

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 18 December 2024

DOCKET NUMBER: AR20240005863

APPLICANT REQUESTS:

- correction to his formal line of duty (LOD) investigation to show in effect, in the LOD in lieu of not in the LOD – due to own misconduct
- personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- two self-authored statements
- DA Form 2173 (Statement of Medical Examination and Duty Status), 25 June 1979
- DA Form 2496 (Disposition Form), 25 June 1979
- DA Form 2823 (Sworn Statement), 18 July 1979
- additional self-authored statements, undated, but contemporaneous to LOD investigation
- DD Form 261 (Report of Investigation – LOD and Misconduct Status), 19 July 1979
- DA Form 2-1 (Personnel Qualification Record – Part II)
- DD Form 214 (Certificate of Release or Discharge from Active Duty) covering the period ending 29 April 1980

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 believes the finding of the formal LOD investigation from 19 July 1979 to be incorrect and should be corrected to read in the LOD – not due to own misconduct. There was an injustice done during the processing of the investigation and the entire

story was never told, which made him look guilty and that all the fault was his, when there were other Soldiers involved who were never named by the investigating officer.

b. His chain of command was never involved in the process or the ultimate findings. The entire investigation was started and completed by Chief Warrant Officer Two (CW2) J____ C____ and his chain of command was never notified of this investigation until it was completed, which was too late for them to render a decision.

c. He wants to tell the Board the rest of the story, the true story, to clear his name of any wrongdoing over 45 years ago in July 1979, when he was assigned as the Motor Transport Operator with the 418th Transportation Company at Fort Hood, TX. The true story is that, unlike what CW2 C____ said in his statement, it was not an impulsive decision on his part to remove the primer from the .50 caliber shell.

d. The truth is, that shell sat on his desk for over 3 months prior to leaving for REFORGER 1979 and there was no thought to removing the primer; it was just a conversation piece. Right before they left for REFORGER 1979, Staff Sergeant (SSG) R____, his section sergeant, came by his desk, took the shell, and said he could not get it back, which he had no issue with. As far as he was concerned, it was gone.

e. The day after they returned from REFORGER 1979, and after a sleepless night celebrating the unit's success at REFORGER 1979, he went to the motor pool to spot check his vehicle. He was tired, as he had no sleep in the last 24 hours. Both Specialist (SPC) S____ and SPC T____ were in the motor pool when he arrived. To this day he does not know why, but they gave him back the 50 caliber shell, even though he does not think they were supposed to.

f. They told him if he was going to keep the shell, he had to take the primer out of the shell. He asked them how he was supposed to do that and, after getting instructions from them, proceeded to the work bench to complete the process. This is when the incident with his eye happened.

g. He was set up by SPC S____ and SPC T____ and they knew what would happen. The part he does not understand is why no one took statements from them. He did not understand because he told First Lieutenant (1LT) B____ about them and what happened, and he never pursued getting their statements. He blamed the whole thing on him, and he does not know why, because his statement is not how it happened, and he was not intentionally committing misconduct. He was doing what two Soldiers who outranked him and had more experience told him to do.

h. He tried to write his statement at the time to tell the story of SPC S____'s and SPC T____'s involvement, but he does not know how to write very well and guesses he didn't do a very good job because it all came back on him and him alone. He knows that

1LT B_____ did not discuss his investigation nor his findings with his chain of command until the LOD finding was approved and it was too late to do anything about it. He talked to several members of his chain of command during this period and they also believed he was set up by these two Soldiers, but just being a private first class (PFC), there was nothing he could do about it, and no one would listen to him.

i. He has lived with this finding and the loss of his eye for over 40 years now, which has caused him much mental anguish, even though he never believed he was at fault. As a PFC in the Army, he just did not know any better and was led astray by two senior Soldiers who set him up for a fall, as there was no love lost among the three of them. He would like to have the record corrected after all these years and clear his name of the wrongdoing in July 1979.

