

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 18 September 2024

DOCKET NUMBER: AR20230009138

APPLICANT REQUESTS: in effect, physical disability retirement in lieu of physical disability separation with severance pay

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

- DD Form 149 (Application for Correction of Military Record)
- DA Form 3349-SG (Physical Profile Record), 20 November 2020, 11 January 2022, and 9 March 2022
- 13 pages of Standard Forms 600 (Chronological Record of Medical Care), January 2022 – March 2022
- Office of Soldiers' Medical Evaluation Board (MEB) Counsel memorandum, 12 May 2022
- applicant's self-authored letter, 12 May 2022
- witness statement, 12 May 2022
- DD Form 214 (Certificate of Release or Discharge from Active Duty), ending 15 June 2022
- 43 pages of Department of Veterans Affairs (VA) medical records, June 2022 – September 2022

FACTS:

1. The applicant states he strongly believes that he was not given what he deserved at the time of his discharge based on his medical conditions that made him unable to perform his military duties. For example, his hip was rated 0 percent and his mix-disorder mental health, with which he still battles, was not even rated as unfitting for service. He believes his separation was an error and unjust.
2. The applicant enlisted in the Regular Army on 21 April 2020, and was awarded the Military Occupational Specialty (MOS) 12N (Horizontal Construction Engineer).
3. A physical profile is used to classify a Soldier's physical disabilities in terms of six factors or body systems, as follows: "P" (Physical capacity or stamina), "U" (Upper extremities), "L" (Lower extremities), "H" (Hearing), "E" (Eyes), and "S" (Psychiatric) and is abbreviated as PULHES. Each factor has a numerical designation: 1 indicates a high

level of fitness, 2 indicates some activity limitations are warranted, 3 reflects significant limitations, and 4 reflects one or more medical conditions of such a severity that performance of military duties must be drastically limited. Physical profile ratings can be either permanent (P) or temporary (T).

4. A DA Form 3349 shows:

a. The applicant was given the following permanent and temporary physical profiles, reflecting a PULHES of 213111:

- a permanent rating of P2 for shaving profile, ingrown facial hair, razor bumps, effective 20 November 2020
- a permanent rating of L3 for lower back/tailbone injury/pain, effective 11 January 2022
- a permanent rating of L3 for chronic pain after hernia repair (left), effective 11 January 2022
- a temporary profile (rating unlisted) for migraine headache (bilateral) of moderate severity effective approximately 7 March 2022, with an expiration date of 5 June 2022

b. His physical profiles limited him in most functional activities and numerous additional activities, including lifting/carrying, standing, no airborne operations, no Kevlar helmet, no field duties, no running, ensure 8 hours of consecutive sleep per 24 hours, and regular breaks at work.

5. The applicant sent multiple Standard Forms 600, dated between January 2022 – March 2022, which have been provided in full to the Board for review, and in pertinent part show:

a. He was seen at the Womack Army Medical Center (WAMC), Pain Center Pharmacy on 23 January 2022, for pain management of other chronic pain. Head, neck, genitourinary, and musculoskeletal pain were reviewed and no change in medication was recommended.

b. He was again seen at the WAMC Pain Center Pharmacy on 25 February 2022, as a follow up for chronic pain. His Naproxen prescription was renewed, and he was educated on the use of capsaicin cream, which was prescribed. He was released without limitations and was to follow up as needed.

c. He was seen at the WAMC Neurology Clinic on 25 February 2022 for migraine pain and prescription renewal. He was being treated with Topamax and Imitrex which was working well to control his headaches without adverse side effects. Within the notes for this visit are Magnetic Resonance Imaging (MRI), brain without contrast, comments

from 19 November 2021, which show an MRI was given on that date for debilitating headaches 2 times per month with associated visual disturbances, loss of balance, and tinnitus. The impression was bilateral maxillary sinus partial opacification. The applicant was released from the 25 February 2022 visit without limitations and was to follow up in the Neurology Clinic in 6 weeks or as needed.

d. He was seen at the WAMC Neurology Clinic on 7 March 2022, for medication refill and complaints of still having breakthrough headaches. The applicant's medication dosage was increased, and he was given a temporary physical profile for his headaches.

