IN THE CASE OF: [redacted]

BOARD DATE: 15 February 2024

DOCKET NUMBER: AR20230007013

APPLICANT REQUESTS: through Counsel,

- physical disability retirement
- personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Counsel's brief
- applicant's self-authored statement
- 388 pages of medical records, dated between 2006 – 2016
- DD Form 214 (Certificate of Release or Discharge from Active Duty), covering the period ending 1 April 2016
- five witness statements/letters of support
- Army Board For Correction of Military Records (ABCMR) Record of Proceedings in Docket Number AR20200006899, dated 28 October 2021

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the ABCMR in Docket Number AR20200006899 on 28 October 2021.

2. Counsel states:

a. The applicant requests medical retirement effective 1 April 2016, at a rating of no less than 30 percent for post cervical fusion and 70 percent for post-traumatic stress disorder (PTSD), or in the alternative, referral into the integrated or legacy Disability Evaluation System (DES) for medical evaluation. This request is made based upon medical evidence that he was suffering from PTSD and herniated discs in his neck that required a fusion of his C5-C7 vertebrae. The applicant was put on permanent profile and only minimized the severity of his neck injury out of fear of being discharged from the Army and ending his military career.

b. This is the applicant's second attempt requesting medical disability retirement. He previously filed a petition to the Board and on 28 October 2021, the Board denied his request to correct his military records to reflect medical retirement from the Army, based on insufficient evidence that his injuries rendered him unfit for duty as a recruiter. The Board failed to realize that the applicant's neck pain and PTSD were so severe that he was placed on the permanent profile list, he could not perform the duties of a recruiter (such as being out in public and in large crowds) and could not perform the duties of a basic Soldier, such as performance of the Army Physical Fitness Test (APFT), rucking with a combat load, or wearing a helmet. He now comes to request the Board consider new and material evidence for reconsideration of his application.

c. The applicant entered the Army on 20 November 2007, and served in Military Occupational Specialty (MOS) 11B (Infantryman). He deployed to Iraq from 1 January 2003 through 11 September 2003, his unit was continuously engaged in multiple operations during the invasion of Iraq. He was involved in multiple direct and indirect fire engagements with the enemy. Fellow Soldiers provided witness statements detailing a time when they and they applicant needed to clean out a Bradley, which exploded after a gun run, and contained the remains of a fellow Soldier. Upon returning from Iraq, the applicant began experiencing PTSD symptoms including nightmares and depression and he also injured his neck while in training.

d. His chain of command pressured him to work through his pain because his unit needed him, and being a young, impressionable Soldier, he worked through the pain and did not seek medial attention. Soon afterward, he was honorably discharged from the Army. The applicant recalls many times where he experienced PTSD symptoms such as hyper-vigilance as a civilian. After attending college, the applicant enlisted back into the Army in 2008. However, because of his neck pain and PTSD, he knew he could not enlist as an Infantryman again, so he enlisted to service in MOS 31B (Military Police (MP)).

e. Once enlisted as an MP, his unit deployed to the Taji Theatre Internment Facility in Iraq, where he experienced the most life-threatening experience of his life helping to put down a prison riot and conducting cell transfers of non-compliant prisoners. After returning from Iraq, the applicant injured his neck while engaging in unarmed defense training. He sought medical attention, and a Magnetic Resonance Imaging (MRI) revealed a bulging disc from C6-C7 vertebrae. On 18 June 2010, he was issued a permanent profile and notified of the option of surgery. The applicant felt paralyzing anxiety while engaging in witness interviews, and his work began to diminish. When he notified his command of the need for surgery, they convinced him their needs exceeded his own.

f. The applicant was then stationed in Italy and as his duties there were administrative, he saw this as an opportunity to rest his neck and relax his mind. He saw

an Italian doctor regarding the bulging discs and was further advised the only way to heal his neck was a permanent neck fusion. The applicant was wary of limiting his mobility permanently and waited until his return to the U.S. to speak with an American doctor about his neck. When he returned to the U.S., he sought a position in recruiting and began to actively seek treatment for his neck pain. An MRI in April 2013 substantiated herniated discs of the C6-C7 vertebrae, and he was continued on a permanent profile directing that he could not run, jump, or do sit-ups.

g. After another MRI in May 2015, the applicant's doctor recommended surgery, stating the applicant has significant muscle spasms that keep him from work and affect his personal life, which he had with increasing severity over the last 10 years without improvement despite conservative treatment. He recommended a two-level anterior cervical discectomy and fusion at the C5-C6 and C6-C7, maintained with screws and a plate. This would potentially keep the applicant out of fully duty for approximately 2-3 weeks and with gradual increasing physical exercise he should be back to full duty, excluding activities that might traumatize his head or neck within 6 weeks.

