

IN THE CASE OF: [REDACTED]

BOARD DATE: 8 February 2024

DOCKET NUMBER: AR20230005655

APPLICANT REQUESTS: through Counsel:

- referral to the Integrated Disability Evaluation System (IDES) for physical disability separation with severance pay or physical disability retirement in lieu of uncharacterized discharge from the Army National Guard (ARNG) due to failure to attend Initial Entry Training (IET) within 24 months
- personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Counsel's letter
- List of Exhibits
- Counsel's Brief
- 225 pages of records as enumerated in the List of Exhibits, labeled Exhibits 1 -14

FACTS:

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

2. Counsel states:

a. The applicant was a member of the [REDACTED] ARNG ([REDACTED] ARNG), service on active duty from 3 August 2016 until 14 December 2016. In September 2016, while on active duty orders for training, he severely injured his right ankle during Basic Combat Training (BCT) at Fort Jackson, SC. Despite the injury, the applicant has a strong desire to continue to serve his country in the [REDACTED] ARNG, so the Army released him from active duty (REFRAD) so he could rehabilitate his ankle, with the intent for him to return to BCT in 6 months.

b. At the time of the applicant's injury in September 2016, his treating physical therapist, Captain (CPT) [REDACTED] recommended that it may be in his best interest to refer him to a Medical Evaluation Board (MEB) due to his injury. Due to his desire to continue to serve his country, the applicant declined. On 1 December 2016, CPT [REDACTED] wrote: "Soldier was given option of MEB; however, the patient declined an MEB due to desire to return to military service at a later date. Soldier was advised that an MEB may be in his best interest; however, the Soldier stated he would prefer a REFRAD with the option to return to BCT in 6 months. I therefore recommend this Soldier receive a REFRAD to complete his rehabilitation."

c. On 5 December 2016, Sergeant First Class (SFC) [REDACTED] wrote a memorandum amending the applicant's active duty orders and giving him a REFRAD. This memorandum states the applicant was being REFRAD for injury recovery to the control of the [REDACTED] ARNG and clearly shows he was discharged from active duty due to his ankle injury. During the course of his treatment, several doctors stated that his injury was severe enough that he should be medically discharged. Unfortunately, his injury necessitated several surgeries, with his third surgery taking place on 4 September 2018. Since his REFRAD for this injury, the applicant has been unable to return to BCT as a result of this injury.

d. During his treatment at Walter Reed National Military Medical Center (WRNMMC) in October 2018, the applicant's doctor determined his condition mandated a referral to IDES. His doctor assigned him a "P3" physical profile, which automatically triggers such a referral. This referral was never conducted; however, and the applicant learned in 2019 that he had been administratively separated from his unit under the provisions of National Guard Regulation 600-200 ((Enlisted Personnel Management)), paragraph 6-35d(4), for failure to attend IET (phase I or II) within 24 months. He was never processed through IDES and was improperly separated. The applicant continues to suffer from the injuries he received from his fall and has received a combined disability rating from the Department of Veterans Affairs (VA) of 100 percent.

e. The applicant is seeking to have his administrative discharge for failure to attend IET within 24 months be corrected to a medical separation or retirement. Army Regulation 15-185 (Army Board for Correction of Military Records (ABCMR)) states an application is timely if filed within 3 years of the date of discharge or discovery of the error or injustice. The applicant's request is timely as he was discharged from the [REDACTED] ARNG on 31 July 2018, and filed his original request to the ABCMR within 3 years of that date.

f. On 5 January 2022, the ABCMR administratively closed the applicant's original request and directed him to first apply to The Adjutant General for the Commonwealth of Virginia for relief and advised he may reapply to the ABCMR after he obtained a decision from The Adjutant General of the Commonwealth of Virginia and/or the Chief,

National Guard Bureau (NGB). Subsequently, on 26 January 2023, The Adjutant General, [REDACTED] ARNG, Major General (MG) [REDACTED] denied the applicant's request; therefore, his matter is correctly and timely before the ABCMR.

g. The applicant respectfully requests the ABCMR grant his request for a change to his records and process him through IDES for his service-connected disabilities, pursuant to Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation).

