

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 26 January 2024

DOCKET NUMBER: AR20230006891

APPLICANT REQUESTS: in effect,

- a medical retirement/separation vice separation with severance pay
- a personal appearance before the board

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

- DD Form 149 (Application for Correction of Military Record)
- Veterans Affairs (VA) disability ratings
- VA letter, 21 March 2023

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.
2. The applicant states the Army did not finish his disability processing before his discharge. He suffers from post-traumatic stress disorder (PTSD), traumatic brain injury (TBI), a lower back condition, a right knee condition, headaches, depression, anxiety, sleep disturbance, a broken neck, broken ribs, a broken right collarbone, etc. None of these injuries were considered during his disability processing. He was told he would be medically discharged/retired. There is substantial evidence in his medical records to reverse the decision. He is 100% disabled through the VA after review of his military records.
3. The applicant enlisted in the Regular Army on 3 September 1998.
4. A DA Form 2173 (Statement of Medical Examination and Duty Status) shows a line of duty (LOD) was conducted for an injury to his left shoulder strain/dislocation. The applicant dislocated his shoulder while driving during a field exercise on 7 March 2000. He reached for an object while in the driver compartment and felt his shoulder pop out.

He was on a P2 profile for this type of injury in the past. This condition was found to be in the line of duty.

5. Another DA Form 2173, shows, he was admitted to the hospital for an injury occurring on 1 June 2000. His injuries consisted of closed head injury, fracture right clavicle, and fractures of left ribs when he was involved in a rollover motor vehicle accident (MVA), where he was ejected after his seat belt broke. The details show, on 31 May 2000, at about 1130 pm the applicant was involved in a single vehicle rollover. The details of the accident state the applicant was traveling at an approximate speed over 100 miles per hour and due to his high level of intoxication he allowed the vehicle to drift from lane to lane, causing it to roll over.

6. On 26 September 2000, he was issued a DA Form 3349 (Physical Profile) for right shoulder clavicle fracture, right shoulder reconstruction, and post traumatic cephalalgia. He was issued a PULHES of 141311.

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.

7. DD Form 261 (Report of Investigation (ROI) Line of Duty and Misconduct Status) shows an investigation was conducted for his injuries resulting from his MVA rollover. The investigator determined intentional misconduct or neglect was the proximate cause of the applicant's injuries. The remarks show, on 31 May 2000, at approximately 2342, the applicant was involved in a single car motor vehicle rollover. The applicant was alone in his vehicle during the incident and no other people were involved. Witness statements (2) state the SM was travelling at a high rate of speed (estimate - 100 MPH) when the accident occurred. The applicant's injuries were found to be not in the line of duty – due to own misconduct, The LOD investigation/determination WAS approved on 17 January 2001. (The entire detail of the investigation is available for the Board's review in the supporting documents.)

8. On 22 January 2001, the applicant acknowledged receipt of the ROI LOD and Misconduct Status pertaining to the injuries he sustained on 31 May 2000. He did not submit an appeal to the LOD determination.

9. On 1 February 2001, a Physical Evaluation Board (PEB) convened and determined the applicant was physically unfit and recommended a combined rating of 20 percent and that his disposition be separation with severance pay if otherwise qualified. His unfitting conditions were:

a. Left shoulder pain and instability status post two reconstructive surgeries - rated at 20 percent.

b. Back and neck pain following MVA (1 June 2000), NOT IN LINE OF DUTY. Sustained multiple left rib fractures and fractures of the transverse process of C7, T2; has had persistent neck and back pain since that time – non-compensable due to own misconduct, willful neglect.

c. His functional limitations in maintaining the appropriate level of mobility, caused by the physical impairments recorded above, makes him medically unfit to perform the duties required of a soldier of his rank and primary specialty.

d. Condition listed as medical board diagnosis #3 was considered by the PEB and found to be not unfitting and therefore not ratable.

e. The applicant concurred and waived a formal hearing of his case.

10. On 1 April another DA Form 2173 was completed for injury to his left shoulder, which occurred April 1999. He was injured when he was tossed an ammo box, which caused his shoulder to dislocate, in Germany. The injury was found in the LOD.

11. The applicant was honorably discharged on 19 March 2001, under the provisions of Army Regulation 635-40 (Physical Evaluation for Retention, Retirements, or Separation), paragraph 4-24b (3), for disability, severance pay. He received \$8,542.80 in severance pay. His DD Form 214 shows he completed 2 years, 6 months, and 17 days net active service this period.

