

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 26 November 2024

DOCKET NUMBER: AR20230006546

APPLICANT REQUESTS, in effect:

- correction of the U.S. Army Human Resources Command (HRC)'s Line of Duty (LOD) determination, pertaining to his cervical radiculopathy, by changing it from "Not in Line of Duty – Not Due to Own Misconduct" to "In Line of Duty – Existed Prior to Service – Service Aggravated"
- void the results of the Formal Physical Evaluation Board (FPEB) and direct the applicant's referral into the Disability Evaluation System (DES) for consideration for a medical retirement

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

- DD Form 149 (Application for Correction of Military Record)
- Exhibit 1 – 18 May 2018 Transit (with Standard Form (SF) 600 (Chronological Record of Medical Care) and doctor's note)
- Exhibit 2 – 20 June 2018, Hit in Head (with SF 600, doctor's note, and California Army National Guard (CAARNG) annual training orders)
- Exhibit 3 – Signed memorandum, subject: Request for Exception to Policy (ETP) for Submission of LOD Determination past 180 days for [applicant]
- Exhibit 4 – 2 June 2021 email regarding DES case
- Exhibit 5 – All Army Activities (ALARACT) Message 025/2021, dated 24 March 2021
- Exhibit 6 – 21 June 2021 Email
- Exhibit 7 – 23 December 2021 Email pertaining to DA Form 199 (Informal PEB Proceedings)
- Exhibit 8 – DA Form 199
- Exhibit 9 – Magnetic Resonance Imaging (MRI) results
- Exhibit 10 – Doctor's evaluation
- Exhibit 11 – Doctor's note
- Exhibit 12 – Email, re: LOD
- Exhibit 13 – Request for FPEB
- Exhibit 14 – K\_\_\_ MRI results

- Exhibit 15 – 7 January 2022 Email
- Exhibit 16 – Non-Duty Related FPEB Notification
- Exhibit 17 – Blank DA Form 5890 (Acknowledgement of Notification of FPEB Hearing)
- Exhibit 18 – 14 October 2022 Email
- Exhibit 19 – Counsel's request for appeal extension
- Exhibit 20 – HRC LOD Determination
- Exhibit 21 – DA Form 199-1 (FPEB Proceedings)
- Exhibit 22 – 17 November 2022 Email
- Exhibit 23 – Memorandum, subject: Appeal of PEB Decision in Matter of [applicant]
- Exhibit 24 – DA Form 1559 (Inspector General (IG) Action Request)
- Exhibit 25 – Additional Information

FACTS:

1. The applicant states while a member of the CAARNG and during inactive duty for training (IDT) and annual training (AT), he sustained two documented injuries, both of which aggravated pre-existing injuries.

a. On 12 July 2017, the applicant incurred injuries to his neck and upper back while at his civilian place of employment.

(1) As reflected in exhibit 1, he transited for 8 hours on 18 May 2018, from the armory to Camp Roberts; during the trip, he sustained a headache, left neck pain, soreness, and experienced a decreased range of motion in his neck, all the result of wearing full combat gear. Because of his injuries, his commander and first sergeant (1SG) removed him from future troop movements via HMMWV (High Mobility Multipurpose Wheeled Vehicle).

(2) Exhibit 2 shows that on 20 June 2018 and during annual training, the applicant was hit in the head while helping to unload a large general purpose tent and tent poles; he immediately complained of neck pain and his leadership reduced his requirements to modified duty.

b. Although the unit medic immediately completed medical documentation, the unit failed to process LOD documentation in a timely manner. In November 2018, he transferred to another unit, and when they asked him for a physical profile, he realized the unit never updated his medical records. He took the following actions:

