

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 27 February 2025

DOCKET NUMBER: AR20230011142

APPLICANT REQUESTS: in effect, reconsideration of his previous request for reevaluation of his retirement disability rating by a physical evaluation board (PEB) and an increase of his disability rating to 100 percent (%).

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

- DD Form 149 (Application for Correction of Military Record), 14 August 2023
- Counsel's Petition (8 Pages) with 16 exhibits –

Exhibit 1 – two DD Forms 214 (Certificate of Release or discharge From Active Duty), 31 May 1985 and 27 December 2006, and a DD Form 215 (Correction of DD Form 214), 7 July 2011

Exhibit 2 – Narrative Recommendation for the award of the Combat Action Badge, 22 December 2004

Exhibit 3 – Medical Evaluation Board (MEB) Narrative Summary (5 Pages), 9 August 2006

Exhibit 4 – Veterans Affairs (VA) Medical Center Neurology Consult, 21 March 2007 (1 Page)

Exhibit 5 – DA Form 3349 (Physical Profile), 9 August 2006

Exhibit 6 – Physical Therapy Exam, 5-6 October 2005

Exhibit 7 – Orders A-10-5215042, 20 July 2006

Exhibit 8 – Memorandum (Physical Condition of the Applicant), 16 August 2006

Exhibit 9 – Excerpt of DA Form 3947 (MEB Proceedings), 11 October 2006

Exhibit 10 – Medical Consultation Sheet 16 September 2006 (3 pages)

Exhibit 11 – DA Form 199 (Physical Evaluation Board (PEB) Proceedings), 12 June 2006

Exhibit 12 – Excerpt Medical Progress Note, 22 April 2008 (1 Page)

Exhibit 13 – VA Letter, 7 May 2009

Exhibit 14 – Army Board for Correction of Military Records (ABCMR) Docket Number AR20190006656, 17 August 2021

Exhibit 15 – Excerpt of Compensation and Pension Exam, undated (1 Page)

Exhibit 16 – Excerpt of a service connection VA document, 18 August 2014 (3 Pages)

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the ABCMR in Docket Number AR20190006656 on 17 August 2021.

2. The applicant states, thru counsel:

a. The applicant served through several periods of service with the Army National Guard. He deployed to Iraq and was exposed to several improvised explosive devices (IED) on 22 December 2004, which caused him long lasting injuries. He developed migraine headaches, bilateral hearing loss, flashes of bright light, at times loss of vision, nausea, and diarrhea.

b. The applicant suffered additional injuries throughout his service, such as when he fell off a vehicle into a tire rack injuring his index finger, upper, and lower back. He also experienced frequent urination and hemorrhoids. On 16 August 2006, he was determined physically incapable of performing his duties due to chronic back and neck problems and recommended to be considered unfit for continued service.

c. Counsel states a physician noted on 16 September 2006, the applicant had a "low level of language functionality, a level of executive functioning that fell within borderline to low average range. symptoms of major depressive disorder and post-traumatic stress disorder (PTSD), which could be consistent with his combat experiences in Iraq, and the possibility of a post concussive disorder, a manifestation of a traumatic brain injury (TBI), related to exposure to IED blasts in Iraq."

d. Ultimately, the applicant was referred to a MEB for medical retirement and found to have had several unfitting conditions, including; chronic cervical pain and chronic low back pain due to degenerative disc disease; common migraines; chronic pain and decreased range of motion in the right index finger due to fracture of the proximal phalanx with slight malunion; major depressive disorder; depressed mood; loss of interest; poor concentration; insomnia; decreased energy; unresolved physical pain; and chronic PTSD.

e. On 7 December 2006, a PEB found the applicant was physically unfit for duty and placed him on the temporary disability retired list (TDRL) with a combined disability rating of 30%. He was honorably separated with temporary disability retirement on 27 December 2006, but continued to suffer from the pain of his injuries rendering him unable to work.

f. He received a recommendation from the Department of Veterans Affairs (VA) showing service-connected disabilities at a 100% rating for the following injuries: brain

syndrome, intervertebral disc syndrome, PTSD, bowel and bladder leakage. In 2010 the PEB changed his rating to permanent retirement with a 60% combined rating.

g. In 2011, the applicant was diagnosed with urinary frequency for symptoms of "dribbling," urinary tract problems, and erectile dysfunction. Because the applicant continues to suffer injuries, he received during combat but has not been fully compensated, he seeks an increased disability rating to reflect these injuries.

