

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: ██████████

BOARD DATE: 25 June 2024

DOCKET NUMBER: AR20230007774

APPLICANT REQUESTS: referral of his medical records to the Army's Disability Evaluation System (DES) for a medical retirement.

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

- DD Form 149 (Application for Correction of Military Record)
- Counsel's brief
- Exhibit 1 – National Guard Bureau (NGB) Form 22 (Report of Separation and Record of Service)
- Exhibit 2 – Five DD Forms 214 (Certificate of Release or Discharge from Active Duty)
- Exhibit 3 – DD Form 2910 (Victim Reporting Preference Statement), dated 29 July 2014
- Exhibit 4 – Applicant's 4-page statement, titled: Justification for Retroactive Medical Evaluation Board (MEB), dated 3 January 2021
- Exhibit 5 – 5-page brief from applicant's counsel, dated 20 June 2014, reference Army Regulation 15-6 (Procedures for Administrative Investigations and Boards of Officers) investigation for applicant, subject: Matters of Mitigation for Appointing Authority and Commanding General's Consideration in Case Disposition
- Exhibit 6 – DA Form 3349 (Physical Profile), dated 7 July 2014 (note: prepared by a physician employed by the Department of Veterans Affairs (VA)) and a list of prescribed medication for post-traumatic stress disorder (PTSD)
- Exhibit 7 – Chemical Rehabilitation Discharge Summary
- Exhibit 8 – Notification of Eligibility for Retired Pay at Age 60 (20-Year Letter)
- Exhibit 9 – memorandum, subject: Selection for Retention Under the Provisions of National Guard Regulation (NGR) 635-102 (Officers and Warrant Officers Selective Retention), undated
- Exhibit 10 – memorandum, subject: Selection for Retention Under the Provisions of NGR 635-102, dated 4 June 2014
- Exhibit 11 – DA Form 1559 (Inspector General Action Request)
- Exhibit 12 – DD Form 214 for the period 15 May 2007 to 19 September 2014
- Exhibit 13 – VA benefits decision letter, dated 9 June 2015

- Exhibit 14 – Social Security Administration (SSA) Notice of Decision – Fully Favorable and Office of Disability Adjudication and Review Order of Administrative Review, dated 20 May 2016
- Exhibit 15 – four third-party character reference letters

### FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.

2. The applicant defers to counsel.

3. In a 7-page brief, counsel states, in part:

a. The applicant enlisted in ARNG on 30 March 1987. He then commissioned as a second lieutenant and graduated from the Basic Officer Leader Course on 25 June 1999. Within the first two years of being a commissioned officer, he was sexually assaulted at a field training exercise and continues suffering from the emotional trauma on his own. He faced further inner turmoil when his command referred him to a mental health evaluation over reporting subordinates for forging his signature. He again persevered and graduated from Captain's Career Course in February of 2006; then immediately deployed to Afghanistan in March of 2006. While in Afghanistan, he served courageously and was awarded the Bronze Star Medal after multiple direct conflicts with Taliban forces.

b. The applicant then began his new role in the Active Guard Reserve (AGR) as the Battalion S1 in May 2007. In 2008, the VA diagnosed him with service-related PTSD after he cited multiple issues like sleeplessness, nightmares, numbness, impulsiveness, and abuse of alcohol as self-medication. He continued to struggle with these issues as the Officer Specialty Recruiter from May 2008 to February 2011. He was then moved to Recruiting Command where Lieutenant Colonel (LTC) R discretely directed him to attend outpatient substance abuse treatment. After a month of chemical rehabilitation, he was discharged from the facility with no indication of his outpatient treatment in his military record. He was then transferred to become the S1 for the Infantry Brigade Combat Team. On 12 January 2012, he received his 20-Year Letter and he was selected for retention in 2014.

c. As the applicant's alcohol dependence and PTSD persisted, he admitted to drinking off duty and violating the general order of no alcohol on or off duty while at the battalion's Homeland Response Force External Evaluation (HRF EXEVAL). Due to this lapse in judgment, his chain of command moved to end his AGR status and effectively

end his military career. Although he had received another retention letter for two more years and the VA had recommended an MEB, he was promptly denied the MEB or Physical Evaluation Board (PEB) and threatened with a dishonorable discharge. He was forced into resignation in 2014 and will not receive his retirement until the age of 60.

