

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 26 June 2024

DOCKET NUMBER: AR20230010905

APPLICANT REQUESTS:

- upgrade of his under honorable conditions (general) discharge to honorable
- retirement for physical disability instead of separation for misconduct
- personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Enlisted Record Brief (ERB)
- DA Form 199 (Informal Physical Evaluation Board (PEB) Proceedings), dated 21 October 2022
- Memorandum from Eisenhower Army Medical Center, Substance Use Disorder Clinical Care (SUDCC), dated 25 October 2022
- DA Form 2627 (Record of Proceedings Under Article 15, Uniform Code of Military Justice (UCMJ))
- Memorandum for Record from Command Sergeant Major (CSM) B, subject: Letter of Consideration, date 24 April 2023
- memorandum from the applicant's defense counsel, subject: Request for Reconsideration of Administrative Separation Board Recommendation dated 25 April 2023
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- four Noncommissioned Officer Evaluation Reports (NCOER)
- DA Form 4856 (Developmental Counseling Form)
- DA form 7652 (Disability Evaluation System (DES) Commanders' Performance and Functional Statement) (page 2 and 3 of 3)
- four pages of medical records
- Department of Veterans Affairs (VA) Rating Decision (pages 2, 4, 7, 9 of 33)

FACTS:

1. The applicant states:

- a. He has been incapacitated since September 2021 as a result of a failed surgery performed by Army doctors. He has lost functions of his lower extremities which, caused him to be wheelchair bound, and he deals with severe mental and physical health complications that are irreversible. According to Army and VA medical providers, it was found during his Medical Evaluation Board (MEB) that he will be permanently immobile and will require in-home care for the rest of his life. He received the same punishment that Soldiers who are mentally and physically healthy would receive. All his issues are a direct reflection of the inadequate care he has received from doctors, physical therapists, and all levels of his chain of command.
- b. Due to the lack of care, he became immensely depressed and self-medicated using marijuana. After self-reflection, he self-enrolled in the SUDCC on 28 March 2022. When enrolling, he was never administered a urinalysis or counseled as he was supposed to in accordance with Army Regulation (AR) 600-85 (The Army Substance Abuse Program). The only urinalysis he took was conducted by his unit in July 2022 while he was enrolled in the SUDCC. His unit was tracking his self-enrollment into the SUDCC but never reviewed any positive progress he made during rehabilitation.
- c. His PEB was completed in October 2022. The commanding general decided to separate him in April 2023, however, during the administrative separation board, instructions to members were incorrect. For enlisted boards, the burden is on the Government to show, by a preponderance of the evidence, that the Soldier should be separated. His administrative separation board's instructions placed the burden on the Soldier to "show cause" for retention. He was being punished when he self-enrolled in the SUDCC to seek help. It seems like the Army is gatekeeping resources to ensure that he is punished for the rest of his life when he is in this situation only due to having a failed surgery and inadequate care. He and his family have been enduring a life of suffering since the failed operation. His wife is his caretaker, and she lost her career, which has caused a huge financial decline within the household.
- d. His service history in no way reflects that he nor his family deserve this lack of care and compassion when referring to his overall quality of life. Before the surgery, he served his country exceptionally for 7 years, earning expert identifier badges and a plethora of awards acknowledging his expertise and performance. He is only asking for help in obtaining a medical retirement for the health care he needs. The Army broke him, and he has supporting documents to explain why the commanding general's decision is unjust and why he should be medically retired.

2. The applicant enlisted in the Regular Army on 12 November 2013. He reenlisted on 6 May 2016 and on 11 June 2020. His ERB shows he was promoted to the rank and grade of staff sergeant/E-6 with a date of rank of 1 May 2020.

