

IN THE CASE OF: [REDACTED]

BOARD DATE: 21 December 2023

DOCKET NUMBER: AR20230004949

APPLICANT REQUESTS: through counsel, in effect, correction of his DA Form 199 (Informal Physical Evaluation Board (PEB) Proceedings) to reflect the following:

- posttraumatic stress disorder (PTSD) rated at 70 percent in lieu of 30 percent
- lumbar spondylosis L4-L5/degenerative arthritis of the spine/intervertebral disc syndrome rated at 20 percent in lieu of 10 percent
- a combined rating of at least 75 percent in lieu of 60 percent or
- referral into the Legacy Disability Evaluation System for his service-connected PTSD and lower back injuries

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

- DD Form 149 (Application for Correction of Military Record)
- counsel's statement
- DD Form 214 (Certificate of Release or Discharge from Active Duty), effective 1 September 2011
- Department of Veterans Affairs (VA) rating decision, dated 30 June 2016
- DA Form 199, dated 8 January 2015
- Order D 027-30 20170127
- applicant statement to the Board
- copy of the entirety of the applicant Official Military Personnel Record (OMPF) from the Army's Interactive Personnel Electronic Records Management System (iPERMS)
- [REDACTED] letter of support
- [REDACTED] letter of support
- [REDACTED] letter of support
- Dr. [REDACTED] letter of support
- VA letter, dated 2 October 2013
- Incapacitation Pay Packets

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.

2. Counsel states:

a. He respectfully contends that the applicant suffered significant unfitting medical conditions during his military service that should have rendered him no less than 75 percent disabled through the Integrated Disability Evaluation System (IDES). These conditions were well-documented during his military service and resulted in the applicant being medically retired from the service on 27 January 2015. However, his conditions were only rated 60 percent for medical retirement purposes through IDES. Given the severity of these unfitting conditions, the applicant should have been higher rated for medical retirement purposes.

b. This unjust and erroneous rating is clearly evidenced by the fact that the VA rated the applicant as 80 percent disabled and granted him Total Disability Individual Unemployability (TDIU) status only weeks after his medical retirement. One unfitting condition for which the applicant received a disabling rating was PTSD. His PTSD was taken into consideration when generating both his medical retirement disability rating for unfitting service-connected conditions, and when generating his VA disability rating for service-connected conditions. During the medical retirement process, the applicant was only granted 30 percent for his PTSD. The VA, however, granted him a rating of 70 percent for the very same condition just days after his medical retirement.

c. Another unfitting condition for which the applicant received a disability rating was for his back pain. For the purpose of medical retirement, he was rated for lumbar spondylosis L4-L5/degenerative arthritis of the spine/intervertebral disc syndrome at 10 percent, while the VA rated it at 20 percent. Given that these conditions are both service-connected and unfitting and were evaluated in the same exam for both the purposes of medical disability retirement and VA service-connection, the vast disparity between the ratings is unjust and is a clear error. This error was compounded by ineffective assistance throughout the IDES process by the applicant's Physical Evaluation Board Liaison Officer (PEBLO). In light of the above mentioned, we respectfully ask that this honorable Board take the appropriate steps to correct this clear injustice.

d. The applicant enlisted in the Army National Guard on 7 June 1990, as a Private (PVT). The applicant rose quickly through the enlisted ranks to the rank of Staff Sergeant (SSG) before commissioning as an officer on 24 July 1994. Throughout his

25-year stellar career, the applicant has been highly regarded and decorated, earning three Bronze Star Medals and a Meritorious Service Medal, as well as numerous other individual and unit awards.

e. When the applicant entered the military service, he was the picture of health and fitness, both mentally and physically. He was consistently commended for his exemplary physical training accomplishments. However, in the later years of his career, the applicant's health swiftly and drastically declined due to his military experiences and demands until he was ultimately determined to be found unfit for duty. He was ultimately medically retired in 2015 because of the debilitating disabilities he incurred from his service. The applicant was medically retired with a disability percentage of 60 percent on 27 January 2015. However, three weeks later he was rated at 70 percent for PTSD by the VA and was already 20 percent for his back prior to medical retirement. Additionally, roughly four weeks after being medically retired, the VA rated the applicant TDIU. This rating is for those who cannot work due to the service-connected disabilities. The applicant was determined to be unable to work, whether full time or part time, only four weeks after his separation from the military.

