexual assault, or sexual harassment. Boards are to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based, in whole or in part, on those conditions or experiences.

2. Title 10, U.S. Code, chapter 61, provides the Secretaries of the Military Departments with authority to retire or discharge a member if they find the member unfit to perform military duties because of physical disability. The U.S. Army Physical Disability Agency is responsible for administering the Army physical disability evaluation system and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with DOD Directive 1332.18 and Army Regulation 635-40 (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 a Medical Evaluation Board (MEB); when they receive a permanent medical profile rating of 3 or 4 in any factor and are referred by an Military Occupational Specialty (MOS) Medical Retention Board; and/or they are command-referred for a fitness-for-duty medical examination.

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

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

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

3. Army Regulation 635-40 establishes the Army Disability Evaluation System and sets forth policies, responsibilities, and procedures that apply in determining whether a Soldier is unfit because of physical disability to reasonably perform the duties of his office, grade, rank, or rating. Only the unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability.

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

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

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

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

4. Army Regulation 40-501 provides information on medical fitness standards for induction, enlistment, appointment, retention, and related policies and procedures. Soldiers with conditions listed in chapter 3 who do not meet the required medical standards will be evaluated by an MEB and will be referred to a PEB as defined in Army Regulation 635-40 with the following caveats:

a. U.S. Army Reserve (USAR) or Army National Guard (ARNG) Soldiers not on active duty, whose medical condition was not incurred or aggravated during an active duty period, will be processed in accordance with chapter 9 and chapter 10 of this regulation.

b. Reserve Component Soldiers pending separation for In the Line of Duty injuries or illnesses will be processed in accordance with Army Regulation 40-400 (Patient Administration) and Army Regulation 635-40.

c. Normally, Reserve Component Soldiers who do not meet the fitness standards set by chapter 3 will be transferred to the Retired Reserve per Army Regulation 140–10 (USAR Assignments, Attachments, Details, and Transfers) or discharged from the Reserve Component per Army Regulation 135–175 (Separation of Officers), Army Regulation 135–178 (ARNG and Reserve Enlisted Administrative Separations), or other applicable Reserve Component regulation. They will be transferred to the Retired Reserve only if eligible and if they apply for it.

d. Reserve Component Soldiers who do not meet medical retention standards may request continuance in an active USAR status. In such cases, a medical impairment incurred in either military or civilian status will be acceptable; it need not have been incurred only in the line of duty. Reserve Component Soldiers with non-duty related medical conditions who are pending separation for not meeting the medical retention standards of chapter 3 may request referral to a PEB for a determination of fitness in accordance with paragraph 9–12.

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

6. National Guard Regulation 635-100 (Termination of Appointment and Withdrawal of Federal Recognition) prescribes the policies, criteria, and procedures governing the separation of commissioned officers of the ARNG. The withdrawal of Federal recognition of an officer is a function of the Chief, National Guard Bureau (NGB), acting for the Secretary of the Army. The discharge of an officer from his appointment as a Reserve of the Army is a function of the Secretary of the Army. Paragraph 5a (Termination of State Appointment) states unless contrary to State law and regulations, the appointment of an ARNG officer should be terminated for the reasons listed below. Among the listed reasons is as a result of failure of selective retention

7. National Guard Regulation 635-102 (Officers and Warrant Officers Selective Retention (SRB)) provides guidance and procedures for conducting the officer SRB. Paragraph 3-2 provides officers pending evaluation by a MEB or PEB as prescribed in Army Regulation 635-40 will not be separated until the final determination by the Integrated Disability Evaluation System (IDES). The separation date will be determined by IDES, or if retained by the IDES and non-selected for retention by the SRB, the separation date will be NLT 30-days following final determination by the IDES. All officers considered by the SRB are presumed to be fit as of the start date of the board, unless otherwise identified for a MEB/PEB upon notification for consideration. As such, the MEB/PEB must have been ordered prior to the convening date of the board.

8. 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.

9. 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.

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

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

//NOTHING FOLLOWS//