

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 5 June 2024

DOCKET NUMBER: AR20230011138

APPLICANT REQUESTS:

- Medical Retirement in lieu of Medical Discharge
- Award of the Purple Heart (PH)
- Award of the Combat Action Badge (CAB)
- Personal Appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Certificate of Release or Discharge from Active Duty), 22 June 2013
- DA Form 638 (Recommendation for Award) Army Commendation Medal (ARCOM), 15 May 2014
- DD Form 214, 22 September 2014
- DA Form 638, ARCOM 1 Oak Leaf Cluster (OLC), 14 December 2016
- Certificate Award of the NATO Medal, 14 February 2017
- DA Forms 1059 (Service School Academic Evaluation Report)
  - Basic Leaders Course, 30 June 2017
  - Advanced Leaders Course, 7 June 2019
- DA Form 2166-9-1 (Noncommissioned Officer Evaluation Report (NCOER) (Sergeant (SGT)) 26 December 2018 and 26 December 2019
- Certificate of Achievement, 2 February 2019
- Department of Defense (DoD) Referral to Integrated Disability Evaluation System (IDES), 11 February 2019
- Enlisted Record Briefs, 11 December 2019 and 11 August 2020
- Application for Disability Compensation and Related Compensation Benefits, 14 January 2020
- DA Form 7642 (Disability Evaluation System (DES) Commander's Performance and Functional Statement), 24 January 2020
- Leave and Earnings Statement (LES), 1-31 January 2020
- Disability Benefits Questionnaires
  - Hearing Loss and Tinnitus

- General Medical - Special Health Assessment
- Headaches Disability
- Back (Thoracolumbar) spine Conditions
- Hypertension
- Peripheral Nerves Conditions
- Mental Disorders
- Medical Evaluation Board (MEB) Documents
- DA Forms 3349 (Physical Profile) 19 February 2020 and 9 March 2020
- DA Form 3947 (MEB Proceedings), 19 February 2020
- Memorandum Request for Rating, 10 March 2020
- DD Form 214, 10 August 2020

FACTS:

1. The applicant states, in effect:

a. His medical discharge should have been a medical retirement. During his MEB his physical evaluation board (PEB) liaison officer stated he should be happy with what he was receiving and to go away. The Judge Advocate General officer the applicant spoke with said he should be happy with getting severance pay.

b. He also should have received a PH and CAB due to breaking his back during a rocket attack in Afghanistan. There was an incident with an improvised explosive device. Everyone else in the vehicle received a PH. Because the applicant was attached to the unit and not assigned, his PH was not submitted.

2. The applicant provides the following documents:

a. DA Form 638, dated 15 May 2014 shows the applicant was recommended for the ARCOM for his deployment to Afghanistan. On 8 June 2014, the ARCOM was approved by permanent order number 156-29.

b. DA Form 638, dated 14 December 2016, shows the applicant was recommended for the ARCOM 1 OLC for his deployment in support of Operation Freedom's Sentinel, Afghanistan. On 31 December 2016 the ARCOM was approved by permanent order number 359-012.

c. DoD Referral to IDES, dated 11 February 2019 shows the applicant's medical conditions included grade 1 anterolisthesis of L5 on S1 and bilateral L5 spondylolysis.

e. Application for Disability Compensation and Related Compensation Benefits, dated 14 January 2020 shows the applicant's disabilities were grade 1 anterolisthesis of L2 on S1 (MEB referred condition), bilateral L5 spondylolysis (MEB referred condition),

numbness and tingling bilateral legs and feet, chronic headaches, loss of strength in hands, insomnia, high blood pressure, ringing ears, and right ear hearing loss.

f. DES Commander's Performance and Functional Statement, dated 24 January 2020 states, in pertinent part, the applicant's military occupational specialty was highly physical. Due to his physical limitations he would not be able to accomplish every task. The injury was combat related; however, the commander did not have the line of duty. The entire form is available for the Board's review.

g. Disability Benefits Questionnaires for the following:

(1) Hearing loss and Tinnitus: The reference audiogram, dated 7 February 2013 showed normal hearing bilaterally. The reference audiogram, dated 22 September 2015 showed normal hearing bilaterally. The service medical records, dated 19 June 2019 indicated a positive threshold shift had occurred and abnormal auditory function. The applicant had a high probability of having Tinnitus due to noise exposure while in the military that impacted ordinary conditions of daily life.

