ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [redacted]

BOARD DATE: 23 April 2024

DOCKET NUMBER: AR20230009455

APPLICANT REQUESTS:

- in effect, physical disability retirement in lieu of physical disability separation with severance pay through a higher rating and the inclusion of additional unfitting conditions
- personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States
- two self-authored statements
- exhibits list
- Headquarters, Combined Joint Task Force-82 Permanent Orders 240-055, dated 28 August 2009
- DD Form 214 (Certificate of Release or Discharge from Active Duty) covering the period ending 20 November 2011
- Department of Veterans Affairs (VA) eBenefits printout, dated 27 June 2023

FACTS:

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

2. The applicant states:

a. He is requesting reconsideration of his discharge as it relates to his post-traumatic stress disorder (PTSD) and traumatic brain injury (TBI) ratings given at the time of his discharge. He requests his discharge be reviewed using the standards and procedures more favorable to veterans, as required by Kennedy v. McCarthy.

b. His discharge packet contains evidence of a qualifying mental health condition that existed after an improvised explosive device (IED) blast in Afghanistan, but was not accounted for at the time of his exit from the Army, although he had an approved rating of 40 percent from the VA. There are many inconsistencies with the use of the VA Schedule for Rating Disabilities (VASRD) relative to the VA ratings and the Army ratings.

c. He is also requesting the Board prioritize the review of his application due to the request for relieve being based in whole or in part on a matter related to PTSD/TBI which was diagnosed as a result of combat-related injuries during deployment in support of a contingency operation, as specified in Army Regulation 15-180 (Army Discharge Review Board), chapter 3, paragraph 3-2 (Prioritization).

d. Army Regulation 15-180 also specifies that a former member of the Armed Forces who, while serving on active duty as a member of the Armed Forces, was deployed in support of a combat operation and who, at any time after such deployment, but prior to being discharged was diagnosed by a physician, clinical psychologist, or psychiatrist while on active duty as experiencing PTSD and TBI as a consequent of that deployment, Title 10, U.S. Code, section 1553 requires as a member of the Board, a clinical psychologist or psychiatrist, or a physician with special training in mental health issues connected to PTSD or TBI. This Board member is to provide expert guidance on clinical manifestations of PTSD, TBI, and other mental or behavioral health indicators to assist Board members in assessing the potentially mitigating effects of PTSD, TBI, and other mental or behavioral health indicators.

e. He requests the Board review the medical evidence he provided, which contains important information during his active duty time from various counselors, doctors, and mental health professionals from Nellis Air Force Base and the medial related ratings from the VA pertaining to his PTSD and TBI, prior to his discharge. Please take into consideration the Board shall apply liberal consideration when reviewing cases for claims where PTSD and TBI potentially contribute to the circumstances resulting in the discharge of a lesser characterization.

f. Some of the conditions overlooked at the time of his discharge were PTSD related symptoms, headaches, and TBI. At the time of his discharge, as stated in a VA letter dated 28 March 2013, he was properly rated at 40 percent for TBI with mild cognitive impairment, including attention/concentration deficits, sleep disturbance consistent with post-concussive syndrome (also diagnosed as mood disorder and claimed as TBI, depression, and insomnia). However, these conditions were not accounted for in his Army disability rating.

g. After his discharge, he was then rated an additional 30 percent by the VA for other specified trauma and stressor-related disorder (claimed as PTSD) linked to his

TBI symptoms with an effective date backdated to 21 November 2013. In recent months, he has spoken to Senator Patty Murray, who is chairwoman of the Senate Veterans' Affairs Committee, regarding how Madigan Army Medical Center, at Joint Base Lewis-McChord, handled mental health issues from 2010-2012. She explained that since that time, the hospital has reversed multiple diagnoses of PTSD and TBI in cases connected to mental health issues. She said that multiple conspiracies say the changes may be linked to efforts to cut costs, but that two doctors who screened for multiple mental health disorders (one of which was his own doctor) have been removed from that duty after the Army conducted an investigation.

h. The Board should reconsider his discharge disability rating of 10 percent for his back issues and increase it to his current rating of 40 percent from the VA. The original rating of 10 percent was given on 28 March 2013, after 6 surgeries, but was increased to 20 percent on 2 June 2016, and again increased to 40 percent in 2023.