f. The applicant encountered many traumatic experiences during his military service that caused his PTSD; specifically, the experiences he encountered while deployed in 2004, 2008, and 2011. In October of 2004, the applicant deployed to Iraq as the Company Commander for 1436th Engineer Company. During this deployment, an Improvised Explosive Device (IED) detonated directly next to the High Mobility Multipurpose Wheeled Vehicle (HUMMV) in which he was riding. There were times during this deployment that the applicant found himself in a position where he had to directly engage with the enemy, and lead ground assault convoys. In addition to the combat operations, he also wrote home to the families of his Soldiers who were injured. The applicant deployed to Iraq for a second time in 2008. While there, he had several traumatic experiences. Specifically, a suicide bomb exploded at the Palestine Pedestrian entrance just outside Baghdad Police College next to Sadr City which he survived. The applicant was awarded the Bronze Star Medal on 28 July 2009 for his exemplary leadership and service while deployed to Iraq in 2008 and 2009. In part, the narrative for the award reads, "[The applicant] was subject to the threat of kidnapping and hostile fire throughout his tour, which included frequent enemy indirect fire attacks on Forward Operating Base Shield, Phoenix Base, and while traveling to and from the International Zone." The applicant deployed for a third time, this time to Afghanistan from 2010-2011. During this deployment, he engaged with detainees at Field Detention Sites and at the Parwan Detention Facility near Bagram Airfield. The applicant was initially granted service connection for PTSD by the VA on 2 September 2011. At the time, he was rated as 30 percent disabled for the condition. However, on 2 February 2015, less than one month after the finalization of his medical retirement, the VA increased his rating to 70 percent for PTSD.

g. The applicant's Intervertebral Disc Syndrome (IVDS, also referred to as Lumbar Spondylosis and Degenerative Arthritis of the Spine in his diagnoses) was first service connected by the VA on 2 September 2011. This disability was one of the unfitting conditions that was evaluated during the IDES process. The VA noted in 2011 and 2014, almost a full year before he was medically retired, that the applicant was 20 percent disabled due to this now static condition. The applicant's combat deployments to Iraq and Afghanistan between 2005 and 2011 contributed to his debilitating injuries. Perhaps one of the most important pieces of evidence is when the VA vocational rehabilitation program denied the applicant from the program because he would no longer be able to work. The Vocational Rehabilitation Program denied the applicant from the program because his back condition deteriorated to the point that he is incapacitated frequently. He was in traction for 4 weeks, and weekly afterwards. The VA stated it is not reasonable to expect he will successfully complete the program. Specific to this request the VA stated, "[the applicant is] no longer able to perform the work [he] previously were employed on because of the constant pain and severity this situation presents on daily basis."

h. Due to a multitude of injuries, the applicant went through IDES and was medically retired on 27 January 2015. He was rated as 60 percent permanently disabled by the DOD. However, the VA rated him not just with a higher rating of 80 percent, but also TDIU. TDIU is awarded when either a single condition or the combination of conditions prevents a Veteran from obtaining and maintaining gainful employment. The VA determined the applicant cannot be gainfully employed and earn more than the poverty threshold due his disabilities as a result of his military service.

i. The discharge of the applicant from service was both an error and injustice. He was erroneously given a rating that should have been higher as the VA only a few days later increased his rating and deemed him TDIU, which essentially stated he could no longer work based on his service-connected disabilities. The applicant was rushed through the medical separation process, deprived of adequate legal counsel, and ultimately pushed out of the Army with an improper disability rating.

j. The DOD and VA both use the same VA diagnostic codes when reviewing a service member/Veteran for a disability. The VA evaluation system employed contractors to evaluate the applicant's disabilities. The DOD decided that the applicant's PTSD was so severe that he was unfit for continued service in the Army. However, the DOD rating was chopped by more than half compared to the VA. There is a major disparity in medical opinions when looking at a 30 percent and 70 percent rating. The fact that the VA determined the applicant was so disabled he cannot work in any to earn more than the poverty threshold demonstrates how improper the 30 percent rating made the DOD was at the time. The VA recognizes PTSD and Major Depressive Disorder as a mental disorder that is compensable for service-connection (38 CFR § 4.130).

k. In the present matter, the applicant had a 30 percent rating that was significantly increased to 70 percent within a month of his medical retirement. A 70 percent rating demonstrates the applicant has impairment within his occupation, judgment, thinking, mood interference with routine activities, near continuous panic, difficulty in adapting to stressful circumstances, and maintaining effective relationships. All these symptoms interfere with his ability to maintain a standard of fitness to serve in the military, especially at the Lieutenant Colonel rank. His PTSD was so debilitating that he had to be redeployed from Afghanistan to the US in 2015. The Narrative Summary (NARSUM) stated the applicant's PTSD could improve once discharged from the Army. However, this turned out to be untrue as not only was his PTSD rating increased from 30 percent to 70 percent within a month of retirement, but was also determined to be unable to be gainfully employed; thus, he was awarded TDIU by the VA.