h. The applicant underwent a cervical fusion of the C5-C7 vertebrae on 5 October 2015. This did not fix the pain the applicant was feeling, and he still could not engage in the traditional physical fitness with his fellow Soldiers. Furthermore, he could not go to schools or be in large crowds for recruiting events, because they reminded him of the fear of being crushed by a sea of bodies during the prison riots. The applicant requested a compassionate reassignment when his father became ill, but his request was denied by his chain of command, because they were targeting him after their impatience with his recovery.

i. The DES is the mechanism for determining fitness for duty, separation, or retirement for service members because of disability. A careful review and application of the governing regulatory guidance reveals the applicant's case was not properly handled. The procedural errors in his case have created a severe and ongoing injustice in which he has been denied full consideration by the DES. Instead, the applicant was targeted and rushed through the separation process without his command's referral to a Medical Evaluation Board (MEB) to determine his fitness. To discharge him without DES referral was an error and injustice.

j. The applicant's spinal fusion rendered him unfit for service under the provisions of Army Regulation 40-501 (Standards of Medical Fitness) and he should have been referred to the DES, based on spinal surgery, disc fusion, and non-radicular pain involving the cervical spine. Additionally, his PTSD also rendered him unfit and was a cause for referral to the DES. His PTSD was so severe that he could not perform the duties of a recruiter and was severely limited in his ability to perform the duties of a Soldier. He could no longer perform the physical duties of an MP; thus, he sought recruiting duty, but even as a recruiter he could only perform the administrative

functions of completing paperwork because his compromised mental health interfered with his duties. The only reason he was never referred to DES is because his command targeted him for seeking mental health treatment instead of recruiting, which ultimately led to his separation rather than DES referral.

k. The applicant's conditions were so severe at the time of his separation, that the only equitable rating he should receive is 30 percent for his post cervical fusion and 70 percent for his PTSD, which is how the Department of Veterans Affairs (VA) rated him within 1 year of his discharge. Due to the proximity of the VA's evaluations of the applicant to his discharge, it is more likely than not that his symptoms were of the same severity as when he was on active duty in the Army.

l. The applicant experienced both physical and mental traumas, which caused him to sustain multiple herniated discs in his neck, necessitating a neck fusion, and PTSD. Due to injuries, his fitness for military service was questionable and his command should have referred him to the DES, which they did not do. Instead, they targeted him and chastised him to make him an example for everyone else. Others took note, as seen in provided witness statements, noticing the treatment the applicant received. Had his command approved his compassionate reassignment, he would have then sought treatment and referral to the DES. It is because of his command's failings that he did not undergo DES processing and receive a disability retirement. The Board should correct this error and injustice, granting the applicant a disability retirement or referral to the DES.

3. The applicant states:

a. He strongly believes in service to his nation, his unit, and the Soldiers that depended on him to lead them. The Army teaches the seven Army values and expects Soldiers to internalize and live those values. He always tried to put his service first. If he was injured, he was told the unit needed him, his Soldiers needed him, and he was mission essential. He was told to suck it up and drive on.

b. After years of conditioning and believing, after injuries in the line of duty (LOD), he was pushed out of the Army without a medical board. He applied for a judgment of medical retirement because his unit at the time of separation did not take care of Soldiers and did nothing to facilitate his transition out of the service. He asked his unit for help when his family needed it most and they told him he did not know what selfless service was, he did not need help, and he needed to just forget it and do his job. After years of setting aside his personal wellbeing for the mission, trying to find assignments where he could continue to serve despite his injuries, he was denied help the one time he asked for it. He separated from the service to help his family.

c. Since he was not inclined to ignore his family problems and in his unit's eyes he had no concept of selfless service, they did nothing to facilitate his separation at his expiration term of service (ETS). He was told to make his own appointments and navigate his exit from the service on his own. They could not be bothered. As such, he did not receive a medical board for his medical conditions, despite the regulations stating he was required to undergo a MEB because he had a permanent profile at the time of his separation. He did not learn of this requirement until after his separation and subsequent VA disability rating of 90 percent. His previous request for medical retirement was denied, despite his injuries, because he attempted to selflessly serve. He felt he was doing his duty by trying to seek out duty assignments that were less physical in attempts to continue to service.

d. Physically and emotionally, it was becoming harder and harder for him to perform the duties he was assigned. At first, it started with his inability to perform in the field and progressed to being unable to perform his duties as a recruiter, although he did everything in his power to try to continue to serve because he wanted to serve. Had he not been pushed out by his command, and instead returned to a line unit as his branch was insisting, he is positive he would have been referred to the DES and received a medical retirement.

e. The only reason he opted to separate when he did was because his father needed assistance and his unit refused to discuss options. They told him he was ineligible for compassionate reassignment because he was a detailed recruiter and did not really belong to them so they could not reassign him. He knew they were lying, but he did not have the time to fight it. His father's health was becoming dire, and he needed family nearby to assist him. His unit forced him to choose his father's needs or his own service. Out of desperation, he chose his father's needs and his unit refused to facilitate his exit. He did not even attend Army Career and the Alumni Program (ACAP). Regulations state that as he was on permanent profile at the time, he separated that he should have received a medical board, but he did not receive one. If he had been referred to DES, the board would have discovered the same list of conditions for which the VA assessed him with a 90 percent disability rating.

