

IN THE CASE OF: [REDACTED]

BOARD DATE: 28 February 2024

DOCKET NUMBER: AR20230007006

APPLICANT REQUESTS:

- a physical disability retirement in lieu of discharge upon his expiration of term of service (ETS)
- personal appearance before the Board via video/telephone

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

- DD Form 149 (Application for Correction of Military Record)
- Counsel's Brief (12 pages)
- Exhibit 1 - Dr. PLL Neuropsychiatric Review and Evaluation, 18 July 2022
- Exhibit 2 - DD Form 214, 5 April 2021
- Exhibit 3 - VA Rated Disabilities printout
- Exhibits 4 - 22 - medical records (34 pages)
- Exhibit 23 -
 - DD Form 2808, 27 January 2021
 - DD Form 2807-1, 6 January 2021
 - DD Form 2697, 9 January 2021
- Exhibit 24 - VA Health Summary

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, in summary:

a. The applicant was denied referral to a Medical Evaluation Board (MEB) for the severe impairments related to his service-connected traumatic brain injuries.

b. Dr. [REDACTED] Neuropsychiatric Review and Evaluation and Independent Medical Evaluation, dated 18 July 2022 proves there were several instances throughout the applicant's Army career where the applicant's neuropsychiatric service-connected impairments were not properly diagnosed nor processed on a DD Form 3349 (Physical Profile).

c. The applicant served as an 11B (infantryman), deployed twice to Kuwait and endured significant injuries resulting in a 100 percent VA disability rating with a 70 percent rating for traumatic brain injury (TBI).

d. The applicant documented these injuries with Army medical staff approximately 30 times during his 8 years on active duty. He was treated for concussions or other trauma to the head. He also experienced pain in both knees, lower back pain, back spasms, and a shoulder injury resulting in surgery.

e. On 25 April 2014, the applicant was treated for a facial bone injury after a Night Observation Device (NOD) was jammed into his left eye, cheek, and face after their Bradley vehicle hit a ditch at high speed. A Military Acute Concussion Evaluation revealed soft tissue pain to the left side of his face, particularly around the left orbit.

f. In May 2017, in Germany, the applicant injured his right shoulder when a 200 pound tow bar fell onto his shoulder. He had surgery on this shoulder in February 2020. During his post-operative evaluation, the medical provided noted an MEB was not appropriate due to applicant's ETS in April 2021.

g. On 15 July 2020, the applicant was treated by a Physician's Assistant (PA) on 15 July 2020 for a severe migraine headache. The PA recorded the reason for the visit as concussion with loss of consciousness of 30 minutes or less and has a personal history of TBI. The PA indicated the applicant had experienced several hits to the head and had completed TBI screening. The applicant reported sleep issues, neck stiffness/pain/tenderness, migraine headaches, vision issues, and issues with fluorescent lights, reading, concentration, memory/attention, processing information, losing items, along with irritability and anger issues.

h. The applicant had an MRI on 24 July 2020 related to his diagnosed concussion. The MRI noted abnormal findings and recommended repeat MRI in 6-12 months. The applicant had follow-up appointments on 28 August 2020 and 30 September 2020.

i. On 14 October 2020, the applicant was diagnosed with cervicgia (severe neck pain).

j. On 17 October 2020, the applicant had a second MRI showing similar abnormal findings to his prior MRI. He had a follow-up appointment on 4 November 2020.

k. On 23 November 2020, the applicant had a telephone appointment concerning sleep disturbances due to TBI. He had an second appointment on 3 December 2020 for the same issue.

l. The applicant was treated on 5 December 2020 for right shoulder pain.

m. On 4 January 2021, the applicant had an appointment for administrative examination for phase 1 of his ETS and he noted a personal history of TBI. He completed his separation medical examination on 27 January 2021, documenting a history of TBI, right should surgery, multiple injuries in Bradley vehicle, dizziness, frequent and severe headaches, head injury, memory loss or amnesia, a period of unconscious ness or concussion, nervous trouble and frequent trouble sleeping.

n. The applicant had a case management telephone appointment with the VA indicating he deals with anxiety and anger issues observed by his spouse, friends, and co-workers on 2 June 2021.