- 19 February 2021 – Sergeant First Class (SFC) K\_\_ P\_\_ notified the applicant via email that an ETP memorandum had been sent to Colonel (COL) T\_\_ B\_\_ for signature
- 7 March 2021 – SFC K\_\_ P\_\_ emailed a copy of the signed ETP memorandum (Exhibit 3)
- 8 March 2021 – according to SFC K\_\_ P\_\_ and Corporal (CPL) S\_\_ H\_\_, the ETP memorandum was approved and an LOD was to be initiated
- 2 June 2021 – Specialist (SPC) J\_\_ D\_\_ emailed to applicant stating the LOD investigation had been administratively closed in accordance with ALARACT 025-2021 (Exhibits 4 and 5)
- 21 June 2021 – CPL S\_\_ H\_\_ emailed the applicant: his LOD was administratively closed because "it was inactive for 67 days"; it sat at the unit commander's level from 20210322 to 20210528 and was never signed or forwarded to State level (Exhibit 6)
- In the same email, CPL S\_\_ H\_\_ noted the ETP was not included with the LOD documents and added, "Now that the rules for DES referral have changed, we will only be able to re-open (the LOD) if it is requested by the PEB/MEB (medical evaluation board) or directed by the ABCMR
- 8 September 2021 – Applicant spoke with Ms. M\_\_ E\_\_, Medical Boards Team; she said SFC K\_\_ P\_\_ had sent the ETP but, on 28 May 2021, they closed the LOD due to inactivity; they did not submit the ETP because unit action was required; the system showed no requests to the unit for status
- 8 September 2021 – Applicant emailed SFC K\_\_ P\_\_, asking that he enter the ETP into the LOD system and that he request the reopening of LOD; additionally, he noted that the nonduty-related documentation was pending; SFC K\_\_ P\_\_ did not respond
- 20 December 2021 – Applicant emailed SFC K\_\_ P\_\_ again, requesting an update; SFC K\_\_ P\_\_ did not respond
- 23 December 2021 – Applicant emailed Ms. L\_\_ J\_\_, Administrative Care Coordinator; he provided her a signed DA Form 199 and his appeal letter (Exhibits 7 through 14)
- 7 January 2022 – Applicant received an email from Ms. L\_\_ J\_\_, Administrative Care Coordinator; she provided him the notification for the FPEB, a DA Form 5890, and a memorandum for the commander (Exhibits 15 through 17)
- 14 October 2022 – Applicant received a memorandum showing approval of his request to extend his appeal deadline, and he was advised his case had been forwarded to HRC for an advisory opinion (Exhibits 18 and 19)
- 8 November 2022 – Applicant received HRC's LOD determination and learned the FPEB considered his injuries as nonduty-related (Exhibit 20)
- 17 November 2022 – Applicant received the DA Form 199-1 showing the FPEB's findings (Exhibits 21 and 22)

- 21 November 2022 – Applicant's PEB attorney filed an appeal of the FPEB's results (Exhibit 23)
- 23 November 2022 – Applicant submitted a DA Form 1559, requesting the California Inspector General investigate the failure of both the CAARNG Surgeon's and his unit to properly complete his LOD paperwork (Exhibits 24 and 25)

c. The applicant requests the Board review and evaluate his actions, as well as the lack of appropriate action by both the CAARNG Surgeon and his unit; based on that review, he asks that the Board find his EPTS injuries were service aggravated in the line of duty .

2. The applicant provides exhibits, as addressed in his statement to the Board; additionally, he includes the following documents:

a. DA Form 199, dated 26 November 2021, wherein an informal PEB determined the applicant was unfit for continued military service and that his cervical radiculopathy was nonduty-related. The applicant non-concurred with the PEB's findings and requested an FPEB.

b. HRC memorandum, addressed to the PEB, dated 13 October 2022, and subject: LOD Determination [applicant]. HRC stated:

(1) "Army Regulation (AR) 600-8-4 (Line of Duty Policy, Procedures, and Investigations), under Terms for Preponderance of Evidence it states: 'Findings must be supported by a greater weight of evidence (more likely than not) than supports any different conclusion.' After a thorough review, [applicant's] cervical radiculopathy condition was not incurred or aggravated by military service. Continue processing this claim as NDR (nonduty-related)."

(2) "Cervical Radiculopathy is a clinical condition in which a nerve or nerves in the neck becomes irritated or compressed, also known as 'a pinched nerve.' While [applicant] alleges his cervical radiculopathy condition is duty related, there is no medical evidence presented to support this claim."

(a) "In 1999-2000, [applicant] had a neck injury while working as law enforcement. In 2002-2003, he was involved in a motor vehicle accident that resulted in neck and back injuries. In 2017, [applicant] hit his head while bending to pick up a card. All of these incidents occurred while not in a duty status."

(b) "After the June 2018 incident, training records reveal [applicant] passed two Army Physical Fitness Tests (APFT), one in June 2018, scoring a 258, and one in

October 2018, scoring a 271. With the medical evidence provided, [applicant's] initial neck and back issues were caused while not in a duty status."

c. Memorandum, dated 21 November 2022, addressed to the U.S. Army Physical Disability Agency (USAPDA), and subject: Appeal of the Physical Evaluation Board Decision In the Matter of [applicant]. Through counsel, the applicant asked the PEB to reconsider its determinations and find that his cervical spine, cervical radiculopathy, and right knee conditions were unfitting and duty related. Counsel argued:

(1) Counsel summarized the applicant's testimony at the FPEB and noted that, at the end of the applicant's remarks, the FPEB was "at least persuaded enough" to forward the (applicant's) case to HRC for an LOD determination.

(2) "The response from HRC notes the injuries that occurred outside of a duty status between the year 200 and 2018. However, the response does not grapple with the injuries presented and discussed at the board that had been contemporaneously memorialized by a medic who attended the annual training period where [applicant] was injured. That decision simply cites that [applicant] continued to pass his fitness tests following that injury as evidence enough in their minds to deny a Soldier entitlement to protection under the IDES (Integrated Disability Evaluation System)."

(3) "The HRC response also failed to grapple with any position that his cervical spine condition itself, in addition to the associated radiculopathy, was an unfitting medical condition. That injury alone prevents him from wearing the ACH or carrying usual protective gear in an austere environment. Not to mention that unfitting radiculopathy is rarely found to exist without an underlying unfitting injury to the cervical or lumbar spine."

