

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 25 June 2024

DOCKET NUMBER: AR20230011139

APPLICANT REQUESTS:

- physical disability separation in lieu of honorable administrative separation due to a condition, not a disability
- personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Defense Finance and Accounting Service (DFAS) letter, dated 23 July 2008
- self-authored statement regarding DFAS letter, undated
- separation notification memorandum, dated 22 September 2009
- DD Form 214 (Certificate of Release or Discharge from Active Duty) covering the period ending 25 November 2009
- DD Form 256A (Honorable Discharge Certificate), dated 25 November 2009
- Department of Veterans Affairs (VA) Rating Decision, dated 11 May 2021
- VA letter, dated 12 May 2021
- VA Rating Decision, dated 31 October 2021
- VA Board of Veterans' Appeals letter, dated 10 November 2021

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:

a. Items 25 (Separation Authority), 26 (Separation Code), and 28 (Narrative Reason for Separation) on his DD Form 214 covering the period ending 25 November 2009, are incorrect. He suffered from the physical condition of sleep apnea, which his co-worker also had, but wasn't separated because of it. In his own case, it was a disability because his disability rating from the VA was backdated to 26 November 2009.

b. In his opinion, he should have undergone a Medical Evaluation Board (MEB) for the purposes of determining medical retirement pay. His command initially tried to administratively separate him under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), chapter 14 (Separation for Misconduct), after a psychologist recommended a separation under the provisions of chapter 5 (Separation for the Convenience of the Government), so it is possible that there were some underhanded things going on.

c. He has attempted to get this resolved at different times, but may have not gone through the proper channels. Additionally, he is mentally disabled, which could explain his delay in making this request. He has marked the block on the application indicating that other mental health conditions are related to his request.

d. The applicant provided a letter from DFAS, wherein they advise him they rectified his Army pay account to cancel an erroneous debt that had been initiated. In a self-authored statement included with the DFAS letter, the applicant explains he included this letter with his application to the Board in order to provide evidence that other mistakes have been made in the past, indicating it is very possible that mistakes were made while being separated from the Army.

3. After multiple prior periods of honorable active and inactive service in the Army National Guard (ARNG) and the U.S. Navy, from 20 March 1992 through 29 May 2007, as evidenced by multiple NGB Forms 22 (Report of Separation and Record of Service), a DD Form 214, and a DA Form 1506 (Statement of Service – For Computation of Length of Service for Pay Purposes), a DD Form 4 (Enlistment/Reenlistment Document) shows the applicant enlisted in the Regular Army on 30 May 2007.

4. The applicant provided a letter from DFAS, dated on or about 23 July 2008, advising him that they had reviewed his Army pay account and found that he had entered active duty in the Regular Army on 30 May 2007; therefore, they cancelled his erroneous debt in the principal amount of \$5,680.00.

5. Multiple DA Forms 4856 (Developmental Counseling Form) show:

a. The applicant was counseled on 5 January 2009, regarding the content of an email he sent to his superior noncommissioned officer (NCO) on 2 January 2009, that caused some concern amongst his NCO support channel. Per the applicant, his email was a response to a comment his NCO had made some months prior regarding acting like a sergeant instead of a private. Among other comments, the applicant suggests he had an encounter at his church on the weekend of 19 – 21 December 2008, which inspired him to make a change and spread “the truth.” He lists examples of some of his shortcomings as an NCO and states he believes the Army should follow through with any threats made and sent him to a reduction board. A copy of the complete email has

been provided to the Board for review. In the counseling the applicant was advised that being an NCO involves doing the best you can with any problem you're confronted with, seeking help from his supervisors when needed, and that they can suggest some agencies to help him adapt to life in the military and being a good NCO. It was also recommended the commander make a mental health appointment for him.

b. He was counseled on 11 February 2009, to inform him he should begin thinking about the upcoming deployment to Iraq in June 2009 and going with the brigade to the "MXR" exercise/training at Fort Hood, TX, prior to deployment. He was also informed of the requirement for immunization, which he did not want to get.

c. He was counseled on 2 March 2009, regarding a failure to follow instructions pertaining maintaining accountability of his junior Soldiers, in particular a private who left the training area unaccompanied by him for an appointment and his whereabouts were unknown.

d. He was counseled on 5 March 2009, for failure to be at his appointed place of duty, when he left the training cite to accompany his wife to an appointment without anyone knowing he was leaving.

