

IN THE CASE OF: [REDACTED]

BOARD DATE: 20 March 2024

DOCKET NUMBER: AR20230007340

APPLICANT REQUESTS:

- an increase to his permanent physical disability retirement rating from 30 percent to 50 percent
- personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- self-authored statement
- DD Form 214 (Certificate of Release of Discharge from Active Duty), ending 2 January 2012
- DD Form 214, ending 14 May 2018
- email correspondence, 19 February 2020
- U.S. Army Physical Disability Agency (USAPDA) memorandum, 6 November 2020
- USAPDA Order D 311-1, 6 November 2020
- National Guard Bureau (NGB) Form 22 (National Guard Report of Separation and Record of Service), ending 10 December 2020
- DA Form 638 (Recommendation for Award), 18 May 2021
- NGB Form 23B (Army National Guard (ARNG) Retirement Points History Statement), 26 February 2021
- DA Form 4980-12 (Meritorious Service Medal (MSM) Certificate), 19 May 2021
- Corcentric Performance Improvement Plan (PIP), 12 January 2023
- wife's statement, 29 May 2023
- Department of Veterans Affairs (VA) Form 21-4138 (Statement in Support of Claim), signed by his father-in-law, 21 May 2023
- Title 38, Code of Federal Regulations (CFR) Section 4.129 excerpt
- Title 38, CFR, Section 4.130 excerpt

FACTS:

1. The applicant states:

a. The percentage of compensation he was assigned is in error. He was assigned 30 percent, which per Title 38, CFR, Section 4.129, is below the minimum 50 percent and believes it was an unjust evaluation of his disability due to the level of active service required as an Army Aviator. He also believes it was unjust due to the fact that he was evaluated during the pandemic in the summer of 2020, during which time he had little interactions with anyone beside his wife and kids, to include minimal military and civilian work responsibilities as both jobs were not able to be done remotely. This made it appear that the disability caused by his post-traumatic stress disorder (PTSD) was not causing as much effect.

b. Due to Covid restrictions, he was extremely isolated, and many stressors had been removed. Though this appeared as an effective means to lower the level of his disability, it was temporary. As soon as regular routines resumed, it had become clear he had extreme difficulty functioning in the workforce. He went through four jobs in 4 years, and all were concluded on bad terms. In addition, he attempted to coach four different youth sports teams and all teams either did not ask him to return or specifically asked him not to return during the 4-year period from 2019 to present.

c. In a 19 February 2020 email, prior to the country-wide restrictions, he was reprimanded by his battalion commander for unprofessional emails and voicemails, stating he was disappointed on many levels that a senior officer would act in this manner and allow his emotions to override his sensibility and conduct. He stated he could empathize with frustrations, but he could not condone taking that behavior to the point of conduct unbecoming an officer. The reprimand also includes references to his desire to harm people. The entire email will be provided in the supporting documents.

d. At a civilian employer, his third one since his Physical Evaluation Board (PEB) in 2020, his supervisor wrote in a PIP that the issue was unprofessional and confrontational communication with both internal teammates and customers. In both incidents, it was not a single event but many, often, and escalating events that triggered the reprimands. His condition and repeated problems were not only present prior to his evaluation, but after years of counseling and multiple medication changes, they have not improved.

e. It is much harder now to show the level of his condition both prior to the PEB and after, as he has isolated himself to his immediate family to the point that by the time of the evaluation, he had not spoken to or interacted with past friends and family, including his parents, in months. He had stopped going out, and when he did, he rarely left the house without his wife. Due to the restrictions of 2020, his civilian job had minimal work

and interaction, as they were not set up to be remote and the military gladly did not require him to attend either, due to his prior conduct. Social interaction went away and when he went out, the volume of people was much lower, and they all stayed away from him. He would gladly return to this environment, and he believes his symptoms would get better.

f. This greatly affected the results of his PEB, resulting in none of the social and behavioral aspects of his condition being mentioned or addressed. The PEB itself states that despite treatment with medication and therapy, his condition has failed to improve, and he is unfit because this condition prevents him from being able to plan flights, ascertain factors such as load, weight, fuel supply, route, altitudes, or schedules as necessary to safely accomplish the mission in his assigned area of concentration (AOC). It clearly states that his condition is beyond the point of self-care and that he cannot perform routine daily tasks needed both to be a pilot (military or civilian) and also an officer in the military, a project manager, and/or an analyst in the civilian world. These issues, along with the relational issues, have not only resulted in his involuntary retirement, but have also made hi unable to maintain employment.