(2) General Medical - Separation Health Assessment: The applicant was diagnosed with anterolisthesis, L5 on S1. L5 spondylolysis; numbness and tingling bilateral legs and feet.

(3) Headaches (Including Migraine Headaches): The applicant had not been diagnosed with a headache condition. The applicant experienced headaches when he had pain in his back. The headaches were symptoms he had with the back pain and not a singular diagnosed type headache.

(4) Back (Thoracolumbar Spine) Conditions: The applicant was diagnosed with anterolisthesis L5 on S1. L5 spondylolysis with right lower extremity radiculopathy. He had bilateral paravertebral tenderness with palpitation in L5/S1.

(5) Hypertension: The applicant was told his blood pressure gets elevated on different occasions. He had not been treated medically as it was not sustained. The five day readings were done when he was having 7/10 severe back pain. The elevated readings are a normal physiological reaction to pain. He had not sustained high blood pressure that required treatment nor a diagnosis.

(6) Peripheral Nerves Conditions: The applicant's diagnosis was cubital tunnel syndrome, right upper extremity, ulnar nerve and carpal tunnel syndrome, right upper extremity, median nerve. Bending of his elbows, bending, twisting of the right hand aggravated the nerve condition.

(7) Mental Disorders (other than post traumatic stress disorder and eating disorders): The applicant was diagnosed with adjustment disorder. The applicant was administered the Assessment of Depression Inventory that assesses the magnitude of depression. The applicant's scores were not indicative of depression. It was as likely as not his mental health symptoms were caused by or as a result of the circumstances, conditions, or hardships of military service as evidenced by the mental health symptoms that first manifested during the applicant's active duty service.

h. MEB document, which shows the applicant did not meet retention criteria because of his L5 lumbar radiculopathy, right side; lumbar degenerative disc disease; bilateral L5 spondylosis; and grade 1 anterolisthesis of L5 on S1. The entire document is available for the Board's review.

i. Physical profile, dated 19 February 2020 shows the applicant had a profile for lower back injury/pain. He had been on a temporary profile for 116 days. Physical profile, dated 9 March 2020 shows the applicant had a profile for lower back injury/pain and L5 lumbar radiculopathy, right side.

j. MEB proceedings, dated 19 February 2020 shows the applicant did not meet retention standards for L5 lumbar radiculopathy, right side; lumbar degenerative disc disease; bilateral L5 spondylolysis; and grade 1 anterolisthesis of L5 on S1. He met retention standards for adjustment disorder; tinnitus, bilateral; sensorineural hearing loss, right ear; carpal tunnel syndrome, right; and cubital tunnel syndrome, right side.

k. Memorandum request for rating, dated 10 March 2020 to the Department of Veterans Affairs(VA), stated the PEB found the applicant physically unfit to continue military service. Provide a disability rating percentage for all referred and claimed conditions. The VA's response was not available for the Board's review.

l. The applicant did not provide documentation to show he was injured in a combat related incident, or to show he was awarded or authorized the PH or CAB.

3. The applicant's request for award of the Purple Heart is premature.

a. Army Regulation 15-185, the regulation under which this Board operates, states that the ABCMR will not consider an application unless the applicant has exhausted all administrative remedies to correct the alleged error or injustice. There is no evidence that you submitted your application for the Purple Heart to the U.S. Army Human Resources Command (HRC), ATTN: AHRC-PDP-A, 1600 Spearhead Division Avenue, Fort Knox, KY 40122, and were denied this award.

b. Army Regulation 600-8-22 (Military Awards) states each approved award of the PH must exhibit all the following factors: (a) Wound, injury, or death must have been the

result of enemy or hostile act, international terrorist at-tack, or friendly fire; (b) The wound or injury must have required treatment by medical official; and (c) The records of medical treatment must have been made a matter of official Army records as described in paragraph 2–7.