e. He was counseled on 17 April 2009, for insubordination, disrespect, and failure to follow instructions. On 15 April 2009, he had been instructed to write a 500 word essay on the importance of following the directions given by the sergeant major about what was to be worn on the airplane to and from Texas, when he elected to wear shorts on the plane. The resultant 500 word essay he wrote was disrespectful in tone, content, and context to his superior NCO, believed to have been intentionally disrespectful and insubordinate. He wrote one brief paragraph about following directions and nine paragraphs of bible verses. He was then directed to rewrite the essay in 1000 words in handwritten form, and focus on improving his behavior, keeping religion and military business separate. He was advised he was supported in having his beliefs, but it would not be tolerated that he use his beliefs to be disrespectful to his superiors. He would be recommended for Uniform Code of Military Justice (UCMJ) action should he be disrespectful in the follow-on essay. Both essays, 13 pages in total, have been provided in full to the Board for review.

f. He was counseled on 23 April 2009, for his refusal to take the mandatory immunizations required for deployment to Iraq, including smallpox vaccination, anthrax vaccination, HIV blood withdrawal, tetanus, typhoid, and yellow fever. He was advised he would be given one more opportunity to get his required immunizations at the clinic on 24 April 2009, or be recommended for further action from the chain of command. The applicant responded that the truth is a broken record. He stated had submitted his accommodation for religious exemption over 4 1/2 months prior, then 1 1/2 months later they received a training session on this topic and then the Army pretends it [religious

exemption] doesn't exist. He was never given a lawful order and does not acknowledge this counseling statement.

g. He was again counseled on 27 April 2009, and he was ordered to receive the immunizations required for deployment. On 20 April 2009, he refused to receive the mandatory anthrax vaccine, despite having been informed there was no option to refuse. He was given the weekend to think over the consequences of his action, but on 29 April 2009, continued to refuse the mandatory vaccination and would be recommended for UCMJ action for disobeying a lawful order.

6. A Medical Command (MEDCOM) Form 4038 (Report of Behavioral Health Evaluation) shows:

a. The applicant underwent a behavioral health evaluation by a staff psychiatrist at the Soldier Assistance Center (SAC) on 27 May 2009, where he was found to be mentally responsible and meet the retention requirements of Army Regulation 40-501 (Standards of Medical Fitness), chapter 3. He was diagnosed with adjustment disorder and obstructive sleep apnea.

b. The proposed treatments section of the form shows he was given a follow-up appointment and precautions shows recommendation against use of weapons/live ammunition and securing of all off-post weapons and an order against the use of alcohol.

c. The fitness for duty and continued service section of the form shows he was psychiatrically cleared for any administrative action deemed appropriate by his command and he met the psychiatric criteria for expeditious administrative separation under the Provisions of Army Regulation 635-200, paragraph 5-17. His prognosis was listed as fair.

d. The remarks show the applicant was evaluated on the date of the form as a fitness for duty evaluation. He consented to the evaluation and was aware that feedback would be given to his commander. His mental status was within normal limits; however, he continued to have difficulty with multiple stressors. While he met retention standards and there is no psychiatric disease or defect which warranted his disposition through medical channels (i.e. medical board), he clearly meets the criteria for adjustment disorder with depressed mood. Adjustment disorders are extremely resistant to treatment if the service member has continued exposure to the causing stressors which may lead to instability and unsafe behavior having a detrimental effect on unit cohesion and mission accomplishment.

e. The remarks further state the applicant meets the medical retention requirements of Army Regulation 40-501, chapter 3 and does not warrant disposition through medical

channels. In other words, he does not meet criteria for an MEB/Physical Evaluation Board (PEB). However, he meets the criteria for administrative separation in accordance with Army Regulation 635-200, paragraph 5-17 (Other designated mental condition); therefore, his expeditious discharge under those provisions is strongly encouraged. It was recommended the applicant continue to be followed by Behavioral Health on a regular basis through the separation proceedings.

f. The applicant was screened for post-traumatic stress disorder (PTSD) and traumatic brain injury (TBI). He has never deployed and there were no positive symptoms that required further evaluation. He was psychiatrically cleared for any administrative action deemed appropriate by his command.

