IN THE CASE OF: [redacted]

BOARD DATE: 14 February 2024

DOCKET NUMBER: AR20230005393

APPLICANT REQUESTS:

- his Line of Duty (LOD) determination be approved as In the Line of Duty: Not Due to Own Misconduct
- a physical disability retirement in lieu of his Non-Duty Related (NDR) disability discharge

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

- ARBA online application in lieu of DD Form 149 (Application for Correction of Military Record)
- Counsel's brief
- Enclosure 1 - DD Form 261 (Report of Investigation Line of Duty and Misconduct Status), 22 July 2020
- Enclosure 2 - memorandum, subjected: Proposed Adverse Finding Rebuttal Offer, 27 April 2020
- Enclosure 3 - memorandum, subjected: Line of Duty Determination, 24 August 2020
- Enclosure 4 - DD Form 199-1 (Formal Physical Evaluation Board (PEB) Proceedings), 19 May 2022
- Enclosure 5 - memorandum, subjected: Request Line of Duty Advisory Opinion, 25 May 2022
- Enclosure 6 - memorandum, subjected: Non-Duty Related (NDR) PEB Advisory Opinion, 25 May 2022
- Enclosure 7

    - DD Form 199 (Informal PEB Proceedings) (partial), 25 August 2021
    - email, subjected: Summary and Additional Docs for Army Human Resources Command (AHRC), 23 May 2022
    - memorandum, subjected: Official Contentions Formal NDR PEB Scheduled for 16 May 2022

- Enclosure 8

    - memorandum, subjected: Rebuttal to PEB Findings, 8 June 2022
    - Orders 0004214686.00 (Separation Orders), 15 March 2023

- Enclosure 9

    - Reserve Reservation Confirmation, 1 February 2007
    - Data Personal in Nature, 26 February 2007
    - USAR Applicant Data Report, 1 February 2007
    - Processee/Enlistee Record, 22 February 2007
    - Audiogram, 2007

- Enclosure 11 - DD Form 214 (Certificate of Release or Discharge from Active Duty), 7 May 2009
- Enclosures 12 through 28 - medical records (total 66 pages)
- Enclosure 31 - medical records (total 4,358 pages)
- email, subject: [applicant], 2 March 2023 and 3 April 2023

FACTS:

1. Counsel refers to enclosures 29, 30 and 32, however, these enclosures are not available for the Board to review. The file provided, which were labeled as enclosures 29, 30 and 32, actually contained duplicates of enclosures 21 - 26.

2. Counsel states:

a. The Line of Duty (LOD) determination finding the applicant's liver disease as Not Line of Duty - Not Due to Own Misconduct was in error and presents new evidence not considered in the Line of Duty Investigation or the Casualty and Mortuary Affairs Operations Division's Advisory Opinion. The LOD was based on incorrect facts and an incorrect chronology of the applicant's medical history.

b. The Casualty and Mortuary Affairs Operations Division's concluded that there is currently no confirmed evidence that exposure to pollutants or toxins from burn pits can result in the development of autoimmune hepatitis or liver failure. Counsel contends extensive scientific and medical research exists to link exposure to pollutants and toxins to the development of autoimmune hepatitis and liver failure.

c. On 20 March 2020, the LOD Investigating Officer found the applicant In Line of Duty and remarked a records review in 2016 by a physician tied the applicant's liver disease to a 2009 deployment during which he had a test showing mildly elevated liver enzymes.

d. On 27 April 2020, the approving authority proposed the Not Line of Duty - Not Due to Own Misconduct opining, in part, there is a large time gap from when he was seen in 2009, and him being diagnosed in 2016. There is no medical documentation provided during that time frame to make a determination.

e. On 22 July 2020, the approving authority found the applicant's condition Not Line of Duty - Not Due to Own Misconduct.

f. On 24 August 2020, the Army's Casualty and Mortuary Affairs Operations Division completed a review of the LOD investigation finding evidence contained in the investigation failed to establish a causative relationship between the diagnosed liver disease and your 2008/2009 military service. There is currently no confirmed evidence that exposure to pollutants or toxins from burn pits can result in the development of autoimmune hepatitis or liver failure.