o. The applicant should have been referred to the Integrated Disability Evaluation System (IDES) under Army Regulation (AR) 635-40 ((Physical Evaluation for Retention, Retirement, or Separation).

p. The applicant entered active duty with no medical limitations and since separation from the Army has been found 100 percent disabled by the VA. The applicant's medical providers documented his head trauma and history of TBI approximately twelve times. There is no documentation of neurological examination or mental status examination.

q. The applicant demonstrated mild to moderate cognitive communication difficulties and a treatment program was recommended in 2020. He had MRIs due to his history of concussions, headaches and memory issues which show brain trauma. No other studies were conducted prior to his ETS in April 2021.

r. A series of appointments with speech pathologist in September and October 2020 note he was making progress, but deficits still existed in memory recall, attention processes and emotional regulation. There is no indication his TBI reached a point of stability.

s. The applicant's separation medical examinations documented his history of TBI and associated symptoms, however, his report shows there were no impairments of any kind.

t. The applicant meets all criteria for referral to the IDES. IDES is appropriate in this case due to the failure to properly evaluate and treat the applicant's numerous notations in his record about his history of severe TBI.

3. The applicant underwent a medical examination for enlistment on 9 January 2013. His DD Form 2807-1 (Report of Medical History) shows he reported no significant defects and was in good health. The corresponding DD Form 2808 (Report of Medical Examination) shows he was qualified for service and assigned 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.

4. The applicant enlisted in the Regular Army on 1 April 2013. He completed his required training and was awarded the military occupational specialty (MOS) 11B (infantryman).

5. The applicant was deployed to Kuwait in support of Operation Enduring Freedom from 17 February 2015 to 15 November 2015 (10 months and 7 days).

6. The applicant was deployed to Europe in support of Atlantic Resolve from 9 January 2017 to 28 September 2017 (8 months and 20 days).

7. The applicant's DA Form 2166-9-1 (NCO Evaluation Report (SGT) covering the period 1 April 2018 to 10 March 2019 shows he passed his Army Physical Fitness Test (APFT) on 17 November 2018. He was rated most qualified with his rater stating he consistently performed at a level higher than what is expected of his position.

8. The applicant was deployed to Kuwait in support of Operation Enduring Freedom from 24 February 2019 to 20 November 2019 (8 months and 27 days).

9. The applicant's DA Form 2166-9-1 covering the period 11 March 2019 to 10 March 2020 shows he passed his APFT on 1 August 2019. He was rated highly qualified with his senior rater stating continue to select for demanding positions of increasing responsibility.

10. Counsel provided:

a. A DD Form 2807-1, dated 6 January 2021, showing the applicant reported the following medical history:

- 11.f. wore glasses
- 12.a. painful shoulder
- 12.b. arthritis, rheumatism, or bursitis in knees, shoulders, and ankles
- 12.c. recurrent back pain or any back problem; hips, lower and upper back
- 12.d. numbness or tingling, in his right arm
- 12.f. foot fungus
- 12.h. swollen or painful knee joints
- 12.i. knee trouble when running, going up stairs, sometimes when walking and standing for a long period of time
- 12.k. any need to use corrective devices, if he has surgery on left shoulder and both knees
- 12.n. broken bone(s); possible fractured both ankles in basic training
- 15.a. dizziness; sometimes
- 15.b. frequent or severe headache; almost every day
- 15.c. a head injury, memory loss or amnesia; multiple head injuries with the infantry fighting vehicle rolling over, and driving in rough terrain
- 15.g. a period of unconsciousness or concussion, when Bradley vehicle rolled over
- 16.c. pain or pressure in the chest; stabbing feeling in chest and short of breath
- 17.a. nervous trouble of any sort; anxiety problems
- 17.d. frequent trouble sleeping; takes longer than usual to fall asleep
- 17.e. received counseling of any type; anger management counseling

b. A DD Form 2697, dated 9 January 2021, showing the applicant reported his health was worse than his last physical examination of 1 April 2013. He indicates issues with his neck, shoulders, hips, knees, ankles, chest pain, headaches, sleeping, anger and back. He indicates the following history and concerns:

