

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 9 February 2024

DOCKET NUMBER: AR20230007134

APPLICANT REQUESTS: through counsel, physical disability retirement in lieu of honorable discharge from the U.S. Army Reserve (USAR) due to medical disqualification, not the result of own misconduct.

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

- DD Form 149 (Application for Correction of Military Record)
- Counsel's Brief
- Self-Authored Statement
- DD Form 1966 (Record of Military Processing – Armed Forces of the United States), dated 29 May 2001
- Military Entrance Processing Station (MEPS), Orders 153-11, dated July 2001
- DD Form 4 (Enlistment/Reenlistment Document), dated 16 July 2009
- DA Form 4836 (Oath of Extension of Enlistment or Reenlistment), dated 22 May 2015
- DD Form 4, dated 9 January 2016
- 34 pages of medical records dated between April 2018 – January 2020
- Headquarters, 88th Readiness Division, Orders 20-290-00015, dated 16 October 2020
- Social Security Administration Letter, dated 20 June 2021

FACTS:

1. Counsel states:

a. The applicant is requesting evaluation by a Physical Evaluation Board (PEB) for the purpose of a medical retirement.

b. The applicant enlisted in the U.S. Navy on 29 May 2001 and reported to the Navy Recruit Reporting Command in Great Lakes, IL on 30 July 2001, after which transferred to various duty stations in Florida, Virginia, and California. Following her honorable discharge from the U.S. Navy, she entered the U.S. Navy Individual Ready Reserve

(IRR) and was subsequently released early from the IRR to enlist in the U.S Army Reserve (USAR) in Cedar Rapids, IA, on 16 July 2009, for a commitment of 6 years.

c. After her USAR enlistment, she went to Fort Sill, OK, for a Warrior Transition Course then proceeded to her Military Occupational Specialty (MOS) schooling where she became a 92F (Petroleum Supply Specialist). She was subsequently promoted to specialist (SPC) then sergeant (SGT). The applicant extended her enlistment for an additional year on 15 July 2015, and on 9 January 2016, reenlisted for an additional 6 years. On 23 October 2020, she was awarded an honorable discharge for medical disability.

d. The applicant first sought orthopedic care from Physicians Clinic of Iowa in 2015. She was diagnosed with osteoarthritis in her right knee and anxiety and depression. In 2017, the same clinic diagnosed her with carpal tunnel syndrome in both upper limbs. In 2018, the applicant sought treatment for chronic left upper extremity pain. She attended physical therapy and received injections, but they did not alleviate her pain. She began to struggle with activities of daily living (ADL), including dressing, brushing her hair, and even reaching into upper cabinets. Because of her pain, the applicant was forced to quit her job.

e. The medical report noted that her assignment in the fueling unit with the USAR exacerbated her condition and caused significant pain because she was required to frequently lift heavy items and equipment. The medical examination also noted decreased myofascial restrictions on both sides of her upper trapezius muscles, more prominent on her left side.

f. A Magnetic Resonance Imaging (MRI) of her spine was conducted in 2018. The MRI revealed significant issues with her C5-6 and C5-7. At her C5-6, the MRI showed complex disk osteophyte (bone spurs), bilateral unciniate spurs (bony and convex spur-like ridges), severe left foraminal stenosis (severe narrowing of the disk space caused by enlargement of the joint), mild right foraminal stenosis, and suggested a superimposed left foraminal disc protrusion (disk herniation). At the applicant's C6-7, the MRI revealed bilateral unciniate bone spurs, severe left foraminal stenosis, and mild right foraminal stenosis. The MRI also demonstrated bilateral facet arthropathy and edematous degenerative endplate changes at C5-7.

g. In July 2018, the applicant underwent surgery at her C5-6 and C6-7. Her pre-surgical diagnosis was cervical spondylosis at C5-6 and C6-7, with left side foraminal stenosis, nerve compression, and radiculopathy. The surgery consisted of C5-6 and C6-7 anterior cervical discectomies (removal of the damaged portion of the disk), osteophylectomies (removal of osteophytes), and foraminotomies (widening of the bones in the spinal column). She also had anterior cervical plates at both disk levels C5-6.

h. The following year, the applicant underwent an independent medical examination. The examination revealed that a post-operative MRI demonstrated she continued to suffer from swelling around both disks, which indicated radiculopathy. The exam also noted that despite the surgery, the applicant still suffered from neural stenosis. The exam also noted the applicant had developed cervical dystonia as a complication of her spinal surgery. This is an extremely painful condition that causes the applicant's neck to contract involuntarily and can cause it to twist to one side, or to uncontrollably tilt her head backward. There is no cure for this condition. Based on her extensive physical limitations and spinal diagnosis, the applicant applied for Social Security Disability Income (SSDI) in 2018, which was ultimately approved.

