

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 11 December 2024

DOCKET NUMBER: AR20230010468

APPLICANT REQUESTS: reconsideration of his previous request:

- A permanent disability retirement
- A disability rating of 30 percent (%)
- A personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- A self-authored letter
- Medical records
- Army Board for Correction of Military Records (ABCMR) Docket Number AR20210013576, 14 June 2022, with attachments
- DD Form 214 (Certificate of Release or Discharge from Active Duty)

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the ABCMR in Docket Number AR20210013576 on 14 June 2022.

2. The applicant states, in effect, he is requesting reconsideration of his previous request for a permanent disability retirement and a disability rating of 30 %. He believes the ABCMR dismissed all new evidence that he, along with the Physical Disability Agency (PDA), provided. The new evidence proved the Informal Physical Evaluation Board (PEB) Proceedings and the Medical Evaluation Board (MEB) erred in their decision of his disability rating. All of his medical conditions were lumped in his rating of 10%, which he should have been rated at 30% and received a permanent disability retirement. Although the PDA attempted to correct this injustice, the ABCMR misquoted the advisory opinion and denied his request. The applicant's statement is available in its entirety for the Boards review.

3. The applicant provides medical records that will be reviewed and discussed by the Medical staff at Army Review Boards Agency (ARBA).

4. The applicant's service record shows the following:

a. He enlisted in the Regular Army on 28 November 1995, followed by multiple reenlistments.

b. He served in Iraq from 29 April 2003 to 17 June 2004.

c. In a memorandum subject: Commander's Performance Statement, 12 November 2005, it shows his medical condition began in November of 2001, while on active duty. The applicant's back injury affects his daily job in the Army, and he is unable perform the basic duties of a Soldier.

d. DA Form 3349 (Physical Profile Record), provides the following information:

- he was issued a permanent profile on 23 November 2005
- due to a degenerative disc disease L3-L4 with radiculopathy
- a 3 in "L" lower extremities reflects significant limitations
- he could not perform the two-mile run and the sit up event for the army physical fitness test (APFT)
- he could not perform airborne operations
- MEB was recommended

e. DA Form 3947 (Medical Evaluation Board Proceedings), 20 December 2005, reflects the following concerning his medical condition:

- Diagnosis: Chronic low back pain with radiculopathy due to degenerative disc disease
- Approximate Date of Origin: 2002
- Incurred while entitled to basic pay
- Did not exist prior to his service
- Permanently aggravated by service
- He was referred to a PEB
- He did not desire to continue on active duty
- He agreed with the board's findings and recommendation

f. DA Form 199 (Physical Evaluation Board (PEB) Proceedings), shows a PEB was convened on 14 February 2006, wherein the applicant was found physically unfit with a recommended combined disability rating of 10%, and that the disposition be separation with severance pay if otherwise qualified, for chronic low back pain since 2000, that worsened in 2002, after falling of a truck. The applicant concurred with the findings and waived a formal hearing of his case. This document further shows the PEB made the following administrative determinations:

(1) The Soldier's retirement is not based on disability disease from injury or disease received in the line of duty as a direct result of armed conflict or caused by an instrumentality of war and incurring in the line of duty during a period of war as defined by law.

(2) Evidence of record reflects the Soldier was not a member or obligated to become a member of an armed Force or Reserve thereof, or the NOAA or the USPHS on 24 September 1975.

(3) The disability did not result from a combat-related injury as defined in Title 26, U.S. Code, section 104.

g. Physical Disability Information Report, 24 February 2006, shows he received a disability rating of 10%, and his date of separation was to be on 24 May 2006.

h. DD Form 214 shows he was honorably released from active duty on 14 April 2006, due to disability, severance pay. He completed 10 years, 4 months, and 17 days of active service and 1 year, 2 months and 19 days of foreign service. His rank/grade at the time of separation was sergeant (SGT)/E-5. This document also shows he was awarded or entitle to the following awards:

- Army Commendation Medal (second award)
- Army Achievement Medal (fifth award)
- Army Good Conduct Medal (second award)
- National Defense Service Medal
- Global War on Terrorism Service Medal
- Humanitarian Service Medal
- Army Service Ribbon
- Iraq Campaign Medal
- Parachutist Badge
- Driver and Mechanic Badge with Mechanic Clasp

