

IN THE CASE OF: [REDACTED]

BOARD DATE: 31 January 2024

DOCKET NUMBER: AR20230006812

APPLICANT REQUESTS: through counsel a/an-

a. review of whether the applicant was performing the duties of his military occupational specialty (MOS) at the time of his transfer to the Warrior Transition Unit (WTU) on 5 June 2012.

b. review of whether the applicant's referred lumbar spine injury declined during the presumptive period from 1 March 2012 to 1 March 2013.

c. review of whether the applicant was performing duties befitting his experience level, office, grade, or rank at the time of entering the presumptive period on 1 March 2013.

d. correction of his DA Form 199-2 (U.S Army Physical Disability Agency (USAPDA) Revised Physical Evaluation Board (PEB) Proceedings), dated 1 April 2014 to show the applicant is unfit with a totally disability rating of 90 percent for the following:

- Lumbar Spine Injury, rated at 20 percent
- Migraine Headaches, rated at 30 percent
- Cervical Spine Injuries, rated at 40 percent and combat-related due to an instrumentality of war
- Bilateral Carpal Tunnel Syndrome, rated at 10 percent
- Bilateral Patellofemoral Syndrome with Arthritis, rated at 10 percent
- Right Shoulder Internal Derangement, with Osteoarthritis Bilateral A/C Joints, rated at 20 percent, rated at 10 percent and combat-related due to an instrumentality of war
- Fibromyalgia, rated at 40 percent and combat-related due to an instrumentality of war

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

- DD Form 149 (Application for Correction of Military Record)
- counsel's brief
- Enclosure 1A

- email, subjected: WTU entry, 10 January 2023
- email, subjected: Transition Online Learning (TOL) entry, 9 January 2023

- Enclosure 1
 - memorandum, subjected: Contingency Operation for Active Duty Operational Support (CO-ADOS) Mobilization, 11 September 2011
 - DA Form 7349 (Initial Medical Review - Annual Medical Certificate), 12 September 2011

- Enclosure 2 - email, subjected: Medical, 14 February 2012
- Enclosure 3 - Orders A-02-203499, 27 February 2012
- Enclosure 4
 - memorandum, subjected: WTU Entrance Nomination, 29 May 2012
 - Orders A-06-210084, 5 June 2012

- Enclosure 5 - Clinical Summary and Treatment Plan, 24 May 2012
- Enclosure 6 - DA Form 7652 (Physical Disability Evaluation System (PDES) Commander's Performance and Functional Statement, 29 May 2012
- Enclosure 7 - Army medical records (20 pages)
- Enclosure 8 - DA Form 199 (Informal Physical Evaluation Board (PEB) Proceedings), 24 September 2013
- Enclosure 9 - PEB Appeal, 11 December 2013
- Enclosure 10 - DA Form 199-1 (Formal PEB Proceedings), 19 December 2013
- Enclosure 11 - FPEB Appeal, 16 January 2014
- Enclosure 12 - memorandum, subjected: Appeal of Physical Evaluation Board (PEB) Formal Proceedings 2 February 2014
- Enclosure 13
 - email, subjected: Forwarding Supplement to Appeal from JBLM PEB, 19 February 2014
 - Mr. ■■■ letter of support, 19 February 2014

- Enclosure 14
 - memorandum, subjected: Response; Appeal of Adverse FPEB Finding, 1 April 2014
 - DA Form 199-2 (US Army Physical Disability Agency (USAPDA) Revised PEB Proceedings), 1 April 2014

- Enclosure 15 - DA Form 7652, 22 August 2013
- Enclosure 16 - Physical Requirements for Award of Area of Concern (AOC) 19A/B/C
- Enclosure 17 - medical records (4 pages)
- Enclosure 18 - medical records (13 pages)
- Enclosure 19 - VA Rating Decision, 23 October 2015
- Enclosure 20
 - Army CRSC Decision Letter, (Claim#: 380561), undated
 - Army CRSC Decision Letter, (Claim #: 378591), 4 August 2020
- Enclosure 21 - medical records (5 pages)
- Enclosure 22 - medical records (10 pages)
- Enclosure 23 - medical records (5 pages)

FACTS:

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

2. Counsel states:

a. The critical issues in this case are whether there is sufficient evidence to overcome the presumption of fitness, whether the agency appropriately applied the presumption of fitness criteria, and whether there is new medical and nonmedical evidence not previously available that militates in favor of reversing the final agency action in this case and medically retiring the applicant retroactively to 28 June 2014.

b. On 11 September 2011, Mr. ■■■, the Command Historian at United States Central Command (USCENTCOM), requested CO-ADOS orders for the applicant to continue in his role of Deputy Command Historian from 28 February 2012 to 1 March 2013. On 14 February 2012, Mr. ■■■ engaged in an email exchange with LTC ■■■, the Chief of Army Reserve Affairs at USCENTCOM, regarding preparing a packet to enroll the applicant in the WTU as he was medically unable to be cleared for CO-ADOS orders.

c. The applicant was issued orders on 27 February 2012, transferring him to the WTU at Fort Stewart, Georgia. On 29 May 2012, the applicant was nominated for entry into the Warrior Transition Battalion (WTB) at Fort Stewart and approved for acceptance into the program, with orders being issued to this effect on 5 June 2012. At the time of

his entry into the WTU, the applicant's Clinical Treatment Plan focused on his lumbar and cervical spine injuries, carpal tunnel syndrome, and right knee injuries.

d. The PDES Commander's Performance and Functional Statement completed on 29 May 2012 indicates the applicant was not working within his MOS and was not in an appropriate table of allowance (TOA) position for his pay grade and MOS.

e. On 30 May 2013, Dr. RJ dictated a Medical Evaluation Board (MEB) Narrative Summary (NARSUM) in which he found that the applicant failed medical retention standards for degenerative disc disease of the lumbar spine, degenerative disc disease of the cervical spine with cervical radiculopathy, bilateral patellofemoral syndrome, right shoulder derangement, post concussive migraine headaches, bilateral carpal tunnel syndrome, bilateral ulnar neuropathy - left greater than right, and fibromyalgia.