j. In a second statement, the applicant provides some additional detail to his recollection of the injury to his eye. He states while stationed at Fort Hood, TX, assigned to a motor vehicle section, he was given a .50 caliber shell from the firing range and was keeping it in his barracks room. During an inspection, CW2 L_____ confiscated the shell, stating it was unauthorized to keep in the barracks. He took it to the motor pool and threw it in the trash can. Sergeant (SGT) A_____ took it from the trash can and placed it in a filing cabinet there in the motor pool, where it remained for approximately 2 months. Then, two SPCs removed it from the filing cabinet and gave it back to him. He then took it to the work bench, under their supervision, and he started to remove the primer from the shell. At this point, the primer exploded, and a fragment hit him in the right eye. Delirious from shock and pain, he was taken by his squad leader to the Camp Hospital, where he was admitted for treatment.

k. At the time, his squad leader told the doctors that a hammer head had flown off the handle and hit him in the eye and he was to corroborate his story. After undergoing eye surgery and in the recovery room, the applicant informed the doctors what really happened. While in the hospital, the doctor confirmed he had a piece of metal in his head, which is still in place. He has a total loss of sight in his right eye and was honorably discharged due to his eye injury, as the Army stated he was no longer qualified for combat duty. He was discharged without being allowed to appear before a medical board to determine if he were eligible for medical compensation and was informed, he could apply to the Department of Veterans Affairs (VA) for medical evaluation.

l. After the surgery, he was given 30 days of convalescent leave, and his squad leader told him to leave his medical records with him while he was on leave. When he returned from convalescent leave, his squad leader told him his medical records were lost. He believes those medical records were destroyed on purpose to cover up the fictitious story his squad leader gave to the doctors when he was first admitted to the hospital. He has never seen those records since and was shuffled around from one

office to another for 3 months, pulling all kinds of company duty before he was finally allowed to return to the hospital to try to establish some type of medical records to substantiate his claim for medical disability. By then, the Army had performed an investigation, and their determination was that he was injured, but not injured in the LOD, so he was finally discharged. Based on this information, he requested examination at the Martinsburg VA Medical Center for a determination on his in-service injury and evaluation to determine if he is eligible for VA compensation.

3. The applicant enlisted in the Regular Army on 31 August 1978, and was awarded the Military Occupational Specialty (MOS) 64C (Motor Transport Operator).

4. The applicant's DA Form 2-1 shows he was promoted to the rank of private second class (PV2) on 2 March 1979.

5. A DA Form 2173 shows:

a. On 31 May 1979, the applicant was admitted to Darnall Army Hospital (DAH) due to an eye injury resulting in the loss of his right eye. The medical opinion shows the injury was incurred in the LOD, based on medical history and examination, and may result in permanent partial disability.

b. The detail of the accident shows the injury was allegedly incurred when the member was struck in the eye with a head on a hammer at approximately 1020 hours on 31 May 1979.

c. Further details of accident - remarks show the applicant entered the maintenance building and went directly to a workbench. He pulled a .50 caliber cartridge (less projective and powder) out of his pocket and placed the cartridge on a welding rod already on the vise. He then proceeded to strike the cartridge with a metal object, attempting to remove the primer. The primer then detonated, and a piece of metal struck him in the eye. He was then transported to DAH.

d. His company commander signed the form on 25 June 1979, indicating that a formal LOD investigation was required, and the injury was not considered to have been incurred in the LOD as it was pending investigation.

6. A DA Form 2496, dated 25 June 1979, shows on 22 June 1979, 1LT B_____ was appointed the LOD investigating officer for the purpose of investigating the injuries to the applicant.

7. The applicant's DA Form 2-1 shows he was promoted to the rank of PFC on 1 July 1979.

8. A DA Form 3881 (Rights Warning Procedure/Waiver Certificate) shows on 9 July 1979, the applicant signed the form indicating the LOD investigating officer wanted to question him and he indicated he wanted a lawyer.

9. A DA Form 2823 shows the applicant provided a sworn statement on 18 July 1979, stating:

a. A couple of months ago, a guy has him the brass, but he forgets who gave it to him. CW2 L_____ found them in his room, two of them. Instead of burning him, the threw them in the garbage can. Then someone picked them out of the garbage and put them in a drawer.

b. On 31 June 1979, he went to work that day and worked on a couple of trucks. He got finished and then there was not anything to do, and he remembered seeing the two brass in the drawer. SPC T_____ gave them to him and he took them to the workbench. Seeing that the brass was already fired, he took the primer out of one of the shells and was taking the primer out of the other one. He hit it a couple of times with a piece of metal. He looked at it to see if it was coming out and it went off.

c. He was then rushed to Darnall Army Hospital. When he got out, SGT P_____ told him what to say on the first statement, so he did so think it would keep them out of trouble. He was going to keep the brass for a souvenir.