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

7. A DA Form 199 (Informal Physical Evaluation Board (PEB)), shows:

a. An informal PEB convened on 11 April 2022, where the applicant was found physically unfit with a recommended rating of 20 percent and that his disposition be separation with severance pay.

b. The applicant's medical conditions determined to be unfitting were:

(1) Lumbosacral spine degenerative arthritis with diffuse epidural lipomatosis (MEB diagnosis (Dx) 1); 20 percent.

(2) Left inguinal hernia status post repair with residuals (MEB Dx 2), 0 percent.

c. The combined effect was considered in the fitness determination for conditions referred by the MEB. The applicant's medical conditions determined not to be unfitting were MEB Dx 3-21 (the diagnoses are not specified on this form).

d. On 13 April 2022, the applicant signed the form indicating he had been advised of the findings and recommendations of the informal PEB, concurred with the findings and recommendations, and waived a formal hearing of his case. He additionally indicated he did not request reconsideration of his VA Ratings.

8. U.S. Army Installation Management Command Orders 126-0295, 6 May 2022, reassigned the applicant to the U.S. Army transition point effective 9 May 2022, for processing of his disability separation with severance pay with a disability rating of 20 percent and a discharge date of 15 June 2022.

9. An Office of Soldiers' MEB Counsel memorandum addressed through to the PEB President to the U.S. Army Physical Disability Agency (USAPDA), dated 12 May 2022, provided the applicant's rebuttal and appeal to the PEB findings and shows:

a. This memorandum was to serve as the applicant's nonconcurrence with his DA Form 199 and request to have his case returned to the PEB for a scheduled formal hearing with appointed counsel. He requested his migraine headaches and left hip strain, MEB Dx 7 and 12 respectively, be found unfitting by the PEB.

b. The applicant provided a personal letter requesting review of his migraine headaches and left hip as new unfitting conditions. Additionally, First Lieutenant (1LT) S\_\_\_\_ provided written testimony as to how the applicant's headaches and hip interfere with his abilities to perform the duties of his MOS. A Physical Profile Record has also been provided that shows his temporary profile for migraine headaches for over 50 days with all functional activities being restricted, including the ability to deploy. He also attached four recent service treatment records for consideration, two of which reflect breakthrough headaches despite medication and two of which reflect pain in the hip area. Lastly, the VA found the applicant's migraine headaches are frequently completely prostrating with prolonged attacks, resulting in a proposed rating of 50 percent for migraine headaches.

c. The applicant stressed that his current conservative treatments were failing to treat his chronic conditions and requested the PEB entertain his appeal and schedule a formal hearing. If the PEB is unwilling to grant this request, the applicant asks that the APDA, as the final reviewing authority, make said finding or direct this case to be returned to the PEB for a formal hearing. If this request is not granted, the applicant requests a delay in his separation date to allow him to submit a VA Rating Reconsideration (VARR).

10. The applicant's self-authored letter, dated 12 May 2022, requests a reevaluation of his unfitting conditions. He stated his migraine headaches had gotten worse over the past 3 months, preventing him from doing his basic work tasks as he spends most of his time battling the headache. It affected his thinking, causing confusion, dizziness, and sensitivity to light and noise, requiring him to lay down for hours in a dark room to wait for the situation to calm down. He had been prescribed multiple medications by doctors at the Neurology Clinic as well as the Pain Clinic Pharmacy. This condition, along with his hip injury, were preventing him from going to Airborne School, climbing up and down military equipment and loading/offloading things; therefore, he requested reevaluation of his left hp pain after hernia repair and severe migraine headaches.

11. A witness statement from 1LT S\_\_\_\_, dated 12 May 2022, shows that the applicant's left hip injury and constant migraines made it difficult for him to participate in physical training, field exercises/rotations, and marksmanship ranges since his arrival at

their unit. His hip injury and migraine headaches severely restricted him from performing his MOS 12N, which requires the use of heavy construction engineer equipment, impeded by his conditions. His conditions have also led to further complications in his personal life and everyday activities with his family and children, such as his inability to participate in birthday parties, carry his children, play sports, leaving him feeling depressed, angry and frustrated. Please reevaluate the extent of his injuries and the lasting impact they have on his life.

12. The applicant's DD Form 214 shows he was honorably discharged on 15 June 2022, under the provisions of Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation) due to disability with severance pay, non-combat related. He was credited with 2 years, 1 month, and 25 days of net active service.

