IN THE CASE OF: [redacted]

BOARD DATE: 7 March 2024

DOCKET NUMBER: AR20230011473

APPLICANT REQUESTS: This case comes before the Army Board for Correction of Military Records (ABCMR) on a remand from the United States District Court for the District of Columbia. The Court directs the case be stayed pending the ABCMR's reconsideration of the applicant's request to change the line-of-duty (LOD) determination from "Not In Line of Duty – Not Due to Own Misconduct" to "In-Line-of-Duty."

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

Court remand in lieu of DD Form 149 (Application for Correction of Military Record), with motion and order.

FACTS:

1. The applicant filed his initial ABCMR application, on 25 July 2017; through counsel, he asked the Board to reverse the [redacted] Army National Guard (NDARNG) LOD determination that his medical condition (Hodgkin's Lymphoma) was "Not In Line of Duty – Not Due to Own Misconduct."

a. Counsel argued the [redacted]ARNG had committed numerous legal errors in reaching its LOD determination:

(1) The [redacted]ARNG's 2 October 2014 legal review, prepared by Major (MAJ) [redacted], lacked legal sufficiency because it disregarded the regulatory presumption that the applicant's military service aggravated his medical condition.

(a) Counsel pointed to paragraph 4-8e (3) (Medical Treatment – Injury or Disease Prior to Service), Army Regulation (AR) 600-8-4 (Line of Duty Policy, Procedures, and Investigations) (then in effect) which stated, "Specific findings of natural progress of the pre-existing injury or disease based upon well-established medical principles alone are enough to overcome the presumption of Service aggravation." Further, the regulation defined "presumption," as "an inference of the truth of a proposition or fact, reached through a process of reasoning and based on the

existence of other facts. Matters that are presumed need no proof to support them but may be rebutted by evidence to the contrary."

(b) In his legal review, MAJ [redacted] wrote, "There is no evidence in the LD (line-of-duty) packet that [applicant's] military service aggravated his medical condition. There is no documentation that even intimates the physical rigors or mental stress of BCT (basic combat training) aggravated his Hodgkin's Lymphoma. The only evidence offered regarding this matter is found in Dr. [redacted] (applicant's physician) 4 September 2013 letter. 'It is my opinion that delay in his diagnosis has led to a progression of his disease and has, therefore, affected the outcome adversely.'"

(c) In the foregoing comment, MAJ [redacted] failed to address the regulatory presumption of service aggravation and did not acknowledge that no evidence is needed to establish service aggravation. In a 26 August 2014 letter, the applicant's physician (Dr. [redacted]) indicated the applicant's symptoms commenced during BCT, and the doctor maintained the applicant's military service had aggravated his medical condition, noting she had considered, "...the natural progress of the disease based upon well-established medical principles, my evaluation of the patient, and my experience."

(d) The applicant initially attributed his symptoms during BCT to have resulted from the rigors of training and cited an instance when one of the cadre "punched (him) in the chest" during brass ammunition checks to ensure the applicant was wearing his identification tags. Counsel argued, "Because [applicant] reasonably attributed pain and symptoms to maltreatment, his condition was aggravated by military service."

(e) The legal review asserted that, although medical diagnosis and treatment were readily available to the applicant during BCT, the applicant admitted, "he freely chose, after consulting several times with battle buddies and drill sergeants, not to go to sick call. Even after one drill sergeant "'explained (he) had the right to seek medical care,' [applicant] chose not to." Counsel contends the legal review's assertions are irrelevant because the applicant's condition is presumed aggravated by service; according to paragraph 4-8e (3) and 4-8f (Medical Treatment – Injury or Disease while Not on AD – Specific Findings of Natural Progression) (2), AR 600-8-4, "specific findings of natural progression of the pre-existing injury or disease, based on well-established medical principles, as distinguished from medical opinion alone, are (required) to overcome the presumption of service aggravation."

(f) The legal review continued, "There are additional reasons why any delay in diagnosis cannot be blamed on his military service. It is noteworthy that [applicant] did not seek medical attention until three weeks after he graduated from BCT. This delay cannot be placed on his military service." "The delay in diagnosis is the only aggravating reason provided in the LD packet. Because [applicant's] military service was not the cause of this delay, it did not aggravate his EPTS (existed prior to service) condition."

Counsel again argues this reasoning is not relevant because there were no specific findings as to the natural progression of the applicant's pre-existing disease.

(g) The legal review noted counsel's lengthy rebuttal to the results of the LOD investigation, and, although counsel correctly identified deficiencies in several of the investigating officer's (IO) assumptions, those deficiencies did not detract from the IO's findings. Counsel contended the main deficiency was that both the IO and MAJ [redacted] ignored the presumption of service aggravation.