3. On 21 October 2022, a PEB found the applicant physically unfit for further military service due to right knee patellar tendon rupture, status post repair. The DA Form 199 shows the applicant first sought treatment for this condition on 21 September 2021. He was playing basketball when he jumped, felt a pop, and immediately had pain in the right knee. He was transported via ambulance to the emergency room, and he underwent surgery to repair the right knee patellar tendon on 22 September 2021. He was treated with physical therapy and medication without significant improvement. The PEB recommended a 30% disability rating and the applicant's permanent disability retirement.
4. A memorandum from the Eisenhower Army Medical Center, Substance Use Disorder Clinical Care (SUDCC), dated 25 October 2022, shows the applicant was assessed at the SUDCC on 28 March 2022 secondary to a self-referral for substance use concerns. He was diagnosed with alcohol use disorder, moderate and cannabis use disorder, moderate. He was recommended for enrollment into SUDCC and referred to the Residential Treatment Facility (RTF). Admission to the RTF was denied because of his medical problems and the concern that the RTF would not be able to provide the mental assistance he needed.
5. On 22 November 2022, the applicant received nonjudicial punishment under the provisions of Article 15, UCMJ, for wrongful use of marijuana between on or about 7 June 2022 and 7 July 2022. The punishment consisted of reduction to the rank and grade of sergeant (SGT)/E-5.
6. On 2 February 2023, the applicant's commander informed him that he was initiating action to separate him from the Army under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), paragraph 14-12c(2), for commission of a serious offense-abuse of illegal drugs, with a general, under honorable conditions characterization of service. The commander stated the reason for the proposed separation action was the applicant's wrongful use of marijuana, and as a result, he tested positive on a urinalysis sample submitted on 7 July 2022. The applicant was also advised of his rights to consult with legal counsel, to request a hearing before an administrative separation board, and to submit statements in his own behalf.
7. On 9 February 2023, the applicant consulted with legal counsel, and he was advised of the basis for the contemplated action to separate him for abuse of illegal drugs. He requested consideration of his case by an administrative separation board.
8. On 14 April 2023, an administrative separation board convened to determine whether the applicant should be retained or discharge from the Army under the provisions of AR 635-200, paragraph 14-12c(2) for abuse of illegal drugs. The board recommended the applicant's separation from the Army with a characterization of

service of general, under honorable conditions. *The complete administrative separation board proceedings were provided to the Board for their review and consideration.*

9. On 24 April 2023, CSM B provided a Memorandum for Record, subject: Letter of Consideration, requesting the applicant's separation for medical reasons. CSM B stated the following:

a. The applicant was injured for over a year before the unfortunate lapse of judgement happened. He was also already over six months in the MEB process. He was highly active and a motivated Soldier before the injury occurred. He volunteered to represent the organization during the "CCoE's" Commander's Cup Week and was injured during the Flag Football game. This injury required immediate surgery and some serious complications had occurred during the operation that prevented him from being able to walk. The hospital spent months trying to figure out what went wrong with him and why he was confined to a wheelchair. The doctor's post-surgery projections or expectation was a full recovery and walking after six months. Thus, this never happened, and he was sent to pain management, behavioral health, and other special entities. None of the Army's elements were successful at helping the Soldier at not being confined to a wheelchair or in constant pain. The history of the Soldier's career and actions before this injury does not reflect the current predicament he is in now.

b. I do not condone his actions, which I believe the appropriate action was taken by him losing his rank and starting this separation process. But the Army is still responsible for the Soldier's medical condition, which he did not come in unable to walk. The Soldier should be allowed to receive the medical benefits only because complications happened from the Army Doctor's surgery. The applicant being sent out of the Army in his current medical condition without the Army's support is counterproductive to the Army's retention and recruiting crisis. If possible, I recommend taking away other benefits, but do not take away the medical benefits for this Soldier.

10. On 25 April 2023, the applicant's administrative separation board counsel provided a memorandum addressed to the applicant's general court-martial convening authority (GCMCA), subject: Request for Reconsideration of Administrative Separation Board Recommendation, stating the following:

a. The applicant respectfully requests to be retained in the United States Army so that he can proceed with his completed medical board or that the separation authority order a new administrative separation board. The board members at his administrative separation board were erroneously instructed as to the burden of proof for an administrative separation board. Given this error, the interests of justice are best served by his retention or the ordering of a new board.

b. At the administrative separation board on 14 April 2023, the board members recommended that the applicant be involuntarily separated with a general, under honorable conditions discharge. The board script, provided by the government, under the "Voir Dire and Challenges of Members" section incorrectly instructed the board members that the applicant had the "requirement that you show cause why you should not be eliminated from the Army" and that "the respondent, should show cause for your retention in the Army." As a result, the board applied an incorrect standard for an enlisted administrative separation board.