13. The applicant provided 43 pages of VA medical records, dated between June – September 2022, which have been provided in full to the Board for review, and in pertinent part show his diagnosis and treatment of adjustment disorder with mixed anxiety and depressed mood, allergic rhinitis, chronic headaches, chronic low back pain, erectile dysfunction, gastroesophageal reflux disease (GERD).

14. In the adjudication of this case, an advisory opinion was provided by the USAPDA on 15 November 2023, which shows:

a. On 11 April 2022, the informal PEB found the applicant unfit for the following medical conditions: (1) Lumbosacral spine degenerative arthritis with diffuse epidural lipomatosis (MEB Dx 1 ); and (2) Left inguinal hernia status post repair with residuals (MEB Dx 2). The Board recommended a rating of 20 percent and that the Soldier's disposition be separated with severance pay. The PEB determined that the Soldier was fit for MEB Dx 3-21.

b. The applicant initially concurred with the PEB findings on 13 April 2022, waived a formal hearing, and indicated that he did not request reconsideration of his VA ratings (which determined he was 100 percent disabled). However, on 12 May 2022, he submitted through counsel a request to non-concur with his DA Form 199 and have his case returned to the PEB for a scheduled formal hearing. The appeal was considered by the USAPDA on 16 May 2022, and denied for failure to demonstrate good cause to re-open the matter.

c. The evidence of record demonstrates that the PEB, on 11 April 2022, carefully considered the applicant's medical conditions and rendered findings that are supported by the facts in existence at that time. For instance, with respect to the condition, Migraine/Headaches, the NARSUM stated, "The Service Member underwent initial evaluation at WAMC Neurology on 27 January 2022 and the condition was treated conservatively with Imitrex and Topamax." As it relates to the Left Hip Strain, the

NARSUM stated, "The Service Member underwent evaluation by WAMC Pain Management on 9 December 2021 and the condition was not determined to be duty limiting for military service or cause the Service Member to fail retention standards. The condition has not required evaluation or treatment by Orthopedics over the past 12 months. Radiographs have been negative. The Service Member has multiple temporary profiles over the past 12 months for a hip condition. However, the Service Member was determined to be experiencing postop pain from the left hip."

d. In his 12 May 2022 rebuttal and appeal, the applicant's counsel acknowledged the initial 13 April 2022 concurrence on the DA Form 199. The appeal included a personal letter from the applicant and a memorandum from 1LT B\_\_\_\_ S\_\_\_\_, noting the limiting effects of his migraine headaches and left hip condition, as well as recent treatment notes for those conditions. Notably, the appeal did not contend (as the applicant does presently) that the PEB erred with respect to his behavioral condition.

e. Medical records accompanying the appeal showed that, in January 2022, the applicant was being treated at Womack-Bragg Pain Center Pharmacy for chronic left lower abdominal/groin pain and axial low back pain. Treatment consisted of medication management. Additional medical records indicated that, on 25 February 2022, the applicant had a follow up appointment at the Womack-Bragg Neurology Clinic for migraines in which it was noted he was being treated with Topamax 50 mg and Imitrex 50 mg and the "medication is working well to control his headaches without adverse side effects." His physical exam and imaging were unremarkable with the exception of some partial opacification of the bilateral maxillary sinus shown on MRI. The appeal also included a 7 March 2022 treatment note from the Womack-Bragg Neurology Clinic in which the applicant self-reported breakthrough headaches and requested a headache profile. His Topamax dosage was increased to 100 mg at bedtime with 1 refill, and he was issued a headache profile for 90 days.

f. The applicant's appeal was considered by the USAPDA on 16 May 2022, and denied for failure to demonstrate good cause to re-open the matter. Specifically, the USAPDA found, "It is apparent from the most recent medical evidence that the Soldier is still being treated for the medical conditions and that based upon the treatment records the conditions, while not having responded to treatment as one would have hoped, also do not appear to have worsened. As such, good cause does not exist to reopen the matter."

g. In his current application for the correction of military records, the applicant states that he "strongly believe[s] that...[he] was not [given] what [he] deserved based on [his] medical conditions," but he does not present any new or preponderant evidence demonstrating error or injustice on the part of the PEB/USAPDA. Rather, the evidence shows that, at all relevant times, the applicant was being treated conservatively through medication management for both his migraines and left hip pain. There was little if any

treatment for behavioral health conditions, but medical records consistently showed that his mood was euthymic and his affect normal, with no homicidal or suicidal ideations. Based on the then-available evidence, the PEB properly determined those conditions to not be unfitting. The applicant concurred with the PEB findings and, thereafter, failed to establish good cause to re-open the matter for the reasons stated in its review of his appeal. Indeed, his appeal largely consisted of medical evidence that was available to and considered by the PEB. To the extent that the appeal included evidence not available to the PEB, that evidence only showed that his conditions may not have responded to treatment as one would have hoped but did not rise to the level of being unfitting.

h. Based upon the above and without any additional evidence, the applicant's application to correct his PEB ratings is found to be legally insufficient.

