

IN THE CASE OF: [REDACTED]

BOARD DATE: 12 August 2024

DOCKET NUMBER: AR20230006173

APPLICANT REQUESTS:

- medical retirement
- a personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Counsel brief (18 pages) including table of contents, table of authorities, and list of exhibits listed below
- Birth Certificate
- DD Form 4 (Enlistment/Reenlistment Document), 11 June 1997
- Separation packet
- Request for waiver
- Interstate transfer
- Honorable Discharge Certificate, 4 December 2003
- DD Form 4, 16 April 2004
- Marriage License
- Honorable Discharge Certificate, 8 July 2013
- Mobilization order, 29 January 2008
- Department of Veteran Affairs (DVA) Statement in Support of Claim for Service Connection for PTSD
- Stressful Incident No. 2
- Post-Deployment Health Assessment (PDHA)
- Statement of Medical Examination and Duty Status
- Army Reserve Components Overseas Training Ribbon
- Mental Health Internal Assessment
- Request for Non-Rated Time
- Psychology Outpatient Clinic
- (6) DA Form 3349 (Physical Profile), 2011
- DA Form 3349 (PTSD), 25 July 2012
- Notification of Required Medical Evaluation, 21 August 2012
- DA Form 4856 (Developmental Counseling Form), 9 October 2012

- Notification of Medical Disqualification and Intent (Enlisted), 28 February 2013
- Compensation and Pension (C&P) exam, 25 February 2013
- DVA C&P Decision Letter, 10 June 2013
- DVA Notice of Disagreement, 10 June 2013
- Review PTSD - Disability Benefits Questionnaire, 24 May 2016
- DVA - First steps to appealing to Board of Veterans Appeals; Statement of the Case, 14 June 2016
- Declaration of applicant in support of brief

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 is requesting correction of his records to reflect that at the time of his honorable discharge, he suffered from duty-related PTSD and that his disability rating was at least 50%. At the time of his discharge, the Army stated that his diagnosed PTSD was not duty-related even though, at that time, the VA had determined that his PTSD was duty-related from combat in Iraq, and his PTSD disability rating was 30%. The VA later increased that disability rating to 50%. He therefore requests correction of his records to reflect that his PTSD was duty related at the time of discharge, with a disability rating of at least 50%. In July 2014, he thought there was something wrong with his medical discharge because he was not receiving benefits. He asked his unit about it, and they said they would correct it, but they never did. In 2016, he hired a lawyer to help him with his VA benefits; he told him that he could only get his VA benefits and refused to help him with anything else. He fired him in 2019. In July 2021, he hired his current attorney, to help him with his discharge. In a declaration in support of his counsel's brief he stated:

a. In 2008, he was a member of the 1138th Military Police (MP) Company in the Missouri Army National Guard (MOARNG), headquartered in West Plains, MO. He received orders to go on active duty in Iraq and was farmed out to the 1175th unit headquartered in St. Claire, MO. After serving in Iraq, he returned to the United States. He then was transferred back to the 1138th MP Company in West Plains, MO.

b. Before getting out of the service, he was rated 30 percent disability by the VA for PTSD. The 1138th unit told him that he would be medically discharged for PTSD and sent him to the Troop Medical Clinic (TMC) in Jefferson City for evaluation. When he arrived at the clinic, it was a complete circus. He told the personnel there that he was there for a medical evaluation for PTSD, but they refused to give him one. The Colonel

who was in charge even told him that the Army would not discharge him for having PTSD. The only medical thing that happened to him was they gave him a flu shot.

c. As a result, the 1138th unit provided him the wrong discharge paperwork. He brought it to their attention, but they did not do anything about it. He believes they were not interested in fixing the problem because he served in Iraq with the 1175th unit, and the personnel in the 1138th unit thought that he was the 1175th unit's problem.

d. In July 2014, he started asking his unit about his discharge and related benefits. They said they would take care of it, but they never did. He also started an appeal process for his VA benefits. In April 2015, the appeal of his VA benefits was denied.