5. In a prior ABCMR Docket Number AR20210013576, 14 June 2022, the applicant requested a correction of his DA Form 199 to show a higher disability rating resulting in his retirement for physical disability, and personal appearance before the Board.

a. 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 was not necessary to serve the interest of equity and justice in this case.

b. Based on a preponderance of evidence, the Board determined that the reason

for separation the applicant received was not in error or unjust. Although the applicant was awarded multiple service-connected disability ratings, including two 10% ratings for his lumbar radiculopathies, the military disability evaluation system compensates an individual only for service incurred condition(s) which have been determined to disqualify him/her from further military service. The Board found that relief was not warranted.

c. In that case, a medical review was obtained from the USAPDA, which states:

(1) Background: On 27 October 2005, the applicant was issued a physical profile for degenerative disc disease (back) L3-14 with radiculopathy. It is noted that the conditions were lumped together. Subsequently, he was referred to the MEB. On 26 January 2006, the MEB found his degenerative disc disease (back) L3-L4 with radiculopathy failed medical retention standards and recommended that the matter proceed to a PEB. Again, it is noted that the conditions were listed together versus more appropriately being separated.

(2) The Narrative Summary (NARSUM) provided that the applicant was injured while in South Korea in February 2002 when he fell backwards from the tailgate of a S-ton truck. His commander's statement indicates that he was participating in a crew drill when the fall occurred. The applicant concurred with the findings of the MEB. On 14 February 2006, the PEB found the back condition as unfitting, while also noting, "mild spinalstenosis and mild/moderate bilateral L4 foraminal stenosis due to a right paracentral disc protrusion." The PEB went on to state that the back condition had a motion (ROM) of forward flexion of 90 degrees and extension of 20 degrees. (Id.) The condition was rated at 10 percent due to tenderness to palpation. (Id.)

(3) A review of the medical examination, dated 5 December 2005, indicates that the passive range of motion (PROM) was, indeed, 90 degrees forward flexion. However, the active range of motion (AROM) was 60 degrees forward flexion. (Id.) The applicant's final disposition, which he concurred with, was separation with severance pay at 10 percent with no combat codes.

(4) Analysis: The VA provides Diagnostic Codes (DC) in 38 Code of Federal Regulations (CFR) Part 4 for various physical and mental health conditions. The DCs are generally found together based upon the systems of the body (ex. muscular-skeletal system, nervous system, digestive system, etc.). Here, the applicant was referred for both a muscular-skeletal condition (back) and for his bilateral nervous conditions (radiculopathy (right greater than left)). Still, both the MEB and PEB lumped those conditions into one rating - the back. The rating for the back condition can be found at 38 CFR § 4.71 (DC 5237) and rated under the General Rating Formula for Diseases and Injuries of the Spine.

(5) The General Rating Formula provides for a rating of 10% if the back condition has a forward flexion of greater than 60 degrees but not greater than 85 degrees. It also provides for a rating of 20% if the forward flexion is greater than 30 degrees but not greater than 60 degrees. 38 CFR § 4.59 - Painful Motion, provides for the minimum scheduler rating when painful motion is present. 38 CFR § 4.46 - Accurate measurement, requires the measurement of both AROM and PROM. 38 CFR § 4.3 - Resolution of Reasonable Doubt, requires that if a reasonable doubt arises regarding the degree of disability it should be resolved in favor of the Soldier. 38 CFR § 4.7 - Higher of two evaluations, requires that when there is a question as to two evaluations the higher will be assigned if the disability picture more closely approximates the higher criteria for that rating.

(6) In accordance with Department of Defense Instruction 1332.18, an instrumentality of war is, "[a] vehicle, vessel, or device designed primarily for military service and intended for use in such service at the time of the occurrence or injury." An injury or illness attributed to the special dangers (hazardous service) associated with armed conflict or preparation or training (simulations) for armed conflict are conditions simulating combat.

