

IN THE CASE OF: [REDACTED]

BOARD DATE: 6 March 2024

DOCKET NUMBER: AR20230008974

APPLICANT REQUESTS, through counsel, in effect:

- review of his medical conditions by a Physical Evaluation Board (PEB)
- retroactive retirement due to disability

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

- DD Form 149, Application for Correction of Military Record
- Legal Brief
- Applicant's Statement
- DD Form 4/3, Enlistment/Reenlistment Document-Armed Forces of the United States, U.S. Air Force (USAF), 22 January 2008
- AF Form 1411, Extension or Cancellation of Extensions of Enlistment in the Regular Air Force (REGAF)/Air Force Reserve (AF Reserve)/Air National Guard (ANG)
- Voluntary Separation Application
- DD Form 214, Certificate of Release or Discharge from Active Duty, USAF, 18 July 2017
- DD Form 4, 31 July 2017
- DD Form 214, Regular Army, 7 June 2018
- Neurology Progress Notes
- Information Paper, Subject: Migraine Headaches
- Extract of Army Regulation (AR) 40-501, Medical Services-Standards of Medical Fitness
- Department of Veterans Affairs (VA) correspondence
- 2-HQ USAREC Forms 3.3, Letter of Recommendation-Warrant Officer Procurement Program
- Civilian Employment Resume

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. Counsel states, in effect:

a. The applicant enlisted in the USAF Reserve on 17 August 2007, for a commitment of eight years, of which four years was to be served on active duty. The applicant entered active duty in the USAF on 22 January 2008. On 22 June 2008, the applicant extended his enlistment for 24 months, in addition to his six-year enlistment. During his service the applicant received the following USAF awards: Achievement Medal with two oak leaf clusters, the Meritorious Unit Award, Outstanding Unit Award, Good Conduct Medal with two oak leaf clusters, the National Defense Service Medal, the Global War on Terrorism Expeditionary Medal, the Nuclear Deterrence Operations Service Medal, the Overseas Ribbon Long, the Expeditionary Service Ribbon with Gold Border, the Longevity Service with Oak Leaf Cluster, the Noncommissioned Professional Military Education Medal with Oak Leaf Cluster, Small Army Expert Marksmanship Ribbon with Service Star, and a Training Ribbon.

b. On 18 July 2017, the applicant was honorably discharged from the USAF for the purpose of accepting a commission or warrant in another branch of service. At the time of his separation, he had completed 9 years, 5 months, and 27 days of net service for the period.

c. The applicant enlisted in the Regular Army on 31 July 2017. At the time he was suffering from chronic migraines, anxiety, and depression, as well as lower back pain, ankle and foot arch pain, and trouble with sleeping. The applicant saw a neurologist and therapist on base regarding his migraines, depression, and anxiety. The applicant was removed from training while he underwent treatment and was subsequently removed from flight status in November of 2017. After receiving three months of treatment, the applicant's migraines were not able to be controlled. The applicant did not pass his flight physical and therefore was unable to attend Warrant Officer Training. In addition, he was unable to be reclassified into another military occupational specialty (MOS).

d. The applicant has been subjected to a material error of procedure and a material error of discretion. Under AR 40-501, a Soldier experiencing migraines is to be referred to a neurologist for three months of therapy and if the migraines are not adequately controlled at the end of the three months, the Soldier is to be referred to a PEB. The applicant suffered from migraines, as well as depression and anxiety. He was referred to a neurologist on base and he actively sought treatment for his migraines. The

applicant's symptoms had not improved in a three-month timeframe, indicating he should have been referred to a PEB. Instead, he was simply discharged from the U.S. Army.