f. Once he received notice of his denial of request for medical retirement, he saw that the decision stated that at the time he left service he was able to do his job. Immediately upon his separation, he was assessed with a 90 percent disability rating for service-connected injuries. He left the Army 90 percent disabled; however, his denial letter implied he could perform as a Soldier. He took that letter and went to the local recruiting station because his father had passed away and there was no longer a need to stay at home. The recruiters told him that per Army Regulation 601-210 (Personnel Procurement), the 90 percent disability rating that he left service with prohibited him from serving and that there was no way he could rejoin. The Board's previous decision

seems to imply he can simultaneously both perform and not perform the duties of a Soldier.

g. He will outline the timeline of his injuries as well as PTSD and the effects they had on his service, beginning with his neck. He originally injured his neck while stationed at Fort Benning, GA, doing combative training during physical training (PT) in late 2003 or early 2004. He was in a headlock and during the subsequent struggle to break free, his neck became injured. He could not move it and experienced intense pain. His platoon sergeant told him to return to his room and take the rest of the day to rest and to return to work on Monday ready for duty. He believes they did not want him going to sick call out of fear of losing him during training. He spent the week lying in bed, unable to turn his head, and his neck could not support the weight of his head while sitting up. He had to grasp his head with his hands in order to sit up. He healed enough o return to work on Monday but continued to experience limited mobility with his head and neck.

h. While stationed at Fort Polk, LA, in 2008, he again injured his neck while performing combatives. He was unable to move his head and experienced intense, sharp pain. He went to sick call and was put on profile. After this injury and after being off profile, it was becoming easier to reaggravate his neck injury. One time he slipped walking downstairs and landed flat on his rear end when his neck seized up again, he experienced sharp intense pain, and he could not move his neck. He had to restrict his movements to include PT both on and off duty to avoid reaggravating his neck injury. He then began to go to sick call more often than usual.

i. Upon examination of his neck, he was told there was a bulging disc in his cervical spine. He began to experience intense muscle spasms even when his neck was not immobilized. He was told that the solution would be surgery, but his unit appealed to his sense of service, especially to his duty to his Soldiers who depended on him and would have to deploy without their noncommissioned officer (NCO). His chain of command requested he put off surgery because he was mission essential. This approach worked and he did not get the surgery. His platoon sergeant and squad leader understood he was putting off surgery at their request and he was able to get away with not performing tasks that his neck could not handle.

j. After returning from deployment in 2009, he requested to go to the 91st MP, a law enforcement detachment to do investigations. It was becoming harder and harder for him to perform duties while wearing a vest and especially a helmet. It was also getting harder to perform high intensity PT without experiencing pain. He thought that working investigations would be a good place to allow his neck to heal. While doing MP unarmed self-defense training for the 91st MP Detachment, he reaggravated his neck injury and experienced a total loss of mobility in his neck, along with intense spasms and sharp pain. He went to sick call, and it was discovered he now had multiple bulging

discs. His platoon sergeant from his prior unit was now the detachment sergeant of his current unit and again his sense of duty was appealed to. He was “essential” to the unit because if he was not working cases, the entire investigations section would have to pick up his workload, victims would not receive justice, and criminals would not be caught. This approach worked again, and he put off needed surgery. He believes it was around this time that he was put on permanent physical profile. It was becoming easier and easier to injure his neck, with his neck seizing once when he was simply walking down the sidewalk, immobilizing him for several days.

k. After 1 year at the 91st Detachment, he was told he would have to go back to a line unit in the battalion. Knowing he could not physically perform his duties and that he would be discouraged from surgery because they were training to deploy, he called his Branch and received orders to another assignment performing investigative duties at the U.S. Army Garrison, Livorno (USAG-L), Italy. Once he arrived in Italy, he got settled in and found it to be a very relaxed and laid back environment. He was left to do PT entirely on his own and spent most of his efforts in the gym on the stair master or a stationary bicycle. This constant form of PT caused an exacerbation of issues in his knees, and it became harder to perform tasks. Sitting at a desk for long amounts of time was hurting his lower back and causing spasms. He would have to shift position, but that would hurt his neck, so he would have to shift back. Standing for long periods hurt his neck. Sitting in police cars, carrying his issued weapon, spare magazines and a radio hurt his lower back and he was experiencing intense muscle spasms regularly.

l. At least in Italy, he had no Soldier tasks to perform, never had to wear tactical gear, and could do PT however he wanted. His unit was supportive of him getting the medical care he needed and did not attempt to talk him out of seeking aid, but USAG-L was a small community with only a basic aide station, and he had to seek medical care on the Italian economy. An Italian doctor told him that in the U.S. he had several options for surgery to repair his neck, but in Italy the only option was a cervical fusion and the accompanying loss of range of motion that goes with it. He opted to wait until he was in the U.S. to get the repair and have options other than a fusion. He believes it was around this time that while getting his permanent profile renewed, that the physicians assistant rendered him non-deployable and informed him they were going to place a “no helmet, no tactical vest” restriction in his file, which would have ended his career. He asked him not to do so, because he did not want to be separated from the Army.