- shoulder injury had surgery, but since COVID-19 his, did not get the proper rehabilitation, had minor issues with his shoulder
- did physical therapy on neck, lower back, hips and knees

- takes medication for TBI and pain
- his joint pain limits him for his job as 11B
- random chest pains
- intention to file a claim with the VA

c. A DD Form 2808, dated 27 January 2021, showing:

- history of TBI - multiple head injuries in Bradley fighting vehicle
- history of right shoulder surgery - arthroscopy and bicep repair, February 2020
- a physical profile of 111111
- recommendation for follow up with TBI clinic and orthopedics

11. The applicant was honorably discharged on 5 April 2021 for completion of required active service. He was credited 7 years 11 months 3 days net active service this period.

12. Counsel provided:

a. VA Rated Disabilities printout, effective 6 April 2021, showing the following service-connected conditions and ratings:

- 0 percent - residual scars, post-surgical repair, right shoulder
- 0 percent - left hip impairment
- 10 percent - right hip strain with leg length discrepancy
- 0 percent - right hip impairment
- 0 percent - right hip extension limitation
- 0 percent - left hip extension limitation
- 10 percent - right lateral collateral ligament sprain
- 10 percent - cervical strain
- 10 percent - tinnitus
- 0 percent - chronic post traumatic headache
- 20 percent - right shoulder rotator cuff and labrum tear post repair
- 10 percent - thoracolumbar strain
- 20 percent - left shoulder rotator cuff tendonitis
- 10 percent - right knee patellofemoral pain syndrome
- 10 percent - left knee patellofemoral pain syndrome
- 70 percent - traumatic brain injury (TBI) with unspecified insomnia
- 10 percent - pes planus, bilateral
- 10 percent - left hip strain

b. Dr. [REDACTED] Neuropsychiatric Review and Evaluation, dated 18 July 2022, states a diagnosis of TBI - recurrent with residuals of cognitive impairment, headaches and

sleep impairment. The review and evaluation are available to the Board in its entirety and will be address in more detail by the Agency's medical advisor.

13. The Army rates only conditions determined to be physically unfitting at the time of discharge, which disqualify the Soldier from further military service. The Army disability rating is to compensate the individual for the loss of a military career. The VA does not have authority or responsibility for determining physical fitness for military service. The VA may compensate the individual for loss of civilian employability.

14. Army Regulation 15-185 (Army Board for Correction of Military Records) prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR. Paragraph 2-11 states applicants do not have a right to a formal hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

15. 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, his previous ABCMR denial, 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 in essence requesting a referral to the Disability Evaluation System (DES). On his DD Form 149, he notes that TBI is a condition related to his request. He states through counsel:

"This law firm represent Mr. [Applicant] in his application for correction of his military records due to the denial of a referral to a Medical Evaluation Board for the severe impairments related to his service-connected traumatic brain injuries. We submit that the that the appropriate discharge characterization for Mr. Burgos is Permanent Disability Retirement (PDR).

Pursuant to 10 U.S.C.A. 1552, and 32 C.F.R. 723, Mr. [Applicant] hereby requests correction of his military records. Mr. [Applicant] respectfully requests, in the interest of propriety, equity and clemency that this Board favorably consider this petition and change the narrative reason for his discharge due to disabling injury and grant Disability Evaluation System (DES) review."

c. The Record of Proceedings outlines the circumstances of the case. His DD 214 for the period of Service under consideration shows he entered the Regular Army on 1 April 2013 and was honorably discharged on 5 April 2021 under provisions provided in chapter 4 of AR 635-200 (19 December 2016) after having completed his required active service. It shows two periods of service in Kuwait: 17 February 2015 thru 15 November 2015, and 24 February 2019 thru 20 November 2019. It does not show the applicant was awarded a Combat Infantry Badge.

d. Paragraph 3-1 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (20 March 2012) 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 their office, grade, rank, or rating.”

e. The DES compensates Soldiers when their career is terminated prior to retirement due to a service incurred medical condition. Paragraph 1-1b of AR 635–40, Physical Evaluation for Retention, Retirement, or Separation (19 January 2017) states a purpose of the DES is to:

“Provide benefits for eligible Soldiers whose military Service is terminated because of a service-connected disability.”