7. A DD Form 2697 (Report of Medical Assessment) shows:

a. On 9 June 2010, the applicant provided his medical assessment, indicating:

- compared to his last medical assessment, his overall health was the same
- since his last medical assessment, he did not have any illnesses or injuries causing him to miss duty for longer than 3 days
- since his last assessment, he was treated for plantar fasciitis of the foot and knee problems
- he was not taking any medication
- his sleep apnea was a condition requiring geographic limitations and prevented him from deployment

b. A medical provider signed the form on 13 July 2009, indicating the applicant was referred for further evaluation to his primary care provider for follow-up for his diabetes mellitus and to SAC.

8. A DD Form 2807-1 (Report of Medical History) shows the applicant provided his medical history on 11 June 2009, in conjunction with a separation examination. He stated he was not in good health and indicated numerous conditions, to include breathing problems, chronic cough, hay fever, eye disorder, recurrent back pain, foot trouble, knee trouble, dizziness, heart palpitation, depression or excessive worry, stammering, having been evaluated and treated for a mental condition, low blood pressure, sleep apnea, and diabetes.

9. A physical profile is used to classify a Soldier's physical disabilities in terms of six factors or body systems, as follows: "P" (Physical capacity or stamina), "U" (Upper extremities), "L" (Lower extremities), "H" (Hearing), "E" (Eyes), and "S" (Psychiatric) and is abbreviated as PULHES. Each factor has a numerical designation: 1 indicates a high level of fitness, 2 indicates some activity limitations are warranted, 3 reflects significant limitations, and 4 reflects one or more medical conditions of such a severity that

performance of military duties must be drastically limited. Physical profile ratings can be either permanent (P) or temporary (T).

10. A DD Form 2808 (Report of Medical Examination) shows:

a. On 13 July 2009, the applicant underwent medical examination for the purpose of separation. He was found qualified for service and separation under the provisions of Army Regulation 635-200, paragraph 5-17 or chapter 14, with a PUHLES of 211111, the 2 rating in factor P for physical capacity or stamina.

b. The summary of defects and diagnoses includes diabetes mellites, non-compliance with medication, adjustment disorder with depressed mood, plantar fasciitis, sleep apnea, obesity, and self-reported lower back pain.

c. The recommendations show non-compliance with medication and taking home blood sugars, he needed to follow-up with his primary doctor and with SAC, SAC recommended discharge under the provisions of chapter 5-17, and weight loss was recommended.

11. The applicant's available service records do not contain a DA Form 3349 (Physical Profile) or show:

- he was issued a permanent physical profile rating
- he was diagnosed with a medical condition that warranted his entry into the Army Physical Disability Evaluation System (PDES)
- he was diagnosed with a condition that failed retention standards and/or was unfitting

12. On 22 September 2009, the applicant was notified by his immediate commander of his initiation of action to honorably separate him under the provisions of Army Regulation 635-200, paragraph 5-17, for other physical or mental conditions based on his diagnoses of adjustment disorder with depressed mood and obstructive sleep apnea. The applicant was advised of his right to consult with appointed counsel, submit written statements in his behalf, and have his case heard before an administrative separation board.

13. On 1 October 2009, the applicant acknowledged receipt of his commander's memorandum of notification of separation and having been advised of his right to consult with counsel prior to making his election of rights.

14. On 2 October 2009, the applicant acknowledged having been afforded the opportunity to consult with appointed counsel and that he was advised by counsel of the basis for the contemplated action to separate him under the provisions of Army Regulation 635-200, paragraph 5-17, its effect, and the rights available to him. He acknowledged having been advised of his right to have his case considered by an administrative separation board, personally appear before an administrative separation board, and submit statements in his own behalf. He did not indicate on the form whether he requested or waived these rights; he merely initialed that he acknowledged them.

15. An undated memorandum shows the applicant's battalion commander recommended approval of the applicant's honorable discharge under the provisions of Army Regulation 635-200, paragraph 5-17.

16. A legal review by the Senior Trial Counsel, 130th Engineer Brigade Office Legal Team, dated 7 October 2009, shows the separation was legally sufficient and notes that both the company and battalion commanders recommended an honorable characterization of service.

17. On 8 October 2009, the approval authority directed the applicant's honorable discharge under the provisions of Army Regulation 635-200, paragraph 5-17, for other physical or mental conditions.