(2) The memorandum transmitting a copy of the DD Form 261 (Report of Investigation – Line of Duty and Misconduct Status) was legally erroneous because it declared the applicant's medical condition was not service aggravated. The memorandum stated, "...per NGB (National Guard Bureau) Surgeon, medical evidence supports that this was an EPTS condition without evidence of service aggravation, rather the normal progression of the disease process." The statement ignores the requirements set out in paragraph 4-8e (3) and 4-8f (2), AR 600-8-4.

(3) The statement made by the appointing authority on the finalized DD Form 261 is legally erroneous.

(a) The appointing authority wrote, "I concur with the IO that this is 'Not in the Line of Duty - Not Due to Misconduct' per AR 600-8-4, Rule 1. It was due to the Soldier's Willful Negligence of not seeking medical examination/treatment while he was at Basic Training or directly telling his Commander/Drill Sergeant of his medical issues/concerns."

(b) AR 600-8-4, Appendix B (Rules Governing Line-of-Duty and Misconduct Determination), paragraph B-1 (Rule 1), states, "Injury, disease, or death directly caused by the individual’s misconduct or willful negligence is not in line of duty. It is due to misconduct. This is a general rule and must be considered in every case where there might have been misconduct or willful negligence. Generally, two issues must be resolved when a soldier is injured, becomes ill, contracts a disease, or dies — (1) whether the injury, disease, or death was incurred or aggravated in the line of duty; and (2) whether it was due to misconduct."

(c) Counsel argues, "This rule has no relevance to this investigation because there was no assertion or facts indicating that misconduct or willful negligence was involved in this case." "The quoted language from Box 19 (Appointing Authority – Reasons and Substituted Findings) of DD Form 261 is legally inconsistent with the ultimate determination in this line of duty investigation. The IO did not find willful negligence."

(4) The [redacted]ARNG Surgeon General's medical opinion did not rebut the regulatory presumption of service aggravation.

(a) The [redacted]ARNG Surgeon General's 30 October 2014 memorandum stated, "The medical documentation and literature support that the condition is EPTS to the period of active duty. The fact that [the] SM was asymptomatic and was not diagnosed during MEPS (Military Entrance Processing Station) physical does not mean that the SM was disease free. The finding is NLD/NDOM (Not In Line of Duty – Not Due to Own Misconduct)."

(b) Counsel asserts the statement is legally erroneous because it ignores the regulatory presumption of service aggravation.

(5) The Director, Casualty and Mortuary Affairs Operations Center (CMAOC), U.S. Army Human Resources Command (HRC) memorandum, dated 24 February 2015 and addressed to the applicant, did not rebut the regulatory presumption of service aggravation and ignored the previously cited guidance in AR 600-8-4. The Director, CMAOC wrote:

(a) "The Fargo MEPS medically evaluated you on 20 Jan 12 and you were found fit for duty. You attended BCT from 19 Jan – 30 Aug 12. During BCT, you were never seen at the TMC for any medical or physical complaints. However, after approximately four weeks of training, you began to notice symptoms of shortness of breath and chest pain while running. However, you chose not to be seen at the TMC for these symptoms."

(b) "You were seen by a physician shortly after completing BCT and were diagnosed with a viral illness. On 18 Sep 12, you were seen again with complaints of 'not feeling well, lump in my neck.' Further testing revealed the lump in your neck to be an enlarged lymph node. This was biopsied and you were diagnosed with nodular sclerosis classical Hodgkin's Lymphoma (HL) on 24 Sep 12. You also had a chest x-ray and chest CT scan performed that showed a mediastinal mass (tumor) and effusion that probably accounted for his [your] shortness of breathing with running."

(c) "You underwent chemotherapy, which failed and eventually underwent autologous bone marrow transplant that appeared to put your lymphoma into remission. In your case, your oncologist stated that the cancer was probably present at least 6 months prior to you seeing her; which would mean that the cancer first started at least in March 2012."

(d) "Because there are many factors that affect the growth rate of tumor cells, it is very difficult to determine how long a cancer has been present. From research, we

found nothing to contradict the 6 months, but could have started as long as a year before. Either way, the condition existed prior to your military service."

(e) (In his brief, counsel used bold lettering to highlight the following statement): "While you had some physical complaints during BCT, evidence presented indicates your military training did not cause the cancer, nor did it aggravate the cancer. Had you presented to the TMC with the symptoms that are mentioned above, the cancer may have been diagnosed earlier. However, the symptoms that you had during BCT were only a reflection of the presence of the tumor and not an aggravation of the cancer. Your military service did not make the cancer more aggressive or alter the course of the disease."

b. Counsel concluded by stating, "For all of the reasons set forth in this appeal, [applicant] respectfully requests that the legally erroneous line of duty determination be overturned and changed to in-line-of-duty."

c. With the application, counsel provided documents from the [redacted]ARNG LOD investigation, medical documentation, extracts from the applicant's service record, and an excerpt from AR 600-8-4.