m. While assigned to USAG-L, he was sent back stateside to attend the Advanced NCO Course (ANCOC), where they had regular PT and field time. He had a great deal of problems performing in the field, having to wear a helmet and vest and he could not do many physical activities during PT. He found he could not do pull-ups, the side straddle hop, or anything that required jumping. He spoke on the side with the instructor, and he was understanding, allowing him to “under the radar” sandbag at PT. During field time, he removed his gear as frequently as he could get away with and, to

his shame, he was very inventive at finding ways to lead from the rear or the seat of the Humvee during his missions.

n. At the conclusion of his time in Italy, he again contacted his Branch manager to try to get another assignment in investigations. He was told that staying in investigations would hurt his career and that he had to return to a line unit. He argued as much as he could and made every effort to get another investigations assignment but could not. He then submitted a request to go to recruiting duty so he could perform duties behind a desk. He arrived at his unit in [redacted]Recruiting and found an incredibly toxic leadership environment. They were strongly opposed to recruiters getting medical attention that would take them away from recruiting activities. He was constantly told that he should not care for himself because he was not living up to the Army value of selfless service. Despite this, he scheduled surgery for his neck because the pain in his neck and constant immobilization became too much for him to bear. The doctor told him at one point he did have options other than a cervical fusion; however, because he constantly put off surgery, his neck injury advanced from a single bulging disc to multiple herniated discs. A cervical fusion was his only available option at this point.

o. Also, because he was forced to carry weight differently to ease the burden on his neck, his posture shifted, and he was diagnosed with degenerative lower discs. He had the cervical fusion; however, his spine had slowly changed curvature because he shifted his position so many times in order to alleviate his neck pain. The mechanical fusion forced the effected vertebrae back into the natural poison and caused constant neck and upper back muscle spasms, shifting the strain to his lower back and causing more pain. Following the fusion, the doctor told him that for the rest of his life he cannot carry or lift over 50 pounds (lbs.) and that for at least 1 year he should not wear a helmet and only after 1 year they would have to revisit to see if he could even wear a helmet at all. He was out of the service before the year was up though, so he was not evaluated on whether he could wear a helmet again. After recruiting duty, if he had not separated, he would have had no other options other than to be placed on orders back to a line unit where it would become abundantly clear he could not perform the duties of a Soldier.

p. With regard to his PTSD, he deployed as part of the invading force of Iraq in 2003. His platoon was detached and assigned to an Armor battalion, and together they spearheaded the assault from the Kuwait/Iraq border to their objective on the Euphrates. Once there, they were attached to the brigade spearheading another offensive. Once at that brigade's objective, his unit was attached to another brigade in order to advance over the Euphrates and halted just south of Baghdad. They were then reattached to another brigade, so they could flank around the west of Baghdad to set up a perimeter north of the city to stop any enemy combatants from fleeing. The Iraqi Republican Guard met them at their objective and surrounded their position where they were met with constant artillery fire for 3 days and defended against enemy attacks to

break their perimeter. Afterward, they advanced south to Baghdad, where they began patrolling the city 3 times daily until they were sent home. During the Iraqi offensive, he experienced many horrors while escaping near death himself.

q. He thought he dealt with this well; however, his friends and family told him they saw a huge change in his behavior. He was hyper aware of everything that went on around him when he was home on leave. He went to a theme park with friends and realized the adrenaline rush he experienced waiting to go on rides was making him hostile and agitated and he had to sit out while his friends went on rides.

r. He separated from the Army shortly after 2004 and went into the Individual Ready Reserve (IRR) while he tried out college. After a few short years, he want back into the service as an MP. He found that anticipation of field action still had the same effect as waiting for rides did. He had connected adrenaline with death and terror and any time he anticipated an event, this caused an adrenaline rush, which was extremely hostile.

s. While deployed with his MP unit to Iraq in 2009,he was ordered to the Taji Theater internment facility. While there, because of his prior Infantry experience, in addition to his regular duties, he was assigned to the Immediate Response Force (IRF). The IRF quelled prison riots, conducted forced cell moves, moved dangerous detainees, and conducted searches for the maximum security housing units. During one riot, they had to pull out the ringleader and relocate him to another cell in the hopes that this would take the fight out of the other rioters. There were 20 detainees per cell. They knew they wanted the ringleader, so they formed a human wall in front of him. They formed a line of Soldiers in full riot gear, the front man with a shield. Each man grabs the man in front of him. A Soldier off to the side throws the cell door open and they charge in as hard and as fast as they can to break through the human wall. Then, when the ringleader is grabbed, the entire line reverses and pulls. During this action, 19 men were pummeling, ripping, and clawing to fight and stop them. They also threw bodily fluids at them; they had been saving in preparation. If the man behind him had lost his grip on him, he would have been beaten to death and ripped apart by an incensed mob. If he lost his own grip on the man in front of him, the same would have happened to him. He continues to have recurring nightmares of being crushed to death by a mob of people because of this experience.

