

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 19 March 2024

DOCKET NUMBER: AR20230008930

APPLICANT REQUESTS:

- honorable physical disability discharge in lieu of bad conduct discharge as a result of court-martial
- reinstatement of rank/grade to staff sergeant (SSG)/E-6
- back pay and allowances
- personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- table of contents
- self-authored statement
- 88 pages of Department of Veterans Affairs (VA) medical records, dated between February 2023 – April 2023
- multiple church identification cards

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 states:

a. He is requesting an upgrade of his discharge from bad conduct discharge to medical/disability discharge based on his medical diagnoses of post-traumatic stress disorder (PTSD), severe depression, and other injuries. He is also requesting reinstatement of his rank/grade to SSG/E-6 and back pay and allowances from the date of his separation.

b. He was in a military motor vehicle accident on 20 March 1986, with other service members in the car, wherein the driver was killed, another passenger was partially

paralyzed, and he received a broken jaw, broken wrist, and multiple bodily injuries. In 1986, PTSD was not in existence, but his appearance and job performance changed as a result of his PTSD symptoms. He was not allowed to use the accident in his defense at his court-martial. He was also targeted for a urinalysis based on his weight loss and mood swings, which are typical symptoms of PTSD and severe depression, which were the result of the accident.

c. He believes his discharge was inequitable because of his diagnoses of PTSD and major depression resulting from the military vehicular accident in 1986. There is substantial doubt that his discharge would have been the same under policies now in effect regarding the diagnosis and treatment of PTSD.

d. Prior to the accident, he was a top noncommissioned officer (NCO) with several commendations and medals, graduating in the top 5 percent of both the Primary Leadership Development Course (PLDC) and Basic NCO Leadership Course (BNCOC). He was also selected to attend the Advanced NCO Leadership Course (ANCOC) and selected for promotion on the E-7 list, an accomplishment he achieved in 10 years of service. Due to a positive urine test, resulting from his decision to self-medicate, he was never allowed to attend ANCOC or be promoted to sergeant first class (SFC)/E-7.

e. Due to his symptoms of PTSD, including his appearance, job performance, and weight loss, he was improperly singled out for a drug test. At the time, was also dealing with the additional PTSD symptoms of flashbacks, cold sweats, sleepless nights, mood swings, and loss of appetite. The flashbacks and depression were hard to understand. The fact that he was selected for a urinalysis based on his symptoms of untreated PTSD at the height of his career was improper. He understands that little was known about PTSD in 1986 and it was not until 1980 that the American Psychiatric Association added PTSD to the third edition of its Diagnostic and Statistical Manual of Mental Disorders (DSM-III).

f. Prior to leaving Germany, he received a sub-par Enlisted Evaluation Report (EER), where his supervisor indicated his concerns about his mental status due to the accident. He does not have access to his personnel military records, so he cannot provide this document. He has applied for and requested his personnel records, medical and dental, but they have not yet been delivered and he can no longer delay his request to the Board by waiting for their delivery. He also had a discussion with his last unit first sergeant, as was indicated at his court-martial, where he stated he discussed his problems with him, and they were not about drugs.

g. He did not apply earlier because of his ignorance of military law and the VA claims process. He was constantly being told by VA employees that he had no rights to any benefits, to include medical. He has struggled for over 30 years dealing with PTSD, to include substance abuse for 10 years and holding over 25 jobs in 30 years, two failed

marriages, and major depression. He has been clean of substance abuse for over 20 years. He is an ordained elder and pastor of Tabernacle of Hope Church of God in Christ, organized by his present wife and himself.

h. He is explicitly requesting the Board to change his records pertaining to his rank/grade, character of service, and he wants to be awarded disability retirement benefits with applicable back pay, due to his PTSD and other bodily injuries resulting from a military vehicle accident on or about 20 March 1986.

3. The applicant enlisted in the Regular Army on 28 November 1979.

4. 55th Personnel Service Company Orders 276-34, dated 3 December 1985, promoted the applicant to the rank/grade of SSG/E-6 effective 24 October 1985.

5. The applicant's available service records do not contain documentation referencing the military motor vehicle accident on or about 20 March 1986. The DA Forms 2166-6 (EER) in his available service records are illegible.