Army Regulation 635-200 requires that "each allegation in the notice of proposed separation be supported by a preponderance of the evidence." Therefore, the government must prove the allegations are supported by a preponderance of the evidence. An officer Board of Inquiry requires that the officer "show cause" for why they should not "be eliminated from the Army." An enlisted Soldier is never required to show cause as to why he should be retained.

Here, [the applicant] was unfairly prejudiced by the improper instructions from the administrative separation board script. Given the secretive nature of board deliberations, it is impossible to demonstrate that the board members understood this distinct difference in the applicable burden of proof, and it is likely the government failed to meet their burden. Given the evidence, the board members may have made a different recommendation if properly instructed. A new board is the proper remedy for this legal error.

c. In addition to the error in the administrative separation board script, the interests of justice may be equally served by the applicant's retention. He took responsibility for his mistake at every instance when the government confronted him. This conduct did not happen in a vacuum. At the time, he was dealing with constant pain and the psychological effects of a failed surgery to repair the ruptured patellar tendon in his right knee, performed at Eisenhower Army Medical Hospital. This surgery did not fix his knee and instead left him with documented lingering neurological damage. The pain medication prescribed to him by the hospital staff did not ease his suffering. After his multiple complaints to the medical community (see Patient Complaints) were not addressed, he made a poor decision for which he has already paid through the non-judicial punishment process.

d. The applicant's record demonstrates that had it not been for the complications of this surgery, he would not be in this situation. He was an excellent noncommissioned officer (NCO) who performed above his peers and never had other misconduct prior to the botched surgery. He demonstrated his dedication to the Army while stationed in Hawaii, where he completed the Expert Soldier Badge roughly 7 months after suffering a heart attack on his first attempt. His excellent NCOERs and the witnesses presented at the board attest to the quality of Soldier he was before the surgery left him immobile

and in constant pain. Every witness at the board testified that he should be allowed to leave the Army through medical retirement rather than administrative separation, including the government's only witness, CSM B. The applicant has finished the PEB phase of his medical board which is the final step for his medical separation. The Army has deemed him permanently disabled because of his knee.

e. In conclusion, the applicant was prejudiced by the script instructions the government provided to the board members during the Voir Dire section of board proceedings. This error warrants that he be granted a new administrative separation board with properly instructed members. In the interests of justice, this Soldier's plight would be better served by his retention so that he can separate via his completed medical board. His medical issues, which were caused by Army surgeons, will require lifelong care. To administratively separate him would be unjust for the multiple reasons outlined above.

11. On 27 April 2023, a member of the Office of the Staff Judge Advocate (JAG) provided a legal review pertaining to the applicant's separation board proceedings. The JAG officer determined the board complied with the requirements in the appointment memorandum, sufficient evidence existed to support the findings of the board, that the board's recommendations were consistent with the findings. The JAG officer also addressed the applicant's administrative separation board counsel's contentions, outlined in the memorandum dated 25 April 2023, and indicated that the erroneous language is harmless error in that the script the government used for the administrative separation board is: 1) not an official document of board proceedings; 2). not placed in the Army Military Human Resource Record; and 3) does not go into the deliberation room with the board members for their deliberations. *The complete legal review was provided to the Board for their review and consideration.*

12. On 18 May 2023, the GCMCA, in accordance with AR 635-200, paragraph 1-34 (Disposition through medical channels), reviewed the administrative separation board proceedings, the MEB proceedings and Narrative Summary, the findings of the PEB, and the memorandum for record submitted by CSM B pertaining to the applicant. The GCMCA determined the applicant's medical condition was not the direct or substantial contributing cause of the conduct leading to the recommendation for administrative separation, nor do other circumstances of the individual case warrant disability processing. The GCMCA directed the applicant's case proceed under the administrative separation provisions of AR 635-200.

