

IN THE CASE OF: [REDACTED]

BOARD DATE: 27 January 2025

DOCKET NUMBER: AR20230011072

APPLICANT REQUESTS:

- Payment of Incapacitation (INCAP) Pay from 1 October 2020 through 15 August 2023 or
- Place him on Title 10 U.S. Code (USC) 12301(h) orders retroactively

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

- DD Form 149 (Application for Correction of Military Record) on line application
- U.S. Army Human Resource Command (AHRC) Letter Army Board for Correction of Military Record (ABCMR) Line of Duty (LOD) Reversal
- DD Form 261 (Report of Investigation LOD and Misconduct Status)
- Extract from Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation)
- U.S. Army Physical Disability Agency (USAPDA) Permanent Disability Retirement
- Extract from Department of Defense Instruction (DoDI) 1332.18 (Disability Evaluation System(DES))
- Email to Inspector General (IG)
- Open Door Policy Email
- Email showing Uniform Code of Military Justice (UCMJ) Charges
- DES Status Update
- IG Closeout Letter
- Email showing approved LOD
- Formal Request to Extend Orders
- Medical Note showing Post Traumatic Stress Disorder (PTSD)
- NGB PPOM #18-005 Memorandum on Medical Evaluation Board (MEB) Orders
- DA Form 1559 (IG Action Request)
- [REDACTED] Army National Guard ([REDACTED] ARNG) Memorandum LOD Reversal
- DA Form 3881 (Rights Warning Procedure/Waiver Certificate)

FACTS:

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

2. The applicant states, in effect:

a. He is asking the Board to correct an injustice. The [REDACTED] ARNG does [not] follow regulations. The background of his case is that he was on active duty orders, had an approved LOD and was referred to an MEB and determined unfit for duty and medically retired.

b. The [REDACTED] ARNG did not counsel him about his rights and went to great lengths to hide his LOD and even tried to refer him to a non-duty related MEB, even though he had an approved LOD.

c. On 22 April 2008, he witnessed the traumatic death of a fellow Soldier at basic training, while simulating combat. Unfortunately, the event caused him extensive mental health issues. Fast forward to the boarder mission in early 2020. He had witnessed several deaths to include multiple people being run over, a person drowning, and another person who shot themselves in the head. Unfortunately, these events really affected his ability to work and function.

d. He reached out to his command and asked for help. Unfortunately, the command was not supportive and accused him of fraud and attempted to charge him under the UCMJ. Ultimately, he had a pending LOD and asked the command to retain him on Title 10 USC 1230(h) orders. This request was denied. He quoted DoDI 1332.18 specifically and Army Regulation 635-40, which both state that Reserve Component Soldiers on active duty orders specifying a period of more than 30 days will, with their consent, be kept on active duty for disability evaluation processing until final disposition, subject to the circumstances set forth in paragraph 4-2a, (a) the original orders issuing authority is responsible for coordinating with Medical Command to generate a Title 10 USC 1230(h) order extending the Reserve Component Soldier on active duty to complete the DES process; (b) the original orders issuing authority is responsible for providing the funding for the Title 10 USC 1230(h) orders and any temporary duty travel for DES required appointments. Reserve Component servicemembers on active duty orders specifying a period of more than 30 days, who incur a potentially unfitting condition, during that time will, with their consent, will be kept on active duty for disability evaluation processing until final disposition by the Secretary of the Military Department concerned.

e. In accordance with DoDI 1241.01 (Reserve Component LOD Determination for Medical and Dental Treatments and Incapacitation Pay Entitlements), Reserve

Component servicemembers may elect to be released from active duty before completing the DES process. He was on orders for the SWBM [sic] from 1 October 2018 through September 2020. He experienced mental health issues and reached out to his command for help.