e. The applicant currently has a service-related disability rating of 90-percent all from injuries and medical diagnoses he had during his time in the U.S. Army. Being examined by the PEB is the most crucial step in allowing a service member to receive a medical retirement, and it was a material error in the applicant's case to not recommend for an examination of his known injuries that were exacerbated by his time in service and the given provision of Army Regulations. Further, it was a material error of discretion for the applicant's chain of command to not refer him to a PEB given his previous referrals to numerous medical professionals to attempt to combat his serious symptoms. The applicant tried his best to overcome his disabilities, and when he was not able to, he should have been allowed to receive a medical retirement. His chain of command simply decided to discharge him for his inability to pass physical standards. The applicant's chain of command should have used their discretion to determine the applicant was a prime candidate to go before a PEB. The applicant served honorably for over ten years and would have continued to serve had it not been for his injuries and disabilities. It is respectfully submitted that the applicant suffered a material error of procedure and a material error of discretion when he was not referred to a PEB so that he would be able to receive a medical retirement.

e. Not only has the applicant been the victim of a material error of procedure and discretion, but he has also clearly been subjected to a material injustice due to him not receiving a medical retirement. By not receiving a medical retirement, the applicant has been unable to receive benefits to which he is entitled. The applicant sacrificed his mental and physical health in service to his country but has been left incomplete and with a diminished quality of life without proper treatment and remuneration. He continues to struggle with numerous injuries and illnesses that were caused and exacerbated by his time in the service. Further, the applicant is forced to deal with these issues on his own, without help and benefits he would receive if he had been correctly given a medical retirement. The applicant has suffered immensely from his disabilities that resulted from his service and it has been a material injustice to him that he has been unable to receive the benefits of a medical retirement. If the material error had not occurred, and the applicant had been examined by the Medical Evaluation Board (MEB), these injustices to his life after discharge would have been avoidable.

f. Following his discharge, and despite the injustice he continues to face, the applicant has been able to secure employment as a Site Reliability Engineer. Prior to this employment, the applicant worked as a Space Systems Operator for three years, where he took on numerous tasks such as creating the training videos for their training, tactics, and procedures. Numerous people have written on behalf of the applicant. Captain [REDACTED] commends the applicant for his positive, earnest, and professional manner

while serving. She acknowledges he is willing to tackle new challenges and will succeed in whatever he pursues. The applicant was highly recommended for the U.S. Army Warrant Officer Program and would have undoubtedly succeeded in that position had it not been for his ailments. Despite his migraines and mental illnesses, the applicant was still able to keep his positive work attitude and continue to show his commitment to the U.S. Military.

g. It is respectfully submitted that the applicant has suffered a material injustice due to him not receiving a medical retirement. The applicant clearly was suffering from disabilities at the time of his discharge, and it has negatively affected his life that he was unable to receive the designation of medical retirement and the benefits that come with a retirement status.

h. Considering the facts and arguments presented, the applicant requests a PEB be convened in order to determine if he should have been medically retired from the U.S. Army rather than honorably discharged. Further, request the applicant be provided with his full disability retirement package for his countless years of selfless service to the U.S. Military.

2. The applicant states, in effect, that –

a. He left the USAF in 2017 to pursue a career as a helicopter pilot in the U.S. Army. He began Warrant Officer Training in July 2017, but was removed after only a few weeks to be treated for his anxiety and migraines. Subsequently, he was removed from flight status in November 2017 because he could not pass the flight physical. He was unable to reclassify into another MOS and therefore, discharged after 10 months.

b. By regulation, a Soldier should be referred to a neurologist after three months of trial therapy, if not adequately controlled at the end of the three months the Soldier will be seen be a MEB for referral to PEB. He further contends that while serving in the U.S. Army he was treated for migraines, anxiety, depression, lower back pain, ankle and arch pain, and sleeping trouble.

3. The applicant enlisted in the USAF on 22 January 2008.

4. While serving in the USAF, the applicant completed a Flight Physical, 15 June 2016. The Report of Medical History contains the question: Have you ever had, or do you now have frequent or server headache? The applicant responded “NO.” On 18 August 2016, he was found qualified for Class 1W, Warrant Officer Aviator Training Applicant Flying Duty.”