f. At the time of his formal entry into the PEB process, the applicant had entered the presumptive period for his mandatory retirement date on 1 March 2013. On 24 September 2013, the applicant was found fit by the IPEB due to the members finding he was performing duties befitting his experience level, office, grade, or rank at the time of entering the presumptive period and that his conditions were neither acute nor grave and that he had not experienced a serious deterioration during the presumptive period.

g. The applicant appealed this finding, requested an FPEB hearing and submitted a case brief with supporting evidence through Counsel on 11 December 2013 outlining why he should be found unfit for the conditions cited as failing retention standards in the MEB NARSUM. The FPEB sustained the finding by the IPEB that he should be found fit for duty.

h. Counsel filed an appeal to this decision on 16 January 2014 that focused on the fact that the OER relied upon by the FPEB members in finding that the applicant was performing duties befitting his experience level, office, grade, or rank through July 2012 when this reporting period ended on 26 February 2012.

i. On 2 February 2014, the FPEB members responded to this appeal by finding that they considered the applicant to be performing duties appropriate to his grade and thus fit for duty when he entered the presumptive period on 1 March 2012 as out-processing from one post, moving and in-processing to another post are appropriate duties and that he would only be considered not to be performing appropriate duties when he completed in processing and no further duties were assigned.

j. On 19 February 2014, counsel supplemented the previous FPEB appeal with a letter from Mr. ■■■, the applicant's supervisor at USCENTCOM, documenting that he had many lengthy absences due to medical issues and had limited ability to perform his duties after undergoing multiple thumb surgeries as well as a back surgery that made

him unfit to accept another set of orders. In this letter, Mr. ■■■ makes it clear that the applicant's transition from USCENTCOM to the WTU resulted from his back surgery and was unexpected.

k. On 1 April 2014, the USAPDA rejected these appeals and opined that nothing in their contents refuted the presumption that the applicant was unable to physically perform his duties or that he was not performing successfully in his assigned duties before his transfer to the WTU.

l. First Issue: Whether the applicant was performing the duties of his MOS at the time of his transfer to the WTU:

(1) The applicant's PMOS was 12A-Armor Officer. Counsel would ask the Board to note that the PMOS for Armor Officers is 19A, not 12A. The physical requirements for this PMOS makes it clear that the physical requirements for a Lieutenant Colonel within this PMOS are as follows:

- To occasionally walk over varying terrain and altitude changes for a distance of 20 kilometers during a 24-hour period while carrying 103 pounds evenly distributed over the entire body, after which the soldier must retain the ability to perform all other physical requirements.
- To occasionally throw a 1-pound grenade a distance of 35 meters from the standing, kneeling, or prone positions while wearing an 80-pound fighting load.
- To occasionally drag a 268-pound person 15 meters while wearing an 80-pound fighting load.
- To frequently visually identify personnel at 500 meters and vehicles and equipment at 2,000 meters.
- Frequently hears, gives, or echoes oral commands in outside areas at distances up to 50 meters.
- Frequently uses finger dexterity in both hands.

(2) The applicant's Commander reported that he could not perform his MOS duties because his physical conditions prohibited him from doing so. However, there is no discussion in the agency decisions as to whether the decision-makers considered the actual duties being performed by the applicant in the context of his specialty or that both PDES Commander's Performance and Functional Statement during this process reflected that he was not in an appropriate TOA position for his grade or MOS.

(3) The agency's rationale failed to address how the physical limitations posed by the applicant's referred conditions would not prevent him from performing the physical activities required by his PMOS and the fitness testing and other physical demands expected of any Army officer.

m. Second Issue: Whether the applicant's Referred Lumbar Spine Injury Declined During the Presumptive Period:

(1) A review of the medical evidence contained within MEB NARSUM regarding Diagnosis 1: Degenerative Disc Disease, Lumbar Spine shows that the applicant underwent an endoscopic-assisted lateral transforaminal lumbar discectomy and decompression at L4/5 on 9 February 2012 but began to suffer a gradual increase in post-surgical pain and stiffness in the fall of 2012.

(2) A copy of the surgical report and the Standard Form (SF) 600 entry granting the applicant 29 days of convalescent leave post-surgery.

(3) The MEB NARSUM noted that the gradual stiffness and increased pain in this spinal segment in pain had remained constant for 6-8 months and was accompanied by a decreased range of motion, an antalgic gait, and was unable to perform his PMOS as an Armor Officer as he was unable to lift/carry the equipment required to do his job, sit for extended periods at the computer and move with speed and agility over the battlefield.

(4) There is no discussion in any of the agency decisions as to why this evidence would not represent a serious decline in the applicant's lumbar spine injury that would have precluded further duty had he not reached his MRD on 1 March 2013.

n. Third Issue: Whether the applicant Was Performing Duties Befitting His Experience Level, Office, Grade, or Rank at the Time of Entering the Presumptive Period:

(1) The convalescent leave slip accompanying the lumbar spine surgical report 9 February 2012 shows that the applicant was placed on 29 days of convalescent leave as of 13 February 2012, four days after his surgery.

(2) The letter 10 August 2022 from the orthopedic surgeon who performed Bilateral Thumb AI Pulley Release procedures on the applicant on 30 August 2011 and 8 November 2011 constitutes new medical evidence showing that the applicant was placed on Total Temporary Disability for a total of 50 days secondary to these procedures.

(3) These records support the observations of Mr. ■■■ in his letter 19 February 14, the applicant had a number of lengthy absences from work due to medical issues and that he had limited ability to use the affected hands for some time after these surgeries.