f. He received an LOD for depression in December 2019. It was approved and he was referred to an active duty Physical Evaluation Board (PEB). However, the commander, at the time, Lieutenant Colonel (LTC) [REDACTED] asked AHRC to overturn the LOD and accused him of fraud. The LOD was overturned in September 2020. The LTC then attempted to charge him under the UCMJ for having mental health issues.

g. It is unfortunate, in this day and age, that the Army still attaches stigma to those who seek help. He did not receive any support from his command, instead he was ostracized and charged with a crime. This is very unsettling as he personally believes if his command supported him instead of charging him and accusing him with a crime, perhaps the results of his medical board would have been different.

h. He received a separate LOD for PTSD in September 2020, which was ultimately approved in July 2021. However he was not informed this LOD was approved. They also failed to provide him any counseling or anything regarding his rights with the September 2020 LOD for PTSD. In light of the approved LOD for PTSD, he asked to stay on active duty orders in accordance with DoDI 1332.18. However, this request was denied in violation of the regulation. The [REDACTED] ARNG tried to refer him to a non-duty related MEB, due to the unapproved LOD for depression. The ABCMR overturned his original LOD for depression and found it to be in the LOD.

i. Given his two LODs, he asks to be placed on active duty from 1 October 2020 through the current date and immediately referred to an active duty MEB in accordance with DoDI 1332.18. The [REDACTED] ARNG failed to do its job when they did not counsel him on his rights, inform him of the approved LOD or retain him on orders. This needs to be rectified immediately.

j. He reached out to state leadership and again asked to be placed on orders and this request was denied. He reached out to [REDACTED] IG and they did not find in his favor. He is asking to retroactively be placed on orders in accordance with the regulation or to receive INCAP pay retroactively from 1 October 2020 through 15 August 2023. Again, he must stress that he reached out numerous times and tried to get [REDACTED] to follow the regulations and place him on orders, yet they failed to do so and denied his request multiple times. They do not follow the laws or regulations. He is hoping the Board can correct this injustice either by backdating INCAP pay from 1 October 2020 through 15 August 2023, or place him on Title 10 USC 12301(h) orders retroactively. Even though it is clear that he should either be eligible for Title 10 USC 12301(h) order or INCAP pay, he received neither even after multiple requests.

3. The applicant provides the following documents:

a. Letter from AHRC, 3 May 2022, states in pertinent part, the ABCMR recommends the finding of not in the LOD-existed prior to service-not service aggravated be changed to read in the LOD-existed prior to service-service aggravated. All Army records will be changed to reflect this new finding.

b. Memorandum from USAPDA, 17 July 2023, advises the applicant he has a disability and will be permanent retired with a DoD disability rating of 100 percent.

c. Email regarding extension request, 15 December 2020, from the Deputy Chief of Staff, states, in pertinent part, he ran the applicant's request by senior leadership. Since the applicant currently has a not in the LOD finding and his profile reflects routing through PEB, they are unable to extend his orders, at this time.

d. Medical notes which show he was diagnosed with PTSD are available for the Board's review and will be reviewed by the Army Review Board's Agency (ARBA) Medial Section who will provide an advisory opinion.

e. Memorandum from National Guard Bureau (NGB), extension of ARNG Soldiers on Active Duty to Complete Integrated Disability Evaluation System, 13 April 2018, states in pertinent part, the memorandum applies to all officers and enlisted Soldiers of the ARNG on active duty greater than 30 days who need their orders extended to complete the DES process.

(1) Title 10 USC 1218 states that the Secretary of the Army may not discharge or release a Soldier from active duty because of physical disability until he or she has made a claim for compensation, pension, hospitalization, to be filed with the Department of Veterans Affairs (VA), or has refused to make such a claim. ARNG Soldiers on active duty orders specifying a period of more than 30 days will, with their consent, be kept on active duty for disability evaluation processing until final disposition.