(4) "One of the glaring logical inconsistencies with the HRC response is that they point to injuries that pre-date the event [applicant] cites as the clear substantial and permanent aggravation of his injury as what they believe to have been the cause. But they support their denial of benefit based on the fact that SGT A\_\_\_\_\_ passed two more fitness tests following the injury in 2018." "The HRC cannot eat its cake and have it too – it cannot point to injuries that predate the one claimed as a basis for showing the claimed injury did not aggravate it, but then cite a passing fitness test following the aggravation as a reason for showing no impact."

(5) "Regarding his knee injury, [applicant] testified persuasively about the damage he experienced following the clearly documented injury from his initial term of service."

3. A review of the applicant's service record shows the following:

a. On 15 February 2011, after serving over 3 years of prior service in the U.S. Navy, the applicant enlisted into the CAARNG for 3 years. Between April and June 2011, he entered active duty and completed basic combat training; following his release from active duty, the CAARNG awarded him military occupational specialty 31B (Military Police). Effective 24 December 2013, the CAARNG promoted him to sergeant (SGT)/E-5.

b. The applicant continued his CAARNG service through extensions. On 6 October 2022, an FPEB determined the applicant was physically unfit for continued military service and referred him for final disposition in accordance with Reserve Component (RC) regulations. The FPEB's DA Form 199-1 shows the following:

(1) Regarding the applicant's cervical radiculopathy, he was first diagnosed in July 2017; the condition was caused by a civilian industry injury. "The condition is not compensable because, at the time the Soldier was diagnosed with this condition, the Soldier was not in an active duty status for more than 30 days or entitled to base pay, and there is no Line of Duty Investigation for this condition. Additionally, there is no evidence within the Soldier's available case file that indicates that military service has aggravated the condition."

(2) The applicant and his counsel appeared before the FPEB and contended his referred medical condition was both unfitting and incurred in the line of duty; additionally, the applicant maintained that his unREFERRED right knee condition was also unfitting and incurred in the line of duty.

(3) "Based on the preponderance of evidence, the PEB has determined the Soldier's cervical radiculopathy is unfitting and sufficient evidence exists to request a Line of Duty determination from HRC. The PEB further determined there was insufficient evidence presented to request a profile review from the CAARNG State Surgeon's Office for the unREFERRED right knee condition." "HRC (subsequently) determined (the applicant's cervical radiculopathy) is NOT IN LINE OF DUTY – Not due to own misconduct."

(4) On 21 November 2022, the applicant non-concurred with the FPEB's determinations and attached a written appeal.

c. On 16 December 2022, the USAPDA responded to the applicant's 21 November 2022 rebuttal of the FPEB's findings and recommendations.

(1) "The 21 November 2022 appeal of the FPEB decision and the attached exhibits (MRI results dated 3 November 2022 which essentially show no change since prior MRI and EMG (electromyography) results dated 3 November 2022 which continue to support the presence of bilateral carpal tunnel syndrome and bilateral cubital tunnel

syndrome) were reviewed and considered along with the Soldier's current DA Form 3349 (Physical Profile). Of note, (the DA Form 3349) does not include any duty limitations or restrictions for right knee condition."

(2) "The 23 December 2021 Informal PEB (IPEB) request for reconsideration memorandum, and the associated 10 January 2022 'Rebuttal of Physical Evaluation Board Proceedings' were reviewed, and the following is supported by the evidence in the case file:"

(a) "In your appeal you acknowledge initial incurrence of your neck injury during a civilian industrial accident in 2017. However, you contend that medical evidence of record, documents two separate additional injuries to your neck that occurred while in a qualified duty status that permanently service aggravated your neck injury. A review of the evidence you provided shows medical treatment/documentation for pain due to the incidents while in a military service status in May and June 2018."

(b) "According to AR 600-8-4, 'generalized pain' is not appropriate for an LOD, as pain does not have a lasting effect. Further supporting no lasting effect or permanent service aggravation from these incidents is evidence that shows you took and passed your APFT (Army Physical Fitness Test) on 29 June 2018 and 20 October 2018 with no alternate events."

(c) "Further, the PEB has no authority to make your condition service connected as you requested. Under DODI (Department of Defense Instruction) 1332.18 (Disability Evaluation System (DES)), Section 6a(1) (Relationship of line of duty (LOD) findings to DES determinations) of Appendix 3 (Standards for Determining Compensable Disabilities) to Encl 3 (Operational Standards for the DES), (1) LOD determinations will be made in accordance with the regulations of the respective Military Department (thus, AR 600-8-4 for the Army). Section 6b (Referral Requirement), when an LOD determination is required, it will be done before sending a service member's case to the PEB.' In your case, the CAARNG made the determination that your condition is not in the line of duty in their non-duty related (NDR) memorandum to the PEB dated 19 September 2021."