i. The applicant suffered a material injustice when the Army failed to award her a medical retirement. In order to be eligible for a military medical retirement, the applicant must demonstrate that her injuries were caused or exacerbated by military service, that the injuries were not the result of her own misconduct, and that the injuries rendered her unfit for continued service at the time of her discharge.

j. The applicant's medical record notes her position in the USAR required frequent heavy lifting and moving heavy equipment. Per her records, this aggravated her condition. The applicant sought repeated treatment and was advised by her medical providers on many occasions to refrain from military duty. It is evident from her records the applicant's injuries were not a result of misconduct, but in part, from her service which required extensive physical labor. The applicant made myriad attempts and methods to heal, including stem cell injections, nerve blocks, physical therapy, and ultimately surgery.

k. Despite her attempts to recover, the applicant's medical provider determined, given her condition, it was appropriate for her to be discharged. Additionally, although the Social Security Administration's decision is generally not considered in this matter, the applicant respectfully submits that the Social Security Administration determined her disability began in 2018, 2 years before her honorable discharge.

l. The applicant suffered professionally, personally, socially, physically, and mentally because of her condition, which the records show was aggravated by her Army service. She is now fully disabled under the Social Security Administration guidelines. To deny her a medical retirement is a prima facie example of a material injustice. She now seeks to correct this and be made whole by amending her discharge to a medical retirement.

m. In light of the facts and arguments presented, the applicant requests evaluation by a PEB for a medical retirement. She has suffered extreme and debilitating injuries that, despite her best efforts, were worsened by her labor-intensive assignment. She humbly requests the Board consider the extensive medical evidence provided and her years of selfless service to her country in rendering its decision.

2. The applicant states:

a. She served on active duty in the U.S. Navy from 29 July 2001 through 29 July 2005. She was stationed in Pensacola, FL, for Aviation Ordnance School. She then went to Virginia Beach, VA, at an intermediate maintenance department, followed by duty in a pilot training squadron in San Diego, CA. She served honorably.

b. In 2009, she was released early from her IRR obligation in order to join the USAR out of Cedar Rapids, IA. She then proceeded to Fort Sill, OK, for a Warrior Transition Course and then went to her MOS school for 92F.

c. She reported to her USAR unit, the 960th Quartermaster Company after her training was complete. She then quickly got promoted to SPC. Her fitness was always passing, and she always passed her weapons qualifications. In February 2012, she had her son, and this was the only time where she barely passed her Army Physical fitness Test (APFT) in her career. She requested to be sent to the fitness course for annual training so she could get additional help in getting back in top fitness shape and learn more about proper dietary needs. Her unit was impressed with her willingness to better herself and learn, so they approved her request and sent her. When she returned from the fitness program, she was always the top female in the unit with her APFT scores. Her highest score was 297 and she was given a coin by the battalion leaders for most improved and best attitude based on her APFT scores.

d. She was finally promoted to SGT, which was a very proud moment for her, as it is for everyone who gets the honor to be a noncommissioned officer (NCO). She was immediately trained in their unit's substance abuse program and led this program for many years to follow. She always took additional training, even when it was not mandatory, so she could be the best she could at all her endeavors. She led the remedial physical training (PT) program at the unit. She is a registered yoga instructor and volunteered to help Soldiers learn yoga. She was complimented on the program by other NCOs because they said they never had such a good unit PT with someone who was so passionate about the betterment of Soldiers. Her positive attitude always made her a trusted NCO for Soldiers to come to with anything that was going on. She always led her team in a way that reflected true teamwork; everyone was there to learn something and help each other out.

e. It was around this time that Sergeant First Class (SFC) V_____ came on to her in an inappropriate manner. She has provided her attorneys with the text messages. She used to talk to him a lot about fitness and initially appreciated being spoken to and trusted him, as he was married. Then the texts came, and she was very uncomfortable with it. She just wanted to make the whole thing disappear. She was cornered in her office while she was preparing the unit prevention leader (UPL) specimens to be sent off

to FedEx. He had just given her a hug; she was very uncomfortable with it and gave him a side pat. She could not wait for him to leave.