h. The applicant enlisted in the [REDACTED] ARNG, was ordered to active duty for training, and on 3 August 2016, reported to Fort Jackson, SC, for his IET. On 13 September 2016, while in BCT, the applicant tripped while exiting a bus. He suffered severe injuries from his fall, including a dislocation and fracture of his lower right leg, which necessitated an ambulance response and transportation to the hospital.

i. Dr. [REDACTED], of [REDACTED] Orthopedics and Neurosurgery in [REDACTED] performed an open reduction and internal fixation (ORIF) surgery on the applicant's right ankle on 20 September 2016. ORIF surgery involves re-aligning a person's bones back into place after a break. The definition of ORIF surgery illustrates its severity. "Open reduction" means to reposition that pieces of a bone during surgery, and "internal fixation" means a physical reconnection of the bones, usually by means of screws, plates, rods, wires, or nails inserted into the bones. The applicant's surgery required two screws.

j. After undergoing ORIF surgery, the applicant was placed on convalescent leave to recover, during which time he returned to [REDACTED], where he continued his rehabilitation. Upon his return to Fort Jackson, SC, the applicant had a follow-up with Dr. [REDACTED]. In a letter dated 30 November 2016, Dr. [REDACTED] stated the applicant would need a second surgery to remove the two screws from his ankle. He wrote: "Due to the nature of his injury, I do not believe that he will be able to perform full military duties necessary to continue his training at this time. He will be undergoing another surgery for his ankle and I do not anticipate full recovery for at least 6 months. Therefore, I do recommend medical discharge from the military at this time." This letter was written while the applicant was still on active duty and supports the fact that he was discharged from active duty due to his service-connected ankle injury.

k. The applicant was given the option of processing through an MEB for his injury. Despite being advised that an MEB was in his best interest, the applicant was adamant about eventually returning to active duty because he had a strong desire to continue to service his country. On 5 December 2016, his active duty orders were modified that he could be REFRAD for injury recovery. His REFRAD was executed on 14 December 2016, with the option to return to BCT in 6 months after the completion of his rehabilitation.

l. On 20 December 2016, the applicant underwent his second surgery in order to remove the screws in his right ankle. Following the surgery, his doctors concluded he would be unable to perform full military duties and would be unable to continue his training at that time. In a letter dated 5 January 2017, Ms. [REDACTED] Physician Assistant, certified (PA-C) from the Orthopedic [REDACTED] in [REDACTED] wrote: “[The applicant] underwent surgery for a right ankle fracture on 20 September 2016 with hardware removal on 20 December 2016. Due to the nature of his injury, I do not believe he will be able to perform full military duties necessary to continue his training at this time. He will be undergoing physical therapy (PT) for rehabilitation of his ankle and I do not anticipate full recovery for at least 6 months. Therefore, I do recommend medical discharge from the military at this time.” This note was written within 30 days of the applicant’s REFRAD due to his ankle injury.

m. In 2018, the applicant underwent treatment for his injuries at WRNMMC. In October 2018, his doctor determined the applicant’s injuries were still causing him significant pain and discomfort, resulting in significant post-traumatic ankle arthritis that is very functionally limiting. His doctor further assigned him a P3 physical profile, which should automatically trigger a referral to IDES, in order to be evaluated for fitness for duty, and if found medically unfit for duty, provided with a VA disability rating. After that point, the service member is either returned to duty or medically separated.

n. The applicant’s doctor determined his condition mandated referral to IDES. His doctor gave him a P3 profile, which automatically triggers such a referral. This referral never transpired; however, and the applicant learned in 2019 had been administratively separated from his unit for failure to attend IET (phase I or phase II within 24 months). He was never processed through IDES and was improperly separated. The applicant continues to suffer from the injuries he received as a result of his fall and has been given a combined VA disability rating of 100 percent.