(1) The authority to approve or disapprove recommendations for the award for service members who did not receive a Purple Heart while serving in a unit with wartime awards approval authority is the Chief, Awards and Decorations Branch, HRC. Although a service member may be deployed, award of the Purple Heart for injuries incurred in a previous deployment must be processed through the service member's current chain of command to the Commander, HRC for approval. The first general office in the current chain of command may disapprove the recommendation. Any member of the Army who believes that they are eligible for the Purple Heart but, through unusual circumstances no award was made, may submit an application through the member's chain of command to Commander, HRC (AHRC–PDP–A). If the requestor has separated from the military, the application may be mailed directly to the Commander, HRC (AHRC–PDP–A). The application will include the following documentation pertaining to the wound/injury and inflicting force:

- DA Form 4187 (for currently serving members)
- Chain of command endorsement (through the first general officer in the Soldier's current chain of command for currently serving members)
- Deployment orders
- DA Form 4037 (Officer Record Brief)/Enlisted/Soldier Records Brief (E/SRB)/DA Form 2–1 (Personnel Qualification Record)
- One-page narrative describing the qualifying incident and the conditions under which the member was injured or wounded
- Statements from at least two individuals, other than the proposed recipient, who were personally present, observed the incident, and have direct knowledge of the event. Alternatively, other official documentation may be used to corroborate the narrative
- Casualty report (if available).
- Standard Form 600 (Medical Record - Chronological Record of Medical Care)
- DD Form 214 (Certificate of Release or Discharge from Active Duty) (if applicable)

(2) In view of the foregoing, this portion will not be discussed further in this Record of Proceedings. Should his case not be resolved to his satisfaction by HRC, and he still feels that an error or injustice exists, he may resubmit his application to this Board requesting the Purple Heart, including evidence of the denial of his request for administrative correction of his records by HRC, as well as evidence supporting his entitlement to this award.

4. The applicant's request for award of the Combat Action Badge (CAB) is premature. Army Regulation 600-8-22 (Military Awards) states retroactive award of the CAB is authorized to fully qualified individuals. The wartime command retains wartime awards approval authority for 12 months after redeployment and can approve award of the CAB for Soldiers who deployed with their command, and qualified for, but did not receive the CAB during the deployment.

a. Soldiers redeployed more than 12 months or reassigned to a command other than their wartime command and qualified for the CAB while deployed may request award through command channels to Commander, U.S. Army Human Resources Command (AHRC-PDP-A), 1600 Spearhead Division Avenue, Fort Knox, KY 40122-5408. Applications for retroactive award to active duty Soldiers and Reserve Component Soldiers will be forwarded through command channels to the first general officer (for endorsement) to HRC for processing. The first general officer in the chain of command of the Soldier recommended for award of the CAB may disapprove the recommendation. All Army National Guard requests, once endorsed, will be submitted to the Director, (ARNG-HRH-A), 111 South George Mason Drive, Arlington, VA 22204 prior to being submitted to HRC. Retirees and veterans should address their applications to HRC for processing. The DA Form 4187 with endorsement by the first general officer is not required. All other criteria must be met. Requests for retroactive award of the CAB will not be made except where evidence of injustice is presented. Submitted request must include justification explaining why the CAB was not awarded in theater.

b. Veterans may submit their request for award of the CAB to the Commander, U.S. Army Human Resources Command, ATTN: AHRC-PDP-A, 1600 Spearhead Division Avenue, Fort Knox, KY 40122. Requests must contain:

- assignment, attachment, or operational control orders
- a copy of your Enlisted/Officer Record Brief or Personnel Qualification Record
- a copy of the chain of command endorsement
- a one-page narrative description of the qualifying incident
- a certified copy of the DD Form 214
- other supporting documentation, including medical records identifying injuries and/or medical care received, operational staff duty logs recording the date of incident, casualty reports, sworn statements, and/or other supporting documents

c. In view of the foregoing, this portion will not be discussed further in this Record of Proceedings. Should his case not be resolved to his satisfaction by HRC, and he still feels that an error or injustice exists, he may resubmit his application to this Board requesting the CAB, including evidence of the denial of his request for administrative

correction of his records by HRC, as well as evidence supporting his entitlement to this award.