f. The texts were ignored by her in a most gentle way. She did not want to make her unit, where she had been so much longer than him, uncomfortable in any way. She had ignored these text messages that were very racy, highly inappropriate, and offensive. She had been trained as a licensed massage therapist and for someone to think that a massage is anything other than therapeutic and healing is very disrespectful to anyone who is licensed and paid the tuition to learn this healing craft. She ignored this, as she just wanted it to go away.

g. Eventually, she found that she was being treated differently. She was not being told about NCO briefings at the end of the day. She was the last to receive the new uniforms from the unit, even though she was one of the three people who had been in the unit the longest. Then in the fall 2017, SFC V_____ shattered his leg playing rugby, so during that timeframe that he was out on medical leave the unit was back to normal, other than the fact that she had been injured that entire year with her cervical fusion.

h. Around this same time, she was also hired on at International Paper Mill in Cedar Rapids, IA. She worked there from June 2012 until her date of disability in February 2018. Her workman's compensation case went on for years. She had bone spurs and multiple slipped discs from working in the shipping department. She was not found to have been doing anything unsafe and she was compensated. This resulted in her having many treatments to help her with her pain. First, she had trigger point therapies, cortisone shots, and an epidural. Nothing helped. She had a lot of pain in her left shoulder and swelling in her neck. She went to a neurosurgeon who recommended a three level spinal fusion. The titanium in her neck covers the vertebrae of C5 through C7.

i. During this time, she was consistently open and honest with her unit about what was going on with her medically. She could no longer perform the APFT wear the Advanced Combat Helmet (ACH), or the Kevlar helmet required for shooting. She has medical records for all of this. She has spoken to someone she trusted about the sexual harassment she had endured. He was new to the unit, served as the training NCO, and claimed to be a former Equal Opportunity (EO) advisor, so she felt he was a good outlet, but nothing came of that.

j. She also found that she was beginning to be treated very unfairly and knew that something needed to be done. She felt so alone, so when she attended her February 2019 Logistics Health Incorporated (LHI) [a centralized management system for USAR medical readiness services] appointment in Waterloo, IA, she begged and pleaded with the doctor to please include in her notes what was happening at her unit. This entire

time she was also struggling with a life-changing injury. She had continued to be off of work on disability for the last year.

k. As hard as it was for her, she was so committed to the military that she still showed up. She did have physical profiles at this time, so while all of her peers were going out to eat after drill, she was at home icing and wearing a neck brace so she would be able to show up the next day for drill. The weight of her uniform top caused swelling in her neck and shoulders and gave her bad headaches. She was still not going to annual training or weapons qualifications and certainly not performing any APFT. Her responsibilities were dwindling down and she was depressed. She was constantly feeling like she did not belong there anymore. In her mind she was wondering why a medical review had not been done for her yet.

l. She then took it upon herself to let the person in charge of her profile know that she had been on disability, did not work a full-time job, and that coming to drill was a challenge, but she had been in so long that she could not just give up. She needed the proper paperwork. If there was a drill that she could not perform, she needed a rescheduled training (RST). During these RSTs, she would do many classes on the computer or research different Army stuff. This is when she discovered she could potentially get a 15-year retirement due to a medical condition that was not caused by the Army but was severely aggravated by the years she served after the date of the disability. She told this to SFC V____, and she believes this is when the dates that she performed RST were not being counted. He said he would take care of it. She went to her LHI and dental appointment and dropped those off on his desk. She never noticed anything about not being paid for it at that time. It was not until she checked with the U.S. Army Human Resources Command (AHRC) for her last year's points that she noticed she was 2 points short. She knows this was done purposely. This individual ruined her reputation in the last years of her service.

m. She spoke with an Army investigator who asked her if there was any chance of malingering, so she believes they were accusing her of malingering. This is a character assassination after all her hard work. She would consistently tell everyone what was going on with her medically and they would still act like it was the first time she ever told them anything. She can only imagine what people thought while she was doing her best to even be able to show up to fulfill her obligation. No one in the unit ever asked what was happening with this Soldier with a top APFT score, who always passed weapons qualification, and always showed up. Their unit was a split unit. They had half in Cedar Rapids, IA, and half in Sioux City, IA. Their first sergeant along with all of the S1 (personnel) department were in Sioux City. They did not know her other than as the girl who cannot perform or who does not perform. She had no one advocating for her other than herself. She wanted to keep her head down and just make it to the finish line, which was her 15th good year, so she could be eligible for a medical retirement. This experience has caused her severe depression and she has also been diagnosed with

anxiety and PTSD, on top of all the physical limitations she has. She is requesting adjustment to her service record to reflect the two appointments she was not paid for; she provided the vouchers to her attorneys. She is also respectfully requesting her discharge be changed to medical retirement.

