IN THE CASE OF: [redacted]

BOARD DATE: 20 December 2023

DOCKET NUMBER: AR20230005371

APPLICANT REQUESTS: through counsel:

- his DA Form 199 (Physical Evaluation Board (PEB) Proceedings), dated 21 August 2000, corrected to add his spinal injury as an unfitting condition with a disability rating of 40 percent

  OR

- referral to the Disability Evaluation System (DES) for evaluation

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

- DD Form 149 (Application for Correction of Military Record)
- counsel's brief
- copy of AR20190003786
- applicant statement
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- Standard Form (SF) 93 (Report of Medical History)
- DA Form 3947 (Medical Evaluation Board (MEB) Proceedings)
- memorandum, subjected: Commanders Input for Pending Medical Board
- [redacted] Statement
- [redacted] Statement
- Department of Veterans Affairs (VA) decision letter
- medical records (8 pages)

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20190003786 on 13 July 2021.

2. Counsel states:

a. He respectfully contends that Army medical personnel were grossly negligent in their failure to properly evaluate the applicant after he fell to the ground from a height of approximately 30 feet during a parachute training exercise. The failure of Army officials to properly evaluate the applicant is abundantly clear given the lack of imaging done on the applicant's spine and lower extremities following the accident. The failure to properly evaluate the applicant following his accident constitutes medical malpractice on the part of the attending physicians. As a result of the accident, the applicant suffered significant injuries to his spine and hips, to include multiple herniated discs, fractured vertebras, and fractured hips, which went untreated for several years. Various medical journals have recognized that trauma impact injuries are associated with the development of the very same physical conditions that the applicant has been diagnosed with following his MRIs. These conditions drastically interfered with the applicant's ability to perform his assigned duties as a Chaplain and would have been evaluated by a MEB had the applicant been properly evaluated at the time of the accident. While the applicant was eventually referred to a MEB, the assistance that the applicant received from his assigned PEBLO was grossly insufficient and only contributed to the injustices suffered by the applicant.

b. On or around January 2019, the applicant applied to this honorable Board requesting that his service-connected spinal cord injuries resulting from a parachuting accident be included in his medical disability retirement, as well as entitlement to Combat Related Special Compensation. On 13 July 2021, this honorable Board issued a decision denying the relief sought by the applicant.

c. The applicant enlisted in the United States Army on 17 July 1979 as a parachute rigger before volunteering for the Simultaneous Membership Program which would ultimately lead to his commission as a 2LT in 1981. Following his commission, the applicant served as a Field Artillery Officer with the 82nd Airborne before being honorably discharged upon completion of his service obligation. In December 1990, the applicant was recommissioned as a Captain in the Chaplains Corps, where he served for over four years in the U.S. Army Reserve. In February 1995, the applicant was recalled to active duty as a Chaplain and returned to the 82nd Airborne before he was eventually placed on the Temporary Disability Retirement List in December 2000.

d. During the course of his military career, he earned the following awards and decorations: Meritorious Service Medal (2nd award); Army Commendation Medal; Army Achievement Medal; Army Reserve Components Achievement Medal; National Defense Service Medal; Armed Forces Expeditionary Medal; Armed Forces Service Medal; Humanitarian Service Medal; Armed Forces Reserve Medal (1st hourglass device and mobilization device); Army Service Ribbon; Overseas Service Ribbon; NATO Medal; Master Parachutist Badge; and Parachute Rigger Badge.

e. On 13 December 1990, the applicant executed an oath of office after being appointed as a commissioned officer in the Army Reserve and began his service as a Chaplain. During his commission physical in May 1990, there were no noted defects with the applicant's spine or musculoskeletal system.

f. On 18 November 1994, the applicant executed active-duty orders assigning him to the 18th Airborne Camp Regiment. On or around June 1995, the applicant was conducting parachute training when an accident caused him to fall approximately 20-30 feet toward the ground in an uncontrollable manner. The applicant lost consciousness upon impact with the ground and was taken for medical evaluation. A DA Form 5181-R associated with that visit indicates that the applicant's chief complaint was "loss [of] consciousness" and suggests that he was unconscious for approximately 4 hours. The attending medical provider noted that the applicant had decreased short-term memory and nausea upon examination and diagnosed him with post-concussion syndrome. The provider's notes also indicate that the applicant was suffering from abdominal pain as well.

g. According to the applicant, he was left dizzy and confused following his fall, and had significant pain throughout his body, especially in his lower back. During his medical evaluation, no x-rays were ever taken of the applicant's back or pelvis and when he complained of pain in those areas a few days later, he was told that the pain was merely soreness attributable to the fall and that the pain would subside in a few days.

h. In the weeks and months following the parachuting accident, the applicant continued to experience intermittent pain in his back and hips, which was exacerbated by physical activity such as running. Eventually, the pain became so intense that the applicant was no longer capable of passing the Army Physical Fitness Test (APFT) and was forced to drop out of several unit formation runs. After several years of increasing back pain, the applicant was allowed to take an alternate APFT, allowing him to walk the 2.5 miles instead of run. The applicant's pain eventually became so unbearable that he could no longer complete the alternate APFT event, nor could he stand for prolonged periods of time.