3. The applicant's counsel states in part in an 18-pages brief:

a. The applicant served honorably in the Army National Guard from 2002 to 2013. His service included active-duty deployment to Iraq from 2008 to 2009, and to Haiti in 2010. He was a machine gunner, deployed to two of the most combat-intensive areas of Iraq: Hawijah and Mosul. Some of his buddies were killed in the line of duty. In one incident, he was riding in the turret of the second vehicle in a convoy, when the first vehicle immediately in front of him exploded from an improvised explosive device (IED). The blast knocked him back in his turret and he saw firsthand its devastating impact on the first vehicle and its passengers. These experiences, and others, exacted a mental and emotional toll.

b. As he completed his deployment to Iraq in 2009, he reported that he suffered from emotional problems, insomnia, nightmares, difficulty concentrating, memory lapses, and irritability. These symptoms did not go away, and in fact, became progressively worse. By August 2011, a medical provider diagnosed the applicant with PTSD. He was placed on medical leave, received a temporary physical profile for PTSD, and sought mental health treatment for his condition. In 2012, his PTSD profile was made permanent, which meant he could not carry or fire his assigned weapon, or live in an austere environment. In 2013, he was medically discharged on the basis of his PTSD.

c. Also in 2013, the Veteran's Administration (VA) similarly determined that his PTSD was service-connected, and he deserved a disability rating of 30% for this condition. The VA would later raise that disability rating to 50% in 2016.

d. Remarkably, however, the applicant's discharge papers stated that his behavioral health condition of PTSD resulting from his deployment in Iraq was Non-Duty Related. He therefore never received an evaluation by a Medical Evaluation Board (MEB) or a Physical Evaluation Board (PEB). He did not receive medical retirement or the attendant disability benefits to which he and his family should be entitled.

e. This submission establishes he should have been provided duty-related disability Evaluation System (DES) processing for his PTSD, rather than separated as unfit for a non-duty related behavioral health condition. This submission further establishes that if DES processing had been provided, he would have failed medical retention standards, been found unfit for further service, and received medical retirement with at least a 30% disability rating. The applicant respectfully requests that the ABCMR recommend to the Secretary of the Army that he receive medical retirement and a 30% disability rating for his line-of-duty related PTSD.

f. Counsel provides factual background of the applicant which includes his enlistment in 1997 and resulting discharge in 1999. He joined the [REDACTED] Army National Guard ([REDACTED] ARNG) in 2002. He then transferred to the [REDACTED] Army National Guard ([REDACTED] ARNG) which he remained until his discharge in 2013. Counsel also discussed the applicant's PTSD while on active duty in Iraq, placement on medical leave, and ultimately receiving a permanent profile for PTSD. Counsel discussed how the applicant was discharged for PTSD but did not receive a medical retirement after being sent a notification of required medical evaluation which led to him only receiving a flu shot. Counsel also details the DVA review of the applicant's PTSD which resulted in a 30 percent rating in 2013 before his discharge. (The entire details are listed in the counsel brief provided).

g. Counsel argues the applicant's records uniformly show that he suffered and continues to suffer from PTSD in the wake of his combat to deployment to Iraq. His symptoms are textbook. He has anxiety, difficulty concentrating, memory lapses, social avoidance, anger and irritability, and depression. He continues to have recurring nightmares about one particular traumatic event: seeing a vehicle and its passengers in his convoy explode and catch fire from an IED. He was formally diagnosed with PTSD and given permanent restrictions prohibiting him from carrying or firing his firearm or living in an austere environment. There was no way he could continue to perform his duties as Military Police in light of those restrictions. Two months before his discharge, the VA gave him a disability rating of 30% on this basis.

h. And yet, for reasons that are entirely unknown and unclear, he was informed that he was being discharged for Non-Duty Reasons. This was an error. He satisfied the requirements for disability retirement and should have received all of the attendant disability benefits as a result. He requests that his records be corrected to reflect a medical retirement under 10 U.S.C. § 1201 for being unfit because of physical disability due to PTSD, with at least 30% disability rating.

i. Counsel continues his argument stating the applicant should have been referred for DES processing based on his diagnosis of PTSD under Department of Defense Instruction (DoDI) 1332.18. Had he been referred into DES, the MEB and PEB respectively would have concluded that he failed medical retention standards and was

unfit for further service. The MEB would have found that he failed to meet medical retention standards. The PEB similarly would have found him unfit for further service based on his diagnosed PTSD. Ultimately, resulting in him being medically retired with at least 30 percent disability rating rather than separated.

j. In conclusion, counsel stated the applicant served honorably in the Army National Guard, including a year deployed to hotly contested combat zones in Iraq. The evidence is undisputed that he suffers from PTSD as a result of his deployment and qualifies for retirement benefits under the governing statutes and regulations. For the reasons above, we respectfully request that the Board correct his medical records to reflect disability retirement with a rating of at least 30%, entitling him to receive monthly military disability retirement and Tricare. (The entire 18-page counsel brief is available for review in it's entirety in supporting documents).