10. A DD Form 261, 19 July 1979, provides a Report of Investigation – LOD and Misconduct Statement and shows:

a. On 31 May 1979, a blow stuck a .50 caliber bullet; it went off and a fragment of metal struck the applicant in the right eye. The medical diagnosis is lost right eye.

b. The remarks show on 31 May 1979, the applicant placed a .50 caliber bullet in a vise and started striking it. It went off and a fragment of metal struck his right eye. He was taken to Darnall Army Hospital. The injury was found not in the LOD – due to own misconduct. The applicant presents the truth accurately.

c. On 23 July 1979, the appointing authority approved the findings as not in the LOD – due to own misconduct. On 3 August 1979, by Authority of the Secretary of the Army, the findings were approved as not in the LOD – due to own misconduct.

11. A Headquarters, III Corps and Fort Hood memorandum, 3 August 1979 references the report of investigation pertaining to the applicant's injury incurred on 31 May 1979, and shows the determination was not in the LOD- due to worn misconduct. The applicant was to be notified of the determination and advised of his right to appeal the determination.

12. A memorandum from 1LT B_____ to the applicant, 14 August 1979, the applicant was advised of his right to appeal the determination of not in the LOD. He was further advised, if he chose to appeal the determination, it must be in writing within 45 days after receipt of notification of the findings.

13. The applicant's DA Form 2-1 shows he was promoted to the rank/grade of private first class (PFC)/E-3 on 1 July 1979.

14. In an undated, self-authored statement made while the applicant was still assigned to Fort Hood, TX, and is presumably his appeal of the LOD determination, he states:

a. On or about 15 February 1979, a guy gave him two empty .50 caliber cartridges, no lead or powder and firing pin marks on the primers. He put them on his desk where, on or about 30 February 1979, CW2 L_____ came through the room during a TA 50 gear inspection and found them. He said he could not have them in his room and that he would have to take them. He said OK, go ahead. And instead of taking them to the Orderly Room and turning them in to get properly disposed of and giving him punishment under Article 15 of the Uniform Code of Military Justice (UCMJ) or whatever needed to be done, he instead took them to the maintenance shop office in the motor pool, where he threw them in the trash can, which was wrong.

b. Then SGT A_____ picks the two .50 caliber cartridges up and puts them into the filing cabinet, where they stayed until 31 May 1979. At that time, he asked SPC T_____ if the .50 caliber cartridges were still in the cabinet and if he could have them back. SPC T_____ found them and gave them back to him. He took them to the work bench where SPC S_____ was standing and he attempted to take the primers out while SPC S_____ watched. He did not say a word.

c. The first primer came out and the second one blew up in his face, destroying his right yet. SSG P_____, his squad leader, came running and grabbed him by the arm and took him to the office where Sergeant First Class (SFC) T_____ told him to take him to Darnall Army Hospital. When they arrived at the emergency room, they asked him what had happened. He said he had a hammer head fly off and hit him in the eye, which is not what happened.

d. One hour later, after the primer blew up in his face, Lieutenant Colonel (LTC) O_____, ordered a police call throughout the motor pool and they found two ammo boxes full of ammunition that was not supposed to be there. Then, one day later, LTC O_____, Captain (CPT) S_____, a priest, and Master Sergeant (SMG) R_____ came to see him and asked what happened. He told them he had the primer of a .50 caliber shell blow up in his face and he told the doctor who operated on him what happened as well, so he could x-ray him and confirm he had metal in his head.

e. On or about 3 June 1979, a nurse came to him and was ready to put him to sleep again, telling him that the doctor was going to operate on him to see if he could get the metal out of his head, but he told her that if he wasn't sure the doctor could get it the metal out of his head to not operate on him. So, after 5 days in the hospital, he was released. On or about 5 June 1979, he went to his room where SSG P____ met him and told him to let him hold his medical records so they didn't get lost on his way home on convalescent leave and they he would keep them for him until he returned from his 30 days of convalescent leave. When he came back from his convalescent leave, SSG P____ said he could not find them, and that he had to go see 1LT B____ who was doing an LOD investigation on him. He was so delirious and nervous, that he did not know what he wanted to say on paper. 1LT B____ stood right there and watched everything he was writing, which made matters even worse, because he is not a particularly good writer any way.