i. On 15 August 1995, the applicant reported to medical with complaints of hip pain after he had run into another Soldier while playing softball. He complained of bruising that had failed to subside in the two weeks prior to his presentation to the medical clinic.

j. In March 1997, another SF 600 was completed. The documentation notes that the applicant injured his shoulder during a parachuting training exercise and was complaining of "constant pain." The form states that an exam was deferred even though the applicant was experiencing constant pain.

k. On 27 April 1999, the applicant underwent a medical exam at Kaiserslautem Health Clinic. Documentation associated with that visit indicates that the applicant had endorsed having a head injury, hearing loss, broken bones, shortness of breath, and foot trouble.

l. On 15 June 2000, a MEB was convened, and it was determined that the applicant's Type II Diabetes and Asthma failed medical retention standards for further military service. The MEB also considered the applicant's hypertension, elevated cholesterol, and history of histoplasmosis exposure, but determined that these conditions met medical retention standards. The MEB did not consider the applicant's history of foot pain or spinal injuries.

m. On 10 August 2000, the applicant's commander submitted a letter stating the following:

> The applicant's asthma prevents him from being able to preach, which is a highly significant part of his duties as a chaplain, and from performing routine physical training or strenuous activities ... as a chaplain and chapel pastor, the applicant is routinely required to preach and speak at public functions. He is currently incapable of performing this requirement due to his asthma.

n. On 21 August 2000, and informal PEB convened and determined that the applicant's Asthma and Diabetes failed retention standards. The PEB assigned a 30 percent rating for the applicant's asthma and a 20 percent rating for his diabetes.

o. On 22 August 2000, the applicant was counseled by his assigned PEBLO and elected to concur with the findings and recommendations of the informal PEB and waived his right to a formal hearing on the matter.

p. Mr. [redacted] the applicant's former Chaplain Assistant, has indicated that the applicant suffered from "back and hip pain and was forced to leave the office early due to his back pain." According to Mr. [redacted] the applicant could not sit for prolong periods due to his back pain and could no longer perform duties that required him to be on his feet. Mr. [redacted] a retired Air Force Major and longtime friend of the applicant and his family, has indicated that the applicant suffered from back pain since his parachuting accident and that this pain affected his ability to successfully complete the APFT. Mr. [redacted] saw the applicant twice weekly and has indicated that he was never known the applicant to make false or misleading statements.

q. In January 2020, the applicant underwent an MRI on his spine, which revealed the following:

(1) L2-3 Generalized disc bulging and perimeter osteophyte. Small posterior central annular fissure. Mild bilateral facet arthrosis and ligamentum flavum thickening. Mild to moderate spinal canal stenosis.

(2) L3-4: Disc degeneration with generalized left asymmetric bulging and perimeter osteophyte. Moderate bilateral facet arthrosis. Left-sided ligamentum flavum thickening. Suspected surgical changes of possible right laminotomy. Moderate spinal canal stenosis.

(3) L4-5: Generalized disc bulging and perimeter osteophyte. Moderate bilateral facet arthrosis with ligamentum flavum thickening. Moderate spinal canal stenosis. Moderate to severe bilateral foraminal stenosis.

(4) L5-S1: Generalized disc bulging and bilateral facet arthrosis. Suspected right anterior intraformational facet joint synovial thickening or complex synovial cyst causing moderate right foraminal stenosis and potentially affecting the right L5 nerve root series.

r. Moreover, the results indicate he was suffering from "degenerative lumbar spondylosis with multilevel canal and foraminal stenosis. Most notably, severe left foraminal stenosis at L3-4."

s. On 29 September 2021, the Department of Veterans Affairs issued a rating decision assigning the applicant the following disability percentages: left hip osteoarthritis, 40 percent; right hip osteoarthritis, 40 percent; impairment of the left thigh, 20 percent; impairment of the right thigh, 20 percent; left hip osteoarthritis, extension, 10 percent; and right hip osteoarthritis, extension 10 percent.

t. In June 2022, the applicant underwent a left L2-L3 partial hemilaminectomy and lumbar diskectomy and extruded disk fragment medial to the L3 pedicle.

u. Army medical personnel were grossly negligent in their failure to properly evaluate the applicant after he fell to the ground from a height of approximately thirty feet during a parachute training exercise. The failure of Army officials to properly evaluate the applicant is abundantly clear given the lack of imaging done on the applicant's spine and lower extremities following the accident. As a result of the accident, the applicant suffered significant injuries to his spine and hips, to include multiple herniated discs, fractured vertebras, and fractured hips, which went untreated and undiagnosed for several years. These conditions drastically interfered with the applicant's ability to perform his assigned duties as a Chaplain and would have been evaluated by the MEB had the applicant been properly evaluated at the time of the accident. While the applicant was eventually referred to a MEB, the assistance that the applicant received from his assigned PEBLO was grossly insufficient and only contributed to the injustices suffered by the applicant. In consideration of the below

discussion, we respectfully ask this honorable Board to grant the relief requested herein.