(7) Here, the MEB and PEB erred in lumping multiple separate conditions with distinct DCs together for both medical retention and fitness determinations. The PEB further erred by misapplying the rating standards in the General Rating Formula by not providing the higher rating based upon the medical examination findings of AROM of 60 degrees, which would have equated to a 20% rating for the back condition. Based upon the findings of the NARSUM, the applicant demonstrated mild radiculopathy of the right greater than the left side. 38 CFR § 4.12a - Schedule of ratings - neurological conditions and convulsive disorders, DC 8520 (Sciatic Nerve) incomplete paralysis with mild symptoms would equate to a 10% rating. Finally, his backwards fall from a 5-ton military vehicle (instrumentality of war) while participating in a crew drill (conditions simulating combat) should have been awarded a combat code for the three conditions (V3/10C - Yes). Thus, it appears that his disposition should have been permanent disability retirement at 40% (20% + 10% + 10% + 1.9% (bilateral factor)) with V3/1QC combat codes for each condition.

(8) Conclusion: Given the above the USAPDA find the applicant's requests to increase his back condition rating to 20% and to add unfitting bilateral lower extremity radiculopathy conditions (10% each) to be legally sufficient. While not requested, the USAPDA also find that combat (V3/10C) codes should be awarded for each condition. As such, the applicant's requests are legally sufficient.

6. During that case, the USAPDA advisory opinion was provided to the applicant and given the opportunity to provide additional evidence or comments. He responded and expressed his agreement with the contents of the USAPDA advisory opinion.

7. Army Regulation 15-185 (ABCMR), currently in effect, states an applicant is not entitled to a hearing before the Board; however, the request for a hearing may be authorized by a panel of the Board or by the Director of ABCMR.

8. Due to the applicant's request for a permanent disability retirement and a disability rating of 30%, the case is being forwarded to the Medical staff at ARBA.

9. 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 (AHLTA), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant is applying to the ABCMR requesting reconsideration of their denial of his previous request for an increase in his military disability rating with a subsequent change in his disability discharge disposition from separated with severance pay to permanent retirement for physical disability. He states:

"The ABCMR dismissed the new evidence that myself and the Physical Disability Agency provided proving the error and injustice made on my disability decision that proved the PEB [physical evaluation board] and MEB [medical evaluation board] erred while making the decision on my disability separation.

Attached you will find that my disability at the time of service was DOD on spine with bilateral radiculopathy. My rating were lumped into one and I was rated 10% for back pain, disregarding the DOD and bilateral radiculopathy which in turn the ratings would have been at least 30% which qualifies for medical retirement."

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. His DD 214 shows he entered the regular Army on 28 November 1995 and was separated with \$49,932 of disability severance pay on 14 April 2006 under provisions in chapter 4 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (8 February 2006).

d. This request was previously denied by the ABCMR on 14 June 2022 (AR20210013576). Rather than repeat their findings here, the board is referred to the

record of proceedings and medical advisory opinion for that case. This review will concentrate on the new evidence submitted by the applicant.

e. The applicant was placed on a duty limiting permanent physical profile for "Degenerative disc disease L3-L4 with radiculopathy" on 27 October 2005.

f. On 14 February 2006, the applicant's informal PEB determined his "Chronic low back pain" to be the sole unfitting for continued Service. There is no mention of radiculopathy in their rationale on his Physical Evaluation Board Proceedings (DA form 199):

"Chronic low back pain with onset in 2000, worsened in 2002 after falling off a truck. Pain is described as constant, of an intensity of 7/10 for which he takes non-opioid pain medications. Physical examination revealed an antalgic gait tenderness to palpation in the paraspinal muscles with 5/5 muscle strength and intact reflexes.