2. On 3 December 2018, the Army Review Boards Agency (ARBA) Medical Advisor provided a medical advisory. After summarizing information from the applicant's service, medical records, and the [redacted]ARNG LOD investigation, the ARBA Medical Advisor concluded:

a. "The applicant did not (emphasis added by Medical Advisor) meet medical ACCESSION standards for EPTS not-diagnosed Hopkins Lymphoma with a large mediastinal mass/tumor, IAW (in accordance with) chapter 2 (Physical Standards for Enlistment, Appointment, and Induction), AR 40-501 (Standards of Medical Fitness) and the following provisions set forth in AR 635-40 (Physical Evaluation for Retention, Retirement, or Separation) that were applicable in the applicant's era of service."

(1) "The preponderance of the available evidence and the applicant's oncologist opine that the tumor had been present for approximately 6 (six) months in order to reach the size noted on diagnostic imaging (late Sep 2012) indicates initial origin(s) of malignancy around Mar 2012 (three months PRIOR to IADT for basic training)."

(2) "Based on well-established medical principles, the applicant's oncologist opine, and natural progression of the pre-existing disease (Hodgkin's Lymphoma) starting around Mar 2012 this lead to the symptomatic evaluation in mid and late Sep 2012 and subsequent diagnosis. There is NO evidence the condition, NOT reported to or evaluated by military medical providers, was aggravated by military service. The condition was NOT diagnosed on initial civilian evaluation on 10 Sep 2012 (nearly two

weeks after separation) – there was NO cervical or inguinal adenopathy on examination (the most common finding leading to diagnosis)."

(3) "Only later, on subsequent civilian evaluation on 18 Sep 2012 (nearly three weeks after separation/BCT), with left cervical lymphadenopathy noted, was additional diagnostic testing performed leading to identification of HL (Hodgkin's Lymphoma)."

b. "The applicant met medical retention standards for EPTS visual acuity and other physical, medical, dental and/or behavioral conditions IAW Chapter 3 (Medical Fitness Standards for Retention and Separation, Including Retirement), AR 40-501, and following the provisions set forth in AR 635-40 that were applicable to the applicant's era of service."

c. "Based on the available medical evidence and natural history of the underling condition, this reviewer concurs with "Not in Line of Duty – Not Due to Own Misconduct" determination."

(1) "The Hodgkin's Lymphoma WAS an EPTS medical condition."

(2) "The medical condition WAS NOT aggravated by military service."

(3) "There was NO delay in diagnosis by military medical or healthcare providers. The applicant NEVER presented for military medical evaluation of symptoms reported in hindsight (around or after his Sep 2012) diagnosis of Hodgkin's Lymphoma. There is/was NO credible, corroborated or confirmed reason for the applicant's failure to present for medical evaluation and treatment during BCT."

(4) "There is NO evidence that IF he had presented with non-specific symptoms, an earlier diagnosis of Hodgkin's lymphoma would have been made."

(5) "The applicant presented nearly 2 weeks AFTER completion of BCT to his civilian provider with NO lymphadenopathy and NO diagnosis of Hodgkin's Lymphoma was made. It was only a WEEK later, on/about 18 Sep 2012 when the applicant re-presented for evaluation with cervical lymphadenopathy (and most other symptoms resolved) was diagnostic testing performed revealing the heretofore unrecognized condition."

(6) "The Army has neither the role nor the authority to compensate for progression or complications of service-connected conditions after separation. Congress grants that role and authority to the Department of Veterans Affairs, operating under a different set of laws."

3. On 6 December 2018, ARBA provided the applicant and his counsel a copy of the advisory opinion for review and the opportunity to submit a statement or additional evidence. On 2 January 2019, the applicant's counsel responded with a memorandum for the Board and additional evidence.

a. Counsel cited paragraphs 4-8e and 4-8f, AR 600-8-4 and argued, "The review ignored AR 600-8-4 paras. 4-8e (3) and f (2), as well as the definition of presumption throughout the entire advisory opinion. As such, the advisory opinion is legally insufficient in its entirety. For this reason, the entire advisory opinion should be disregarded by the Board."

b. Counsel went on to quote specific paragraphs within the advisory and maintained none of the information mattered because "it ignores the binding regulatory presumptions set forth in AR 600-8-4, para. 4-8 e (3) and f (2)." Additionally, the ARBA Medical Advisor failed to consider "competent evidence" provided by the applicant, gave greater weight to a "negligent exam conducted by Dr. [redacted]," and, contrary to the findings of two board-certified clinicians, indicated the applicant's oncologist (Dr. [redacted]) made medical statements/assertions that were unsubstantiated.

c. Counsel submitted letters from the applicant and the applicant's father (a medical doctor) and provided a sworn statement from fellow Soldier who was in BCT with the applicant.