v. The applicant was involved in an extremely unfortunate parachute training accident, which caused him to fall uncontrollably from a height of approximately thirty feet. The applicant landed square on his back, buttocks, shoulders, and head, causing him to lose consciousness for several seconds. Despite the traumatic nature of his injury, the medical personnel attending to the applicant never performed diagnostic imaging on his spine, hips, or lower extremities. But for this gross negligence on the part of these physicians, the applicant's injuries would have been discovered and diagnosed prior to his subsequent separation from service.

w. Army Regulation (AR) 40-501, Chapter 3, sets for a list of medical conditions which may render a Soldier unfit for further military service. Per AR 40-501, 3-39e, herniated discs are cause for referral to the DES when the Soldier experiences "more than mild symptoms following appropriate treatment or remedial measures, with sufficient objective findings to demonstrate interference with the satisfactory performance of duty." Here, the applicant fell approximately thirty feet to the ground during a parachute training exercise. He impacted the ground in such a way that his buttocks/hips, back, shoulders and head impacted the ground with such force as to cause him to suffer a loss of consciousness. The applicant was subsequently taken to the hospital for evaluation following the injury, but never underwent diagnostic imaging on his back or hips. Rather, the only concern of medical professionals appeared to be the applicant's head given his loss of consciousness.

x. The failure to evaluate the applicant's spine and lower extremities was a clear error constituting gross negligence on the part of medical professionals, as the level of care given to the applicant clearly fell below the standard of care expected of reasonable medical professional. The negligence of the attending physicians is compounded when one considers the fact that the applicant continued to complain of pain in his lower back and hips for several days following the accident. The Army Public Health Center ("APHC") has routinely acknowledged that the most common injuries suffered during a parachuting accident are "injuries to the lower extremities (e.g., ankle, leg, & hip), low back, and head." Moreover, the medical community has routinely recognized that the very ailments that the applicant suffers from can and are routinely caused by impact trauma. A recent study on parachuting accidents associated with static line jumps shows that 86 percent of the studied subjects were injured during landing, 65 percent sustained lower body injuries, and 22 percent suffered spine and upper extremity injuries. Rather than provide the applicant with even the most minimal level of medical care, such as conducting an x-ray of his spine, doctors merely attributed the back pain to soreness from the fall and told the applicant the pain would subside in a few days. Frankly, such a lack of due diligence on the part of medical professionals in this matter is a textbook example of medical malpractice. Further, the

medical community has recognized abdominal pain as being linked to traumatic spinal cord injuries.

y. Pursuant to 32 C.F.R. § 581.3 (e) (2), an applicant need only prove the existence of an error or injustice by a preponderance of the evidence. This requires the service member to show that it is more likely true than not true that an error or injustice exists within his or her medical records. Here, the applicant was involved in a parachuting accident that caused him to fall uncontrollably from an approximate height of thirty feet. He impacted the ground with such force that he lost consciousness. Medical research clearly indicates that trauma injuries, such as the injuries in this case, can often result in the very types of spinal conditions that the applicant suffers from. Despite the fact that the applicant fell from approximately thirty feet, lost consciousness, and complained of back pain immediately following the accident, he was never examined for spinal cord damage. Had medical providers properly evaluated the applicant following this injury, they would have discovered the numerous herniated discs in his back and fractured pelvis. But for this error, the applicant's spinal injuries would have been considered by the appropriate medical board and found to be unfitting.

z. This honorable Board has previously voted in favor of relief when an applicant has presented evidence showing the presence of a medical condition that calls into question the ability of the applicant to perform his or her military duties at the time of separation and when certain conditions were not afforded consideration during the separation process. The applicant should be afforded similar treatment and, at the very least, referred to the DES for evaluation of all medical conditions identified herein.

aa. Here, the applicant was clearly injured during his parachute training exercise and was not appropriately evaluated by medical professionals following that accident. His back was clearly injured and these injuries were apparent to several individuals who worked alongside him. As a Chaplain, the applicant was required to spend long hours on his feet throughout the course of his duty day. His spinal cord injuries prevented him from successfully completing his duties and these conditions should have been evaluated by the DES during his initial processing. Granting relief is consistent with past Board precedent and there is no reason to deviate from this Board's prior decisions.

bb. The applicant suffered severe injuries to his spine after a parachute training accident while on active duty. Despite complaining of back pain after this accident, medical professionals failed to perform diagnostic testing, such as an x-ray or MRI, to ensure there were no fractures or other damage to his spine. This accident resulted in the applicant experiencing severe back pain and ultimately required him to undergo surgery to alleviate his pain. Pursuant to AR 40-501, the MEB was required to evaluate all potentially unfitting medical conditions, to include the applicant's spinal injuries. The MEB failed to consider the applicant's spinal injuries, as well as injuries to his feet. As a Chaplain, the applicant was required to stand or sit for extended periods of time. His

injuries clearly prevented him from doing so. This honorable Board has routinely voted in favor of relief when the evidence shows the existence of potentially unfitting medical conditions and a failure of the MEB to consider those conditions. Accordingly, relief is warranted in this matter.