12. The applicant provided:

a. His VA disability ratings showing he has a 100 percent combined disability rating.

b. A VA letter dated 21 March 2023, which lists all the conditions for which the VA rated the applicant.

13. AR 635-40 (Physical Evaluation for Retention, Retirement, or Separation) a Soldier will be separated without benefits when their unfitting condition results from injury which is due to intentional misconduct or willful neglect.

#### 14. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. Documentation reviewed included the applicant's ABCMR application and accompanying documentation, the military electronic medical record (EMR - AHLTA and/or MHS Genesis), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and 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 additional medical conditions be determined unfitting for military service with a subsequent increase in his military disability ratings and a change in his disability discharge disposition from separated with disability severance pay to permanent retirement for physical disability. He states:

"The Army did not finish my disability before I was discharged (PTSD, TBI, lower back, right knee, headaches, depression, anxiety, sleep disturbance, broken neck, broken ribs, broken right collar bone, etc.) None of these injuries were considered in my disability discharge. I would ask someone to review my service record. I was told I would be medically discharged/retired."

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. His DD 214 shows he entered the regular Army on 3 September 1998 and was discharged with \$8,542.80 of disability severance pay on 19 March 2001 under provisions in paragraph 4-24b(3) of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (1 September 1990).

d. The applicant's requests related to behavioral health (BH) will be addressed in a separate BH advisory. This advisory will address the non-BH related issues.

e. The applicant's 1 February 2001 Physical Evaluation Board (PEB) Proceedings (DA Form 199) shows the PEB found his "Left shoulder pain and instability status post two reconstructive surgeries" to be his sole compensable unfitting condition for continued military service.

f. The injuries noted above by the applicant were indeed addressed by the PEB and found to be unfitting for continued service. However, because these injuries were incurred when his driving under the influence of alcohol resulted in a single vehicle motor vehicle accident while driving approximately 100 MPH, they were correctly found to have not been incurred in the line of duty:

“Back and neck pain following MVA (1 Jun 00), NOT IN LINE OF DUTY. Sustained multiple left rib fractures and fractures of the transverse process of C7, T2; has had persistent neck and back pain since that time. (MEBD Dx 1, 4 & NARSUM [narrative summary])

g. The Report of Investigation Line of Duty and Misconduct Status (DD Form 261) show his closed head injury and right clavicle fracture were injuries also incurred at the time of this drunk driving accident.

h. Paragraphs B1, B4, and B8 in appendix B AR 600-8-4, Line of Duty Policy, Procedures, and Investigations (15 April 2004) explain why these injuries were found NOT IN LINE OF DUTY – DUE TO OWN MISCODUCT:

“B-1. Rule 1

Injury, disease, or death directly caused by the individual's misconduct or willful negligence is not in line of duty. It is due to misconduct. This is a general rule and must be considered in every case where there might have been misconduct or willful negligence. Generally, two issues must be resolved when a soldier is injured, becomes ill, contracts a disease, or dies---(1) whether the injury, disease, or death was incurred or aggravated in the line of duty; and (2) whether it was due to misconduct.

B-4. Rule 4

Injury, disease, or death that results in incapacitation because of the abuse of intoxicating liquor is not in line of duty. It is due to misconduct. The principles in Rule 3 apply here. While merely drinking alcoholic beverages is not misconduct, one who voluntarily becomes intoxicated is held to the same standards of conduct as one who is sober.

Intoxication does not excuse misconduct. While normally there are behavior patterns common to persons who are intoxicated, some, if not all, of these characteristics may be caused by other conditions. For example, an apparent drunken stupor might have been caused by a blow to the head. Consequently, when the fact of intoxication is not clearly fixed, care should be taken to determine the actual cause of any irrational behavior.

B-8. Rule 8

Injury or death caused by a soldier driving a vehicle when in an unfit condition of which the soldier was, or should have been aware, is not in line of duty. It is due to misconduct. A soldier involved in an automobile accident caused by falling asleep while driving is not guilty of willful negligence solely because of falling

asleep. The test is whether a reasonable person, under the same circumstances, would have undertaken the trip without expecting to fall asleep while driving. Unfitness to drive may have been caused by voluntary intoxication or use of drugs.”

i. Using the VA Schedule for Rating Disabilities, the PEB derived and applied a 20% rating and recommended the applicant be separated with disability severance pay. On 5 February 2001, after being counseled on the PEB’s findings and recommended disposition, the applicant concurred with the board and waived his right to a formal hearing.

