

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 8 January 2025

DOCKET NUMBER: AR20230010220

APPLICANT REQUESTS: in effect, an increase of his disability rating.

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

- DD Form 149 (Application for Correction of Military Record)
- Self-Authored Statement
- DA Form 3947 (Medical Evaluation Board (MEB) Proceedings)
- DA Form 199 (Information Physical Evaluation Board (PEB) Proceedings)
- DA Form 199-1 (Formal PEB Proceedings)
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- Letter from the Department of Veterans Affairs (VA)
- Medical Documents

FACTS:

1. The applicant states:

a. He is respectfully appealing to the Board to correct his military records. He served in the Army from 9 August 2016 to 8 November 2020 facing challenges with untreated obstructive sleep apnea and ongoing right wrist pain. COVID-19 restrictions hindered timely treatment for his sleep apnea and delayed x-ray and MRI appointments. He kindly requests a comprehensive review considering pandemic circumstance to accurately reflect his disabilities and adjustment to his disability rating.

b. His obstructive sleep apnea hindered his performance as a 25U (Signal Support Systems Specialist). The COVID-19 pandemic prevented timely treatment. Additionally, his ongoing wrist pain significantly affects his daily activities.

c. During his time in the military, he encountered numerous challenges and faced various health issues, including a condition that went untreated until recently - obstructive sleep apnea. This condition significantly affects his quality of life, both personally and professionally. It is his understanding that it should be appropriately reflected in his military records. As a 25U noncommissioned officer responsible for operating and maintaining complex communication systems, obstructive sleep apnea

impeded his performance. He had daytime sleepiness and difficulty maintaining focus, which compromised his alertness hindering his effectiveness. Despite his efforts to manage the condition, persistent fatigue and cognitive impairments associated with obstructive sleep apnea affected his mission readiness.

d. He completed an in-person polysomnogram test at Fort Campbell, Kentucky. On 19 March 2020, the results of the test concluded that he has obstructive sleep apnea. After the test was completed, he was informed that the initial corrective measure to be taken for his obstructive sleep apnea was the use of an oral mandibular advancement device. This device was to be created at a dental clinic located at Fort Campbell. Unfortunately, during that time, the COVID-19 pandemic was in full effect, leading to significant restrictions and closures of medical facilities, including the dental clinics.

e. Additionally, he would like to bring attention to his ongoing pain and limitations in his right wrist, which continues to afflict him. During his military tenure, the persistent pain and limitations in his right wrist impeded his ability to perform essential duties and tasks. Engaging in physical activities necessary for his role often intensified the pain and further restricted his capabilities. The persistent pain and limitations in his right wrist significantly impact his daily activities to this day. He obtained an x-ray to assess the condition, and he was provided a referral for an MRI to further investigate the issue. He is still waiting on a call from this clinic regarding the referral. Despite this, the pain remains unresolved, and physical activity only intensifies it. He continues to experience a popping sensation, further exacerbating the pain and highlighting the severity of the injury. Considering the continuous nature of this condition, he kindly requests that his right wrist pain be thoroughly evaluated for an adjustment to his disability rating.

f. Regrettably, the challenges imposed by the COVID-19 pandemic exacerbated the difficulties he faced in receiving timely and appropriate care. The resulting restrictions and closures of medical facilities, including dental clinics, significantly impeded access to follow-up treatment for both his sleep apnea and right wrist pain. These circumstances persisted until his expiration term of service date, leaving him unable to receive the necessary care, during his military tenure. The unprecedented circumstances surrounding the pandemic and the resulting limitations also caused a backlog of medical services, including the x-ray and MRI appointments for his right wrist pain. These delays prevented him from receiving the necessary follow-up care and treatment for both his obstructive sleep apnea and right wrist pain.

g. After his discharge from the military and when COVID-19 restrictions were lifted, he proactively enrolled with a primary care provider and received a referral to a pulmonary specialist to address his ongoing health concerns. However, due to the high demand for medical services and the backlog of appointments, it took several months before he could be seen by a specialist. During the subsequent sleep study, he was

diagnosed with obstructive sleep apnea and as a result he was prescribed a continuous positive airway pressure (CPAP) machine for treatment.

h. Despite his efforts to adjust to the use of the CPAP machine and the various attempts with different tubing and mask equipment, there have been no notable improvements in his condition, as noted by his pulmonary specialist. The challenges and limitations associated with the effective use of the CPAP machine have not improved his obstructive sleep apnea symptoms.

i. In conclusion, he kindly requests the Board review his case and make the necessary corrections to accurately reflect his service-connected disabilities, incorporating his sleep apnea and right wrist pain. He believes that this appeal is a just and reasonable request, considering the extraordinary circumstances surrounding the COVID-19 pandemic, and he trusts the Board's commitment to ensuring fairness and equity within the military community. He is grateful for this opportunity to present his case before the Board and provide any additional information they may request in their evaluation. He is fully committed to providing any necessary documentation or undergoing further medical examinations, if required, to support his appeal.