5. 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 U.S. Army Reserve (USAR) on 1 October 2012.

b. DD Form 214 shows the applicant, as a member of the USAR was ordered to active duty on 21 September 2013 and was honorably released on 22 September 2014. He had service in Afghanistan from 18 November 2013 through 12 August 2014.

c. DD Form 368 (Request for Conditional Release), 16 May 2015 shows the applicant requested a conditional release from the USAR, which was approved until 22 November 2015.

d. DA Form 2807-2 (Medical Prescreen of Medical History Report), 27 May 2015; DD Form 2808 (Report of Medical Examination), 9 June 2009; and DD Form 2807-1 (Report of Medical History), 9 June 2009 do not indicate the applicant had any medical or mental health issues.

e. DD Form 4, 10 September 2015 shows the applicant enlisted in the Regular Army.

f. Orders D-09-518493, published by U.S. Army Human Resources Command, dated 15 September 2015 shows the applicant was honorably discharged from the USAR effective 9 September 2015.

g. Orders HO-141-00027, published by Headquarters III Corps, Fort Hood, 20 May 2016 are TCS orders in support of Operation Freedom's Sentinel Afghanistan not to exceed 270 days. The proceed date was on or about 24 May 2016. Orders HO-141-00027 (A1) amended the proceed date to on or about 24 June 2016.

h. NATO Medal Certificate shows the applicant was awarded the NATO Medal for his service in Afghanistan from 23 May 2016 through 14 February 2017.

i. DA Form 199 (Informal PEB Proceedings), 14 April 2020 shows the board found the applicant physically unfit for duty and recommended a rating of 20 percent and that he be separated with severance pay.

- Lumbar Radiculopathy, right, 10%
- Lumbar Degenerative Disc Disease, 10%

j. The applicant concurred with the findings and waived a formal hearing of his case and did not request reconsideration of his VA ratings.

k. DD Form 214 shows the applicant was honorably discharged for disability on 10 August 2020. He had completed 4 years, 11 months, and 1 day of net active service this period with 1 year, 4 months, and 20 days prior active service and 1 year, 6 months, and 19 days of prior inactive service. He had service in Afghanistan from 25 May 2016 through 10 February 2017. He received disability severance pay of \$37,134. He was awarded or authorized the:

- Army Commendation Medal (2nd Award)
- Army Achievement Medal (2nd Award)
- Army Good Conduct Medal (2nd Award)
- National Defense Service Medal
- Global War on Terrorism Service Medal
- Afghanistan Campaign Medal w/2 Campaign Stars
- Army Service Ribbon
- Overseas Service Ribbon (2nd Award)
- Armed Forces Reserve Medal
- Armed Forces Reserve Medal w/M Device
- NATO Medal (2nd Award)

l. The applicant enlisted record brief, dated 11 August 2020 shows he had two deployments to Afghanistan from 25 May 2016 through 10 February 2017, 9 months; and from 18 November 2013 through 12 August 2014, 9 months.

4. Based on the applicant's discharge for disability with severance pay, the ARBA Medical Section provided a medical review for the Board's consideration.

#### 5. 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 additional conditions be determined to have been unfitting for continued service, a corresponding increase in his



military disability rating, and that his disability discharge disposition be changed from separated with disability severance pay to permanent retirement for physical disability. He is also requesting the awarding of a Combat Action Badge (CAB) and Purple Heart.

c. On his DD Form 149, the applicant has indicated the PTSD and TBI (traumatic brain injury) are conditions related to his request. He states:

“My medical discharge should have been a medical retirement. I also should have received a Purple Heart and a Combat Action Badge due to breaking my back during a rocket attack in Afghanistan. During an IED incident, everyone else in the vehicle received a Purple Heart. Because I was attached to the unit and not assigned, my PH was not submitted.