l. The applicant went through the disability rating evaluation process where the DOD cut his VA rating in half. The VA recognizes Lumbar Spondylosis/Intervertebral Disc Syndrome (VA Codes 5235/5243) that is compensable for service-connection (38 CFR § 4.71a). In the present matter, the applicant should have been rated higher for his back condition. He was given a 20 percent rating by the DOD when he should have received at minimum a 40 percent rating. In 2013, the applicant was denied vocational rehab specific to his back condition. The VA stated he is no longer able to work due to the constant pain and severity of his back. Further, the VA cited he was in traction for four weeks as well as weekly afterwards, which meets at a minimum the 40 percent rating.

m. TDIU is a designator rarely used by the VA when determining a Veteran's disability. TDIU is analogous to Social Security disability. A Veteran with the TDIU designation, as the applicant had within weeks of retirement, cannot maintain substantially gainful employment. It is clear that at the time of the ratings determination by the DOD there was a clear error. In the present matter, the applicant was so severely disabled during his MEB that he was unemployed and receiving Social Security disability pay. He could not find any employment, which the MEB was aware of. The PTSD and back injuries were the cause of his inability to be employed. The TDIU was granted only weeks after his retirement, thus, it was apparent to the medical personnel and those designated to review claims the applicant's PTSD and back injuries were at the most serious level to prevent any type of employment.

n. The applicant received ineffective assistance of counsel during the course of his IDES process. The applicant's assigned counsel failed to adequately assist and advise him. The failure of the counsel to identify the rating errors discussed above and then advocate for a new evaluation was contrary to the responsibilities of counsel, constituted ineffective assistance of counsel, and directly resulted in the applicant's separation with an error in rating for his medical disability retirement from the service.

o. When determining whether an accused received ineffective assistance of counsel, a court looks to see whether a counsel's performance "was so deficient that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment, and that the deficiency resulted in prejudice." *United States v. Johnson*, 2020 CCA LEXIS 364, (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). While the courts do not normally second guess a strategic decision by counsel, when such a decision is "unreasonable" or "based on inadequate investigation" the courts have found a sufficient basis for a finding of ineffective assistance of counsel. See *United States v. Davis*, 60 M.J. 469, 474 (C.A.A.F. 2005). In order to determine whether an accused received ineffective assistance of counsel, the courts apply a three-part test; 1) is there a reasonable explanation for counsel's actions; 2) did defense counsel's level of advocacy fall measurably below the performance ordinarily expected of fallible lawyers; 3) if defense counsel was ineffective, is there a reasonable probability that, absent the error, there would have been a different result. See *United States v. Gooch*, 69 M.J. 353, 362 (C.A.A.F. 2011).

p. In the present matter, the advice and strategic decisions made by the applicant's counsel were wholly unreasonable and resulted in substantial prejudice to the applicant. But for the ineffective assistance of counsel, the applicant would have received a higher disability rating from the DOD. The applicant's disabilities were so severe he was on Social Security disability, already receiving VA disability pay, and unable to find gainful employment. The applicant's counsel neglected to provide this information and documentation along with the severity of his conditions. The applicant did not know he could have submitted Social Security disability and his unemployment as further evidence for the extent of his injuries. The failure to identify and address this error cannot be rationally explained as a strategic decision, nor can it be attributed to any other logical rationale. Rather, the failure to identify and raise this issue is a direct result of the incompetence of the assigned counsel and his or her failure to pay attention to critical details which were material to the proper disposition. It is clear had the applicant's counsel provided competent legal advice he would have received a higher rating for his military disability retirement as evident by the VA increases in his disability pay and TDIU designation. The applicant had one of the highest levels of disability a Veteran can receive and this was while he was going through the MEB process. Yet, his counsel failed at the job to competently advocate for the applicant that resulted in his ratings being lower than they should have been rated. But for the inaction and gross incompetence of the applicant's counsel, he would have been medically retired with the appropriate higher ratings.