g. Please reference Title 38, CFR, Section 4.129 (Mental disorders due to traumatic stress). Due to the technicality that he was not on active service at the time he was medically retired, this statute has been determined to not apply to him, not because he did not develop a mental disorder in service as a result of a highly stressful event severe enough to being about his release from the service, but because of the words "active service." This statute implies that the results of a stressful event of this magnitude warrant a rating no less than 50 percent, meaning an individual can no longer function in their miliary role by default meets the below 50 percent criteria. Thought not on active service at the time of his discharge, the events that resulted in his condition were in active service along with all active-duty Soldiers. He was assigned to the 3rd Infantry Division Headquarters.

h. By assigning him the unjust rating of 30 percent, which is below that in this statute, it is implied that disabilities are not assigned by the disability, but more by the individual's status at the time of discharge. Added to that are the aspects that were overlooked in the results of the PEB due to the national situation in comparison to Title 38, CFR, Section 4.130 (Schedule of ratings – mental disorders). There is a significant difference in his assigned rating of 30 percent and what the conditions are from which he suffers. Reference Title 38, CFR, Section 4.130 is attached. It says occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks, although generally functioning satisfactorily, with routing behavior, self-care, and conversation normal. This is well below what was stated by the PEB regarding ineffective treatment and the inability to do tasks that are required at a nearly constant rate as a pilot, an officer, and in any civilian occupation in which he has the training and experience. When once considers the criteria of the 50 percent rating, he believes he is

even well above the 50 percent criteria, as even the PEB list of items to meet the first part for reduced reliability and productivity with the addition of work and social impairment that clearly shows difficulty in establishing and maintaining effective work and social relationships. He believes his status was improperly considered due to the national circumstances provided by the pandemic and that his assigned medical retirement rating of 30 percent is unjust and should be increased to 50 percent or greater.

2. An NGB Form 22 shows the applicant initially enlisted in the ARNG on 18 March 1998, and was honorably discharged on 7 June 2004, for the purpose of appointment in the ARNG as a Warrant Officer.

3. Office of the Adjutant General, ■■■ ARNG, Orders 155-700 appointed him a Warrant Officer One in the ARNG on 8 June 2004.

4. A second NGB Form 22 shows the applicant was honorably discharged from the ARNG on 24 June 2009, for the purpose of transfer to a U.S. Army Reserve (USAR) Troop Program Unit (TPU).

5. Headquarters, 81st Regional Support Command Orders 10-168-00012, dated 17 June 2010, released the applicant from his TPU assignment in the USAR and transferred him back to the ARNG due to voluntary request, effective 8 June 2010.

6. A DD Form 214 shows the applicant was ordered to active duty in support of Operation New Dawn on 27 November 2010, with service in Iraq from 23 January 2011 through 16 November 2011. He was honorably released from active duty after 1 year, 1 month, and 6 days of net active service on 2 January 2012, due to completion of required active service and transferred back to his ARNG unit. Among his decorations and badges awarded or authorized is the Combat Action Badge.

7. A second DD Form 214 shows the applicant was ordered to active duty in support of Operation Freedom's Sentinel on 16 June 2017, with service in Afghanistan from 29 July 2017 through 31 March 2018. He was honorably released from active duty after 10 months and 29 days on 14 May 2018, due to completion of required active service and transferred back to his ARNG unit.

8. Email correspondence from the applicant's battalion commander, dated 19 February 2020, advised the applicant his emails and voicemail were brought to his attention as his battalion commander, and he was disappointed that a senior officer would act in this manner and allow his emotions to override his sensibility and conduct. Threatening voicemails are not only against good order and discipline but are also criminal. His last voicemail was threatening and caused the person he left the voicemail for to file a police report. As a result of his actions, he has requested a notice be placed in the system of

entry onto any military post that an escort will be required. He was advised any further threats or disrespectful conduct would result in severe consequences that could result in loss of pay, rank, and/or a General Officer Memorandum of Reprimand (GOMOR).

9. The applicant's DA Form 3349 (Physical Profile), DA Form 7652 (Disability Evaluation System (DES) Commander's Performance and Functional Statement), Medical Evaluation Board (MEB) Narrative Summary (NARSUM), DA Form 3947 (MEB Proceedings), Department of Veterans Affairs (VA) Compensation and Pension (C&P) Exam, and VA Rating Decision are not in his available records for review and have not been provided by the applicant.