15. On 4 December 2023, the applicant was provided a copy of the USAPDA advisory opinion and given an opportunity to submit comments in rebuttal. On 11 December 2023, the applicant responded via email, which shows:

a. He appreciates the opportunity to comment on the advisory opinion. With regard to his migraine headache, it is true that he was seen at WAMC Neurology center on 27 January 2022; however, the Topamax never cured his migraine and instead he suffered from mild side effects including burning sensation, double vision and confusion, which he did complain to the doctor about, who changed his medication.

b. He is providing a copy of the physical profile he received at that time as a trial to control his migraine, which seriously inhibited him during his time of active service. The profile permitted him to wear sunglasses during work hours and in formations. It also gave him permission to always move to dark and quiet places for a short nap during working hours, which also confirms his unfitness for duty, as these actions are not allowed in the job description of someone who was trained to battle with the enemies. He used to be a great runner and running was his hobby, but today he finds it difficult to even walk due to his left hip injury.

c. In conclusion, he still believes his reason for leaving the military should have been physical disability retirement instead of physical disability separation. Thank you for your time and support in this issue.

16. 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.

17. MEDICAL REVIEW:

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

2. The applicant is applying to the ABCMR requesting additional medical conditions be determined to have been unfitting for continued service prior to his separation; a corresponding an increase in his military disability rating; and that his disability discharge disposition be changed from separated with severance pay to permanent retirement for physical disability. He states:

“I strongly believe that, at the time of my Discharge from Active-Duty military, I was not giving what I deserved based on my medical conditions which made me unable to fully perform my military task. For example, my hip was rated 0% , my migraine and mix-disorder mental health which I still battle with it till date was not rated service incapable.”

3. The Record of Proceedings details the applicant's service and the circumstances of the case. His DD 214 shows he entered the Regular Army on 21 April 2020 and was discharged with \$17,433.00 of disability severance on 15 June 2022 under provisions provided in paragraph 4-27c(3) of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (19 January 2017).

4. A Soldier is referred to the Integrated Disability Evaluation System (IDES) when they have one or more conditions which appear to fail medical retention standards reflected on a duty liming permanent physical profile. At the start of their IDES processing, a physician lists the Soldiers referred medical conditions in section I the VA/DOD Joint Disability Evaluation Board Claim (VA Form 21-0819). The Soldier, with the assistance of the VA military service coordinator, lists all other conditions they believe to be service-connected disabilities in block 8 of section II of this form, or on a separate Application for Disability Compensation and Related Compensation Benefits (VA Form 21-526EZ).

5. Soldiers then receive one set of VA C&P examinations covering all their referred and claimed conditions. These examinations, which are the examinations of record for the IDES, serve as the basis for both their military and VA disability processing. The medical evaluation board (MEB) uses these exams along with AHLTA encounters and



other information to evaluate all conditions which could potentially fail retention standards and/or be unfitting for continued military service. Their findings are then sent to the physical evaluation board for adjudication.

6. All conditions, both claimed and referred, are rated by the VA using the VA Schedule for Rating Disabilities (VASRD). The physical evaluation board (PEB), after adjudicating the case, applies the applicable ratings to the Soldier's unfitting condition(s), thereby determining his or her final combined rating and disposition. Upon discharge, the Veteran immediately begins receiving the full disability benefits to which they are entitled from both their Service and the VA.

7. On 11 January 2022, the applicant was referred to the IDES for "Lumbosacral Spine Degenerative Arthritis with Diffuse Epidural Lipomatosis" and "Status Post Left Inguinal Hernia Repair with Residuals." The applicant claimed sixteen additional conditions on a separate Applications for Disability Compensation and Related Compensation Benefits (VA Form 21-526EZ), including miraging headaches, anxiety/depression/insomnia", and "bilateral hip pain."