t. After his deployment, he went back into investigations; however, he began to experience extreme hypervigilance around crowds of people, which he found to be terrifying. Talking to a suspect who may become violent caused a level of anxiety with which he could barely cope. Operating in a civilian environment caused a never-ending roller coaster of anxiety as well. He felt he must watch the hand of everyone he spoke with and always instructed others away from kitchen knife blocks during house calls. The conditioning of Basic Combat Training (BCT) and years of field work do not translate well in a civilian context, where he only experienced crushing anxiety.

u. Once in recruiting, he thought he would be free of that, but in recruiting he found so many other triggers. The first time he was in a high school for a recurring presentation and the bell rang unexpectedly when he was surrounded by a sea of loud teens with constant sudden movements, he was in hell. It took all of his faculties to remain in control. His job required him to seek out crowds and talk to people, but his anxiety was too much to bear. In order to deal with his fear of crowds, he volunteered to complete paperwork no one else wanted to complete. He built all the packets, set up all the appointments, and chased down all the paperwork that applicants needed. The position was called recruiter support, but then their command told them that recruiter support no longer existed, despite no change in regulations or manuals and he was forced to resume the activities that were causing him anxiety. He began speaking to mental health professionals, but his unit regularly chastised him for taking the time to speak to mental health. This added levels of anxiety onto the act of seeking help for the anxiety he was experiencing from the job.

4. The applicant enlisted in the Regular Army on 17 April 2000 and was awarded the MOS 11B.

5. The applicant deployed to the following locations during the following time periods:

- Kuwait, from 1 May 2002 through 1 November 2002
- Kuwait/Iraq, from 1 January 2003 through 1 September 2003

6. A physical profile is used to classify a Soldier's physical disabilities in terms of six factors or body systems, as follows: "P" (Physical capacity or stamina), "U" (Upper extremities), "L" (Lower extremities), "H" (Hearing), "E" (Eyes), and "S" (Psychiatric) and is abbreviated as PULHES. Each factor has a numerical designation: 1 indicates a high level of fitness, 2 indicates some activity limitations are warranted, 3 reflects significant limitations, and 4 reflects one or more medical conditions of such a severity that performance of military duties must be drastically limited. Physical profile ratings can be either permanent or temporary.

7. The applicant's Enlisted Record Brief (ERB), dated 3 February 2004, shows his PULHES as 111311, reflecting a physical profile rating of 3 in factor H.

8. The applicant's available records do not contain a corresponding DA Form 3349 (Physical Profile) for this period of service.

9. The applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) shows on 16 September 2004, he was honorably released from active duty due to completion of required active service, with corresponding separation code of MBK and transferred to the U.S. Army Reserve (USAR) Control Group (Reinforcement). It further shows he was awarded the Combat Infantryman Badge and credited with 4 years and

5 months of net active service.

10. A review of the U.S. Army Human Resources Command (AHRC) Soldier Management System (SMS) reveals the applicant was involuntarily activated on 5 November 2006, while in the USAR Control Group (Reinforcement), due to partial individual mobilization.

11. A DD Form 220 (Active Duty Report) shows the applicant entered active duty in a USAR status on 5 November 2006, per AHRC Orders M08601784, dated 29 August 2006.

12. A Standard Form 600 (Chronological Record of Medical Care), shows:

a. The applicant was seen at Moncrief Army Community Hospital, Readiness Program on 6 November 2006, as an IRR Soldier for Soldier Readiness Processing (SRP).

b. He was seen for IRR SRP with a physical profile of H3 for hearing loss; he also had PTSD-like symptoms of nightmare and depression since returning from Iraq in 2003, and knee pains

c. The assessment/plan shows diagnoses of hearing loss (H3); non-deployable, depression, and joint pain, localized in the knee.

13. Headquarters, U.S. Army Training Center and Fort Jackson Orders 324-180, dated 20 November 2006, released the applicant from active duty by reason of physical disability effective 22 November 2006 and reassigned him to the USAR Control Group (Reinforcement).

14. The applicant's DD Form 220 shows he was released from active duty on 22 November 2006.

15. A review of SMS shows the applicant:

- was returned to Reserve component control on 23 November 2006
- he was transferred from the USAR Control Group (Reinforcement) to USAR Standby Reserve (Active Status List), a non-unit category on 6 August 2007, due to temporary medical disqualification remedial within 1 year

16. AHRC Orders C-08-724653, dated 6 August 2007, released the applicant from the USAR Control Group (Reinforcement) and reassigned him to the Standby Reserve (Active List) effective 6 August 2007, due to temporary medical disqualification.