f. The EMR shows the applicant had several medical issues in his last 18 months of Service:

Right shoulder – Following evaluations and the failure of conservative treatments, the applicant underwent right shoulder arthroscopy with subacromial bursectomy and distal clavicle excision with open sub-pectoral biceps tenodesis on 28 February 2020. His three-month post-op follow-up with orthopedics on 13 May 2020 shows he was recovering well with limited pain, a full range of motion, full strength, and was expected to return to full:

“He has been compliant with home rehabilitation exercises and is happy with his progress so far. He does get mild aching in his shoulder at night but denies pain otherwise. He has questions regarding push-up progression and whether or not an MEB [medical evaluation board] is appropriate ...

PHYSICAL EXAMINATION – EXTREMITIES:

A focused physical examination of the right upper extremity demonstrates well-healed incisions. No muscular atrophy. No Popeye deformity. Full

shoulder range of motion with mild pain at extremes of abduction. 5/5 strength with FF/ABD/IR/ER [forward flexion, abduction, internal rotation, external rotation] /supination.

IMPRESSION

Two-week f/u [follow-up] {sic}, status post shoulder arthroscopy with sub acromial bursectomy, distal clavicle excision open subpectoral biceps tenodesis and PRP [platelet rich plasma] injection, recovering well after surgery.

PLAN

1. Follow up with me in 3 months for 6-month post-op appointment. Release to full activity at that time if possible. Patient. expecting to ETS [expiration term of service] this summer. Initiation of MEB is not appropriate, patient has not reached maximum clinical benefit for his shoulder and will most likely complete his Army service prior to completion of an MEB.
2. Continue physical therapy
3. NSAIDs and Tylenol for pain control.”

From a 3 June 2020 encounter:

“SM has been on profile for 249 days, profile expiration date is 6/18/2020 with expected Medical Retention Determination Point (MRDP) of Return to Duty (RTD) by: 6/18/2020”

At a physical therapy reevaluation on 6 October 2020, it was noted the applicant sustained an injury to the shoulder in September and had mild residual discomfort with a decrease in internal rotation of his shoulder but otherwise full range of motion (ROM) and continued to improve:

“ASSESSMENT

Pt [patient] is just over 7 months out from surgery and has seen some recovery from his recent injury. Pt continues to have similar levels of pain but has regained a functional ROM in every plane besides IR with some limitation reaching behind the back. Strength is progressing as well with no pain exacerbation besides with flexion.

Pt was equipped with some techniques to manage UT pain and was shown pectoral stretch to assist with anterior shoulder pain and tenderness. Pt will

follow up in a month as he independently weans into full function, likely leading to discharge at next appointment.”

In a 3 November 2020 physical therapy encounter the provider noted “Patient reports working a lot on his 5 acres he gets a sharp pain down on L side down thoracic spine inside shoulder blade, no problem on the R, but only on the L.”

Low back pain – A 26 May 2020 encounter shows no history of trauma and that this had been an intermittent issue for the applicant for 6 years:

“32-year-old active-duty male reports to DiRaimondo clinic on 20200526 complaining of lower back pain x 6 years. SM [Service Member] states he is unsure what caused the pain in his lower back to start. SM states pain is a constant. SM states pain gets worse with rucking, lifting heavy objects, sleeping on soft surfaces, and being bent over for an extended period of time. SM states sleeping on the floor, foam roller, ice pack makes the pain go away.”

The last identified low back pain encounter was with physical therapy on 21 September 2020. The applicant had become symptomatic during field training:

“- SM has been in the field for an extended period and became symptomatic due to all the sitting while driving and wearing kit. SM reports he did a good amount of his stretching program while in the field which helped.

- Focus today was on recovery from the field using ROM/stretching exercises followed by gait work. Hot pack was utilized simultaneously during several of the exercises today.”

History of mild traumatic brain injuries (mTBI) with sleep disturbance and post-traumatic headaches – The applicant is reported to have sustained two mTBIs during his Service. His 28 July 2020 follow-up at the TBI Neurology/Rehab Clinic shows his main issues were “trouble sleeping, headaches,” and he stated his goals as “have peace of mind that I don’t have any major issues.”