During my Med Board process during my discharge my PEBLO [physical evaluation board liaison officer] stated that I should be happy with what I was receiving and go away. The JAG [judge advocate general] officer that I spoke with said I should be happy with getting a severance.”

d. The Record of Proceedings details the applicant's service and the circumstances of the case. His DD 214 for the period of Service under consideration shows he entered the Regular Army on 10 September 2015 and was separated with \$37,134.00 of disability severance pay under provisions in paragraph 4-27c(3) of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (19 January 2017).

e. A Soldier is referred to the Integrated Disability Evaluation System (IDES) when they have one or more conditions which appear to fail medical retention standards reflected on a duty limiting permanent physical profile. At the start of their IDES processing, a physician lists the Soldiers referred medical conditions in section I the VA/DOD Joint Disability Evaluation Board Claim (VA Form 21-0819). The Soldier, with the assistance of the VA military service coordinator, lists all other conditions they believe to be service-connected disabilities in block 8 of section II of this form, or on a separate Application for Disability Compensation and Related Compensation Benefits (VA Form 21-526EZ).

f. Soldiers then receive one set of VA Disability Benefits Questionnaires (DBQ – aka C&P examinations) covering all their referred and claimed conditions. These examinations, which are the examinations of record for the IDES, serve as the basis for both their military and VA disability processing. The medical evaluation board (MEB) uses these exams along with AHLTA encounters and other information to evaluate all conditions which could potentially fail retention standards and/or be unfitting for continued military service. Their findings are then sent to the physical evaluation board for adjudication.

g. All conditions, both claimed and referred, are rated by the VA using the VA Schedule for Rating Disabilities (VASRD). The physical evaluation board (PEB), after adjudicating the case, applies the applicable ratings to the Soldier's unfitting condition(s), thereby determining his or her final combined rating and disposition. Upon discharge, the Veteran immediately begins receiving the full disability benefits to which they are entitled from both their Service and the VA.

h. On 6 November 2019, the applicant was referred to the IDES for "Bilateral L5 spondylolysis" and "Grade 1 anterolisthesis of L5 on S1."

Spondylolysis is the term for the isolated pars interarticularis defects/fractures responsible for this condition and are present in up to 6% of the population. They are most often either congenital or acquired from repetitive overuse in activities requiring hyperextension of the lumbar spine, e.g., gymnastics or a down lineman in football. They are almost never secondary to acute trauma.



i. While reports of traumas are often associated with an onset or increase in lumbar pain associated with spondylolysis, isolated pars fractures are very rarely caused by trauma: The substantial energy required to yield these fractures through acute trauma would also lead to the fracturing of nearby associated boney structures.

j. The applicant claimed seven additional conditions on a separate Application for Disability Compensation and Related Compensation Benefits (VA Form 21-526EZ) which included chronic headaches (a possible sequela of a traumatic brain injury (TBI)). He did not list a mental health condition or sequelae/symptoms of such a condition.

k. A medical evaluation board (MEB) determined his lumbar spine condition and a right L5 radiculopathy failed the medical retention standards of AR 40-501, Standards of Medical Fitness. The MEB determined 5 additional medical conditions met medical retention standards, including adjustment disorder. This condition from his MEB narrative summary:

“Adjustment disorder. The SM [service member] has been participating in an evidence-based treatment program. The preponderance of evidence does not support that the SM has had persistence or recurrence of symptoms sufficient to require extended or recurrent hospitalization, necessitating limitations of duty or duty in a protected environment; or symptoms resulting in interference with effective military performance.