g. On 19 May 2022, a Formal Physical Evaluation Board (FPEB) convened and found the applicant's liver disease secondary to primary sclerosing cholangitis (PSC, autoimmune hepatitis status post liver transplantation and ulcerative colitis (UC)) is not found to be in the line of duty.

h. On 25 May 2022, the PEB Board President requested a Line of Duty Advisory Opinion from AHRC.

i. On 25 May 2022, the Casualty and Mortuary Affairs Operations Division provided an Advisory Opinion stating there is zero evidence as to how this disease was sustained, thus prompting a Not in Line of Duty-Not Due to Own Misconduct (NLD-NDOM) finding, and there is no evidence to support an overturn of the Line of Duty investigation.

j. On 6 June 2022, the applicant appealed the FPEB's findings and recommendations.

k. On 8 June 2022, the PEB concluded the applicant's case following receipt of AHRC's Advisory Opinion and affirmed the FPEB's decision which states, based on the preponderance of evidence, the PEB has determined the applicant's liver disease secondary to primary sclerosing cholangitis (PCS), autoimmune hepatitis status post liver transplantation and ulcerative colitis (UC) are not found to be in the line of duty.

l. On 10 March 2023, the Army separated the applicant.

3. The applicant enlisted in the Army Reserve on 1 February 2007. He served on active duty for training from 22 February 2007 to 3 July 2007.

4. The applicant was ordered to active duty in support of Operation Iraqi Freedom serving on active duty from 29 March 2008 to 7 May 2009.

5. DA Form 2173 (Statement of Medical Examination and Duty Status), dated 17 October 2019, shows the applicant was treated for liver disease, unspecified on 18 February 2009. Specifically, labs showed mild elevation in liver enzymes with plans to check HEP panel and RPR. The applicant was on active duty at the time of treatment. A Formal Line of Duty Investigation (LODI) was required. The injury was considered to have been incurred in Line of Duty (LOD).

6. Counsel provided a memorandum to the applicant, subjected: Proposed Adverse Finding Rebuttal Offer, dated 27 April 2020, which shows the proposed findings of the formal LODI as Not LOD: Not due to own misconduct.

a. While in Kuwait in 2009, the applicant reported for right knee pain. His labs drawn showed mildly elevated LFTS (liver functions tests). He was supposed to have follow-up testing to include a hep panel, RPR, and GC the following months. There are no records of the follow-ups as he redeployed.

b. In 2016, he was diagnosed with ulcerative colitis and has been on several different medications including steroids for disease control. He had a CT scan that showed liver cirrhosis in 2017. He was later diagnosed with primary sclerosing cholangitis and autoimmune hepatitis.

c. During a review of his records in 2016, it was discovered he had elevated liver enzymes at that time. In 2018, he underwent a colectomy with ileostomy conduit. Two months later, he underwent a liver transplant for end-stage liver disease.

d. In 2019, he was found to be unfit for duty due to his chronic medical diseases. There is a large time gap form when he was seen in 2009, and him being diagnosed in 2016. There is no medical documentation provided during that time frame to make a determination.

e. The applicant was advised of his right to rebut the recommended findings.

f. He was advised the Veterans Administration (VA) may determine conditions to be service connected. The VA examination process and LOD determination processes are different and can lead to different determinations.

7. A DD Form 261 (Report of Investigation Line of Duty and Misconduct Status), dated 22 July 2020 shows:

a. There is zero evidence as to how the disease was sustained. This is a major shortcoming of the investigation for the medical diagnosis of liver disease, unspecified.

b. A records review in 2016 by a physician ties the applicant's liver disease to a 2009 deployment during which he had a test showing mildly elevated liver enzymes. There is no evidence to suggest misconduct and the applicant was present for duty and mentally sound, the disease is found in the line of duty.

c. The final approval authority found the applicant's disease Not LOD: Not due to own misconduct for liver disease.