(4) The applicant was unable to fully perform his assigned duties for 79 out of the 231 days from 15 August 2011 to 29 February 2012, approximately 37 percent of this period, demonstrates that he was not capable of performing befitting his office, grade, rank, or PMOS.

o. Fourth Issue: Unfitting Nature of Migraine Headaches (VA Code 8100):

(1) During the applicant's time in the WTU, his MEB NARSUM reported that his headaches occurred 4-6 times per week and lasted for 2-4 hours, requiring him to lie down in a darkened room due to photosensitivity and phonophobia. The MEB NARSUM further described that the applicant could not continue to work with the onset of these migraines and that this condition failed retention criteria.

(2) The PDES Commander's Performance and Functional Statement of 22 August 2013, noted that the applicant had been working in an Emergency Management position as his Community Based Warrior Transition Unit (CBWTU) work assignment. The Executive Director of the Custer County Office of Emergency Management provided a detailed description of the impact of both his spinal injuries and severe migraine headaches. She described the applicant's chronic migraine headaches as occurring several times per month and required him to lie down in a darkened room for several hours at a time. At the onset of these migraines, the applicant could not follow conversations or instructions and lost focus on his assigned tasks until the headaches subsided.

(3) This nonmedical evidence was supplemented by medical treatment records from the applicant's Patient Care Manager (PCM) showing that he was still experiencing at least five migraines a month that had been refractory to various prophylaxis as of 21 November 2013.

(4) The MEB NARSUM shows the applicant's chronic migraine condition was not expected to improve within the next five years.

p. Fifth Issue: Unfitting Nature of Cervical Spine Injuries (VA Code 5242):

(1) The MEB NARSUM reflects that the applicant's chronic cervical spine injury had declined badly enough prior to him entering the presumptive period that surgical intervention was recommended. This recommendation was made because an MRI study performed on 20 January 2012 found that the applicant had a C4/5 bulging disc and facet degeneration, hypertrophy, osteophytes, and foraminal stenosis bilaterally.

(2) The MEB NARSUM shows this condition failed retention standards because the applicant failed to respond to adequate conservative treatment and that this condition necessitated significant limitation of physical activity.

q. Sixth Issue: Unfitting Nature of Bilateral Carpal Tunnel Syndrome (VA Code 8515):

(1) The MEB NARSUM documented the onset of this condition as having been established by a Nerve Conduction Study (NCS)/ Electromyography (EMG) study conducted in February 2012 that was confirmed by another NCS/EMG study on 23 October 2012 showing bilateral median nerve slowing.

(2) This condition was documented to cause the applicant to experience decreased grip strength, loss of manual dexterity, and increased numbness of the hands with sharp shooting pain in the forearms- since he had initially sought treatment from 2011 to 2012.

(3) Despite undergoing bilateral surgery on his thumbs for Trigger Finger Syndrome in 2011, these symptoms continued to adversely impact the applicant prior to the onset of the presumptive period and declined further over time, as shown by the fact that this condition was included in his WTU Treatment Plan on 24 May 2012.

(4) Additionally, the applicant's supervisor at his CBWTU posting also confirmed that his bilateral carpal tunnel syndrome limited his ability to write or type for extended periods and adversely affected his ability to drive a motor vehicle for extended periods.

(5) Counsel concurs with the findings of the MEB NARSUM that this condition fails retention standards because the bilateral hand weakness, diminished manual dexterity, and hand numbness caused by this condition would prevent the applicant from performing activities of his PMOS.

r. Seventh Issue: Unfitting Nature of Bilateral Patellofemoral Syndrome with Arthritis (VA Code 5010-5260):

(1) The MEB NARSUM describes how the applicant's chronic knee pain that initially occurred in 2003 had reached the point at which a right knee patellar chondroplasty of the right knee with a medial plate excision was performed on 29 March 2012. Post-surgery, the applicant reported symptoms of giving way, pain, stiffness, crepitus, and tenderness in both knees, demonstrating a reduced range of motion in flexion that caused problems with decreased mobility, lifting, carrying, and pain.

(2) These symptoms continued to adversely impact the applicant post-surgery and declined further over time, as shown by the fact that this condition was included in his WTU Treatment Plan on 24 May 2012.

t. Eighth Issue: Unfitting Nature of Right Shoulder Internal Derangement, with Osteoarthritis Bilateral Ale Joints (VA Code 5010-501):

(1) The MEB NARSUM noted that the applicant was experiencing chronic right shoulder pain that was diagnosed by an MRI study on 7 September 2012 as revealing tears of the supraspinatus and the subscapularis tendons as well as a tear of the anterior labrum and change of the right a/c joint.

(2) After undergoing a right shoulder arthroscopic surgery in November 2012 to correct the rotator cuff injury and repair the anterior labrum, the applicant still suffered from chronic shoulder pain. On 13 May 2013, the applicant was found to suffer from bilateral a/c joint degenerative changes as found on radiographic studies.

(3) At that time, his symptoms included crepitus, pain, stiffness, and decreased range of motion in both shoulders that caused problems with lifting, carrying, and reaching that impacted most activities involving the upper extremities. These symptoms and limitations would prevent the applicant from performing his duties as an Armor Officer because he would be unable to lift or carry the equipment needed to do his job and work for extended periods on a computer.

s. Ninth Issue: Unfitting Nature of Fibromyalgia (VA Code 5025):

(1) The MEB NARSUM, reported that the applicant's generalized musculoskeletal myalgias and arthralgias prevent him from performing the duties of his PMOS as an Armor Officer as he would be unable to supervise operations in the field, complete physical activities with strength and endurance and move over the battlefield with speed and agility. As a result, he found that this diagnosis failed retention standards.

(2) The provider conducting the Impartial Review of the applicant's MEB NARSUM concurred with this assessment. The applicant's PCM put in a referral to have this diagnosis confirmed by a rheumatologist on 3 June 2013. On 7 June 2013, this diagnosis was confirmed by Dr. ■■■, a rheumatologist.

