

IN THE CASE OF [REDACTED]

BOARD DATE: 17 April 2024

DOCKET NUMBER: AR20230005490

APPLICANT REQUESTS: in effect: his DA Form 199 (Physical Evaluation Board (PEB) Proceedings) corrected to show:

- a combined rating of 100 percent in lieu of 30 percent
- placement on the Permanent Disability Retired List (PDRL) in lieu of placement on the Temporary Disability Retired List (TDRL)
- the following conditions added and rated:
 - obstructive sleep apnea with hypoxia, combat related
 - chronic obstructive pulmonary disease (COPD), combat related
 - cervical spine conditions
 - right shoulder injury, combat related
 - lumbar spine spondylolisthesis, combat related
 - posttraumatic stress disorder (PTSD) , combat related
 - traumatic brain injury (TBI), combat related

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

- ARBA online application in lieu of DD Form 149 (Application for Correction of Military Record)
- Department of Veterans Affairs (VA) award letter, 17 October 2012
- VA decision letter, 12 December 2012
- Army medical records (32 pages)
- VA medical records (647 pages)

FACTS:

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

2. The applicant states he was placed on the Temporary Disability Retired List (TDRL), however he out processed on his original expiration of term of service (ETS) date. During out processing, he asked where his retirement documents and TDRL instructions were, as he was to receive a retired identification card. He was told he was misinformed. Fort Knox did not have a wounded warrior or warrior transition team to assist medical retirees. He later received a letter stating he needed to report to Brooke Army Medical Center (BAMC) for a final decision and transfer to the PDRL. He was told a higher rating would not change his benefits since he had a VA offset waiver and it would be futile to appeal the decision. At the time of his separation, the VA had rated him 100 percent totally and permanently disabled. Since the Army used the VA's rating system at the time of his TDRL review, his review should match his VA ratings. The entire time he was on TDRL he was seen by a medical practitioner one time; he does not believe there was enough medical evidence to justify the low retirement rating he was granted based on the VA's ratings.

a. A few weeks before separation, he was subject to a sleep study, which was not included in his medical board. He has severe sleep apnea and hypoxia and believes he should have been rated for this condition by the Army.

b. In 2002, he hurt his right shoulder and was seen in the emergency room. The pain subsided after several days so he did not seek follow up until after separation. He had surgery in 2009 to repair his rotator cuff and partial bicep tear. He was advised he had a healed injury to his clavicle.

c. In 2003, his truck was hit by an improvised explosive device (IED) in Fallujah. The vehicle flipped and threw him out of the turret. He was concussed, had a laceration to his left hand, leg pain, shoulder pain and back pain. He was medevac to an 82nd Airborne CASH where he was treated. He was released back to his unit and given a 30 day profile. A few days later he began to feel sore but after a few days the pain subsided, and he never followed up.

d. After his second deployment, on 21 May 2006, he was assaulted by being hit with a pipe in the head back and cervical spine and kicked several times. He was treated at Evans Army Medical Center, Fort Carson. This ultimately resulted in a C4 laminectomy surgery on 7 June 2019.

e. He has posttraumatic stress disorder (PTSD) that is debilitating at times. The doctor conducting his medical review lowered his PTSD rating evaluation because he said it had improved. He does not believe that enough time had gone by to justify an improvement his mental condition. He had just been under in-patient care for almost 90 days for PTSD.

f. His conditions are not shown connected to his service in Iraq, specifically his asthma, COPD, hypoxia, and PTSD. His first diagnosis, post-deployment, stated his breathing and loss of lung function are a result of asthma due to exposure to toxic fumes during deployment in Iraq. His lumbar spine fusion, right shoulder condition and one head injury should also be combat related.

g. He suffered 3 concussions while on active duty and he should be service connected for traumatic brain injury (TBI) for:

- 25 October 2003 - concussion suffered as the result of an IED and vehicle rollover
- 24 August 2004 - concussion from assault
- 21 May 2006 - concussion from being assaulted with a pipe to the head and other parts of the body

3. The applicant underwent a medical examination on 24 March 2001 for enlistment. His Standard Form (SF) 93 (Report of Medical History) shows he reported he was in good health. The corresponding SF 88 (Report of Medical Examination) was found qualified for enlistment and 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.