3. The applicant completed 4 years of honorable active service in the U.S. Navy, from 30 July 2001 through 29 July 2005, and an additional nearly 3 years of honorable service in the U.S. Navy Reserve in an IRR status, from 30 July 2005 through 30 May 2009.

4. A DD Form 2808 (Report of Medical Examination), dated 16 July 2009, shows the applicant underwent medical examination on the date of the form for the purpose of USAR enlistment and was found qualified for enlistment with a physical profile rating of "1" in all factors.

5. 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.

6. Enlistment documents show the applicant enlisted in the USAR for a period of 6 years on 16 July 2009, extended her USAR enlistment by 1 year on 22 May 2015, and reenlisted in the USAR for an additional period of years on 9 January 2016.

7. Counsel provided numerous medical documents, dated between April 2018 and January 2020, all of which have been provided in full to the Board to review.

8. A DA Form 199 (PEB Proceedings) convened on 3 September 2020, and was adjudicated as a non-duty related case, where the applicant was found physically unfit and her referral for case disposition under Reserve Component regulations was recommended.

a. Her unfitting disability is degenerative disc disease cervical spine and spondylosis, status post cervical fusion C5-C7 discectomy; no rating; non-compensable; this is a non-duty related case.

b. On 15 July 2020, the U.S. Army Reserve Command, Army Reserve Medical Management Center indicated this condition does not meet medical retention standards

because as a result of this condition, the Soldier cannot live and function without restrictions in any geographic or climatic areas without worsening the medical condition.

c. This condition is not compensable because there was a thorough review of the military and civilian medical records that ascertained this condition was not started or permanently aggravated in the line of duty. Reasonable performance in the applicant's MOS 92F requires her to perform certain activities. This condition is medically unacceptable and prevents worldwide deployment in a field or austere environment. Therefore, in accordance with Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation), paragraph 5-4, e(2), the applicant is unfit.

d. Among the records used in arriving at this determination were the applicant's Non-Duty Related Referral Memorandum, dated 15 July 2020, NARSUM, DA Form 7652, DA Form 3349, and her service treatment records.

e. On 24 September 2020, the applicant signed the form indicating she had been advised of the findings and recommendations of the informal PEB, concurred, and waived a formal hearing of her case.

9. A U.S. Army Physical Disability Agency (USAPDA) memorandum, dated 28 September 2020, provided the applicant's commander with a copy of her non-duty related case wherein she was found unfit for duty for the units' disposition.

10. Headquarters, 88th Readiness Division Orders 20-290-00015, dated 16 October 2020, honorably discharged the applicant from the USAR effective 23 October 2020, under the provisions of Army Regulation 135-178 (ARNG and Reserve Enlisted Administrative Separations) with a loss reason JA (Medically Disqualified, Not Result of Own Misconduct), due to no fault of the Soldier.

11. The applicant's DA Form 5016 (Chronological Statement of Retirement Points) shows she is credited with 14 years, 3 months, and 9 days of qualifying service for retirement.

12. It is unclear from the applicant's statement precisely which qualifying service dates and points for retirement she believes are in dispute, she has not provided any documentation reflecting an error in her DA Form 5016, and there is no evidence of record she previously exhausted the administrative remedies available to correct her DA Form 5016 through the USAR or the AHRC.

13. A Social Security Administration letter, dated 20 June 2021, shows the applicant is entitled to monthly disability benefits beginning August 2018, after becoming disabled under their rules on 21 February 2018.

MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. Documentation reviewed included the applicant's ABCMR application and accompanying documentation, the military electronic medical record (EMR – AHLTA and/or MHS Genesis), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant is applying to the ABCMR requesting through counsel a reversal of the United States Army Physical Disability Agency's (USAPDA) determination that her cervical spine condition was neither incurred during nor permanently aggravated by her military Service, i.e., duty related.