### 3. Counsel provided:

a. Exhibit 2 is a narrative recommendation for awarding the Combat Action Badge, showing the applicant was escorting a convoy on 22 December 2002 when his unit came under several IED attacks.

b. Exhibit 3 is a MEB Narrative Summary based on an examination on 9 August 2006, showing the applicants unacceptable medical diagnoses of chronic pain and decreased range of motion in right index finger due to fracture of the proximal phalanx with a slight malunion, PTSD, major depressive reaction, chronic cervical and lower back pain due to degenerative disc disease, and common migraines without aura, non-prostrating.

c. Exhibit 4 is a VA Medical Center Neurology Consult, showing the applicant was seen for headaches, back and neck pain on 21 March 2007.

d. Exhibit 5 is the DA Form 3349, showing the applicant was physically unable to perform duty on 9 August 2006, leading to his MEB.

e. Exhibit 6 physical therapy treatment on 5 and 6 October 2005 due to: migraines, loss of hearing, back and neck pain, numbness/tingling in right index and thumb and cannot move my index finger, right knee pain intermittent and increases with standing and knee feels like it is going to buckle, has buckled 10 times since March 2005, sitting eliminates knee pain but increases, low back pain, neck and left shoulder pain increases with movement of neck and produces neck pain to back of left elbow, neck and low back pain are constant.

f. Exhibit 8 is a memorandum (Physical Condition of the Applicant), 16 August 2006 from the applicant's commander showing he recommended the applicant be considered unfit for reasonable performance of his duties as a Field Artillery Cannoneer. He was a good Soldier, but his physical condition created a burden for others in his gun section and adversely impacted readiness.

g. Exhibit 9 is a DA Form 3947, showing a MEB referred the applicant to a PEB on 11 October 2006 for the following unfitting conditions:

- Chronic pain and decreased range of motion in right index finger
- AXIS I: Major Depressive Disorder; AXIS II: No Diagnosis; AXIS III: Multiple Medical Problems; AXIS IV: Occupational, Marital discord, Chronic medical problems; AXIS V: Global assessment of functioning = 55
- PTSD – Chronic
- Chronic Cervical Pain
- Chronic Low Back Pain
- Common Migraines without aura non-prostrating
- Bilateral Sensorineural hearing loss

h. Exhibit 10 is a neuropsychological consultation showing the applicants exposure to multiple IED blasts while deployed to Iraq and his reports of significant memory loss.

i. Exhibit 11 is DA Form 199 showing the applicant underwent a PEB on 6 December 2006 and the board found him physically unfit for duty, recommended a rating of 30%, and that his disposition be temporary disability retirement. The PEB further found that the applicant's disability did result from combat related injury as defined in Title 26 United States Code (U.S.C.) section 104. He concurred with the findings and did not request reconsideration of his Department of Veterans Affairs ratings.

j. Exhibit 12 is an excerpt of a medical progress note completed on 22 April 2008, showing the applicant came to a mental health appointment but passed out in the waiting and was transferred to the emergency room.

k. Exhibit 13 is a VA showing he is being treated and considered 100% service connected. He has been unable to work due to service-connected disabilities of brain syndrome, intervertebral disc syndrome and PTSD.

l. Exhibit 14 is ABCMR Docket Number AR20190006656, wherein the Board denied the applicant's request for 100% disability retirement on 17 August 2021.

m. Exhibit 15 is an excerpt of the applicant's final VA compensation and pension exam.

n. Exhibit 16 is an incomplete document dated 18 August 2014 referencing some of the applicant's service-connected VA disabilities.