(3) "Regarding the Soldier's right knee condition, the Soldier's current DA Form 3349 was re-evaluated and does not include any duty limitations or restrictions for a right knee condition. Of the available medical records reviewed, to include the Naval records from 1990 and the Kaiser Permanente medical records from 2021, there was no identified statement from a treating provider regarding the need for temporary or permanent duty restrictions related to the right knee. We are unable to conclude differently than the FPEB concluded as summarized on the DA Form 199-1 dated 7 November 2022. The Soldier's right knee condition is not unfitting."

(4) "Regarding the cervical spine condition, we are unable to conclude differently than the FPEB concluded as summarized on the DA Form 199-1 dated 7 November 2022. The Soldier is unfit for cervical radiculopathy (non-compensable). We are not the appellate authority for LOD determinations. AR 600-8-4, Para(graph) 4-17 (Appeals) provides for the appeal process of unfavorable LOD determinations."

(5) "Our conclusion is that this case was properly adjudicated by the FPEB, which correctly applied the rules that govern the Physical Disability Evaluation System (PDES) in making its determination. The findings and recommendations of the FPEB are supported by a preponderance of evidence and are therefore affirmed. The issues raised in your 21 November 2022 appeal were adequately addressed by the PEB in its Formal Board proceedings. If your client feels that our findings are in error, any future submission for correction may be directed to the ABCMR."

d. On 9 March 2023, the CAARNG issued a memorandum stating the CAARNG Surgeon had determined the applicant was to be medically discharged and transferred to The Retired Reserve. Effective 15 March 2023, the CAARNG transferred the applicant to The Retired Reserve. His DA Form 5016 (Retirement Accounting Statement) shows he completed 15 years, 10 months, and 22 days of qualifying service for retirement.

MEDICAL REVIEW: The Army Review Board Agency (ARBA) Medical Advisor reviewed the ROP and casefiles, supporting documents and the applicant's military service and available medical records. The Cervical Radiculopathy condition was reviewed. The preponderance of evidence does NOT support changing the designation from "Not in Line of Duty – Not Due to Own Misconduct" to "In Line of Duty – Existed Prior to Service – Service Aggravated."

#### BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. The applicant contends he sustained a headache, left neck pain, soreness, and experienced a decreased range of motion in his neck, all the result of wearing full combat gear, and he was hit in the head while helping to unload a large tent and tent poles and complained of neck pain.

a. The evidence shows on 26 November 2021, an informal PEB determined the applicant was unfit for continued military service and that his cervical radiculopathy was non-duty-related. The applicant did not concur with the PEB's findings and requested a formal PEB. After a thorough review, it was determined that the applicant's cervical



radiculopathy condition was not incurred or aggravated by military service. His claim continued to be processed as NDR (nonduty-related)."

b. The PEB determined the applicant's cervical radiculopathy is unfitting and sufficient evidence exists to request a Line of Duty determination from HRC. The PEB further determined there was insufficient evidence presented to request a profile review from the CAARNG State Surgeon's Office for the unreferral right knee condition. HRC (subsequently) determined (the applicant's cervical radiculopathy) is not in line of duty and not due to his own misconduct. The Board was not convinced by the applicant's arguments. The Board also reviewed and agreed with the medical reviewer's determination that the preponderance of evidence does not support changing the designation from "Not in Line of Duty – Not Due to Own Misconduct" to "In Line of Duty – Existed Prior to Service – Service Aggravated." Therefore, the Board determined relief is not warranted.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

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

BOARD DETERMINATION/RECOMMENDATION:

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

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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 1556 (Ex Parte Communications Prohibited) 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 (ABCMR) applicant's (and/or their counsel) prior to adjudication.

2. Army Regulation (AR) 600-8-4 (Line of Duty (LOD) Policy, Procedures, and Investigations), currently in effect, prescribes policies and procedures for LOD determinations.

a. Paragraph 2-1 (General). LOD determinations are essential for protecting the interests of both the Soldier concerned and the U.S. Government where service was interrupted by injury, disease, or death.

b. Paragraph 2-2 (Requirements for LOD Investigations). LOD investigations determine duty status at the time of incident and whether misconduct was involved and, if so, to what degree. Additionally, LOD investigations may be required to determine an "existed prior to service" (EPTS) condition, and, if so, determine whether service aggravation has occurred.

(1) An LOD investigation will be conducted for all Soldiers, regardless of Component, if the Soldier experiences a loss of duty time for a period of more than 24 hours and the injury is of lasting significance; there is a likelihood the injury could result in permanent disability; and the Reserve Component (RC) Soldier requires follow-on care for an injury incurred while on active duty (AD).

(2) An injury diagnosed while serving on AD does not mean that the injury was incurred while serving on AD or that an EPTS condition was service aggravated. An expert medical opinion from an appropriate provider is required and must address when the condition was incurred, if the condition existed prior to the current military service, and whether the condition was service aggravated. If an LOD determination has been made during a period of prior military service and the same condition arises in a subsequent period of military service, the prior determination will remain unchanged unless intervening events exist.

(3) A person who became a casualty because of his or her intentional misconduct or willful negligence could never be said to be injured, diseased, or deceased in the line of duty. Such a person stood to lose substantial benefits as a consequence of his or her actions; therefore, it was critical that the decision to categorize injury, disease, or death as not in the line of duty was only made after following the deliberate, ordered procedures described in this regulation.