d. Since being separated from the military, the applicant has been given a service related disability rating of 100%. He has been diagnosed with radiculopathy, with a 10% rating, a right shoulder rotator cuff tear, with a 20% rating, gastroesophageal reflux disease, with a 10% rating, a lumbosacral strain, with a 10% rating, radiculopathy (left upper extremity) with a 20% rating, asthma, with a 10% rating, a cervical strain, with a 10% rating, a left knee strain with a 10% rating, a right knee strain, with a 10% rating, a 10% rating for tinnitus, and PTSD with major depression and alcohol abuse disorder, with a rating of 100%. The Social Security Administration also recently determined that he has been permanently disabled since 2016.

e. It is respectfully submitted that the applicant has been subjected to a material error of procedure and a material error of discretion. In the instant case, the applicant was harmed when he was not evaluated for a medical retirement even though he has been left permanently disabled. In order to be eligible for a military medical retirement, the applicant must demonstrate that the injuries were caused or exacerbated by military service, the injuries were not the result of his misconduct, and the injuries rendered the applicant unfit for continued service at the time of his discharge.

f. The first element states the applicant must show that the injuries were caused and exacerbated by the military. Specifically, the VA gave him a service related disability rating of 100%. The applicant joined the military in 1987 perfectly healthy and then accumulated debilitating injuries during his service, including PTSD and the physical ailments listed previously. Furthermore, he was and still is taking multiple medications he never had to take before his diagnoses. These medications have been prescribed by the VA and are meant to help anxiety, depression, PTSD-related nightmares, and panic attacks. Doctor L provided further insight into his continued worsening symptoms and VA medical treatment.

g. The second element for a medical retirement is that the injuries may not be a result of misconduct. Here, there is no documentation or evidence of any misconduct resulting in the injuries the applicant suffered. Instead, there is evidence showing that the injuries were sustained in service of the United States Army and that the applicant earned myriad awards for such service. The timeline here clearly shows the applicant was rewarded for his actions during the time in which he suffered his injuries and therefore, was not the result of his own misconduct.

h. The final element requires the injuries to have rendered the applicant unfit for continued service at the time of discharge. He has a 100% service related disability rating from the VA since 2014. The SSA also deemed the applicant disabled since 22 September 2014. Specifically, both decisions determined he was disabled and unable to work within the civilian world. These decisions show he was unfit for a more strenuous job of service in the United States Army. After reviewing both of these decisions in totality, they both indicate he has been disabled since 2014 and was clearly unfit for service in the military at the time of his separation. At the very least, he certainly was no longer capable of deploying to an austere environment without these conditions worsening.

i. The applicant has provided multiple character references with outside perspectives on why he should be evaluated for a medical retirement. These letters speak to the clear signs of PTSD, the unfair treatment by the chain of command, and the applicant's self-awareness of his own ailments, which the military was unable to adequately recognize. Altogether, he has sufficiently provided evidence to offer that he was unfairly treated for not being provided a PEB, even after a recommendation for one. With this being said, he has fulfilled all three elements necessary for a medical retirement. He requests that this honorable Board authorize a new PEB to ascertain the severity of his injuries and provide him with the full medical retirement he deserves.

j. In this instance, the material injustice is self-evident. The applicant served his country with honor and distinction for more than two decades. He sacrificed his physical and mental wellbeing while fulfilling the Army's mission, including during combat operations. Rather than being evaluated for a medical retirement so he could have immediate access to benefits and treatment he clearly needs, he was unceremoniously separated from the Army because of his reliance on alcohol as a means of self-medicating his myriad of service related medical issues. He has been forced to live with the shame of the abrupt end of his military career, which continues to haunt him. This decision has certainly prejudiced him and will continue to cause him undue harm until it is rectified by this honorable Board.

k. In light of the facts and arguments presented, the applicant requests that this honorable Board direct that he be evaluated by a PEB to determine if he should have been medically retired from the United States Army. He has been the victim of both, a material error by his chain of command and a material injustice by the Army. He now seeks redress from these errors so he may be eligible for the medical benefits he clearly has earned. *The complete counsel's brief was provided to the Board for their review and consideration.*

4. The applicant was appointed a second lieutenant in the ARNG effective 27 June 1998. His record shows he had prior enlisted service in the ARNG.