3. The applicant states:

a. He enlisted in the United States Army on 17 July 1979 and served honorably as both an enlisted Soldier and Commissioned Officer. He was separated from service in December 2000 after it was determined that he was suffering from numerous unfitting medical conditions. However, not all of his medical conditions that were of an unfitting nature were considered by the Medical Evaluation Board (MEB) and informal Physical Evaluation Board. Specifically, the back and hip injuries that he incurred as a result of a parachuting accident were excluded and never considered by either board.

b. He enlisted as a parachute rigger in the United States Army Reserve and soon thereafter volunteered for the Simultaneous Membership Program leading to a commission as a reserve officer. He was commissioned in the Army Reserve as a second lieutenant in 1981 and called to active duty as a field artillery officer. Upon completion of the Field Artillery Officer Basic and Cannon Battery Officer Courses, he was assigned to the 82nd Airborne Division at Fort Bragg, North Carolina. He was released from active duty upon completion of his service commitment and honorably discharged. He was recommissioned as a captain in the Chaplains Corps on 13 December 1990 and served for over four years in the Army Reserve. He was recalled to active duty as a chaplain on 4 February 1995 and returned to the 82nd Airborne Division. He was placed on the Temporary Disability Retired List (TDRL) on 1 December 2000. During his time on active duty, he was awarded the Master Parachutist Badge and twice awarded the Meritorious Service Medal. He graduated from the Army Command and General Staff Officer Course, and he deployed to Bosnia twice.

c. While in the 82nd Airborne Division he participated in an airborne operation that resulted in a concussion, twisted and bruised shoulder, fractured pelvis, and three fractured vertebrae. While it was a routine operation, wind conditions caused him to land in such a way that he fell straight backward, hitting his buttocks/hips, back, shoulders, and head on the ground. The impact caused his ballistic helmet to come part of the way off. Upon striking his head on the ground, he lost consciousness for several seconds.

d. Upon recovery from the fall, he left the drop zone but was dizzy, confused, and felt pain throughout his body, especially in his lower back. He was later evaluated by emergency medical personnel at his unit, and they determined that he had suffered a mild concussion and twisted shoulder. Due to his loss of consciousness, he had no idea

that he had fractured his pelvis and three vertebrae. Being dazed and confused, he was unable to relate to attending medical personnel that his back and hip were also in pain, so they failed to evaluate those issues. His back and pelvis were never x-rayed. He continued to experience pain in his lower back and hip for days afterward, but he had been told by the medics that that pain was merely soreness from the fall and would disappear in a few days.

e. Contrary to what he had been told, his back and hip pain persisted intermittently for months afterward, especially while running or engaging in physical exertion. Eventually, the lumbar pain worsened to the point that he was no longer capable of passing a physical training (PT) test. He was forced to drop out of several unit formation runs due to intense back pain, which is unacceptable for an officer. After two years of worsening back pain, he failed a PT test and was forced to retake it with it an alternate 2.5-mile walk. Within two years following his back and pelvic injury, he was no longer capable of standing for extended periods. His duties as a chaplain included prolonged standing and occasional time in a field environment, neither of which he was capable of performing. In addition, within a few weeks of passing the PT test with the alternate 2.5-mile walk, his back pain had worsened to the point at which he was no longer able to repeat the walking event. He was no longer capable of performing chapel services, which is among the most basic of functions for a chaplain.

f. He requests that the Board take his statement into consideration when evaluating the evidence in support of his claim. The medical evidence shows that he suffered a traumatic injury to the lumbar region of his back and multiple fractures of his pelvis resulting in a condition that prohibited him from adequately performing his duties as an officer and a chaplain. As an officer in the United States Army, he continued to perform his duties to the best of his ability even when he continued to be in increasing levels of pain until such time as he was physically incapable of continuing. While the MEB placed him on the TDRL for asthma and diabetes, the referring physician was never informed of his worsening back condition. He was unaware that the medical records showing his injuries from the previous airborne operation had never been taken into consideration by the referring physician and the MEB.

g. (On his VA statement in support of claim) His ongoing disability, caused by a parachuting accident while on active duty in the U.S. Army and which has already been determined by the Department of Veterans Affairs (VA) to be service-related, has worsened. A recent medical exam, also confirmed by VA, determined that in addition to the damage done to his spine in that parachuting accident, he also fractured his pelvis in at least four spots. The pelvic fractures and stress on the hip joints caused by that accident has now resulted in the onset of arthritis in both hips. In addition, the damage done to his spine has continued to deteriorate such that he now can stand only for very short periods of time and have limited mobility. He is unable to walk more than a few feet before having to sit, and he now have to utilize a cane. If he attempts to stand for

more than a short four or five minute period, he experiences intense stabbing pain in his back and hip.