o. The applicant’s medical records indicate ongoing complications from his ankle injury. He has suffered from anterior tibiotalar osteophytes and chronic painful hardware since his 2017 ORIF surgery. The nerves in his right foot are decreased globally compared to his left foot. The applicant’s doctors recommended that the hardware be removed. He underwent surgery to remove the hardware in his ankle as well as ankle arthroscopy with extensive debridement and diffuse talar chondroplasty in September 2018. During a follow-up appointment the next month, Dr. [REDACTED] noted the applicant continues to have significant post-traumatic ankle arthritis that is very functionally limiting. The applicant was custom fitted for an intrepid dynamic exoskeletal orthosis (IDES) brace at the time. Despite the brace, he has continued to experience pain in his ankle and is only moderately functional. His doctors have noted he may require ankle fusion at some point in the future.

p. The VA has assigned the applicant a combined disability rating of 100 percent, which includes a rating for his ankle injury. This rating includes a 20 percent rating for calcaneal spur, right foot; 20 percent rating for trochanteric pain syndrome, left hip; a 10 percent rating for two tender scars, right lateral and medial ankle associated with right ankle; a 10 percent rating for patellofemoral pain syndrome left knee; and a 10 percent rating for right ankle degenerative arthritis, intraosseous membranous calcification and calcaneal spur status post (s/p) dislocation and fracture, ORIF, arthroscopy, debridement, and hardware removal. He also received a rating of 10 percent for right hip strain (limitation of extension); 10 percent for right hip strain (impairment of thigh); and 10 percent for right knee strain with patellofemoral pain syndrome and shin splints, all of which are associated with the initial injury to his right ankle.

q. On 31 July 2019, the applicant was administratively discharged from the [REDACTED] ARNG, for failure to attend IET (phase I or phase II) within 24 months. As discussed above, it was his injury that rendered him unable to attend IET, an injury which was incurred at BCT and has been found service-connected.

r. The applicant's request for correction of his military records should be granted to correct an error or remove an injustice. 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 rated at least at 30 percent. The applicant is currently rated with a combined evaluation of 100 percent, effective 23 June 2021.

s. The applicant's condition warranted a referral through the IDES, which would have resulted in a medical separation or medical retirement. IDES is a joint program between the VA and the Department of Defense (DOD) that is part of VA's pre-discharge system, allowing service members to file claims for disability compensation prior to separation or retirement from active duty or full-time National Guard or Reserve duty.

t. If a service member is processed through IDES, they are evaluated for continued fitness for duty, and if found medically unfit for duty, they are provided a proposed VA disability rating. After that point, the service member is either returned to duty or separated. A referral to the IDES process is mandated when a Soldier receives a sufficiently serious rating in any one of the six areas of consideration, specifically: physical capacity (P), upper extremities (U), lower extremities (L), hearing and ears (H), eyes (E), and psychiatric (S). This is known as the PULHES grading system. Soldiers are rated in each of those areas on a numeric scale of 1 through 4. In addition to the numerical rating, each category is also assigned a designation of temporary or permanent.

u. A code of 1 or 2 generally means that a Soldier can deploy and meet the obligations of their Military Occupational Specialty (MOS) with few, if any, restrictions. A

rating of 3 or above and a designation of permanent in any category is considered to have medical conditions or physical defects with significant functional or activity limitations and warrant processing through the MAR2 (MOS Administrative Retention Review) or DES process. If under the PULHES rating system, a Soldier is issued a permanent profile and if that profile contains a numerical designator of P3/P4 in any of the serial profile factors for a condition that appears not to meet medical retention standards, then that Soldier is to be referred to IDES within 1 year. Once referred, the IDES medical examination procedures include a general medical examination and any other applicable medical examinations performed to VA Compensation and Pension (C&P) standards. Collectively, the examinations will be sufficient to assess the member's referred and claimed condition(s), assist the VA in ratings determinations, and assist military departments with unfit determinations.

v. The applicant fits the criteria for IDES referral precisely. He was rated a permanent 3 in one category, legs, due to his ankle injury. During his treatment at WRNMMC, his doctor stated they would give him a P3 profile for his significant post-traumatic ankle arthritis, in order to begin the process of MEB evaluations. An IDES referral should have commenced immediately upon his receipt of a 3 rating in his lower extremities.