8. A medical evaluation board (MEB) determined the two referred conditions failed the medical retention standards of AR 40-501, Standards of Medical Fitness. The MEB determined nineteen other medical conditions met medical retention standards, including "Adjustment Disorder with Mixed Anxiety and Depressed Mood," "Migraine Headaches," and "left Hip Strain." From the MEB Narrative Summary (NARSUM) for the behavioral health condition:

"Adjustment Disorder with Mixed Anxiety and Depressed Mood:

The Service Member underwent evaluation at WAMC [Womack Army Community Hospital] Psychology on 1 February 2022. The Provider determined that a "BH [behavioral health] eProfile not clinically indicated at this time. Disposition: The SM's [Service Member]s' capacity to adequately perform military duties in assigned MOS [Military Occupational Specialty] is NOT negatively affected by a psychiatric condition. SM meets medical retention standards IAW AR 40-501, Paragraph 3-33. SM meets BH standards for deployment IAW theater-level Unified Combatant Command guidance. The condition has not resulted in extended/recurrent hospitalization, interference with duty, or required duty in a protected environment. Expiration date of the most recent temporary profile: 0."

9. Paragraph 3-33 of AR 40-501, Standards of Medical Fitness (27 June 2019) address the retention standards for "Learning, psychiatric, and behavioral health conditions. The causes for referral to an MEB for anxiety disorders and mood disorders are the same, and there is no probative evidence his condition would have required such a referral:

“(1) Persistence or recurrence of symptoms sufficient to require extended or recurrent hospitalization.

(2) Persistence or recurrence of symptoms that interfere with duty performance and necessitate limitation of duty or duty in a protected environment.”

10. From the NARSUM for his migraine headaches:

“Migraine Headaches:

The Service Member underwent initial evaluation at WAMC Neurology on 27 January 2022 and the condition was treated conservatively with Imitrex and Topamax. Expiration date of the most recent temporary profile: 0”

11. Paragraph 3-31g of AR 40-501 (27 June 2019) address the causes for referral to an MEB for headache disorders and there is no probative evidence his condition would have required such a referral:

“g. Migraine, tension, or cluster headaches. 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.”

12. From the NARSUM for his left hip strain:

“Left Hip Strain:

The Service Member underwent evaluation by the WAMC Pain Management [Service] on 9 December 2021 and the condition was not determined to be duty limiting for military service or cause the Service Member to fail retention standards. The condition has not required evaluation or treatment by Orthopedics over the past 12 months. Radiographs have been negative. The Service Member has multiple temporary profiles over the past 12 months for a hip condition. However, the Service Member was determined to be experiencing postop pain from the left hip.”

13. The referenced surgery is his left inguinal hernia repair on 19 November 2020. Encounters from pain management and primary care providers show the pain was nerve pain and not from the hip joint per se but secondary to this surgery and/or radicular pain secondary to his lumbar spine condition. From a 24 November 2021 encounter: “Hip pain: SM reports having pain in his left anterior hip area that radiates

along the medial aspect of his leg from his groin to near his medial malleolus.” From a 23 January 2022 Pain Pharmacy Encounter:

“Patient reports symptoms began less than one year ago after left inguinal hernia repair in NOV2020. He noted increased pain around the umbilicus and left lower quadrant with associated radiation of pain into the groin and scrotum. Patient also notes radiating pain down the medial aspect of the thigh past the knee and into the medial aspect of the foot with the groin pain. Symptoms have been treated with medication regimen of Gabapentin which has been able to decrease the baseline pain symptoms at rest but symptoms will return with increased activity. Since the surgery, symptoms are described as a dull, achy pain over the left lower quadrant with associated sharp radiation of pain/numbness/tingling into the groin/scrotum as well as the left lower extremity.”

14. On 1 March 2022, the applicant non-concurred with the MEB’s decision but declined the opportunity to request an Impartial Medical Review (IMR) and/or the opportunity to submit a written rebuttal. His case was forwarded to a physical evaluation board (PEB) for adjudication.

15. On 11 April 2022, the applicant’s informal PEB found the two referred conditions to be the unfitting conditions for continued military service. They found the nineteen remaining medical conditions not unfitting for continued service. The PEB applied the Veterans Benefits Administration (VBA) derived rating of 20% and 0% respectively and recommended the applicant be separated with disability severance pay. On 13 April 2022, after being counseled by his PEB Liaison Officer (PEBLO) on the PEB’s findings and recommendations, the applicant concurred with the PEB’s finding, waived his right to a formal hearing, and declined to request a VA reconsideration of his disability ratings.