“SM presents for f/u visit with this provider and clinic for TBI, last seen 15JUL20, this is SM's [Service Member] 2nd visit with me, first seen by me 15JUL20, patient was in no obvious distress today, was oriented X 3. Today's F2F encounter was conducted in person, at the request of the patient ...

We discussed the clinical nature of the patient's condition, available, diagnostic and treatment options and prognosis. We, together, discussed

and developed a plan that would be implemented until our next encounter. PE [physical examination] completed today. SM has been working 12 hr. shifts at night. Reminded him to pick up meds and get labs done.

He has appts with remaining therapist. His brain MRI showed T2 hyperintensities, more than expected for his age, will review with Dr L. (neuro). Likely will repeat MRI in 6-12 months to ensure stability. I will f/u with SM in 4 weeks.

A 29 September 2020 Neurology TBI / Rehab encounter shows though he continued to have some minor deficits, his work at therapy was effective, he had met his 5 short-term (ST) goals, and was being discharged after which he would continue with a home exercise program (HEP):

“PLAN:

Discharge from ST services at this time.

D/C [discharge] SUMMARY:

Pt [patient] alert and oriented x 3 and has met ST goals at this time. Pt seen for 07 visits and has met ST goals at this time and is at cognitive-communication functional baseline. Pt verbalized understanding of HEP and to continue with cognitive-communication exercises in the home environment.

Pt instructed to seek repeat referral for ST services through PCM [primary care manager] if pt experiences a change in status. Pt verbalized understanding ...

Disposition: Released w/o Limitations”

His 30 September 2020 TBI follow-up encounter shows his headaches were improving:

“ ... Today’s virtual health encounter was conducted via phone, at the request of the patient ... He continues to see PT [Physical therapy] for shoulder/neck and OT [occupational therapy] for sleep. His headaches are still daily, but 1-2/10, I added Indocin to use prn [as needed]. I ordered a repeat brain MRI w/wo [with and without intravenous contrast] to check stability of T2 hyperintensities seen on MRI of 24JUL20. I will follow up with SM in 4-6 weeks.

The applicant completed the California Verbal Learning Test (CVLT-II) on 1 October 2020. This test provides a measure of encoding and acquisition of new

verbal information (list learning), with initial learning entailing presentation of a 16-word list over 5 trials. The provider stated "Overall performance on encoding and acquisition of the list over all 5 trials is Average ..."

It was noted at his 2 November 2020 TBI Neurology/Rehab appointment: "SM was in good spirits today. We reviewed his MRI, no further f/u imaging required, but I suggested he repeat it in 1-2 yrs. I added nortriptyline for HA prophylaxis as his low grade HAs are daily.

He was treated by occupational therapy for sleep disturbance thought to be related to his mTBI. Treatment was successful and he was discharged from occupational therapy and released without limitations on 3 December 2020:

"Pt reports he is maintaining sleep despite family stressors (his dad had a stroke). Pt reports he slept well when he was in [REDACTED] visiting his family."

Mental health – In the fall of 2020, the applicant was engaged in an Anger Education Workgroup. On 10 February 2021, he underwent a required behavioral health assessment at part of his out-processing. He denied any mental health concerns and was cleared to separate from the Army.

"SM was seen by the Social Worker and Neuropsychologist for psych testing and as part of the TBI Intensive Outpatient Program. SM intends to f/u with VA and will place his claim on-line for continued services. SM will stay in [REDACTED] where his autistic son can continue to receive excellent care for his autism for at least the next 2 years. SM and his wife flip houses for a living and will continue to do so.

He denies any acute behavioral health needs, f/u with VA for continued services.