f. After that, he found out the supply room lost his TA 50 gear, and it took him 3 months to clear the unit when he was supposed to be assigned to the Medical Holding Company getting his eye taken care of. He ended up being in the Medical Holding Unit for 1 year and it was the longest year of his life, because they did nothing but mess with him. When the LOD investigation finally came back, the finding was not in the LOD – due to own misconduct and he could not appeal it anymore; this was the final appeal and he had to sign all the paperwork and get out. He thinks what happened is that between LTC O____, who ordered the police call in the motor pool and found the two ammo boxes full of live and dead ammo, CPT S____ who wrote a false statement on the Statement of Medical Examination and Duty Status, CW2 L____ who found the empty cartridges in his room and didn't properly dispose of them, SPC T____, who gave the cartridges back to him, SPC S____ who stood and watched, and SSG P____, who lost all his medical records, they all got together and thought they would pass the buck down to him instead of getting burned themselves. If this was misconduct, he should have been given Article 15 punishment, or court-martial, or whatever, instead he was promoted when he returned from convalescent leave from E2- E3.

15. A Standard Form 502 (Narrative Summary (NARSUM)), 19 September 1979, shows:

a. On 31 May 1979, the applicant placed a .50 caliber bullet in a vise and started striking it with a metal object, detonating the primer, causing a metal fragment to hit him in the right eye. Examination revealed a massive corneoscleral rupture of the right eye, rendering the eye unsalvageable. The eye was enucleated on the same day and a small right upper lid laceration was also repaired. X-rays during hospitalization revealed a retained metallic foreign body. The applicant was subsequently fitted with a prosthesis at Brooke Army Medical Center, which proved unsatisfactory cosmetically and a new prosthesis was made.

b. The applicant was found to not meet the medical retention standards of Army Regulation 40-501 (Standards of Medical Fitness) and would be referred to the Physical Evaluation Board (PEB) for the following diagnoses:

(1) Anophthalmus (absence of an eye), acquired, surgical, secondary to corneoscleral rupture of right eye sustained on 31 May 1979, when struck in right eye by metal fragment. LOD no, per formal investigation with appeal by applicant being denied; LOD no, due to own misconduct.

(2) Retained right orbital secondary to injury as in diagnosis 1; LOD no, due to own misconduct.

(3) Left varicocele (enlargement of the veins in the scrotum), grade II, asymptomatic; LOD yes.

16. A memorandum from 1LT B____, 4 October 1979, shows the applicant turned his attached LOD appeal to the Battalion Staff duty officer on 4 October 1979.

17. A physical profile is used to classify a Soldier's physical disabilities. PULHES is the acronym used in the Military Physical Profile Serial System to classify a Soldier's physical abilities in terms of six factors, 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).

18. A Standard Form 88 (Report of Medical Examination) shows the applicant underwent medical examination on 10 December 1979, for the purpose of a Medical Board. The applicant was found not qualified for retention with a PULHES of 111141, with the rating of 4 in factor E due to surgical absence of right eye (fitted with prosthesis).

19. A 1 February 1980 memorandum from the Department of the Army shows:

a. By order of the Secretary of the Army, after careful review of the attached appeal of the LOD Investigation concerning the applicant's injury sustained on 31 May 1979, it was determined the evidence is sufficient to support the findings of not in the LOD – due to own misconduct.

b. Explosives are inherently dangerous, thus necessitating a high degree of care when handling. A servicemember who voluntarily or willfully handles an explosive

device and disregards its dangerous qualities is willfully negligent. Any injury which is a result of handling an explosive device while disregarding its dangerous qualities is incurred not in the LOD -due to own misconduct. Therefore, the previous findings are considered correct and hereby reaffirmed.

c. The applicant should be advised that his appeal was denied.