13. After review of the board proceedings, the findings and recommendations of the board, and all relevant matters, The GCMCA approved the findings and recommendations of the board and directed the applicant's involuntary separation pursuant to AR 635-200, paragraph 14-12c(2), for misconduct-abuse of illegal drugs, with his service be characterized as general under honorable conditions.

14. On 30 May 2023, the U.S. Army Physical Disability Agency (USAPDA) administratively terminated the Integrated Disability Evaluation System (IDES) case for the applicant due to being involuntarily separated pursuant to AR 635-2, paragraph 14-12c(2). The USAPDA indicated all authorizations and the PEB proceedings were void.

15. The applicant's DD Form 214 shows he was discharged on 4 September 2023, under the provisions of AR 635-200 by reason of misconduct (drug abuse), with his service characterized as under honorable conditions (general), after completing 9 years, 9 months, and 23 days of active service. The DD Form 214 does not indicate the applicant's prior periods of honorable service in block 18 (Remarks).

16. The applicant provided his VA Rating Decision showing he was granted service-connected disability compensation for a number of conditions that include: cognitive, behavioral and emotional symptoms of traumatic brain injury; major depressive disorder with anxious distress, and alcohol and opioid use disorder (also claimed as post-traumatic stress disorder, adjustment disorder, insomnia, severe anxiety, depression, stress, tobacco use, drug and alcohol dependence, loss of concentration, loss of consciousness, memory loss, severe suicidal ideation's - life altering injuries, depression, anxiety, stress, inadequate healthcare, dyspnea -anxiety, easily irritable, and grinding of teeth).

17. During the processing of this case a legal advisory opinion was obtained from the USAPDA Legal Advisor. It states:

a. On 17 August 2022, an (MEB found the applicant did not meet medical retention standards. On 21 October 2022, a PEB found him to be physically unfit and recommended permanent disability retirement. On 2 February 2023, he was notified of separation under AR 635-200, Chapter 14, paragraph 14-12(c), and, on 9 February 2023, he elected to appear before an administrative separation board. The board was conducted on 14 April 2023 and found by a preponderance of the evidence that he committed serious misconduct when he wrongfully used marijuana, a schedule I controlled substance. The board recommended his involuntary separation from the U.S. Army and that his service be characterized as general (under honorable conditions).

b. The arguments that the applicant is presenting to the Army Review Boards Agency (ARBA), namely, that his medical conditions stemmed from a "botched surgery" on the part of Army medical personnel and contributed to his misconduct; that the separation board applied the incorrect burden of proof; and that he should be medically retired, were all made with the assistance of legal counsel prior to action being taken on the findings and recommendations of the administrative separation board by the GCMCA on 18 May 2023. Those same arguments were also addressed in a Legal Review conducted by a Judge Advocate on 27 April 2023. On 30 May 2023, the

USAPDA terminated the applicant's IDES case due to his involuntary separation for misconduct in accordance with AR 625-200, Chapter 14, paragraph 14-12c(2).

c. Analysis and Conclusion: In accordance with AR 635-40 (Disability Evaluation for Retention, Retirement, or Separation), paragraph 4-3f(2), when a Soldier is pending both an AR 635-200 and AR 635-40 action, the GCMCA must decide which action to pursue. Soldiers continue to be eligible for these administrative separation actions up until the day of their separation or retirement for disability even though their PEB findings have been previously completed and approved by USAPDA for the Secretary of the Army. In no case will a Soldier, being processed for an administrative separation for misconduct be discharged through the DES process without the approval of the GCMCA. Under AR 635-40, paragraph 4-9a, enlisted Soldiers with an initiated or approved administrative separation for misconduct will be disenrolled when the MEB is completed, the Soldier's GCMCA has reviewed the MEB, and the GCMCA has directed in writing to proceed with the administrative separation. If the separation action was initiated after the Soldier's MEB was forwarded to the PEB, the last level of approved PEB findings prior to initiation of separation will be provided to the GCMCA for consideration in their decision. See also AR 625-200, paragraphs 1-34a&d.

d. As part of his decision-making process, the GCMCA, reviewed the MEB proceedings and Narrative Summary, the findings of the PEB, and a favorable letter of support endorsing the applicant's receipt of medical benefits. On 18 May 2023, he nonetheless concluded that the circumstances of this case did not warrant disability processing and directed that the case proceed under the administrative separation provisions of AR 635-200. He thereafter approved the findings and recommendations of the board. The USAPDA acted appropriately when, on 30 May 2023, it terminated the applicant's IDES case because such action was mandated by law as a result of the GCMCA's decision to proceed with administrative separation. For the same reasons, the USAPDA does not have the authority to grant the administrative relief requested by the applicant.