10. A DA Form 199 (Informal PEB Proceedings) shows:

a. An informal PEB convened on 26 August 2020, where the applicant was found physically unfit with a recommended rating of 30 percent and that his disposition be permanent disability retirement.

b. His medical condition determined to be unfit is PTSD; VA diagnostic code 9411; 30 percent; MEB diagnosis (Dx) 1. He reported the onset of this condition in 2019, due to combat stress and exposures from his deployment to Afghanistan from 2017 – 2018. This condition is attributed to the stressor of fear for life during vehicle improvised explosive device detonation and exposure to hostile fire by armed gunman, the direct result of armed combat. He was awarded the Combat Action Badge. Despite treatment with medication and therapy, his condition failed to improve. He is unfit because this condition prevents him from completion of assigned duties in his AOC due to depressed mood, anxiety, and disturbance of motivation and mood. VA Schedule for Rating Disabilities (VASRD) section 4.129 does not apply for re-exam purposes; the applicant is a drilling member of the ARNG not on active duty.

c. The applicant's medical conditions determined not to be unfitting are:

- bilateral ankle tendonitis (MEB Dx 2)
- left olecranon bursitis (MEB Dx 3)
- gastroesophageal reflux disease (GERD) MEB Dx 4)
- erectile dysfunction (MEB Dx 5)
- subjective tinnitus (MEB Dx 6)
- insomnia (MEB Dx 7)
- anxiety condition (MEB Dx 8)
- numbness/paresthesia of both feet (MEB Dx 9)
- pain in right shoulder (MEB Dx 10)
- neck pain (MEB Dx 11)
- pain in left shoulder (MEB Dx 12)

d. Section VI: Instructions and Advisory Statements further shows VASRD 4.129 does not apply. The applicant does not have a mental disorder that developed as a result of a highly stressful event that resulted in his release from active duty.

e. On 23 September 2020, the applicant signed the form indicating he concurred with the findings and recommendations of the informal PEB and waived a formal hearing of his case. He additionally indicated he requested VA reconsider his disability ratings and that his written request for VA reconsideration was attached. Neither the applicant's written request nor the VA reconsideration are in his available records for review.

f. On 24 September 2020, the USAPDA authenticated the PEB determinations for the Secretary of the Army.

11. USAPDA Order D 311-1, dated 6 November 2020, released the applicant from assignment and duty because of physical disability incurred while entitled to basic pay and under conditions that permit his permanent retirement for physical disability, effective 11 December 2020, with a rating of 30 percent.

12. ■■■ ARNG AUGOE Army Element Joint Force Headquarters Orders 000810031.00, dated 12 November 2020, transferred the applicant to the Retired Reserve effective 11 December 2020, due to placement on the Permanent Disability Retired List (PDRL).

13. A third NGB Form 22, issued on 30 November 2021, shows the applicant was discharged from the ARNG effective 10 December 2020, and transferred to the Retired Reserve, due to placement on the PDRL. He was credited with 22 years, 8 months, and 23 days of total service for retired pay.

14. An NGB Form 23B shows he completed 22 years, 8 months, and 23 days of creditable service for retired pay.

15. A DA Form 4980-12 shows the applicant was awarded the MSM on 19 May 2021 for exceptionally meritorious service for over 20 years, throughout a career distinguished by exceptional duty performance.

16. The applicant provided a PIP from his employer, dated 12 January 2023, which shows the applicant was placed on a PIP to address concerns associated with his performance and to define specific corrective actions he needed to take in order to bring his performance to an acceptable level. It shows he had issues controlling his emotions, communicating professionally, and treating others with respect.

17. A statement from the applicant's wife, dated 29 May 2023, has been provided in full to the Board for review, and in pertinent part shows she indicated her husband exhibited

some significant changes since his return from Afghanistan in 2018, where he struggled to transition back to civilian life and flounder in his work life. She details the applicant's numerous struggles with his return to civilian occupation, resulting in being let go from three jobs within a short period of time due to his temper and agitation. His mental illness due to his PTSD has rendered his day-to-day functioning a struggle and his quality of life has diminished as a result of the nightmares and his inability to control his moods.