4. The applicant enlisted in the Regular Army on 19 September 2001. He was deployed in support of Operation Iraqi Freedom from 1 April 2003 to 31 March 2004 and 4 March 2005 to 19 February 2006.

5. The applicant's DA Form 2166-8 (Non-Commissioned Officer (NCO) Evaluation Report (NCOER)) covering the period November 2005 to June 2006 shows the applicant passed his Army Physical Fitness Test (APFT) in April 2006. He was rated marginal by his rater and fair by his senior rater.

6. The applicant's NCOER covering 1 July 2006 to 30 June 2007 shows he failed the APFT's 2 mile run. He was rated marginal by his rater and fair by his senior rater.

7. A DA Form 199 shows an Informal PEB convened on 11 December 2007, wherein the applicant was found physically unfit with a recommended rating of 30 percent and that his disposition be placement on the TDRL.

a. The applicant was found unfit for asthma, existing prior to service, permanently service aggravated by respiratory infections and exposure to dust, fumes, and irritants during two tours of duty in Iraq.

b. The PEB determined the applicant's 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.

c. The applicant concurred and waived a formal hearing of his case. The proceedings were finalized on 3 January 2005.

8. The applicant's NCOER covering 7 July 2007 to 15 February 2008 shows he passed a APFT on 30 October 2007. He was rated fully capable by his rater and successful by his senior rater.

9. The applicant was retired from active duty on 6 March 2008 and placed on the TDRL. He was credited 6 years 5 months 18 days net active service.

10. On 25 March 2013, the applicant was notified of the findings and recommendations of his TDRL periodic physical examination and provided a copy of his narrative summary (NARSUM).

11. An Informal PEB convened on 11 April 2013, wherein the applicant was found to continue to be physically unfit with a recommended rating of 30 percent and that his disposition be placement on the permanent disability retirement list for his asthma. He concurred and waived a formal hearing of his case. The proceedings were finalized on 12 April 2013.

12. On 18 April 2013, the applicant was notified of his removal from the TDRL effective 6 March 2013 and placement on the PDRL with a rating of 30 percent.

13. The applicant provided a VA award letter, dated 17 October 2012, showing his rating for obstructive sleep apnea with asthma increased from 50 percent to 100 percent effective 25 January 2011. His VA letter, dated 12 December 2012, confirms his rating.

14. 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.

15. 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 (EMR – AHLTA and/or MHS Genesis), 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 applied to the ABCMR requesting the military disability rating for his unfitting asthma be increased from 30% to 100%. He states: "Because I got 30% retirement from service and my condition never got better." He also requests numerous injuries, to include a cervical spine condition, a right shoulder injury, PTSD, TBI, and a lumbar spine condition be added as additional unfitting medical conditions. Finally, he requests that his asthma be determined combat related.

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. His DD 214 shows he entered the regular Army on 19 September 2001 and was placed on the Temporary Disability Retirement List on 6 March 2008 under provisions provided in paragraph 4-24b(2) of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (8 February 2006).

d. After his TDRL reevaluation and informal physical evaluation board in 2013, 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 6 March 2013 with a military disability rating of 30%.

e. The applicant was placed on a permanent duty limiting physical profile for asthma on 19 November 2007.

f. An MEB subsequently determined that his Asthma was the sole condition which failed medial retention standards. From the Narrative Summary:

"ASSESSMENT: This patient is suffering from moderate to severe persistent asthma, clearly exacerbated type of form in military service in Iraq. He was exposed to heavy amounts of air pollution and diesel exhaust fumes. The plan is

for the patient to pick-up his home nebulizer today and he is to use the Pulmicort Respules and Xopenex Neb Treatments twice a day as instructed.