(2) To ensure compliance with all references, all ARNG Soldiers, with their consent, will be extended on active duty Title 10 USC 12301(h) orders to complete the DES process. Soldiers who do not consent to the extension, will be released from active duty to complete the DES process in their traditional M-Day status. The entire memorandum is available for the Board's review.

f. Memorandum from the [REDACTED] ARNG, 7 April 2020, requesting to reopen the applicant's LOD based on new information received concerning possible fraud. The commander received pertinent information that was not considered by the investigating officer, at the time of the original determination. Following the original determination, the commander has spoken with several servicemembers who have informed him that the

applicant has a history of patterns of engaging in a deliberate and systematic scheme to obtain an LOD and/or VA disability rating benefits that he would otherwise not be entitled. The entire memorandum is available for the Board's review.

4. 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 ARNG on 27 February 2008.

b. Orders 809920, published by Military Entrance Processing Center, 8 April 2008 shows he was ordered to initial active duty training with a report date of 9 April 2008. DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was ordered to active duty, as a member of the ARNG, on 8 April 2008 and was honorably released on 25 July 2008.

c. NGB Form 80 (Proceedings of a Federal Recognition Examining Board), 1 October 2008, the board recommended he be granted federal recognition. The entire form is available for the Board's review.

d. DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was ordered to active duty, as a member of the ARNG, to complete office candidate school from 22 February 2009 through 13 May 2009. He was honorably released from active duty for completion of required active service.

e. Memorandum from Headquarters, United States Army Infantry School, 14 May 2009 appointed him as a Reserve Commissioned Officer. DA Form 71 (Oath of Office - Military Personnel) shows he took the oath of office on 14 May 2009.

f. DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was ordered to active duty, as a member of the ARNG, on 4 March 2010 and was honorably released on 1 July 2010 for completion of required active service.

g. DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was ordered to active duty, as a member of the ARNG, on 12 Jun 2011 and was honorably released on 19 February 2012 for completion of required active service.

h. DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was ordered to active duty, as a member of the ARNG, on 29 March 2014, and was honorably released on 30 July 2014 for completion of required active service.

i. DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was ordered to active duty, as a member of the ARNG on 1 October 2018 and was honorably released on 30 September 2020 for completion of required active service.

j. Memorandum from USAPDA, 11 May 2022, states the USAPDA administratively terminated the non-duty related case for the applicant.

k. DA Form 199-1 (Formal PEB Proceedings), 22 June 2023, shows the applicant was evaluated for PTSD. The Board found him physically unfit for duty and recommended a rating of 100 percent and that he be permanently retired for disability. He did not concur with the recommendation and attached his written appeal. He did not request reconsideration for his VA ratings. The written appeal is not available for the Board's review.

l. Memorandum from USAPDA, 17 July 2023, states the memorandum is to advise the applicant that in accordance with the findings and recommendations of the USAPDA, he was found to have a disability and will be permanently retired with a DoD rating of 100 percent. The entire memorandum is available for the Board's review. Order 198-15, published by USAPDA, 17 July 2023, placed him on the retired list effective 17 August 2023.

m. Memorandum from USAPDA, 17 July 2023, states, in pertinent part:

(1) They note the applicant's disagreement with the findings of the formal PEB and have reviewed the entire case. He non-concurred with the formal PEB findings. He requests that his unfitting condition of PTSD be awarded a V1/V3 combat code.

(2) A review of all of his records confirms that he has a prolonged behavioral health history. USAPDA notes that he experienced a traumatic event by witnessing the passing out of a peer, during a basic training event on 8 April 2008, subsequently, his peer died 10 days later. The actual training event did not have a causal relationship to his behavioral health condition since witnessing the passing out of the peer was the traumatic event, and not the training. He is physically unfit for PTSD.

(3) USAPDA concludes that his case was properly adjudicated by the formal PEB, which correctly applied the rules that govern the DES in making its determination. The findings and recommendations of the formal PEB are supported by a preponderance of evidence and therefore affirmed.

n. NGB Form 22 (National Guard Report of Separation and Record of Service) shows he was honorably transferred to the Retired Reserve on 16 August 2023.