4. On or about 16 January 2019, the ARBA Medical Advisor reviewed counsel's arguments and evidence and chose not to amend the conclusions of the medical advisory.

5. On 17 October 2019, after considering the applicant's arguments and evidence, the Board denied the applicant's request, stating:

a. "After reviewing the application and all supporting documents, the Board found relief was not warranted. Board members discussed this in detail, read the argument, reviewed the supporting documents, discussed the advisory, and discussed whether the disease was or was not preexisting."

b. "Board members agreed that the medical doctor has thoroughly reviewed the case and determined the condition existed prior to service. Based upon the documentary evidence provided by the applicant and found within the military service record, the Board concluded there was insufficient evidence to change the finding of the LOD."

6. On 24 May 2023, the applicant and counsel filed a complaint in the U.S. District Court for the District of Columbia.

a. Counsel argued:

(1) The applicant, a former member of the [redacted]ARNG, received a diagnosis of Hodgkin's Lymphoma after exhibiting symptoms during BCT; the circumstances required an LOD investigation to determine his entitlement to Army benefits, but the [redacted]ARNG and Army failed to afford the applicant the presumptions mandated by Army regulation.

(2) "In January 2020 (sic), the ABCMR acted arbitrarily and capriciously by failing to address [applicant's] non-frivolous arguments about the applicability of the service-aggravation presumption and, ultimately, by failing to apply the presumption in accordance with Army regulation."

b. Counsel asked the court to "hold unlawful in their entirety and set aside the ABCMR's final decision"; "enter judgment in favor of [applicant] on all counts of this complaint"; "remand the matter to the ABCMR for further actions in accordance with the court's findings, decision, and order"; "upon proper application, award attorney fees under the Equal Access to Justice Act"; and "award such other relief as the court deems appropriate."

7. On 24 August 2023, the Army and the applicant's counsel filed a joint motion asking the court to stay the proceedings and to permit the voluntary remand of the applicant's case to the ABCMR. On 25 August 2023, the court granted the motion and ordered the applicant's case to be remanded to the ABCMR.

8. On 15 September 2023, applicant's counsel submitted a supplemental memorandum in support of the Board's court remand reconsideration.

a. After providing an introduction; a recounting of the Board's statutory and regulatory authority; a review of the relevant law; a reciting of Title 10 (Armed Forces), United States Code (USC), section 1552 (Correction of Military Records: Claims Incident Thereto); and a description of the facts in the applicant's case, counsel identified the applicant's requested relief:

- Find the applicant's Hodgkin’s disease to be in the line of duty, effective at least as of February 24, 2015 (the date of final action on the LOD, and
- As new request, show the applicant was referred into the Integrated Disability Evaluation System (IDES) and placed on the Permanent Disability Retired List (PDRL) with combined disability rating of at least 30 percent

b. Counsel offered the following arguments in support of the applicant's request:

(1) "The ABCMR must fully address the arguments raised in the Initial Application that assert that the [redacted]ARNG's finding that [applicant's] Hodgkin's disease was not in the line of duty is erroneous because the presumption the disease was service aggravated was not overcome."

(a) No entity made specific findings, as distinguished from medical opinion alone, with regard to the natural progress of the applicant's EPTS Hodgkin's disease in order to overcome the presumption of service aggravation.

(b) While deferring to the arguments initially made in the applicant's first ABCMR consideration, counsel offers the following supplemental, emphasizing points:

- Applicant's disease is EPTS, and there was no evidence of intentional misconduct or willful negligence; as such, his condition must be presumed to have been service aggravated, and no proof is needed to support this presumption
- To overcome the presumption of service aggravation, the government must have specific findings of natural progression based on well-established medical principles and, with a preponderance of evidence, clearly show the disease was neither incurred nor aggravated while serving on active duty
- Counsel reiterates earlier arguments pertaining to HRC's LOD determination and concludes, "The only reasonable conclusion...is that the government did not meet its burden to rebut the presumption that the condition was service aggravated"

(2) "[Applicant's] in-LD (In-Line-of-Duty (ILOD)) condition would have required referral into the IDES." While AR 40-501 does not specifically identify Hodgkin's Lymphoma as failing medical retention standards, it does list "malignant neoplasms that are unresponsive to therapy"; based on cited case law, the applicant would have been referred into IDES.