2. The applicant provides the following documents:

a. DA Form 3947 (MEB Proceedings), 6 February 2020, shows his status post left wrist repair with residual pain did not meet retention standards. The following conditions met retention standards:

- Right ankle chronic sprain
- Left knee patellofemoral pain syndrome
- Right foot plantar fasciitis
- Left foot plantar fasciitis
- Sensorineural hearing loss in the right ear
- Tinnitus
- Adjustment disorder with mixed anxiety and depressed mood

There was no medical diagnosis for the following conditions:

- Right wrist condition
- Skin rash
- Gastritis
- Loss of smell
- Low back condition
- Right knee condition
- Left arm/elbow condition
- Left hip condition

- Neck condition
- Right or left upper extremity radiculopathy
- Right or left lower extremity radiculopathy
- Migraine headaches
- Sleep apnea
- Eye condition (claimed as astigmatism)

He was referred to a PEB. He concurred with the board's decision and did not request an impartial medical review and did not wish to submit a written rebuttal. He signed the MEB on 20 February 2020.

c. DA Form 199 (Informal PEB Proceedings), 2 April 2020, shows his unfitting condition was status post left wrist triangular fibrocartilage. The board found him psychically unfit and recommended a rating of 10 percent and that he be separated with severance pay. The portion regarding the applicant's election was blank.

d. Letter from the VA and a VA rating decision, 12 November 2020, shows he received service connection for the following conditions:

- Adjustment disorder with mixed anxiety and depressed mood, 30 percent effective, 9 November 2020
- Bilateral plantar fasciitis, 10 percent, effective 9 November 2020
- Left knee patellofemoral pain syndrome, 10 percent, effective 9 November 2020
- Right ankle lateral collateral ligament sprain, 10 percent, effective 9 November 2020
- Post left wrist (non dominant) triangular fibrocartilaginous complex repair, 10 percent, effective 9 November 2020
- Tinnitus, 10 percent, effective 9 November 2020
- Obstructive sleep apnea, 0 percent, effective 9 November 2020

Service connection for right wrist (dominant) pain is denied.

e. Medical documentation, which is available for the Board's review and will be reviewed by the Army Review Boards Agency's Medical Staff.

3. The applicant's service record contains the following documents:

a. DD Form 4 (Enlistment/Reenlistment Document Armed Forces of the United States) shows he enlisted in the Regular Army and entered active duty on 9 August 2016.

b. DA Form 199-1 (Formal PEB Proceedings), 15 July 2020 shows the medical conditions determined to be unfitting as right ankle chronic sprain, 10 percent and status post left wrist triangular fibrocartilage with residual pain, 10 percent. The board found him physically unfit and recommended a rating of 20 percent and that he be separated with severance pay. He did not concur with the findings and requested VA reconsideration of his disability ratings.

c. DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was honorably discharged on 8 November 2020. He completed 4 years and 3 months of active service. He received disability severance pay in the amount of \$34,696.80. He was discharged for disability, severance pay, combat related.

MEDICAL REVIEW:

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

b. The applicant is applying to the ABCMR requesting his sleep apnea and right wrist pain be determined to have been unfitting conditions for continued military service with a subsequent increase in his military disability rating and a change of his disability discharge disposition from separate with disability severance pay to permanent retirement for physical disability. He states:

"I am requesting a correction to my military records due to untreated obstructive sleep apnea, which hindered my performance as a 25U [signal support systems specialist] NCO. The COVID-19 pandemic prevented timely treatment. Additionally, ongoing right wrist pain significantly affects my daily activities. I kindly request a review to accurately reflect my disabilities, adjust my disability rating, and consider the impact of these conditions."

c. The Record of Proceedings details the applicant's service and the circumstances of the case. His DD 214 for the period of Service under consideration shows he entered the Regular Army on 9 August 2016 and was separated with \$34,696.80 of disability severance pay on 8 November 2020 under provisions provided in paragraphs 4-22b(9)

and 4-27c(3) of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (19 January 2017).