4. The applicant enlisted in the Regular Army on 11 June 1997. He held military occupational specialty 11B (Infantryman).

5. He was discharged under the provisions of Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), paragraph 14-12b for misconduct under honorable conditions (General) on 16 July 1999. His DD Form 214 shows he completed 2 years, 1 month, and 6 days net active service this period.

6. He enlisted in the [REDACTED] ARNG on 30 August 2002. He was transferred to the [REDACTED] ARNG on 5 December 2002.

7. He was ordered to active duty in support of Operation Enduring Freedom on 21 January 2003. He was honorably released from active duty on 6 June 2003 upon completion of required active service. He completed 4 months and 16 days active service this period.

8. He was honorably discharged from the [REDACTED] ARNG on 4 December 2003, due to expiration of active status commitment in the selective reserve. He completed 1 year, 3 months, and 5 days net service this period.

9. He enlisted in the [REDACTED] ARNG again on 23 June 2005. He was ordered to active duty in support of Operation Iraqi Freedom. He served in Iraq from 2 May 2008 – 14 February 2009. He was released from active duty on 20 March 2009 due to completion of required service. He completed 1 year and 24 days service this period.

10. He received a letter of reprimand on 19 May 2011, for having admitted to on a sworn statement, of knowingly violating command alcohol policy while on overseas deployment training (ODT) in Grafenwöhr; Germany, on or about 11 May 2011. Failure

to obey a lawful order is in violation of Article 92 of the Uniform Code of Military Justice (UCMJ). He acknowledged receipt of the reprimand on 20 May 2011.

11. On 8 July 2013, the applicant was honorably discharged from the [REDACTED] ARNG due to being medically unfit for retention per AR 40-501 (Standards of Medical Fitness). He completed 8 years and 16 days net service this period.

12. The applicant provides:

- a. Separation packet related to his Chapter 14-12b discharge for misconduct.
- b. Request for waiver for enlistment into the [REDACTED] ARNG.
- c. DVA statement in support of claim for service connection for PTSD, related to a mission he was a part of on 12 July.
- d. Stressful Incident No. 2 which occurred on 5 October 2008, which the applicant detailed the actions from a convoy he was in as the gunner of the second truck. An IED hit the first truck which sent a shock wave and then the blast. The first truck was engulfed in flames and smoke.
- e. PDHA which was completed on 19 February 2009. The provider comments state he was cleared by behavioral health at Fort Dix. He will follow-up with behavioral health when he returns to home station.
- f. DA Form 2173 (Statement of Medical Examination and Duty Status), related to poor sleep, H.A. (unknown), left arm, and hip injury. Item 30 (Details of accident) states service member requires further medical evaluation in accordance with Secretary of Defense PDHRA Directive MILPER message 05-273 dated 3 November 2005.
- g. Mental Health Internal Assessment related to his symptoms from his deployment in which his Global Assessment of Functioning score was 58.
- h. Request for Non-Rated Time memorandum for the period 10 June 2011 – 9 June 2012 due to the applicant being on medical leave-status for this rating period. He had not drilled with this unit since 8 August 2011.
- i. Psychology Outpatient Clinic from 12 September 2011, related to his mental health.
- j. Six DA Forms 3349 for:
  - Behavioral health- with a temporary expiration of 15 December 2011

- Low back and right knee pain – with a temporary expiration of 21 December 2011
- Behavioral health- with a temporary expiration of 29 December 2011 (no drill status until cleared)
- Low back and right knee pain – with a temporary expiration of 20 March 2012
- Behavioral health- with a temporary expiration of 28 March 2012 (no drill status until cleared by behavioral health provider)
- PTSD – with a temporary expiration of 24 July 2012

k. DA Form 3349 for PTSD permanent with a "3" in S of PULHES issued 25 July 2012. His profile was marked NO for carry and fire individual assigned weapon and live in an austere environment without worsening the medical condition.