16. On 12 May 2022, the applicant’s MEB counsel submitted a request to reverse the applicant’s concurrence with the PEB. However, the PEB’s determinations had been approved finalized for the Secretary of the Army on 13 April 2022.

17. The United States Army Physical Disability Agency’s advisory opinion for this case discusses the reasoning for not reopening his case in depth. It reads in part:

“Mr. [Applicant]’s appeal was considered by the U.S. Physical Disability Agency (PDA) on 16 May 2022, and denied for failure to demonstrate good cause to re-open the matter. Specifically, the PDA found, ‘It is apparent from the most recent medical evidence that the Soldier is still being treated for the medical conditions and that based upon the treatment records the conditions, while not having responded to treatment as one would have hoped, also do not appear to have worsened. As such, good cause does not exist to reopen the matter.’”

18. Review of his PEB case file in ePEB along with his encounters in AHLTA revealed no substantial inaccuracies or discrepancies.

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

20. JLV shows he has been awarded numerous VA service-connected disability ratings, including migraine headaches (50%), chronic adjustment disorder (30%), and limited flexion of left of the thigh (10%). However, the DES only compensates an individual for service incurred medical condition(s) which have been determined to disqualify him or her from further military service and consequently prematurely ends their career. The DES has neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions which were incurred or permanently aggravated during their military service; or which did not cause or contribute to the termination of their military career. These roles and authorities are granted by Congress to the Department of Veterans Affairs and executed under a different set of laws.

21. It is the opinion of the ARBA medical advisor that neither an increase in his military disability rating nor a referral of his case back to the DES is warranted.

22. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? NO

(2) Did the condition exist or experience occur during military service? N/A

(3) Does the condition or experience actually excuse or mitigate the discharge? N/A

### BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation. Upon review of the applicant's petition, available military records and medical review, the Board concurred with the advising official finding that neither an increase in the applicant's military disability rating nor a referral of his case back to the DES is warranted. The opine noted the applicant's record is absent any evidence of

any additional medical condition(s) which would have failed the medical retention standards prior to his discharge.

2. The Board determined there is insufficient evidence to support the applicant's contentions for a physical disability retirement in lieu of physical disability separation with severance pay. The Board determined there was no cause for referral to the Disability Evaluation System. The Board agreed, there is no evidence that any additional medical condition prevented the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his discharge. Evidence shows the applicant concurred with the PEB's finding, waived his right to a formal hearing, and declined to request a VA reconsideration of his disability ratings. Based on the medical opine and preponderance of evidence, the Board denied relief.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

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

BOARD DETERMINATION/RECOMMENDATION:

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

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

# REFERENCES:

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

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

- a. Soldiers are referred to the disability system when they no longer meet medical retention standards in accordance with Army Regulation 40-501 (Standards of Medical Fitness), chapter 3, as evidenced in a Medical Evaluation Board (MEB); when they receive a permanent medical profile rating of 3 or 4 in any factor and are referred by an Military Occupational Specialty (MOS) Medical Retention Board (MMRB); and/or they are command-referred for a fitness-for-duty medical examination.

- b. The disability evaluation assessment process involves two distinct stages: the MEB and Physical Evaluation Board (PEB). The purpose of the MEB is to determine whether the service member's injury or illness is severe enough to compromise his/her ability to return to full duty based on the job specialty designation of the branch of service. A PEB is an administrative body possessing the authority to determine whether or not a service member is fit for duty. A designation of "unfit for duty" is required before an individual can be separated from the military because of an injury or medical condition. Service members who are determined to be unfit for duty due to disability either are separated from the military or are permanently retired, depending on the severity of the disability and length of military service. Individuals who are "separated" receive a one-time severance payment, while veterans who retire based upon disability

receive monthly military retired pay and have access to all other benefits afforded to military retirees.

c. The mere presence of a medical impairment does not in and of itself justify a finding of unfitness. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier may reasonably be expected to perform because of his or her office, grade, rank, or rating. Reasonable performance of the preponderance of duties will invariably result in a finding of fitness for continued duty. A Soldier is physically unfit when a medical impairment prevents reasonable performance of the duties required of the Soldier's office, grade, rank, or rating.

4. 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.

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

6. Title 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.

7. 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.

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



Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//