

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 26 January 2024

DOCKET NUMBER: AR20230006705

APPLICANT REQUESTS:

- reconsideration of his prior requests for physical disability retirement
- personal appearance before the Board

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

- DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States)
- self-authored statement
- Headquarters, 75th Division (Training Support) memorandum, dated 4 January 2005
- DA Form 1574 (Report of Proceedings by Investigating Officer (IO)/Board of Officers, dated 11 January 2005
- Headquarters, 75th Division (Training Support) memorandum, dated 6 June 2006
- Department of Veterans Affairs (VA) Compensation & Pension (C&P) Exam Summary, Initial Evaluation for Post-Traumatic Stress Disorder (PTSD), dated 22 June 2009
- Houston VA Medical Center (VAMC) Mental Health (MH) Psychiatric Assessment Note, dated 2 July 2009
- Houston VAMC Problem List, dated 29 August 2018

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20100009128 on 21 September 2010 and Docket Number AR20220001633, dated 7 December 2022.

2. The applicant states:

a. He is requesting correction of his record to reflect physical disability retirement effective 19 February 2007. He was erroneously forced through an expiration term of service (ETS) discharge with the following unfitting conditions that are service-

connected and were all incurred and aggravated in active and U.S. Army Reserve (USAR) service:

- PTSD with depression (labeled as bipolar disorder, but removed as a diagnosis)
- bilateral thumb condition
- bilateral knee condition
- bilateral shoulder condition

b. On or about 19 February 2022, he requested on his prior DD Form 293 that he be granted a personal appearance before a travel board. At that time, he had custody of all of his service-connection documents as well as new and material evidence to provide to the Board. He was just waiting for the Army Review Boards Agency (ARBA) to contact him with a board date in order to provide the documents in person so they would not be misplaced and so that he could answer any questions regarding his service-connected issues. However, no one called him with a Board date, and they were allowed to knowingly decide his case without informing him he was not to appear before a travel board.

c. Please expedite his case due to not having been informed by ARBA that he was not to appear before a travel board, for which he was waiting. He is a 100 percent service-connected disabled veteran.

d. He is providing documents reflecting service-connection for PTSD, hands, knees and shoulders. His ETS was in February 2007 and the VA granted him service-connection for PTSD in July 2007.

3. After prior honorable service in the Army National Guard (ARNG) from 5 September 1989 through 11 September 1991, the applicant enlisted in the Regular Army on 7 January 1992. He served in Southwest Asia from 1 September 1997 through 15 December 1997.

4. On 20 August 1998, the applicant enlisted in the USAR for a period of 6 years.

5. The applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was honorably discharged from the Regular Army due to completion of required active service on 25 September 1998, after 6 years, 8 months, and 19 days of net active service. He was transferred to a USAR Troop Program Unit (TPU) in Houston, TX.

6. A DD Form 2807-1 (Report of Medical History), dated 22 November 2003, shows the applicant underwent medical examination for the purpose of USAR retention on the date of the form and provided his medical history, indicating he had the following medical conditions:

- bronchitis
- sinusitis
- arthritis
- impaired use of arms, legs, hands, or feet
- knee trouble
- indigestion
- skin diseases
- severe headache
- trouble sleeping
- depression or excessive worry
- a 60 percent service-connected disability from the VA for an unspecified condition or conditions

7. A previously provided Weight Control Program Summary Sheet shows the applicant entered the Army Weight Control Program on 6 June 2004, a Suspension of Favorable Action (Flag) was initiated on the same date, and his monthly weigh-ins between September 2004 through February 2006 show alternately satisfactory and unsatisfactory progress.

8. A memorandum from The Federal Strategic Health Alliance, dated 28 January 2004, provided the applicant's unit commander/command surgeon with the results of the applicant's retention physical/annual dental examination. The memorandum shows:

a. The applicant was found physically fit for retention under the provisions of Army Regulation 40-501 (Standards of Medical Fitness)

b. He had one or more abnormal finding per a urinalysis, as indicated on the DD Form 2808, requiring follow-up, which was the responsibility of the applicant and was to be done at no expense to the USAR.

c. Result of the physical examination required the commander's review and action.

9. 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.