w. As one ABCMR case put it, "the requirements for referral to the IDES system are clear." If a Soldier is found to have "persistent or recurrence of symptoms necessitating limitations of duty or duty in protected environment," regulations require that the Soldier be "referred to the IDES for further evaluation." That particular case dealt with a Soldier who was found fit for duty, but whose service-connected post-traumatic stress disorder (PTSD) and major depressive disorder rendered him ineligible for a security clearance and unable to carry a weapon for 3 months. Despite the fact that this Soldier was found to be generally fit for duty and able to service, the limitations on his security clearance and inability to carry a weapon constituted a sufficient limitation on his duty restriction in his MOS to trigger a mandatory IDES referral.

x. Even more so than in the above case, the applicant's ankle injury plainly and visibly resulted in unfitness for duty. He suffered serious and disabling physical injuries as a result of his fall, including a dislocation and fracture of his leg. The surgery performed on the applicant involved the insertion of two screws into the bones of his leg and even after their removal, two different doctors stated they did not believe he would be able to perform full military duties necessary to continue his training and both recommended his medical discharge.

y. In another ABCMR case, a Soldier was diagnosed with several medical conditions, including PTSD, during their time in the DCARNG. This diagnosis was eventually determined to be service-connected and the Board held that, "it is reasonable to presume his PTSD condition may have failed retention standards," and that his

Soldier “met the criteria for referral to the IDES under the provisions of Army Regulation 635-40.” Similar to that case, the applicant’s injuries are service-connected. However, unlike that case, there is no reason to speculate or presume whether or not his conditions failed retention standards. Two of his treating doctors stated explicitly that they recommended medical discharge as a result of his injuries that rendered him unable to continue his training. Further, the applicant was issued a P3 profile for his ankle injury while he was still serving in the [REDACTED] ARNG and he should have been referred to IDES.

z. Although the applicant received an honorable discharge, he should have been separated through medical channels and medically separated or retired due to his ankle injury, since his condition prevented him from performing his duties and responsibilities. The applicant’s separation deprived him of processing through the proper channels that would have accounted for his service-connected injuries. The applicant was administratively discharged for failure to complete his IET within 24 month, but he was physically unable to complete his IET. During that 24 month time span, he was still undergoing significant treatments for his service-connected injury and should have been processed through an MEB by his unit, as recommended by several of his doctors.

aa. The applicant suffered a debilitating ankle injury from a fall he sustained during BCT. Due to this injury, he experienced and continues to experience significant detrimental health effects. As a result of his injury, not only was he REFRAD and subjected to highly invasive medical procedures, he was discharged from his [REDACTED] ARNG unit for failure to attend IET. The applicant was only unable to complete training because of his service-connected injury and should have been processed through IDES rather than administratively discharged for failure to complete IET.

3. The applicant enlisted in the [REDACTED] ARNG on 20 January 2016.

4. Military Entrance Processing Station Orders 6216026, dated 19 July 2016, ordered the applicant to initial active duty for training (IADT) with a report to BCT at Fort Jackson, SC, on 3 August 2016 and follow-on reporting to Advanced Individual Training (AIT) in MOS 91B (Wheeled Vehicle Mechanic) at Fort Lee, VA, on 17 October 2016.

5. A Standard Form 600 (Chronological Record of Medical Care), dated 13 September 2016, shows the following:

a. The applicant, a soldier in training at Fort Jackson, SC, was transported off post by the Fort Jackson Emergency Medical Service (EMS) to the Providence Health Northeast Emergency Room (ER) in Columbia, SC, with a dislocated right ankle.

b. The applicant was discharged from the ER to Midlands Orthopedics for a walk-in appointment. At Midlands Orthopedics, he was given a same day evening appointment.

6. A second SF 600, dated 22 September 2016, shows the following:

a. The applicant was admitted to [REDACTED] Hospital in [REDACTED] on 20 September 2016, for ORIF of his right ankle fractures. This was a planned follow-up surgery to the original office visit on 13 September 2016. The applicant was discharged from the hospital to his training unit on 22 September 2016

b. The applicant was in a full-length cast of his right leg given Eliquis and Percocet for pain control. He was to follow up with orthopedics on 3 October 2016 and was discharged to medical quarters with strict non-weight bearing.