4. The applicant enlisted in the Army reserve on 20 September 1979 as a cadet. He underwent a medical examination on 13 June 1980 to attending officer training. His Standard Form (SF) 88 (Report of Medical Examination) shows he was found qualified for service without significant defect and was assigned a physical profile of 111111.

> A physical profile, as reflected on a DA Form 3349 (Physical Profile) or DD Form 2808, is derived using six body systems: "P" = physical capacity or stamina; "U" = upper extremities; "L" = lower extremities; "H" = hearing; "E" = eyes; and "S" = psychiatric (abbreviated as PULHES). Each body system has a numerical designation: 1 meaning 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.

5. The applicant was commissioned as a Reserve Commissioned Officer in the grade of Second Lieutenant (2LT) effective 7 June 1981. He entered active service on 8 June 1981. He was honorably released from active duty on 7 June 1984 and assigned to the Ready Reserve.

6. The applicant underwent a medical examination on 23 May 1990 for commissioning purposes. His SF 88 shows, despite some minor concerns, he was found qualified for service and assigned a physical profile of 111111.

7. The applicant was commissioned as a Reserve Commissioned Officer in the grade of Captain (CPT) effective 13 December 1990.

8. The applicant underwent a medical examination on 13 August 1994 to enter active duty. His SF 88 shows he was found qualified for service without significant defect and was assigned a physical profile of 111111. Orders A-11-004264 show he was ordered to active-duty effective 6 February 1995 for a period of 3 years.

9. A DA Form 3947 (Medical Evaluation Board (MEB) Proceedings), dated 15 June 2000, shows after consideration of clinical records, laboratory findings, and physical examination, the applicant was found to have the following medical conditions/defects which were incurred while entitled to base pay and did not exist prior to service:

- Type II diabetes, well -controlled, approximate date of origin October 1999
- Asthma, approximate date of origin May 2000
- Hypertension, approximate date of origin 2000
- Elevated cholesterol, approximate date of origin 2000

- History of histoplasmosis exposure, approximate date of origin 1990

10. The applicant did not present views on his own behalf to the MEB. His case was referred to the Physical Evaluation Board (PEB). He indicated he did not desire to continue on active duty. He agreed with the board's findings on 17 August 2000. The findings and recommendation were approved the same day.

11. The applicant underwent a medical examination on 19 June 2000 for the purpose of separation. His SF 88 shows his MEB diagnoses, and he was qualified for separation. The corresponding SF 93 (Report of Medical History) shows he reported the following history of past/current medical history:

- head injury
- asthma (1999)
- shortness of breath
- pain or pressure in chest (chest pain, 1998)
- high or low blood pressure
- broken bones
- skin diseases
- recent gain or loss of weight
- foot trouble (bunionectomy, 1989)
- easy fatigability
- diagnosis of diabetes (1999)

12. The applicant was issued a DA Form 3349 (Physical Profile), approved on 17 August 2000, showing a PULHES of 311111 for well controlled diabetes, hypertension, elevated cholesterol, and asthma. He was limited to walking and running at his own pace and distance; however, no other activities were restricted. He was restricted from eating no more than one Meal ready-to-eat (MRE) per day.

13. A memorandum, subjected: Commanders Input for Pending Medical Board, dated 10 August 2000, shows the applicant's commander indication the applicant was unable to perform his dues as a 56A chaplain due to his chronic asthma, diabetes, hypertension, and high triglycerides. He goes on to state:

a. [The applicant]'s asthma prevents him from being able to preach, which is a highly significant part of his duties as a chaplain, and from performing routine physical training or strenuous activities. When he attempts to preach, he frequently, becomes short of breath and is unable to continue. His diabetes restricts his lifestyle in such a way that he is currently unable to go for more than a few hours without eating. He is presently on medication that restricts when he may eat. If he goes more than three to four hours without a snack he suffers from hypoglycemia. He also requires regular medication for both his hypertension and high triglycerides.

b. As a chaplain and chapel pastor, [the applicant] is routinely required to preach and speak at public functions. He is currently incapable of performing this requirement due to his asthma. As a chaplaincy resource manager, he is also routinely required to attend lengthy meetings or public functions that prevent him from being able to regulate his blood sugar properly through his diet. As a result, he frequently suffers from hypoglycemia due to his diabetic medication. He routinely has to leave work and go home due to complications from hypoglycemia which renders him incapable of performing these missions adequately.

c. [The applicant]'s physical condition creates a burden on others in his unit who must help perform his duties especially when he is unable to remain at work after suffering a hypoglycemic episode. Also, another chaplain has had to be assigned to perform his chapel duties since he has been unable to preach.

d. [The applicant] is also a fully qualified master parachutist and is subject to reassignment to an airborne unit since the Chaplains Corps is currently in need of airborne-qualified chaplains. However, [the applicant] is no longer capable of performing his duties as a paratrooper and jumpmaster due to the demanding physical activities involved and the extended periods of time that he would be required to go without food. In fact, he was previously granted a ten percent disability rating by the Department of Veterans Affairs for a prior service problem with his feet as a result of jump injuries. He is totally incapable of performing his duties in a combat environment.