Range of motion testing showed flexion of 90 degrees and extension of 20 degrees, measurement. Limited by pain, MRI showed mild spinal stenosis and mild/moderate bilateral L4 foraminal stenosis due to a right paracentral disc protrusion. Rated at 10% for tenderness to palpation.

g. While an 8 November 2021 advisory from the United States Army Physical Disability Agency states the PEB erred by "lumping multiple separate distinct' conditions together, the above rationale shows this not to have been the case. Though the applicant's 27 October 2005 Physical Profile (DA Form 3349) did list "L3-L4 Radiculopathy," this did not obligate the PEB to determine the condition unfitting for continued military service.

h. Review of his medical records show the referenced bilateral lumbar radiculopathy was limited to decreased sensation over the anterior aspect of his thighs with no decrease in strength. As such, they did not fail medical retention standards, and so it is highly unlikely the PEB would have been determined these mild sensory deficits to have been unfitting conditions for continued military Service: There was no evidence they would have prevented the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his discharge.

i. Review of a submitted VA ratings decision and JLV show he has been awarded multiple service-connected disability ratings, including two 10% ratings for his paralysis

of the anterior crural nerve originally effective 14 March 2012. This was almost six (6) years after his separation.

j. This nerve is responsible for sensory innervation of the anterior thigh as well as innervation of some muscles of the anterior thigh. The VA's rating of 10% rating equates to "mild" and was most likely related to the applicant's decreased sensation over his anterior thighs as the PEB noted 5/5 (normal) strength in their rationale. From the VASRD:

"Anterior crural nerve (femoral).

8526 Paralysis of:

Complete; paralysis of quadriceps extensor muscles .....40

Incomplete:

Severe ..... 30

Moderate .....20

Mild .....10

k. Paragraph 3-1 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (8 February 2006) states:

"The mere presence of an impairment does not, of itself, justify a finding of unfitness because of physical disability. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier reasonably may be expected to perform because of their office, grade, rank, or rating."

l. By law, the Services are required to use the VASRD to rate unfitting military disabilities Chapter 61 of Title 10, United States Code). Paragraph B-3a of Appendix B to AR 635-40, reads in part:

"Once a Soldier is determined to be physically unfit for further military service, percentage ratings are applied to the unfitting conditions from the VASRD. These percentages are applied based on the severity of the condition."

m. The PEB rated the applicant's lumbar spine condition using VASRD diagnostic code (DC) 5237. As previously noted, the PEB, using the VA Schedule for Rating Disabilities (VASRD), derived and applied a rating of 10% to his disability and recommended he be separated with disability severance pay. The PEB's derived disability rating was correct. This is confirmed in his VA Ratings Decision which shows the condition was rated as 10% disabling effective 14 March 2012.

n. The DES compensates an individual only for service incurred condition(s) which have been determined to disqualify him or her from further military service. The DES has neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions which were incurred or permanently aggravated during their military service; or which did not cause or contribute to the termination of their military career. That role and authority is granted by Congress to the Department of Veterans Affairs and executed under a different set of laws.

o. Given no evidence of error or injustice, it is the opinion of the ARBA medical advisor that both an increase in his military disability rating or a referral of his case back to the DES remain unwarranted.

#### 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 request 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 official finding that both an increase in his military disability rating or a referral of his case back to the disability evaluation system (DES) remain unwarranted. The opine noted the PEB's derived disability rating was correct. This is confirmed in the applicant's VA Ratings Decision which shows the condition was rated as 10% disabling.

2. The Board determined there is insufficient evidence to support the applicant's contentions for a permanent disability retirement nor his request for a disability rating of 30 percent (%). The Board noted the applicant concurred with the findings and waived a formal hearing of his case. Based on the advising opine and evidence found in the applicant's record, the Board found determined reversal of the previous Board determination is without merit and denied relief.

3. 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

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

BOARD DETERMINATION/RECOMMENDATION:

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 to amend the decision of the ABCMR set forth in Docket Number AR20210013576 on 14 June 2022.

■

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. Army Regulation 15-185 (Army Board for Correction of Military Records (ABCMR)), currently in effect, prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR. 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. The ABCMR may, in its discretion, hold a hearing (sometimes referred to as an evidentiary hearing or an administrative hearing) or request additional evidence or opinions. Applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

2. Title 10, United States Code (USC) (Armed Forces), 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 Department of Defense (DOD) Directive 1332.18 and AR 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 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 Medical Evaluation Board (MEB) and the Informal Physical Evaluation Board (PEB) Proceedings. 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.

3. Title 10, United States Code (USC) (Armed Forces), 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%. Title 10, United States Code (USC) (Armed Forces), 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%.