q. The applicant was committed to his service in the United States Army. He began his career by enlisting in the Army and working his way up the ranks, through Officer Candidate School, and reached the rank of Lieutenant Colonel based on his dedication and performance. However, this is when the injuries he sustained in supporting the country finally caught up to him. Through numerous deployments to the combat zones

of Iraq and Afghanistan, the applicant's life was adversely affected by PTSD. He was individually sought out to be kidnapped by our adversaries, witnessed the horrors of war, and had to notify the families of his Soldiers that their child was wounded in action. Additionally, the applicant's physical injuries to his back including an injury while in the line of duty in Iraq. Despite using the same diagnostic code and medical provider as the VA, the DOD severely cut the applicant's ratings for PTSD and his lower back injury. The VA rated the applicant at 70 percent while the DOD reduced his rating by more than half down to 30 percent. The DOD also cut his lower back rating in half from 20 percent to 10 percent. Furthermore, the VA granted the applicant TDIU weeks following his retirement based on the same information the DOD had in their possession. To allow the military disability retirement to severely cut the ratings in such an egregious manner is an error and injustice that only this Board may correct. We respectfully request that the applicant be granted a medical disability retirement to match the VA ratings or referred into the Legacy Disability Evaluation System for his service-connected PTSD and lower back injuries.

3. The applicant states:

a. He served 25 years with 33 months boots on the ground between Iraq and Afghanistan. The purpose for petitioning the board of corrections is that the Integrated Disability Evaluation System (IDES) should reflect both VA and DoD ratings. He is requesting an increase based on the fact his VA rating increased for PTSD before his official retirement from military service.

b. Preservice he was physically fit, agile, and enlisted at [REDACTED]. He had a pilot's license at the age of [REDACTED] and a [REDACTED] Builders License at age [REDACTED]. Married at age [REDACTED] raised 4 kids. and celebrated [REDACTED] years of marriage this year. He completed a Bachelor of Science degree in Construction Management at 22 years old.

c. During his time of service, he excelled as the youngest to complete boot camp, Officer Candidate School, Officer Basic and Advanced Courses, Combined Armed Services and Staff School, and Intermediate Level Education to name the main courses. He exceeded or maxed out the requirements for the APFT. He held 2 Company Command positions for a total of 5 years. During his second Company Command, he was in charge of 163 Combat Engineers in Iraq for the full year of 2005. Operating in the red zone and having IEDs detonate alongside their HUMMV, directly engaged and neutralizing the enemy, leading ground assault convoys, and contacting loved ones back home regarding injured soldiers. In 2005, during his second deployment, he suffered survivor's guilt from a suicide bomber at the Palestine Pedestrian Entrance just outside the Baghdad Police College next to Sadr City, Iraq. Then during his third deployment he was engaged with detainees at Field Detention Sites and at the Parwan Detention Facility near the Bagram Airfield. The service connected PTSD and TBI associated with multiple combat related missions operating in the red zones from 2005,

2008-2009, and 2010-2011 along with a bad lower back as diagnosed by the Veterans Affairs from 2005 have had a negative impact on his ability to sustain a full time job. He has earned three bronze stars, combat action badge, and various other awards and decorations.

d. Since retirement, he has established the Fighting Diamond Foundation to help men who have suffered trauma in their life.

4. The applicant enlisted in the [REDACTED] Army National Guard ([REDACTED] ARNG) on 8 March 1990. He completed initial active duty for training (IADT) from 14 June 1991 to 23 August 1991. He held military occupational specialty (MOS) 62E (Heavy Construction Equipment Operator). He was honorably discharged from the [REDACTED] ARNG on 23 July 1994 and was commissioned as a Second Lieutenant in the [REDACTED] ARNG on 24 July 1994. He was commissioned as a reserve commissioned officer in the Army Reserve on 29 January 1995.

5. The applicant served on active duty in support of Operation Iraqi Freedom from 23 October 2004 to 2 January 2006. He was awarded the Combat Action Badge during this period of service. He again served on active duty in support of Operation Iraqi Freedom from 6 August 2008 to 1 September 2009. He served on active duty in support of Operation Enduring Freedom (Afghanistan) from 14 May 2010 to 1 September 2011.

6. The applicant provides through counsel:

a. A VA letter dated 2 October 2013, stating in part: it does not appear feasible for the applicant to obtain suitable employment through Vocational Rehabilitation services at this point in time because of the severity of his disability.

b. Incapacitation Pay Packets showing the applicant received incapacitation pay from 12 July 2013 through 30 June 2014.