5. On 3 January 2025, the Chief, Special Actions Branch, NGB provided an advisory opinion, which states in pertinent part:

a. The applicant requests the ABCMR recommend that he be retroactively placed on active duty orders effective 1 October 2020, while pending the outcome of an LOD determination and possible medical board or receive INCAP pay retroactively from 1 October 2020 through 15 August 2023. NGB recommended disapproval of his request.

b. DoDI 1332.18 states that Reserve Component members on active duty orders specifying a period of more than 30 days, who incur a potentially unfitting condition, during that time will, with their consent, be kept on active duty for disability evaluation processing until final disposition by the Secretary of the Military Department concerned.

c. According to Army Regulation 135-381 (Incapacitation of Reserve Component Soldiers) paragraph 1-8d, states" a Soldier attending inactive duty training (IDT) and performing military duties may be evidence that they are not suffering from a disability that entitle them to INCAP pay." Additionally, the regulation states for establishing fitness, "a Reserve Component member will be determined to be unable to perform military duties, if under service procedures in Army Regulation 40-501 (Standards of Medical Fitness) the member would be determined to be medically unfit to perform his or her military duties." A Soldier attending IDT and performing military duties may be evidence that they are not suffering from a disability that entitles them to INCAP pay. This will not be used as a basis for terminating entitlement to medical treatment."

d. Army Regulation 135-381, paragraphs 2-11 and 2-12 state that an LOD determination is the prerequisite for INCAP pay and that a Soldier must have an approved in LOD condition, in a qualifying duty status, to file for, or request INCAP pay. A Soldier must be unable to perform military duties, as determined by a military physician, is otherwise referred to as tier 1 INCAP pay. A Soldier unable to perform military duties, who can show a loss of nonmilitary, earned income from their civilian employer is otherwise referred to as tier 2 INCAP pay.

e. A medical profile is a process for communicating functional abilities, medical instructions, and recovery time estimates to commander for accurate readiness and duty assignment. It communicates a Soldier's capabilities and functional limitations. Determining individual assignments or duties is a commander's decision. Profiling providers must provide specific information on the Soldier's functional limitations, capabilities, and a description of what the Soldier "can do" to enable assignment or duty determination. If the Soldier's commander believes the Soldier cannot perform within the limits of the profile or the profiles limitations do not address or prevent training that the Soldier can safely complete without aggravating the condition, the commander requests clarification and reconsideration of the profile. When the commander and the profiling provider cannot come to an agreement on the profile, the commander can request a fitness for duty evaluation with another profiling provider.

f. The applicant was able to establish that there was an LOD that was determined to be in the LOD for PTSD, which was found to be unfitting by the PEB. This determined him to be 100 percent disabled and therefore recommended permanent disability retirement. However, as per Army Regulation 135-381, an LOD is only the prerequisite to file or request INCAP pay. The applicant failed to provide the medical documentation to support his request for INCAP pay.

g. A review of the applicant's claim by NGB and the [REDACTED] ARNG found that he, after the period of 1 October 2020, as per his request to continue on active duty orders or INCAP pay, continued to attend IDTs for the period of 2 November 2020 through 10 June 2023, and therefore, shows that he was not suffering from a disability that entitled him to INCAP pay.

h. Additionally, the medical records provided by the applicant indicate that he was being seen for anxiety and PTSD symptoms. The anxiety issues were not found to be unfitting according to the MEB and do not show any recommendations or directives indicating he should be kept from attending IDTs.

i. For the above reasons, NGB recommends denial of his request. The opinion was coordinated with the [REDACTED] ARNG.