7. Numerous additional medical documents from Providence Health NE, including a Radiology Report and Providence Health Operative Report, dated 20 September 2016, have been provided in full to the Board for review, and likewise show the applicant underwent ORIF of his right ankle trimolecular fracture with syndesmosis fixation on 20 September 2016, subsequent to his fall in BCT, detailing the procedure in full.

8. A DA Form 2173 (Statement of Medical Examination and Duty Status) shows the following:

a. The applicant was admitted to [REDACTED] Hospital on 13 September 2016 for nondisplaced trimalleolar fracture of right lower leg.

b. On 4 October 2016, the patient administrator indicated medical documentation shows the injury occurred in BCT at Fort Jackson, SC. It was reported through the Fort Jackson, EMS they arrived on the scene at 0810 to find the applicant, a student in training, with a dislocated right ankle. He had fallen off the bus going to the range.

c. The details of the accident show the applicant tripped while unloading the bus and rolled his ankle while falling, resulting in a broken ankle and necessary surgery.

d. The applicant's company commander signed the form on 6 October 2016, indicating that a formal Line of Duty (LOD) investigation was not required and the injury is considered to have been incurred in the LOD.

9. A Headquarters, 193rd Infantry Brigade, U.S. Army Training Center of Excellence, Fort Jackson, SC, memorandum dated 13 October 2016, shows an informal LOD was reviewed for completeness and his injury was found in the LOD.

10. A Midlands Orthopaedics and Neurosurgery letter, signed by Dr. [REDACTED] dated 30 November 2016, shows Dr. [REDACTED] was treating the applicant for his right ankle fracture. Due to the nature of his injury, he did not believe the applicant would be able to



perform full military duties necessary to continue his training at this time. He will be undergoing another surgery for his ankle and the doctor did not anticipate full recovery for at least 6 months. Therefore, he recommended the applicant's medical discharge from the military at this time.

11. A Moncrief Army Health Clinic memorandum for record, signed by CPT [REDACTED] [REDACTED] Physical Therapy, dated 1 December 2016, shows the following:

a. The applicant dislocated his right ankle on 13 September 2016 while in BCT. He was initially referred to the Troop Medical Clinic (TMC) Physical Therapy on 5 October 2016, after receiving ORIF surgery to his right ankle on 20 September 2016, by Dr. [REDACTED] a [REDACTED] Orthopedics.

b. The applicant was placed on convalescent leave and returned to [REDACTED] where he continued his rehabilitation and also received a second evaluation by another orthopedic surgeon, Dr. [REDACTED]. Upon returning from convalescent leave, the applicant had a follow-up with Dr. [REDACTED] who confirmed that he would need a second surgery to remove two screws from his ankle. Dr. [REDACTED] advised the applicant he would likely not be able to return to BCT for at least 6 months following the second surgery.

c. The applicant is highly motivated to stay in the military. His second surgery is not yet scheduled, but he is expected to be able to return to BCT after 6 months of rehabilitation. Due to his current limitations, CPT [REDACTED] recommended the applicant's REFRAD so he could return to his home unit and complete his rehabilitation.

d. The applicant was given the option of an MEB; however, he declined an MEB due to a desire to return to military service at a later date. He was advised that an MEB may be in his best interest; however the applicant stated he would prefer a REFRAD with the option to return to BCT in 6 months. It was therefore recommended that the applicant receive a REFRAD to complete his rehabilitation.

12. A memorandum from the Training and Doctrine Command (TRADOC) ARNG Liaison Noncommissioned officer to the Trainee/Student Processing Center, Fort Jackson, SC, dated 5 December 2016, shows the following:

a. The unused portion of the applicant's active duty for training orders, dated 19 July 2016, were to be rescinded and the applicant was to be REFRAD from initial active duty training on or about, but no later than 13 December 2016.

b. The reason for the REFRAD is injury recovery. The applicant was being released to the control of the [REDACTED] ARNG and was counseled on returning to his parent

unit within 72 hours. The applicant is not a BCT graduate and is not MOS qualified for 91B.

