

IN THE CASE OF: [REDACTED]

BOARD DATE: 8 August 2024

DOCKET NUMBER: AR20230005469

APPLICANT REQUESTS: in effect,

- Medical separation/retirement
- Formal retirement briefing
- Entry into Integrated Disability Evaluation System (IDES) or
- Acknowledgement of Veterans Affairs (VA) disability rating for change of military discharge to medical
- Complete copy of his retirement documentation including characterization of discharge
- DD Form 214 (Certificate of Release or Discharge from Active Duty) to show overseas duty in Uzbekistan
- Personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States)
- Counsel brief (9 pages)
- Officer Record Brief
- Support letter [REDACTED]
- Response to Hurricane Katrina
- Physical Profile, 9 June 2017
- Annual Training Orders 209-047, 27 July 2016
- Orders 280-085, 6 October 2016
  - Orders 060-084, 1 March 2017
  - Orders 174-427, 23 June 2017
- DD Form 214, 31 July 2017
- Orders 152-833, 1 June 2018
- Orders C-06-807146, 12 June 2018
- Promotion list to Lieutenant Colonel (LTC) notification
- DA Form 67-10-2 (Field Grade Plate Officer Evaluation Report), 27 June 2019
- VA letters, 29 July 2020

- Serious Incident Report (SIR) and police report, 29 August 2019
- Motion to Nolle Prosequi
- Previous Attorney emails
  - Conditional Waiver request, 19 June 2020
  - DA Form 2173 (Statement of Medical Examination and Duty Status, 25 September 2007
  - Met by despair, not violence (LA Times article)
  - DA Form 5016 (Chronological Statement of Retirement Points), 3 June 2020
  - Motion to Nolle Prosequi
  - email traffic with TDS
- Initiation of Involuntary separation
- AR 135-175 (Separation of Officers), Ch 2 excerpt
- Memorandum for separation
- Updated Profile PTSD and back
  - Chronological Record of Medical Care, 17 September 2008
  - DA Form 2173, 22 May 2010
  - DA Form 2173, 25 September 2007
  - Operation Report, 14 August 2008
  - Authorization for disclosure of medical or dental information
  - Summary of Care by Non-Military Medical Provider
  - [REDACTED] Sports Medicine & Orthopaedic Center, 27 February 2020
- Medical Disqualification
- Possible duty related condition(s), notification of medical disqualification, 10 August 2020
- Awards
- Medical record (My HealtheVet pages 1865 pages)

### FACTS:

1. The applicant states through counsel he requests the Board change his involuntary separation from the United States Army to a medical separation based upon failure to afford him requisite medical testing and treatment before discharge and erroneous denial of either a Medical Examination Board (MEB) or Physical Examination Board (PEB). With his request, he requests a formal retirement briefing, entry in the IDES system for medical board, or acknowledgement of VA disability rating for change of military discharge to medical, and a complete copy of his retirement documentation including characterization of discharge. Additionally, he requests the correction of his last DD Form 214 to show overseas duty and service at the US Embassy in Uzbekistan.

a. Counsel describes the applicant's honorable military service in the Army National Guard and Army Reserve in detail. On 25 September 2007, during Survival, Evasion,

Resistance, Escape (SERE) training, he sustained a right thumb and back injury. He successfully completed SERE and Aviator Qualification on 7 January 2008, however, his back injury worsened throughout his military service. The Medical Examination and Duty Status states, "During S.E.R.E. training at Fort Rucker, Soldier stepped on a patch of leaves over a hidden hole and landed on back and felt sharp pain in lower back. Later that same night, right thumb was stepped on while trying to assist another soldier. Right thumb continues to bother soldier. This injury progressed and required a permanent profile and spinal fusion.

b. In 2013, he deployed to Kandahar, Afghanistan, where he honorably served overseas for a year working as part of an agricultural development team. He returned again to the Middle East when he was deployed to the country of Uzbekistan to work for Central Command (CENTCOM) Special Projects Office, in the US Embassy, as the Chief of the Counter Narcotics Program for that country.

c. His back condition deteriorated severely over his military service, which resulted with him becoming medically unable to fly in 2018. As a result, he was separated from the Army National Guard effective 24 April 2018 with an honorable characterization.