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. Orders published by the 88th Readiness Division (USAR) show the applicant was honorably discharged from the USAR effective 23 October 2020.

d. While a drilling Soldier in the USAR, the applicant was placed on a duty limiting permanent physical profile effective 19 February 2020 for " Neck Pain/Injury." She was informed in a 20 February 2020 memorandum from the United States Army Reserve Command's Army Reserve Medical Management Center (ARMMC) that she no longer met the medial retention standards in chapter 3 of AR 40-501, Standards of Medical Fitness. She was given four options:

1. Transfer to the Retired Reserve if he had 20 qualifying years of service
2. Receive a 15-year notice of eligibility for a non-regular retirement due to being discharged for a non-duty related medical condition yet having between 15 and 20 years of qualifying service and subsequently transferred to the Retired Reserve
3. Receive an honorable discharge if she had less than 15 years of qualifying service
4. Request a non-duty related physical evaluation board, or NDR PEB, for a determination of medical fitness.

e. On 26 March 2020, the applicant elected for a non-duty related physical evaluation board.

f. Reserve Component (RC) Service Members who are not on a call to active duty of more than 30 days and who are pending separation for non-duty related medical conditions may enter the Disability Evaluation System (DES) for a determination of fitness. A non-duty related physical evaluation board (NDR PEB) affords these Soldiers the opportunity to have fitness determined under the standards that apply to Soldiers who have the statutory right to be referred to the DES for a duty related medical condition. After 2014, these boards would also look to see if the referred condition(s) were duty related, and if so, return them to the sending organization for entrance into the duty related processes of the DES.

g. Her condition and it's onset as described in her ARMMC narrative summary show on onset in 2018 and the finding the condition was not duty-related:

On 20180416, Soldier initially complained of having neck pain when looking down or turning her head after PT for Left shoulder pain. On 20180509, Soldier had steroidal injections and trigger point injections performed on her neck and trapezius which soldier reported as alleviating some pain.

The Soldier was seen and evaluated by spine surgeon Dr. D.S. and on 20180726 had Discectomy and spinal fusion C5-C7. On 20180913, Soldier was seen for a follow-up and advised the provider that her pain has actually worsened since the surgery. Per provider letter dated 20200131, left cervical radiculopathy and limitations is permanent and will require continued palliative treatment with medications and injections.

Basis for Non-Duty Related vs/ Duty Related Process: Soldier has been provided opportunity to support IDRM [IDES Referral Memorandum] and/or LOD [Line of Duty] to determine if condition(s) could have been duty related. Soldier was found not eligible for IDRM or LOD, reference Medical Disqualification Memo sent to Soldier for full details on the requirements/criteria for each.

Key notes; simply being in a qualified duty status (receiving DoD Healthcare or not) does not automatically make a condition duty related and a VA Rating or Service Connection has no bearing on IDRM or LOD eligibility, processing or determination.

Specifically, to this Soldier's case, the main reason case did not meet IDRM Criteria for Shoulder Injury was; Soldier cannot provide incident(s) or circumstance(s) where military duty caused the condition(s), or aggravated beyond normal progression and permanently worsened the condition(s). The main reason case did not meet LOD Criteria for Shoulder Injury was; Soldier cannot provide incident(s) or circumstance(s) where military duty caused the

condition(s), or aggravated beyond normal progression and permanently worsened the condition(s).

The main reason case did not meet IDRM Criteria for Neck Injury was; Soldier cannot provide incident(s) or circumstance(s) where military duty caused the condition(s), or aggravated beyond normal progression and permanently worsened the condition(s).

h. On 3 September 2020, her informal NDR PEB determined her “Degenerative disc disease cervical spine and spondylosis status post cervical fusion C5-C7 and discectomy” was unfitting condition for continued military service and that there was insufficient evidence that this chronic degenerative condition, exacerbated by civilian surgery, was duty related. The Board referred her for appropriate disposition under reserve component regulations. On 24 September 2020, after being counseled by her PEB liaison officer on the PEB’s findings and recommendation, the applicant concurred with their findings and waived her right to a formal hearing.

i. Counsel states the condition should be duty related because her military occupation in the USAR required “frequent heavy lifting and moving heavy equipment” and her medical records show this aggravated the condition. Her 13 June 2019 Independent Medical Review shows the applicant related the condition to her civilian occupation:

“[Applicant] is a 36-year-old right hand dominant Caucasian female Clamp Truck Operator for a paper mill, who presents for independent medical examination at the request of Network Medical Review. The claimant reports chronic neck and shoulder pain due to a repetitive motion injury sustained during her occupation as a Clamp Truck Operator over a sustained period of time.”

j. The EMR contains no encounters related to her cervical spine.

k. It is the opinion of the ARBA Medical Advisor there is no probative medical evidence her unfitting cervical spine condition was duty related and thus a reversal of USAPDA’s determination the condition was not duty related is unwarranted.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. The Board concurred with the medical advisor's review finding no evidence her condition was duty related. The Board determined the applicant's discharge from the U.S. Army Reserve was not in error or unjust.