8. A memorandum, subjected: Line of Duty Determination, dated 24 August 2020, showing a review of the applicant's LODI was conducted and upheld the original finding of Not LOD - Not due to Own Misconduct.

a. Evidence contained in the investigation failed to establish a causative relationship between the diagnosed liver disease and his 2008/2009 military service. There was no confirmed evidence that exposure to pollutants or toxins from burn pits can result in the development of autoimmune hepatitis or liver failure.

b. The applicant was advised this action was final. Any appeal should include new evidence not previously submitted or considered.

9. A DD Form 199 (Informal PEB Proceedings), 25 August 2021, shows an Informal PEB convened on 25 August 2021 wherein the applicant was found physically unfit and his case should be referred for disposition under Reserve Component Regulations.

a. He was found unfit for end stage liver disease secondary to primary sclerosing cholangitis/autoimmune hepatitis, status post liver transplantation; ulcerative colitis: diabetes mellitus type 2 (non-compensable).

b. NDR: The applicant was diagnosed with this condition in April 2011, followed by the diagnosis of ulcerative colitis in May 2016 which led to diabetes mellitus type 2 induced by the prescribed steroids. This condition is not compensable because at the time he was diagnosed with this condition he was not in an active duty status for more than 30 days or entitled to base pay, and there is no Line of Duty investigation for this condition. Additionally, there is no evidence within his available case file that indicates that military service has aggravated the condition.

c. The applicant did not concur and demanded a formal hearing with a personal appearance and regularly appointed counsel on 28 September 2021.

10. Counsel provided a memorandum, subjected: Official Contentions Formal NDR PEB Scheduled for 16 May 2022 from the applicant's counsel to the PEB. Counsel's contentions were:

- The condition first manifested during 2008-2009 Kuwait deployment; elevated liver enzymes and knee issues.
- He began receiving VA treatment for this condition after returning from deployment.
- Lesions on his liver were observed within a year of returning from deployment, progressing to sclerosing cholangitis and cirrhosis, and a liver transplant.
- He has received consistent treatment for this condition since 2009.

11. DD Form 199-1 (Formal Physical Evaluation Board (PEB) Proceedings) shows a formal PEB convened on 19 May 2022 and upheld the findings of the informal PEB.

a. The applicant contends that his unfitting autoimmune conditions should be found in the line of duty. Based on the preponderance of evidence, the PEB has determined the applicant's liver disease secondary to primary sclerosing cholangitis (PSC), autoimmune hepatitis status post liver transplantation and ulcerative colitis (UC) are not found to be in the line of duty.

b. The applicant testified the condition began while he was deployed to Kuwait and Iraq evidenced by elevated liver enzyme tests in February 2009 and synovitis of his right knee. A LOD was submitted for these conditions to HRC in 2020. HRC denied the LOD, stating there is a large gap from when he was seen in 2009 and being diagnosed in 2016 with liver disease and these two events cannot be connected.

c. The applicant did not concur and submitted an appeal on 6 June 2022.

12. Counsel provided an email, subjected: Summary and Additional Docs for Army Human Resources Command (AHRC), 23 May 2022, from the applicant's counsel at the time to the PEB, restating his PEB contentions.

13. Counsel provided a memorandum, subjected: Request Line of Duty Advisory Opinion, dated 25 May 2022, showing the PEB requested AHRC provide a LOD advisory opinion as to whether or not the applicant's unfitting conditions were incurred in the line of duty and/or aggravated beyond normal progression and should be referred to the Integrated Disability Evaluation System or continue to be processed as a non-duty related case.

14. Counsel provided a memorandum, subjected: Non-Duty Related (NDR) PEB Advisory Opinion, dated 25 May 2022, showing AHRC upheld their previous findings as proper and remain Not Line of Duty - Not Due to Own Misconduct.

15. A memorandum, subjected: Rebuttal to PEB Findings, dated 8 June 2022, acknowledging the applicant's disagreement with the findings of the Formal PEB and the decision to uphold the findings of the Formal PEB.

16. A memorandum, subjected: NDR case, dated 9 June 2022, shows the applicant's case was forwarded for disposition.

17. Orders 0004214686.00 show the applicant was honorably discharged on 15 March 2023.

18. Counsel provided an email, subject: [applicant], dated 2 March 2023 and 3 April 2023 referring the applicant to the ABCMR as his administrative remedies had been exhausted concerning his LOD.