17. A DA From 3349 shows:

a. On 13 August 2007, the applicant was given the PULHES 111312, with a permanent physical profile rating of 3 for hearing loss and a rating of 2 for factor S, without a corresponding diagnosis listed.

b. He was not healthy without any medical condition preventing deployment and needed an MEB.

c. He was able to perform all listed functional activities and APFT events.

d. He was unfit in accordance with Army Regulation 40-501.

18. A DD Form 2807-1 (Report of Medical History) shows on 23 October 2007, the applicant provided his medical history for the purpose of enlistment in the USAR. He indicated he previously had a ruptured hernia that was surgically repaired in 2003 and was in good health. The examiner's summary shows honorable discharge, non-medical, re-entry code 1, an no significant medical history.

19. A DD Form 2808 (Report of Medical Examination) shows the applicant underwent medical examination on 23 October 2007, for the purpose of Regular Army enlistment and was found qualified for enlistment with a PULHES of 111111.

20. On 20 November 2007, the applicant again enlisted in the Regular Army and was awarded MOS 31B.

21. The applicant deployed to Iraq form 12 September 2008 through 1 September 2009.

22. A Post-Deployment Health Assessment (PDHA), dated 5 September 2009, shows the applicant indicated:

- his health was good
- his health was about the same as before he deployed
- during the past 4 weeks, physical health problems did not make it difficult at all to do his work or other regular daily activities
- during the past 4 weeks emotional problems, such as feeling depressed or anxious did not make it difficult at all for him to do his work, take care of things at home, or get along with other people

23. An MRI of the cervical spine, performed on 8 December 2009, for assessment of neck pain, shows shallow disc osteophyte bulge pattern at C5-6 and disc bulging with a

very subtle left paracentral disc protrusion, not resulting in central canal or foramen stenosis at C6-7.

24. A second PDHA, dated 23 February 2010, shows the applicant indicated:

- his health was fair
- his health was somewhat worse than before he deployed
- during the past 4 weeks, physical health problems made it somewhat difficult do his work or other regular daily activities
- during the past 4 weeks emotional problems, such as feeling depressed or anxious did not make it difficult at all for him to do his work, take care of things at home, or get along with other people
- comments show the applicant had recurrent back pain and was under treatment with physical therapy and orthopedics

25. A DA Form 3349 shows:

a. On 18 June 2010, the applicant was given a permanent physical profile rating of "2" in factor L for lumbar degenerative joint disease and cervical disc bulge. He retained a physical profile rating of "1" in all other factors.

b. He was able to fully participate in all listed functional activities and was deemed healthy without any medical condition that prevented deployment.

c. He was unable to participate in the 2-Mile Run of the APFT but could participate in the other two APFT events.

d. He was not to run or participate in combatives and could lift or carry a maximum weight of 50 lbs. and could march with standard field gear except rucksack a maximum distance of 2 miles.

26. Numerous additional medical records, which have been provided in full to the Board for review, in pertinent part show:

a. A Standard Form 600 (Chronological Record of Medical Care) shows the applicant was seen at Livorno, Italy on 12 December 2012, for follow-up to a cervical MRI. The applicant injured his neck performing combatives in 2003 and reinjured in a few years later during an MP defensive course. He is currently on profile for his neck, but the pain never completely goes away. The assessment and plan shows diagnosis of bulging cervical disc and lower back pain with referral to physical therapy. He was released with duty limitations.

b. Multiple Standard Forms 600, dated between March 2013 and May 2014, show the applicant's repeated medical appointments, consultations, and physical therapy for neck pain and cervicalgia, with the recommendation for anterior discectomy and herniotomy at the level of C6-C7. They reflect the applicant had a P2 permanent profile for his neck and depression screenings were negative.

c. On 18 May 2015, he underwent cervical spine MRI at the Harford Memorial Hospital, where the impression was mild to moderate degenerative changes involving the cervical spine. C5-6, disc osteophyte complex causes mild central canal stenosis without significant foraminal stenosis. C6-7 left paracentral disc osteophyte complex causes moderate left foraminal stenosis and mild right foraminal stenosis with mild central canal stenosis.

d. A Brain and Spine Specialists office visit report shows the applicant was seen on 23 June 2015 for neck pain. The severity of the problem was moderate. The pain frequency was constant. The assessment shows cervical disk disorder with radiculopathy. Recommended treatment was a two-level anterior cervical discectomy and fusion at C5-6 and C6-7, maintained with screws and a plate. This should potentially keep him out of full duty for approximately 2-3 weeks and with gradual increasing physical exercise, he should be back to full duty minus activities which may traumatize his head or neck. The plan shows the proposed C5-7 procedure, fitted hard cervical collar, topical compounded pain cream, physical therapy, and external bone growth stimulator.

e. A Standard Form 600 shows the applicant underwent a Periodic Health Assessment (PHA) on 7 July 2015. The applicant had a positive history of PTSD for which he would like to be evaluated by psychology as well as have a modified permanent P2 profile for cervical degenerative disc disease and cervical disc herniation with lumbar disc herniation, where he experienced increased pain with running, jumping, and sit-ups. The assessment and plan shows diagnoses of PTSD for which he was referred to behavioral health and herniated intervertebral disc cervical, for which reevaluation of his P2 profile with no running and no sit ups was recommended. He was released without limitations.