14. A DA Form 199 shows:

a. An Informal PEB convened on 21 August 2000, wherein the applicant was found physically unfit with a recommended rating of 40 percent and that his disposition be placed on the temporary disability retired list (TDRL) with reexamination during September 2001.

b. The applicant was found unfit:

- Asthma, with normal pulmonary function tests. On daily inhalational anti-inflammatory therapy. (MEB Diagnosis 2, NARSUM, and Addendum Diagnosis dated 13 July 2000.
- Type II diabetes, one oral hypoglycemic therapy (MEBD Diagnosis 1 and NARSUM)

c. The PEB made the following administrative determinations:

(1) The disability disposition is not 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 not result from a combat-related injury under in 26 USC 104.

d. The applicant concurred and waived a formal hearing of his case on 22 August 2000.

15. The applicant was honorably released from active-duty effective 1 December 2000 and placed on the TDRL effective 2 December 2000.

16. The applicant underwent a TDRL reexamination on 21 June 2002. The attending physician concluded the applicant had no significant changes in his conditions or symptoms.

17. A copy of the TDRL NARSUM was provided to the applicant on 8 July 2002 for his review, retention, and comment if applicable.

18. On 15 July 2002, the applicant provided the following statement:

a. [He does] not concur with the contents of the TDRL narrative summary attached to [the] letter of 8 July 2002. However, [his] only nonconcurrence is with one statement of fact in the paragraph "HISTORY OF PRESENT ILLNESS." The attending physician stated, "For this, he was further evaluated in 1990 with a methacholine challenge which was positive with a greater than 20 percent drop in his FEV1 with a saline challenge." That was not the case. [He] was evaluated at Ireland Army Community Hospital in 2000 with a methacholine challenge. [He] was never diagnosed with asthma until that time. [He] refer[s] [the Board] to the next paragraph of the attending physician's letter, "PAST MEDICAL HISTORY." He stated, "Once again, significant for type II diabetes diagnosed in October of 1999, asthma which was diagnosed in May of 2000." [Emphasis mine] That is the correct date.

b. [He] concur[s] with all other statements throughout the report.

19. The PEB acknowledged receipt of the applicant’s statement on 24 July 2002.

20. A DA Form 199 shows an Informal PEB convened on 7 August 2002, wherein the applicant was found physically unfit with a recommended rating of 40 percent and that his disposition be permanent disability retirement.

21. The applicant was removed from the TDRL and permanently retired on 5 September 2002.

22. Counsel provided the following pertinent documents not previously discussed or considered:

a. A statement of support from Mr. [redacted] who served with the applicant and has known him for 23 years. He states:

(1) He served for four years on active duty in the Army, leaving active duty at the rank of corporal. He was the ranking non-commissioned officer of his section, serving in a position that normally required a sergeant first class. He is currently serving his country as a Rating Veterans Services Representative with the Department of Veterans Affairs (VA). He has been with the VA for over twelve years. In his current position he routinely assesses disability compensation applications along with medical issues stemming from military service and adjudicate the plausibility of Veteran's claims.

(2) During his time on active duty in the Army, he was assigned to [the applicant] for almost two years as his chaplain assistant. In accordance with Army doctrine, he went everywhere [the applicant] did and served alongside him at all times. Consequently, he had the opportunity to observe [the applicant] for an extended period. [The applicant] frequently suffered from back and hip pain and was forced to leave the office early due to his back pian. [The applicant] and he frequently traveled 1 hour from Kaiserslautern to Heidelberg, Germany. They were forced to stop halfway on many occasions to allow [the applicant] to stretch his back. He observed how [the applicant]'s back pain affected his performance by limiting the amount of time he was able to be on his feet performing his duties. [The applicant] was an exceptional staff officer and performed well while in the office. However, while running or performing any field duties that required [the applicant] to be on his feet, he routinely experienced significant back pain.

(3) He believes that the Army's Medical Evaluation Board (MEB) was in error for not considering [the applicant]'s back and hip injuries. [The applicant]'s medical condition gradually worsened during the time that he worked with him. He does not believe that [the applicant] would have been able to effectively perform his duties for much longer had he remained on active duty. He believes it would be in the interest of both [the applicant] and the United States Army to reconsider his claim for back and hip injuries in the evaluation of his medical retirement from active duty, and he urge the Army Review Board to consider his statement as an eyewitness account regarding his claim.

(4) Although he was not with [the applicant] during his Airborne school, he has indicated his injuries began during his training and the condition has existed ever since training. A review of [the applicant]'s personnel records indicated 78 documented parachute jumps which establish his in-service event. His injuries and lay statements are credible to supports his claim. There is generally not a formal presumption of credibility. However, as a matter of policy, VA decision makers accept evidence at face value unless called into question by other evidence of record or sound medical or legal principles.