18. The USAPDA advisory opinion was provided to the applicant and given the opportunity to provide additional comments or evidence. He responded via email and stated the following:

a. I have received the advisory opinion and understand that the USAPDA does not have the authority to change my discharge. However, based on my understanding, the Army Board for Correction of Military Record (ABCMR) has the ability to grant me a medical retirement. I have new documentation attached to this email that supports the fact that the surgery not only failed, but also resulted in a disabling condition.

b. I underwent surgery on or around 24 September 2021. According to the new documentation provided, I was considered disabled on 29 September 2021. This further

supports that during my last 24 months in the Army, I was disabled due to lack of medical care. Furthermore, my service record supports that my characterization of service should be changed to honorable for reasons that have already been provided during the submission of my application.

19. The applicant also provided a Social Security Administration (SSA) Benefit Verification Letter, dated 22 April 2024, showing the SSA found that he became disabled under their rules on 29 September 2021.

MEDICAL REVIEW:

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

a. The applicant, an active-duty Soldier at the time of application, had applied to the ABCMR requesting an upgrade of his pending discharge and that he be permanently retired for physical disability. He has since been discharged. He states in part:

I have been incapacitated since September 2021 from a failed surgery performed by army doctors at Eisenhower Army Medical Center. I have lost functions of my lower extremities which caused me to be wheelchair-bound, I deal with severe mental and physical health complications that are irreversible. Being separated will be detrimental to me and my family I will not qualify for healthcare benefits. I will not have health care or any income I am currently unemployable due to my conditions.

b. 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 12 November 2013 and was discharged on 4 September 2023 under the separation authority provided in paragraph 14-12c(2) of AR 635-200, Active Duty Enlisted Administrative Separations (28 June 2021): Abuse of Illegal Drugs or Alcohol.

c. The applicant was entered into the Integrated Disability Evaluation System for "Right knee injury/pain" on 6 June 2022. He claimed 73 additional conditions. The MEB found his right knee patellar tendon rupture status post repair his only condition which failed the medical retention standards in chapter 3 of AR 40-501, Standards of Medical Fitness. On 22 August 2022, the applicant concurred with the board and declined the

opportunity to request an Impartial Medical Review (IMR) and/or to submit a written appeal. Her case was subsequently forwarded to a physical evaluation board (PEB) for adjudication.

d. On 21 October 2022, his informal PEB determined his "Right knee patellar tendon rupture, status post repair" was his sole unfitting for continued military service, and that the thirty-one remaining medical conditions were not unfitting. They applied the VA derived disability rating of 30% and recommended the applicant be permanently retired for physical disability. On 26 October 2022, after being counseled on the Board's findings and recommendation by her PEB liaison officer, he concurred with the PEB, waived his right to a formal hearing, and declined the opportunity for the VA to reconsider his disability rating.

e. On 22 November 2022, the then Staff Sergeant received an Article 15 for wrongful use of marijuana.

f. On 2 February 2023, the applicant was informed by his company commander of the initiation of action to separate him under paragraph 14-12c(2) of AR 635-200.

g. The applicant's misconduct made him ineligible for referral to the DES without the approval of the General who had approved his chapter 10 request. From paragraph 4-3f(2) of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (19 January 2017):

Approval and suspension of an AR 635-200 separation action is not authorized when the Soldier is pending both an AR 635-200 and AR 635-40 action. The GCMCA must decide which action to pursue (as described in AR 635-200). Soldiers continue to be eligible for these administrative separation actions up until the day of their separation or retirement for disability even though their PEB findings have been previously completed and approved by USAPDA for the SECARMY. In no case will a Soldier, being processed for an administrative separation for fraudulent enlistment or misconduct be discharged through the DES process without the approval of the GCMCA.