10. A partial DD Form 2808 (Report of Medical Examination), dated 28 January 2004, shows:

- a. The applicant was found qualified for servicing pending medical review.
- b. He was given a PULHES physical profile rating of 233112 on 28 January 2004. That rating was stricken through with a line and underneath is annotated a physical profile rating of 244112.
- c. His listed significant or disqualifying defects were as follows:
  - arthritis bilateral knees, bilateral shoulders, bilateral hands
  - bipolar disorder, depression
  - folliculitis
- d. The summary of his defects and diagnoses shows the following:
  - arthritis both knees, shoulders, hands, 60 percent VA service-connected
  - gastroesophageal reflux disease (GERD)
  - headaches
  - depression, bipolar disorder
- e. The recommendations for further specialist examinations indicated shows the applicant was being followed at the Houston VAMC.

11. A memorandum from Headquarters, 75th Division (Training Support) to the applicant's TPU, dated 24 March 2004, with the subject "referral to the MEB/PEB [Medical Evaluation Board/Physical Evaluation] Board", shows:

- a. The applicant had a permanent physical profile rating of P3/P4.
- b. He had a medical condition that did not allow him to appear before the Military Occupational Specialty (MOS) Medical Retention Board (MMRB) at the 75th Division.
- c. his DA Form 3349 (Physical Profile) needed his commander's signature.
- d. A signed DA Form 3349 along with the applicant's medical records and an approved DA Form 2173 (Statement of Medical Examination and Duty Status) indicating line of duty (LOD) status were to be sent to this Headquarters for further processing.

12. A memorandum from Headquarters, 75th Division (Training Support) to the Commander, Brooke Army Medical Center (BAMC), dated 16 May 2004, requested a fit for duty evaluation/MEB referral for the applicant. The memorandum shows:

a. The applicant may be unable to perform the duties of his MOS due to his medical conditions of bilateral knee/shoulder/hand arthritis, bipolar disorder, and folliculitis, as determined by a review of medical records and/or a DA Form 3349. A complete formal investigation was requested.

b. The applicant was not eligible to appear before the 75th Division (Training Support) MMRB and possesses a potential medical disqualification in accordance with Army Regulation 40-501, chapter 3.

13. The applicant's available service and medical records do not contain a DA Form 3349.

14. A VA letter, dated 21 July 2004 and signed by a Staff Physician shows:

a. The applicant requested this letter be written on his behalf as he was requesting medical documentation in connection with determining his medical eligibility for continued medical service.

b. The applicant has been followed at the Houston VAMC since January 1999 and has significant medical and mental health diagnoses, which include:

- hyperlipidemia
- elevated liver function tests
- degenerative joint disease of the hand, knees, and shoulder
- GERD
- intermittent explosive disorder
- mood disorder

c. Due to these medical difficulties, the Staff Physician did not feel the applicant was a good candidate for military deployment and strongly recommended he be referred to an MEB for possible discharge from the USAR.

15. A DA Form 4836 (Oath of Extension of Enlistment or Reenlistment), dated 7 August 2004, shows the applicant extended his enlistment in the USAR by 12 months, extending his then current USAR ETS of 19 August 2004 to a new ETS date of 19 August 2005.

16. A Houston VAMC Certificate of Visit, dated 15 September 2004, shows the applicant was seen in the Prime Care Clinic on the date of the form and was restricted

from running, prolonged walking, pushups, and sit-ups. He had a P4 physical profile in physical factors U and L and was unable to participate in the Army Physical Fitness Test (APFT) until evaluated by orthopedics. It was suggested he be seen by an MEB to determine his eligibility to remain in the service.

17. 90th Regional Readiness Command Order Number 003410, dated 7 October 2004, ordered the applicant to proceed on TDY to Fort Sam Houston, TX, to undergo a physical effective 11 October 2004.