4. The applicant's service record shows:

a. After having previous enlisted service in the South Carolina Army National Guard (SCARNG) and in the United States Army Reserve Career Group (USARCG) (Annual training), the applicant again enlisted SCARNG On 18 August 1994.

b. Orders 195-263, 13 July 2004 ordered the applicant to active duty in support of Operation Iraqi Freedom (OIF), and he entered active duty, on 15 July 2004.

c. Permanent Order 261-002, 17 September 2004, further shows he was directed to deploy in support of OIF with assignment to United States Central Command, area of responsibility.

d. Orders A-10-521504, show the applicant was retained on active duty under the provision of Title 10 Section 12301 to voluntarily participate in reserve component medical holdover for completion of medical care and treatment.

e. DA Form 2173 (Statement of Medical Examination and Duty Status), 8 December 2005, showing on 9 February 2005 the applicant fell off a vehicle in Iraq and injured his spine. He had numbness in his left arm and the injury was determined to have occurred in the line of duty while the applicant was in Iraq.

f. DA Form 2173, 10 January 2006 showing on 14 March 2005 the applicant fell off a vehicle in Kuwait and fractured his left index finger proximal phalanx. The injury was determined to have occurred in the line of duty while the applicant was serving on active duty.

g. Orders A-07-619455, 26 July 2006, shows the applicant again retained on active duty for medical retention, care, and treatment.

h. Orders 349-0015, 15 December 2006, shows he was being released from assignment and duty because of physical disability incurred while entitled to basic pay under conditions which placed him on the TDRL. His date for retirement was amended to read 28 December 2006.

i. On 27 December 2006, the applicant was honorably retired from active duty. His DD Form 214 (Certificate of Release or discharge from Active Duty), shows he completed 2 years, 5 months, and 13 days, and the narrative reason for separation was "DISABILITY, TEMPORARY." He received the following awards:

- Army Commendation Medal
- Army Achievement Medal
- Army Reserve Component Achievement Medal (6TH Award)
- National Defense Service Medal (2ND Award)
- Global War on Terrorism Service Medal

- Army Service Ribbon
- Armed Forces Reserve Medal with M Device
- Combat Action Badge

j. On 3 February 2010, a PEB recommend he be permanently retired with a combined military disability rating of 60%.

5. On 17 August 2021 in Docket Number AR20190006656, the ABCMR denied the applicant's request to change his disability ratings and/or narrative reason for separation based upon the available documentation, findings, and recommendation of the medical advisor.

#### 6. 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). For the reasons outlined below, the ARBA Medical Advisor is unable to make a recommendation at this time.

b. This application submitted from the applicant's counsel to the ABCMR requesting to refer his case to the Disability Evaluation System (DES) in order to increase his disability rating to 100 percent. This is a reconsideration of his previous application to ABCMR. His counsel stated:

"Pursuant to 10 U.S.C. ~ 1553, P.L. 95-126 and Department of Defense Directive 1332.41, codified at 32 C.F. R. ~ 581.3 et seq., Nathaniel McCray (hereinafter "Applicant") respectfully submits this application to correct his military records so that he may undergo a new Physical Evaluation Board (PEB) to review whether the Applicant should have been medically retired from the United States Army with a disability rating of 100%."

"The Applicant suffered an error in both PEB ratings, in 2006 and 2010, because both ratings failed to recognize his problems with urinary incontinence and fecal leakage from previous hemorrhoids he experienced after being injured in combat. The PEB findings in 2006 showed no evidence that the Board considered either of these injuries, though they were present at the time the PEB convened, as the Applicant had begun suffering from these symptoms in 2005. Additionally, the PEB

rating from 2010 also failed to consider these conditions. Although his disability rating was increased in 2010 to 60%, this disability rating still does not encompass all the injuries the Applicant has sustained due to his time in the service.”

c. Based on the documents available for review, these medical conditions were not career terminating. Therefore, the DES would not be able to provide a disability rating on these conditions. Additionally, review of his records in JLV shows he has been awarded multiple VA service connected disabilities. However, the DES has neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions incurred during or were permanently aggravated by their military service; or for compensating conditions which did not contribute to career termination. These roles and authorities are granted by Congress to the Department of Veterans Affairs and executed under a different set of laws.

d. Given the current documentation, it is the opinion of the ARBA Medical Advisor that a referral of his case to the DES is not warranted.

#### BEHAVIORAL HEALTH REVIEW:

a. Background: The applicant is applying to the ABCMR requesting reconsideration of his previous request for reevaluation of his retirement disability rating by a physical evaluation board (PEB) and an increase of his disability rating to 100 percent (%).