5. On 18 July 2017, he was discharged from USAF for the purpose of accepting a commission or warrant in the U.S. Army. He completed a total of 9 years, 5 months, and 27 days net service for the period.
6. On 31 July 2017, he enlisted in the Regular Army on 31 July 2017.
7. His record is void of a physical profile or referral to the Disability Evaluation (DES).
8. On 7 June 2018, the applicant was honorably discharged from the U.S. Army under the provisions of AR 635-200, Active Duty Enlisted Administrative Separations, chapter 5-11, for failing to medical/physical procurement standards. He completed 10 months, and 7 days of net active service for the period.
9. The applicant provides:
 - a. An Information Paper- Subject: Migraine Headaches, 1 October 2013, which states in part, that the PEB determines whether those medical conditions that fall below retention standards, alone or in combination, prevent the Soldier from performing their Primary MOS duties, basic Soldier Skills, and passing an Army Physical Fitness Test (APFT). If the PEB determines the migraine condition to render the Soldier unfit for duty and compensable, the VA will assign a disability rating under the Veterans Affairs Schedule for Rating Disabilities (VASRD).
 - b. An extract from AR 40-501, which list migraines as a case for referral to the DES when manifested by incapacitating attacks that interfere with duty or social activities three or more days per month. All such Soldiers will be referred to a neurologist, who will ascertain the cause of the headaches. The neurologist will determine whether prophylactic therapy (up to 6 months) or referral to the DES is warranted. If the headaches are not adequately controlled at the end of the 6 months, the Soldier will be referred to the DES. If the neurologist feels the Soldier is unlikely to respond to therapy, the Soldier can be referred directly to the DES.
 - c. Neurology Progress Notes, 27 December 2017, which show the applicant was treated for migraines (which occurred 2 times per month) and adjustment disorder with anxiety.
 - d. His VA service connected disability with ratings and benefits documentation which show the applicant is currently receiving disability compensation at the combined rate of 90% for the following conditions:
 - sleep apnea, 30%
 - medical condition not legible, 10%
 - generalized anxiety disorder (panic attacks), 70%

- hemorrhoids, 0%
- patellofemoral pain syndrome, right knee, 10%
- herpes simplex virus II with scar on penis and buttocks, 0%
- migraine headaches, 30%
- left ankle strain, 10%
- varicocele, left testicle, 10%
- patellofemoral pain syndrome, left knee, 10%
- bilateral plantar fasciitis (claimed as bilateral pes planus), 10%
- tinnitus, 10%
- lumbosacral strain (claimed as lumbago), 10%

e. Letters of Recommendation from his former USAF supervisor and commander. These letters speak to the applicant's professionalism, work ethic, character, and competency for acceptance into the U.S. Army Warrant Officer Corps.

f. A civilian employment resume for the period 2008 to present.

10. Regulatory guidance provides Soldiers who were not medically qualified under procurement medical fitness standards when accepted for enlistment or who became medically disqualified under these standards prior to entry on active duty or active duty training from initial entry training, may be separated. Such conditions must be discovered during the first six months of active duty. Such findings will result in an entrance physical standards board. This board must also be convened within the Soldier's first six months of active duty. Additionally, the causes for medial unfitness for flying duty Classes 1 (warrant officer candidate, commissioned officer or cadet) include a history of chronic, recurrent, or incapacitating headaches (APL, Headache and Migraine).

11. MEDICAL REVIEW:

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

b. The applicant is applying to the ABCMR in essence requesting a referral to the Disability Evaluation System (DES). He states:

“A few weeks after arriving to Warrant Officer Training, I was seen for anxiety and migraines. I was then removed from training while undergoing treatment/diagnosis. I was removed from flight status in Nov 2017 due to not have a passing flight physical. I could not attend Warrant Officer Training and was also unable to reclass into another MOS. I was separated from the Army after 10 months. While in the Army I was seen for the following medical issues:

- Migraines: Saw a neurologist off base (Dr. ██████ Neurology)
- Anxiety: Saw a therapist on base
- Depression: Saw a therapist on base
- Lower back pain: Saw a chiropractor on base
- Ankle and arch pain: Saw a physical therapist on base
- Sleeping trouble: Saw PA and therapist on base

I was recently going through some old paperwork and discovered a paragraph in AR 40-501.