(3) "[Applicant's] Hodgkin's disease would have been found unfitting with at least a 30% (disability rating)."

(a) Given the applicant's medical condition, the Army could not have reasonably expected him to perform the duties of his office, grade, rank, or rating. "Documents reflect that his disease was marked by a large tumor in his neck and chest, severe pain, shortness of breath, loss of feeling in his leg, vision problems, thrombosis and other issues that required aggressive long-term treatment that, without question, made him unfit."

(b) Additionally, the Army had issued the applicant a "P3" profile, which would have strongly supported an unfitting determination.

(c) "Finally, the inherent severity and level of impairment of (the applicant's) symptoms is reflected in the controlling VASRD (Department of Veterans Affairs Schedule for Rating Disabilities) regulation itself, which provides a single 100% rating for Hodgkin's Lymphoma 'with active disease or during treatment.' This a clear indication of the duty-prohibiting limitations [applicant's] active Hodgkin's Lymphoma imposed." "Importantly, the 100% VASRD rating is the percentage that would have been assigned to his disability if he was found unfit, far exceeding the 30% threshold required for placement on the disability retired list (i.e., PDRL)."

c. Counsel concluded, "The ABCMR has ample justification to remedy the errors and injustices detailed herein and correct [Applicant's] record to reflect that his Hodgkin's lymphoma was an unfitting, in line-of-duty condition resulting in a disability retirement."

d. Counsel included the following as documentary evidence:

(1) The supporting documents file, with all exhibits, from the applicant's initial ABCMR consideration.

(2) Addendum, containing complete copies of the below-listed regulations; a copy of the applicant's United States District Court for the District of Columbia complaint, joint motion for voluntary remand, and court order; and an extract from 38 CFR (Pensions, Bonuses and Veterans' Relief – Code of Federal Regulations), section 4.117 (Schedule of ratings—hemic and lymphatic systems).

- AR 40-501 (Standards of Medical Fitness) dated December 14, 2007 with Rapid Action Revision, issued August 4, 2011
- AR 600-8-4 (Line of Duty Policy, Procedures, and Investigations), dated September 4, 2008
- AR 635-40 (Physical Evaluation for Retention, Retirement, or Separation) dated February 8, 2006 with Rapid Action Revision, issued March 20, 2012
- Department of Defense Instruction (DODI) 1332.38 (Physical Disability Evaluation) dated November 14, 1996 and incorporation change 2 dated April 10, 2013

9. A review of the applicant's service record reveals the following:

a. On 26 January 2012, the applicant enlisted into the [redacted] ARNG for 8 years. MEPS Orders, dated 27 January 2012, directed the applicant to enter initiate active duty for training (IADT), on 19 June 2012, at Fort Benning (now Fort Moore), GA; the orders further indicated the applicant would participate only in BCT, based upon the alternate (split) training program, and he would return to his [redacted] ARNG unit, not later than 7 September 2012.

b. DD Form 220 (Active Duty Report) shows the applicant entered IADT at Fort Moore, on 19 June 2012, and was released from active duty, on 30 August 2012; the remarks section of the report states the applicant completed BCT.

c. The applicant's counsel provided copies of the [redacted]ARNG's LOD investigation, NGB's determination that the applicant's medical condition was "NOT IN LINE OF DUTY – NOT DUE TO OWN MISCONDUCT"; HRC's decision on the applicant's LOD appeal, and the applicant's separation packet.

(1) On or about 8 April 2014, the LOD IO completed a DD Form 261, wherein he recommended a finding of "NOT IN LINE OF DUTY – NOT DUE TO OWN MISCONDUCT."

(2) On 25 November 2014, NGB affirmed it concurred with the LOD IO's recommendation and directed the finding of "NOT IN LINE OF DUTY – NOT DUE TO OWN MISCONDUCT."

(3) On 4 December 2014, the applicant's brigade-level medical evaluation board officer-in-charge advised the applicant of the NGB's LOD determination and informed him of his right to appeal. On 29 December 2014, the applicant's counsel filed an appeal with the State Surgeon's Office.

(4) On 28 January 2015, after receiving the applicant's appeal, the NGB forwarded the appeal to HRC, in accordance with paragraph 4-17a (Appeals), AR 600-8-4. (Paragraph 4-17 states a Soldier could submit an appeal within 30 days after notification of the LOD determination, and, if the final approving authority (NGB) found no basis for changing its initial decision, the appeal was forwarded to HRC for a final review and determination).

(5) On 24 February 2015, Director, CMAOC, HRC issued its decision on the applicant's appeal, finding no change was warranted to the determination of "NOT IN LINE OF DUTY – NOT DUE TO OWN MISCONDUCT."