13. The applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) shows the applicant was honorably REFRAD on 14 December 2016, due to completion of required active service and transferred back to his [REDACTED] ARNG unit. He was credited with 4 months and 12 days of net active service and was not awarded an MOS.

14. A Providence Health Operative Report, dated 20 December 2016, shows on the date of the report the applicant underwent removal of right ankle syndesmotom screws by Dr. [REDACTED]

15. A letter [REDACTED] PA-C [REDACTED], dated 5 January 2017, shows the following:

a. The applicant underwent surgery for a right ankle fracture on 20 September 2016, with hardware removal on 20 December 2016. Due to the nature of this injury, she did not believe he would be able to perform full military duties necessary to continue his training at this time.

b. The applicant would be undergoing physical therapy for rehabilitation of his ankle and she did not anticipate full recovery for at least 6 months. Therefore, she recommended medical discharge from the military at this time.

c. The applicant's diagnoses were as follows:

- closed dislocation of right ankle, subsequent encounter
- bimalleolar fracture of right ankle, open type III, with routine healing, subsequent encounter
- contracture of right Achilles tendon

16. A physical profile is used to classify a Soldier's physical disabilities in terms of six factors or body systems, as follows: "P" (Physical capacity or stamina), "U" (Upper extremities), "L" (Lower extremities), "H" (Hearing), "E" (Eyes), and "S" (Psychiatric) and is abbreviated as PULHES. Each factor has a numerical designation: 1 indicates 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.

17. The applicant's records do not contain and he has not provided a copy of any of the DA Forms 3349 (Physical Profile) he may have been issued while in the ARNG, to

ascertain if he was ever issued a permanent profile rating of 3 or 4 for his ankle injury during his period of service.

18. The applicant's DA Form 4037 (Enlisted Record Brief (ERB)), dated 16 November 2017, shows the applicant's physical profile rating was "1" in all factors, with his last physical exam being in January 2000, a date that predates his military service.

19. A Standard Form 600, dated 27 June 2018, shows the applicant was seen at the WRNMMC, Orthopaedic Foot and Ankle Clinic on the date of the form for pain in the right ankle and joints of the right foot. The applicant was seen in a follow-up 1 year prior, when hardware removal was recommended, as this is where his residual pain was originating from; however, he was separating from the military at that time. He was now returning to again request hardware removal since his right ankle was still painful.

20. ■■■ ARNG Orders 212-016, dated 31 July 2018, discharged the applicant from the ARNG and as a Reserve of the Army effective the date of the orders, under the provisions of National Guard Regulation 600-200, paragraph 6-35, with an assignment/loss code of PE (Pre-IADT Discharge Program. His service was uncharacterized.

21. The applicant's NGB Form 22 (National Guard Report of Separation and Record of Service) shows on 31 July 2018, he was given an uncharacterized discharge under the provisions of National Guard Regulation 600-200, paragraph 6-35, for failure to attend IET (phase I or phase II) within 24 months. He was credited with 2 years, 6 months, and 11 days of net service and not awarded an MOS. The form shows the applicant was not available for signature.

22. A Standard Form 600, dated 8 August 2018, shows the applicant was seen at the WRNMMC Orthopaedic Foot and Ankle Clinic on the date of the form for pre-operative assessment, prior to removal of hardware right ankle and arthroscopic debridement of the right ankle, scheduled for 4 September 2018.

23. A WRNMMC, Department of Orthopaedics, Orthopaedic Post-Surgical/Post Injury Convalescent Leave Recommendation Form, dated 8 August 2018, shows the applicant's physician at WRNMMC Orthopaedic Foot and Ankle Surgery, Dr. ■■■ indicated the applicant was scheduled for right ankle surgery on 4 September 2018 and in conjunction with and following this procedure, the physician's convalescent leave recommendations was for 30 days.

24. A WRNMMC Clinical Note, dated 4 September 2018, shows the applicant underwent right ankle arthroscopic debridement and removal of hardware at WRNMMC, due to right ankle symptomatic hardware.