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 South Carolina Army National Guard a second time on 18 August 1994, and he was ordered to active duty on 15 July 2004.
- The applicant was retained on active duty under the provision of Title 10 Section 12301 to voluntarily participate in reserve component medical holdover for completion of medical care and treatment.
- Orders on 15 December 2006 shows he was released from assignment and duty because of physical disability incurred while entitled to basic pay under conditions which placed him on the TDRL. His date for retirement was amended to read 28 December 2006.
- On 27 December 2006, the applicant was honorably retired from active duty. His DD Form 214 shows he completed 2 years, 5 months, and 13 days, and the narrative reason for separation was "DISABILITY, TEMPORARY."
- On 3 February 2010, a PEB recommend he be permanently retired with a combined military disability rating of 60%.

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 deserved of 100% disability retirement, and he indicated TBI as an issue or condition related to his request. He contends there was an error in both PEB ratings in 2006 and 2010 because the rating failed to recognize his problems with urinary incontinence and fecal leakage from hemorrhoids, and he requests that a new PEB be conducted to increase his disability rating to 100% as suggested by the Department of Veterans Affairs to reflect these addition injuries. Commentary or an opinion by this Behavioral Health Advisor will be withheld considering these physical health conditions exceed this Advisor's scope of expertise. The application included a Medical Evaluation Board (MEB) Proceedings document dated 11 October 2006, which showed that he was found to be medically unacceptable IAW 40-501, 3-33 for Major Depressive Disorder, Single Episode, moderate and PTSD, Chronic, and this document outlines specific symptoms, which demonstrate he met criteria for these diagnoses. Physical Evaluation Board (PEB) Proceedings dated 6 December 2006 showed that he was found to be unfit for PTSD and Major Depressive Disorder at 10%, and he was placed on the TDRL. On 2 March 2010, the PEB found the applicant to be unfit with a combined rating of 60% (50% for Major Depressive Disorder and PTSD). In regard to the condition of TBI, the application included an extensive neuropsychological evaluation dated 16 September 2006, which was included in his MEB/PEB, and it concluded the following: "His poor performance on this assessment battery is likely due to premorbid to low premorbid intellectual abilities, the presence of severe depression and PTSD, and chronic pain, and the effects of pain medications on cognitive functioning. This examiner, therefore, cannot rule out the possibility of a post concussive disorder due to this service member's exposure to multiple IED blasts in Iraq." A Medical Review associated with ABCMR Docket Number AR20190006656 on 17 August 2021 concluded that neither an increase in military disability rating nor a referral of his case to the DES was warranted. There was no new evidence related to the applicant's mental health conditions provided as part of this application. There was sufficient evidence that the applicant was diagnosed with PTSD and Major Depressive Disorder 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 is 100% service connected (SC) through the VA for several physical and mental health conditions, and more specifically, he is 70% SC for PTSD and 10% SC for Brain Syndrome. It does not appear that there has been an increase in ratings since his original examinations in December 2006. The applicant was seen on 7 August 2013 by an Interdisciplinary TBI Team, and the physician's note stated, "based on his history today his memory complaints are not related in time to concussive events" and "no significant deficits noted on brief cognitive eval today." The physician also explained that the applicant's past performance on neuropsychological testing and the degree of impairment was suspected to be due to high levels of anxiety. A neuropsychological evaluation

conducted on 17 December 2024 showed diagnoses of PTSD, Anxiety, Depression, and Alcohol Use Disorder (all by history), and the evaluator discussed the invalid results of some of the testing as attributed to these conditions. Additionally, the evaluator noted, “although he does have impaired functional abilities it is possible this is related to substance use and mental health problems, and a diagnosis of a primary cognitive disorder is not provided. Other factors that may be having an impact on cognition include chronic pain and possibly untreated OSA (sleep apnea).”