d. Because of no longer medically qualified to fly, he transferred to the US Army Reserve (USAR) on 24 April 2018 into a computer engineer position due to having prior computer forensics experience with law enforcement. He served in this position with no issues, completing his military education and making the list for promotion to LTC.

e. Counsel describes the applicant's mental health. In part, stating early in his service, he noted difficulties with sleep, depression, anger, insomnia, and decreased focus and memory. In 2009, these difficulties lead him to seek counseling and medical treatment at the [REDACTED] VA Hospital. Subsequently, the VA Hospital diagnosed him with post-traumatic stress disorder (PTSD) and found the condition service connected. He has continued to receive counseling and medical treatment for PTSD through the VA to present. On 29 July 2020, he applied for, and received, a VA service-connected disability rating of 100% for PTSD with an effective date of 1 December 2019.

f. Counsel describes the SIR resulting from the applicant's PTSD episode in which he was detained and placed in holding until able to stand before the court. In the SIR it stated upon successful completion of treatment, court has stated they will drop charges. He went before a magistrate and was told to attend an alcohol treatment program. He completed Addictive Disorders Treatment Program and received a Certificate of Completion on 1 November 2019. No charges were filed in the case. Documents confirming this information are attached. The Motion to Nolle Prosequi shows the court dismissed the action against the applicant on 5 June 2020.

g. This incident was not discussed at his AR unit, until March drill, 2020. At the end of this drill weekend, his commander instructed him he would be involuntarily separated, and his command provided documents stating the same. Upon receipt, he contacted the legal defense unit and was assigned to [REDACTED]. Unfortunately, legal defense was very little help. (Enclosure 11). After 33 years of honorable service without incident, he was forced to retire.

h. The applicant started the medical evaluation board before his separation. At the time of his discharge the applicant met the diagnostic criteria for PTSD. A MEB would have been appropriate under the Army Regulation (AR) 40-501 (Standards of Medical Fitness) for a determination of fitness status. AR 635-40 (Physical Evaluation for Retention, Retirement, or Separation) governs the evaluation for physical fitness of Soldiers who may be unfit to perform their military duties because of physical disability. The company commander did not want the applicant to go through a MEB process, so he completed none of the documents sent to him pertaining to this. He would not answer calls from the applicant. Due to the time required for the MEB process, he was pressured, through his attorney, to accept retirement now, or face a dishonorable discharge. When the formal line of duty (LOD) was initiated, the command sent a letter to the USAR commander. The diagnosis of PTSD, pending LOD's, or MEB was not provided for her consideration. The commander gave her opinion, and the order was cut. (Enclosure 12). With the order, Army Reserve Medical Management Center was instructed to "cease" the LOD investigation and MEB process. This contradicts the Army's own regulation 135-175, section 2-8. (Enclosure 13) To date, he has had no contact with the 412th since his last drill period. He has no information on the recommended Grade Determination Board, or characterization of service. He was dropped and forgotten.

i. Counsel argues the USAR's discharge of the applicant was erroneous and unjust. He experienced ineffective assistance of legal counsel. Also, he was involuntarily discharged inequitably. The evidence in the record leads to the inevitable conclusion that the applicant's PTSD was a "direct or contributing cause" of the conduct that provided the basis for his separation. His OERs show he was an exemplary soldier for many years before his diagnosis with PTSD. The conduct that led to his separation - the incident that led to the police report – all occurred after several traumatic deployments, including to Hurricane Katrina where he was Executive Officer for the Louisiana Special Reaction Team. Weighing the one incident that arose from mixing alcohol with his PTSD medication versus his 33 years of exceptional service, the Board should find that his PTSD was a direct or contributing cause of his conduct and should therefore re-characterize his discharge as a mandatory medical separation under AR 635-200 paragraph 14-17g (1), which requires him to go through the DES process.

j. Even if this Board were to determine that the mandatory provision in paragraph 14-17 does not apply, he also qualifies for medical separation under the discretionary

provision in paragraph 1-33b (1). That provision states: "The General Court Martial Convening Authority may direct, in writing, that the Soldier be processed through the physical disability system when action under the Uniform Code of Military Justice has not been initiated, and ... [o]ther circumstances of the individual case warrant disability processing instead of further processing for administrative separation." Here, his unique circumstances warrant separation through medical channels as a matter of discretion. He served for over 33 years in the Army Reserves and National Guard. He received many prestigious accolades, and consistently high marks. His isolated incident of misconduct should not be allowed to overshadow his years of distinguished service, particularly given his PTSD diagnosis.