7. DA Form 199 shows:

a. An Informal PEB convened on 8 January 2015, wherein the applicant was found physically unfit with a recommended rating of 60 percent and that his disposition be permanent disability retirement.

b. The applicant was found unfit for the following conditions:

(1) Posttraumatic stress disorder (MEB Dx 1). The applicant was deployed to Iraq in 2005 and 2009 and Afghanistan 2011. The behavioral health examiner attributes the applicant's condition to combat stressors. It has not responded adequately to treatment and represents a decided medical risk to the mental health of the member. Therefore, it

is unfitting due to the stressors related to military service (Department of Defense Instruction ((DoDI) 1332.18). The applicant is competent to manage personal and financial affairs and to participate in medical board proceedings. (NARSUM, DA Form 7652, DA Form 3349, VA C&P Exam and DVA Proposed Rating Decision).

(2) Lumbar spondylosis L4-L5/ degenerative arthritis of the spine/intervertebral disc syndrome (MEB Dx 2) Onset March 2005 based on a TMDS-AHLTA entry with a diagnosis only, no other specifics are given regarding the low back pain. The soldier reports developing back pain while conducting PT in Iraq, no date(s) indicated. LOD on file for initial injury in Iraq. In accordance with (IAW) DODI 1332.18, the applicant is unfit because DA Form 3349, Physical profile limitations associated with this condition make the applicant unable to reasonably perform in their PMOS/AOC. The applicant's condition prevents them from performing functional activity (b.) evading direct and indirect fire. (NARSUM, DA Form 7652, DA Form 3349, VA C&P Exam, and DVA Proposed Rating decision).

(3) Left ankle sprain/posterior tibial tendonitis (MEB Dx 3) Onset: April 2011, the applicant rolled ankle while conducting PT while deployed in Afghanistan (per AHLTA note dated 3 February 2011), LOD in case file. Condition unfitting due to ROM. IAW DODI 1332.18, the applicant is unfit because DA Form 3349, Physical profile limitations associated with this condition make the applicant unable to reasonably perform in their PMOS/AOC. The applicant's condition prevents them from performing functional activity (i.) moving 40 pounds while wearing usual protective gear at least 100 yards. DoDI 1332.18. (NARSUM, DA Form 7652, DA Form 3349, VA C&P Exam and DVA Proposed Rating Decision).

(4) Right knee strain iliotibial band friction syndrome PEB referred as Right patellar tendonitis and right chondromalacia patella (MEB Dx 4) Onset: 10 September 2011, per PDHRA, the applicant injured right knee conducting PT in Afghanistan, (AHLTA theater notes date 16 April 2011). IAW DODI 1332.18, the applicant is unfit because DA Form 3349, Physical profile limitations associated with this condition make the applicant unable to reasonably perform in their PMOS/AOC. The applicant's condition prevents them from performing functional activity (b.) evading direct and indirect fire. (NARSUM, DA Form 7652, DA Form 3349, VA C&P Exam, and DVA Proposed Rating decision).

(5) Left knee strain iliotibial band friction syndrome PEB referred as Left chondromalacia patella (MEB Dx 5) Onset: 10 September 2011, per PDHRA, the applicant injured right knee conducting PT in Afghanistan, (AHLTA Theater notes date 16 April 2011). IAW DODI 1332.18, the applicant is unfit because DA Form 3349, Physical profile limitations associated with this condition make the applicant unable to reasonably perform in their PMOS/AOC. The applicant 's condition prevents them from

performing functional activity (b.) evading direct and indirect fire. (NARSUM, DA Form 7652, DA Form 3349, VA C&P Exam, and DVA Proposed Rating decision).

c. The applicant was found fit for the following conditions:

- Sprain Ribs (MEB Dx 6)
- Tinnitus (MEB Dx 7)
- Bilateral Hearing Loss (MEB Dx 8)
- Mild Traumatic Brain Injury (TBI) (MEB Dx 9)
- Headaches (MEB Dx 10)
- Irritable Bowel Syndrome (IBS) (MEB Dx 11)
- Latent Tuberculosis (MEB Dx 12)
- Bilateral Epicondylitis (claimed as Bilateral Elbow Condition (MEB Dx 13)
- Right Wrist Strain (MEB Dx 14)
- Chronic Bronchitis (MEB Dx 15)
- Chronic Granulomatous Disease (CT scan finding) (MEB Dx 16)
- Pulmonary and Adrenal nodules finding on Chest X-Ray/Abdominal CT Scan (claimed as Large Dense Mass by A/P Window) (MEB Dx 17)
- Fibromyalgia (claimed) (MEB Dx 18 - diagnosis not substantiated by VA)
- Chronic Fatigue Syndrome (MEB Dx 19 - diagnosis not substantiated by the VA)
- Chronic Obstructed Pulmonary Disease (COPD) (MEB Dx 20- diagnosis not substantiated by the VA)
- In full consideration of DoDI 1332.18, to include combined, overall effect, the conditions are not unfitting because the MEB indicates these conditions meet retention standards; does not indicate that any of these conditions cause profile limitations (functional activities a-h); and does not indicate that performance issues, if any, are due to these conditions

d. The PEB made the following administrative determinations:

(1) The disability disposition is based on disease or injury incurred in the line of duty in combat with an enemy of the United States and as a direct result of armed conflict or caused by an instrumentality of war and incurred in the line of duty during a period of war as defined by law.