6. On 3 January 2025, the advisory opinion was provided to the applicant to allow him the opportunity to respond. On the same day, the applicant responded stating, in pertinent part:

a. DoDI 1332.18 unequivocally mandates that "Reserve Component servicemembers on active duty orders specifying a period of more than 30 days, who incur a potentially unfitting condition, during that time, will, with their consent, be kept on active duty for DES processing until final disposition by the Secretary of the Military Department concerned." The use of the word "will" in this directive creates a mandatory requirement, not a discretionary option. This requirement is further reinforced by DoD Directive 1332.18 and Army Regulation 635-40, which together establish a comprehensive framework for the proper processing of servicemembers with potentially unfitting conditions.

b. During the period in question, he had two valid LODs. A PTSD LOD approved in July 2021, which the [REDACTED] ARNG failed to properly process or notify him about. This failure to notify constitutes a significant procedural error that directly impacted his ability to pursue appropriate medical care and administrative remedies. His original depression LOD, which was initially disapproved but subsequently overturned by the ABCMR and found to be in the LOD-existed prior to service-service aggravated. This reversal demonstrates the initial improper handling of his medical conditions by the command.

c. The advisory opinion's assertion that he "failed to provide medical documentation" is demonstrably incorrect. Medical records from Travis Air Force Base, 15 September 2020, show he has severe PTSD symptoms, major depressive disorder, severe anxiety, severe depression, clinical assessment determining duty-impacting conditions, and a service connection determination.

d. These medical records clearly establish both the severity and service connection of his conditions. The documentation also included a detailed assessment that explicitly describes the impact of these conditions on his ability to perform military duties.

e. The advisory opinion's reliance on his IDT attendance as evidence against INCAP pay reflects a fundamental misunderstanding of both the regulatory framework and the actual nature of his participation. Several key points must be considered:

(1) Army Regulation 135-381 states "a Soldier attending IDT and performing military duties may be evidence that they are not suffering from a disability that entitled them to INCAP pay." However, this provision specifically applies to Tier 1 cases. His case clearly falls under Tier 2, as documented by both the VA and military medical.

(2) The characterization of his IDT "attendance" is misleading because he frequently received pay in lieu of drill to attend VA medical appointments; his medical profile severely limited his ability to conduct duties; during IDT periods, he was often isolated and unable to fully participate; and the command's own documentation acknowledges these limitations.

(3) The proper interpretation of Army Regulation 135-381 requires consideration of the totality of circumstances, not merely the technical fact of IDT attendance.

f. Throughout this period, he made repeated and documented requests through his chain of command to be retained on active duty orders under Title 10 USC 12301(h) to complete the DES process. Each of these requests were improperly denied despite meeting all regulatory requirements for retention. The documentation shows a pattern of the command failing to properly process and respond to these requests, often citing incorrect regulatory interpretations or failing to acknowledge the mandatory nature of the retention requirement.

g. The failure to retain him on active duty orders were not merely a technical violation - it had severe practical consequences:

(1) Medical care impact: disruption of necessary medical treatment, inability to access required military medical facilities, and he was forced to rely on civilian care without proper coordination.

(2) Administrative impact: improper processing of his disability evaluation, delays in his medical board proceedings, and loss of continuity in medical documentation.

(3) Personal impact: financial hardship due to loss of active duty pay, stress and anxiety from improper handling of his medical conditions, and ultimate determination of a 100 percent disability rating and medical retirement.

(4) Systemic impact: violation of regulatory requirements, precedential concerns for similarly situated servicemembers, and undermining of DES integrity.

h. Based on the foregoing he requests the Board override the advisory opinion's recommendation for disapproval, grant retroactive active duty pay or INCAP pay for the period of 1 October 2020 through 15 August 2023, and direct any additional relief deemed appropriate to remedy this regulatory violation.

i. The evidence clearly shows he met all regulatory requirements for retention on active duty orders during the DES process. The failure to retain him on orders was contrary to both controlling regulations and established policy. The advisory opinion's recommendation, if adopted, would serve to validate a clear regulatory violation that has resulted in substantial prejudice. This outcome would be contrary to both the letter and spirit of the applicable regulations designed to protect servicemembers, during the disability evaluation process.