(4) Depending on the circumstances of the case, an LOD investigation may or may not be required to make this determination. Only U.S. Army Human Resources Command (HRC) can make a presumptive in line of duty (PILD) determination. Except for cases involving minor injuries that will not result in a permanent disability (i.e., sprain, contusion, or minor fracture), an LOD investigation must be conducted.

(a) Conduct an informal LOD investigation in cases where no intentional misconduct or gross negligence is suspected.

(b) Circumstances requiring a formal LOD investigation include the following:

- Injury, illness, disease, or death that occurs under strange or doubtful circumstances or is apparently due to intentional misconduct or gross negligence
- When directed by higher authority (HRC, approval authority, or appointing authority)
- When a USAR or ARNG Soldier serving on orders for less than 30 days becomes disabled due to injury, illness, disease, or death
- Conditions that the medical treatment facility commander or other medical provider determine EPTS

(5) Any Soldier, retired or separated from Service and requesting an LOD investigation be initiated and/or adjudicated, must submit a request and proper documentation to the Army Review Boards Agency.

b. Paragraph 2-4 (Standards Applicable to LOD Determinations). An injury is presumed to be in the line of duty (ILD) unless rebutted by the evidence.

(1) Consider all the evidence:

- All direct evidence (i.e., evidence based on actual knowledge or the observation of witnesses)
- All indirect evidence (referring to the facts or statements from which reasonable inferences, deductions, and conclusions could be drawn to establish an unobserved fact, knowledge, or state of mind)

- No distinction will be made between the relative value of direct and indirect evidence; in some cases, direct evidence may be more convincing than indirect evidence; in other cases, indirect evidence may be more convincing than direct evidence (for example, statement of a witness).

(2) The rules in appendix D (Rules Governing Line of Duty and Misconduct Determinations) and the terms in section II (Terms) of the glossary will be considered when making an LOD finding. The rules elaborate upon, but do not modify, the standards for making LOD determinations.

c. Paragraph 2-5 (LOD Determination(s)). One of the following eight determinations will be applied to the Soldier's injury, illness, disease, or death. Any not in line of duty (NLD) finding of an LOD investigation must be forwarded to HRC.

(1) In line of duty. The injury, illness, disease, or death did not occur while the Soldier was absent without leave and was not due to the Soldier's own intentional misconduct or gross negligence. For U.S. Army Reserve and Army National Guard (ARNG) Soldiers, the injury, illness, disease, or death occurred while the Soldier was in a duty status, as defined in AR 638-8 (Army Casualty Program), which, for ARNG Soldiers, includes Annual Training (AT) and Inactive Duty for Training (IDT).

(2) Not in line of duty – not due to own misconduct. A formal investigation with supporting evidence, that the injury, illness, disease, or death occurred during a period when a Soldier was AWOL, was mentally sound at the inception of AWOL, and which was not directly caused by Soldier's own intentional misconduct or gross negligence (mental soundness can only be determined by a behavioral health expert). EPTS conditions typically falls under this determination.

(3) Not in line of duty – due to own misconduct. A formal investigation determined that the Soldier's injury, illness, disease, or death was proximately caused by the Soldier's own intentional misconduct or gross negligence. Mental soundness can only be determined by a behavioral health expert.

(4) In line of duty – existed prior to service – service aggravated. This finding is made when there is clear and unmistakable evidence the Soldier's injury, illness, or disease existed prior to service and the condition has been service aggravated. Aggravation will be determined by an appropriate provider in accordance with Department of Defense Instruction (DODI) 1332.18 (Disability Evaluation System (DES)).

(5) Not in line of duty – existed prior to service – not service aggravated. This finding is made when there is clear and unmistakable evidence the member's injury, illness, or disease EPTS and the condition has not been service aggravated.

Aggravation will be determined by an appropriate military provider in accordance with DoDI 1332.18.

(6) In line of duty – this episode only. This determination relates to a one-time event, where no serious injury or illness has occurred, but warranted the Soldier be attended to by a medical physician. This incident occurred while the Soldier was in an authorized duty status at the time of the episode. Treatment should be limited for this particular episode only. A RC Soldier is not authorized military treatment if episode occurs while not in an authorized duty status. A Formal LOD should be conducted to determine the cause of episode.

(7) Presumptive in line of duty – Reserved for HRC and RC for purposes of Soldiers transferring components only. HRC uses this determination in cases of hostile action, death of natural causes, or death of passengers in a commercial carrier or military vehicles.

(8) No finding – reserved for HRC purposes only. Used in cases where an LOD investigation was completed but was not required.

d. Paragraph 4-17 (Appeals). Soldiers may appeal an NLD finding as follows:

(1) Within 30 days after receipt of the NLD determination, the Soldier may appeal to his/her unit's approval authority. If the Soldier is no longer assigned in the geographic area of responsibility of the original approval authority, the Soldier may send the appeal directly to The Adjutant General (TAG), HRC.