5. The applicant's DD Forms 214 show he entered active duty on 29 September 1999 and was released from active duty on 26 February 2006 by reason of completion of AGR. He again entered active duty on 27 February 2006 and served in Afghanistan from 13 May 2006 to 8 May 2007. He was released from active duty on 14 May 2007.
6. The applicant was orders to full time National Guard Duty in AGR status and he entered active duty on 15 May 2007. He was promoted to the rank and grade of major/O-4 effective 24 December 2008.
7. The applicant's 20-Year Letter is dated 12 January 2012. This letter notified him that having completed the required years of service, he is eligible for retired pay upon application at age 60.
8. A memorandum, subject: Selection for Retention Under the Provisions of NGR 635-102, undated, shows the 2012 Selective Retention Board selected the applicant for retention in the ARNG for a period of two years.
9. A memorandum dated 1 May 2014, shows the applicant was informed that he was selected for promotion to LTC/O-5 by the 2014 Army Reserve Component Promotion Board.
10. A second memorandum, subject: Selection for Retention Under the Provisions of NGR 635-102, dated 4 June 2014, shows the 2014 Selective Retention Board selected the applicant for retention in the ARNG for a period of two years.
11. The applicant's record show he received a general officer memorandum of reprimand (GOMOR) on 27 June 2014 for violation of General Order Number 1 by consuming alcohol during the period 24 April – 2 May 2014 while participating in the HRF EXEVAL.
12. The applicant received a second GOMOR on 18 July 2014. The GOMOR shows that during the course of an investigation, it was revealed that:
  - a. He was diagnosed on or about 15 December 2008 by the VA as having a 30% disability rating for PTSD with alcohol abuse. He neglected his professional responsibility by not informing and furnishing his command and the medical command this medical information in a timely manner.
  - b. On or about 9 July 2014, his commander asked him to verify whether or not he was receiving disability payments from the VA to which he responded in the negative. It was later revealed that this was not true and that he knowingly made a false statement to his commander.

c. On or about 15 July 2014, the Office of the Staff Judge Advocate was informed by the VA's Inspector General's office that applicant has been fraudulently receiving disability payments at the 30% rate since 2008, in conjunction to his full time AGR orders.

13. The applicant received a third GOMOR on 18 July 2014 for sending inappropriate text messages to his acting commander, making inappropriate comments to a member of the Staff Judge Advocate, and for being absent from his place of duty on 16 and 17 July 2014.

14. Orders issued on 6 August 2014 ordered the applicant's involuntary release from active duty by reason of professional dereliction.

15. The applicant was honorably released from active duty to the control of the ARNG on 19 September 2014, for "Miscellaneous/General Reason" (Separation Code JND). His DD Form 214 for this period shows he completed 7 years, 4 months and 5 days of active service.

16. Orders issued on 16 September 2014 ordered the applicant's discharge from the ARNG and his transfer to the Retired Reserve, effective 23 September 2014, by reason of completion of 20 years of active or inactive service.

17. The applicant provided:

a. A 4-page personal statement, titled: Justification for Retroactive MEB, stating he was unjustly denied referral to an MEB and explaining the reasons why he should have been referred to an MEB based on his PTSD condition.

b. A DA Form 3349 showing he was issued a permanent (P) "4" physical profile for PTSD; however, the form was prepared and signed by a physician employed by the VA, not by military medical personnel as required by Army regulations.

c. A Chemical Rehabilitation Discharge Summary showing he was admitted on 16 April 2012 for chronic stage alcoholism and impending loss of career.

d. A VA benefits decision letter showing he is receiving service-connected disability compensation for various conditions that include PTSD.

e. SSA documents showing the SSA determined he has been disabled since 22 September 2014.

f. Four third-party character reference letters attesting to the applicant's positive character traits and speak of the applicant's signs of behavioral health issues warranting a medical retirement.