7. Based on the applicant's diagnosis of PTSD, the ARBA Medical Section provided a medical review for the Board's consideration.

8. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting consideration of payment of Incapacitation (INCAP) Pay from 1 October 2020 through 15 August 2023 or to be paced on Title 10 U.S. Code (USC) 12301(h) orders retroactively. He contends he should have been on orders and received pay through the medical evaluation board (MEB) and disability evaluation system (DES) processes.

b. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Pertinent to this advisory are the following:

- The applicant enlisted into the ARNG on 27 February 2008, and he was granted federal recognition on 1 October 2008. After attending Officer Candidate School, he was appointed as a Reserve Commissioned Officer on 14 May 2009. Several DD Form 214s show periods of active duty service.
- A letter from AHRC, 3 May 2022, recommends the finding of "not in the LOD-existed prior to service-not service aggravated" be changed to read "in the LOD-

existed prior to service-service aggravated.” It directed that all Army records be changed to reflect this new finding.

- DA Form 199-1 (Formal PEB Proceedings), 22 June 2023, shows the applicant was evaluated for PTSD. The Board found him physically unfit for duty and recommended a rating of 100 percent and that he be permanently retired for disability.
- Memorandum from USAPDA, 17 July 2023, states the memorandum is to advise the applicant that in accordance with the findings and recommendations of the USAPDA, he was found to have a disability with a DoD rating of 100 percent. He was placed on the retired list effective 17 August 2023.

c. Review of Available Records: The Army Review Board Agency (ARBA) Behavioral Health Advisor reviewed the supporting documents contained in the applicant’s file. The applicant asserts he is entitled to INCAP pay or retroactive orders to cover, essentially, the time period during which he was going through the LOD and DES processes. Opining on this entitlement exceeds the scope of this BH Advisor’s expertise, but a summary of records will be provided. The application included a Formal Physical Evaluation Board (PEB) Proceedings dated 22 June 2023, which showed that the applicant was determined to be unfitting for PTSD (VA diagnosed as Major Depressive Disorder and Agoraphobia with Panic Disorder) at a rating of 100%. The traumatic event was noted as witnessing the passing out and subsequent death of a trainee during an exercise and witnessing deaths of migrants captured by drone video footage. The PEB determined the applicant’s PTSD was not a result of direct armed conflict, caused by an instrumentality of war, or incurred during hazardous service or conditions simulating war. Mental health documentation from Travis AFB dated 15 September 2020 showed that the applicant initiated services on 7 May 2020 and completed five sessions of psychotherapy and safety planning, and his current complaint was related to distress experienced at work. The visit concluded with diagnoses of Major Depressive Disorder and PTSD. There was sufficient evidence that the applicant was diagnosed with PTSD or another psychiatric condition while on active service.

d. The Joint Legacy Viewer (JLV), which includes medical and mental health records from DoD and VA, was also reviewed and showed the applicant initiated mental health services on 5 April 2010 with complaints of sleep problems and low mood secondary to relationship issues, and he was diagnosed with Adjustment Disorder with depressed mood and Insomnia and was prescribed an antidepressant medication. He was seen again for medications in September 2011 and reported similar difficulties, and he had five encounters in 2012, which reflected relationship problems and medication changes. JLV showed evidence of compensation and pension evaluations in 2013 and 2014, but no documentation of any mental health claims was viewable. Documentation from an initial psychiatry visit on 28 August 2015 noted that the applicant was 70% service connected for Major Depressive Disorder, and he reported depression, anxiety, and continued difficulty in relationships. He was lost to follow up until November 2016 when