j. There are no EMR encounters related to his right knee. JLV shows he was awarded a 10% VA service-connected disability rating for this joint effective 12 July 2011. JLV also shows the applicant has received multiple VA service-connected disability ratings, including PTSD (50%), migraine headaches (50%), and his limited motion of motion of arm remains unchanged at 20%.

k. No additional medical documentation was submitted with the application.

l. There is no evidence the applicant had one or more duty-incurred medical conditions would have failed the medical retention standards of chapter 3 of AR 40-501, Standards of Medical Fitness, prior to his discharge. Thus, there was no cause for referral to the Disability Evaluation System.

m. The DES only compensates an individual for service incurred medical condition(s) which have been determined to disqualify him or her from further military service and consequently prematurely ends their career. The DES has neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions which were incurred or permanently aggravated during their military service; or which did not cause or contribute to the termination of their military career. These roles and authorities are granted by Congress to the Department of Veterans Affairs and executed under a different set of laws.

n. Paragraph 3-1 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (1 September 1990) states:

“The mere presence of an impairment does not, of itself, justify a finding of unfitness because of physical disability. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier reasonably may be expected to perform because of his or her office, grade, rank, or rating.”

o. It is the opinion of the ARBA Medical Advisor that neither an increase in his military disability rating nor a referral of his case back to the DES is warranted.

15. BEHAVIORIAL REVIEW:

a. Background: The applicant is requesting a medical retirement/separation vice separation with severance pay. The applicant asserts PTSD, TBI, and other mental health are related to his request.

b. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Below is a summary of information pertinent to this advisory:

- The applicant enlisted in the Regular Army on 3 September 1998.
- A DA Form 2173 (Statement of Medical Examination and Duty Status) shows a line of duty (LOD) was conducted for an injury to his left shoulder strain/dislocation. The applicant dislocated his shoulder while driving during a field exercise on 7 March 2000.
- Another DA Form 2173, shows, he was admitted to the hospital for an injury occurring on 1 June 2000. His injuries consisted of closed head injury, fracture right clavicle, and fractures of left ribs when he was involved in a rollover motor vehicle accident (MVA; he was traveling at over 100 mph, was intoxicated and was drifting from lane to lane, causing the roll over).
- On 26 September 2000, he was issued a DA Form 3349 (Physical Profile) for right shoulder clavicle fracture, right shoulder reconstruction, and post traumatic cephalalgia. He was issued a PULHES of 141311.
- DD Form 261 (Report of Investigation (ROI) Line of Duty and Misconduct Status) shows his injuries were found to be not in the line of duty – due to own misconduct.
- On 1 February 2001, a Physical Evaluation Board (PEB) convened and determined the applicant was physically unfit and recommended a combined rating of 20 percent and that his disposition be separation with severance pay if otherwise qualified. His unfitting conditions were:
  - Left shoulder pain and instability status post two reconstructive surgeries - rated at 20 percent.
  - Back and neck pain following MVA (1 June 2000), NOT IN LINE OF DUTY. Sustained multiple left rib fractures and fractures of the transverse process of C7, T2; has had persistent neck and back pain since that time – non-compensable due to own misconduct, willful neglect.

- His functional limitations in maintaining the appropriate level of mobility, caused by the physical impairments recorded above, makes him medically unfit to perform the duties required of a soldier of his rank and primary specialty.
- Condition listed as medical board diagnosis #3 was considered by the PEB and found to be not unfitting and therefore not ratable.
- The applicant concurred and waived a formal hearing of his case.
- On 1 April another DA Form 2173 was completed for injury to his left shoulder, which occurred April 1999. The injury was found in the LOD.
- The applicant was honorably discharged on 19 March 2001, under AR 635-40 (Physical Evaluation for Retention, Retirements, or Separation), paragraph 4-24b (3), for disability, severance pay.

c. Review of Available Records Including Medical:

The Army Review Boards Agency (ARBA) Behavioral Health (BH) Advisor reviewed this case. Documentation reviewed included the applicant's completed DD Form 149, his ABCMR Record of Proceedings (ROP), DD Form 214, documents from his service record and separation, as well as a copy of his VA disability ratings and a VA letter. The VA electronic medical record and DoD health record were reviewed through Joint Longitudinal View (JLV). Lack of citation or discussion in this section should not be interpreted as lack of consideration.