(2) If the TAG agrees with NLD determination upon appeal, the Soldier may appeal a NLD determination to ARBA; ARBA can only address issues after all administrative recourse or appeals available to the applicant have been exhausted.

e. Glossary, Section II.

(1) Existing prior to service (EPTS). Any injury, illness, or disease to include the underlying causative condition, which was sustained or contracted prior to the present period of active duty or authorized training or had its inception between prior and present periods of active duty or training is considered to have EPTS. A medical condition may in fact be present or developing for some time prior to the point when it is either diagnosed or manifests symptoms. Consequently, the time at which a medical condition "exists" or is "incurred" is not dependent on the date of diagnosis or when the condition becomes symptomatic."

(2) Natural progression. The worsening of a pre-Service injury, illness, or disease that would have occurred within the same timeframe regardless of military service.

(3) Not in line of duty-not due to own misconduct. A determination supported by a preponderance of the evidence that the member's injury, illness, disease, or death happened while the member was absent without authority, and the injury, illness, disease, or death was not proximately caused by the member's own misconduct. EPTS conditions also fall under this finding unless negligence or misconduct is found.

3. DODI 1332.18, in effect at the time, established policy, assigned responsibilities, and provided procedures for referral, evaluation, return to duty, separation, or retirement of Service members for disability.

a. Paragraph 3 (Policy). RC Service members who are not on a call to active duty of more than 30 days and who are pending separation for non-duty related medical conditions may enter the DES for a determination of fitness and whether the condition is duty related.

b. Enclosure 3 (Operational Standards for the DES).

(1) Paragraph 1 (Overview of the DES). Under the supervision of the Secretary of the Military Department concerned, the DES will consist of:

(a) Medical evaluation to include the medical evaluation board (MEB), impartial medical reviews, and rebuttal.

(b) Disability evaluation to include the physical evaluation board (PEB) and appellate review, counseling, case management, and final disposition.

(2) Paragraph 2 (MEB). An MEB is not required when an RC member who is not on active duty is referred for conditions unrelated to military status and performance of duty. The medical documentation for RC members with non-duty related conditions referred for disability evaluation must provide clear and adequate written description of the medical condition(s) that, individually or collectively, may prevent the RC member from performing the duties of his office, grade, rank, or rating.

(3) Paragraph 3 (Disability Evaluation). PEBs determine the fitness of Service members with medical conditions to perform their military duties and, for members determined unfit because of duty-related impairments conditions, their eligibility for benefits. Service members may appeal the decision of the PEB. The PEB process includes the informal physical evaluation board (IPEB), formal physical evaluation board (FPEB) and appellate review of PEB results.

(a) IPEB. The IPEB reviews the case file to make initial findings and recommendations without the Service member present. The Service member may accept the finding, rebut the finding, or request a FPEB. The Secretary of the Military Department concerned will allow the Service member a minimum of 10 calendar days from receipt of the informal findings to rebut the findings of the IPEB or request an FPEB.

(b) FPEB. Service members who are found unfit are entitled to a formal hearing, an FPEB, to contest their IPEB findings. The Service members have a right to appear personally before the FPEB and to be represented by counsel. The FPEB will provide the Service member with a record of proceeding; for RC members referred for a nonduty-related determination, the record of proceedings must include the fitness determination and, when found to be fit, a finding of whether the Service member is deployable.

(c) The Military Department will review the findings and recommendations of the FPEB when requested by the Service member or designated representative or as required by the regulations of the Military Department concerned. The Military Department will also provide to the Service member a written response to an FPEB appeal that specifically addresses each issue presented in the appeal

c. Appendix 1 to Enclosure 3 (DES Referral).

(1) The following categories of Service members are eligible for duty-related determinations by the PEB:

- Service members on active duty or in the RC who are on orders to active duty specifying a period of more than 30 days
- RC members who are not on orders to active duty specifying a period of more than 30 days but who incurred or aggravated a medical condition while the member was ordered to active duty for more than 30 days
- Other Service members who are on orders to active duty specifying a period of 30 days or less if they have a medical condition that was incurred or aggravated in the LOD while the Service member was performing active duty or IDT or traveling directly to or from a place where such duty was performed

(2) Members of the RC with non-duty related determinations, who are otherwise eligible will be referred solely for a fitness for duty determination when one of the following exist:

- The RC member does not meet duty-related criteria
- The RC member has requested referral for a fitness determination upon notification that he/she does not meet medical retention standards

- Service regulations required the RC member to be referred to the DES for a fitness determination prior to separation for failing to meet medical retention standards

(3) Evidentiary Standards for Determining Unfitness Because of Disability. The Secretary of the Military Department concerned must cite objective evidence in the record, as distinguished from personal opinion, speculation, or conjecture, to determine a Service member is unfit because of disability. Additionally, the Secretary of the Military Department concerned will determine fitness or unfitness for military service on the basis of the preponderance of the objective evidence in the record.

d. Appendix 3 to Enclosure 3 (Standards for Determining Compensable Disabilities).