(5) For these reasons, it is his professional opinion that [the applicant]'s current back and hip injuries are at least as likely as not due to his military training.

b. A statement of support from Mr. [redacted] who served with the applicant and has known him since 1997. He states:

(1) He served twenty years in the United States Air Force. His last assignment was as the Legislative Liaison for USAFE at Ramstein AFB. After retiring from the Air Force, he worked on church staff and as a teacher at [redacted] Community Church in [redacted] He worked there for seventeen years, serving as director of men's ministry and as a middle school teacher. He was the founding director of [redacted] Family Kids' Camp, a summer camp for foster children.

(2) He has known [the applicant] as both his pastor and as a friend and they've maintained contact throughout the years. While in Germany, he attended services twice a week and attended a sign language class for much of that time. He saw [the applicant], his wife [redacted] and the rest of his family frequently. He traveled to [redacted] when his son was married and helped with wedding preparation. When his son was married, his son traveled to [redacted] for the event. They have more than a casual friendship. In all of their time together, he's known that [the applicant] has suffered from back pain that has prevented from performing well. He knew that [the applicant] had difficulty completing Army PT and that he suffered from pain during that time.

(3) He's known [the applicant] for a long time and never known him to make false or misleading statements. [The applicant] related to him that [the applicant] has had this pain since parachuting at Fort Bragg from a time before he knew [the applicant]. He does not know of any other accident or event that could have caused his pain and believe his assessment is accurate.

23. The applicant previously applied to the Board on 16 January 2019, requesting Increase disability percentage from 40 percent to reflect inclusion of three fractured vertebrae/ruptured discs and establish eligibility for Combat Related Special Compensation. On 13 July 2021, the Board denied the applicant's requests, determining the evidence presented did not demonstrate the existence of a probable

error or injustice and that the overall merits of his case were insufficient as a basis for correction of his records.

24. Based on the applicant's contention the Army Review Boards Agency medical staff provided a medical review for the Board members. See "MEDICAL REVIEW" section.

25. 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.

26. 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.

27. 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.

28. 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. The applicant has again applied to the ABCMR requesting his lumbar spine condition be added as an additional unfitting condition with a corresponding increase in his military disability rating. Counsel states in part:

> "We respectfully request the following relief on behalf of CPT [Applicant]:
>
> 1. Add CPT [Applicant]'s spinal injury to his list of unfitting medical conditions at a disability rate of no less than 40%; or in the alternative,

2. Refer all medical conditions identified herein to the DES [Disability Evaluation System] for evaluation."

c. The Record of Proceedings and prior case detail the applicant's military service and the circumstances of the case. The DD 214 for the period of Service under consideration shows the former USAR Chaplain entered the active duty on 4 February 1995 and place placed on the temporary disability retirement list (TDRL) on 1 December 2000 under authority in paragraph 4-24b(2) AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (1 September 1990).

d. The associated Physical Evaluation Board (PEB) Proceedings (DA Form 199) dated 21 August 2000 shows the PEB determined he had two unfitting conditions: Asthma rated at 30% and Type II Diabetes at 30% for a combined military disability rating of 40%

e. Discharge orders published by the United States Army Physical Disability Agency (USAPDA) show the applicant was removed from the TDRL and permanently retired for physical disability on 5 September 2002 with a military disability rating of 40%. The associated DA 199 shows no change in his unfitting conditions: Asthma rated at 30% and Type II Diabetes at 30% for a combined military disability rating of 40%

f. This request was previously denied in by the ABCMR on 13 July 2021 (AR20190003786). Rather than repeat their findings here, the board is referred to the record of proceedings and medical advisory opinion for that case. This review will concentrate on the new evidence submitted by the applicant. Addressing the back injury, counsel states the injury was incurred during a parachute landing fall (PLF) in 1995, the applicant continued to have intermittent back and hip pain for several months, suggests his back pain led to his inability to run and so the applicant had to do the 2.5 mile walk event for his Army Physical Fitness Test (APFT), and the medical evaluation board was negligent in not addressing his spine at the time of his MEB in 2000:

"On or around June 1995, CPT [Applicant] was conducting parachute training when an accident caused him to fall approximately 20-30 feet toward the ground in an uncontrollable manner. CPT [Applicant] lost consciousness upon impact with the ground and was taken for medical evaluation ... The attending medical provider noted that CPT [Applicant] had decreased short-term memory and nausea upon examination and diagnosed him with post-concussion syndrome …

During his medical evaluation, no x-rays were ever taken of CPT [Applicant]'s back or pelvis and when he complained of pain in those areas a few days later, he was told that the pain was merely soreness attributable to the fall