‘g. Migraines, referred to a neurologist 3-month trial of therapy, if not adequately controlled at the end of 3 months Soldier will be MEB for referral to PEB.’

My migraines were not controlled after 3months. And I feel I should have been put up to a medical board.”

c. The Record of Proceedings outlines the applicant’s military service and the circumstances of the case. The applicant’s DD 214 for the period of service under consideration shows he entered the regular Army on 31 July 2017 and was honorably discharged on 07 June 2018 under the separation authority provided by paragraph 5-11 of AR 635-200, Active Duty Enlisted Administrative Separations (19 December 2016): Separation of personnel who did not meet procurement medical fitness standards.

Paragraphs 5-11a and 5-11b of AR 635-200:

“5–11. Separation of personnel who did not meet procurement medical fitness standards:

a. Soldiers who were not medically qualified under procurement medical fitness standards when accepted for enlistment or who became medically disqualified under these standards prior to entry on AD [active duty] or ADT[active duty for training] for initial entry training, may be separated. Such conditions must be discovered during the first 6 months of AD. Such findings will result in an entrance physical standards board. This board, which must be convened within the Soldier’s first 6 months of AD, takes the place of the notification procedure (para 2–2) required for separation under this chapter.

b. Medical proceedings, regardless of the date completed, must establish that a medical condition was identified by an appropriate military medical authority within 6 months of the Soldier's initial entrance on AD for RA or during ADT for initial entry training for ARNGUS and USAR that—

(1) Would have permanently or temporarily disqualified the Soldier for entry into the military service or entry on AD or ADT for initial entry training had it been detected at that time.

(2) Does not disqualify the Soldier for retention in the military service per AR 40–501, chapter 3. As an exception, Soldiers with existed prior to service conditions of pregnancy or HIV infection (AR 600–110) will be separated.”

d. A Report of Medical Examination shows the United States Army Aeromedical Center determined the applicant was medically qualified for full flying duties as a student on 18 August 2016.

e. The applicant underwent a command referred mental health evaluation on 14 August 2017 at Ft. Novosel (formerly Ft. Rucker) at which time he informed the provider he had previously been treated for mental health issues which had become worse as he was there for initial rotary wing flight training, aka flight school.

“Patient reported, ‘stress, anxiety, panic attacks, depression, dealing with these issues for the past 7 years.’ Counselor gleaned information regarding presenting problem and desires for treatment. ‘Command told me to take care of myself before going to warrant officer college.’

‘I have been in the Army for 14 days. I came from Air Force and want to become a helicopter pilot.’ Patient continued to disclose how symptoms have escalated since the transition thus prompting presentation to BH. Patient reported a prior history of mental health concerns and/or treatment addressed via MFLC and chaplains. BHDP [Behavioral Health Data Portal] was reviewed with patient. BHDP revealed the following high concern issues – Distress, Depression, Anxiety, and Insomnia.”

f. The provider discussed her findings with the applicant's flight surgeon. She stated “Initial presentation does not support patient continuing current career path.” Given these new revelations, she noted there was a pending review of his Position of Significant Trust (POST) Recruiter clinical statement: It is highly unlikely he would have been found qualified for aviation duties if the applicant had initially been honest with the

flight surgeon performing his flight physical. He was removed from Warrant Officer Candidate School (WOCS). Other than flight duties, the provider determined he was otherwise fully qualified to serve:

“SM [Service Member] has no duty restrictions necessitating a profile. Patient meets the retention standards of Chap 3, AR 40-501 and AR 635-200 for fitness and suitability for continued service. Patient remains world-wide qualified and cleared for any TDY [temporary duty] or deployments. No alterations to duty status or security clearance recommended at this time.”

g. The applicant was seen on 28 August 2017 for a three-year history of headaches (HA):

“HA eval. Pt [patient] has been experiencing HA off and on for the past three years. Recently he's noted tunneling of his vision when he gets the HA. He describes the pain as being both on top of his head and behind his eyes. He's never sought treatment before.”