k. In closing counsel states the applicant respectfully requests the Board change his separation from the United States Army to a medical separation based upon failure to afford him requisite medical testing and treatment before discharge and erroneous denial of either a MEB or PEB. With his request, he requests a formal retirement briefing, entry in the IDES system for MED board, or acknowledgement of VA disability rating for change of military discharge to medical, and a complete copy of his retirement documentation including characterization of discharge. Additionally, he requests the correction of his last DD Form 214 to show overseas duty and service at the US Embassy in Uzbekistan. (The complete counsel brief is available for review in supporting documents).

2. The applicant provided over 2,000 pages of documents in support of his claim including awards, orders, evaluations, and medical records, listed above under applicant's supporting documents considered by the Board. [All documents are available for the Board's review].

3. The applicant having had prior enlisted service he was honorably discharged on 18 August 2001, to accept a commission in [REDACTED] Army National Guard ([REDACTED] ARNG). He was commissioned as a Reserve Officer in the [REDACTED] ARNG on 19 August 2001.

4. He entered a period of active duty on 1 October 2001, and was honorably released from active-duty special work on 31 May 2002, after completion of period of active duty.

5. He entered another period of active duty on 6 September 2005, in support of Operation Iraqi Freedom. He was honorably released from active duty on 28 October 2005, after completion of required active service.

6. He entered a period of active-duty training (ADT) on 18 April 2006. DA Form 2173 shows on 25 September 2007, he was injured at Fort Rucker, AL during S.E.R.E. training when he stepped on a patch of leaves over a hidden hole and landed on his back and felt sharp pain in lower back. Later that same night, his right thumb was

stepped on while trying to assist another soldier. On 30 November 2007, he was released from ADT after completion of period of ADT.

7. On 9 January 2008, a notification of eligibility for retired pay at age 60 (20-Year Letter) was issued.

8. On 5 February 2008, after careful review of the evidence provided, it was determined in the line of duty for low back pain and right thumb pain.

9. The applicant provided a DA Form 2173, which shows on 22 May 2010, he was watching a movie and began having chest pains and shortness of breath. He then went to the hospital and he was admitted.

10. He was transferred from the [REDACTED] ARNG to [REDACTED] Army National Guard ([REDACTED] ARNG) on 1 May 2011, for an indefinite period.

11. He was ordered to active duty on 31 July 2012, in support of Operation Enduring Freedom. He served in Kuwait/Afghanistan from 16 August 2012 – 11 May 2013. He was honorably released from active duty on 1 July 2013, after completion of required active service.

12. He was promoted to major on 1 September 2014.

13. He entered another period of active duty on 15 August 2016, for operational support. He was honorably released from active duty on 31 July 2017, after completion of required active service. His DD Form 214 shows he completed 3 years, 2 months, and 29 days net active service this period (which appears to be in error). His actual net active service this period was 11 months, and 17 days. It also shows in Item 12f (Foreign Service): 1 year|6 months|26 days (which also appears to be in error).

a. The applicant provided his Orders 280-085, 6 October 2016, showing he was ordered to active duty for operational support – reserve component (ADOS-RC) for a period of 1 October 2016 – 31 December 2016, reporting to U.S. Embassy, Taskent, Uzbekistan with a report date of 1 October 2016.

b. Orders 060-084, issued 1 March 2017, showing an amendment to the above orders extending his period from 31 December 2016 to 30 June 2017.

c. Orders 174-427, issued 23 June 2017, showing an amendment to the above orders extending his period from 31 December 2016 to 31 July 2017.

14. The applicant provided a Physical Profile Record, which shows he was issued a profile for lower back injury/pain on 9 June 2017.