he reengaged with continued complaints of anxiety, irritability, and social isolation. He was continued on a medication for nightmares and restarted on an antidepressant. He routinely engaged in psychotherapy, couples therapy, and medication management through May 2017, and at that time he and his wife were approved for the VA's Caregiver Support Program. Psychiatry documentation from May 2018 showed he was prescribed two antidepressants, a medication for insomnia, and was started on a mood stabilizer to help with anger and irritability. DoD mental health services were initiated in August 2018, and anxiety and interpersonal stressors were the presenting problem, but the applicant continued with medication management through the VA. His next encounter with DoD MH was in December 2019, and he was diagnosed with Adjustment Disorder with depressed mood as related to occupational and relationship stressors. He had a couple of therapy sessions before a break in care until May 2020 when he returned to DoD MH following the initiation of an investigation related to fraud and his MEB process. He engaged in six psychotherapy sessions through 7 August 2020, and the focus of treatment was supportive counseling, reassurance of protection of confidentiality, and improving coping skills as the applicant was navigating the MEB process and the investigation. In September 2020 he requested an evaluation for PTSD and this documentation is included in his application. DoD MH services were terminated in November 2020 because he went off of active duty orders, and although it was noted that he was not on duty limitations, he would require a reassessment in order to deploy. Documentation showed an MEB was initiated on 23 August 2022, and the applicant continued with MH treatment, primarily marital therapy, through 2023.

e. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is sufficient evidence to support that the applicant had a mental health condition that warranted a referral to DES, and he received a 100% disability rating from the PEB in June 2023. Mental health documentation indicated diagnoses of Adjustment Disorder, Major Depressive Disorder, and PTSD as well as multiple medication changes and evidence on-going treatment. The applicant's request for consideration of INCAP pay or retroactive orders exceeds this Advisor's area of expertise.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? N/A

(2) Did the condition exist or experience occur during military service? N/A

(3) Does the condition or experience actually excuse or mitigate the discharge? N/A

BOARD DISCUSSION:

After reviewing the application and all supporting documents, the Board determined relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. Based upon the available documentation, the regulatory guidance outlined in the NGB advisory opinion and the recommendation from the NGB, the Board concluded there was insufficient evidence of an error or injustice warranting a change to the applicant's military record.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

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|---|---|---|----------------------|
| : | : | : | GRANT FULL RELIEF |
| : | : | : | GRANT PARTIAL RELIEF |
| : | : | : | GRANT FORMAL HEARING |
| ■ | ■ | ■ | 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

CHAIRPERSON

I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

REFERENCES:

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

2. Army Regulation 600-8-4 (Line of Duty Policy, Procedures, and Investigations) prescribes policies and procedures for investigating the circumstances of disease, injury, or death of a Soldier providing standards and considerations used in determining LOD status.

a. A formal LOD investigation is a detailed investigation that normally begins with DA Form 2173 (Statement of Medical Examination and Duty Status) completed by the medical treatment facility and annotated by the unit commander as requiring a formal LOD investigation. The appointing authority, on receipt of the DA Form 2173, appoints an investigating officer who completes the DD Form 261 (Report of Investigation LOD and Misconduct Status) and appends appropriate statements and other documentation to support the determination, which is submitted to the General Court Martial Convening Authority for approval.

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

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

3. Army Regulation 135-381 (Army National Guard of the United States and Army Reserve – Incapacitation of Reserve Component Soldiers) provides policies regarding incapacitation pay for Soldiers of the Army National Guard/Army National Guard of the United States and U.S. Army Reserve.

a. The objective of the Reserve Component Incapacitation System is to compensate, to the extent permitted by law, members of the Reserve Component who are unable to perform military duties and/or who demonstrate a loss in civilian earned income as a result of an injury, illness, or disease incurred or aggravated in the line of duty, and to provide the required medical and dental care associated with the incapacitation.

b. Incapacitation pay will be paid only during the period a member remains unfit for military duty or demonstrates a loss of earned income as a result of the incapacitation.

c. When incapacitation lasts for over a year, the case should be processed through the Disability Evaluation System for disability separation or retirement.

d. Incapacitation pay will end upon retirement, separation for physical disability, or determination by military medical personnel that the member has recovered sufficiently to perform military duties or when actually returned to military duty, whichever occurs first.