18. A BAMC memorandum for the Commander, Headquarters, 75th Division (Training Support), dated 12 October 2004, provides the following fit for duty evaluation:

a. Medical evaluation of the applicant shows he did not meet retention standards per Army Regulation 40-501, paragraph 3-14c for knee pain, preventing APFT and shoulder pain limiting MOS performance.

b. As no LOD was currently present, the applicant was referred to his USAR channels for retention determination and disposition.

c. This determination was based upon a record review and Soldier interview.

d. The following conditions were identified:

- bilateral knee osteoarthritis versus patellofemoral pain
- bilateral shoulder arthritis
- bipolar disorder, recent onset, not service-connected and listed as medically acceptable on physical

19. A Headquarters, 75th Division (Training Support) memorandum, dated 4 January 2005, appointed an IO to conduct a formal investigation into the applicant's medical condition. From the available evidence in the applicant's medical records and from the applicant himself, the IO was to make a finding as to whether the injuries or illnesses were valid and occurred during active duty, annual training, or drill.

20. A DA Form 1574, dated 11 January 2005, provides the Report of Proceedings by IO, as follows:

a. An investigation board commenced on 9 January 2005; a formal board was not required for this investigation. On 11 January 2005, the IO finished gathering/hearing evidence and completed his findings and recommendations.

b. A review of the applicant's medical records from William Beaumont Army Medical Center, dated 10 August 1998 show evidence of his complaint of knee injury while on

active duty and receiving base pay. There is no evidence of trauma/injury noted in the medical records. There is no evidence of the applicant willfully, intentionally, and knowingly committing harm to himself with regard to his right and left knee injuries. The injuries are service-connected.

c. The IO's recommended the applicant's referral to a medical board for further evaluation.

21. A Headquarters, 75th Division (Training Support) memorandum for the President, PEB, dated 30 March 2005, shows the applicant took his last APFT in March 1999 and has been unable to take another APFT since that date due to bilateral knees, shoulders, and hands arthritis. He has been found unfit for continued service and elects a PEB to review his case. His permanent physical profile was approved on 6 March 2004.

22. A DA Form 4856 (Developmental Counseling Form) shows the applicant was counseled on 26 June 2005 regarding his reenlistment eligibility. He was on the overweight program and was ineligible for reenlistment but could extend his contract.

23. A second DA Form 4836, dated 26 June 2005, shows the applicant again extended his contract in the USAR by another 12 months, giving him a new ETS date of 19 August 2006.

24. Two additional memoranda from Headquarters, 1st Battalion (Training Support), 289th Regiment, 4th Brigade, 75th Division (Training Support), dated 1 August 2005 and 22 December 2005, appointed two additional IOs to conduct a formal investigation into the applicant's medical condition. The IOs were to make findings from the available evidence in the applicant's medical records and from the applicant himself, as to whether the injuries or illnesses were valid and occurred during active duty, annual training, or drill.

25. The applicant's available service records do not contain a DA Form 2173, a DD Form 261 (Report of Investigation Line of Duty Misconduct Status), or any other documentation indicating he had a condition, injury, or illness approved as having been incurred in the LOD.

26. The applicant previously provided email correspondence from the Senior Health Care Noncommissioned Officer, Headquarters, 75th Division (Training Support) and other USAR individuals between November 2005 and June 2006, indicating there were issues with outstanding LODs pertaining to the applicant.

27 A Headquarters, 75th Division (Training Support) memorandum dated 6 June 2006, shows the following:

a. A Judge Advocate reviewed the Report of Investigation pertaining to the applicant's LOD and found the investigation to be not legally sufficient. The submitted investigation lacks the required medical evaluation; it is therefore incomplete and does not support the finding of "not in the LOD."

b. An LOD investigation, whether formal or informal, requires the completion of the DA Form 2173, Section I, by the appropriate Medical Treatment Facility (MTF) commander, attending physician, or patient administrator, and per regulatory guidance the appropriate MTF is the MTF where the Soldier is treated for the injury. The DA Form 2173 submitted for the applicant's bipolar disorder lacks the required medical opinion and signature. This is the first step in an LOD investigation and should precede the completion of Section II by the unit commander and the appointment of the IO.

c. Without the required medical evaluation, there is not sufficient evidence to sustain the IO's finding that the applicant's injury was not in the LOD. Unless refuted by substantial evidence contained in the investigation, an injury, disease, or death is presumed to be in the LOD. The IO's report does correctly note that the applicant's medical record does not include any positive evidence that his bipolar disorder originated prior to his discharge from active duty on 25 September 1998. However, the required medical opinion on the nature, extent, and origin of the injury is necessary before it can be determined whether the lack of medical evidence prior to 2003 is sufficient to overcome the presumption that the injury occurred within the LOD.