20. A DA Form 3947 (Medical Evaluation Board (MEB) Proceedings) shows an MEB convened on 8 February 1980, where the applicant was found medically unfit and referred to a PEB for the following conditions:

a. Anophthalmus, acquired, surgical, secondary to corneoscleral rupture of right eye sustained on 31 May 1979, when struck in right eye by metal fragment.

b. Retained right orbital secondary to injury as in diagnosis 1.

(3) Left varicocele grade II, asymptomatic.

21. A DA Form 199 (PEB Proceedings) shows:

a. A PEB convened on 7 March 1980, where the applicant was found physically unfit with a recommendation that he be separated from the military without entitlement to disability benefits.

b. His unfitting condition is traumatic loss of right eye; left eye 20/20. He was unfit because of impairment of vision as a result of the loss of his right eye. It is not in the best interest of either the member or the service for his continuance on active duty. His appeal of the LOD was denied by Headquarters, Department of the Army on 1 February 1980. The injury was found to have been intentional misconduct, willful neglect, or during unauthorized absence.

c. The applicant signed the form on 17 March 1980, indicating he concurred and waived a formal hearing of his case.

22. The applicant's DD Form 214 shows he was honorably discharged on 29 April 1980, under the provisions of Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation), due to physical disability without severance pay, with corresponding separation code JFR. He was credited with 1 year, 7 months, and 29 days of net active service.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that 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. One possible outcome was to deny relief based on the argument that the applicant may not have been on duty and was engaged in unsafe and potentially unlawful activity. However, upon review of the applicant's request and available military records, the Board found surrounding circumstances of the injury sustained on 31 May 1979 sufficient justification to overturn the original formal Line of Duty (LOD) determination from "Not in the LOD – due to own misconduct" to "In the LOD."

2. The Board determined the applicant, a young and inexperienced soldier at the time, was the victim of a misguided prank by older service members who failed to understand the potential consequences of their actions. The Board found credible the applicant's account that he was misled into believing the cartridge was inert and had already been fired. His actions, while unquestionably unsafe, were not malicious, criminal, or intentionally reckless. Instead, they were the product of immaturity, misinformation, and a breakdown in accountability. The Board further notes that the applicant's initial misstatement at the emergency room claiming a hammer head caused the injury was made under duress and confusion. This was later corrected in multiple sworn statements and medical disclosures, which consistently reflect a lack of intent to deceive or conceal the true nature of the injury. The medical documentation initially supported an "In the LOD" finding, and the retained metal fragment in the applicant's orbital cavity further corroborates the nature and severity of the injury.

3. The Board noted, despite the severity of the injury, the applicant was promoted upon return from convalescent leave, which contradicts the notion of misconduct. If the incident had truly constituted willful negligence, appropriate disciplinary measures under the Uniform Code of Military Justice (UCMJ) would have been warranted—but no such action was taken. The Board found credible the applicant's assertion that he was pressured during the Line of Duty (LOD) investigation, lacked proper legal counsel, and was not afforded a fair opportunity to present his case. The loss of his medical records, the disappearance of his issued gear, and the prolonged assignment to the Medical Holding Unit further compounded the injustice.

4. While the handling of explosive materials requires caution, the Board majority agreed the applicant's injury was a tragic accident, exacerbated by a culture of informal behavior, poor supervision, and a lack of institutional safeguards. Based on the totality of evidence, the Board agreed that the original finding of Not in the LOD -due to own misconduct was unjust and procedurally flawed. Therefore, in the interest of justice,

equity and integrity, the Board granted relief to show that the formal Line of Duty determination be corrected to reflect that the injury sustained on 31 May 1979 was incurred "In the Line of Duty."

4. The applicant's request for a personal appearance hearing was carefully considered. In this case, 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.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

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

BOARD DETERMINATION/RECOMMENDATION:

The Board determined the evidence presented is sufficient to warrant a recommendation for relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected to reflect the determination from the formal line of duty where the applicant sustained an injury on 31 May 1979 was incurred "In the Line of Duty."