Provided SM with both In-Transition program flyer as well as Veterans Resource List, and reviewed both with SM."

g. He underwent his pre-separation examination on 27 January 2021 after which the applicant was cleared for separation and released without limitations. The applicant underwent a periodic Health Assessment in February 2021 after which the provider wrote:

"ETS + SM reports good health, no limits/profiles, no BH [behavioral health] concerns, SM denies any SI/HI [suicidal ideations / homicidal ideations] thoughts or plans. SM agrees fit for duty."

h. The applicant's final two NCO Evaluation Reports (NCOER) cover 1 April 2018 thru show 10 March 2020 (Evaluation Reports covering a final period of service of less than one year are generally optional). Both reports show he passed his Army Physical Fitness Test and was a successful Soldier and Noncommissioned Officer. Rater comments from his penultimate NCOER:

- SGT [Applicant] is in the top 10% of SGTs I have served with in my career
- a highly technically proficient NCO for his experience level
- consistently performs at a level higher than what is expected of his position

i. On this same NCOER, his senior rater was the brigade executive officer. He top-blocked the applicant as "Most Qualified" and went on to opine:

"SGT [Applicant] is the #1 Sergeant I rate and is in the top 20% of all Sergeants I have served with in over 17 years of service. He was hand selected by the Brigade Commander to run the Command team section and executed flawlessly in his duties. Send to Advanced Leaders Course as soon as possible and promote to SSG ahead of his peers. Continue to challenge this fine NCO."

j. Such laudatory comments continued on his final NCOER. From his rater:

o he is the #1 SGT that I rate and in the top 20% of SGTs I have served with in my career

o the most technically proficient SGT I have served with

o can always be counted on to accomplish the mission with minimal guidance and little to no supervision

k. His senior rater blocked him as highly qualified, opining:

"SGT [Applicant] is the #1 SGT I rate and is in the top 25% of all SGTs I have worked with in 15 years of service. Send to Advanced Leaders Course when eligible and promote to SSG when eligible. Continue to select for demanding positions of increasing responsibility."

l. There is no evidence the applicant had any duty incurred medical condition which would have failed the medical retention standards of chapter 3 of AR 40-501, Standards of Medical Fitness, prior to his voluntary separation. Thus, there was no cause for referral to the Disability Evaluation System. Furthermore, there is no evidence that any medical condition prevented the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his voluntary separation.

m. JLV shows he has been awarded multiple VA service-connected disability ratings, including one for traumatic brain disease. However, 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. 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. It is the opinion of the ARBA medical advisor that a referral of his case to the DES is unwarranted.

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 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 of the applicant's petition, available military records and medical review, the Board concurred with the advising official finding no evidence the applicant had any duty incurred medical condition which would have failed the medical retention standards prior to his voluntary separation. Thus, as noted by the opine, there was no cause for referral to the Disability Evaluation System. Furthermore, the Board determined there is no evidence that any medical condition prevented the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his voluntary separation. Based on the evidence and the advising opine, the Board found insufficient evidence to support a physical disability retirement in lieu of discharge upon his expiration of term of service (ETS). Therefore, the Board denied relief.

2. The applicant's request for a personal appearance hearing was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

BOARD VOTE:

| <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.

3/1/2024

X [REDACTED]

CHAIRPERSON
[REDACTED]

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. Title 10, USC, 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 (Physical Evaluation for Retention, Retirement, or Separation).

a. Soldiers are referred to the disability system when they no longer meet medical retention standards in accordance with Army Regulation 40-501 (Standards of Medical Fitness), chapter 3, as evidenced in an MEB; when they receive a permanent medical profile rating of 3 or 4 in any factor and are referred by an MOS Medical Retention Board; and/or they are command-referred for a fitness-for-duty medical examination.

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

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

3. 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.

4. 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.

5. 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.

a. Disability compensation is not an entitlement acquired by reason of service-incurred illness or injury; rather, it is provided to Soldiers whose service is interrupted and who can no longer continue to reasonably perform because of a physical disability incurred or aggravated in military service.

b. Soldiers who sustain or aggravate physically unfitting disabilities must meet the following line-of-duty criteria to be eligible to receive retirement and severance pay benefits:

(1) The disability must have been incurred or aggravated while the Soldier was entitled to basic pay or as the proximate cause of performing active duty or inactive duty training.

(2) The disability must not have resulted from the Soldier's intentional misconduct or willful neglect and must not have been incurred during a period of unauthorized absence.

c. The 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 Department of Veterans Affairs (VA) Schedule for Rating Disabilities (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 their office, grade, rank, or rating in such a way as to reasonably fulfill the purpose of their employment on active duty. 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.

6. 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.

7. 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.

8. 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.

9. 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.

10. 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.

//NOTHING FOLLOWS//