(1) Paragraph 1 (Overview of Disability Compensation Criteria). Service members who are determined unfit to perform the duties of the member's office, grade, rank, or rating because of disability may be eligible for disability benefits when:

- The disability is not the result of the member's intentional misconduct or willful neglect and was not incurred during unauthorized absence or excess leave
- The Service member incurred or aggravated the disability while he or she was a member of the Military Services called or ordered to active duty for a period of 30 days or less, performing IDT or traveling directly to or from the place of IDT, or to funeral honors duty

(2) Paragraph 3 (Disability Retirement Criteria for Members on Active Duty for 30 days or less, on IDT, Funeral Honors Duty, or Training Pursuant to Section 10148 (Ready Reserve: Failure to Satisfactorily Perform Prescribed Training), Title 10, U.S. Code). A Service member who incurred or aggravated a disability while he or she was a member of the Military Services called or ordered to active duty for a period of 30 days or less, performing IDT or traveling directly to or from the place of IDT, or to funeral honors duty will be retired with disability benefits when:

- The disability is permanent and stable
- The Service member has at least 20 years of service or the disability rating is at least 30 percent and was incurred or aggravated in the LOD while performing active duty or IDT or while traveling to or from the place of active duty or IDT

(3) Paragraph 5 (Disability Separation Criteria for Members on Active Duty for 30 days or less, on IDT, Funeral Honors, or Training Pursuant to Section 10148, Title 10 U.S. Code). A Service member who incurred or aggravated a disability while he or she was a member of the Military Services called or ordered to active duty for a period of 30 days or less, performing IDT or traveling directly to or from the place of IDT, or to funeral honors duty will be separated with disability benefits when:



- The Service member has less than 20 years of service
- The disability is or might be permanent and was the result of an injury incurred or aggravated by service in the line of duty while performing active duty or IDT or traveling to or from the place of duty

(4) Paragraph 6 (LOD Requirements). In the DES, LOD determinations assist the PEB and appellate review authority in meeting the statutory requirements under chapter 61 (Retirement or Separation for Physical Disability) of Title 10, U.S. Code for separation or retirement for disability.

(a) Relationship of LOD Findings to DES Determinations. LOD determinations will be made in accordance with the regulations of the respective Military Department. When an LOD determination is required, the DES will consider the finding made for those issues mutually applicable to LOD and DES determinations. These issues include whether a condition is pre-existing and whether it is aggravated by military service and any issues of misconduct or negligence.

(b) Referral Requirement. When an LOD determination is required, it will be done before sending a Service member's case to the PEB.

(c) Required Determinations. At a minimum, LOD determinations will be required in these circumstances:

- Injury, disease, or medical condition that may be due to the Service member's intentional misconduct or willful negligence, such as a motor vehicle accident
- Injury or disease possibly incurred during a period of unauthorized absence
- Injury, illness, or disease of RC members on orders specifying a period of active duty of 30 days or less while performing active duty or IDT or traveling directly to or from the place of active duty

4. DODI 1332.18, currently in effect, provides guidance for determining fitness for duty because of disability, and whether a Service member (including initial entry trainees, Military Academy cadets, and midshipmen) found unfit for duty due to disability will be separated or retired.

a. Paragraph 1.2 (Policy). RC Service members who are in an Non-Active Duty (NAD) status, not on a call to active duty for more than 30 days and are pending separation for non-duty-related medical conditions, may, with the consent of the Service member, receive a determination of fitness and whether the unfitting condition is duty related.

b. Paragraph 3.3 (PEB). PEBs determine the fitness of Service members with medical conditions that are, either singularly, collectively, or through combined effect,

potentially unfitting and, for members determined unfit, determine their eligibility for compensation.

(1) Duty-related Determinations. The PEB record of proceedings will document whether the Service member is fit or unfit; if unfit, specify the code and disability rating (based on the Department of Veterans Affairs Schedule for Rating Disabilities (VASRD)); and identify the reasons conditions are not compensable. The reasons for being not compensable would include the following:

- The specific accepted medical principle for overcoming the presumption of sound condition and the presumption of service aggravation for all cases with a finding of preexisting condition without service aggravation
- The accepted medical principle that an RC Service member performing IDT, AD training, or on active duty of 30 days or less, has a preexisting disability that was not permanently aggravated by service

(2) Non-Duty-Related Determinations. The record of proceedings will document only the PEB's determination as to whether the Service member is fit or unfit and, if the RC member is found to be fit, whether the member is deployable.

c. Paragraph 5.3 (Eligibility for Referral).

(1) Duty-Related Determinations. Service members who are on orders to active duty specifying a period of 30 days or fewer and have a medical condition that was incurred or permanently aggravated in the LOD while the Service member was performing AD or IDT or traveling directly to or from the place at which such duty was to be performed.

(2) Non-Duty-Related Determinations. RC Service members with only non-duty-related conditions will be referred solely for a fitness for duty determination when either: the RC Service member does not qualify for a duty-related determination or the RC Service member requests or Service regulations require referral to the DES.

d. Paragraph 7.1 (Disability Compensation Criteria Overview). Service members who are determined unfit to perform the duties of their office, grade, rank, or rating because of disability in accordance with Section 5 may be eligible for disability benefits when:

(1) The disability is not the result of the Service member's intentional misconduct or willful neglect and was not incurred during unauthorized absence or excess leave.