h. He was diagnosed with “Migraine with aura, not intractable, without status migrainous. This medical condition also appears to have been kept from his flight surgeon.

i. When evaluated by neurology on 27 September 2017, the provider noted he had been diagnosed with “Adjustment Disorder With Anxiety” and she diagnosed him with “Migraine with Aura but without intractable” and initiated treatment with oral medication. His 27 December 2017 neurology follow-up encounter shows the applicant was under treatment for “Headaches/Migraines: 2 headaches per month. Treximet does not work as Maxalt. Adherent and tolerant. No new issues.”

j. Paragraph 3-30g of AR 40-501, Standards of Medical Fitness (14 June 2017) addresses the retention standards and causes for referral to a medical evaluation board (MEB) for Soldiers with headaches:

“g. Migraine, tension, or cluster headaches, when manifested by frequent incapacitating attacks. All such Soldiers will be referred to a neurologist, who will ascertain the cause of the headaches. If the neurologist feels a trial of prophylactic medicine is warranted, a 3-month trial of therapy can be initiated. If the headaches are not adequately controlled at the end of the 3 months, the Soldier will undergo an MEB for referral to a PEB. If the neurologist feels the

Soldier is unlikely to respond to therapy, the Soldier can be referred directly to MEB.

k. The 27 December 2017 progress shows the applicant did not have “frequent, incapacitating headaches” as his headaches were controlled with just 2 per month.

l. His penultimate behavioral health encounter shows he was doing relatively well and preparing to separate from the Army:

“Patient presents today for a follow up appointment. Patient states he’s been doing well for the most part. He states he is getting ready to separate from the Army. He states he should be out by March 20 give or take 5 days. He states right now he is busy with staying OUT processing.

He states he is getting ready to move to [REDACTED] and applying for jobs. He states he still waiting to hear back on the electrician’s apprentice child. He states the job for border patrol is under review. He states nothing is really concrete right now. He states his anxiety has gone up with the added stress of his pending separation. He states his panic attacks have increased as well. He states the hydroxyzine has been working okay for sleep ...”

m. Review of EMR encounters for his back and ankle/foot during this period of service shows he received fifteen chiropractic treatments on his back from August 2017 thru May 2018. There are no imaging studies, encounters with specialist(s), or evidence this affected his abilities to Soldier.

n. On 19 January 2018, the applicant was evaluated by physical therapy for a 2-month history of running associated foot pain. He was treated by physical therapy with stretching, exercises, and ultrasound. His final encounter dated 9 February 2018 shows he had responded well to treatment:

“Pt presents with minimal pain today, responded well to treatment, increased reps of most therex this visit which pt reports as a good challenge and no pain increase. Reports a decrease in stiffness/tightness ... “

o. The applicant’s separation packet was not submitted with the application or uploaded into iPERMS. None the less, the applicant’s involuntary administrative separation under paragraph 5-11 of AR 635-200 was appropriate: He had two medical conditions which failed enlistment standards according to paragraphs 2-26e (Headaches) and 2-27k (Anxiety disorders) of AR 40-501:

“2-26e. History of recurrent headaches, including, but not limited to, migraines and tension headaches that interfere with normal function in the past 3 years, or of such severity to require prescription medications, do not meet the standard.”

“2-27k. Current or history of anxiety disorders or panic, agoraphobia, social phobia, simple phobias, obsessive-compulsive, other acute reactions to stress, and post-traumatic stress disorder do not meet the standard.”

p. There is no evidence the applicant had any duty incurred medical condition which would have failed the medical retention standards of chapter 3 of AR 40-501, Standards of Medical Fitness, prior to his discharge. Thus, there was no cause for referral to the Disability Evaluation System. Furthermore, there is no evidence that any medical condition prevented the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his discharge.

q. JLV shows he has been awarded several VA service-connected disability ratings, including ratings for generalized anxiety disorder and migraine headaches. However, the 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. These roles and authority were granted by Congress to the Department of Veterans Affairs and are executed under a different set of laws.