(6) On 3 April 2015, the applicant's battalion commander sent the applicant a memorandum advising him of HRC's determination and indicating the only remaining remedy was to appeal to the ABCMR.

(7) Also, on 3 April 2015, and in a separate memorandum, the battalion commander informed the applicant she was initiating separation action against him, under the provisions of chapter 6 (Convenience of the Government), AR 135-178 (ARNG and Reserve – Enlisted Administrative Separations) and NGR (National Guard Regulation) 600-200 (Enlisted Personnel Management).

(a) The basis for her action was the LOD appeal results showing the applicant's disease was "NOT IN LINE OF DUTY – NOT DUE TO OWN MISCONDUCT."

(b) Although the memorandum addressing the applicant's separation action elections is included, the document was not completed nor was it signed by the applicant.

(c) The separation authority's approval memorandum is unavailable for review.

d. On 15 May 2015, the [redacted]ARNG discharged the applicant with an uncharacterized character of service, per National Guard Regulation (NGR) 600-200 (Enlisted Personnel Management), paragraph 6-35c (6) (Separation/Discharge from State ARNG and/or Reserve of the Army – For the Convenience of the Government – Other Designated Physical or Mental Conditions). His NGB Form 22 (Report of Separation and Record of Service) shows he completed 3 years, 3 months, and 20 days of NDARNG service.

10. On 11 January 2024, the ARBA Medical Advisor provided an advisory opinion.

a. The medical advisor cites subparagraphs within paragraph E3.P4.5 (Evidentiary Standards for Determining Compensability of Unfitting Conditions) of DODI 1332.38 and notes those paragraphs were incorporated into AR 600-8-4. Additionally, both EPTS and PSA (permanently service aggravated) are addressed in paragraph 4-8e (Medical Treatment – Injury or Disease Prior to Service) of AR 600-8-4. The medical advisor then states, "Neither the case file nor electronic records include sufficient probative evidence to warrant a reversal of USAHRC's determination the applicant's cancer was not incurred during, incident to, or permanently aggravated by his military service during BCT."

b. The medical advisor points out the following:

- Applicant told the formal LOD IO that his treating oncologist said the disease likely existed at least 6 months prior to the September 2012 diagnosis (i.e., March 2012)
- The disease, with a more than 50 percent probability, was present before and at the end of applicant's term of active duty, and this explains why he felt symptoms within 4 weeks of starting BCT

c. The advisory addresses counsel's quote of the applicant's doctor that, "Even if (applicant's) condition existed prior to his entry into boot camp, it is indisputable that his participation in military service severely aggravated his condition. This is true because the delay in diagnosis led to the progression of the disease and has, therefore, effected the outcome adversely." The ARBA Medical Advisor maintains this statement is a misapplication of the military's concept of PSA. "PSA of an EPTS medical condition

occurs when the condition is permanently worsened or aggravated as a result of military service more than it would have been worsened or aggravated in the absence of military service. In this case, it was not his physical/military training but only the delay in diagnosis which allowed for the disease to worsen due to natural progression as would be expected without therapeutic intervention."

d. The medical advisor continues, "The applicant himself notes in his written statement that this delay in seeking care was his choice, that it was due to his declining to seek health care for his symptoms while in BCT." "Had the applicant sought health care and been diagnosed with Hodgkin's lymphoma while in BCT, he probably would have been offered and possibly received medical care. However, it is likely he would been separated later for this EPTS, non-duty related condition, probably under paragraph 5-11 (Separation of Personnel Who Did Not Meet Procurement Medical Fitness Standards), AR 635-200 (Active Duty Enlisted Administrative Separations)."

e. "It is the opinion of the ARBA medical advisor there is insufficient probative medical documentation displaying a more than 50 percent probability that his cancer did not exist prior to his BCT or that it was permanently service aggravated during BCT. Thus, a reversal of USAHRC's Not in line of duty – Not due to own misconduct determination is not warranted."

11. On 6 February 2024, ARBA provided the applicant and his counsel a copy of the advisory opinion for review and the opportunity to submit a statement or additional evidence on his own behalf.

12. On 19 February 2024, counsel submitted a response. Counsel argues:

a. The ARBA medical advisory failed to address the primary argument of this case and failed to grapple with the central assert counsel and the applicant assert.

(1) The primary argument is that the [redacted]ARNG, NGB, and HRC failed to properly apply the presumption framework necessary for LOD determinations involving EPTS conditions. The applicant does not dispute that his Hodgkin's Lymphoma likely existed prior to his service, and there is no evidence of any intentional misconduct or willful negligence on the applicant's part. As such, the presumption is that his EPTS condition is service aggravated, and the Army, not the applicant, bears the burden of overcoming that presumption; this can only be done with "(s)pecific findings of natural progress of the pre-existing injury or disease based upon well-established medical principles."