d. The report also lacks documentation that the IO notified the applicant in writing of the proposed adverse determination, provided him a copy of the supporting evidence, and gave him an opportunity to reply in writing and offer a rebuttal.

e. This investigation appears to be a re-creation of an investigation that should have taken place in 1998 or 2003. The applicant's statement indicates his belief was that his mental problems began prior to leaving active duty on 25 September 1998. The medical records submitted as supporting evidence all appear to have been made during or after 2003. Therefore, the investigation did not take place within the required time limitation of 75 days from the date of the injury.

28. There is no evidence of record indicating if and how the issues surrounding the applicant's LOD investigation were resolved.

29. A third DA Form 4836 dated 17 August 2006, shows the applicant again extended his contract in the USAR by another 6 months, giving him a new ETS date of 19 February 2007.



30. A final memorandum from Headquarters, 75th Division (Training Support) addressed to the PEB and dated 23 January 2007, shows the applicant's last APFT was taken on 12 September 2004, and he had not taken another since then due to his U4/L4 physical profile rating. He was unable to participate in the APFT until evaluated by orthopedics, it was suggested he be seen by a Medical Review Board to determine his eligibility to remain in the service.

31. Headquarters, Headquarters, 75th Division (Training Support) Orders 07-108-0004, dated 18 April 2007, honorably discharged the applicant from the USAR effective 19 February 2007, citing the authority of Army Regulation 135-178 (ARNG and Reserve Enlisted Administrative Separations). The regulating paragraph is not listed.

32. The applicant's DA Form 5016 (Chronological Statement of Retirement Points), covering the entirety of his service from 5 September 1989 through 19 February 2007, shows he completed a total of 14 qualifying years for retirement.

33. A VA C&P Exam Summary, Initial Evaluation for PTSD, dated 22 June 2009, shows:

a. The applicant underwent a neuropsychiatric C&P Examination for rating purposes only. He then presently had a 0 percent service-connected disability rating for PTSD and a 70 percent service-connected disability rating for other physical disabilities.

b. The applicant conceded stressors secondary to his active duty military service in Southwest Asia where he was under frequent attack with both small arms fire and the fear of biological and chemical enhanced SCUD missiles.

c. The applicant's diagnoses include PTSD and major depressive disorder.

34. A Houston VAMC MH Psychiatric Assessment Note, dated 2 July 2009, shows:

a. The applicant was seen on the date of the medical record for a MH assessment, subsequent to an initial assessment on 13 March 2006. He had a 70 percent service-connected disability rating for the following conditions:

- traumatic arthritis, 10 percent
- knee condition, 20 percent
- knee condition, 20 percent
- paralysis of ulnar nerve, 10 percent
- traumatic arthritis, 10 percent
- eczema, 10 percent
- paralysis of ulnar nerve, 10 percent

b. He reported a history of traumatic events, including being fired upon by enemies in Desert Storm in 1997 -1998. He also reported multiple PTSD symptoms, including nightmares, intrusive thoughts, flashbacks, avoidance of activities, and anger outbursts.

c. His listed diagnosis is PTSD, and he was to enroll in the Trauma Response Program (TRP).

35. The applicant previously applied to the ABCMR requesting physical disability retirement. The Record of Proceedings for ABCMR Docket Number AR20100009128 reflects that on 21 September 2010, the Board denied the applicant's request, determining the evidence did not demonstrate the existence of a probable error or injustice.

36. A Houston VAMC Problem List, dated 29 August 2018, shows the applicant's listed problems dating from 16 January 2003 through 16 September 2016, as follows:

- mood disorder, 16 January 2003
- intermittent explosive disorder, 24 March 2003
- GERD, 11 June 2003
- elevated liver function tests, 15 June 2004
- degenerative joint disease (DJD), 15 June 2004
- hyperlipidemia, 15 July 2004
- other unspecified counseling, 30 January 2006
- simple renal cyst, 17 May 1006
- pain in knee, 14 June 2007
- chondromalacia patellae, 14 June 2007
- pain in joint involving shoulder region, 7 September 2007
- pain in joint involving ankle and foot, 17 November 2007
- osteoarthritis, 19 May 2009
- hypercholesterolemia, 29 May 2009
- chronic PTSD following military combat, 7 July 2009
- stress, 15 February 2010
- headache, 16 February 2010
- sleep apnea, 28 March 2011
- acromioclavicular (joint) (ligament) sprain, 26 June 2012
- injury of tendon of the rotator cuff of shoulder, bilateral, 26 June 2012
- bursitis, subacromial, bilateral, 26 June 2012
- cough, 2 June 2013
- tendonitis, bicipital, 13 August 2013
- rotator cuff tear, 30 August 2013
- diabetes mellitus, 16 December 2014
- insomnia disorder related to other mental disorder, 17 April 2015

- depressive disorder, 17 April 2015
- anxiety disorder, 17 April 2015
- gout, 16 September 2016

37. The applicant again applied to the ABCMR in February 2022, requesting reconsideration of his prior request for physical disability retirement. In the adjudication of that case, a medical advisory opinion was provided by the ARBA medical advisor, who opined that referral of the applicant's case to the Disability Evaluation System (DES) is not warranted.

38. The Record of Proceedings for ABCMR Docket Number AR20220001633 shows on 7 December 2022, the Board denied the applicant's request, determining the evidence did not demonstrate the existence of a probable error or injustice.

39. 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.

40. MEDICAL REVIEW:

a. SUBJECT: Medical Advisory Opinion – AR20230006705 GRANT Christopher Lavella AR20220001633 (07Dec2022); AR20100009128 (21Sep2010); xxx-xx-1541

b. The Army Review Boards Agency (ARBA) Medical Advisor reviewed the supporting documents, the Record of Proceedings (ROP), and the applicant's available records in the Interactive Personnel Electronic Records Management System (iPERMS), the Health Artifacts Image Management Solutions (HAIMS) and the VA's Joint Legacy Viewer (JLV). The applicant desires medical disability retirement. He listed the following conditions: PTSD, hands, knees, and shoulder. This is an appeal for reconsideration of a previous request. In this application he cites memos associated with Liberal Consideration (Carson, Kurta and Wilkie) in support of his request.

c. The ABCMR ROP summarized the applicant's record including personnel records discussing his physical profile status and retention/fitness recommendations. The ABCMR ROP also detailed the applicant's service record. Of note, he was a member of ARNG 05Sep1989 through 11Sep1991. He enlisted in the Regular Army 07Jan1992. His MOS was 63B10 Light Wheeled Vehicle Mechanic. He was deployed in Southwest Asia 19970901 to 19971215. He was discharged on 25Sep1998 under provisions of AR 635-200 chapter 4 due to completion of required active service. Then he enlisted in

the USAR 07Jan1999 from which he was ultimately discharged on 19Feb2007. His service was characterized as honorable.

d. Concerning the applicant's physical conditions hands, knees, and shoulder, there were no active duty service treatment records available for review. JLV search revealed records starting in December 1998 (after his Regular Army service), which showed x-rays of knee, hand, and shoulders without associated clinical notes. VA service connection (and ratings) for hands, knees, and shoulder conditions was noted. Physical profile limitations and APFT restrictions were also noted in the record (Certificate of Visit document dated 15Sep2004 noted a P4 for upper and lower extremities). However, the basis for these recommendations, namely treatment records to include the origin of the medical conditions, were not available for review.

e. BH Review.