X //SIGNED//

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 600-8-4 (Line of Duty (LOD) Policy, Procedures, and Investigations) prescribes policies and procedures for investigating the circumstances of disease, injury, or death of a Soldier providing standards and considerations used in determining LOD status.
 - a. A formal LOD investigation is a detailed investigation that normally begins with DA Form 2173 (Statement of Medical Examination and Duty Status) completed by the medical treatment facility and annotated by the unit commander as requiring a formal LOD investigation. The appointing authority, on receipt of the DA Form 2173, appoints an investigating officer who completes the DD Form 261 (Report of Investigation Line of Duty (LOD) and Misconduct Status) and appends appropriate statements and other documentation to support the determination, which is submitted to the General Court Martial Convening Authority for approval.

b. The worsening of a pre-existing medical condition over and above the natural progression of the condition as a direct result of military duty is considered an aggravated condition. Commanders must initiate and complete LOD investigations, despite a presumption of Not in the Line of Duty, which can only be determined with a formal LOD investigation.

c. An injury, disease, or death is presumed to be in LOD unless refuted by substantial evidence contained in the investigation. LOD determinations must be supported by substantial evidence and by a greater weight of evidence than supports any different conclusion. The evidence contained in the investigation must establish a degree of certainty so that a reasonable person is convinced of the truth or falseness of a fact.

d. A Soldier may appeal, in writing, within 30 days after receipt of the notice of the LD determination. For appeals not submitted within the 30-day time limit, the reason for delay must be fully explained and a request for exception to the time limit justified.

e. Among the possible LOD determinations are:

(1) In line of duty: the injury, illness, disease, or death did not occur while the Soldier was absent without leave (AWOL) and was not due to the soldier's own intentional misconduct or gross negligence.

(2) Not in line of duty – not due to own misconduct: A formal investigation with supporting evidence that the injury, illness, disease, or death occurred during a period when the Soldier was AWOL, was mentally sound at the inception of AWOL, and which was not directly caused by the Soldier's own intentional misconduct or gross negligence. Mental soundness can only be determined by a behavioral health expert. Existed prior to service (EPTS) conditions typically falls

(3) Not in line of duty – due to own misconduct: A formal investigation determined that the soldier's injury, illness, disease, or death was proximately caused by the Soldier's own intentional misconduct or gross negligence. Mental soundness can only be determined by a behavioral health expert.

f. Appendix D (Rules Governing Line of Duty and Misconduct Determinations). Soldiers training and professional values must be considered in all LOD determinations. In every formal investigation, the purpose is to find out whether there is evidence of misconduct or gross negligence and if so, whether the preponderance of the evidence rebuts the presumption of ILD. To arrive at such decisions, the following rules will be applied and considered when making LOD findings or determinations.

(1) Rule 1 - Injury, illness, disease, or death directly caused by the individual's misconduct or gross negligence is NLD.

(2) Rule 2 - Violation of military regulation, orders, or instructions, or of civil laws, if there is no further sign of misconduct, may be no more than simple negligence. Simple negligence is not misconduct. Therefore, a violation as described under this rule alone may not be enough to determine that the injury, illness, disease, or death resulted from misconduct. However, the violation is one circumstance to be examined and weighed with all the other circumstances. Depending on the facts of a particular case, a combination of multiple (two or more) violations may be considered gross negligence.

(3) Rule 3 - Incapacitation because of the abuse of alcohol or other drugs that results in injury, illness, disease, or death is due to misconduct and is NLD. This rule applies to the effect of the drug on the Soldier's conduct, as well as to the physical effect on the Soldier's body. Any actions that are induced by voluntary ingestion of alcohol or drugs that cause injury, illness, disease, or death are misconduct and are NLD. That the Soldier may have had a pre-existing physical condition that caused increased susceptibility to the effects of the drug does not excuse the misconduct. Abuse of alcohol or drugs must be proven as the proximate cause for the injury, illness, aggravation, or death. While merely drinking alcoholic beverages is not misconduct, one who voluntarily becomes intoxicated is held to the same standard of conduct as one who is sober. Intoxication does not excuse misconduct.

(4) Rule 7 - A Soldier who operates a motor vehicle in a negligent manner that was the proximate cause of an injury, illness, disease, or death may be found to have engaged in misconduct depending on the circumstances as a whole. Simple negligence alone does not constitute misconduct. A Soldier who knew or should have reasonably known they were unfit to drive, and who is injured or deceased as a result of driving a motor vehicle when unfit to do so, may be found to have engaged in misconduct. Voluntary intoxication, use of drugs or other circumstances that affect the Soldier's mental or physical faculties may cause a Soldier to be unfit.

3. 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//