(2) The Service member incurred or permanently aggravated the disability while they were:

- A member of a regular component of the Military Services entitled to basic pay
- A Service member entitled to basic pay, called or ordered to active duty for a period of more than 30 days
- A Service member called or ordered to active duty for a period of 30 days or fewer, performing IDT or traveling directly to or from the place of IDT or to funeral honors duty

b. Paragraph 7.3 (Disability Retirement Criteria for Members on AD for 30 days or Fewer, on IDT, Funeral Honors Duty, or Training Pursuant to Section 1204 (Members on AD for 30 days or Less or on IDT: retirement), Title 10 (Armed Forces), U.S. Code). Service members described in paragraph 7.1 above will be retired with disability benefits when:

- The disability is permanent and stable
- The Service member has at least 20 years of service, or
- The disability is rated at 30 percent or more and, when incurred after 23 September 1996, occurred while performing AD or IDT or traveling directly to or from AD or IDT

c. Paragraph 7.5 (Disability Separation Criteria for Members on AD for 30 days or less, on IDT, Funeral Honors Duty, or Training Pursuant to Section 1206 (Members on Active duty for 30 days or Less or on IDT: Separation) of Title 10, U.S. Code).

(1) Service members described in paragraph 7.1 above will be separated with disability benefits when:

- The Service member has fewer than 20 years of service
- The disability is or may be permanent; is the result of an injury incurred or aggravated ILD while performing AD or IDT or traveling directly to or from the place of such duty
- The disability is rated at less than 30 percent under the VASRD

(2) If the Service member is eligible for transfer to the inactive status list pursuant to Section 1209 (Transfer to Inactive Status List Instead of Separation) of Title 10, U.S. Code and chooses to, they may be transferred to that list instead of being separated; (applies to members with at least 20 years of service who would be qualified for retirement but for the fact that the disability is less than 30 percent).

d. Paragraph 7.6 (LOD Requirements). LOD determinations assist the physical evaluation board (PEB) with meeting its statutory requirements under Title 10, U.S. Code, chapter 61 (Retirement or separation for Physical Disability).

(1) LOD determinations will at least be required when the injury, illness, or disease is of an RC Service member on orders specifying a period of active duty of 30 days or fewer while performing AD or IDT or when traveling directly to or from the place of AD or IDT.

(2) The Secretary of the Military Department concerned will determine if injuries and diseases to RC Service members serving on orders of 30 days or fewer were incurred or aggravated in the LOD.

e. Paragraph 7.7 (Evidentiary Standards for Determination Compensability of Unfitting Conditions). For RC Service members being examined in accordance with Paragraph 7.3., aggravation must constitute the worsening of a preexisting medical condition beyond the natural progression of the condition. There is no presumption of incurrence or aggravation in the LOD for RC Service members serving on orders of 30 days or fewer.

f. Paragraph 11.5 (Disposition for Unfit Service Members). RC Service members with at least 15 years and less than 20 years of qualifying service, who would otherwise be qualified for non-regular retirement, may waive disability disposition and request early qualification for retired pay in accordance with Section 12731b (Special Rule for Members with Physical Disabilities Not Incurred in Line of Duty) of Title 10, U.S. Code.

5. AR 635-40 (Disability Evaluation for Retention, Retirement, or Separation), currently in effect, prescribed policies and procedures for the Army DES and sets forth policies and procedures for determining whether a Soldier is unfit for continued military service due to physical disability.

a. Paragraph 4-2 (DES Overview – Applicability). The non-duty related process applies to RC Soldiers who are not on active duty and who do not meet medical retention standards because of non-duty related impairments.

b. Paragraph 4-24 (Formal PEB Process). RC Soldiers adjudicated under the non-duty related process have the right to the assistance of Government counsel provided at no expense to the Soldier or a personal representative provided at no expense to the Army.

c. Paragraph 4-34 (RC Non-Duty-Related Process). The RC non-duty related process is established by policy. It affords RC Soldiers not called to active duty of more than 30 days and who are pending separation by the RC for non-duty related medical conditions to enter the DES for a determination of fitness and whether the condition is duty related. An LOD investigation resulting in a finding of NLD is not required when it is clear that the disqualifying disability is non-duty related.

6. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military DRBs and BCM/NRs regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. BCM/NRs may grant clemency regardless of the type of court-martial. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to other corrections, including changes in a discharge, which may be warranted based on equity or relief from injustice.

a. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. In determining whether to grant relief on the basis of equity, injustice, or clemency grounds, BCM/NRs shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment.

b. Changes to the narrative reason for discharge and/or an upgraded character of service granted solely on equity, injustice, or clemency grounds normally should not result in separation pay, retroactive promotions, and payment of past medical expenses or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded service characterization.

//NOTHING FOLLOWS//