18. On 31 May 2023, the applicant's father-in-law provided a statement in support of the applicant's claim on a VA Form 21-4138, which has been provided in full to the Board for review, and in pertinent part provides insight into the applicant's PTSD, which he experienced firsthand after moving in with his daughter and the applicant prior to his second deployment. Prior to the deployment, the applicant was outgoing and even-tempered, but subsequent to the second deployment lost his temper quickly, had difficulty focusing, and displayed anxiety.

19. On 8 November 2023, the USAPDA legal advisor provided an advisory opinion, which shows:

a. On 26 August 2020, an IPEB found the applicant to be unfit for the condition of PTSD. The IPEB recommended a rating of 30 percent and a disposition of permanent disability retirement. The IPEB further found the condition to be combat-related, but that VASRD 4.129 did not apply insofar as the applicant was a drilling member of the ARNG not on active duty, and he did not have a mental disorder that developed as a result of a highly stressful event that resulted in his release from active duty.

b. On 23 September 2020, the applicant concurred with the findings and requested the VA to reconsider his ratings. His request to the VA was made with the assistance of counsel and included documentation in support of his claim that the "proposed evaluation of a 30 percent disability [did] not account for the myriad of symptoms...reflect[ing] impaired judgment, disturbances of mood, difficulty with relationships...anger, rage, periods of violence and suicidal ideation." The VA reconsideration memorandum dated 27 October 2020 found that, "The new evidence is not necessarily in conflict with the findings of the VA examination. They do not show a clear basis for increased evaluation. The 30 percent evaluation of PTSD is confirmed for Disability Evaluation System (DES) purposes."

c. The applicant's application for the correction of his military records asserts that the IPEB erred in not determining a rating of 50 percent or higher. He avers that a higher rating is justified by VASRD 4.129, which states, in pertinent part, "[w]hen a mental disorder that develops in service as a result of a highly stressful event is severe enough *to bring about the veteran's release from active military service*, (emphasis added) the rating agency shall assign an evaluation of not less than 50 percent." He

further notes that the COVID-19 pandemic minimized the impact and effect of his disability at the time of his evaluation in 2020.

d. First, the applicant's reliance on VASRD 4.129 to support a rating of 50 percent or higher is misplaced. The provision expressly states that it pertains only to conditions that "*bring about the veteran's release from active military service* (emphasis added)." Although the IPEB found that his PTSD was combat-related, it also properly determined that he was a member of the ARNG not an active duty at the time of his DES proceedings. Thus, the IPEB concluded that VASRD 4.129 did not apply, and a rating of 50 percent was not directed as a matter of law. Rather, based upon a careful review of the record, the IPEB found that a rating of 30 percent was most appropriate based on the evidence. As noted above, the applicant concurred with this finding.

e. Second, the applicant exercised his rights to have his rating reconsidered by the VA. After a careful review of the record, the VA determined that an adjustment to the original rating was not justified. The VA explained its rationale with reference to the relevant evidence in a detailed written memorandum to the applicant. He has not shown that the VA's reconsideration was in erroneous in any aspect.

f. Finally, the applicant has provided no new evidence that supports a higher rating. Instead, he states that the evidence that existed at the time of the IPEB was sufficient to support a higher rating. Yet both the IPEB and the VA, upon consideration, carefully assessed that evidence and rendered findings supported in both fact and law. Based upon the above and without any additional evidence, the applicant's request to correct his PEB ratings is found to be legally insufficient.

20. On 9 November 2023, the applicant was provided a copy of the USAPDA advisory opinion and given an opportunity to submit comments, but he did not respond.

21. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an increase to his permanent physical disability retirement rating from 30 percent to 50 percent for his diagnosis of PTSD.

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

c. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Pertinent to this advisory are the following: 1) The applicant initially enlisted in the ARNG on 18 March 1998, and was honorably discharged on 7 June 2004, for the purpose of appointment in the ARNG as a Warrant Officer; 2) The applicant ordered to active service and deployed to Iraq from 23 January 2011 through 16 November 2011 and then again ordered to active service to deploy to Afghanistan from 29 July 2017 through 31 March 2018. After each deployment he was transferred back to ARNG unit after his deployment; 3) An informal PEB convened on 26 August 2020, where the applicant was found physically unfit with a recommended rating of 30 percent for PTSD and that his disposition be permanent disability retirement; 4) On 23 September 2020, the applicant signed the form indicating he concurred with the findings and recommendations of the informal PEB and waived a formal hearing of his case; 5) The applicant was discharged from the ARNG effective 10 December 2020, and transferred to the Retired Reserve, due to placement on the PDRL. He was credited with 22 years, 8 months, and 23 days of total service for retired pay.