19. Counsel provided 4,404 pages of medical records.

20. MEDICAL REVIEW:

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

2. The applicant is applying to the ABCMR requesting a reversal of the United States Army Human Resources Command's "Not in Line of Duty – Not due to own Misconduct" (NLD-NDOM) determination for his autoimmune hepatitis and that he subsequently be permanently retired for physical disability.

3. The Record of Proceedings details the applicant's military service and the circumstances of the case. The applicant's DD 214 for the period of Service under consideration shows the former USAR Soldier was ordered to active duty in support of Operation Iraqi Freedom from 29 March 2008 thru 7 May 2009 with Service in Kuwait/Iraq from 26 May 2008 thru 27 March 2009. Orders published by the Department of the Army on 15 March 2023 show the applicant was involuntarily separated from the Army effective 10 March 2023.

> "Autoimmune hepatitis (AIH) is a non-contagious, chronic, inflammatory, autoimmune disease in which one's own immune system attacks healthy, normal

liver cells. The cause of liver cell destruction in this disease is unclear but may be related to an imbalance in some of the immune system cells (effector and regulatory). The persistent
inflammation within the liver observed in AIH can result in scarring, ultimately leading to cirrhosis, liver failure requiring a liver transplant, and even death."

[redacted]

"Many people with autoimmune hepatitis have no symptoms. In such cases, doctors may find signs of liver problems during routine blood tests, and this may lead to a diagnosis of autoimmune hepatitis. People without symptoms at diagnosis may develop symptoms later. Some people with autoimmune hepatitis don't have symptoms until they develop complications due to cirrhosis.

[redacted]

4. Applicant's counsel nicely outlines the applicant's relevant medical history in paragraphs 2c and 2d of her brief and so it will not be fully repeated here. The main points:

3 February 2009: Applicant injured his knee during a firefight and he sought medical treatment. As part of the medical treatment, a blood draw was conducted in which the provider documented in his record of medical care: "Labs did show mild elevated LFTs [liver functions tests] will check hep panel, RPR, GC to complete knee labs and address abnormal LFTs.

(These labs were drawn, but the lab noted a problem with the samples and requested they be redrawn. There is no evidence this was done, and this may have been because the applicant was asymptomatic and left theater on 27 March 2009.)

2 July 2009: The VA ordered blood tests to evaluate his liver functions. The results were abnormal indicating liver problems.

22 June 2010: The VA physician noted in the assessment/plan the possibility of autoimmune hepatitis and stated that [Applicant] may need a liver biopsy.

10 September 2010: The physician noted in the assessment that [Applicant] has "probable autoimmune liver disease, liver hemangiomas, portal LNodes [lymph nodes] related, joint pains" … will need liver clinic referral for possible liver biopsy.

9 March 2011: The VA performed the liver biopsies.

17 March 2011: The pathologist recorded the core biopsy showed "chronic hepatitis with lymphocytic infiltrate compatible with autoimmune hepatitis. Bridging fibrosis is present; the biopsy has a nodular appearance suspicious for a more advance fibrosis. Minimal siderosis is present."

5. The applicant was diagnosed with end stage liver disease secondary to Primary Sclerosing Cholangitis/Autoimmune Hepatitis on 5 April 2011 and underwent a liver transplant on 15 August 2018.