d. The applicant is requesting a medical retirement. He asserts that the Army "did not finish my disability before I was discharged (PTSD, TBI, lower back, right knee, headaches, depression, anxiety, sleep disturbance, broken neck, broken ribs, broken right collar bone, etc.)." He notes that none of these injuries were considered in his disability discharge. In addition, he notes that he was told he would be medically discharged/retired.

e. The applicant's time in service predates use of electronic health records (EHR) by the Army, hence no EHRs are available for review. His service record and supporting documents did not contain his service treatment records (STR) and no other records were provided to substantiate his claim. His supporting documents and service records also did not contain any indication of mental health symptoms nor a mental health diagnosis, though did include relevant medical data. The Physical Profile after his car accident has him listed as a "1" under S, indicating no psychiatric conditions impacting his functioning. Also, the applicant's record reflects that a PEB was convened, and determination was made for him to be medically discharged with a combined rating of 20% and to receive severance pay for numerous physical disabilities. However, no mental health concerns were considered, or opined on, as part of his PEB. In summary, there is insufficient evidence the applicant was ever diagnosed with, or treated for, a mental health condition while in the Army.



f. The applicant has been engaged in care at the VA since 2001, and with mental health care since 2015. He has been diagnosed with mood disorder in conditions classified elsewhere, insomnia due to medical condition, nondependent alcohol abuse, anxiety disorder due to a general medical condition, PTSD, major depressive disorder (MDD) – single episode – unspecified, concussion with loss of consciousness, personal history of traumatic brain injury, adjustment disorder with anxiety, anxiety disorder – unspecified as well as psychosocial concerns to include relationship problems, other specified problems related to primary support group, and other specified problems related to psychosocial circumstance. He has engaged in therapy, rehab psychology, TBI care, group therapy, and medication management. The applicant completed an Initial PTSD Disability Benefits Questionnaire, TBI DBQ, and Headaches DBQ as part of his Compensation and Pension Exam on 21 November 2015. The applicant asserted being involved in several tank wrecks, to include one where his tank fell in a trench, flipped, and he believed he was going to be killed. He also cited his MVA rollover as a traumatic experience. The applicant previous diagnosis of PTSD (first noted in August of 2015), TBI, and headaches were affirmed. Per the applicant's VA EHR and supplied VA ratings document, he is 100% service connected, to include 50% for PTSD. His records reflect the effective date of his PTSD diagnosis – with traumatic brain injury (TBI; which was also claimed as depression, anxiety, insomnia, memory loss and mood) was 16 June 2015. Through review of JLV, this applicant did have "Community Health Summaries and Documents" available. His summary show that he's been diagnosed with insomnia, nightmare disorder, and MDD. No other medical or mental health records were provided to suggest the applicant was experiencing mental health concerns any earlier than 2015.

g. Opinion:

Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support the applicant had a mental health condition during his time in service that warranted a medical retirement, nor that now warrants a referral to the DES. The applicant has been service connected at 50% for PTSD and TBI. However, there is insufficient evidence that he was diagnosed with a med boardable condition, nor any mental health condition nor concerns, while in the service. His EHR reflects that he was not diagnosed with PTSD until 2015, approximately 14 years after his discharge. In addition, he was never issued a permanent profile for a psychiatric condition, was not found to fail medical fitness standards in accordance with AR 40-501 due to a mental health condition, nor was he ever found to be at the medical readiness decision point due to a mental health condition. Furthermore, VA examinations are based on different standards and parameters; they do not address whether a medical condition met or failed Army retention criteria or if it was a ratable condition during the period of service. Therefore, a post-discharge diagnosis of PTSD and a VA disability rating does not imply failure to meet Army retention standards at the time of service, nor is it indicative of an injustice at

the time of service. In addition, a diagnosis of PTSD during his time in service would not have necessarily rendered him unfit for duty. Hence, from a behavioral health perspective, his separation process appears proper, equitable and free of error, and insufficient evidence has been provided to determine otherwise.

Kurta Questions:

(1) Does any evidence state that the applicant had a condition or experience that may excuse or mitigate a discharge? Not applicable (NA).