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.



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. On 25 August 2017, the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to Discharge Review Boards (DRBs) and Boards for Correction of Military/Naval Records (BCM/NRs) when considering requests by veterans for modification of their discharges due in whole or in part to: mental health conditions, including PTSD, traumatic brain injury, sexual assault, or sexual harassment. Boards are to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based, in whole or in part, on those conditions or experiences.

2. Title 10, U.S. Code, chapter 61, provides the Secretaries of the Military Departments with authority to retire or discharge a member if they find the member unfit to perform military duties because of physical disability. The U.S. Army Physical Disability Agency is responsible for administering the Army physical disability evaluation system and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with DOD Directive 1332.18 (Discharge Review Board (DRB) Procedures and Standards) and Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation).

a. Soldiers are referred to the disability system when they no longer meet medical retention standards in accordance with Army Regulation 40-501 (Standards of Medical Fitness), chapter 3, as evidenced in 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; 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.

3. 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.

4. Army Regulation 40-501 provides information on medical fitness standards for induction, enlistment, appointment, retention, and related policies and procedures. Soldiers with conditions listed in chapter 3 who do not meet the required medical standards will be evaluated by an MEB and will be referred to a PEB as defined in Army Regulation 635-40 with the following caveats:

a. U.S. Army Reserve (USAR) or Army National Guard (ARNG) Soldiers not on active duty, whose medical condition was not incurred or aggravated during an active duty period, will be processed in accordance with chapter 9 and chapter 10 of this regulation.

b. Reserve Component Soldiers pending separation for In the Line of Duty injuries or illnesses will be processed in accordance with Army Regulation 40-400 (Patient Administration) and Army Regulation 635-40.

c. Normally, Reserve Component Soldiers who do not meet the fitness standards set by chapter 3 will be transferred to the Retired Reserve per Army Regulation 140–10 (USAR Assignments, Attachments, Details, and Transfers) or discharged from the Reserve Component per Army Regulation 135–175 (Separation of Officers), Army Regulation 135–178 (ARNG and Reserve Enlisted Administrative Separations), or other applicable Reserve Component regulation. They will be transferred to the Retired Reserve only if eligible and if they apply for it.

d. Reserve Component Soldiers who do not meet medical retention standards may request continuance in an active USAR status. In such cases, a medical impairment incurred in either military or civilian status will be acceptable; it need not have been incurred only in the line of duty. Reserve Component Soldiers with non-duty related medical conditions who are pending separation for not meeting the medical retention standards of chapter 3 may request referral to a PEB for a determination of fitness in accordance with paragraph 9–12.

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

6. Title 10 USC, section 12731b (Special rule for members with physical disabilities not incurred in the line of duty), enacted 23 October 1992, provides in pertinent part that in the case of a member of the Selected Reserve of a Reserve Component (RC) who no longer meets the qualifications for membership in the Selected Reserve solely because the member is unfit because of physical disability, the Secretary concerned may, for the purpose of Section 12731 of this title, determine to treat the member as having met the service requirement and provide the member notification required if the member completed at least 15 years, but less than 20 years of qualifying service for retirement purposes as of 1 October 1991. This special provision of the law is applicable only to members who are medically disqualified for continued service in an RC.

7. Army Regulation 140-10 (Assignments, Attachments, Details, and Transfers), provides policy and procedures for assigning, attaching, removing, and transferring USAR Soldiers. Chapter 6 (Transfer to and from the Retired Reserve) states assignment to the Retired Reserve is authorized, with the exception of certain enlisted Soldiers subject to involuntary separation. Eligible Soldiers may be allowed to transfer to the Retired Reserve if the following applies:

- a. They are entitled to receive retired pay from the U.S. Armed Forces because of prior military service or disability.
- b. They have 20 qualifying years of service for retired pay at age 60 and are eligible to receive the notification of eligibility (NOE) of Retired Pay at age 60 (20-year Letter).
- c. They are medically disqualified for retention in an active status, not as a result of their own misconduct, and have completed at least 15 qualifying years of service, but less than 20 qualifying years of service for retired pay and are eligible to receive the NOE for Retired Pay at Age 60 (15-Year Letter). The 15-Year NOE pertains only to members of the Selected Reserve and that loss of qualification to continue in the Selected Reserve must be solely due to medical disqualification.
- d. They have completed a total of 20 years of active service in the U.S. Armed Forces.

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

//NOTHING FOLLOWS//