6. A DA Form 2627 (Record of Proceedings under Article 15, Uniform Code of Military Justice (UCMJ)), shows the applicant accepted nonjudicial punishment (NJP) under Article 15 of the UCMJ on 31 October 1989, for disobeying a lawful general regulation on 15 October 1989, by consuming alcoholic beverages (beer) on a training or field exercise. The imposed punishment included forfeiture of pay for 2 months as well as 30 days extra duty and 30 days restriction, suspended for 60 days. He was not reduced in rank/grade.

7. A DA Form 268 (Suspension of Favorable Personnel Actions (FLAG)), shows an adverse action Flag was initiated against the applicant on 18 January 1990.

8. A memorandum from the applicant's immediate commander, dated 1 February 1990, shows he disapproved award of the Army Good Conduct Medal to the applicant for the period of service from November 1988 through November 1991, due to his acceptance of NJP for his misconduct in 1989.

9. Multiple electronic DA Forms 4187 (Personnel Action) show the following duty status changes pertaining to the applicant:

- from confined by civil authorities to present for duty (PDY) on 22 June 1990
- from absent without leave (AWOL) to PDY on 3 July 1990
- from leave to AWOL on 29 September 1990

10. A second DA Form 268, shows the applicant was again flagged for adverse action, this time due to AWOL, effective 29 September 1990.

11. A DA Form 4384 (Commander's Report of Inquiry/Unauthorized Absence), shows the applicant was found guilty of possession of cocaine by a military court-martial on 4 September 1990. He was released on leave pending military review of the decision but failed to return from leave after a 5-day extension. The applicant's commander indicated he spoke with the applicant on 2 October 1990, and advised him to report to the nearest military installation.

12. Headquarters Fort Hood General Court-Martial Order Number 59, dated 11 October 1990, shows:

a. The applicant was arraigned and tried by a general court-martial at Fort Hood, TX, where he was charged with and found guilty of, at an unknown time and place between about 15 January 1990 and 22 January 1990, wrongfully using cocaine, the use of which was detected by biochemical testing of a urine sample on 22 January 1990.

b. On 5 September 1990, he was sentenced to a bad conduct discharge and reduction in rank/grade to private (PV1)/E-1.

13. A DD Form 553 (Deserter/Absentee Wanted by the Armed Forces) shows the applicant's initial date of AWOL was 29 September 1990, and his administrative date of desertion was 30 October 1990.

14. A corresponding DA Form 4187 shows the applicant's duty status was changed from AWOL to dropped from the rolls (DFR) effective 30 October 1990.

15. A DA Form 458 (Charge Sheet) shows on 19 February 1991, the applicant was charged with absenting himself from his unit without authority beginning on 29 September 1990 and did remain so absent until a future yet to be determined date.

16. A DA Form 4187 shows the applicant's duty status changed from DFR to attached/PDY on 7 March 1991. The remarks show he was apprehended by civilian authorities at Shelby, MS on 7 March 1991 and returned to military control on that date.

17. A DD Form 616 (Report of Return of Absentee), dated 11 March 1991, shows the applicant was apprehended by civilian authorities in MS, on 7 March 1991, returned to military control at Fort McClellan on 9 March 1991, then transferred to the U.S. Army Personnel Control Facility at Fort Knox, KY.

18. A U.S. Army Armor Center (USAARMC) Form 2722 (Medical Examination for Separation Statement of Option) shows on 12 March 1991, the applicant signed the form indicating he understood he was not required to undergo a medical examination for separation from active duty and he did not desire a separation medical examination.

19. A final DA Form 4187 shows on 15 March 1991, the applicant was placed on excess leave pending the appellate review of his bad conduct discharge.

20. Headquarters, U.S. Army Armor Center and Fort Knox General Court-Martial Order Number 110, dated 22 November 1991, shows the general court-martial case of the applicant, adjudged on 5 September 1990, as promulgated in General Court-Martial Order Number 59, Headquarters Fort Hood, dated 11 October 1990, had finally been affirmed. Article 71(c) having been complied with; the bad-conduct discharge would be executed.