f. A Standard Form 600 shows the applicant was seen on 22 September 2015, for a pre-operative examination for C5-7 anterior cervical discectomy and fusion surgery scheduled for 5 October 2015. Depression screening was negative, the estimated risk of surgery and his plan of care was discussed. He was released without limitations.

g. A Standard Form 600 shows the applicant was seen for post-operative follow-up on 3 November 2015. He was on his last day of convalescent leave and needed his leave extended. He was recovering well, and pain was controlled with medication. He was to follow up with the surgeon in 2 weeks. The assessment and plan shows he was

given a 45 day T3 (temporary 3) profile and was to follow up in 2 weeks for physical therapy referral.

27. All of the applicant's DA Forms 2166-8 (NCO Evaluation Report (NCOER)) covering the periods ending 30 September 2009, 30 September 2010, 30 September 2011, 20 September 2012, 30 September 2013, 27 January 2014, and 27 January 2015, reflect he was rated as "Excellence" or "Success" in all rated categories in positions as an MP investigator and a recruiter and passed his APFT every year, with no indication he was unable to perform his duties due to physical profile limitations.

28. The applicant's DD Form 214 shows he was honorably discharged on 1 April 2016, due to completion of required service, with corresponding separation code KBK. He was credited with 8 years, 4 months, and 12 days of net active service this period; 4 years, 5 months, and 18 days of net prior service, and 3 years, 1 month, and 15 days of total prior inactive service.

29. The applicant's ERB, dated 4 April 2016, shows:

- his PULHES was 112111
- his medical readiness classification (MRC) was 1 (deployable)

30. A VA letter, dated 28 November 2016, shows the applicant was granted a combined service-connected disability rating of 90 percent effective 2 April 2016, for the following conditions:

- left knee strain, 10 percent
- surgical scar, neck, status post cervical fusion surgery, 10 percent
- right hearing loss, 0 percent
- right knee strain, 10 percent
- right ankle strain, 10 percent
- tinnitus, 10 percent
- PTSD, 70 percent
- left ankle strain, 10 percent
- status post cervical fusion surgery C5-C7, 30 percent
- thoracolumbar strain, 20 percent

31. The applicant provided five witness statements/statements of support, which have been provided in full to the Board for review. In pertinent part, they attest to the applicant's outstanding leadership and integrity as well as detail traumatic events experienced during deployment and accounts of mistreatment as recruiters.

32. The applicant previously applied to the ABCMR requesting physical disability retirement and on 28 October 2021, the Board denied his request, determining the

evidence presented did not demonstrate the existence of a probable error or injustice and the merits of the case were insufficient as a basis for correction of the applicant's records.

33. 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.

34. 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/or the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant has again applied to the ABCMR requesting a referral to the Disability Evaluation System (DES). He states through counsel:

> "We respectfully request the following relief for Mr. [Applicant]t:
>
> 1. Medical Retirement effective 1 April 2016 at a rating of no less than thirty percent for post cervical fusion and seventy percent for PTSD, or in the alternative
>
> 2. Referral into the Integrated or Legacy Disability Evaluation System for medical evaluation."

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. His DD 214 for the period of Service under consideration shows he entered the regular Army on 20 November 2007 and was honorably discharged on 1 April 2016 at the completion of his required active service under authority provided in chapter 4 of AR 635-200, Active Duty Enlisted Administrative Separations (17 December 2009).

d. A request for a medical retirement based on a post-service VA service-connected mental health condition was previously denied in full on 21 October 2021 (AR20230007013). Rather than repeat their findings here, the board is referred to the record of proceedings and medical advisory opinion with its thorough review of his

mental health condition for that case. This review will concentrate on the new evidence submitted by the applicant.

e. For this case, the applicant has requested that his neck pain be found to have failed the medial retention standards in chapter 3 of AR 40-501, Standards of Medical Fitness, and unfitting for continue military service.

f. The first clinical encounter in the EMR related to his chronic neck pain is a physical therapy evaluation on 3 February 2009. The applicant reported the neck pain began in 2004 after participating in combatives, and that his most recent episode began the day before with no known cause. An MRI had revealed a bulging disc at C 6-7 and he was started on conversative treatment, to include physical therapy with cervical traction.

g. He was evaluated for this condition by orthopedics in March 2010. The disc bulge was determined to be non-operative at that time and the surgeon referred him to pain management.

h. The next clinical encounter shows the applicant was seen for another flare-up of his neck pain in September 2012. An MRI obtained in October 2012 revealed a disc bulge at C6-7 with possible nerve impingement on the left side. The applicant reinitiated physical therapy in Janaury 2013. He was referred to neurosurgery for evaluation, and his 23 May 2013 follow-up note with his primary care provider stated: "Patient saw neurosurgeon who thinks he electively will need to have fusion surgery of the C6-7. He needs to continue current profile as he cannot do sit-ups or pushups. He is on a P2 for running."