(3) Dr. ■■■ findings confirmed the previous report by the VA Compensation and Pension (C&P) examiner on 2 May 2013 that the applicant suffered from active fibromyalgia in almost every joint and in his spine as well. See Pages Three and Four of Enclosure Twenty-three. The severity of this condition may be seen by the fact that the applicant was awarded a 40 percent static rating for fibromyalgia by the VA on 23 October 2015, with an effective date of 29 June 2014.

t. The applicant requests correction of his records to reflect that he was placed on the Permanent Disability Retired List (PDRL) on 28 June 2014 at a combined

90 percent disability rating and his cervical spine injuries and fibromyalgia be deemed to be combat-related.

3. The applicant initially enlisted 8 February 1983. He completed previous enlisted and commissioned service prior to being commissioned in the [REDACTED] Army National Guard ([REDACTED] ARNG) on 3 May 1994. He was discharged from the [REDACTED] ARNG on 12 November 1999. His National Guard Bureau (NGB) Form 22 (Report of Separation and Record of Service) shows he was transferred to the United States Army Reserve (USAR) Control Group (Reinforcement).
4. The applicant was ordered to active-duty effective 1 October 2001, serving in support of Operations Enduring Freedom, Noble Eagle, and Iraqi Freedom. He was released from active duty on 10 September 2003.
5. The applicant was notified on 9 December 2004 he had attained 20 creditable years of service for non-regular retirement (Twenty Year Letter).
6. The applicant was ordered to active-duty effective 1 August 2005, serving in support of Operation Noble Eagle. He was released from active duty on 30 September 2007.
7. The applicant was ordered to active-duty effective 31 October 2007, serving in support of Operation Enduring Freedom. He was released from active duty on 29 October 2010.
8. The applicant was ordered to active-duty effective 28 February 2011.
9. A memorandum, subject: CO-ADOS Mobilization of the applicant, dated 11 September 2011, requested the applicant remain on active duty for an additional 368 days starting 28 February 2012.
10. A DA Form 7349 (Initial Medical Review - Annual Medical Certificate), 12 September 2011, shows the applicant had no medical problems or concerns that would prevent him from extending orders, was fit for duty with a physical profile of 111111.

A physical profile, as reflected on a DA Form 3349 (Physical Profile) or DD Form 2808, is derived using six body systems: "P" = physical capacity or stamina; "U" = upper extremities; "L" = lower extremities; "H" = hearing; "E" = eyes; and "S" = psychiatric (abbreviated as PULHES). Each body system has a numerical designation: 1 meaning a high level of fitness; 2 indicates some activity limitations are warranted, 3 reflects significant limitations, and 4 reflects one or more medical conditions of such a severity that performance of military duties must be drastically limited. Physical profile ratings can be either permanent or temporary.

11. Counsel provided an email, subjected: Medical, 14 February 2012, relating a conversation between the applicant, LTC ■■■, HMCS ■■■, and Mr. ■■■ concerning processing the applicant's medical documents and WTU transfer.

12. The applicant's OER, covering the period 23 July 2011 to 26 February 2012 show's his title as Deputy Command Historian and his rater is Mr. ■■■. The report indicated he deploys, as required, to the USCENTCOM forward headquarters in Qatar. His performance was rated as outstanding, must promote and best qualified.

13. Orders A-02-203499, 27 February 2012; show the applicant was retained on active duty to participate in Reserve component warriors in transition medical retention processing program for completion of medical evaluation.

14. A Clinical Summary and Treatment Plan, 24 May 2012, from the WTU shows the applicants conditions and treatment plan for cervicgia, carpal tunnel syndrome, lumbar bulging disc, and right knee patellar chondromalcia.

15. A memorandum, subjected: WTU Entrance Nomination, 29 May 2012, requested the applicant be admitted to the Warrior Transition Battalion due to his complex medical condition.

16. A PDES Commander's Performance and Functional Statement, 29 May 2012, shows the applicant was within 12 months of his mandatory retirement and mandatory removal dated (MRD) of 1 March 2013. He was not performing the duties of his MOS or in an appropriate TOA for grade and MOS. However, his medical conditions/limitations did not affect unit accomplishing mission. He was recommended for retention and assignment to the WTB.

17. Orders A-06-210084, 5 June 2012; and Orders A-07-212908, 25 July 2012 show the applicant was retained on active duty to participate in Reserve component warriors in transition medical retention processing program for completion of medical evaluation.

18. A PDES Commander's Performance and Functional Statement, 22 August 2013, shows the applicant's conditions/limitations did affect unit accomplishing mission and he was not recommended for retention.

19. The applicant's Informal PEB Proceedings, 24 September 2013, shows he was found physically fit and was returned to duty for non-disability retirement.

a. Although he failed retention standards by the MEB, the case file shows he had an MRD of 1 March 2013 as a LTC. He entered a presumptive period prior to retirement for years of service on 1 March 2012. His OER, 7 July 2012, documents fully successful performance, best qualified and ready to promote. No evidence was present in the MEB

or treatment record showing he suffered an acute and grave deterioration to his condition during the presumptive period.

b. MEB diagnosis 1 (degenerative disc disease, lumbar spine) and 2 (degenerative disc disease C4/5 and C6/7 with cervical radiculopathy) are related to a 1983 incident in Iraq with no visits in the medical record and no unsatisfactory performance until 2006.

c. The following conditions became aggravated during the presumptive period and found to fail retention standards no evidence was present in the MEB or in the treatment record to support that these conditions were unfitting:

- patellofemoral syndrome, bilateral knees and osteoarthritis, right knee
- right shoulder internal derangement (osteoarthritis, bilateral acromioclavicular joints)
- post concussive headache syndrome, migraine type and history of mild traumatic brain injury with post concussive headache syndrome
- bilateral carpal tunnel syndrome
- ulnar neuropathy, bilateral upper extremities, left greater than right
- generalized musculoskeletal myalgias and arthralgias (diagnosed by VA as fibromyalgia)

d. The evidence in the case file establishes that the applicant was within 12 months of his MRD on 1 March 2012 when he entered the PDES on 30 May 2013. He performed duties befitting his experience level, office, grade or rank when he entered the presumptive period. His medical impairment is not a grave, acute condition, nor has it seriously deteriorated during the presumptive period. He has not overcome the presumption of fitness rule.