He will be issued a permanent profile restricting his activities to PT at own pace and distance and no deployment to an area of high air pollution. It is hoped that with good asthma control., his condition will stabilize in the relatively near future.”

g. They determined his PTSD (treated), ADHD, hypertension, and rhinitis met medical retention standards. They errantly determined his alcohol dependence met medical retention standards as it is not eligible for such a determination because the condition is not considered a disability by the Army. On 30 December 2007, the applicant agreed with the board’s findings and recommendation and his case was forwarded to a physical evaluation board (PEB) for adjudication.

h. On 11 December 2007, his informal PEB determined his asthma was the sole unfitting condition for continued service and the remaining conditions were determined to not be unfitting for continued service. They made the administrative determination that his asthma was not combat related. They found no evidence that it was the direct result of armed combat; was related to the use of combat devices (instrumentalities of war); the result of combat training; incurred while performing extra hazardous service though not engaged in combat; incurred while performing activities or training in preparation for armed conflict in conditions simulating war; or that he was a member of the military on or before 24 September 1975.

i. The pulmonary notes state the applicant was exposed to smoke, fumes, and dust, but this does not meet the criteria for a combat related finding under instrumentality of war. An instrumentality of war is defined as a vehicle, vessel, or device designed primarily for military service and intended for use in such Service at the time of the occurrence or injury. They may also include such instrumentalities not designed primarily for military service if use of or occurrence involving such instrumentality subjects the individual to a hazard peculiar to military service. For a disability to be incurred as a result of an instrumentality of war under the Department of Defense’s 2004 Program Guidance, (1) the “disability must be incurred incident to a hazard or risk of the service” and (2) there “must be a direct causal relationship between the instrumentality of war and the disability.”

j. Neither burn pit fires, the burning of oil or refuse are instrumentalities, vehicle fumes, nor dusts are instrumentalities of war designed primarily for a military purpose. While there has been much study into the effects of the oil produced smoke and burn pit smoke on Soldiers and smoke in general is hazardous, smoke from these sources is not an instrumentality of war; nor is exposure to smoke from burning oil, refuse, burn pits, or structures uniquely military and different from occurrences in similar circumstances in civilian pursuits. Fumes or gases which may render a condition combat related via an

instrumentality of war when the condition is directly caused by enemy attack (e.g., a chemical agent) or when caused from the burning of such items as military ordnance, vehicles, or other military material.

k. Using the VA Schedule for Rating Disabilities (VASRD, they derived and applied a rating of 30% stating "Currently maintained on home nebulizer with daily use. Rated 30% for daily use of inhaled bronchodilators. Not yet stable on treatment." This made the condition unstable for final rating and so the PEB recommended he be placed on the TDRL. On 3 January 2008, after being counseled on the board's findings and recommendation by his PEB liaison officer, he concurred with the PEB and waived his right to a formal hearing.

l. From his 26 February 2013 TDRL reevaluation narrative summary:

Asthma - diagnosis based upon prior symptoms and significant bronchodilator response. The narrative summary however is a bit inconsistent because it describes a number on normal spirometry tests (not clear is on or off asthma therapy) and the one abnormal spirometry in allergy with the dramatic response to the SABA [Short-Acting Beta-Agonists].

Suspect today's spirometry reflects the over 60 lbs. gained (spiro wt. in Oct 2007 227lbs, today 290) and now has a more restrictive pattern to his PFTs [pulmonary function test] [pulmonary function test]. Suspect the weight gain is in part due to the chronic prednisone therapy. Hypoxia is not a typical feature of asthma and especially hypoxia requiring supplemental oxygen at such a young age.

There is some other etiology that is yet to be discovered that would account for the hypoxia. He has been evaluated by and is follow by the VA pulmonary service and should make a follow up appointment with them to finish the diagnostic w/u for hypoxia.

The patient does not meet retention standards for asthma due to chronic immunosuppression therapy with prednisone, inability to pass an APFT. There is also the new concern of hypoxia that was not documented on his original MEB that has yet to be clarified. The supplemental oxygen requirement also does not meet retention standards.

m. On 11 April 2013, his informal TDRL PEB found his Asthma continued to be unfitting for military service.

n. Neither conditions found not unfitting at the initial PEB nor additional conditions which developed during the interim and are not directly related to an unfitting condition

are eligible for TDRL PEB evaluation. Only conditions found unfitting at a Soldier's initial PEB or those that may have developed in the interim and are directly related to it (e.g., Soldier on TDRL for lumbar disc disease develops a radiculopathy) are evaluated as part of the TDRL reevaluation. While previously not unfitting conditions may have worsened or the applicant develops additional service incurred conditions during the interim, these Soldiers are retired veterans, and 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.

o. The VA Schedule for Rating Disabilities (VASRD) is the document used by the military services to rate unfitting military disabilities. Paragraph B-1a and B1b of Appendix B to AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (8 February 2006):