21. The applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) shows:

a. He was discharged on 6 December 1991, under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel) chapter 3, as a result of court-martial and given a bad conduct discharge.

b. His rank/grade is shown as PV1/E-1.

c. He was credited with 11 years, 6 months, and 22 days of net active service, with lost time from 29 September 1990 through 15 March 1991.

d. Among his decorations, medals, and ribbons awarded or authorized are the Army Commendation Medal, two Army Achievement Medals, two Army Good Conduct Medals, and one NCO Professional Development Ribbon (Primary Level).

e. Item 18 (Remarks) shows his continuous honorable active service from 28 November 1979 through 20 September 1987.

22. The applicant's available service records do not show:

- he was issued a permanent physical profile rating
- he suffered from a medical condition, physical or mental, that affected his ability to perform the duties required by his Military Occupational Specialty (MOS) and/or grade or rendered him unfit for military service
- he was diagnosed with a medical condition that warranted his entry into the Army Physical Disability Evaluation System (PDES)
- he was diagnosed with a condition that failed retention standards and/or was unfitting

23. The applicant provided multiple church identification cards wherein he is identified as a pastor.

24. The applicant provided 88 pages of VA medical records, dated between February 2023 – April 2023, all of which have been provided in full to the Board for review. In pertinent part, they show the applicant's diagnoses of chronic PTSD and major depressive disorder, severe, with mood congruent psychotic features and his provided history of symptoms related to his traumatic motor vehicle accident while in service.

25. 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.

26. MEDICAL REVIEW:

1. The Army Review Boards Agency (ARBA) Medical Advisor reviewed the supporting documents, the Record of Proceedings (ROP), and the applicant's available records in the Interactive Personnel Electronic Records Management System (iPERMS), the Health Artifacts Image Management Solutions (HAIMS) and the VA's Joint Legacy Viewer (JLV). The applicant had several requests. This review will focus on the applicant's requests for change in discharge from Bad Conduct to medical disability. He indicated that his request was related to PTSD and Other Mental Health conditions. The applicant stated that he was involved in a car accident on 20Mar1986 during which he sustained fractures in the jaw and wrist, and head and body injury. He indicated his PTSD and Depression caused changes in his performance and weight loss. He also stated that he was targeted for a urine drug test because of the changes.

2. The ABCMR ROP summarized the applicant's record and circumstances surrounding the case. The applicant entered the final period of service 21Sep1987. His MOS was 94B, Food Service Specialist. He was stationed in Germany 19840519 to 19881105. He was convicted by general court-martial on 05Sep1990 for wrongful use of cocaine between 15Jan1990 and 22Jan1990. The urine test was positive on 22Jan1990. As a result, he was discharged 06Dec1991 and given a Bad Conduct discharge. The following was also noted in his record and is of interest as possible evidence of impact of a BH condition:

a. He wrongfully possessed or consumed alcoholic beverages (beer) on a training or field exercise 15Oct1989.

b. His duty status changed from confined by civil authorities to present for duty 22Jun1990.

c. His duty status changed from AWOL to present for duty (03Jul1990)

d. He was on leave awaiting the court-martial decision review and did not return when his leave ended. He was AWOL 29Sep1990 until 07Mar1991.

3. The applicant requests medical disability for injuries sustained during a car accident including PTSD (discussed in #4 paragraph below).

a. The applicant presented at the Jesse Brown VAMC in February 2023 to establish care (17Feb2023 General Medicine Outpatient Note) and reported the following: He had been hospitalized in Frankfurt after a car accident. He underwent surgical fixation of his jaw and surgical repair of an open compound fracture of his left wrist. Since the accident he had persistent pain throughout his body (neck, shoulders, ribs, hips, left wrist, left foot). There was also residual left side weakness of his body, paresthesia of his left leg and headaches. The exam showed tenderness to palpation over the neck, left clavicle, left shoulder, left wrist, lower back, and left hip. He had normal 5/5 muscle strength on the right; however, there was mild decreased muscle strength on the left (grip strength, elbow/wrist flexion/extension, left shoulder abduction and left leg muscles).

b. There were no service treatment records available for review. The applicant had elected to forego a separation medical examination (12Mar1991). The 02Nov1990 Personnel Qualification Record, Part I showed physical profile PULHES 111111. Based on records available for review, evidence was insufficient to support the applicant had a physical condition which failed medical retention standards of AR 40-501 chapter 3 at the time of discharge from service. Referral for medical discharge processing was not warranted.