20. The applicant's PEB Appeal, 11 December 2013, states the PEB relied too heavily on the applicant's OER and outlining the reasons the applicant should have been found unfit for migraine headaches, lumbar spine degenerative disc disease, cervical spine degenerative disc disease with cervical radiculopathy, bilateral patella femoral syndrome with right knee osteoarthritis, bilateral shoulder impingement syndrome with right shoulder internal derangement osteoarthritis, and bilateral carpal tunnel syndrome. The appeal in its entirety is available for the Board's review.

21. The applicant's Formal PEB Proceedings, 19 December 2013, upheld the previous decision to find the applicant physically fit by presumption. The applicant contended he had been transferred to the WTU at Fort Stewart prior to 1 March 2012. However, the FPEB concluded the applicant was transferred to the WTU on 3 or 5 March 2012. He presented no new evidence showing an acute or grave injury occurred that would prevent him from performing further duty.

22. The applicant's FPEB Appeal, 16 January 2014 states the PEB did not make counsel or the applicant aware of the discrepancies with the OER in question. Additionally, counsel requested the applicant's cervical lumbar spine and posttraumatic headaches be found to have resulted from the instrumentality of war. The appeal in its entirety is available for the Board's review.

23. A memorandum subject: Appeal of PEB Formal Proceedings, 2 February 2014, acknowledges receipt of the applicant's appeal of his FPEB. The Board continued to find him fit by presumption. His case was forwarded to the US Army Physical Disability Agency (USAPDA) for further review and processing.

24. An email, subject: Forwarding Supplement to Appeal from JBLM PEB, 19 February 2014, contends the applicant's presumption of fitness should be based on when his orders were issued transferring him to WTU and provides new evidence in the form of a letter of support from the applicant's supervisor, Mr. DD.

25. The letter of support from Mr. ■■■, 19 February 2014, states, in part, the applicant had a number of length absences from work due to medical issues such as surgeries on each thumb and back along with limited ability to use his hands.

26. A memorandum, subjected: Approval of the Physical Evaluation Board Action under Provisions of AR 635-40, 12 March 2014, approved The PEBs findings that the applicant was found physically fit to perform the duties of his office, grade, rank, and specialty within the limits of his profile.

27. A memorandum, subject: Response; Appeal of Adverse FPEB Finding, 1 April 2014, from the USAPDA states the information provided was not new evidence and the applicant's disposition was upheld.

28. The applicant's USAPDA Revised PEB Proceedings, 1 April 2014, show the applicant's disposition remained the same. The form was issued to correct Section V - Medical Conditions Determined Not to be Unfitting, description change.

29. The applicant's DD Form 214 shows he was released from active duty on 28 June 2014.

30. The applicant was placed on the retired list on 30 June 2014.

31. A VA Rating Decision, 23 October 2015, shows the applicant's service-connected disabilities and assigned ratings as follows:

- basal cell carcinoma, nose, 0 percent, 29 June 2014
- hypertension, 0 percent, 29 June 2014

- plantar fasciitis and pes planus, right foot, 0 percent, 29 June 2014
- traumatic brain injury (TBI) (claimed as post concussive with memory loss, and agitation), 0 percent, 29 June 2014
- xerosis, bilateral feet, 0 percent, 29 June 2014
- erectile dysfunction, 0 percent, 29 June 2014
- residuals, right trigger thumb to include arthritis, 0 percent, 29 June 2014
- residuals, left trigger thumb to include arthritis, 0 percent, 29 June 2014
- sinusitis, 0 percent, 29 June 2014
- residuals, scar, excision of basal cell carcinoma, left leg, 10 percent, 29 June 2014
- carpal tunnel syndrome, left upper extremity, 10 percent, 29 June 2014
- carpal tunnel syndrome, right upper extremity, 10 percent, 29 June 2014
- bilateral hearing loss, 10 percent, 29 June 2014
- chronic tendinitis, right ankle, 10 percent, 29 June 2014
- dermatitis, forehead and cheeks, 10 percent, 29 June 2014
- tinnitus, 10 percent, 29 June 2014
- patellofemoral syndrome with arthritis, left knee, 10 percent, 29 June 2014
- residuals, trochanteric bursitis, impairment of thigh, right hip, 10 percent, 29 June 2014
- allergic rhinitis, 10 percent, 29 June 2014
- patellofemoral syndrome with arthritis, right knee, 10 percent, 29 June 2014
- residuals, trochanteric bursitis, limitation of thigh, left hip, 10 percent, 29 June 2014
- chronic tendonitis, left ankle, 10 percent, 29 June 2014
- lumbosacral strain with degenerative disc disease and arthritis, 20 percent, 5 November 2014
- benign prostatic hypertrophy, 20 percent, 29 June 2014
- residuals, s/p rotator cuff surgery, to include arthritis, right shoulder (dominant), 20 percent, 29 June 2014
- residuals, partial labrum tear, to include arthritis, left shoulder, 20 percent, 29 June 2014
- residuals, left foot injury, 30 percent, 5 November 2014
- migraine headaches to include migraine variants, 30 percent, 5 November 2014
- cervical arthritis and degenerative disc disease, 30 percent, 29 June 2014
- trochanteric bursitis, right hip, limitation of flexion, 30 percent, 29 June 2014
- trochanteric bursitis, limitation of flexion, left hip, 30 percent, 29 June 2014
- fibromyalgia, 40 percent, 29 June 2014
- obstructive sleep apnea, 50 percent, 29 June 2014

31. An undated Army CRSC Decision Letter and a CRSC decision letter, dated 4 August 2020, show the following conditions were verified as combat-related for a total of 100 percent combat related disability:

- PTSD, 50 percent, July 2014, due to combat award
- fibromyalgia, 40 percent, July 2014, due to instrumentality of war
- bilateral, trochanteric bursitis, limitation of flexion, left hip, 30 percent, July 2014, due to instrumentality of war
- cervical arthritis and degenerative disc disease, 30 percent, July 2014, due to instrumentality of war
- bilateral, trochanteric bursitis, limitation of flexion, right hip, 30 percent, July 2014, due to instrumentality of war
- residuals, status post rotator cuff surgery to include arthritis, right shoulder (dominate), 20 percent, July 2014, due to instrumentality of war
- bilateral, residuals, trochanteric bursitis, limitation of thigh, left hip, 10 percent, July 2014, due to instrumentality of war
- bilateral, residuals, trochanteric bursitis, limitation of thigh, right hip, 10 percent, July 2014, due to instrumentality of war
- bilateral hearing loss, 10 percent, July 2014
- tinnitus, 10 percent, July 2014

32. An email subject: TOL entry, 9 January 2023, showing a copy of the applicant's TOL was provided to counsel.

33. An email subject: WTU entry, 10 January 2023, shows a copy of the applicant's WTU in-processing packet with his clinical summary and treatment plan was provided to counsel.

34. 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.

35. 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 (AHLTA), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, the Army Aeromedical Resource Office (AERO), and/or the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant is applying to the ABCMR requesting a reversal of the United States Army Physical Disability Agency's (USAPDA) finding that the former Officer was fit by presumption. He states:

"I am requesting that the Board set aside the Fit for duty finding made as the final agency action in my case by the USAPDA, find me unfit and assign me disability ratings for the conditions outlined by my counsel – ██████, Esq.- in his brief dated 13 Mar 23. I am also requesting that I be placed on the PDRL retroactive to 28 Jun 14, with combat-related findings as appropriate."

c. The Record of Proceedings details the applicant's service and the circumstances of the case. Orders published by the U.S. Army Human Resources Command (USAHRC) show the former USAR Officer was transferred to The Retired Reserve effective 29 June 2014. Orders published by USAHRC on 30 June 2014 show the applicant was placed on the AUS retired list effective 30 June 2014.

d. Orders published by the United States Army Human Resources Command (USAHRC) on 21 January 2011 show the applicant, a former USAR Armor Officer, was order to 365 days of active at MacDill Airforce Base to serve as an "Historian" with a report date of 28 February 2011. Orders published the day he was to be released from active duty and dated 27 February 2012 show the applicant was transferred to the Warrior Transition Unit at Ft. Novosel (formerly Stewart), GA, with an end date of 26 April 2012.

e. The applicant had been referred to the Integrated Disability Evaluation System (IDES) on 19 February 2013 for "Neck Pain," Low Back Pain," "Bilateral Knee Pain," and "Bilateral Carpal Tunnel Syndrome."

His projected mandatory retirement date was 1 March 2013.

f. A Soldier is referred to the Integrated Disability Evaluation System (IDES) when they have one or more conditions which appear to fail medical retention standards reflected on a duty liming permanent physical profile. At the start of their IDES processing, a physician lists the Soldiers referred medical conditions in section I the VA/DOD Joint Disability Evaluation Board Claim (VA Form 21-0819). The Soldier, with the assistance of the VA military service coordinator, lists all other conditions they believe to be service-connected disabilities in block 8 of section II of this form, or on a separate Application for Disability Compensation and Related Compensation Benefits (VA Form 21-526EZ).

g. Soldiers then receive one set of VA C&P examinations covering all their referred and claimed conditions. These examinations, which are the examinations of record for the IDES, serve as the basis for both their military and VA disability processing. The

medical evaluation board (MEB) uses these exams along with AHLTA encounters and other information to evaluate all conditions which could potentially fail retention standards and/or be unfitting for continued military service. Their findings are then sent to the physical evaluation board for adjudication.

h. All conditions, both claimed and referred, are rated by the VA using the VA Schedule for Rating Disabilities (VASRD). The physical evaluation board (PEB), after adjudicating the case, applies the applicable ratings to the Soldier’s unfitting condition(s), thereby determining his or her final combined rating and disposition. Upon discharge, the Veteran immediately begins receiving the full disability benefits to which they are entitled from both their Service and the VA.

i. At the time the applicant was referred to IDES on 19 February 2013, he was in the community-based Warrior Transition Unit (CBWTU) based at Ft. Riley Kansas. The applicant claimed nineteen additional conditions. CBWTUs are the primary mechanism for Reserve Component (RC) Soldiers to receive medical management while at their home of record. The Soldier is managed and assisted by a nurse case manager while they receive care from local resources.

j. A medical evaluation board (MEB) determined the applicant had eight chronic conditions which failed the medical retention standards of AR 40-501, Standards of Medical Fitness:

#	Condition	Approximate Date of Origen
1	Degenerative Disc Disease, Lumbar Spine	19830101
2	Degenerative Disc Disease, C4/5 & C6/7 Cervical Radiculopathy	19830101
3	Patellofemoral Syndrome, Bilateral Knees and Osteoarthritis, Right Knee	20030101
4	Right Shoulder Internal Derangement, diagnosed by the VA as Osteoarthritis, Bilateral Acromioclavicular Joints	20030101
5	Postconcussive Headache Syndrome, Migraine Type (VA Dx) and History of Mild Traumatic Brain Injury with Postconcussive Headache Syndrome	19870101
6	Bilateral Carpal Tunnel Syndrome	19830101
7	Ulnar Neuropathy, Bilateral Upper Extremities, Left Greater than Right	20060101
8	Generalized Musculoskeletal Myalgias and Arthralgias, diagnosed by the VA as Fibromyalgia	20120101

k. The MEB determined fifteen additional medical conditions met medical retention standards.

l. The applicant non-concurred with the MEB's decision stating through counsel:

"LTC [Applicant] requests that the NARSUM [narrative summary] and DA 3947 [Medical Evaluation Board Proceedings] be amended to reflect that his NARSUM docs not adequately address the complexity or the complete historical antecedents of his current conditions."

m. The MEB Appellant Authority directed that some changes be made and his case was subsequently forwarded to the PEB for adjudication.

n. Paragraphs 4i-4p provides a chronological outline of the actions and processing of his case at the United States Army Physical Disability Agency (USAPDA), and their repeated determinations the applicant was Fit by Presumption.

o. Paragraph 3-2b of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (20 March 2012) addresses presumption of fitness:

Processing for separation or retirement from active service.