(2) "The Medical Advisory Opinion's framing of [applicant's] primary argument ignores the presumption and burden of proof. See Medical Advisory Opinion, paragraph 6. This glaring omission pervades its analysis and serves to perpetuate the same fatal error that tainted the LD findings at issue in this matter."

(3) First, the advisory "cherry-picks" a statement made by the applicant's oncologist referring to the delay in diagnosis leading to the progression of the disease. It then argues the oncologist misapplied the military's concept of PSA because aggravation must occur as a result of military service, not a delay in diagnosis.

(a) Ironically, the advisory itself is misapplying the concept of service aggravation in that it entirely ignores the fact that service aggravation is presumed and must be overcome by specific evidence based on well-established medical principles rather than opinion. "Merely contesting Dr. [redacted] opinion that [applicant's] condition was service aggravated is not sufficient to rebut the presumption. Indeed, because the Army has produced no rebuttal proof of its own, reasonable doubt should have been resolved in [applicant's] favor"; per AR 635-40, paragraph 3-2a (5) (Presumptions – Before and During Active Service – Overcoming Presumptions by Preponderance of Evidence; in the Absence of Proof, Resolve in Soldier's Favor).

(b) The medical advisory's claim that the "alleged 'delay in diagnosis...allowed for the disease to worsen due to natural progression as would be expected without therapeutic intervention' is an unsupported opinion and clearly not one that could be construed as 'specific findings' that are based on 'well-established medical principles.'"

(c) The medical advisory's suggestion that the applicant delayed his diagnosis is misguided; while the applicant did not seek medical assistance, he did report his symptoms to his superiors prior to electing to continue his training. As the LOD IO noted, the applicant "took the advice of both his Drill Sergeant and three Initial Entry Soldiers who were at BCT." The applicant is not a doctor, and he did not know he had cancer while in BCT; instead, he rationalized to himself that his chest pains resulted from "punches and strikes (he) would receive on the range during what (they) called brass ammo shake downs." The notion that the delayed diagnosis was wholly the applicant's choice is both unfair and inaccurate. Ultimately, the reasons given in the medical advisory are largely irrelevant because the Army neither applied nor rebutted the presumption of service aggravation.

(4) Second, the medical advisory claims, for the first time at any point in this matter, that the applicant "likely" and "probably" would have been involuntarily separation under AR 635-200, based on his EPTS diagnosis. The advisory goes on to cite an "out-of-context" provision from the regulation pertaining to "entrance physical standards board" evaluations. A fatal flaw in this argument is that it ignores a later provision within the same section that precludes involuntary separation if the Soldier fails to meet retention standards or has an EPTS condition that is service aggravated.

(a) That the applicant's condition is service aggravated is the central issue in this case, and counsel maintains the Army erred by failing to properly apply or overcome the presumption of service aggravation.

(b) "Further, the entrance physical standards board would have had to determine that [applicant's] Hodgkin's lymphoma was not disqualifying for retention under Army Regulation 40-501...As argued in the ABCMR Remand Memorandum, the condition did not meet chapter 3 retention standards."

b. An ILOD finding would have made the applicant eligible for referral into IDES.

(1) The advisory's claims raise important concerns about the [redacted]ARNG's stated reason for separating the applicant and illustrates broader implications as to the Army's failure to overcome the presumption of service aggravation.

(a) According to the [redacted]ARNG's separation notification, the applicant's separation fell under chapter 6, AR 135-178 and paragraph 6-35 of NGR 600-200; the cited provisions give administrative separation guidance for Soldiers who, "fail[] to meet (the) medical procurement standards of AR 40-501, chapter 2, prior to entry on IET...." (emphasis added by counsel). IET, or initial entry training, "encompasses the completion of basic training and specialty qualification while serving on active duty or active duty for training [and] includes completion of initial active duty for training (IADT)."

(b) NGR 600-200 defers to AR 135-178, and, in (paragraph) 6-6 (Not Medically Qualified under Procurement Medical Fitness Standards), it states, "A Soldier found to be not medically qualified under procurement medical fitness standards will be discharged on the earliest practicable date following such determination and prior to entry on IADT." "Separation under this provision requires a 'medical finding of the staff surgeon that the Soldier has a medical condition that (a) Would have permanently disqualified them from entry in the Army had it been detected or had it existed at the time of enlistment; and (b) Does not disqualify them from retention under the provisions of AR 40–501, Chapter 3.' In other words, regardless of whether the Soldier met procurement standards when they were accepted for enlistment, if the condition is disqualifying for retention under Army Regulation 40-501, Chapter 3, then AR 135-178, (paragraph) 6-6 is not a valid basis for separation."