3. The applicant enlisted in the Army National Guard (ARNG) on 2 February 2005 and was awarded the Military Occupational Specialty (MOS) 11B (Infantryman).

4. The applicant was ordered to active duty in support of Operation Enduring Freedom on 15 April 2009, with duty in Afghanistan from 1 June 2009 through 25 September 2009.

5. Headquarters, Combined Joint Task Force-82 Permanent Orders 240-055, dated 28 August 2009, awarded the applicant the Purple Heart for wounds received in action on 28 August 2009.

6. The applicant was medically evacuated from Afghanistan on 26 September 2009, and remained on active duty for medical retention processing through his eventual discharge date.

7. Despite listing some of these documents along with allied medical documents pertaining to his Medical Evaluation Board (MEB) and Physical Evaluation Board (PEB) in his exhibits list, the applicant's DA Form 3349 (Physical Profile), DA Form 7652 (Disability Evaluation System (DES) Commander's Performance and Functional Statement), MEB Narrative Summary (NARSUM), DA Form 3947 (MEB Proceedings), DA Form 199 (Informal PEB 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.

8. A DA Form 199-1 (Formal PEB Proceedings) shows:

a. A formal PEB convened on 19 August 2013, at Madigan Army Medical Center, Joint Base Lewis-McChord, where the applicant was found physically unfit with a

recommended rating of 10 percent and that his disposition be separation with severance pay.

b. His medical condition determined to be unfitting is status post lumbar spine hemilaminectomy and diskectomy at Ls-S1 with residual of moderate degenerative changes and denervation of lumbosacral muscles at L5, MEB diagnosis (Dx) 1, VASRD 5242, 10 percent.

c. A formal board was held on 10 June 2013, in which the applicant contended he should be awarded a V1/V3 (in the line of duty (LOD) in combat with an enemy of the U.S. and as a direct result of armed conflict or caused by an instrumentality of war and incurred in the LOD during a period of war and the result of a combat-related injury). Evidence provided at that hearing indicated the onset of his unfitting condition was combat-related (V1/V3-YES, Afghanistan).

d. The following conditions were determined by the Medical Treatment Facility (MTF) to meet retention standards, as the case file contains no evidence the conditions independently or in combination render him unfit for assigned duties; accordingly, the PEB found the conditions not to be unfitting and therefore not ratable:

- status post right knee joint strain (MEB Dx 2)
- status post left shoulder joint strain (MEB Dx 3)
- bilateral axillary hyperhidrosis (MEB Dx 4)
- seasonal allergic rhinitis (MEB Dx 5)
- mood disorder secondary to medical condition (MEB Dx 6)

e. At the formal PEB held on 10 June 2013, the applicant also contended his TBI with cognitive impairment should be an unfitting condition. The Board was recessed and reconvened upon return of the Addendum to the NARSUM, dated 12 July 2013, which indicates test results are consistent with normal cognitive functioning, full recovery, and shows no evidence of impairment. There is no evidence to support that the condition fails retention standards.

f. On 21 August 2013, the applicant signed the form indication he concurred with the findings and recommendations of the formal PEB and additionally indicated he did not request reconsideration of his VA ratings.

9. The applicant's DD Form 214 shows he was honorably discharged on 20 November 2013, under the provisions of Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation), due to disability with severance pay, combat-related (enhanced), with corresponding separation code JEA. He was credited with 4 years, 7 months, and 6 days of net active service this period and 3 years, 7 months, and 21 days total prior inactive service. Item 13 (Decorations, Medals, Badges,

Citations, and Campaign Ribbons Awarded or Authorized), does not reflect award of the Purple Heart.

10. Soldier Readiness Center, Joint Base Lewis-McChord Orders 249-0004, dated 6 September 2013, honorably discharged the applicant from the ARNG due to physical disability with severance pay effective 20 November 2013, with a disability rating of 10 percent.