18. A DA Form 1506, dated 3 November 2009, shows the applicant was credited with 12 years, 11 months, and 19 days of creditable service for pay purposes through 25 November 2009.

19. The applicant's DD Form 214 shows he was honorably discharged on 25 November 2009, under the provisions of Army Regulation 635-200, paragraph 5-17, due to a condition, not a disability, with corresponding separation code JFV and Reentry Code 3. He was credited with 2 years, 5 months, and 26 days of net active service this period, 6 years, 4 months, and 6 days of total prior active service, and 4 years, 1 month, and 17 days of total prior inactive service.

20. A VA Rating Decision, dated 11 May 2021, shows the applicant's service-connected evaluation of major depressive disorder (formerly adjustment disorder with mixed anxiety and depression), which was currently 70 percent disabling, was continued.

21. A VA Rating Decision, dated 31 October 2021, shows the applicant's entitlement to an earlier effective date for the grant of individual unemployability and eligibility for Dependents' Educational Assistance was granted in both cases with a new effective date of 26 November 2009.

22. The Army rates only conditions determined to be physically unfitting at the time of discharge, which disqualify the Soldier from further military service. The Army disability rating is to compensate the individual for the loss of a military career. The VA does not have authority or responsibility for determining physical fitness for military service. The VA may compensate the individual for loss of civilian employability.

23. 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/or the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant is applying to the ABCMR in essence requesting a referral to the Disability Evaluation System. He states in part:

"My physical condition was obstructive sleep apnea."

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. The DD 214 for the period of Service under consideration shows he entered the regular Army on 30 May 2007 and received an honorable discharge on 25 November 2009 under the separation authority provided by paragraph 5-17 of AR 635-200, Active Duty Enlisted Administrative Separations (6 June 2005): Other designated physical or mental conditions. His separation code LfV denotes "Condition, Not A Disability."

d. Paragraph 5-17a of AR 635-200:

Commanders specified in paragraph 1–19 may approve separation under this paragraph on the basis of other physical or mental conditions not amounting to disability (AR 635–40) and excluding conditions appropriate for separation processing under paragraph 5–11 or 5–13 that potentially interfere with assignment to or performance of duty. Such conditions may include, but are not limited to— (1) Chronic airsickness, (2) Chronic seasickness, (3) Enuresis, (4) Sleepwalking, (5) Dyslexia, (6) Severe nightmares, (7) Claustrophobia, (8) Other disorders manifesting disturbances of perception, thinking, emotional control or behavior sufficiently severe that the soldier's ability to effectively perform military duties is significantly impaired.

e. The EMR shows the applicant was first evaluated for obstructive sleep apnea on 3 April 2008 and that it had existed prior to his enlistment. From his 2 June 2008 encounter: "Patient seen by me 3 APR 2008 for OSA. At that time, he had recently rejoined the military. He no longer had his CPAP and did not have records from his NPSG. I asked him to request his sleep study results from the VA in Iowa. Those were received and the patient is here to discuss treatment ...Will submit consult for auto-titration CPAP, range 3-15 cmH20 with heated humidification. Mask and headgear fitted appropriately."

f. He was doing well as noted in his 18 July 2008 follow-up encounter: "Clinically improved on auto-titration CPAP. Review of his data indicated excellent compliance (100%) with effective treatment with his current settings. Because of his significant variability in CPAP needs, I recommend that he remain on auto-titration (range 4-13) indefinitely. He will follow-up with me in 3-6 months, sooner PRN."

g. Paragraph 3-41c of AR 40-501, Standards of Medical Fitness (17 December 2007), identifies the retention standards and causes for the referral of sleep apnea to the DES:

"c. Sleep apnea. Obstructive sleep apnea or sleep-disordered breathing that causes daytime hypersomnolence or snoring that interferes with the sleep of others and that cannot be corrected with medical therapy, nasal continuous positive airway pressure (CPAP), surgery, or an oral appliance. The diagnosis must be based upon a nocturnal polysomnogram and the evaluation of a pulmonologist, neurologist, or a privileged provider with expertise in sleep medicine.

(1) A 12-month trial of therapy with nasal continuous positive air pressure may be attempted to assist with other therapeutic interventions, during which time the individual will be issued a temporary profile. Soldiers with severe sleep apnea and/or symptoms may be referred directly for an MEB. If nasal CPAP is required for longer than 12 months, the Soldiers should be profiled as a permanent P2.