i. An MRI was obtained on 18 May 2015, revealing "Left paracentral disc osteophyte complex causes moderate left foraminal stenosis and mild right foraminal stenosis with mild central canal stenosis." This relates to the symptoms as he explained them to his primary care provider on 18 June 2015: "He states that he has some degree of neck pain daily, with intermittent left upper extremity radiculopathy whenever he attempts any kind of physical activity or eccentric movement of his neck." He was again referred to neurosurgery for evaluation.

j. Following the evaluation on 23 June 2015, the surgeon stated that resolution of his chronic symptoms would likely require two-level cervical fusion and the applicant would be on limited duty during the recovery period of approximately six weeks:

> "He has had these symptoms in increasing severity over the last 10 years approximately without improvement despite significant conservative treatment and an active lifestyle of an active military person. I will of course recommend continued conservative treatment such as traction physical therapy, etc. However, I do not believe that these have any significant likelihood of finally addressing his complaints.

> I do believe that the definitive treatment for this shoulder problem will include a two-level anterior cervical discectomy and fusion. This should take place at C5-6 and C6-7 it should be maintained with screws and a plate.
>
> This should potentially keep him out of full duty for approximately 2-3 weeks and with gradual increasing physical exercise he should be back head-to-head combat training, or needing to carry any type of weight on his head, within 6 weeks, to full duty minus activities which may actually traumatize his head or neck such as head-to-head combat training, or needing to carry any type of weight on his head, within 6 weeks.

k. The applicant underwent the cervical fusion on 5 October 2015 and at his 3 November 2015 primary care visit was noted to "be recovering well."

l. The neurosurgeon saw him in follow-up on 4 February 2016:

> "The severity of the problem is mild. The problem has improved. The frequency of the pain in intermittent. Patient is experiencing some mild intermittent neck pain ... This is his three-month follow-up and he is quite pleased with his surgical results. He reports complete resolution of his left arm pain and now only has occasional muscle spasm when he is particularly active."

m. JLV shows his first encounter for neck related symptoms was in March 2019.

n. There is no evidence the applicant's neck condition post cervical fusion nor any other medical condition would have failed the medical retention standards of chapter 3, AR 40-501 prior to his voluntary separation. Thus, there was no cause for referral to the Disability Evaluation System.

o. 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."

p. JLV shows he has been awarded multiple VA service-connected disability ratings, including 70% for PTSD (unchanged) and 30% for residuals of his cervical fusion. However, the DES compensates an individual only 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.

q. It is the opinion of the ARBA medical advisor that a referral of the case to the DES is not warranted.

BOARD DISCUSSION:

After reviewing the application and all supporting documents, the Board determined relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. Based upon the available documentation and the findings and recommendation of the medical advisor, the Board concluded there was insufficient evidence of an error or injustice warranting a change to the applicant's disability ratings and/or a change to his narrative reason for separation.

BOARD VOTE:

Mbr 1	Mbr 2	Mbr 3	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
[redacted]	[redacted]	[redacted]	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.

5/14/2024

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, 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 (DES) and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with DOD Directive 1332.18 (Discharge Review Board (DRB) Procedures and Standards) and Army Regulation 635-40 (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 a Medical Evaluation Board (MEB); when they receive a permanent medical profile rating of 3 or 4 in any factor and are referred by an Military Occupational Specialty (MOS) Medical Retention Board (MMRB); 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 Physical Evaluation Board (PEB). The purpose of the MEB is to determine whether the service member's injury or illness is severe enough to compromise his/her ability to return to full duty based on the job specialty designation of the branch of service. A PEB is an administrative body possessing the authority to determine whether or not a service member is fit for duty. A designation of "unfit for duty" is required before an individual can be separated from the military because of an injury or medical condition. Service members who are determined to be unfit for duty due to disability either are separated from the military or are permanently retired, depending on the

severity of the disability and length of military service. Individuals who are "separated" receive a one-time severance payment, while veterans who retire based upon disability receive monthly military retired pay and have access to all other benefits afforded to military retirees.

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

2. Army Regulation 635-40 establishes the Army Disability Evaluation System and sets forth policies, responsibilities, and procedures that apply in determining whether a Soldier is unfit because of physical disability to reasonably perform the duties of his office, grade, rank, or rating. Only the unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability.

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

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

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

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

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.

3. Title 10, U.S. Code, section 1201, provides for the physical disability retirement of a member who has at least 20 years of service or a disability rating of at least 30 percent. Title 10, U.S. Code, section 1203, provides for the physical disability separation of a member who has less than 20 years of service and a disability rating of less than 30 percent.

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

5. Title 38, U.S. Code, section 1131 (Peacetime Disability Compensation – Basic Entitlement) states for disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during other than a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

6. Title 10, U.S. Code, section 1556 requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal

agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//