11. A VA eBenefits printout, dated 27 June 2023, presumably pertaining to the applicant, although his name is not listed on the document, shows the applicant has a 100 percent service-connected disability rating for the following conditions:

- status post right knee joint strain (extension), 20 percent, effective 7 June 2022
- status post right knee joint strain (flexion), 10 percent, effective 7 June 2022
- headaches with photophobia, effective 21 November 2013
- status post right knee joint strain, 10 percent, effective 7 June 2022
- right lower extremity radiculopathy with sciatic nerve involvement, 20 percent, effective 2 January 2023
- left lower extremity radiculopathy with sciatic nerve involvement, 20 percent, effective 2 January 2023
- painful scar, posterior trunk, 10 percent, effective 2 January 2023
- right lower extremity radiculopathy with femoral nerve involvement, 20 percent, effective 2 January 2023
- left lower extremity radiculopathy with femoral nerve involvement, 20 percent, effective 2 January 2023
- TBI with mild cognitive impairment including attention/concentration deficits, sleep disturbance consistent with post-concussive syndrome (also diagnosed as mood disorder, claimed as TBI, depression, insomnia), 40 percent, effective 21 November 2013
- bladder urgency due to overactive bladder, 40 percent, effective 21 November 2013
- bilateral axillary hyperhidrosis, 30 percent, effective 19 November 2015
- scar from lumbar spine surgery, 0 percent, effective 21 November 2013

12. 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.

13. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting in effect, physical disability retirement in lieu of physical disability separation with severance pay through a higher rating and the inclusion of additional unfitting conditions. He contends he was experiencing mental health conditions including, PTSD and a Traumatic Brain Injury (TBI) as a result of combat, which warrant a referral another referral to IDES.

b. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's military service records. The Armed Forces Health Longitudinal Technology Application (AHLTA), the VA's Joint Legacy Viewer (JLV), and medical documentation provided by the applicant were also examined.

c. The applicant asserts he was experienced mental health conditions including PTSD and TBI, which were not appropriately accounted for during his physical disability separation evaluation. Prior to his deployment Afghanistan, the applicant reported no history of behavioral health symptoms or history of TBI. He was exposed to a IED blast and evacuated out of theater on 26 September 2009. He was provided a brief neurocognitive screening (MACE) in Landstuhl, while in transit from Afghanistan, and he scored within normal limits. He was transferred to the Warrior Transition Battalion (WTB) and remained on Active Duty status till his discharge date. His first encounter with behavioral health services was on 28 September 2009 as part the Soldier Readiness Program and admission to the WTB. The applicant denied any behavioral health concerns at that time. He was seen by the TBI clinic on 30 September 2011. He was reported to have experienced a concussion, and he was provided counseling on proper treatment to ensure proper recover. He was reported to be experiencing manageable headaches with no other symptoms associated with a mild TBI. The applicant continued in three follow-up sessions by behavioral health providers in the WTB till May 2011, and he continued to deny any behavioral health symptoms. He was however, experiencing significant problems with physical injuries, and he was experiencing reoccurring headaches and had been referred to neurology for ongoing assessment and treatment.

d. In November 2011, the applicant reported experiencing worsening memory problems with escalation over the past 4-6 months along with depressive symptoms and sleep problems. He was referred to behavioral health and was initially evaluated on 03 November 2011. In addition, he was prescribed medication to assist with sleeping. The applicant was referred for additional testing to assist in diagnosis and treatment planning.

e. The applicant completed his first Compensation and Pension Evaluation for Mental Health conditions on 21 November 2011. He was noted to have experienced a

TBI. The applicant was diagnosed with a Mood Disorder secondary to his medical condition (back problem which is resulting in him being pushed out of the military).

f. He was seen again by behavioral health for a psychiatric evaluation on 28 November 2011. The applicant described difficulty with concentration with problems sleeping. He also reported low mood and energy. He was diagnosed with an Adjustment Disorder with Disturbance of Emotion and Conduct. His sleep medication was adjusted, and the diagnosis of a Cognitive Disorder was deferred waiting on neuropsychological testing.

g. A neuropsychological screener completed by a clinical psychologist was completed on 07 December 2011 for the applicant. His reported concerns were symptoms of depression greater than six months, complaining of a lack of motivation, poor sleep, lack of concentration, headaches, and poor memory for recent events, but no complaints for immediate recall. The results of this neurocognitive screener showed mild deficits in immediate memory for non-contextual fact/list learning and significant deficits in attention/processing speed for visually presented information, which is a common sequela of a TBI. However, further testing was recommended due to the limitations of the assessment, and the applicant was recommended for further treatment in behavioral health to address his reported depressive symptoms.