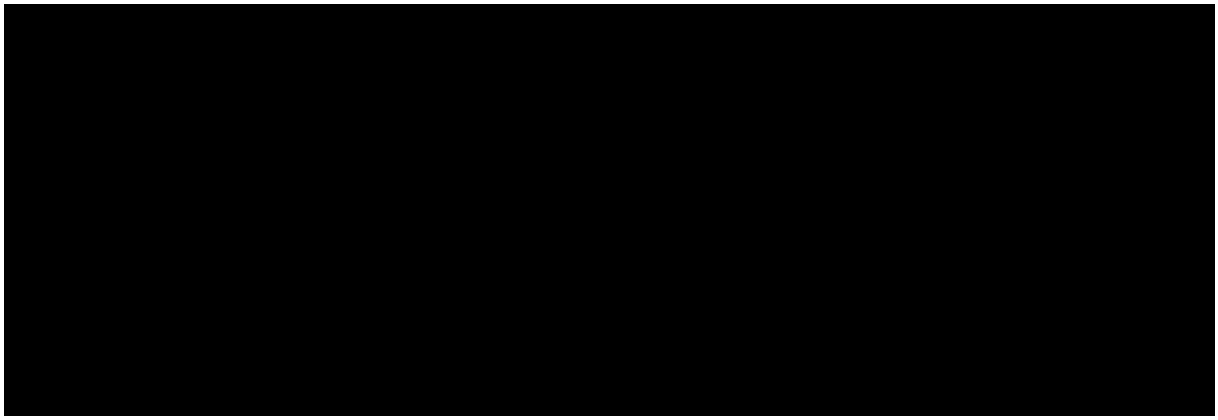
6. Review of the prior line of duty determinations show the negative findings were primarily due to a lack of laboratory values from the applicants February 2009 blood work, with the provider only annotating "mildly elevated LFTs;" and a lack of attention to the timeline of events as outlined above.

7. From the 20 July 2020 Report of Investigation Line of Duty and Misconduct Status (DD Form 261, aka a Formal Line of Duty Investigation) which resulted in a NLD-NDOM finding:

"This Soldier had mildly elevated liver enzymes while in a QDS in 2009. In 2016, he was diagnosed with ulcerative colitis. He had a CT scan that should liver cirrhosis in 2017. He was later diagnosed with primary sclerosing cholangitis and autoimmune hepatitis ...

There is a large gap from when he was seen in 2009, and him being diagnosed in 2016 with liver disease and these two events cannot be connected."

8. The 17 February 2009 lab results were located in JLV:



[redacted]

9. The first four test are LFTs, and they are not mildly elevated, but 2 to more than 3 times the upper limit of normal. The elevated total protein has numerous potential etiologies, one of which is elevated circulating antibodies. Likewise, are there are numerous potential etiologies for an elevated number of platelets, one of which is an ongoing inflammatory process. An elevated ESR (erythrocyte sedimentation rate) is consistent with an inflammatory process as well.

10. The applicant had an antinuclear antibody (ANA) screen drawn on 23 March 2009 and it was positive suggesting the applicant had an autoimmune disease:

> “An ANA test is a blood test that looks for antinuclear antibodies in the blood. Antibodies are immune system proteins the immune system makes to fight foreign substances, such as viruses and bacteria. But an antinuclear antibody attacks healthy cells instead. They are called "antinuclear" because it targets the nucleus of the cells.
>
> It's normal to have a few antinuclear antibodies in your blood. But a large number may be a sign of an autoimmune disorder. In an autoimmune disorder, the immune system attacks the cells of various organs and tissues by mistake. An ANA test is used to help diagnose autoimmune disorders, such as Systemic lupus erythematosus (SLE), Rheumatoid arthritis, Scleroderma, Sjögren's syndrome, Addison Disease, and Autoimmune hepatitis.
>
> [redacted]

11. As to the timeline of events, the applicant continued to have abnormal LFTs and other laboratory values just 2 months after his release from active duty:

[redacted]

12. Eosinophils are the white blood cells associated with allergic reactions.

13. His LFT's remained elevated in October 2009. The applicant was seen for an initial history of physical at a VA clinic in [redacted] Though he had no gastrointestinal symptoms, the provider documented mild tenderness to palpation in the right upper quadrant of his abdomen, the adnominal quadrant containing the liver.

14. Finally, the DD form 261 states: "There is a large gap from when he was seen in 2009, and him being diagnosed in 2016 with liver disease and these two events cannot be connected." It is unclear where this reasoning came from as the record shows the applicant had persistently elevated LFTs following his mobilization, the applicant potentially having autoimmune hepatitis was noted in June 2010, and the diagnosis was essentially confirmed with a liver biopsy in March 2011, not 2016. The pathology report is significant not only for the diagnosis but because the pathologist identified "a nodular appearance suspicious for a more advance fibrosis", i.e., the disease had been present/active for some time.