(2) If symptoms of hypersomnolence or snoring cannot be controlled with medical therapy, nasal CPAP, surgery or an oral appliance, the individual should be referred for a MEB. If the use of nasal CPAP or other therapies for sleep apneas result in interference with satisfactory performance of duty as substantiated by the individual's commander or supervisor, the Soldier should be referred to a MEB."

h. The applicant's sleep apnea met medical retention standards and his separation physical examination shows it continued to meet retention standards.

i. He was first seen by behavioral health on 9 March 2009 at which time the provider diagnosed him with Adjustment Disorder, and later with Adjustment Disorder with Depressed Mood.”

j. The applicant underwent a Behavioral Health Evaluation on 27 May 2009 as a fitness for duty evaluation. The psychiatrist documented a normal examination except for depressed mood and diagnosed the applicant with “Adjustment Disorder with Depressed Mood.” He noted the applicant had the mental capacity understand and participate in administrative proceedings, was mentally responsible, and met the medical retention standards in chapter 3 of AR 40-501, Standards of Medical Fitness. He stated:

“The Service Member's [SM] Mental Status was within normal limits. However, the Service Member continues to have difficulty with multiple stressors. While this individual meets retention standards and there is no psychiatric disease or defect which warrants disposition through medical channels (i.e. medical board), the SM clearly meets DSM IV-TR criteria for Adjustment Disorder with Depressed Mood. Adjustment ...

SM meets the medical retention requirements of Chapter 3, AR 40-501, and does not warrant disposition through medical channels. In other words, the Soldier does not meet criteria for an MEB/PEB. However, the Soldier meets criteria for administrative separation IAW AR 635-200, Chapter 5-17 (Other Designated Mental Condition).

THEREFORE, EXPEDITIOUS DISCHARGE FROM THE US ARMY BY CHAPTER 5-17 IS STRONGLY ENCOURAGED. It is also recommended the Service Member continue to be followed up at Behavioral Health on a regular basis throughout the separation proceedings.

Service Member has been screened for Post Traumatic Stress Disorder and Traumatic Brain Injury. He has never deployed and there are no positive symptoms that require further evaluation .”

k. Paragraph 3-36 of AR 40-501 (17 December 2007) states adjustment disorder does not fail medical retention standards:

“3–36. Adjustment disorders

Situational maladjustments due to acute or chronic situational stress do not render an individual unfit because of physical disability, but may be the basis for administrative separation if recurrent and causing interference with military duty.”

l. In a 22 September 2009 memorandum, his commander notified her of his initiation of separation actions under paragraph 5-17 of AR 635-200: "The reasons for my proposed action are: You have been diagnosed as having Adjustment Disorder with Depressed Mood and Obstructive Sleep Apnea."

m. The brigade commander approved his separation on 8 October 2009.

n. It is the opinion of the ARBA medical advisor that referral of his case to the Disability Evaluation System is unwarranted.

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. The evidence shows the applicant's chain of command initiated separation action against the applicant under AR 635-200, paragraph 5-17, for other physical or mental conditions based on his diagnoses of adjustment disorder with depressed mood and obstructive sleep apnea. The Board found no error or injustice in his separation processing. The applicant's available service records do not show he was issued a permanent physical profile rating, he was diagnosed with a medical condition that warranted his entry into the Disability Evaluation System, or he was diagnosed with a condition that failed retention standards and/or was unfitting. The evidence also shows the applicant's sleep apnea met medical retention standards and his separation physical examination shows it continued to meet retention standards. Likewise, his adjustment disorder does not fail medical retention standards. Therefore, the Board agreed with the medical reviewer's determination that referral of the applicant's case to the Disability Evaluation System is unwarranted.

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.

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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):

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. 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

Discharge Review Boards (DRBs) and Boards for Correction of Military/Naval Records (BCM/NRs) when considering requests by veterans for modification of their discharges due in whole or in part to: mental health conditions, including post-traumatic stress disorder (PTSD), traumatic brain injury (TBI), sexual assault, or sexual harassment. 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.