e. Soldiers are entitled to a portion of the same monthly pay and allowances as are provided members of the Active Army with corresponding grade, length of service, marital status, and dependent status for each period the Soldier is unable to perform military duties (Tier 1 cases) or can demonstrate loss of compensation from civilian earned income (Tier 2 cases). Maximum amount payable for any given period is an amount equivalent to military pay and allowances for the period in question.

f. A member authorized incapacitation pay will not be allowed to attend Inactive Duty Training or to acquire retirement points for performing IDT. A Soldier attending IDT and performing military duties may be evidence that they are not suffering from a disability that entitled them to INCAP pay (Tier 1 cases). This will not be used as a basis for terminating entitlement to medical treatment.

g. Military technicians participating in active duty or IDT in a military status are eligible for the same entitlement to medical care as other Soldiers governed by this regulation. Injury, illness, or disease suffered while performing duties as a civilian employee of the Department of the Army does not qualify technicians for medical care at Government expense under this regulation. Special attention will be devoted to military technicians to determine the status of such individuals, that is civilian, military or neither at the time of incapacitation, to ensure fairness and equity to the Government and the individual.

h. Tier 1 refers to claims by Soldiers who are unfit to perform their military duties as a result of an injury, illness, or disease caused by military service. A determination of fitness for duty must be made by a martially medical physician. Eligible Soldiers are

paid full military pay and allowances, less any civilian earned income received during the month of the claim, and are not eligible to draw retirement points.

i. Tier 2 refers to claims by Soldiers who are determined fit to perform their military duties by a military medical physician, but who are unable to perform their civilian jobs and can demonstrate a loss of civilian earned income. Eligible Soldiers will be reimbursed for lost civilian earned income up to full military pay and allowances and are eligible to draw retirement points.

4. AR 635-40 (Disability Evaluation for Retention, Retirement or Separation), provides policy and responsibilities for the disability evaluation and disposition of Soldiers who may be unfit to perform their military duties due to physical disability. Chapter 4 (Disability Evaluation System) provides that a Soldier may not be discharged or released from active duty because of a disability until they have made a claim for compensation, pension, or hospitalization with the Veterans Affairs or have signed a statement that their right to make such a claim has been explained or have refused to sign such a statement.

a. Paragraph 4-2a(3) provides that Reserve Component (RC) Soldiers on active duty orders specifying a period of more than 30 days will, with their consent, be kept on active duty for disability evaluation processing until final disposition, subject to the circumstances set forth in paragraph 4-2a(2). The original orders issuing authority is responsible for funding and coordinating with the Army Medical Command (MEDCOM) to generate a 12301(h) order extending the RC Soldier on active duty to complete the IDES process.

b. Paragraph 4-2a(2) provides that RC Soldiers, who were called to active duty under the provisions of Title 10, USC, section 12301 but then released from active duty by the 30th day due to the identification of a pre-existing condition not aggravated by the current tour of active duty, and which fails retention standards, will come under the applicable DES process based on whether the pre-existing condition was previously incurred in the LOD (duty-related process) or was a condition incurred when not in a duty status (non-duty-related process).

5. Title 10, USC, section 12301(h) (Reserve Components – General) provides that when authorized by the Secretary of Defense, the Secretary of a military department may, with the consent of the member, order a member of a RC to active duty to receive authorized medical care or to be medically evaluated for disability.

a. A member ordered to active duty under this subsection may, with the member's consent, be retained on active duty, if the Secretary concerned considers it appropriate, for medical treatment for a condition associated with the study or evaluation, if that treatment of the member is otherwise authorized by law.

b. A member of the Army National Guard of the United States or the Air National Guard of the United States may be ordered to active duty under this subsection only with the consent of the Governor or other appropriate authority of the State concerned.

6. Title 10, USC, section 1552 states, the Secretary concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his or another's service in the Army.

7. 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//