15. The applicant was initially placed on a permanent duty limiting physical profiles for diabetes on 27 April 2017 and ulcerative colitis on 27 February 2019. "Liver transplant due to cirrhosis" was added on 26 April 2021. He was informed in a memorandum from the United States Army Reserve Command's Army Reserve Medical Management Center (ARMMC) that he no longer met the medial retention standards in chapter 3 of AR 40-501, Standards of Medical Fitness, for what had previously been determined to be a non-duty related medical conditions. He was given four options:

- Transfer to the Retired Reserve if he had 20 qualifying years of service
- Receive a 15-year notice of eligibility for a non-regular retirement due to being discharged for a non-duty related medical condition yet having between 15 and 20 years of qualifying service and subsequently transferred to the Retired Reserve
- Receive an honorable discharge if she had less than 15 years of qualifying service
- Request a non-duty related physical evaluation board, or NDR PEB, for a determination of medical fitness.

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

- On 25 August 2021, the informal NDR PEB found the applicant's "End stage liver disease secondary to primary sclerosing cholangitis/Autoimmune hepatitis, status post liver transplantation; ulcerative colitis; diabetes mellitus type 2" to be unfitting for continued service and non-compensable as they found none of the conditions to be duty related:
- NDR: The Soldier was diagnosed with this condition in April 2011, followed by the diagnosis of ulcerative colitis in May 2016 which led to diabetes mellitus type 2 induced by the prescribed steroids. This condition was caused by no apparent trauma or injury. The condition is not compensable because at the time the Soldier was diagnosed with this condition the Soldier was not in an Active-Duty status for more than 30 days or entitled to base pay, and there is no Line of Duty investigation for this condition.

17. The applicant non-concurred and requested a formal hearing, maintaining his "condition first manifested during a 2008-2009 Kuwait deployment (elevated liver enzymes and knee issues). To wit, the Soldier began receiving VA treatment for this condition shortly returning from his deployment."

18. The applicant was present for and represented by regularly appointed counsel at his 19 May 2022 formal board. Following a review of the evidence and sworn testimony, the formal board decided to send the case to The Adjutant General to the Army at the USAHRC for a line of duty advisory opinion prior to submission of the case to the United States Army Physical Disability Agency for final processing.

19. The Adjutant General to the Army (TAG) oversees and manages the Army's line of duty processes as directed by the Deputy Chief of Staff, G-1. Paragraph 1-7c1 of AR 600-8-4, Line of Duty Policy, Procedures, and Investigations (15 March 2019):

"1–7. Deputy Chief of Staff, G–1

The DCS, G–1 will —

Maintain functional responsibility for LOD determinations. The following specific tasks may be delegated, but not below The Adjutant General (TAG):

Have functional responsibility for LOD determinations and act for the Secretary of the Army (SECARMY) on all LOD determinations and appeals referred to Headquarters, Department of the Army and all exceptions to provisions described in this regulation."

20. In their 25 May 2022 response to USAPDA, the USAHRC reviewing official confirmed the prior NLD-NDOM apparently mostly based on the prior formal line of duty determination:

"The DD Form 261 states "there is zero evidence as to how this disease was sustained," thus prompting a Not in Line of Duty-Not Due to Own Misconduct (NLD-NDOM) finding. This is the proper finding given that Army Regulation 600-8-4, Line of Duty Policy, Procedures, and Investigations, under Terms for Preponderance of Evidence states: "Findings must be supported by a greater weight of evidence (more likely than not) than supports any different conclusion."

21. The applicant's subsequent appeal to the USAPDA was then denied and he was discharged from the Army without compensation or benefits.

22. Paragraph 2-4 of AR 600-8-4, Line of Duty Policy, Procedures, and Investigations (15 March 2019) is titled "Standards applicable to line of duty determinations:"

- A Soldier's injury, illness, disease, or death is presumed to have occurred ILD [in line of duty] unless rebutted by the evidence.
- Injury, illness, disease, or death proximately caused by the Soldier's misconduct or gross negligence is "not in line of duty-due to own misconduct (NLD–DOM)."
- Simple negligence, alone, does not constitute misconduct and is, therefore, still considered to be ILD.