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 PTSD and Major Depressive Disorder while on active service, but there is insufficient evidence of a primary cognitive disorder based on records and evaluations conducted by VA with the most recent in December 2024. Commentary on the applicant’s physical health conditions is deferred to the Medical Advisor, but from a behavioral health perspective, it is this Advisor’s opinion that a referral for reevaluation by the DES is not warranted.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? NA; request is for reevaluation of retirement disability

(2) Did the condition exist or experience occur during military service? NA; request is for reevaluation of retirement disability

(3) Does the condition or experience actually excuse or mitigate the discharge? NA; request is for reevaluation of retirement disability

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition, and executed a comprehensive review based on law, policy, and regulation.

a. The Board has examined the applicant’s service records, Department of Veterans Affairs (VA) evaluations, and the advisory opinions provided by both the medical advisor and the behavioral health advisor. The Board concurs with the advisors’ findings that there is sufficient evidence to support that the applicant was diagnosed with Post-Traumatic Stress Disorder (PTSD) and Major Depressive Disorder during his period of active service. However, the Board also concurs with the advisors’ conclusion that there is insufficient evidence to support the existence of a primary cognitive disorder. This determination is based on comprehensive evaluations conducted by the VA, including the most recent assessment dated December 2024.

b. The Disability Evaluation System (DES) is governed by specific statutory and regulatory authorities that limit its scope and purpose. The DES is tasked with determining fitness for continued military service and assigning disability ratings only for conditions that led to career termination. It does not possess the authority to compensate service members for anticipated future severity or potential complications of service-connected conditions, nor for conditions that did not contribute to the member's separation from service. These responsibilities are explicitly granted by Congress to the Department of Veterans Affairs and are executed under a separate legal framework.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:XX	:XX	:XX	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 //signed//

CHAIRPERSON

Signed by:

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, USC, section 1556 (Ex Parte Communications Prohibited) requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to Army Board for Correction of Military Records applicant's (and/or their counsel) prior to adjudication.

2. 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 DOD Directive 1332.18 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 an 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 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/her ability to return to full duty based on the job specialty designation of the branch of service. A PEB is an administrative body possessing the authority to determine whether or not a service member is fit for duty. A designation of "unfit for duty" is required before an individual can be separated from the military because of an injury or medical condition. Service members who are determined to be unfit for duty due to disability either are separated from the military or are permanently retired, depending on the severity of the disability and length of military service. Individuals who are "separated" receive a one-time severance payment, while veterans who retire based upon disability receive monthly military retired pay and have access to all other benefits afforded to military retirees.

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

3. Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation) 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. Paragraph 3-1 states the mere presence of an impairment does not, of itself, justify a finding of unfitness because of physical disability. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier reasonably may be expected to perform because of their office, grade, rank, or rating. The overall effect of all disabilities present in a Soldier whose physical fitness is under evaluation must be considered. All relevant evidence must be considered in evaluating the fitness of a Soldier. Findings with respect to fitness or unfitness for military service will be made on the basis of the preponderance of the evidence.

b. 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.

c. 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.

d. Paragraph 4-1 states that a Soldier charged with an offense under the Uniform Code of Military Justice (UCMJ) or who is under investigation for an offense chargeable under the UCMJ, which could result in dismissal or punitive discharge, may not be referred for, or continue, disability processing unless – (1) the investigation ends without charges; (2) the officer exercising proper court-martial jurisdiction dismisses the charges; or, (3) the officer exercising proper court-martial jurisdiction refers the charges for trial to a court-martial that cannot adjudge such a sentence.

e. Paragraph 4-2 states that a Soldier may not be referred for, or continue, disability processing if under sentence of dismissal or punitive discharge. If the sentence is suspended, the Soldier's case may then be referred for disability processing. A copy of the order suspending the sentence must be included in the Soldier's records. If action to vacate the suspension is started after the case is forwarded for disability processing, the PEB serving the area must be promptly notified to stop disability processing. Disability processing may resume if the commander decides not to vacate the suspension.

4. Title 10, USC, Section 1201 provides for the physical disability retirement of a member who has either 20 years of service or a disability rating of 30 percent or greater.

5. Title 10, USC, Section 1203 provides for the physical disability separation of a member who has less than 20 years of service and a disability rating at less than 30 percent.

6. Title 38, USC, Sections 1110 and 1131, permits the VA to award compensation for disabilities which were incurred in or aggravated by active military service. However, an award of a VA rating does not establish an error or injustice on the part of the Army.

a. 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.

b. The VA does not have 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. As a result, the VA, operating under different policies, may award a disability rating where the Army did not find the member to be unfit to perform his duties. 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.

7. 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.

8. 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 Board 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 to 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.

9. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military DRBs and 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.

//NOTHING FOLLOWS//