(2) Did the condition exist or experience occur during military service? NA

(3) Does the condition or experience actually excuse or mitigate the discharge? NA

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. The Board considered applicable regulatory guidance and statutory code. Documentation available for review shows that the applicant was afforded review by a Physical Evaluation Board after he was injured in a motor vehicle crash. As the accident was determined to be a result of his own misconduct, driving under the influence of alcohol, the Board agreed that it was not in the line of duty. Further, the Report of Investigation Line of Duty and Misconduct Status (DD Form 261) shows the injuries incurred happened at the time of the accident. The Board found no error or inconsistencies within the Report of Investigation Line of Duty and Misconduct Status. Evidence does not show he was otherwise forced to consume alcohol or had any mitigating circumstances for consideration by the Board. After due consideration of the applicant's request, the Board determined the evidence available for review insufficient to warrant recommendation for relief and a recommendation for referral to the IDES is not warranted.

BOARD VOTE:

Mbr 1    Mbr 2    Mbr 3

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

BOARD DETERMINATION/RECOMMENDATION:

The 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 for correction of the records of the individual concerned and referral of the case to the Integrated Disability Evaluation System is not warranted.

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

REFERENCES:

1. Title 10, U.S. Code, section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.
2. Army Regulation (AR) 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR.

The ABCMR begins its consideration of each case with the presumption of administrative regularity, which is that what the Army did was correct.

a. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

b. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

3. Title 10, U.S. Code, chapter 61, provides the Secretaries of the Military Departments with authority to retire or discharge a member if they find the member unfit to perform military duties because of physical disability. The U.S. Army Physical Disability Agency is responsible for administering the Army physical disability evaluation system and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with DoD Directive 1332.18 and Army Regulation 635-40.

4. AR 635-40 establishes the Army Disability Evaluation System and sets forth policies, responsibilities, and procedures that apply in determining whether a Soldier is unfit because of physical disability to reasonably perform the duties of his office, grade, rank, or rating.

a. 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 or 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 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.

b. Service members whose medical condition did not exist prior to service 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. 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. A

Soldier is physically unfit when medical impairment prevents reasonable performance of the duties required of the Soldier's office, grade, rank, or rating.

d. The percentage assigned to a medical defect or condition is the disability rating. A rating is not assigned until the PEB determines the Soldier is physically unfit for duty. Ratings are assigned from the VASRD. The fact that a Soldier has a condition listed in the VASRD does not equate to a finding of physical unfitness. An unfitting or ratable condition is one which renders the Soldier unable to perform the duties of his or her office, grade, rank, or rating in such a way as to reasonably fulfill the purpose of his or her employment on active duty.

e. There is no legal requirement in arriving at the rated degree of incapacity to rate a physical condition which is not in itself considered disqualifying for military service when a Soldier is found unfit because of another condition that is disqualifying. Only the unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability.

f. Paragraph 8-9 Disposition states a Soldier not on extended active duty who is unfit because of physical disability (4) will be separated without benefits in the following situations: (a) The unfitting condition results from injury which is due to intentional misconduct or willful neglect.

g. Appendix B (Rules Governing Line of Duty and Misconduct Determinations) In every formal investigation, the purpose is to find out whether there is evidence of intentional misconduct or willful negligence that is substantial and of a greater weight than the presumption of "in line of duty." To arrive at such decisions, several basic rules apply to various situations.

(1) Rule 8 states injury or death caused by a soldier driving a vehicle when in an unfit condition of which the soldier was, or should have been aware, is not in line of duty. It is due to misconduct. A soldier involved in an automobile accident caused by falling asleep while driving is not guilty of willful negligence solely because of falling asleep. The test is whether a reasonable person, under the same circumstances, would have undertaken the trip without expecting to fall asleep while driving. Unfitness to drive may have been caused by voluntary intoxication or use of drugs.

(2) Rule 9 states injury or death because of erratic or reckless conduct, without regard for personal safety or the safety of others, is not in the line of duty. It is due to misconduct. This rule has its chief application in the operation of a vehicle but may be applied with any deliberate conduct that risks the safety of self or others. "Thrill" or "dare-devil" type activities are also examples of when this rule may be applied.

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%.

6. Title 38, USC, Sections 1110 and 1131, permit the VA to award compensation for disabilities which were incurred in or aggravated by active military service. However, an award of a VA rating does not establish an error or injustice on the part of the Army.

7. 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.

8. 10 USC 1207 (Disability from intentional misconduct or willful neglect: separation) Each member of the armed forces who incurs a physical disability that, in the determination of the Secretary concerned, makes him unfit to perform the duties of his office, grade, rank, or rating, and that resulted from his intentional misconduct or willful neglect or was incurred during a period of unauthorized absence, shall be separated from his armed force without entitlement to any benefits under this chapter.

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

//NOTHING FOLLOWS//