- Standard of proof. Unless another regulation or directive, or an instruction of the appointing authority, establishes a different standard, the findings of investigations governed by this regulation must be supported by a greater weight of evidence than supports a contrary conclusion (such as, by a preponderance of the evidence). The weight of the evidence is not determined by the number of

witnesses or volume of exhibits, but by considering all the evidence and evaluating factors, which as a whole shows that the fact sought to be proved is more probable than not.

23. Consider all the evidence.

- All direct evidence, that is, evidence based on actual knowledge or observation of witnesses.
- All indirect evidence, that is, facts or statements from which reasonable inferences, deductions, and conclusions may be drawn to establish an unobserved fact, knowledge, or state of mind.
- No distinction will be made between the relative value of direct and indirect evidence. In some cases, direct evidence may be more convincing than indirect evidence. In other cases, indirect evidence may be more convincing than direct evidence (for example, statement of a witness).
- Evaluate factors such as a witness's demeanor, opportunity for knowledge, information possessed, ability to recall and relate events, and relationship to the matter to be decided.

24. Bringing the specifics into focus on this case:

- "A Soldier's injury, illness, disease, or death is presumed to have occurred ILD [in line of duty] unless rebutted by the evidence (paragraph 2-4a).
- To overcome this presumption, i.e., "rebutted by the evidence," "the findings of investigations governed by this regulation must be supported by a greater weight of evidence than supports a contrary conclusion (such as, by a preponderance of the evidence) (paragraph 2-4b).
- In this case, that his liver disease was not incurred in the line of duty.
- And consider all the evidence, including all direct evidence, that is, evidence based on actual knowledge or observation of witnesses (paragraph2-4b(1)(a).
- There is no evidence the applicant had liver damage or liver disease prior to entering active duty in March 2008. Thus, any disease which developed during that deployment is presumed to have occurred ILD unless rebutted by evidence.
- The laboratory findings of markedly elevated LFTs and a positive ANA 11 months after he entered active duty are direct evidence of liver injury and a likely autoimmune disease. This injury/damage was ongoing, i.e., not due to a single insult, as evidenced by his continually elevated LFTs through the time of his diagnosis of autoimmune hepatitis in April 2011. The table from counsel's brief (H = High, outside of normal range):

Enclosure 28, VA Laboratory Reports.

25. The possibility the applicant had AIH was entertained in June 2010 and biopsies in March 2011 confirmed the applicant had this rare condition, a condition which eventually led to liver failure and a liver transplant. The decrease in some of the LFTs starting in June 2011 was due to the initiation of treatment with prednisone.

26. There is no probative evidence and certainly no preponderance of evidence rebutting the condition was NOT incurred in the line of duty and so the presumption the condition was occurred in the line of duty is not overcome and remains in effect. Quite the contrary, the direct evidence in the form of persistently elevated LFTs and positive ANA identified 11 months after the applicant entered active duty supports an ILD determination.

27. It is the firm opinion of the ARBA Medical Advisor that the evidence, including the new evidence of the missing February 2009 LFTs and ANA from March 2009, supports the reversal of UHA HRC's NLD-NDOM determination.

28. An affirmative line of determination would make the applicant's unfitting liver disease and subsequent liver transplant compensable by the DOD via a permanent retirement for physical disability.

29. In the DES, all conditions, both claimed and referred, are rated using the VA Schedule for Rating Disabilities (VASRD). The VA rates all IDES cases and the PEBs rate legacy cases using the same VASRD.

30. JLV shows the applicant was awarded a 100% VA service-connected disability rating for "Residuals of Hepatitis" and a 30% rating for "Liver Transplant" on 3 February 2020. This would combine for a military disability rating of 100%.