4. Behavioral health condition: PTSD and Major Depressive Disorder

a. In February 2023, the applicant was evaluated by BH (behavioral health services at Jesse Brown VAMC). The following was reported: He did not have combat or exposure to war-zone stressors. His PTSD stressor was a car crash 20Mar1986 while stationed in Germany. Their vehicle was t-boned by a car traveling at high speed (approximately 100 mph). The driver died and another passenger was partially paralyzed. Trauma-related symptoms include sleep disturbance, nightmares, negative feelings (guilt and self-blame), hypervigilance, easily startled, flashbacks and avoidance of reminders of the car crash (prefers not to be a passenger in a car; keeps his physical scars covered; avoids car crashes represented in media). The applicant reported a one-time use of cocaine while in service which he attributes to his PTSD condition. He had a positive urine drug test subsequently. He feels "he was scrutinized/targeted at the time due to decline in performance which in retrospect was likely attributable to PTSD symptoms." He reported having the following symptoms while in service: He couldn't sleep. He had nightmares and intrusive thoughts (hearing the soldiers calling "Help me Sarge"). His symptoms negatively impacted the relationship with his wife and

his military performance. Later, his symptoms contributed to onset of his Cocaine Use Disorder (smoked crack 11 years, in remission 20 years); and difficulty holding a job (often quits near the accident anniversary. There was no history of psychiatric hospitalization, and no suicide attempts. His diagnoses were PTSD and Major Depressive Disorder, Severe, with Mood Congruent Psychotic Features. Depression symptoms included low/depressed mood, low motivation, and decreased appetite (weight loss of 15 pounds in past 3 months). Symptoms were worse near the anniversary of the car accident. He holds an associate degree in restaurant management.

b. An in-service mental status evaluation was not found. There was no indication that the applicant had undergone rehab services for substance use or that he had received any BH treatment while in service. JLV search showed the applicant was not service connected by the VA for any disability, likely due to the characterization of his service. The 02Nov1990 Personnel Qualification Record, Part I showed physical profile S1. Based on records available for review, evidence was insufficient to support that the applicant had a BH condition which failed medical retention standards of AR 40-501 chapter 3 at the time of discharge. Referral for medical discharge processing for a BH condition was not warranted.

c. The 03Sep2014 Secretary of Defense Liberal Guidance Memorandum and the 25Aug2017 Clarifying Guidance, were considered. The applicant has been diagnosed with PTSD which under Liberal Consideration, is mitigating for the drug offence which led to the applicant's court-martial and Bad Conduct discharge.

#### Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant has been diagnosed with PTSD.

(2) Did the condition exist, or did the experience occur during military service? Yes. The applicant has been diagnosed with PTSD with the stressor being an in-service motor vehicle accident.

(3) Does the condition or experience actually excuse or mitigate the discharge? Yes. Substance abuse (cocaine offence), the immediate cause of his discharge, is a common sequela of PTSD. PTSD can also be manifested by avoidant behavior (AWOL offence) which supports the condition was present while he was still in service.



BOARD DISCUSSION:

1. The Board determined the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.
  
2. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was partially warranted. The Board carefully considered the applicant's request, supporting documents, evidence in the records, and published DoD guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement and record of service, the frequency and nature of the applicant's misconduct and the reason for separation. The applicant's trial by a general court-martial was warranted by the gravity of the offenses charged (wrongfully using cocaine) His conviction and discharge were conducted in accordance with applicable laws and regulations and the discharge appropriately characterizes the misconduct for which he was convicted. He was given a bad conduct discharge pursuant to an approved sentence of a general court-martial. The appellate review was completed, and the affirmed sentence was ordered duly executed. All requirements of law and regulation were met with respect to the conduct of the court-martial and the appellate review process, and the rights of the applicant were fully protected. The Board found no error or injustice in the separation processing.