- Concerning the applicant's PTSD, there were no active duty service treatment records available for review for this condition either. However, Liberal Consideration aside, the applicant's VAMC providers noted his report of depression and marital discord (physical and verbal abuse toward his wife) beginning in 1998 in the setting of recent deployment. Mood Disorder, Not Otherwise Specified (NOS); Alcohol Abuse; and Intermittent Explosive Disorder (08Nov2002 Primary Care Note and Mental Health Consult) were diagnosed. Bipolar II and Cyclothymia diagnoses were considered but were ultimately ruled out. Intermittent Impulse Control Disorder (May2004); Depression NOS (Mar2006); Major Depressive Disorder (Apr2007) were also diagnosed while he was still in the Reserves. He was referred for anger management and marital counseling and to AA for sobriety. He also took anti-psychotropic medication and attended group counseling from 26Apr2006 through his discharge from service which he endorsed finding helpful. There was no suicide or homicide ideation, psychosis, or psychiatric hospitalizations.
- Two years after discharge from service, the applicant was diagnosed with combat associated PTSD (02Jul2009 Mental Health Psychiatric Assessment Note). The 22Jun2009 Initial Evaluation for PTSD DBQ was not available for this review. The VA rated his PTSD at 50%. The applicant shared that they were fired upon during Desert Storm 1997-1998, and they were constantly attacked by incoming SCUD missiles. A specific event was not described but he stated that he was given an Armed Forces Expeditionary medal when his Patriot unit had to perform in a very dangerous area. He reported characteristic PTSD symptoms related to combat trauma (frequent nightmares; flashbacks; avoiding thoughts, feelings, or discussions about the trauma; hypervigilance; exaggerated startle response; etc.) and he was assessed to meet DSM IV criteria for PTSD. During the visit, his mental status exam was normal. He had maintained employment with USPS as a mail carrier while in service (he was reportedly medically retired May 2010 from USPS after 11 years walking on cement (21Feb2020 Knee and

Lower Leg Condition DBQ). In the 200008 thru 200107 and 200402 thru 200501 NCO Evaluation Reports, his overall performance and potential was rated respectively as "among the best" and "fully capable". Records showed his physical profile on 06Mar2004 was S2. The BH condition appears to have met medical retention standards of AR 40-501 chapter 3 at the time of discharge from service.

f. There was no documentation indicating the applicant had a premilitary BH history. BH providers endorsed the PTSD condition was associated with combat trauma. While the BH condition appears to be duty related, the condition also appears to meet retention standards. In contrast, medical records documenting that the bilateral hand, knee, and shoulder conditions were either incurred in service or permanently aggravated by service while on active duty orders, were not found during this review. Based on records available for review, evidence was insufficient to recommend referral for medical discharge processing.

#### BOARD DISCUSSION:

1. 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.
2. After reviewing the application, all supporting documents, and the evidence within the military record, the Board found relief was not warranted. The Board carefully considered the applicant's request, supporting documents and evidence in the records. Documentation available for review does reveal active duty treatment records to support a determination any physical conditions. Although there is some documentation regarding post-service conditions, it does not show sufficient detail to determine the cause. The Board further considered that portion of the request regarding his statement of a behavioral health condition. The Board found inconclusive documentation that he had a medical condition that was incurred in service or permanently aggravated by service while on active duty orders. After due consideration of the applicant's request, the Board determined the evidence available for review insufficient to demonstrate the existence of a probable error or injustice and a recommendation for referral to the IDES is not warranted.
3. The Board wished to inform the applicant that the Department of Veteran Affairs (VA) and the Department of Defense (DoD) rate disabilities differently for different reasons. The VA rate disabilities based upon the impact on future civilian employment and earnings, while the DoD rate disabilities based upon the impact future military service.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
█	█	█	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board determined 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 to amend the decision of the ABCMR set forth in Docket Number AR20100009128 on 21 September 2010 and Docket Number AR20220001633, dated 7 December 2022 and referral for medical discharge processing is not warranted.



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, 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 (Discharge Review Board (DRB) Procedures and Standards) 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 an MEB; when they receive a permanent medical profile rating of 3 or 4 in any factor and are referred by an MOS Medical Retention Board; and/or they are command-referred for a fitness-for-duty medical examination.

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

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

2. 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.

3. Army Regulation 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. 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 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 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.

4. Title 10 USC, section 12731b (Special rule for members with physical disabilities not incurred in the line of duty), enacted 23 October 1992, provides in pertinent part that in the case of a member of the Selected Reserve of a Reserve Component (RC) who no longer meets the qualifications for membership in the Selected Reserve solely because



the member is unfit because of physical disability, the Secretary concerned may, for the purpose of Section 12731 of this title, determine to treat the member as having met the service requirement and provide the member notification required if the member completed at least 15 years, but less than 20 years of qualifying service for retirement purposes as of 1 October 1991. This special provision of the law is applicable only to members who are medically disqualified for continued service in an RC.

5. 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.

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) 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//