25. A WRNMMC Radiologic Exam Report, Operative Report, and Surgical Master Note, all dated 4 September 2018, have also been provided in full to the Board for review, and further detail the surgical procedure undertaken on 4 September 2018. A postoperative plan shows the applicant was to remain non-weightbearing for period of 14 days of convalescence after his date of hospital discharge on 4 September 2018, remain in a splint, return for suture removal and conversion to a Cam boot in 2 weeks, then begin weightbearing as tolerated.

26. The applicant provided multiple additional Standard Forms 600, dated between 20 September 2018 and 9 January 2019, all of which have been provided in full to the Board for review.

27. Of pertinent note, the Standard Form 600, dated 17 October 2018, shows the applicant was seen at the WRNMMC Orthopaedic Foot and Ankle Clinic for his 6-week post-operative follow-up to his third and final right ankle procedure. The notes show Dr. [REDACTED] indicated he examined the applicant, who continued to have significant post-traumatic ankle arthritis this is very functional limiting. The applicant indicated he would like to proceed with an MEB at this time. The doctor indicated he would place a P3 profile to begin the process. In the meantime, he would refer the applicant for a brace to try and relieve pain and improve functionality. Note that this medical encounter post-dates the applicant's administrative discharge from the ARNG by roughly 1 1/2 months.

28. A VA Rating Decision, dated 4 September 2020, shows the following service-connection decisions were made regarding his claim effective 27 January 2020:

- right knee strain with patellofemoral pain syndrome and shin splints, 10 percent
- right hip strain (impairment of thigh), 10 percent
- right hip strain (limitation of extension), 10 percent
- right hip strain (limitation of flexion), 0 percent

29. A VA letter, dated 8 September 2020 shows the applicant's combined service-connected disability rating was as follows:

- 40 percent, effective 15 December 2016
- 40 percent, effective 13 December 2017
- 100 percent, effective 4 September 2018
- 100 percent, effective 28 September 2018
- 60 percent effective 1 November 2018
- 70 percent, effective 27 January 2020

30. A VA Rating Decision, dated 1 April 2021, shows the following service-connected decision were made regarding his claim effective 15 January 2021:

- trochanteric pain syndrome left hip, 20 percent
- patellofemoral pain syndrome left knee, 10 percent
- left hip limited extension of the thigh, 0 percent
- left hip limited flexion of the thigh, 0 percent

31. A VA letter, dated 2 April 2021, shows the applicant's combined service connected disability rating changed as follows:

- 90 percent, effective 1 October 2020
- 90 percent, effective 15 January 2021

32. A VA Rating Decision, dated 20 July 2021 shows, service-connection for migraine as secondary to the service-connected disability of primary insomnia disorder was granted with an evaluation of 50 percent effective 18 May 2021.

33. A VA letter, dated 23 July 2021, shows the applicant's combined service-connected disability rating was increased to 100 percent effective 18 May 2021.

34. The applicant previously applied to the ABCMR in May 2021, requesting correction of his records. An ABCMR letter to the applicant, dated 5 January 2022, advised the applicant his application to the ABCMR was premature, as he had not exhausted his recourse with the [REDACTED] ARNG. He was advised first to submit his application to the NGB or The Adjutant General, [REDACTED] ARNG for decision.

35. A memorandum from The Adjutant General, [REDACTED] ARNG, dated 26 January 2023, advised the applicant that the [REDACTED] ARNG no longer had the administrative ability to make a change to the applicant's records to reflect his discharge was for duty-related medical reasons rather than due to failure to complete IET within 24 months. The applicant was advised his request was denied and he was to apply to the ABCMR.

36. 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.

37. 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.

38. 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.