The Commander's statement does not mention any BH [behavioral health] concerns or indicates that this is a duty-limiting condition. Therefore, the SM meets retention standards at this time.”

l. There was no diagnosed TBI, headache condition, or other TBI related sequela listed on his Medical Evaluation Board Proceeding (DA Form 3947). On 27 February 2020, the applicant concurred with the Board's decision and declined the opportunities to request an Impartial Medical Review and/or submit a written rebuttal.

m. On 14 April 2020, the applicant's informal PEB found his lumbar spine condition and his right lower extremity radiculopathy unfitting conditions for continued military service. They found the five remaining medical conditions not unfitting for continued service. The PEB applied the Veterans Benefits Administration (VBA) derived ratings of 10% and 10% respectively for a combined military disability rating of 20%. Because his final rating was less than 30%, the PEB recommended he be separated with disability severance pay. On 27 April 2020, after being counseled on the PEB's findings and recommendation by his PEBLO, the applicant concurred with the Board's findings, waived his right to a formal, and declined the opportunity to have the VA reconsider his disability ratings.

n. His final NCO Evaluation Report (SGT) was an annual with a thru date of 16 December 2019. It shows he was a successful Soldier and met all standards. His rater opined:

- he is a professional NCO at all times; is looked up to by peers and subordinates in this regard
- demonstrates a compassion and care for his Soldiers and his unit both on and off duty
- adaptable and great performance in his position; he performed well at any task given to him

o. His senior rater marked him as highly qualified stating “SGT Hopkins is one of the top 3 Sergeant's that I currently Senior Rate. He is a resilient and dependable NCO with unlimited potential. Promote to Staff Sergeant.”

p. Review of his PEB case file in ePEB along with his encounters in AHLTA revealed no substantial inaccuracies or discrepancies. There is insufficient probative evidence the applicant had any additional duty incurred medical condition which would have failed the medical retention standards of chapter 3 of AR 40-501, Standards of Medical Fitness, prior to his discharge. Thus, there was no cause for a rereferral of his case to the Disability Evaluation System. Furthermore, there is no evidence that an additional medical condition prevented the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his separation.

q. JLV shows was awarded numerous VA service-connected disability ratings, including for Neurosis, General Anxiety Disorder, and Migraine Headaches. However, the DES only compensates an individual for service incurred medical condition(s) which have been determined to disqualify him or her from further military service and consequently prematurely ends their career. The DES has neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions which were incurred or permanently aggravated during their military service; or which did not cause or contribute to the termination of their military career. These roles and authorities are granted by Congress to the Department of Veterans Affairs and executed under a different set of laws.

r. There was no evidence submitted with the application or found in iPERMS showing the applicant has previously applied to the Awards and Decorations Branch at the United States Army Human Resources Command for either a Combat Action Badge (CAB) or Purple Heart; or that he has received a denial for either award. Thus, there is no record to evaluate for possible correction(s). It is the opinion of the ARBA medical advisor that neither an increase in his military disability rating nor a referral of his case back to the DES is warranted.

#### BOARD DISCUSSION:

1. The Board determined the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.
2. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered.
  - a. The applicant was discharged for disability at a combined disability rating of 20%, after a PEB found him unfit for Lumbar Radiculopathy, right, rated at 10% and Lumbar Degenerative Disc Disease, also rated at 10%. After being counseled on the PEB's findings and recommendation by his PEBLO, the applicant concurred with the PEB's findings, waived his right to a formal hearing and declined the opportunity to have the

VA reconsider his disability ratings. The Board found no error or injustice in his disability processing.

b. The Board considered the medical records, any VA documents provided by the applicant and the review and conclusions of the medical reviewing official. The Board concurred with the medical official's finding insufficient probative evidence the applicant had any additional duty incurred medical condition which would have failed the medical retention standards of chapter 3 of AR 40-501, Standards of Medical Fitness, prior to his discharge. Thus, there was no cause for a rereferral of his case to the Disability Evaluation System (DES). Furthermore, there is no evidence that an additional medical condition prevented the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his separation. As such, the Board determined that neither an increase in his military disability rating nor a referral of his case back to the DES is warranted.