d. The applicant asserts the percentage of compensation he was assigned is in error. He was assigned 30 percent, which per Title 38, CFR, Section 4.129, is below the minimum 50 percent and believes it was an unjust evaluation of his disability due to the level of active service required as an ARNG Aviator. He also believes it was unjust due to the fact that he was evaluated during the pandemic. The applicant was actively engaged in behavioral health treatment at the VA for symptoms of PTSD following his second deployment and prior to the COVID pandemic. He was provided psychiatric medication and individual psychological therapy. He continued to demonstrate occupational and interpersonal problems prior to the COVID restrictions. The applicant was not on active-duty orders when he was found physically unfit due to PTSD with a recommended rating of 30 percent and that his disposition be permanent disability retirement. The evaluation was properly completed by an appropriate behavioral health and the evaluator took into account the applicant's history of treatment, previous and current functioning in his within his military duties, and symptomatology. In addition, On 23 September 2020, the applicant signed the form indicating he concurred with the findings and recommendations of the informal PEB and waived a formal hearing of his case. The applicant has been able to apply and provide additional information to the VA for his current level of symptomatology and the impact on his overall functioning. He has been diagnosed and treated for service-connected PTSD, and he has been awarded 70% disability since 2023 for PTSD.

e. Based on the available information, it is the opinion of the Agency BH Advisor that there is insufficient evidence to support referring the applicant to DES again. The applicant was accurately assessed at the time of his service, and he was found to be unfit due to PTSD, and he was awarded the maximum percentage allowable within policy. He has properly engaged the VA for continued care after his discharge and been reviewed and awarded disability for this condition.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation. Upon review of the applicants petition, available military records and medical review, the Board concurred with the advising official finding insufficient evidence to support referring the applicant to DES again. The opine noted the applicant was accurately assessed at the time of his service, and he was found to be unfit due to PTSD, and he was awarded the maximum percentage allowable within policy. Evidence shows the applicant has been awarded 70% disability since 2023 for PTSD. The Board found insufficient evidence based on the opine review and determined an increase to the applicant's permanent physical disability retirement rating from 30 percent to 50 percent is without merit. Therefore, relief is denied.

2. The Board determined DES compensates an individual only for service incurred 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.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

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

BOARD DETERMINATION/RECOMMENDATION:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.

3/25/2024

X 

CHAIRPERSON



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

REFERENCES:

1. 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 (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.

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.

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.

4. Title 38, U.S. Code of Federal Regulation (CFR), Book C, provides the complete Schedule for Rating Disabilities. Appendices in sections 4.125 – 4.130 pertain to mental disorders.

a. Section 4.129 (Mental disorders due to traumatic stress) states when a mental disorder that develops in service as a result of a highly stressful event is severe enough to bring about the veteran's release from active military service, the rating agency shall assign an evaluation of not less than 50 percent and schedule an examination within the six month period following the veteran's discharge to determine whether a change in evaluation is warranted.

b. Section 4.130 (Schedule of ratings – mental disorders) states the nomenclature employed in this portion of the rating schedule is based upon the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, of the American Psychiatric Association (DSM-IV). Rating agencies must be thoroughly familiar with this manual to properly implement the directives in sections 4.125 through sections 4.129 and to apply the general rating formula for mental disorders in section 4.130. The schedule for rating for mental disorders is set forth in subsequent pages, which list the mental disorders in diagnostic codes ranging from 9201 through 9521 and include diagnostic code 9411 for PTSD.

c. The General Rating Formula for Mental Disorders shows:

(1) Occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks (although generally functioning satisfactorily, with routine behavior, self-care, and conversation normal), due to such symptoms as: depressed mood, anxiety, suspiciousness, panic attacks (weekly or less often, chronic sleep impairment, mild memory loss (such as forgetting names, directions, recent events)); 30 percent rating.

(2) Occupational and social impairment with reduced reliability and productivity due to such symptoms as: flattened affect; circumstantial, circumlocutory, or stereotyped speech; panic attacks more than once a week; difficulty in understanding complex commands; impairment of short-and long-term memory (e.g., retention of only highly learned material, forgetting to complete tasks); impaired judgment; impaired abstract thinking; disturbances of motivation and mood; difficulty in establishing and maintaining effective work and social relationships; 50 percent rating.

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, 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.

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

/NOTHING FOLLOWS//