15. He was discharged from the MSARNG on 24 April 2018, under the provisions of National Guard Regulation 635-100, paragraph 5a (3) due to Resignation. His NGB Form 22 shows:

- Item 10a (Net Service this Period): 6 years|11 months|24 days
- Item 10b (Prior Reserve Component Service): 21 years|8 months|9 days
- Item 10e (Total Service for Retired Pay): 30 years|5 months|23 days

16. The applicant provided an SIR and police report, which a summary of incident shows at approximately 0900 hours, on 29 August 2019, Assistant Police Chief [REDACTED] called Headquarters and Headquarters Company orderly room to report the arrest of the applicant. The incident happened at 0700hrs, 29 August 2019, the Leland, [REDACTED] police department reported to a possible domestic disturbance and noise ordinance at the home of the applicant. Upon arrival, a rifle was fired from inside the dwelling, out a window, at law enforcement officers outside. The applicant was instructed to vacate the dwelling, and upon doing so, was armed and determined to be under the influence. After arrest, there was no sign of injury to other family members, nor charges pressed by spouse. The applicant's firearms were confiscated by the police. He was held in holding cell on a "24 hour Hold" until able to stand before the Court.

17. The applicant provided a Motion to Nolle Prosequi in which he and his counsel moved the Honorable Court for an Order dismissing the above styled action against the defendant, charging him with Aggravated Assault on a Law Enforcement Officer, on the grounds that an agreement was reached in the Municipal Court of Leland that should the Defendant complete certain treatment programs that the matter would not be prosecuted further. The Defendant has completed Addictive Disorders Treatment Program and after consultation with the Chief and Assistant Chief of the Leland Police Department and other stakeholders in this matter, the State is asking that said matter be dismissed against the Defendant.

18. On 15 December 2020, a decision memorandum – retirement in lieu of involuntary separation by the Commander of U.S. Army Reserve Command (USARC) states:

a. On 8 March 2020, the Commander, 412th Theater Engineer Command (412th TEC), initiated an involuntary separation action against the applicant, in accordance with Army Regulation (AR) 135-175, paragraphs 2-13d, acts of serious or recurring misconduct punishable by military or civilian authorities; and 2-13p, conduct unbecoming an officer. Specifically, on or about 29-30 August 2019, the applicant resisted arrest and was charged with aggravated assault upon a police officer.

b. On 7 October 2020, the applicant submitted a request to transfer to the Retired Reserve in response to the notification of involuntary separation. He consulted with military counsel.

c. In accordance with AR 135-175, para. 2-19f (2), the Commander is bound to approve the applicant's request to retire in lieu of involuntary separation. Accordingly, he approved the applicant's request, close the involuntary separation action, direct publication of his Retired Reserve transfer orders, and recommend an Army Grade Determination Review Board.

19. Orders 20-353-00007, issued by Headquarters, USARC, Fort Bragg, NC on 18 December 2020, shows the applicant was reassigned to the Retired Reserve effective 18 January 2021, due to unacceptable conduct.

20. The applicant provided a support letter by (Retired Colonel [REDACTED]) stating he supervised the applicant for two years in 2018-2019. L.P.S. spoke on the mission they had and the applicant's position. [REDACTED] directly observed him for several days each month and regularly communicated and collaborated with him multiple times each week. He was persevering through some personal issues near the end of their assignment together in the 412th TEC. [REDACTED] strongly suspected these issues were service-related based on traumatic and tragic experiences from earlier in his career which he related to [REDACTED]. He has taken firm steps to mitigate and correct those personal issues and [REDACTED] believes a medical board should be conducted to properly assess all aspects of his health as he transitions to life after military service. (The entire support letter is available for the Board's review).

21. During the processing of this case a foreign service verification request was sent to Defense Finance Accounting Service (DFAS). DFAS responded stating there is no indication the applicant was deployed during October 2016 – July 2017. DFAS provided leave and earnings statements during this period.

22. 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.

23. 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.

24. Title 38, CFR, Part IV is the VA's schedule for rating disabilities. The DVA awards disability ratings to veterans for service-connected conditions, including those conditions detected after discharge. As a result, the DVA, 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 DVA can evaluate a veteran throughout his or her



lifetime, adjusting the percentage of disability based upon that agency's examinations and findings.

25. By regulation, AR 15-185 (ABCMR) applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

26. By regulation, AR 635-8 (Separation Processing and Documents) prescribes policy and procedural guidance relating to transition management.