d. 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 limiting 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).

e. Soldiers then receive one set of VA Disability Benefits Questionnaires (DBQ) (aka 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.

f. 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.

g. On 27 November 2019, the applicant was referred to the IDES for "Status-post Left Wrist TFCC (triangular fibrocartilage complex] Repair with Residual Pain ." The applicant claimed nineteen additional conditions on a separate Application for Disability Compensation and Related Compensation Benefits (VA Form 21-526EZ), including right wrist pain and sleep apnea.

h. A medical evaluation board (MEB) determined his referred conditions failed the medical retention standards of AR 40-501, Standards of Medical Fitness. They determined the twenty-one additional medical conditions met medical retention standards of which fourteen had "no medical diagnosis." The conditions without a diagnosis after examination included his claimed right wrist condition and sleep apnea.

On 12 February 2020, the applicant concurred with the MEB's decision, declined the opportunity to request an Impartial Medical Review (IMR), declined the opportunity to submit a written rebuttal, and his case was forwarded to a physical evaluation board (PEB) for adjudication.

i. On 2 April 2020, the applicant's informal PEB found his left wrist condition to be his sole unfitting condition for continued military service. They found the remaining twenty-one medical conditions not unfitting for continued service. The PEB applied the Veterans Benefits Administration (VBA) derived rating of 10% and recommended the applicant be separated with disability severance pay. On 15 April 2020, after being counseled by his PEB Liaison Officer (PEBLO) on the PEB's findings and recommendations, the applicant non-concurred with the PEB's finding, requested a formal hearing with the assistance of regularly appointed counsel, submitted a written appeal, and requested a VA reconsideration of his disability rating.

j. From his 15 April 2020 written appeal prepared by counsel:

"SGT [Applicant] also respectfully believes that his Right Ankle Chronic Sprain, (MEB Dx 2), and his Left Knee Patellofemoral Pain Syndrome, (MEB Dx 3), should be deemed to be additional Medically Unfitting Disabilities by the TX PEB based upon the evidence below."

k. From the MEB narrative summary for these two conditions:

SGT [Applicant] has received occasional conservative care for right ankle pain. An x-ray from December of 2019 showed only edema. Advanced imaging has not been performed. His most recent (01/28/2020) physical therapy note reports improvement of his symptoms with treatment. The VA examiner reported normal range of motion with no pain on exam. There is no evidence that a right ankle sprain has chronically interfered with performance of duties, or of a right ankle condition which will not respond to conservative care.

SGT [Applicant] has received occasional conservative care for left knee pain, including evaluation from orthopedics in November of 2019. X-ray from that time period was interpreted as normal. Advanced imaging has not been performed. He was treated with temporary profile restrictions, steroids/NSAID's and bracing, but has had no follow-up with orthopedics to date. His temporary profile is expired. The VA examiner reported normal range of motion with no pain. There is no evidence that a left knee condition has chronically interfered with performance of duties, or of a left knee condition which will not respond to conservative care."

l. The PEB reached back to the MEB for evaluation of the additional evidence presented by the applicant. Dr. D.A.T, Chief of Soldier Readiness at Blanchfield Army Community Hospital, found no reason for changing the MEB's initial findings as seen in his 8 May 2020 response to the PEB:

"The soldier experienced what was objectively a relatively minor right ankle and left knee injury that medical records suggest is healing normally. The MEB discussed both conditions in detail during the soldier's medical board. The soldier's radiologic evidence shows only minimal disease. The MEB finds that the soldier's ankle and knee conditions continue to meet retention standards. No change in that determination is warranted. This memorandum does not address fitness; that determination is under the purview of the PEB.

Based on the data above, no changes are ordered for the DA 3947 [Medical Evaluation Board Proceedings] or the DA 3349 [Physical Profile]. There have been no significant changes in the patient's overall medical condition since the MEB completed its deliberations other than the included information. This case is returned to the PEB for adjudication."

m. The applicant was present for and represented by regularly appointed counsel at his formal PEB on 15 July 2020. Following the presentation and review of evidence along with the applicant's sworn testimony, the Board determined his "Right ankle chronic sprain" was unfitting for continued service based on his testimony and a new 1 July 2020 MRI which showed his ankle condition was worsening. They maintained that his left knee condition continued to be not unfitting for continued service:

"Regarding the Soldier's contention that he is unfit for his left knee patellofemoral pain syndrome condition: Based upon a review of the objective evidence of record, including the Soldier's sworn testimony and exhibits provided during formal board proceedings; and considering the requirements of reasonable performance of duties required by rank and military specialty, in full consideration of DoDI 1332.18 [Department of Defense Instruction 1332.18, SUBJECT: Disability Evaluation System (DES) (5 August 2014)], Enc. 3, App. 2, to include combined, overall effect, the PEB finds insufficient medical evidence to find the Soldier's left knee condition unfitting.