18. 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.

19. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting a referral of his medical records to the Army's Disability Evaluation System (DES) for a medical retirement.

b. 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:

- The applicant enlisted into the ARNG on 30 March 1987 and commissioned as a second lieutenant, graduating from BOLC on 25 June 1999. In May 2007 he began a new role in the Active Guard Reserve (AGR) program. The applicant received his 20-year letter and was selected for retention in 2014.
- During the battalion's HRF EXEVAL, the applicant admitted to drinking off duty and violating the general order of no alcohol on or off duty, and he received a GOMOR on 27 June 2014. He received a second GOMOR on 18 July 2014 as the result of an investigation related to his diagnosis of PTSD and receipt of VA disability payments as well as knowingly making a false statement to his commander. The applicant received a third GOMOR on 18 July 2014 for sending inappropriate text messages and making inappropriate comments as well as being absent from his place of duty.
- On 16 September 2014 orders were issued for the applicant's discharge from the ARNG, and he was transferred to the Retired Reserve on 23 September 2014 by reason of completion of 20 years of active or inactive service.

c. Review of Available Records: The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents contained in the applicant's file. Most pertinent to the contention of a mental health condition, including PTSD, the applicant asserts that he was sexually assaulted (MST) during a field training exercise in June 1999 and began experiencing PTSD symptoms. Subsequently, he deployed to Afghanistan in 2006 and was exposed to trauma, which further exacerbated his PTSD symptoms. He alleges that his command discretely directed him to attend an outpatient substance abuse treatment program, for which no records were included. In 2008 the VA diagnosed him with service-related PTSD, and he is currently 100% service-

connected for PTSD. There was sufficient evidence that the applicant was diagnosed with PTSD while on active service, and the documentation provided focuses on the deployment related trauma.

d. The VA's Joint Legacy Viewer (JLV) was also reviewed and showed the following history while applicant was on active service:

- The applicant initially engaged in mental health treatment at the VA for PTSD symptoms in December 2007. He was referred for PTSD and substance abuse treatment but did not follow up. In November 2011 the applicant initiated counseling and medication management through a DoD mental health provider and was started on medications for depression and anxiety. He reported excessive alcohol use, sleep difficulty, and irritability, and he was diagnosed with Depression and Combined Drug and Alcohol Abuse (due to binge drinking and self-medicating with an anxiolytic). He was referred by a DoD behavioral health provider to substance abuse treatment through the VA in Albany, NY. Documentation notes his command is aware of his alcohol abuse problem, and after two more encounters with DoD providers, the applicant started substance abuse treatment through the VA in April 2012. He successfully completed this four-week program, but in June 2012 he requested another referral for alcohol treatment. In July he attended an intake session for PTSD treatment where his co-occurring alcohol dependence was also addressed, but he did not follow up. The applicant had another visit with his DoD primary care provider, and there was discussion of need for alcohol treatment. He was restarted on Paxil, and therapy was recommended. His next primary care/mental health encounter was in March 2013, and there was discussion of his abstinence from alcohol, which was attributed to acupuncture, increased exercise, and AA attendance. In January 2014, the applicant called the national suicide crisis hotline and was subsequently seen at the VA. He reported binge drinking following a relationship break up. He was restarted on Paxil and discussed returning to AA. He followed up with his psychiatrist in April 2014 and indicated increased panic attacks and anxiety. It was noted that he had 47 days of sobriety and was attending AA. In May the applicant completed another intake in the PTSD program. At this time, he reported drinking 5-18 beers per week, but he also disclosed having a problem with gambling (having lost 100K). He was diagnosed with PTSD, Alcohol Use Disorder, Gambling Disorder, and Adjustment Reaction. Finally, in August 2014 the DoD Report of Medical Examination, as part of the retirement process, showed that the applicant had indicated symptoms of both depression and PTSD.
- Since separation from active service, VA records indicated the applicant has continued to have regular contact with VA mental health providers with a focus on medication management and alcohol dependence treatment. Notes indicate a history of suicide attempt by overdose in 2019. A review of medications showed



that the applicant has had many trials of psychotropic medications, and it appears that he is most recently prescribed venlafaxine, aripiprazole, and clonazepam.