27. 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, the Army Aeromedical Resource Office (AERO), and/or the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant is applying to the ABCMR requesting revocation of the orders transferring him to the Retired Reserve and a referral to the Disability Evaluation System (DES). He has indicated on his DD 293 that PTSD and other mental health issues are relevant to his requests.

c. The Record of Proceedings details the applicant's service and the circumstances of the case. Orders published by the U.S. Army Reserve Command on 18 December 2020 show the former USAR Officer was transferred to the Retired Reserve effective 18 January 2012 for "Unacceptable Conduct."

d. A 15 December 2020 memorandum from the Chief of the Army Reserve shows the applicant requested transfer to the Retired Reserve in lieu of involuntary separation for having assaulted a police officer:

"1. On 8 Mar 20, the Commander, 412th Theater Engineer Command (412th TEC), initiated an involuntary separation action against MAJ [Applicant], in accordance with Army Regulation (AR) 135-175, paras. 2-13d, acts of serious or recurring misconduct punishable by military or civilian authorities; and 2-13p, conduct unbecoming an officer. Specifically, on or about 29-30 Aug 19, MAJ [Applicant] resisted arrest and was charged with aggravated assault upon a police officer.

2. On 7 Oct 20, MAJ [Applicant] submitted a request to transfer to the Retired Reserve in response to the notification of involuntary separation. He consulted with military counsel.

3. In accordance with AR 135-175, para. 2-19f(2), I am bound to approve MAJ [Applicant]'s request to retire in lieu of involuntary separation. Accordingly, I approve MAJ [Applicant]'s request, close the involuntary separation action, direct publication of his Retired Reserve transfer orders, and recommend an Army Grade Determination Review Board."

e. JLV shows the applicant has numerous VA service-connected disability ratings, including one for PTSD.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? YES: PTSD

(2) Did the condition exist or experience occur during military service? YES: The condition has been service connected by the VA

(3) Does the condition or experience actually excuse or mitigate the discharge? NO: PTSD did not prevent the former officer from differentiating right from wrong and adhering to the right. Thus, it cannot mitigate his assault of a police officer, the misconduct which led to his request for transfer to the Retired Reserve in lieu of involuntary separation. It is therefore the opinion of the ARBA medical advisor that a referral of his request to the DES is unwarranted.

#### BOARD DISCUSSION:

1. The Board determined the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

2. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant's request, supporting documents, evidence in the record, and published DoD guidance for liberal consideration of discharge upgrade requests.

a. Reason for Discharge: Deny. The evidence shows the applicant committed acts of serious or recurring misconduct punishable by military or civilian authorities and conduct unbecoming an officer. Specifically, on or about 29-30 August 2019, the applicant resisted arrest and was charged with aggravated assault upon a police officer. As a result, his chain of command initiated separation action against him. As a member of the Selected Reserve, Since he had completed 20 or more qualifying years of service, he was allowed to transfer to the retired Reserve instead. Accordingly, he was transferred to the Retired Reserve effective 18 January 2021, due to unacceptable conduct. The Board found no error or injustice in the reason for his discharge.

b. Medical Separation: Deny. The Board also considered the medical records, any VA documents provided by the applicant and the review and conclusions of the medical reviewing official. The Board agreed with the medical reviewer's determination the applicant's PTSD did not prevent him from differentiating right from wrong and adhering to the right. Thus, it cannot mitigate his assault of a police officer, the misconduct which led to his request for transfer to the Retired Reserve in lieu of involuntary separation. Therefore, the Board agreed that a referral to the disability evaluation system is not warranted.

c. Acknowledgement of VA disability rating for change of military discharge to medical: Deny. The Army rates only conditions determined to be physically unfitting at the time of separation from the military, which disqualify the Soldier from further military service. The VA operated under different policies. The VA 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.

d. Complete copy of his retirement documentation including characterization of discharge: Deny. The applicant was transferred to the Retired Reserve. The Board is not a custodian of his military records. He may request his Retired Reserve orders through his former unit, the U.S. Army Reserve Command, the U.S. Army Human Resources Command, via IPERMS (using DSLogin) or through the National Personnel Records Center.

e. DD Form 214 to show overseas duty in Uzbekistan: Deny. During the processing of the applicant's case, DFAS stated there is no indication the applicant was deployed during October 2016 – July 2017. Additionally, the Board determined the applicant did not provide sufficient documentary evidence in support of this issue.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
■	■	■	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

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

8/8/2024

X

CHAIRPERSON

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

REFERENCES:

1. Title 10, U.S. Code, section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.
2. Army Regulation (AR) 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR begins its consideration of each case with the presumption of administrative regularity, which is that what the Army did was correct.

a. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

b. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

3. Title 10, U.S. Code, chapter 61, provides the Secretaries of the Military Departments with authority to retire or discharge a member if they find the member unfit to perform military duties because of physical disability. The U.S. Army Physical Disability Agency is responsible for administering the Army physical disability evaluation system and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with DoD Directive 1332.18 and Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation).