- a. Discharge Upgrade: Partial Grant. The Board reviewed and agreed with the medical reviewers finding that the applicant has been diagnosed with PTSD which under Liberal Consideration, is mitigating for the drug offence which led to the applicant's court-martial and bad conduct discharge. Given his cocaine use as a SSG and given his AWOL (167 days) and apprehension by civil authorities, the Board determined his service clearly did not rise to the level required for an honorable characterization; however, a general, under honorable conditions characterization of service is appropriate under published DoD guidance for liberal consideration of discharge upgrade requests. The Board also determined that such upgrade did not change the underlying reason for his separation, and that there would be no change to the narrative reason for separation and/or corresponding codes.

- b. Physical Disability: Deny. The applicant's available service records do not show he was issued a permanent physical profile rating, he suffered from a medical condition, physical or mental, that affected his ability to perform the duties required by his MOS and/or grade or rendered him unfit for military service, he was diagnosed with a medical condition that warranted his entry into the Army disability system, or he was diagnosed

with a condition that failed retention standards and/or was unfitting. The Board agreed that his entry into the disability system is not warranted.

c. Grade and pay: Deny. The applicant violated the UCMJ, and he was tried and convicted by a general court-martial of his violations. The resultant punishment included, in addition to a bad conduct discharge, reduction to the lowest enlisted grade of E-1, and other punishment. The Board found no evidence and the applicant did not provide a convincing argument or evidence why his grade is in error or why it should be reinstated. The court clearly reduced him to E-1 and that is the grade he held at the time of separation. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, U.S. Code, Section 1552, the authority under which this Board acts, the ABCMR is not empowered to set aside a conviction. Rather, it is empowered to change the severity of the sentence imposed in the court-martial process and then only if clemency is determined to be appropriate, to moderate the severity of the punishment imposed.

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:

1. The Board determined the evidence presented is sufficient to warrant a recommendation for partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by amending the applicant's DD Form 214 for the period ending 6 December 1991, showing:

- Character of Service: Under Honorable Conditions (General)
- Separation Authority: No Change
- Separation Code: No Change
- Reentry Code: No Change
- Narrative Reason for Separation: No Change

2. The Board further determined the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to

- honorable physical disability discharge in lieu of bad conduct discharge as a result of court-martial
- reinstatement of rank/grade to staff sergeant (SSG)/E-6
- back pay and allowances



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. 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.
3. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records (BCM/NRs) regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. BCM/NRs may grant clemency regardless of the court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-

martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds.

a. This guidance does not mandate relief, but rather provides standards and principles to guide BCM/NRs in application of their equitable relief authority. In determining whether to grant relief on the basis of equity, injustice, or clemency grounds, BCM/NRs shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment.

b. Changes to the narrative reason for discharge and/or an upgraded character of service granted solely on equity, injustice, or clemency grounds normally should not result in separation pay, retroactive promotions, and payment of past medical expenses or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded service characterization.

4. Title 10, U.S. Code, section 1552, provides that the Secretary of a Military Department may correct any military record of the Secretary's Department when the Secretary considers it necessary to correct an error or remove an injustice. With respect to records of courts-martial and related administrative records pertaining to court-martial cases tried or reviewed under the Uniform Code of Military Justice, action to correct any military record of the Secretary's Department may extend only to correction of a record to reflect actions taken by reviewing authorities under the Uniform Code of Military Justice or action on the sentence of a court-martial for purposes of clemency. The Secretary shall make such corrections by acting through boards of civilians of the executive part of that Military Department.

5. Army Regulation 635-200 (Personnel Separations – Enlisted Personnel) sets forth the basic authority for the separation of enlisted personnel.

a. An honorable discharge is a separation with honor and entitles the recipient to benefits provided by law. The honorable characterization is appropriate when the quality of the member's service generally has met the standards of acceptable conduct and performance of duty for Army personnel or is otherwise so meritorious that any other characterization would be clearly inappropriate.

b. A general discharge is a separation from the Army under honorable conditions. When authorized, it is issued to a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Chapter 3, paragraph 3-11, provides that an enlisted person would be given a bad conduct discharge pursuant only to an approved sentence of a general or special

court-martial. The appellate review is required to be completed and the affirmed sentence ordered duly executed.

6. 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.

7. 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.

8. 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.

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

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

11. 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.

12. 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//