3. 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 (DES) and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with DOD Directive 1332.18 (Discharge Review Board (DRB) Procedures and Standards) and Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation).

a. Soldiers are referred to the disability system when they no longer meet medical retention standards in accordance with Army Regulation 40-501 (Standards of Medical Fitness), chapter 3, as evidenced in a Medical Evaluation Board (MEB); when they receive a permanent medical profile rating of 3 or 4 in any factor and are referred by an Military Occupational Specialty (MOS) Medical Retention Board (MMRB); and/or they are command-referred for a fitness-for-duty medical examination.

b. The disability evaluation assessment process involves two distinct stages: the MEB and Physical Evaluation Board (PEB). The purpose of the MEB is to determine whether the service member's injury or illness is severe enough to compromise his/her ability to return to full duty based on the job specialty designation of the branch of service. A PEB is an administrative body possessing the authority to determine whether or not a service member is fit for duty. A designation of "unfit for duty" is required before an individual can be separated from the military because of an injury or medical condition. Service members who are determined to be unfit for duty due to disability either are separated from the military or are permanently retired, depending on the severity of the disability and length of military service. Individuals who are "separated" receive a one-time severance payment, while veterans who retire based upon disability receive monthly military retired pay and have access to all other benefits afforded to military retirees.

c. The mere presence of a medical impairment does not in and of itself justify a finding of unfitness. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier may reasonably be expected to perform because of his or her office, grade, rank, or rating. Reasonable performance of the preponderance of duties will invariably result in a

finding of fitness for continued duty. A Soldier is physically unfit when a medical impairment prevents reasonable performance of the duties required of the Soldier's office, grade, rank, or rating.

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

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

b. 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.

c. The percentage assigned to a medical defect or condition is the disability rating. A rating is not assigned until the PEB determines the Soldier is physically unfit for duty. Ratings are assigned from the Department of Veterans Affairs (VA) Schedule for Rating Disabilities (VASRD). The fact that a Soldier has a condition listed in the VASRD does not equate to a finding of physical unfitness. An unfitting, or ratable condition, is one which renders the Soldier unable to perform the duties of their office, grade, rank, or rating in such a way as to reasonably fulfill the purpose of their employment on active duty. There is no legal requirement in arriving at the rated degree of incapacity to rate a physical condition which is not in itself considered disqualifying for military service when a Soldier is found unfit because of another condition that is disqualifying. 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.

5. 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.

6. Army Regulation 635-200 (Active Duty Enlisted Administrative Separations) sets forth the basic authority for the separation of enlisted personnel.

a. Paragraph 5-17 states a service member may be separated for other designated physical or mental conditions that potentially interfere with assignment to or performance of duty. not amounting to disability under Army Regulation 635-40 and excluding conditions appropriate for separation processing under paragraphs 5-11 (Separation of personnel who did not meet procurement medical fitness standards) or 5-13 (Separation because of personality disorder) Such conditions may include, but are not limited to, the following:

- chronic airsickness
- enuresis
- dyslexia
- claustrophobia
- other disorders manifesting disturbances of perception, thinking, emotional control or behavior sufficiently severe that the Soldier's ability to effectively perform military duties is significantly impaired
- chronic seasickness
- sleepwalking
- severe nightmares

b. When a commander determines a Soldier has a physical or mental condition that potentially interferes with assignment to or performance of duty, the commander will refer the Soldier for a medical examination and/or a mental status evaluation in accordance with Army Regulation 40-501. A recommendation for separation must be supported by documentation confirming the existence of the physical or mental condition. Members may be separated for physical or mental conditions not amounting to disability sufficiently severe that the Soldier's ability to effectively perform military duties is significantly impaired.

c. Separation processing may not be initiated under this paragraph until the Soldier has been counseled formally concerning deficiencies and has been afforded ample opportunity to overcome those deficiencies as reflected in appropriate counseling or personnel records. A Soldier being separated under this section will be awarded a character of service of honorable, under honorable conditions, or uncharacterized if in an entry-level separation. An under honorable conditions characterization of service which is terminated under this paragraph is normally inappropriate.

7. Title 38, U.S. Code (USC), section 1110 (General – Basic Entitlement) states for disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

8. Title 38, USC, section 1131 (Peacetime Disability Compensation – Basic Entitlement) states for disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during other than a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

9. Title 10, USC, 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.

10. Army Regulation 15-185 (Army Board for Correction of Military Records (ABCMR)) prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR. Paragraph 2-11 states applicants do not have a right to a formal hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

//NOTHING FOLLOWS//