B-1. Purpose of the Department of Veterans Affairs Schedule for Rating Disabilities (VASRD)

- a. Congress established the VASRD as the standard under which percentage rating decisions are to be made for disabled military personnel. Such decisions are to be made according to Title IV of the Career Compensation Act of 1949 (Title IV is now mainly codified in 10 USC 61.)
- b. Percentage ratings in the VASRD represent the average loss in earning capacity resulting from these diseases and injuries. The ratings also represent the residual effects of these health impairments on civil occupations.
- p. Using the VASRD, the PEB incorrectly rated the applicant's asthma using VASRD diagnostic code 6602 – Asthma, bronchial. The provider who performed his TDRL reevaluation examination stated the applicant was on chronic steroid therapy for his asthma: "The patient does not meet retention standards for asthma due to chronic immunosuppression therapy with prednisone ..." This was confirmed in review of his outpatient medication list in the EMR. It shows he was prescribed Prednisone, 10 mg tablets, to be take one daily on 16 December 2012. The prescription was for 90 tablets with two refills, both of which were used, for a total of 270 tablets. He had also been prescribed several inhaled steroids.

q. The two relevant ratings:

FEV-1 of 40- to 55-percent predicted, or; FEV-1/FVC of 40 to 55 percent, or; at least monthly visits to a physician for required care of exacerbations, or; intermittent (at least three per year) courses of systemic (oral or parenteral) corticosteroids60

FEV-1 of 56- to 70-percent predicted, or FEV-1/FVC of 56 to 70 percent, or daily inhalational or oral bronchodilator therapy, or inhalational anti-inflammatory medication30

r. Though he is currently rated at 100% for his asthma, this was not at the time of his removal from the TDRL and may be a temporary rating. In their 4 August 2020 narrative for this 100% rating which was made effective 25 January 2011, the VA stated:

“Although recent evidence shows some improvement in the condition, sustained improvement has not been definitively established. Although the current examination does not note continued need for daily high dose corticosteroids the current examination also does not contain pulmonary function test results which could potentially support continuing your 100 percent disability evaluation independent of the medication considerations.

We have assigned a 100 percent evaluation for your obstructive sleep apnea with asthma based on:

- Requires daily use of systemic (oral or parenteral) high dose corticosteroids

s. The use of high does corticosteroids is one criterion which yields a 100% rating.

t. JLV shows he has been awarded multiple VA service-connected disability ratings, including a 30% rating for PTSD and a 20% rating related to his right upper extremity. He has no spine related ratings. However, 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.

u. It is the opinion of the Agency Medical Advisor the applicant’s military disability rating should be increased to 60% effective 6 March 2013.

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 medical review, the Board concurred with the advising official finding the applicant's military disability rating should be increased to 60% effective 6 March 2013. The opine noted the applicant is currently being awarded multiple VA service-connected disability ratings, including a 30% rating for PTSD and a 20% rating related to his right upper extremity. He has no spine related ratings.

2. The Board agreed there is sufficient evidence to partially grant the applicant's contentions based on the advising opine. The Board noted 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. As such, the Board granted partial relief to increase the applicant's military disability rating to 60%.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

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

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined the evidence presented is 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 to the applicant's military disability rating is increased to 60% effective 6 March 2013.

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 a combined rating of 100 percent in lieu of 30 percent and placement on the Permanent Disability Retired List (PDRL) in lieu of placement on the Temporary Disability Retired List (TDRL).

4/19/2024

X [Redacted Signature]

CHAIRPERSON

[Redacted Name]

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

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

a. Soldiers are referred to the disability system when they no longer meet medical retention standards in accordance with Army Regulation 40-501 (Standards of Medical

Fitness), chapter 3, as evidenced in an MEB; when they receive a permanent medical profile rating of 3 or 4 in any factor and are referred by an MOS Medical Retention Board; and/or they are command-referred for a fitness-for-duty medical examination.

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

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

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

4. Title 38 USC, section 1131 (Peacetime Disability Compensation - Basic Entitlement) states for disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during other than a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation

as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

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

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

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

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

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

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

7. Section 1556 of Title 10, USC, requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that

directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

8. 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.

9. 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.

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.

//NOTHING FOLLOWS//