4. Title 38, United States Code (USC) (Veterans' Benefits), 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.

5. Title 38, United States Code (USC) (Veterans' Benefits), 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.

6. Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation), establishes the Army Physical Disability Evaluation System according to the provisions of Title 10, United States Code (USC), Chapter 61, (10 USC 61) and Department of Defense Directive (DODD) 1332.18. It 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 or her office, grade, rank, or rating. If a Soldier is found unfit because of physical disability, this regulation provides for disposition of the Soldier according to applicable laws and regulations. The objectives of this regulation are to maintain an effective and fit military organization with maximum use of available manpower, provide benefits for eligible Soldiers whose military service is terminated because of a service-connected disability, provide prompt disability processing while ensuring that the rights and interests of the Government and the Soldier are protected.

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 an MEB; when they receive a permanent physical profile rating of "3" or "4" in any functional capacity factor and are referred by a Military Occupational Specialty Medical Retention Board; and/or they are command-referred for a fitness-for-duty medical examination or directed by medical providers.

b. The disability evaluation assessment process involves two distinct stages: the MEB and PEB. The purpose of the MEB is to determine whether the service member's injury or illness is severe enough to compromise his or 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 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 whose medical condition did not exist prior to service who are determined to be unfit for duty due to disability are either separated from the military or are permanently retired, depending on the severity of the disability. 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 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 Veterans Affairs 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 his or her office, grade, rank, or rating in such a way as to reasonably fulfill the purpose of his or her 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.

d. Physical disability evaluation will include a determination and supporting documentation on whether the Soldiers disability compensation is excluded from Federal gross income under the provisions of Title 26, United States Code (USC), section 104. The entitlement to this exclusion is based on the Soldier having a certain status on 24 September 1975 or being retired or separated for a disability determined to be combat related as set forth in this paragraph. The determination will be recorded on the record of proceedings of the Soldier's adjudication.

e. Combat related: This standard covers those injuries and diseases attributable to the special dangers associated with armed conflict or the preparation or training for armed conflict. A physical disability will be considered combat-related if it causes the Soldier to be unfit or contributes to unfitness and was incurred under any of the following circumstances:

(1) As a direct result of armed conflict.

(2) While engaged in hazardous service. Such service includes, but is not limited to, aerial flight duty, parachute duty, demolition duty, experimental stress duty, and diving duty.

(3) Caused by an instrumentality of war. Occurrence during a period of war is not required. A favorable determination is made if the disability was incurred during any period of service as a result of such diverse causes as wounds caused by a military weapon, accidents involving a military combat vehicle, injury, or sickness caused by fumes, gases, or explosion of military ordnance, vehicles, or material. However, there must be a direct causal relationship between the instrumentality of war and the disability. For example, if a Soldier is on a field exercise and is engaged in a sporting activity and falls and strikes an armored vehicle, the injury will not be considered to result from the instrumentality of war, because it was the sporting activity that was the cause of the injury, not the vehicle. On the other hand, if the individual was engaged in the same sporting activity and the armored vehicle struck the Soldier, the injury would be considered the result of an instrumentality of war.

7. Army Regulation 40-501 (Standards of Medical Fitness), in effect at the time, provides that a profile is considered permanent unless a modifier of "T" (temporary) is added.

a. A permanent profile may only be awarded or changed by the authority designated by Commanders of Army Military Treatment Facilities. If the profile is permanent, the profiling officer must assess if the Soldier meets the medical retention standards of this regulation, those Soldiers on active duty who do not meet the medical retention standards must be referred to an MEB. Permanent profiles may be amended at any time if clinically indicated and will automatically be reviewed at the time of a soldier's periodic examination. The soldier's commander may also request a review of a permanent profile.

b. A physical profile, as reflected on a DA Form 3349 (Physical Profile) or DD Form 2808, is derived using six body systems: "P" = physical capacity or stamina; "U" = upper extremities; "L" = lower extremities; "H" = hearing; "E" = eyes; and "S" = psychiatric (abbreviated as PULHES). Each body system has a numerical designation:

1 meaning 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 or temporary.

8. Title 10, United States Code (USC) (Armed Forces), section 1556 (Ex Parte Communications Prohibited) 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 applicant's (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//