The Soldier first complained about his left knee in September 2019 when he fell in a ravine during a training exercise, and then again later in November 2019 during an Army Physical Fitness Test. His initial x-ray was normal. Orthopedics prescribed a

tracking brace for the left kneecap in November 2019, plus a short trial of oral steroid medication which the SM did not pick up at the pharmacy.

The Soldier was not seen again for the left knee condition until June 2020 at which time instructions were repeated as to wearing the kneecap tracking brace and a second prescription for a short trial of oral steroids was submitted to the pharmacy.

The Soldier's testimony during the formal proceedings confirmed that it was his opinion that the kneecap brace was not effective, so he stopped wearing it full time as prescribed. The Soldier also testified that he did pick up the second oral steroid prescription which the orthopedic specialist ordered in June 2020, but that he'd not yet taken the oral steroids.

Due to the patient restrictions brought on by COVID-19, the Soldier has not had adequate treatment through physical therapy and other treatment modalities to determine with any certainty that his knee will not improve with proper care. His left knee condition has not reached its medical retention determination point. Therefore, the PEB maintains the informal board finding that his left knee condition is NOT unfitting.”

n. Thou the additional 10% disability rating for his right ankle brought his combined military disability rating to 20%, his final rating remained less than 30% and so the PEB recommended he be separated with disability severance pay. On 30 July 2020, after being counseled on the PEB's findings and recommendation, the applicant non-concurred with the Formal Board's findings, submitted a written appeal, and requested a VA reconsideration of his disability rating. Counsel stated the applicant had continued with treatment, it had failed, and thus the condition should now be found unfitting.

o. In his 10 August 2020 response to the applicant, the PEB president maintained that his left knee conditioned remained not-unfitting for continued service:

“Regarding your contention that your left knee condition should be found physically unfit, this is not substantiated by the current objective evidence available for review. Your left knee condition has not met the requisite MRDP [medical retention determination point] yet. Your condition still has treatment options that you have elected not to take advantage of, and during formal board testimony you chose to not follow the instructions of your physician as to wearing your knee brace on two separate occasions.

The recent treatment notes you provided since your formal board do not substantiate a change to the formal PEB findings concerning your left knee condition. Until reasonable treatment modalities have been exhausted, your left knee condition does not warrant a MEB referral based on AR 40-501, Ch 3, and therefore remains not unfitting.”

p. MRDP as defined in paragraph 7-4b(2) of AR 40-501. Standards of Medical Fitness (14 June 2017):

“The MRDP is when the Soldier’s progress appears to have medically stabilized; the course of further recovery is relatively predictable; and where it can be reasonably determined that the Soldier is most likely not capable of performing the duties required of his MOS, grade, or rank. This MRDP and referral to a MEB/PEB will be made within 1 year of being diagnosed with a medical condition(s) that does not appear to meet medical retention standards, but the referral may be earlier if the medical provider determines that the Soldier will not be capable of returning to duty within 1 year.

The MEB physician or physician approval authority will review all MEB referrals to insure that MRDP has been achieved prior to initiating a medical evaluation board; ...”

q. The applicant appealed this finding to the United States Army Physical Disability Agency. In his 18 August 2020 response to Soldier’s counsel, the Deputy Commander of the Agency maintained the formal PEB’s finding that his left knee pain was not unfitting:

“The current objective evidence in review shows your client's left knee condition has not met the requisite MRDP yet. Your client's condition still has treatment options that your client has elected not to take advantage of, and during formal board testimony your client chose to not follow the instructions of your physician as to wearing their knee brace on two separate occasions.

The recent treatment notes you provided since your formal board do not substantiate a change to the formal PEB findings concerning your client's left knee condition. Until reasonable treatment modalities have been exhausted, your client's left knee condition does not warrant a MEB referral based on AR 40-501, Ch 3, and therefore remains not unfitting. As a result, the findings and responses of the PEB are reaffirmed.”

r. Though his VARR was not available for review, JLV shows he continues to have 10% disability ratings for both his left wrist and right ankle conditions.

s. His appeals exhausted, the case was approved for the Secretary of the Army on 18 August 2020.