(2) Evidence of record reflects the individual was not a member or obligated to become a member of an Armed Force or Reserve thereof, or the NOAA or the USPHS on 24 September 1975.

(3) The disability did result from a combat-related injury under in 26 USC 104.

e. This case was adjudicated as part of the Integrated Disability Evaluation System (IDES).

f. The applicant concurred and waived a formal hearing of his case on 22 January 2015.

g. The applicant did not request reconsideration of his VA ratings.

h. The proceedings were finalized on 7 July 2015.

8. The applicant's NGB Form 22 (National Guard Bureau Report of Separation and Record of Service) shows he was honorably separated from the [REDACTED] ARNG effective 2 March 2015 for placement on the Permanent Disability Retired List (PDRL). He was credited with 24 years, 11 months, and 25 days total service for pay and 23 years for total service for retired pay. Order D 027-30 shows he was placed on the retired list effective 3 March 2015.

9. Counsel provided the following pertinent documents not previously discussed:

a. A VA Rating Decision, dated 30 June 2015, showing the applicant is rated as follows:

(1) PTSD – 30 percent effective 2 September 2011; 70 percent effective 18 February 2015.

(2) lumbar spondylosis L4-L5/ degenerative arthritis of the spine/intervertebral disc syndrome – rated 20 percent effective 2 September 2011; 10 percent effective 2 October 2013; 20 percent 3 March 2014.

(3) right elbow lateral epicondylitis (dominate), limitation of flexion – 10 percent effective 2 September 2011.

(4) right wrist strain (dominate) – 10 percent effective 2 September 2011.

b. A letter of support from [REDACTED], a Vietnam veteran. He has known the applicant for two to four years. He states the applicant has PTSD and is a good upstanding veteran.

c. A 9 August 2021, letter of support from Dr. [REDACTED], a licensed psychologist, who served four years in the Navy as a psychologist. He states he did not witness the events the applicant brings in question. He is the applicant's psychologist. The applicant attends PTSD group therapy on a monthly basis.

d. An 11 August 2021, letter of support from [REDACTED], a former Army Engineer officer of 21 years. He states the applicant is respected in the community and is trustworthy.

e. A 22 August 2021, letter of support from [REDACTED], a retired E-9 sailor of 33 years. He is a longtime friend of the applicant. He did not witness the events resulting in the applicant's unfitting conditions. However, he believes the applicant concerning these events because the applicant has character and integrity.

f. Counsel's brief indicated he provided a Narrative Summary, however, it was not included with the application.

10. 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.

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

12. 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.

13. 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:

The applicant is applying to the ABCMR an increase in his military disability rating. He states through counsel:

“LTC [Applicant] received a disability rating of 60% from the DOD when he should have received a rating of 75% because within weeks of retiring the VA awarded him Temporary Disabled Individual Unemployable (TDIU). This rating is assigned only in the most extreme cases and was awarded to LTC [Applicant] as he was suffering from his disabilities and was unable to work.

The DOD rated LTC [Applicant] at only 30% for his severe PTSD that was rated at 70% by the Department of Veterans Affairs (VA), which both use the same VA code. The DOD also reduced the VA rating for his back pain from 20% down to 10%.”

b. The Record of Proceedings details the applicant’s military service and the circumstances of the case. Orders published 27 January 2015 by the United States Army physical Disability Agency show he was permanently retired for physical disability with an 60% military disability rating effective 3 March 2015 under provisions provided in chapter 4 of AR 635–40, Physical Evaluation for Retention, Retirement, or Separation (20 March 2012). It shows one or more of his disabilities had been determined combat related.

c. A Soldier is referred to the IDES when they have one or more conditions which appear to fail medical retention standards as documented on a duty limiting permanent physical profile. At the start of their IDES processing, a physician lists the Soldier’s referred medical conditions in section I the VA/DOD Joint Disability Evaluation Board Claim (VA Form 21-0819). The Soldier, with the assistance of the VA military service coordinator, lists all conditions they believe to be service-connected disabilities in block 8 of section II or a separate Statement in Support of Claim (VA form 21-4138).