> and that the pain would subside in a few days ...
>
> In the weeks and months following the parachuting accident, CPT [Applicant] continued to experience intermittent pain in his back and hips, which was exacerbated by physical activity such as running ...
>
> After several years of increasing back pain, CPT [Applicant] was allowed to take an alternate APFT, allowing him to walk the 2.5 miles instead of run ...
>
> Had medical providers properly evaluated CPT [Applicant] following this injury, they would have discovered the numerous herniated discs in his back and fractured pelvis. But for this error, CPT [Applicant] 's spinal injuries would have been considered by the appropriate medical board and found to be unfitting."

g. While the applicant appears to have complained of back and pelvic pain in the days following the injury, there is no indication that radiographs were clinically indicated at the time. Counsel states the applicant was experiencing intermittent pain exacerbated by running. This is not consistent with acute fractures for which the pain is constant and more severe, and there were no lower extremity findings of lower extremity nerve issues. The results from the January 2020 MRI obtained 25 years after the PLF showed only degenerative changes and no findings consistent with an old fracture.

h. The permanent physical profile authorizing the applicant to perform an alternate aerobic event in lieu of the 2-mile run event for his Army Physical Fitness Test (APFT) in June 2000 shows this limitation was due to his asthma and diabetes: There were no spine or other musculoskeletal conditions listed on the profile. In addition, the applicant was marked able to do all conditioning exercises, to include the high jump, side straddle hop, and upper and lower body weight training; able to perform the push-up and sit-up events of the APFT, the sit-up event frequently restricted in Soldiers with significant low back pain; and had no lifting limitations and was able to wear a 40-pound backpack, again activities usually restricted in Soldiers with low back pain. The applicant had passed the standard APFT six months earlier, in December 1999.

i. To counsel's charge the MEB providers failed to address his client's lumbar spine, counsel submitted the Report of Medical History the applicant completed on 9 June 2000 as part of his MEB (Enclosure 7). Though the applicant marked "YES" to multiple symptoms and conditions including shortness of breath, broken bones, and diabetes, he marked "NO" to "Recurrent back pain or any back injury." The applicant having completed the form himself and signed the form as "true and complete to the best of my knowledge," and with no complaint of back pain or injury, the MEB had no reason to

evaluate his spine, just as they did not evaluate other systems/body parts to which the applicant had marked “NO.”

j. JLV shows the applicant was first awarded VA service-connected disability ratings on 2 December 2000. He was first awarded a VA service-connected disability rating for “Interverbal Disc Syndrome” on 11 March 2016, well after his 2002 separation from the Army.

k. The DES only compensates an individual for service incurred medical condition(s) which have been determined to disqualify him or her from further military service and consequently prematurely ends their career. The DES has neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions which were incurred or permanently aggravated during their military service; or which did not cause or contribute to the termination of their military career. These roles and authorities are granted by Congress to the Department of Veterans Affairs and executed under a different set of laws.

l. It is the opinion of the ARBA Medical Advisor that that neither an increase in his military disability rating nor a referral of his case to the DES is warranted.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that partial relief was warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation. Upon review of the applicant’s petition, available military records and the medical review, the Board notwithstanding the advising official finding that neither an increase in his military disability rating nor a referral of his case to DES is warranted. The Board, however noted the applicant complained of back and pelvic pain in the days following the injury, although there is no indication that radiographs were clinically indicated at the time. The Board found based on the preponderance of evidence there was a failure to properly evaluate the applicant’s spine and lower extremities

2. Furthermore, the Board agreed there is a clear error constituting potentially gross negligence on the part of the medical professionals, whereas the applicant’s spinal injuries would have been considered by appropriate medical board officials and found to be unfitting based on the applicant’s injuries. The Board determined there is sufficient evidence for referral of the applicant’s case to DES. Therefore, partial relief was granted.

BOARD VOTE:

Mbr 1	Mbr 2	Mbr 3	
:	:	:	GRANT FULL RELIEF
[redacted]	[redacted]	[redacted]	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 concerned to determine whether the applicant's conditions(s), met medical retention standard at the time-of-service separation

a. In the event that a formal physical evaluation board (PEB) becomes necessary, the individual concerned may be issued invitational travel orders to prepare for and participate in consideration of his case by a formal PEB if requested by or agreed to by the PEB president. 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 under the DES, these proceedings will serve as the authority to void his administrative separation and to issue him the appropriate separation retroactive to his original separation date, with entitlement to all back pay and allowances and/or retired pay, less any entitlements already received.

2. The Board further determined the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to correction to add his spinal injury as an unfitting condition with a disability rating of 40 percent.

1/2/2024

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. 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 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.

2. 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.

3. 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.

4. 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.

5. 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.

6. 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.

7. 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 UOTHC 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.

8. 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.

9. 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 court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds. This guidance does not mandate relief, but rather provides standards and principles to guide BCM/NRs in application of their equitable relief authority. In determining whether to grant relief on the basis of equity, injustice, or clemency grounds, BCM/NRs shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental

acknowledgement that a relevant error or injustice was committed, and uniformity of punishment.

//NOTHING FOLLOWS//