e. A review of documents available related to the applicant's VA claim(s) of PTSD were also reviewed. Documentation of seven counseling sessions from the Middletown Vet Center indicated a myriad of PTSD symptoms all associated with deployment as well as problems with alcohol abuse. A summary was provided that reflected a diagnosis of PTSD. A VA Rating Decision letter dated 8 December 2008 showed that the applicant was evaluated on 14 November 2008, and a summary of this evaluation was included in the letter. It outlines the applicant's deployment history, trauma exposure, symptoms of PTSD, and his excessive, self-medicating alcohol use. There was no mention of PTSD associated with MST. He was awarded a 30% service connection effective 24 July 2008. The applicant was reevaluated on 1 July 2015, and documentation noted worsening PTSD symptoms, increased alcohol use, relationship difficulties, and occupational problems (i.e. loss of AGR position).

f. A review of MedChart and HRR showed PHAs completed in 2012 indicated mild symptoms of depression and subthreshold symptoms of PTSD. A PHA in 2013 showed no significant symptoms or problems, and a PHA on 2 August 2014 indicated minimal symptoms of PTSD and that the applicant was under the care of a civilian mental health provider and taking medications. However, the applicant responded "no" to the question related to a mental health diagnosis. An eCase was created by a NYARNG behavioral health provider on 8 August 2014, which outlined the applicant's history with VA treatment, primarily noting the diagnoses of PTSD and alcohol misuse as a way of self-medicating PTSD symptoms. There was no evidence of a history of any behavioral health profiles.

g. A review of iPERMS and the applicant's most recent OERs showed him as "Best Qualified" in both 2012 and 2013. There was no indication of problems in his occupational functioning.

h. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that while the applicant is service connected for PTSD and has been since 2008, which was during his active duty service, the documentation does not support that the applicant was psychiatrically unfit at the time of discharge for any boardable mental health condition as he did not have persistent or reoccurring symptoms requiring extended or recurrent psychiatric hospitalization or persistent and reoccurring symptoms that interfered with duty performance or necessitated duty limitations (AR 40-501, para 3-33c). Moreover, during his PHAs in 2012, 2013, and 2014 he did not report significant symptoms of PTSD (deployment or MST related) or indicate that he was receiving any treatment for PTSD. It wasn't until August 2014, after discharge proceedings were in place, that he informed a NYARNG behavioral health officer of his PTSD and VA treatment and service connection. Additionally, there was no

history of any behavioral health profiles put in place by his DoD primary care provider, who was aware of his condition, or the DoD behavioral health providers, who referred him to the VA. Finally, further support is found in the applicant's personnel records, which reflect positive OERs, awards, and promotions, indicating a lack of evidence of any occupational impairment. Therefore, a referral to the Disability Evaluation System (DES) is not supported.

#### 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.

a. The evidence shows the applicant was released from active duty in September 2014 due to "Miscellaneous and General Reasons" following receipt of 3 GOMORs. He was then transferred to the Retired Reserve since he had completed 20 or more qualifying years of service towards non-regular retirement. The Board found no error or injustice in his separation processing.

b. The Board reviewed and agreed with the medical reviewer's finding that although the applicant is service connected for PTSD (for VA purposes) and has been since 2008, which was during his active duty service, the documentation does not support that the applicant was psychiatrically unfit at the time of discharge for any boardable mental health condition as he did not have persistent or reoccurring symptoms requiring extended or recurrent psychiatric hospitalization or persistent and reoccurring symptoms that interfered with duty performance or necessitated duty limitations. It wasn't until August 2014, after discharge proceedings were in place, that he informed a NYARNG behavioral health officer of his PTSD and VA treatment and service connection. There was no history of any behavioral health profiles put in place by his DoD primary care provider, who was aware of his condition, or the DoD behavioral health providers, who referred him to the VA. Finally, further support is found in the applicant's personnel records, which reflect positive OERs, awards, and promotions, indicating a lack of evidence of any occupational impairment. The Board was not persuaded by his argument and determined that a referral to the Disability Evaluation System (DES) is not supported.

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.