d. Soldiers then receive one set of VA C&P examinations called Disability Benefits Questionnaires (DBQs) covering all their referred and claimed conditions. These examinations, which are the examinations of record for the IDES, serve as the basis for both their military and VA disability processing. All conditions are then rated by the VA prior to the Soldier’s discharge. The physical evaluation board (PEB), after adjudicating the case sent them by the medical evaluation board (MEB), applies the applicable VA derived ratings to the Soldier’s unfitting condition(s), thereby determining their final combined rating and disposition. Upon discharge, the Veteran immediately begins receiving the full disability benefits to which they are entitled from both their Service and the VA.

e. On 25 February 2014, the applicant was referred to “1. PTSD (Posttraumatic Stress Disorder). 2. Chronic Back Pain. 3. Ankle Sprain, Left.” He claimed fifteen additional conditions on his VA 21-0819. The MEB determined he had five conditions which failed medical retention standards:

1. Post-Traumatic Stress Disorder.
2. Lumbar Spondylosis L4-L5 / Degenerative arthritis of the Spine / Intervertebral Disc Syndrome
3. Left Ankle Sprain/Posterior Tibial Tendonitis
4. Right Patellar Tendonitis and Right Chondromalacia Patella
5. Left Chondromalacia Patella

f. The MEB determined fifteen additional conditions met retention standards. The applicant non-concurred with the MEB, maintaining that several additional conditions should be determined to fail medical retention standards. From his counsel's appeal:

"LTC [Applicant] disagrees with the finding of the Medical Evaluation Board (MEB) dated 20 April 2014 in that he asserts his Irritable Bowel Syndrome (IBS) (MEB Dx 12), Bilateral Lateral Epicondylitis (claimed as Bilateral Elbow Condition) (MEB Dx 14), and Right Wrist Strain (MEB Dx 15) should be found to have been incurred while entitled to base pay and found medically unacceptable. LTC [Applicant] agrees with the other findings of the MEB."

g. His appeal with enclosures was reviewed and the findings and recommendations of the MEB confirmed. His case, along with his appeal, was then forwarded to a physical evaluation board (PEB) for adjudication.

h. The applicant's Informal Physical Evaluation Board (PEB) Proceedings (DA Form 199) dated 6 March 2015 show the board determined all the conditions which had failed medical retention standards were also unfitting conditions for continued military service. The PEB determined the remaining fifteen conditions were not unfitting for continued service. They then applied the VA derived ratings to his five disabilities:

1. Post-Traumatic Stress Disorder – 30%
2. Lumbar Spondylosis L4-L5 / Degenerative arthritis – 20%
3. Left Ankle Sprain/Posterior Tibial Tendonitis – 10%
4. Right Patellar Tendonitis and Right Chondromalacia Patella – 10%
5. Left Chondromalacia Patella – 10%

i. This yielded a combined military disability rating of 60% and the PEB recommended the applicant be permanently retired for physical disability. On 22 January 2015, after being counseled on the PEB's findings and recommendation by his PEB liaison officer, he concurred with the board's findings, waived his right to a formal hearing, and declined to request a VA reconsideration of his disability ratings.

j. Counsel stated: "The DOD also reduced the VA rating for his back pain from 20% down to 10%." As seen above and on the Applicant's DA 199 submitted by counsel, this is false. Review of the applicant's 28 October 2014 IDES VA Ratings Decision shows this is the same 20% derived by the VA and applied by the PEB.

k. The code sheet shows the applicant's PTSD had been rated at 30% since 2 September 2011 and was again rated by the VA at 30% at the time he went through the DES. From the VA Rating Decision

"6. Evaluation of post-traumatic stress disorder currently evaluated as 30 percent disabling.

Evaluation of post-traumatic stress disorder, which is currently 30 percent disabling, is continued.

We have assigned a 30 percent evaluation for your PTSD based on:

- Difficulty in establishing and maintaining effective work and social relationships
- Anxiety
- Chronic sleep impairment
- Depressed mood
- Occupational and social impairment due to mild or transient symptoms which decrease work efficiency and ability to perform occupational tasks only during periods of significant stress.

The overall evidentiary record shows that the severity of your disability most closely approximates the criteria for a 30 percent disability evaluation."

l. JLV shows the VA increased the rating for his PTSD to 70% effective 18 February 2015. A 9 February 2015 VA mental health encounter shows the applicant was experiencing increasing PTSD symptoms at that time necessitating residential treatment:

"42-year-old combat Veteran with history of PTSD ... Outpatient provider reporting that symptoms have increased to the degree that residential treatment is indicated.

m. He was admitted into the program on 23 March 2015 and discharged on 13 April 2015.

n. The applicant underwent reevaluation with a VA Review Post Traumatic Stress Disorder (PTSD) Disability Benefits Questionnaire on 2 June 2015.