h. The applicant reengaged with his behavioral health provider on 12 December 2011. The results of the neuropsychological testing were not provided to the applicant, and the majority of the session was focused on the applicant's continued symptoms of depression. The applicant was diagnosed with Major Depression, but he was not placed on a deployment limiting profile or any psychiatric profile. The applicant was seen for one more follow-up behavioral health appointment in the month of December 2011.

i. On 21 December 2011, IDES completed a records review of the applicant's behavioral health history. The applicant was not present for this evaluation. It was noted the applicant was in the process of a medical evaluation board for a somatic condition that falls beneath the medical retention standards defined in Army Regulation 40-501, Chapter 3. The only evaluation noted was the VA Compensation and Pension evaluation the applicant had completed on 21 November 2011. There was no mention or discussion of the previous neuropsychological screener the applicant had completed, history of migraines, or the previous behavioral health appointments. However, the reviewer stated based on the available data, the applicant did not have evidence of a behavioral health condition that has led to any functional impairment in the performance of assigned military duties. The diagnosis provided was Mood Disorder Secondary to Medical Condition (per VA).

j. On 29 December 2011, the applicant was seen to review the results of his neuropsychological screener. He was told the results found a processing speed/attention impairment, but he was also experiencing depressive symptoms, which could impact his scores on his neurocognitive function. He was recommended for treatment for his mental health symptoms. However, it was again noted that the

applicant was recommended for further neuropsychological testing. He was diagnosed with Major Depressive Disorder with a rule out of a cognitive disorder.

k. On 23 January 2012, the applicant was seen by a prescribing behavioral health provider, and despite the evidence of the applicant experiencing a combat related TBI, and reporting symptoms of depression, the provider diagnosed the applicant with adult onset ADHD with Adjustment Disorder with Depressed Mood. He was prescribed a psychostimulant that can be prescribed for ADHD. For TBI patients, this medication only shows a short-term improvement in concentration, but it typically does not perform well in long term. The applicant was seen by his regular behavioral health provider on 30 January after starting the medication, and the applicant no longer wanted to discuss his depression, because he felt his concerns were related primarily to ADHD not his head injury or depression. He reported an improvement with his Depression. He was diagnosed with Major Depressive Disorder and rule out ADHD.

l. On 03 April 2012, the applicant had a Compensation and Pension evaluation for a TBI. The applicant noted an improvement in concentration. He was found in the Compensation and Pension evaluation to be experiencing a TBI with mild cognitive impairment including attention/concentration deficits, sleep disturbance, and headaches, which is consistent with post-concussive syndrome. It was also noted it was his improvement as reflective of the treatment he had recieved. He had another Compensation and Pension evaluation for mental health conditions on 24 April 2012. Due to his reported improvement with his sleep and the ADHD medication. He was not diagnosed with a mental health condition beyond a mood disorder as a result of a TBI.

m. In June 2012, the applicant was seen by the provider who completed his neuropsychological screener. He wanted to discuss the results, because he reported “having to defend his diagnosis in front of the Board.” He stated the board said his ADHD diagnosis was prior existing problem. The applicant was reminded the testing previously completed was only a screener, and it had been recommended he have a full and complete neurocognitive evaluation completed by a neuropsychologist. It was also noted the applicant did not experience attention problems prior to his TBI. In addition, his depression symptoms had improved, but he was still experiencing problems with concentration and increase problems with sleep. The applicant remained did not attend regular behavioral health appointment, but he did attend medication management appointments where his psychostimulant and sleep medication was maintained, and he attended regular case management appointments.

n. In July 2013, the applicant completed a full neuropsychological assessment. The neuropsychologist noted the inconsistency with the applicant’s diagnostic history, and thoroughly reviewed this behavioral health and previous records of neurocognitive testing. In addition, the applicant was provided a full battery of psychological and neurocognitive testing. The results of the evaluation were at that time the applicant did not meet criteria for ADHD. He had sustained a TBI, but the results of testing were consistent with normal cognitive functions and full recovery with no genuine signs of

impairments. He did report low mood and motivational challenges which likely explained his subjective complainants, but there was no evidence of a formal psychological disorder. The applicant was found to meet medical retention standards IAW 40-501, Chapters 3-31 to 3-37.