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.

l. Notification of Required Medical Evaluation, 21 August 2012, showing the applicant was to report to the Troop Medical Clinic, on 9 October 2012 to complete a chapter 3 physical.

m. DA Form 4856, 9 October 2012, which stated the determination had been made that current supporting medical documentation is required to verify that the conditions listed on his DA Form 3349 are an accurate representation of his current physical/mental state and limitations. He was required to obtain and forward the following civilian medical documentation to the Health Services Office, through his unit administrator, no later than 8 December 2012, Cardiologist's clearance for uncontrolled hypertension and angina and updated medication list after cardiology appointment. He was notified that failure or refusal to comply with medical processing requirements (as directed by AR 40-501, AR 600-60, AR 635-40, AR 600-8-4), Health Services personnel, and his unit during this process will result in administrative separation and bar to reenlistment in accordance with NGR 600-200, AR 135-178, and NGB-ARH Policy Memorandum #09-026 dated 13 August 2009. It was indicated on his counseling form that his PTSD "DID" occur in the line of duty.

n. C&P exam, 25 February 2013, related to his claim.

o. DVA C&P Decision Letter, 10 June 2013, notifying the applicant of his entitlement amount and payment start date. He was rated 30 percent for PTSD and 0 percent for sinusitis effective 17 October 2011.

p. DVA Notice of Disagreement, 10 June 2013, filed as a result, a new VA examination was ordered to evaluate the severity of his PTSD.

q. Review PTSD - Disability Benefits Questionnaire, 24 May 2016, in which the applicant was diagnosed with PTSD, major depressive disorder, cannabis use disorder and alcohol use disorder.

r. DVA - First steps to appealing to Board of Veterans Appeals; Statement of the Case, 14 June 2016, letter notifying the applicant of very important information concerning his appeal.

13. 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.

14. 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.

15. 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.

16. 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.

#### 17. 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 in essence requesting referral to the Disability Evaluation System for PTSD. He has indicated on his DD 149 that PTSD is related to his request. He states:

“At the time of my discharge, the Army stated that my diagnosed PTSD was not duty-related even though, at that time, the VA had determined that my PTSD was duty-related and my PTSD disability rating was 30%. The VA later increased that disability rating to 50%. I therefore request correction of my records to reflect that my PTSD was duty related at the time of discharge, with a disability rating of at least 50%.”

c. The Record of Proceedings and prior denial detail the applicant’s service and the circumstances of the case.

d. His Report of Separation and Record of Service (NGB 22) for the period of Service under consideration shows he entered the Army National Guard on 23 June 2005 and was separated from the [REDACTED] Army National Guard ([REDACTED] ARNG) effective 8 July 2013 under provisions of paragraph 6-35l(8) of NGR 600-200, Enlisted Personnel Management (31 July 2009): Medically unfit for retention per AR 40-501(Standards of Medical Fitness). It shows he had 10 years, 01 months, and 27 days of total service for retired pay.

e. MEDCHART shows the applicant was placed on a permanent duty limiting profile on 8 November 2012. The profile was for “PTSD, angina and uncontrolled hypertension, previously profile for hearing loss and changes.” It is this profile which should have resulted in his referral to the DES. While there are two conditions listed on the profile which were unlikely to have been duty related, the PTSD was duty related.

f. From his Initial Post Traumatic Stress Disorder (PTSD) Disability Benefits Questionnaire (previously termed a VA C&P):

“He is currently in the National Guard said, "I'm on a no drill profile." He has been in this status for one year.

[NOTE \*\*\* - A "No Drill Profile" is for Soldiers with PTSD for whom drill itself is often too stressful.]

His MOS is Military Police and he has attained a rank of Sergeant. He denied having any disciplinary action while in the military. He reported heavy alcohol use while in the military but denied drug usage ...

He was deployed to Kuwait for 5 months in 1998 and deployed a second time to Iraq in 2007. This deployment was for one year. He reported having combat exposure while in this region. He denied having any specific stressor statement and said, "Not anymore. There is not just one incident."

Mr. [REDACTED] indicated-being exposed to traumatic events in which he experienced, witnessed or was confronted with an event that involved actual or threatened death or serious injury, to the physical integrity of himself and others. This series of events, which are stated elsewhere in this report, occurred while he was in the military service.

His response involved intense fear, helplessness, or horror. The traumatic events are persistently re-experienced through distressing recollections of the event, distressing dreams of the events. He said, "The content of the nightmares consist of "I'm in an MWRAP and the truck is stopped. There is a big fire and I see people I know dying or needing help." He indicated acting or feeling as if the traumatic events were recurring, and having both psychological distress and physiological reactivity on exposure to internal or external cues that symbolize or resemble an aspect of the traumatic events.