BOARD VOTE:

Mbr 1    Mbr 2    Mbr 3

:	:	:	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.

[Redacted]

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[Redacted]

[Redacted]

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

REFERENCES:

1. Title 10, U.S. Code, chapter 61, provides the Secretaries of the Military Departments with authority to retire or discharge a member if they find the member unfit to perform military duties because of physical disability. The U.S. Army Physical Disability Agency is responsible for administering the Army physical disability evaluation system and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with Department of Defense Directive 1332.18 and Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation).

2. Army Regulation (AR) 635-40 establishes the Army Disability Evaluation System and sets forth policies, responsibilities, and procedures that apply in determining whether a Soldier is unfit because of physical disability to reasonably perform the duties of his office, grade, rank, or rating. Only the unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability.

a. Soldiers are referred to the disability system when they no longer meet medical retention standards in accordance with Army Regulation 40-501, chapter 3, as evidenced in a medical evaluation board (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.

b. The disability evaluation assessment process involves two distinct stages: the MEB and physical evaluation board (PEB). The purpose of the MEB is to determine whether the service member's injury or illness is severe enough to compromise his 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 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 and length of military service. Individuals who are "separated" receive a onetime 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 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 medical impairment prevents reasonable performance of the duties required of the Soldier's office, grade, rank, or rating.

d. Paragraph 3-2 states disability compensation is not an entitlement acquired by reason of service-incurred illness or injury; rather, it is provided to Soldiers whose service is interrupted and who can no longer continue to reasonably perform because of a physical disability incurred or aggravated in military service.

e. Paragraph 3-4 states Soldiers who sustain or aggravate physically unfitting disabilities must meet the following line-of-duty criteria to be eligible to receive retirement and severance pay benefits:

(1) The disability must have been incurred or aggravated while the Soldier was entitled to basic pay or as the proximate cause of performing active duty or inactive duty training.

(2) The disability must not have resulted from the Soldier's intentional misconduct or willful neglect and must not have been incurred during a period of unauthorized absence.

3. Title 10, U.S. Code, section 1201, provides for the physical disability retirement of a member who has at least 20 years of service or a disability rating of at least 30 percent. Title 10, U.S. Code, section 1203, provides for the physical disability separation of a member who has less than 20 years of service and a disability rating of less than 30 percent.

4. Title 38, U.S. Code, sections 1110 and 1131, permits the VA to award compensation for disabilities that were incurred in or aggravated by active military service. However, an award of a higher VA rating does not establish error or injustice on the part of the Army. The Army rates only conditions determined to be physically unfitting at the time of discharge which disqualify the Soldier from further military service. The VA does not have the authority or responsibility for determining physical fitness for military service. The VA awards disability ratings to veterans for service connected conditions, including those conditions detected after discharge, to compensate the individual for loss of civilian employability. These two government agencies operate under different policies. Unlike the Army, the VA can evaluate a veteran throughout his or her lifetime, adjusting the percentage of disability based upon that agency's examinations and findings.

5. AR 600-8-22 (Military Awards) prescribes Department of the Army policy, criteria, and administrative instructions concerning individual and unit military awards. It states:

a. On 2 May 2005, the Chief of Staff of the Army approved creation of the Combat Action Badge to provide special recognition to Soldiers who personally engage in or are engaged by the enemy. The Combat Action Badge may be awarded by any commander delegated authority by the Secretary of the Army during wartime or the Commanding General, U.S. Army Human Resources Command and will be announced in permanent orders. Requirements for award of the Combat Action Badge are branch and MOS (Military Occupational Specialty) immaterial. Assignment to a combat arms unit or a unit organized to conduct close or offensive combat operations, or performing offensive combat operations is not required to qualify for the Combat Action Badge. However, it is not intended to be awarded to all Soldiers who serve in a combat zone or imminent danger area. Any Soldier may be awarded the Combat Action Badge but they must meet specific eligibility requirements as follows:

(1) The Soldier must be performing assigned duties in an area where hostile fire pay or imminent danger pay is authorized.