o. On 12 July 2013, the applicant's PEB was completed. The results were the applicant's neurological exam dated 9 July 2013 were reviewed. The applicant's chronic headaches were considered mild, not disabling, and met retention standards. His insomnia was unlikely due to his history of TBI. The results of the neuropsychology exam conducted on 8 July 203 found the applicant was not diagnosed with psychological disorder and the applicant met retention standards IAW 401-501, Chapters 3-31 to 3-37.

p. A review of JLV provided evidence the applicant has been diagnosed with mild neurocognitive impairment secondary to TBI. He has reported PTSD symptoms, but he has predominately endorsed symptoms of anxiety. A Compensation and Pension evaluation for PTSD was completed for the applicant on 29 August 2014. He was not diagnosed with PTSD. He was instead diagnosed with Other Specified Trauma-Stressor Related disorder. The applicant did not have evidence of consistent behavioral health care in the VA since his discharge. He has been treated for migraines. He was awarded service-connected disability for Anxiety Disorder (30%), Migraine Headaches (30%), and Traumatic Brain Disease (40%) in November 2013.

q. Based on the available information, it is the opinion of the Agency BH Advisor that there is insufficient evidence to support the applicant had condition or experience that warrants another referral to IDES at this time from a behavioral health perspective. There is sufficient evidence the applicant was exposed to an IED blast, and he did experience injury as a result. He was found to be physically unfit as a direct result of this combat injury. He did report problems with concentration, low mood, and difficulty with motivation. He did receive multiple and inconsistent diagnoses related to these reported symptoms. However, he did not attend consistent behavioral health treatment or found to not meet retention standards as a result of psychiatric conditions. He was not placed on a permeant profile for a psychiatric profile, and he never required inpatient psychiatric care.

r. The applicant did experience a TBI. He was provided various assessments as result from various medical and behavioral health providers, and the early results of a neurocognitive screener found the applicant was experiencing some attention problems, but it was recommended the applicant undergo a full neuropsychological assessment from a neuropsychologist. The results of his neuropsychological testing found the applicant's performance was consistent with normal cognitive functions and full recovery with no genuine signs of impairments. There was insufficient evidence contradictory to this full neuropsychological battery. Therefore, there is at this time insufficient evidence to refer the applicant to IDES again for PTSD and TBI.

Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? No. Based on the available information, it is the opinion of the Agency BH Advisor that there is insufficient evidence to support the applicant had condition or experience that warrants another referral to IDES at this time from a behavioral health perspective. There is sufficient evidence the applicant was exposed to an IED blast, and he did experience injury as a result. He was found to be physically unfit as a direct result of this combat injury. He did report problems with concentration, low mood, and difficulty with motivation. He did receive multiple and inconsistent diagnoses related to these reported symptoms. However, he did not attend consistent behavioral health treatment or found to not meet retention standards as a result of psychiatric conditions. He was not placed on a permeant profile for a psychiatric profile, and he never required inpatient psychiatric care.

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(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. The Board determined the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

2. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. The applicant contends that he experienced mental health conditions including PTSD and TBI, which were not appropriately accounted for during his physical disability separation evaluation. The Board reviewed his argument as well as the findings of the medical

reviewer. The Board concurred with the medical official's finding that there is insufficient evidence to support the applicant had condition or experience that warrants another referral to IDES at this time from a behavioral health perspective. There is evidence he was exposed to an IED blast, and he did experience injury as a result. He was found to be physically unfit as a direct result of this combat injury. He did report problems with concentration, low mood, and difficulty with motivation. He did receive multiple and inconsistent diagnoses related to these reported symptoms. However, he did not attend consistent behavioral health treatment or found to not meet retention standards as a result of psychiatric conditions. He was not placed on a permeant profile for a psychiatric profile, and he never required inpatient psychiatric care. Therefore, the Board determined there is insufficient evidence to change his disability rating or disposition.

BOARD VOTE:

Mbr 1	Mbr 2	Mbr 3	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
[redacted]	[redacted]	[redacted]	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

Except for the correction addressed in Administrative Note(s) below, the Board found 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.

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.

ADMINISTRATIVE NOTE(S):

amend his DD Form 214, ending 20 November 2013 by adding the Purple Heart to item 13 (Decorations, Medals, Badges, Commendations, Citations, and Campaign Ribbons Awarded or Authorized).

REFERENCES:

1. Title 10, U.S. Code, section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.

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

3. 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.

9. 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.

a. 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.

b. 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//