h. Paragraph 4-9a of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (19 January 2017) states "Disenrollment from DES, or termination of the case for any other reason, will occur no earlier than prescribed below:

Enlisted Soldiers with an initiated or approved administrative separation for misconduct or fraudulent enlistment will be disenrolled when the MEB is completed, the Soldier's GCMCA has reviewed the MEB, and the GCMCA has directed in writing to proceed with the administrative separation. If the separation action was initiated after the Soldier's MEB was forwarded to the PEB, the last

level of approved PEB findings prior to initiation of separation will be provided to the GCMCA for consideration in their decision.

- i. On 18 May 2023, the Commanding General of the U.S. Army Cyber Center of Excellence determined the applicant should be administratively separated under paragraph 14-12c(2) of AR 635-200 with a general (under honorable conditions) characterization of service and his DES proceedings terminated. He stated in part:

In accordance with AR 635-200, para 1-34, I reviewed the enclosed administrative separation board proceedings, the MEB proceedings and Narrative Summary, the findings of the PEB, and the memorandum for record submitted by Command Sergeant Major J.L.B. pertaining to SGT [Applicant]. I have determined that the Soldier's medical condition is not the direct or substantial contributing cause of the conduct leading to the recommendation for administrative separation, nor do other circumstances of the individual case warrant disability processing. I direct SGT [Applicant]'s case proceed under the administrative separation provisions of AR 635-200.

- j. The EMR shows that while in the Army, the applicant was diagnosed with adjustment disorder with depressed mood, and that it was mostly related to his alcoholism and right knee injury with its relatively poor outcome. JLV shows the applicant has no service-connected behavioral health disorders but does maintain the diagnosis of adjustment disorder with and depressed mood.
2. It is the opinion of the ARBA medical advisor that neither a discharge upgrade nor a referral of his case back to the DES is warranted.

3. Kurta Questions:
 - a. Did the applicant have a condition or experience that may excuse or mitigate the discharge? "No: Adjustment disorder is not a mitigating mental health condition unless it is associated with a mitigating behavioral health condition."
 - b. Did the condition exist, or experience occur during military service? "N/A"
 - c. Does the condition or experience actually excuse or mitigate the discharge? "N/A"

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was/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, and published Department of Defense guidance for liberal and clemency determinations requests for upgrade of his characterization of service. Upon review of the applicant's petition, available military records and medical review, the Board
2. 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

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

BOARD DETERMINATION/RECOMMENDATION:

- 1.
- 2.

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):

add to block 18 of the applicant's DD Form 214 the entry:
Continuous Honorable Active Service From 20131102 Until 20200610.

REFERENCES:

1. AR 625-200 sets forth the basic authority for the separation of enlisted personnel:
 - a. Paragraph 1-34d states Soldiers undergoing administrative separation under section IV of chapter 7 (fraudulent entry), chapter 14 (involuntary separation for misconduct) or under chapter 15 (secretarial plenary authority) are eligible for referral to and completion of the MEB phase of DES. The administrative separation proceedings will continue, but the separation authority will not take final action. If the MEB finds the Soldier does not meet medical retention standards and referral to a PEB is warranted, the Soldier's GCMCA and unit commander will receive the approved MEB proceedings. The GCMCA must direct, in writing, whether to proceed with the DES process or administrative separation. The GCMCA's written directive must address whether the Soldier's medical condition is the direct or substantial contributing cause of the conduct that led to the recommendation for administrative separation, and/or whether other circumstances of the individual case warrant disability processing instead of further processing for administrative separation.
 - b. Paragraph 3-7a states an honorable discharge is a separation with honor. The honorable characterization is appropriate when the quality of the Soldier's service generally has met the standards of acceptable conduct. When a Soldier is discharged before expiration term of service for a reason for which an honorable discharge is discretionary, the following considerations apply:
 - (1) Where there have been infractions of discipline, the extent thereof should be considered, as well as the seriousness of the offense(s).
 - (b) A Soldier will not be denied an honorable discharge solely by reason of a conviction by court-martial, action under the UCMJ, Article 15, or any other administrative action. The characterization should be based upon the underlying conduct.
 - (c) In accordance with paragraph 3-5 (General considerations), an honorable discharge may be furnished when disqualifying entries in the Soldier's military record are clearly outweighed by prior or subsequent honest and faithful service over a greater period of time during the current term of service. In these cases, the performance of

duty must be so meritorious that any other characterization would be clearly inappropriate.