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

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

4. AR 635-40 establishes the Army Disability Evaluation System and sets forth policies, responsibilities, and procedures that apply in determining whether a Soldier is unfit because of physical disability to reasonably perform the duties of his office, grade, rank, or rating. Only the unfitting conditions or defects and those which contribute to unfitness

will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability.

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

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

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

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

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. A Soldier is physically unfit when medical impairment prevents reasonable performance of the duties required of the Soldier's office, grade, rank, or rating.

d. The percentage assigned to a medical defect or condition is the disability rating. A rating is not assigned until the PEB determines the Soldier is physically unfit for duty. Ratings are assigned from the VASRD. The fact that a Soldier has a condition listed in the VASRD does not equate to a finding of physical unfitness. An unfitting or ratable condition is one which renders the Soldier unable to perform the duties of his or her office, grade, rank, or rating in such a way as to reasonably fulfill the purpose of his or her employment on active duty.

e. There is no legal requirement in arriving at the rated degree of incapacity to rate a physical condition which is not in itself considered disqualifying for military service when a Soldier is found unfit because of another condition that is disqualifying. 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.

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

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

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

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

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

6. AR 600-8-4 (Line of Duty 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. The Army LOD Program is a commander's program which essentially protects the interest of both the Soldier and the U.S. Government where service is interrupted by injury, illness, disease, or death. LOD investigations determine duty status at the time of incident and whether misconduct was involved and, if so, to what degree. Additionally, LOD investigations may be required to determine an existed prior to service condition, and, if so, determine service aggravation.

b. An LOD investigation will be conducted for all Soldiers, regardless of Component, if the Soldier experiences a loss of duty time for a period of more than 24 hours and:

(1) The injury, illness, or disease is of lasting significance (to be determined by a physician, physician assistant, or nurse practitioner).

(2) There is a likelihood that the injury, illness, or disease will result in a permanent disability.

(3) If a Reserve Component Soldier requires follow-on care for an injury, illness, or disease incurred during a period of active duty.

c. A formal LOD investigation is a detailed investigation that normally begins with a DA Form 2173 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.

d. 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.

7. AR 635-8 (Separation Processing and Documents) prescribes policy and procedural guidance relating to transition management. For RC Soldiers ordered to active duty, participating in or supporting a contingency operation, and deployed to a foreign country, enter the following three statements in 1, 2, and 3, below in succession. For RC Soldiers ordered to active duty, participating in or supporting a contingency operation, and stationed in CONUS enter statements in 1 and 3, below. 1. "ORDERED TO ACTIVE DUTY IN SUPPORT OF (OPERATION NAME) PER 10 USC (applicable section)." 2. "SERVICE IN (NAME OF COUNTRY DEPLOYED) FROM (inclusive dates)." 3. "SOLDIER HAS/HAS NOT COMPLETED PERIOD FOR WHICH ORDERED TO ACTIVE DUTY FOR PURPOSE OF POST-SERVICE BENEFITS AND ENTITLEMENTS."

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



of a member who has less than 20 years of service and a disability rating of less than 30%.

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

10. 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.

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

12. On 25 August 2017, the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to DRBs and BCM/NRs when considering requests by Veterans for modification of their discharges due in whole, or in part, to: mental health conditions, including PTSD; traumatic brain injury; sexual assault; sexual harassment. Boards were directed to give liberal consideration to Veterans petitioning for discharge relief when the application for relief is based in whole or in part on those conditions or experiences. The guidance further describes evidence sources and criteria and requires Boards to consider the conditions or experiences presented in evidence as potential mitigation for that misconduct which led to the discharge.

13. Section 1556 of Title 10, U.S. Code, requires the Secretary of the Army to ensure that an applicant seeking corrective action by 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 ABCMR applicants (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//