[REDACTED]

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[REDACTED]

[REDACTED]

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

REFERENCES:

1. Title 10, U.S. Code, section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.
2. Army Regulation (AR) 635-40 (Disability Evaluation for Retention, Retirement or Separation) prescribes the Army Disability Evaluation System (DES) 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. It implements the requirements of Title 10, U.S. Code, chapter 61;

Department of Defense Instructions (DoDI) 1332.18 (Disability Evaluation System); DoD Manual 1332.18 (DES Volumes 1 through 3) and Army Directive 2012-22 (Changes to Integrated Disability Evaluation System Procedures) as modified by DoDI 1332.18.

a. The objectives are to maintain an effective and fit military organization with maximum use of available manpower; provide benefits to eligible Soldiers whose military service is terminated because of a service-connected disability; provide prompt disability evaluation processing ensuring the rights and interests of the Government and Soldier are protected; and, establish the Military Occupational Specialty Administrative Retention Review (MAR2) as an Army pre-DES evaluation process for Soldiers who require a P3 or P4 (permanent profile) for a medical condition.

b. Public Law 110-181 defines the term, physical DES, as a system or process of the DoD for evaluating the nature and extent of disabilities affecting members of the Armed Forces that is operated by the Secretaries of the military departments and is composed of the MEB, PEB, counseling of Soldiers, and mechanisms for the final disposition of disability evaluations by appropriate personnel.

c. The DES begins for a Soldier when either of the events below occurs:

(1) The Soldier is issued a permanent profile approved in accordance with the provisions of AR 40–501 (Standards of Medical Fitness) and the profile contains a numerical designator of P3/P4 in any of the serial profile factors for a condition that appears not to meet medical retention standards in accordance with AR 40–501. Within (but not later than) 1 year of diagnosis, the Soldier must be assigned a P3/P4 profile to refer the Soldier to the DES.

(2) The Soldier is referred to the DES as the outcome of MAR2 evaluation.

d. An MEB is convened to determine whether a Soldier's medical condition(s) meets medical retention standards per AR 40-501. This board may determine a Soldier's condition(s) meet medical retention standards and recommend the Soldier be returned to duty. This board must not provide conclusions or recommendations regarding fitness determinations.

e. The PEB determines fitness for purposes of Soldiers' retention, separation or retirement for disability under Title 10, U.S. Code, chapter 61, or separation for disability without entitlement to disability benefits under other than Title 10, U.S. Code, chapter 61. The PEB also makes certain administrative determinations that may benefit implications under other provisions of law.

f. Unless reserved for higher authority, the U.S. Army Physical Disability Agency approves disability cases for the Secretary of the Army and issues disposition instructions for Soldiers separated or retired for physical disability.

g. Unit commanders will ensure medical profiles containing a P3/P4 or temporary (T) 3/T4 in one of the serial profile factors are reviewed according to the standards of AR 40-501. Among the duties required, a unit commander will provide a non-medical assessment by completing DA Form 7652 (DES Commander's Performance and Functional Statement).

3. AR 40-501 provides that for an individual to be found unfit by reason of physical disability, he or she must be unable to perform the duties of his or her office, grade, rank or rating. Performance of duty despite impairment would be considered presumptive evidence of physical fitness. The regulation also provides in chapter 10 (ARNG):

a. The State Surgeon or physician designee shall be the profile approval authority for their respective state.

b. Soldiers' responsibilities include seeking medical advice quickly when they believe their physical well-being is in question. Any hospitalization, significant illness, or disease that occurs when not on duty will be reported to the unit commander at the earliest possible opportunity.

c. It is the individual Soldier's responsibility to report any medical problems immediately to the chain of command.

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

5. Title 38, Code of Federal Regulations, Part IV is the VA Schedule for Rating Disabilities. The VA awards disability ratings to veterans for service-connected conditions, including those conditions detected after discharge. As a result, the VA, operating under different policies, may award a disability rating where the Army did not find the member to be unfit to perform his duties. Unlike the Army, the VA can evaluate a veteran throughout his or her lifetime, adjusting the percentage of disability based upon that agency's examinations and findings.

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 ABCMR applicants (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//