(1) 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 they can no longer continue to reasonably perform because of a physical disability incurred or aggravated in service.

(2) When a Soldier is being processed for separation or retirement for reasons other than physical disability, continued performance of assigned duty commensurate with his or her rank or grade until the Soldier is scheduled for separation or retirement, creates a presumption that the Soldier is fit. An enlisted Soldier whose reenlistment has been approved before the end of his or her current enlistment, is not processing for separation; therefore, this rule does not apply. The presumption of fitness may be overcome if the evidence establishes that —

(a) The Soldier was, in fact, physically unable to perform adequately the duties of his or her office, grade, rank or rating for a period of time because of disability. There must be a causative relationship between the less than adequate duty performance and the unfitting medical condition or conditions.

(b) An acute, grave illness or injury or other significant deterioration of the Soldier's physical condition occurred immediately prior to, or coincident with processing for separation or retirement for reasons other than physical disability and which rendered the Soldier unfit for further duty."

p. The time frame during which the presumption of fitness rule is applicable is known as the presumptive period and is the 12 months prior to a service member's discharge

from the Service for any of the reasons outlined in E3.P3.5.2 part 3 to enclosure 3 of Department of Defense Instruction of Department of Defense Instruction 1332.38
Subject: Physical Disability Evaluation (14 November 1996).

E3.P3.5.2. Presumptive Period. Service members shall be considered to be pending retirement when the dictation of the member's MEB occurs after any of the circumstances designated in paragraphs E3.P3.5.2.1. through E3.P3.5.2.4., below.

E3.P3.5.2.1. When a member's request for voluntary retirement has been approved. Revocation of voluntary retirement orders for purposes of referral into the DES does not negate application of the presumption.

E3.P3.5.2.2. An officer has been approved for Selective Early Retirement.

E3.P3.5.2.3. An officer is within 12 months of mandatory retirement due to age or length of service.

E3.P3.5.2.4. An enlisted member is within 12 months of his or her retention control point (RCP) or expiration of active obligated service (EAOS) but will be eligible for retirement at his or her RCP/EAOS.

q. Paragraph E3.P3.5.3 of DODI 1332.38 further defines the three circumstances in which the presumption of fitness is overcome:

E3.P3.5.3. Overcoming the Presumption. The presumption of fitness rule shall be overcome when:

E3.P3.5.3.1. Within the presumptive period an acute, grave illness or injury occurs that would prevent the member from performing further duty if he or she were not retiring; or

E3.P3.5.3.2. Within the presumptive period a serious deterioration of a previously diagnosed condition, to include a chronic condition, occurs and the deterioration would preclude further duty if the member were not retiring; or

E3.P3.5.3.3. The condition for which the member is referred is a chronic condition and a preponderance of evidence establishes that the member was not performing duties befitting either his or her experience in the office, grade, rank, or rating before entering the presumptive period. When there has been no serious deterioration within the presumptive period, the ability to perform duty in the future shall not be a consideration.

r. When a Service Member is referred to the DES during the 12-month presumptive period and none of his medical conditions overcome the presumption of fitness (neither paragraphs 3-2b(2)(a) or 3-2b(2)(b) of AR 635-40 or paragraph E3.P3.5.3 of DODI 1332.38 are applicable), the member is found fit by presumption: The Service Member is retirement eligible for length of Service and is within 12 months of retirement and so their medical condition(s) did not cause or contribute to career termination and are therefore not compensable. The Service Member will go on to receive retirement pay when eligible.

s. The presumptive period for this applicant was being “An officer is within 12 months of mandatory retirement due to age or length of service” (paragraph E3.P3.5.2.3.): The applicant was referred to the DES on 19 February 2013 and his mandatory retirement date was 1 March 2013.

t. Counsel’s first primary argument is the applicant was not performing duties consistent with his rank of LTC and rating as an armor officer at the time of referral. First, the USAR does not have an armor unit. Second, his Officer Record Briefs (DA Form 4037-E) and three most recent DD 214s show he had not served in table of organization and equipment unit (TOE or TO&E – aka “Line Unit”) or as a line officer for more than 10 years. His three DD214 for the periods prior to that under consideration: 1 October 2001 – 20 September 2003 he was assigned to the military history detachment in Oakdale, PA; 1 August 2005 – 30 September 2007 and 31 October 2007 – 29 October 2010 he was assigned to joint staffs in the National Capital Region as an historian. Finally, during the period of service under consideration, the Officer had been serving as a deputy historian.

u. His Officer Evaluation Reports (OER) show he was a valued and successful officer and historian in these assignments. Senior rater comments from several of the OERs:

2007: “LTC [Applicant] made a superb contribution to the Joint History Staff ... LTC [Applicant] is that rare talented officer with outstanding potential.”

2008: “LTC [Applicant] is one of the most technically gifted and energetic Lieutenant Colonel historians in the Army and ranks among the top 10% of officers I have worked with.”

2011: “LTC [Applicant] is a brilliant officer who provided outstanding support to the USCENTCOM History Office and USCENTCOM.”

2012 (his last OER): “LTC [Applicant] is an extraordinarily conscientious officer who is deeply concerned about the well being of his subordinates and the fitness of the command ... Promote to Colonel now.”