31. Given the applicant's separation from the Army was not until 10 March 2023, it is recommended the applicant be permanently retired for physical disability with a 100% rating effective 11 March 2023.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that 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 medical review, the Board concurred with the advising official finding the evidence, including the new evidence of the missing February 2009 LFTs and ANA from March 2009, supports the reversal of UHA HRC's NLD-NDOM determination. Furthermore, the opine noted the applicant should be permanently retired for physical disability with a 100% rating with an effective date of 11 March 2023 based on the applicant's separation from the military on 10 March 2023. The Board determined based on the preponderance of evidence and the medical opine, there is sufficient evidence to grant relief.

BOARD VOTE:

Mbr 1	Mbr 2	Mbr 3	
[redacted]	[redacted]	[redacted]	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board determined the evidence presented is sufficient to warrant a recommendation for relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected to show the applicant's Line of Duty (LOD) determination was approved as In the Line of Duty: Not Due to Own Misconduct and he is authorized a physical disability retirement in lieu of his Non-Duty Related (NDR) disability discharge. The applicant should be permanently retired for physical disability with a 100% rating with an effective date of 11 March 2023.

3/29/2024

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. Army Regulation (AR) 600-8-4 (Line of Duty (LOD) Policy, Procedures, and Investigations) prescribes policies and procedures for investigating the circumstances of disease, injury, or death of a Soldier providing standards and considerations used in determining LOD status.

a. A formal LOD investigation is a detailed investigation that normally begins with DA Form 2173 (Statement of Medical Examination and Duty Status) completed by the

medical treatment facility and annotated by the unit commander as requiring a formal LOD investigation. The appointing authority, on receipt of the DA Form 2173, appoints an investigating officer who completes the DD Form 261 (Report of Investigation LOD and Misconduct Status) and appends appropriate statements and other documentation to support the determination, which is submitted to the General Court Martial Convening Authority for approval.

b. The worsening of a pre-existing medical condition over and above the natural progression of the condition as a direct result of military duty is considered an aggravated condition. Commanders must initiate and complete LOD investigations, despite a presumption of Not In the Line of Duty, which can only be determined with a formal LOD investigation.

c. An injury, disease, or death is presumed to be in LOD unless refuted by substantial evidence contained in the investigation. LOD determinations must be supported by substantial evidence and by a greater weight of evidence than supports any different conclusion. The evidence contained in the investigation must establish a degree of certainty so that a reasonable person is convinced of the truth or falseness of a fact.

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 DOD Directive 1332.18 and Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation). 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.

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

a. USAR or Army National Guard (ARNG) Soldiers not on active duty, whose medical condition was not incurred or aggravated during an active duty period, will be processed as follows. Reservists who do not meet the fitness standards set by chapter 3 will be transferred to the Retired Reserve per Army Regulation 140–10 or discharged

from the USAR per Army Regulation135–175 (Separation of Officers) or Army Regulation 135–178 (ARNG and Reserve Enlisted Administrative Separations). They will be transferred to the Retired Reserve only if eligible and if they apply for it.

b. Reservists who do not meet medical retention standards may request continuance in an active USAR status. In such cases, a medical impairment incurred in either military or civilian status will be acceptable; it need not have been incurred only in the line of duty. Reservists with nonduty related medical conditions who are pending separation for not meeting the medical retention standards of chapter 3 may request referral to a PEB for a determination of fitness in accordance with this regulation.

c. Reserve Component Soldiers with nonduty related medical conditions who are pending separation for failing to meet the medical retention standards of chapter 3 of this regulation are eligible to request referral to a PEB for a determination of fitness. Because these are cases of Reserve Component Soldiers with nonduty related medical conditions, MEBs are not required and cases are not sent through the PEBLOs (Physical Evaluation Board Liaison Officers) at the military treatment facilities. Once a Soldier requests in writing that his or her case be reviewed by a PEB for a fitness determination, the case will be forwarded to the PEB by the USARC Regional Support Command or the U.S. Army Human Resources Command Surgeon’s office and will include the results of a medical evaluation that provides a clear description of the medical condition(s) that cause the Soldier not to meet medical retention standards.

4. 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.

5. 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 (Personnel Separations-Disability 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.

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.

//NOTHING FOLLOWS//