r. It is the opinion of the ARBA Medical Advisor that a referral of his case to the DES is not warranted.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that partial relief was 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 applicant's petition, available military records and medical review, the Board considered the advising official opine, however, the Board determined the applicant did not have a break in service and separated from the Air Force with no noted medical concerns and joined the Army the following day. The Board found the applicant spent 9 years in the Air Force and was medically disqualified after 10 months in the Army. The Board agreed that based on counsel, there is sufficient evidence to support referral to DES, notwithstanding the medical review. Therefore, the Board granted partial relief.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

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

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined that the evidence presented was 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 directing the applicant be entered into the Disability Evaluation System (DES) and a Medical Evaluation Board concerned to determine whether the applicant's conditions(s), met medical retention standard at the time-of-service separation.

a. In the event that a formal physical evaluation board (PEB) becomes necessary, the individual concerned may be issued invitational travel orders to prepare for and participate in consideration of his case by a formal PEB if requested by or agreed to by the PEB president. All required reviews and approvals will be made subsequent to completion of the formal PEB.

b. Should a determination be made that the applicant should have been separated under the DES, these proceedings will serve as the authority to void his administrative separation and to issue him the appropriate separation retroactive to his original separation date, with entitlement to all back pay and allowances and/or retired pay, less any entitlements already received.

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 review of the applicant's medical conditions by a Physical Evaluation Board (PEB) and retroactive retirement due to disability.

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. 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) 635-200, Active Duty Enlisted Administrative Separations, sets forth the basic authority for the separation of enlisted personnel.

a. Paragraph 1–33, Disposition through medical channels. Except in separation actions under chapter 10 and through medical channels that takes precedence over administrative separation processing.

b. When the medical treatment facility (MTF) commander or attending medical officer determines that a Soldier being processed for administrative separation under chapters 7, Defective Enlistments/Re-enlistment and Extensions-Fraudulent Entry, or Chapter 14, Misconduct, does not meet the medical fitness standards for retention in AR 40–501, Medical Services-Standards of Medical Fitness, Chapter 3, he/she will refer the Soldier to a Medical Evaluation Board (MEB) in accordance with AR 40–400, Patient Administration. The administrative separation proceedings will continue, but final action by the separation authority will not be taken, pending the results of MEB.

(1) If the MEB findings indicate that referral of the case to a Physical Evaluation Board (PEB) is warranted for disability processing under the provisions of AR 635–40, Disability Evaluation for Retention, Retirement, or Separation, the MTF commander will furnish copies of the approved MEB proceedings to the Soldier’s General Court Martial Convening Authority (GCMCA) and unit commander. The GCMCA may direct, in writing, that the Soldier be processed through the physical disability system when action under the UCMJ has not been initiated, and one of the following has been determined:

(a) The Soldier’s medical condition is the direct or substantial contributing cause of the conduct that led to the recommendation for administrative elimination.

(b) Other circumstances of the individual case warrant disability processing instead of further processing for administrative separation.

(2) The authority of the GCMCA to determine whether a case is to be processed through medical disability channels or under administrative separation provisions will not be delegated.

(3) The GCMCA’s signed decision to process a Soldier through the physical disability system will be transmitted to the MTF commander as authority for referral of the case to a PEB.

(a) Copies of the GCMCA’s decision will be furnished to the unit commander and included in the administrative separation proceedings.

(b) The unit commander will suspend processing of the administrative separation action pending the PEB.

(1) If the Soldier is found physically fit, the administrative separation action will be resumed.

(2) If the Soldier is found physically unfit, the administrative separation action will be abated.

b. Paragraph 5-11, Separation of personnel who did not meet procurement medical fitness standards, states Soldiers who were not medically qualified under procurement medical fitness standards when accepted for enlistment or who became medically disqualified under these standards prior to entry on active duty or active duty training from initial entry training, may be separated. Such conditions must be discovered during the first six months of active duty. Such findings will result in an entrance physical standards board. This board must also be convened within the Soldier's first six months of active duty.

c. Paragraph 5-12, Discharge for failure after enlistment to qualify medically for flight training, states Soldiers who enlist for warrant officer flight training option and who, after enlistment, fail to qualify medially for flight training, may be discharged from the Army. The following conditions apply:

(1) Eligibility for discharge will be based on a determination by the Commander, U.S. Army Aeromedical Center, Fort Rucker, AL that (1) the medical condition would permanently disqualify the Soldier for flight training (2) the condition does not disqualify the Soldier for retention in the military service per AR 40-501, chapter 3.