Review of his PEB case file in ePEB along AHLTA records identified no material inaccuracies, omissions, or discrepancies.

t. There is insufficient probative evidence the applicant had additional medical condition(s) were unfitting IAW AR 635-40 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(s) prevented the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his discharge.

u. Review of his records in JLV shows he has been awarded several additional VA service-connected disability ratings, including chronic adjustment disorder (30%), limited flexion of his left knee (10%), and sleep apnea (0%). 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. 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.

v. It is the opinion of the ARBA Medical Advisor that neither an increase in his military disability rating, a change of his disability discharge disposition, nor a referral of his case back to the DES is warranted.

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 request, available military records and medical review, the Board concurred with the advising opinion of the ARBA Medical Advisor that neither an increase in his military disability rating, a change of his disability discharge disposition, nor a referral of his case back to the DES is warranted. The opine

noted there is insufficient probative evidence to conclude that the applicant had any additional medical conditions that were unfitting under the provisions of Army Regulation (AR) 635-40 prior to separation. Based on this, no justification exists for referral to the Disability Evaluation System

2. The Board reviewed the applicant's request for an increase in disability rating and found insufficient justification to support the claim. The applicant was referred to a Physical Evaluation Board (PEB), concurred with the board's findings, and elected not to pursue an impartial medical review or submit a written rebuttal. He signed the Medical Evaluation Board (MEB) documentation on 20 February 2020, acknowledging his agreement with the proceedings. DA Forms 199 and 199-1 reflect that the applicant was found physically unfit due to status post left wrist triangular fibrocartilage with residual pain and chronic right ankle sprain, and was assigned a combined disability rating of 20 percent with recommendation for separation with severance pay

3. The Board determined, although the Department of Veterans Affairs (VA) later granted service connection for several conditions, including adjustment disorder and musculoskeletal impairments, this post-separation adjudication does not retroactively alter the findings of the PEB under Department of Defense and Army disability evaluation guidelines. Furthermore, the Board found no compelling evidence indicating that additional service-connected conditions rated by the VA were unfitting at the time of separation, nor is there documentation demonstrating these conditions impaired the applicant's ability to perform the duties of his office, grade, rank, or rating. Therefore, the Board agreed the disability rating assigned by the PEB was appropriate and in accordance with Army Regulation 635-40, and does not support an increase

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
XXX	XXX	XXX	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

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, 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 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; 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.

2. 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. The Surgeon General of the Army will establish and interpret medical standards for retaining or medically separating Soldiers. The objectives are to maintain and effective and fit military organization with maximum use of available manpower; provide benefits to eligible Soldiers whose military service is terminated because of a service-connected disability provide prompt disability evaluation processing ensuring the rights and interests of the Government and Soldier are protected; and establish the Military Occupational Specialty Administrative Retention Review (MAR2) as an Army pre-Disability Evaluation System (DES) evaluation process for Soldiers who require a permanent 3 (P3) or P4 physical profile for a medical condition that meets the medical retention standards of Army Regulation 40-501.

c. 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.

d. The DES begins for a Soldier when either of the events below occurs:

(1) The Soldier is issued a permanent profile approved in accordance with the provisions of Army Regulation 40-501 and the profile contains a numerical designator of P3/P4 in any of the serial profile factors for a condition that appears not to meet medical retention standards in Accordance with Army Regulation 40-501. Within (but not later than) 1 year of diagnosis, the Soldier must be assigned a P3/P4 profile to refer the Soldier to the DES.

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

e. 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.

3. 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.

4. Title 38, USC, sections 1110 and 1131, permits the VA to award compensation for disabilities that were incurred in or aggravated by active military service. However, an award of a higher VA rating does not establish error or injustice on the part of the Army. The Army rates only conditions determined to be physically unfitting at the time of discharge which disqualify the Soldier from further military service. The VA does not have the authority or responsibility for determining physical fitness for military service. The VA awards disability ratings to veterans for service-connected conditions, including those conditions detected after discharge, to compensate the individual for loss of

civilian employability. These two government agencies operate under different policies. Unlike the Army, the VA can evaluate a veteran throughout his or her lifetime, adjusting the percentage of disability based upon that agency's examinations and findings.

5. 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//