It is clear the applicant had not served as a line officer for quite some time and his functional area was that of an Army Historian, an occupation at which he excelled for many years.

v. Counsel's second primary argument is that one or more of the applicant's medical conditions overcame the presumption of fitness. A review of the applicant's medical evaluation board narrative summary (NARSUM) shows the applicant had been successfully treated for and working thru the chronic condition listed as # 1-7 above for years, and for some conditions, decades. Diagnosis #8 was more recent, and the NARSUM shows this was a provisional diagnosis and had yet to be confirmed with an evaluation by a rheumatologist.

w. There is insufficient probative evidence one or more of the applicant's conditions overcame the presumption of fitness IAW paragraphs 3-2b(2)(a) or 3-2b(2)(b) of AR 635-40 or paragraph E3.P3.5.3 of DODI 1332.38 during the presumptive period.

x. The applicant's final appeal was to the USAPDA, who reconfirmed the prior determinations he fit by presumption. From their 17 March 2014 response to the applicant's appeal which reads in part:

"The Physical Disability Agency (PDA) has carefully considered the arguments you presented in your memorandum and reviewed your client's case file. The PEB in its 02 February 2014 response to your appeal noted that your client was found fit for duty based on Presumption of Fitness criteria as explained in the formal findings, i.e., that your client entered a presumptive period prior to retirement for years of service, on or about 01 March 2012, and because the official OER dated 07 July 2012 documents fully successful performance, "best qualified", and ready to promote, and your client was not assigned to Fort Stewart until 3 or 5 March 2012 (as he stated in his sworn testimony), he was found to be performing his duties prior to the presumption period (01 March 2012). The PDA notes that your client's conditions are longstanding with some from 1983 and 1987 and that there is no evidence of a serious deterioration of any of the conditions within the presumptive period.

Based on our review of the evidence available, we agree with the PEB that your client does not overcome the Presumption of Fitness criteria and thus is fit for duty IAW DoDI 1332.38, E5.P3.5 and AR 635-40, Chapter 3-2b(2). Your client's case was properly adjudicated by the PEB in accordance with rules that govern the Physical Disability Evaluation System in making its determination."

y. Review of his PEB case file in ePEB along with his encounters in AHLTA revealed no substantial inaccuracies or discrepancies.

z. It is the opinion of the ARBA medical advisor there is insufficient evidence to warrant the overturning of the USAPDA's finding that the former Officer was fit by presumption.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board through counsel carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation. Upon review through counsel of the applicant's petition, available military records and medical review, the Board concurred with the advising official finding insufficient evidence to warrant the overturning of the USAPDA's finding that the former Officer was fit by presumption. Based on the preponderance of evidence and the PDA, the Board noted the applicant's conditions are longstanding with some from 1983 and 1987 and that there is no evidence of a serious deterioration of any of the conditions within the presumptive period.

2. The Board determined the applicant's record is absent sufficient probative evidence that one or more of his conditions overcame the presumption of fitness IAW paragraphs 3-2b(2)(a) or 3-2b(2)(b) of AR 635-40 or paragraph E3.P3.5.3 of DODI 1332.38 during the presumptive period. The Board found the applicant's counsel did not demonstrate by a preponderance of evidence that a procedural error occurred that was prejudicial to the applicant, and his counsel did not demonstrate that the applicant's contention requesting a review of whether the applicant was performing the duties of his military occupational specialty (MOS) at the time of his transfer to the Warrior Transition Unit nor to correct the applicant's DA Form 199-2 (U.S Army Physical Disability Agency (USAPDA) Revised Physical Evaluation Board (PEB) Proceedings), dated 1 April 2014 were substantially incorrect. The Board determined there is insufficient evidence to support reversal of the USAPDA board determination. Therefore, the Board denied relief.

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 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.

2/6/2024

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. AR 635-40 (Personnel Separations-Disability Evaluation for Retention, Retirement, or Separation) establishes the Army Disability Evaluation System and sets forth policies, responsibilities, and procedures that apply in determining whether a Soldier is unfit because of physical disability to reasonably perform the duties of his office, grade, rank, or rating. Only the unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability. Paragraph 5-5 (Presumption of fitness) states the DES compensates disabilities when they cause or contribute to career termination. Servicemembers who are pending retirement at the time they are referred for disability evaluation are presumed fit for military service when an officer is within 12 months of

mandatory retirement due to age or length of service. Soldiers may overcome this presumption by presenting a preponderance of evidence that they are unfit for military Service. The presumption of fitness rule may be overcome (rebutted) when:

a. Within the presumptive period an illness or injury occurs that would prevent the Soldier from performing further duty if they were not retiring or not a retiree recall.

b. Within the presumptive period a serious deterioration of a previously diagnosed condition, to include a chronic condition, occurs and the deterioration would preclude further duty if the Soldier were not retiring or not a retiree recall.

2. Title 10, U.S. Code, chapter 61, provides the Secretaries of the Military Departments with authority to retire or discharge a member if they find the member unfit to perform military duties because of physical disability. The U.S. Army Physical Disability Agency, under the operational control of the Commander, U.S. Army Human Resources Command (HRC), is responsible for administering the PDES and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with Department of Defense Directive 1332.18 and Army Regulation 635-40.

a. Soldiers are referred to the PDES 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, when they receive a permanent medical profile, P3 or P4, and are referred by an MOS Medical Retention Board, when they are command-referred for a fitness-for-duty medical examination, and when they are referred by the Commander, Human Resources Command.

b. The PDES assessment process involves two distinct stages: the MEB and the 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 are either 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 retirement payments and have access to all other benefits afforded to military retirees.

c. The mere presence of a medical impairment does not in and of itself justify a finding of unfitness. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier may

reasonably be expected to perform because of his or her office, grade, rank, or rating. Reasonable performance of the preponderance of duties will invariably result in a finding of fitness for continued duty. A Soldier is physically unfit when a medical impairment prevents reasonable performance of the duties required of the Soldier's office, grade, rank, or rating.

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

4. Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation) establishes the Physical Disability Evaluation System (PDES) 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 or her office, grade, rank, or rating. It provides that an MEB is convened to document a Soldier's medical status and duty limitations insofar as duty is affected by the Soldier's status. A decision is made as to the Soldier's medical qualifications for retention based on the criteria in Army Regulation 40-501. 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 service.

5. 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.

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

b. Title 38 USC, section 1131 (Peacetime Disability Compensation - Basic Entitlement) states for disability resulting from personal injury suffered or disease

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

c. 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.

6. Section 1556 of Title 10, USC, requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//