(2) To be eligible for discharge under this paragraph, the Soldier must submit a written request for discharge to his/her commander. It must be submitted withing 30 days of the date the Commander, U.S. Army Aeromedical Center, finds the Soldier disqualified for flying.

(3) Applications for discharge will be processed promptly and separations will be accomplished withing 72 hours following approval by the discharge authority.

(4) Soldiers who do not meet retention medical fitness standards will be processed per AR 635-40.

3. AR 40-501, Medical Services-Standards of Medical Fitness, governs medical fitness standards for enlistment, induction, and appointment, including officer procurement programs and medical standards and polices for aviation.

a. The causes for referral to an MEB for migraine, tension, or cluster headaches, when manifested by frequent incapacitating attacks. All such Soldiers will be referred to a neurologist, who will ascertain the cause of the headaches. If the neurologist feels a trial of prophylactic medicine is warranted, a 3-month trial of therapy can be initiated. If the headaches are not adequately controlled at the end of the 3 months, the Soldier will undergo an MEB for referral to a PEB. If the neurologist feels the Soldier is unlikely to respond to therapy, the Soldier can be referred directly to MEB.

b. Paragraph 4-22, Neurological Disorders, states, in part, the causes for medial unfitness for flying duty Classes 1 (warrant officer candidate, commissioned officer or cadet) include a history of chronic, recurrent, or incapacitating headaches (APL, Headache and Migraine).

4. AR 635-40, Personnel Separations-Disability Evaluation for Retention, Retirement, or Separation states:

a. Military Occupational Specialty Administrative Retention Review (MAR2). Soldiers must be of sufficient medical fitness to satisfactorily perform their PMOS or area of concentration (AOC), as well as those functional activities listed on the DA Form 3349, Physical Profile, which all Soldiers must perform regardless of PMOS or AOC. All functional activities listed on the DA Form 3349 must be marked "YES" for Soldier to be eligible for referral to a MAR2. The MAR2 is an administrative process for Soldiers who meet the medical retention standards of AR 40-501, but who nonetheless may not be able to satisfactorily perform duties of their PMOS or AOC in a worldwide field or austere environment because of medical limitations. The MAR2 process is used to determine whether a Soldier will be retained in their PMOS or AOC or reclassified into another PMOS or AOC. Soldiers who do not meet PMOS or AOC standard and who do not qualify for reclassification will be referred into the DES.

b. The DES begins for a Soldier when either:

(1) The Soldier is issued a permanent profile 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) one year of diagnosis, the Soldier must be assigned a P3/P4 profile to refer the Soldier to the DES. Any DA Form 3349 generated for a USAR Soldier in a drilling Troop Program Unit or AGR status must be validated by the U.S. Army Reserve Command's Medical Management Center before their referral into the DES.

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

c. An MEB is convened to determine whether a Soldier's medical condition(s) meets medical retention standards per AR 40-501. With the exception of cases referred by

MAR2, an MEB may determine that a Soldier's condition(s) meet medical retention standards and recommend the Soldier be returned to duty.

d. PEBs determine 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 have benefit implications under other provisions of law.

5. Title 38, USC, section 1110, General - Basic Entitlement: 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.

6. Title 38, USC, section 1131, Peacetime Disability Compensation - Basic Entitlement: 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.

7. The Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records on 25 July 2018, regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. Boards for Correction of Military/Naval Records 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 Boards in application of their equitable relief authority. In determining whether to grant relief on the basis of equity, injustice, or clemency grounds, Boards 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.

8. Section 1556 of Title 10, U.S. Code, 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.

9. AR 15-185, ABCMR, states the ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

//NOTHING FOLLOWS//