39. In the adjudication of this case, an advisory opinion was obtained from the Office of the Surgeon General (OTSG) on 3 January 2024, which shows:

a. A thorough review of the provided documents was conducted, including the military electronic medical record (MHS Genesis), the VA electronic medical record (JLV), the Health Artifact and Image Management Solution (HAIMS), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and the Interactive Personnel Electronic Records Management System (iPERMS).

b. The applicant was a member of the [REDACTED] ARNG, serving on active duty from 3 August 2016 through 14 December 2016. During that time, he suffered a right ankle injury in BCT, requiring operative intervention and physical rehabilitation. Clinical course was complicated by chronic painful hardware and post-traumatic degenerative arthritis, which persisted despite maximal medical and surgical therapies. The applicant was subsequently unable to complete IET for the [REDACTED] ARNG.

c. The applicant was REFRAD after his injury in December 2016. During care received in 2018, discussion of a P3 profile and referral to an MEB occurred, but was not initiated at that time. In July 2019, the applicant was notified of administrative separation from the unit in accordance with National Guard Regulation 600-200, paragraph 6-35d(4), "Failure to attend IET (phase I or phase II) within 24 months."

d. Per Army Regulation 40-501, paragraph 3-22(b), a Soldier fails medical retention standards when, "due to trauma, when surgical treatment fails or is contraindicated and there is functional impairment of the involved joints so as to meet the definition of a disqualifying medical condition or physical defect as in paragraph 3-1."

e. The applicant was injured during BCT while on active duty orders, with subsequent complications preventing him from completing duties associated with his enlistment. At the time of his administrative separation from the [REDACTED] ARNG, he had undergone multiple therapies for this condition, with no reasonable prognosis of returning to duty despite further treatment.

f. The undersigned opines that the applicant failed medical retention standards and warranted processing through an MEB. The applicant receives VA disability compensation for several other conditions which are beyond the scope of this review.

Following a review of the applicant’s case, the OTSG DES Program Office has determined that there is adequate evidence and justification to refer the applicant to an MEB.

40. On 18 January 2024, the applicant and his Counsel were provided a copy of the OTSG advisory opinion and given an opportunity to submit comments. On 22 January 2024, Counsel responded via email acknowledging receipt of the advisory opinion and advising he would not be submitting a response.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found relief is warranted. The Board found the available evidence sufficient to consider this case fully and fairly without a personal appearance by the applicant.

2. The Board concurred with the OTSG advisory official’s conclusion that the evidence supports referral to the Disability Evaluation System. The Board determined action should be taken to effect this referral to determine if he should be retired or discharged due to disability.

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 that the evidence presented was sufficient to warrant a recommendation for partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by directing the applicant be entered into the Disability Evaluation System (DES) and a Medical Evaluation Board (MEB) convened to determine whether the applicant's condition(s), to include [applicable conditions], met medical retention standards at the time of service separation.

a. In the event that a formal physical evaluation board (PEB) becomes necessary, the individual concerned will be issued invitational travel orders to prepare for and participate in consideration of their case by a formal PEB. All required reviews and approvals will be made subsequent to completion of the formal PEB.

b. Should a determination be made that the applicant should have been separated or retired under the DES, these proceedings will serve as the authority to void their administrative separation and to issue them the appropriate separation retroactive to their original separation date, with entitlement to all back pay and allowances and/or retired pay, less any entitlements already received.

6/3/2024

X [REDACTED]

CHAIRPERSON  
[REDACTED]

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

REFERENCES:

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

2. Title 10, 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 (DES) 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 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.

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. Army Regulation 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 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 Department of Veterans Affairs (VA) Schedule for Rating Disabilities (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 their office, grade, rank, or rating in such a way as to reasonably fulfill the purpose of their employment on active duty. 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.

4. 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 percent.

5. National Guard Regulation 600-200 (Enlisted Personnel Management) prescribes the criteria, policies, processes, procedures and responsibilities to classify, assign, utilize, transfer within and between States, provides special duty assignment pay, separate and appoint to and from Command Sergeant Major Army National Guard (ARNG) and Army National Guard of the United States enlisted Soldiers. Paragraph 6-35 provides reasons, for administrative separation or discharge from the Reserve of the

Army and/or the State ARNG, with paragraph 6-35d(4), specifying discharge for failure to attend initial entry training (IET) (phase I or II) within 24 months.

6. Title 38, U.S. Code, 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.

7. Title 38, U.S. Code, 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.

8. Title 10, U.S. Code, section 1556 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.

9. Army Regulation 15-185 (Army Board for Correction of Military Records (ABCMR)) prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR. Paragraph 2-11 states applicants do not have a right to a formal hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

//NOTHING FOLLOWS//