c. Paragraph 14-12c states Soldiers are subject to discharge for commission of a serious military or civil offense, if the specific circumstances of the offense warrant separation and a punitive discharge is, or would be, authorized for the same or a closely related offense under the Manual for Courts-Martial. Specific instances of serious offenses include, but are not limited to:

- absent without leave and desertion
- abuse of illegal drugs or alcohol

Except for Soldiers referred to a court-martial authorized to impose a punitive discharge; commanders will process for separation all Soldiers who are:

- (1) Identified as illegal drug abusers (as defined AR 600-85).
- (2) Involved in two serious incidents of alcohol-related misconduct within a 12-month period. A serious incident of alcohol-related misconduct is defined as any offense of a civil or military nature that is punishable under the UCMJ by confinement for a term exceeding 1 year.
- (3) Involved in illegal trafficking, distribution, possession with intent to distribute, or sale of illegal drugs.
- (4) Tested positive for illegal drugs a second time during their career.
- (5) Convicted of driving while intoxicated or driving under the influence a second time during their career.

All Soldiers processed for separation as a result of drug or alcohol misconduct as provided for in paragraphs 14-12c(2)a2 through a5 require a retention decision from the first general officer in the chain of command with a legal advisor. Voluntary (self) identification/referral, in accordance with AR 600-85, does not require initiation of separation proceedings under this section.

2. AR 635-40 prescribes Army policy and responsibilities for the disability evaluation and disposition of Soldiers who may be unfit to perform their military duties due to physical disability:

a. Paragraph 4-3f(2) states Soldiers under processing for an administrative separation for fraudulent enlistment or misconduct remain eligible to be referred to the MEB. The Soldier's commander must notify the Soldier's PEB Liaison Officer in writing

that administrative separation action has been initiated. The Soldier's completed MEB must be referred to the Soldier's GCMCA in accordance with AR 635-200 to determine whether the Soldier will be referred to the PEB. Approval and suspension of an AR 635-200 separation action is not authorized when the Soldier is pending both an AR 635-200 and AR 635-40 action. The GCMCA must decide which action to pursue (as described in AR 635-200). Soldiers continue to be eligible for these administrative separation actions up until the day of their separation or retirement for disability even though their PEB findings have been previously completed and approved by USAPDA for the Secretary of the Army. In no case will a Soldier being processed for an administrative separation for fraudulent enlistment or misconduct be discharged through the DES process without the approval of the GCMCA.

b. Paragraph 4-9a states enlisted Soldiers with an initiated or approved administrative separation for misconduct or fraudulent enlistment will be disenrolled when the MEB is completed, the Soldier's GCMCA has reviewed the MEB, and the GCMCA has directed in writing to proceed with the administrative separation. If the separation action was initiated after the Soldier's MEB was forwarded to the PEB, the last level of approved PEB findings prior to initiation of separation will be provided to the GCMCA for consideration in their decision.

3. AR 635-8 (Separation Processing and Documents) explains separation document preparation, distribution, and correction. It states that in block 18 of the DD Form 214, for Soldiers who have previously reenlisted without being issued a DD Form 214 and are separated with any characterization of service except "honorable," enter "Continuous Honorable Active Service From" (first day of service for which DD Form 214 was not issued) Until (date before commencement of current enlistment).

4. AR 15-185 (ABCMR) provides Department of the Army policy, criteria, and administrative instructions regarding an applicant's request for the correction of a military record. Paragraph 2-11 states 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.

5. Title 10, U.S. Code, section 1556 requires the Secretary of the Army to ensure that an applicant seeking corrective action by 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 ABCMR applicants (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//