In his prior PTSD DBQ completed on 25 March 2014 as part of his IDES process, the provider had opined the applicant's PTSD resulted in "Occupational and social

impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks, although generally functioning satisfactorily, with normal routine behavior, self-care and conversation.” This resulted in the 30% rating derived by the VA during his IDES processing.

o. In contrast to his prior PTSD, the provider now opined the applicant’s PTSD now resulted in “Occupational and social impairment with deficiencies in most areas, such as work, school, family relations, judgment, thinking and/or mood.” This led to the new 70% rating. The VA Rating Decision with this new rating is dated 30 June 2015. The reason the 70% rating was effective 28 February 2015 is VA typically bases the effective date of a rating on the date of application or date of change in the Veteran’s health condition.

p. The awarding of a higher VA rating does not establish prior error or injustice. A disability rating is intended to compensate an individual for interruption of a military career after it has been determined that the individual suffers from an impairment that disqualifies him or her from further military service. The rating derived from the VA Schedule for Rating Disabilities reflects the disability at the point in time the VA exams were completed. The DES has neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions incurred during or permanently aggravated by their military service. These roles and authorities are granted by Congress to the Department of Veterans Affairs and executed under a different set of laws.

q. It is the opinion of the ARBA Medical Advisor there is insufficient probative evidence upon which to reverse the United States Army Physical Disability Agency’s application of the VA derived disability ratings.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found relief is not warranted.

2. The Board concurred with the conclusion of the ARBA Medical Advisor that the applicant’s disability rating for PTSD accurately reflects the VA’s rating of that condition while he was being processed through IDES. The fact that this rating changed with an effective date in close proximity to his retirement does not constitute an error in the Army record. Based on a preponderance of the evidence, the Board determined the disability rating the applicant received during his IDES processing is not in error or unjust.

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

2/27/2024

X

CHAIRPERSON

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

REFERENCES:

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

2. Title 10, USC, chapter 61, provides the Secretaries of the Military Departments with authority to retire or discharge a member if they find the member unfit to perform military duties because of physical disability. The U.S. Army Physical Disability Agency is responsible for administering the Army physical disability evaluation system and executes Secretary of the Army decision-making authority as directed by Congress in

chapter 61 and in accordance with (IAW) DOD Directive 1332.18 and Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation).

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

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

c. The mere presence of a medical impairment does not in and of itself justify a finding of unfitness. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier may reasonably be expected to perform because of his or her office, grade, rank, or rating. Reasonable performance of the preponderance of duties will invariably result in a finding of fitness for continued duty. A Soldier is physically unfit when a medical impairment prevents reasonable performance of the duties required of the Soldier's office, grade, rank, or rating.

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

4. Title 38 USC, section 1131 (Peacetime Disability Compensation - Basic Entitlement) states for disability resulting from personal injury suffered or disease contracted in line

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

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

a. Paragraph 3-2 states disability compensation is not an entitlement acquired by reason of service-incurred illness or injury; rather, it is provided to Soldiers whose service is interrupted and who can no longer continue to reasonably perform because of a physical disability incurred or aggravated in military service.

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

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

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

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

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

8. On 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRBs) and Service Boards for Correction of Military/Naval Records (BCM/NRs) to carefully consider the revised PTSD criteria, detailed medical considerations, and mitigating factors, when taking action on applications from former service members administratively discharged under other than honorable conditions, and who have been diagnosed with PTSD by a competent mental health professional representing a civilian healthcare provider in order to determine if it would be appropriate to upgrade the characterization of the applicant's service.

9. 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; sexual harassment. Boards were directed to give liberal consideration to Veterans petitioning for discharge relief when the application for relief is based in whole or in part on those conditions or experiences. The guidance further describes evidence sources and criteria and requires Boards to consider the conditions or experiences presented in evidence as potential mitigation for that misconduct which led to the discharge.

10. 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 (BCM/NRs) regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. BCM/NRs may grant clemency regardless of the type of court-martial. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to other corrections, including changes in a discharge, which may be warranted based on equity or relief from injustice. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. In determining whether to grant relief based on equity, injustice, or clemency grounds, BCM/NRs shall consider the prospect for rehabilitation,

external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment. 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.

//NOTHING FOLLOWS//