He has persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness including an avoidance of thoughts, feelings or conversations associated with the trauma, along with an avoidance of activities, places, or people that arouse recollections of the trauma."

g. The applicant received a 30% VA service-connected disability rating for PTSD in October 2011 which was increased to 50% in May 2016.

h. This referral to the DES is not optional and addressed in several ARs. Paragraph 7-1 of AR 40-400, Patient Administration (8 July 2014), states in part: "If the Soldier does not meet retention standards, an MEB is mandatory and will be initiated by the physical evaluation board liaison officer (PEBLO)." Note there is no mention of component or duty status. Paragraph 7-5b(5) is more direct for this case, stating that one of the situations which requires MEB consideration is "an RC member not on AD who requires evaluation because of a condition that may render him or her unfit for further duty."

i. Paragraph 2-9c of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (8 February 2006), identifies the error made by his command:

“The unit commander will –

c. Refer a soldier to the servicing MTF for medical evaluation when the soldier is believed to be unable to perform the duties of his or her office, grade, rank, or rating.”

j. Finally, paragraph 1–33a of AR 635-200, Active Duty Enlisted Administrative Separations (6 June 2005), notes that disposition through medical channels takes precedence over almost all administrative separations:

a. Except in separation actions under chapter 10 and as provided in para 1–34b, disposition through medical channels takes precedence over administrative separation processing.

k. Chapter 10 addresses separations in lieu of courts-martial. Paragraph 1-34b:

b. Regular Army soldiers will be transferred to the IRR to complete their statutory or contractual MSO {military service obligation, whichever expires later.

l. It is the opinion of the ARBA Medical Advisor the applicant should be referred to the DES for a long overdue evaluation of a medical condition which failed medical retention standards and for which he was profiled and referred to the DES prior to her separation.

m. It is more likely than not that the applicant will be permanently retired for physical disability and subsequently entitled to Combat Related Special Compensation (CRSC). However, CRSC is subject to a 6-year statute of limitations (31 U.S.C., Section 3702(b)). To receive the full retroactive CRSC entitlement, a claimant must file their CRSC claim within 6 years of any VA rating decision that could potentially make them eligible for CRSC or the date they become entitled to retired pay, whichever is more recent. If a claimant files a claim more than 6 years after initial eligibility, they are restricted to 6 years of any retroactive entitlement.

n. It is therefore recommended the Board consider authorizing the applicant to apply for CRSC beyond the 6-year statute of limitations, and if CRSC is granted, receive retroactive payments for this disability and other combat related disabilities he may have incurred IAW Chapter 63, Volume 7B of Department of Defense 7000.14R, Financial Management Regulation - Combat-Related Special Compensation (CSRC). This

should also include interest and COLAs. Because one criterium for receiving CRSC is that the Veteran be in a retired status (e.g., length of Service, permanent disability, etc.), this authorization could only be used by the applicant if/when he was retired.

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 review based on law, policy, and regulation. Upon review of the applicant's petition, available military records, and the medical review, the Board concurred with the advising official finding that the applicant had a history of post traumatic stress disorder (PTSD) while on active service. Based on this, the Board granted relief of referral of his case to the Disability Evaluation System (DES) as recommended by the medical reviewer.
2. The applicant's request for a personal appearance hearing was carefully considered. In this case, 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.

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 concerned to determine whether the applicant's condition(s) 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 may be issued invitational travel orders to prepare for and participate in consideration of his case by a formal PEB if requested by or agreed to by the PEB president. All required reviews and approvals will be made subsequent to completion of the formal PEB.

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

2. The Board further determined that 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 changing his type of discharge without evaluation under the DES.

10/28/2024

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.

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.

4. Army Regulation (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 Army Regulation 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. 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 ARNG and Army National Guard of the United States enlisted Soldiers. Paragraph 6-35 provides for the separation of Soldier found medically unfit for retention per Army Regulation 40-501.

7. 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%.

8. 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.

9. 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.

10. On 25 August 2017, the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to DRBs and BCM/NRs when considering requests by veterans for modification of their discharges due in whole or in part to: mental health conditions, including PTSD, traumatic brain injury, sexual assault, or sexual harassment. Boards are to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based, in whole or in part, on those conditions or experiences.

11. 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//