(2) The Soldier must be personally present and actively engaging or being engaged by the enemy, and performing satisfactorily in accordance with the prescribed rules of engagement; but the Soldier must not be assigned or attached to a unit that would qualify the Soldier for the Combat Infantryman Badge or the Combat Medical Badge.

(3) The Combat Action Badge may be awarded to members from the other U.S. Armed Forces and foreign Soldiers assigned to a U.S. Army unit, provided they meet these criteria.

(4) Award of the Combat Action Badge is authorized from 18 September 2001 to a date to be determined. Retroactive awards of the Combat Action Badge are not authorized prior to 18 September 2001. The Soldier must be performing assigned duties in an area where hostile fire pay or imminent danger pay is authorized. The Soldier must be personally present and actively engaging or being engaged by the enemy and performing satisfactorily in accordance with the prescribed rules of engagement.

b. The Purple Heart is awarded for a wound sustained in action against an enemy or as a result of hostile action. Substantiating evidence must be provided to verify that the wound was the result of hostile action, the wound must have required medical treatment from medical personnel, and the medical treatment must have been made a matter of official record.

6. Title 10, U.S. Code, section 1130 (10 USC 1130) provides:

a. The legal authority for consideration of proposals for decorations not previously submitted in a timely fashion. Upon the request of a Member of Congress, the



Secretary concerned shall review a proposal for the award of or upgrading of a decoration. Based upon such review, the Secretary shall determine the merits of approving the award.

b. The request, with a DA Form 638 (Recommendation for Award), must be submitted through a Member of Congress to: Commander, U.S. Army Human Resources Command (AHRC-PDP-A), 1600 Spearhead Division Avenue, Fort Knox, KY 40122. The unit must be clearly identified, along with the period of assignment and the recommended award. A narrative of the actions or period for which recognition is being requested must accompany the DA Form 638. Requests should be supported by sworn affidavits, eyewitness statements, certificates, and related documents. Supporting evidence is best provided by commanders, leaders, and fellow Soldiers who had personal knowledge of the facts relative to the request. The burden and costs for researching and assembling supporting documentation rest with the applicant.

7. AR 15-185 (Army Board for Correction of Military Records (ABCMR)) paragraph 2-9 states 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. Additionally, it states in paragraph 2-11 that 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.

8. On 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRBs) and Service Boards for Correction of Military/Naval Records (BCM/NRs) to carefully consider the revised PTSD criteria, detailed medical considerations and mitigating factors when taking action on applications from former service members administratively discharged under other than honorable conditions and who have been diagnosed with PTSD by a competent mental health professional representing a civilian healthcare provider in order to determine if it would be appropriate to upgrade the characterization of the applicant's service.

9. On 25 August 2017 the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to DRBs and BCM/NRs when considering requests by Veterans for modification of their discharges due in whole or in part to: mental health conditions, including PTSD; traumatic brain injury (TBI); sexual assault; or sexual harassment. Standards for review should rightly consider the unique nature of these cases and afford each veteran a reasonable opportunity for relief even if the sexual assault or sexual harassment was unreported, or the mental health condition was not diagnosed until years later. Boards are to give liberal consideration to Veterans petitioning for discharge relief when the application for relief is based in whole or in part on those conditions or experiences. The guidance further describes evidence sources and criteria and requires Boards to

consider the conditions or experiences presented in evidence as potential mitigation for misconduct that led to the discharge.

10. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records (BCM/NRs) regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. BCM/NRs may grant clemency regardless of the type of court-martial. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to other corrections, including changes in a discharge, which may be warranted based on equity or relief from injustice.

a. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. In determining whether to grant relief on the basis of equity, injustice, or clemency grounds, BCM/NRs shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment.

b. Changes to the narrative reason for discharge and/or an upgraded character of service granted solely on equity, injustice, or clemency grounds normally should not result in separation pay, retroactive promotions, and payment of past medical expenses or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded service characterization.

11. 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//