(c) In the applicant's case, he had a condition that, according to AR 40-501, states fails medical retention standards. A Federal court held that "AR 40-501, chapter 3 conditions which are 'cause for referral to an MEB (medical evaluation board)' obligate the Army to refer to the soldier to an MEB." "Although Army Regulation 40-501 does not specifically list Hodgkin's Lymphoma as a specific disqualifying condition, paragraph 3-42 lists 'malignant neoplasms that are unresponsive to therapy as falling below medical retention standards and cause for referral to an MEB.' More importantly, DoDI 1332.38, paragraph E4.9.10.1 (Hemic and Lymphatic Systems – Lymphomas or History Thereof – Hodgkin's) lists Hodgkin's disease as a disqualifying condition that is a cause per se for referral into the disability evaluation system (which begins with an MEB). Ultimately, to be eligible for disability retirement,

the disqualifying medical condition must be incurred or aggravated during an active-duty period or put another way, it must meet line-of-duty criteria. And whether his Hodgkin's lymphoma met line-of-duty criteria is the error that lies at the heart of this case." Counsel contends, had the applicant been properly referred into IDES, he would have been found unfitting and been granted at least a 30 percent disability rating, entitling him to a disability retirement.

c. "ABCMR precedent warrants relief in this case." The ABCMR must follow its own precedent; in a U.S. District Court, District of Columbia case (Wilhelmus v. Geren), the court rejected the argument that the ABCMR was not bound by its precedent because it is a board of equity. "Indeed, '[it] is axiomatic that 'an agency must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so.'" It is a fundamental norm of administrative procedure for an agency to treat like cases alike.

(1) In ABCMR Docket Number AR2001054368, dated 30 April 2002, "a former national guard member asserted that he had been denied benefits due to an improper adverse finding in a LD investigation conducted by his unit and the NGB. Analyzing a line-of duty regulation with materially similar language as the regulations at issue in this case, the ABCMR found that the 'Reviewing, Approving, and Appellate Authorities and various other officials repeatedly and consistently reversed and misapplied the fundamental presumptions and burdens of proof appropriate to LD determinations involving injuries, illnesses or diseases incurred by a Soldier on IDT...'"

(2) As in the applicant's case, the LOD entities in AR2007054368 failed to cite evidence or recognize that "specific evidentiary findings based upon well-established medical principles, as opposed to medical opinion, were required to overcome the presumption of service aggravation. Given the absence of such evidence, the ABCMR expunged the erroneous LD findings and directed that corrected LD findings reflecting 'LD YES' be placed in the applicant's file. Docket No. AR2001054368 dictates that, in circumstances materially like [applicant's], the primary remedy for an LD determination that fails to apply the service-aggravation presumption rules is to correct the findings to reflect the condition was ILOD."

d. "If the ABCMR adopts a deficient advisory opinion in whole, its final decision will violate the Administrative Procedure Act (APA)."

(1) Counsel refers to a U.S. District Court, District of Columbia case (McDonough v. Stackley) and argues, "Although the ABCMR is free to seek and adopt the rationale of an advisory opinion, it still must satisfy its legal obligation to engage in lawful decision making under Federal standards imposed by the APA...The ABCMR has a legal obligation to, among other things, address all non-frivolous arguments...and consider all important aspects of a problem."

(2) "As argued above, the Medical Advisory Opinion's deficiencies are myriad and, standing alone, would not satisfy the arbitrary and capricious standard. We implore the ABCMR panel to reject its misguided analysis and undertake a review that honors the Board's 'abiding moral sanction to determine, insofar as possible, the true nature of an alleged injustice and to take steps to grant thorough and fitting relief'" (Haselwander v. McHugh). "The evidence is clear that the line-of-duty determination is erroneous and must be corrected in a manner that thoroughly remedies all its collateral consequences."

e. In support of his arguments, counsel submits complete copies of AR 135-178, AR 635-200, and NGR 600-200. Additionally, he provides a redacted copy of the record of proceedings (ROP) for AR2001054368, dated 30 April 2002.

(1) In AR2001054368, the applicant, a member of the Maryland ARNG, requested, "correction of his records to show he is entitled 'to receive pay and allowances, [and] medical discharge with retirement as promised with disability since [he] was on [Inactive Duty for Training (IDT)].' He also request(ed), in effect, health care and subsistence, compensation for temporary disablement, disability separation or retirement for an illness or injury that he incurred during IDT."

(2) In July 1999, after leaving his home to attend IDT, the applicant experienced chest pains and underwent treatment at a civilian hospital; he subsequently transferred to Walter Reed Army Medical Center (WRAMC) and doctors performed a coronary artery bypass. In December 1999, NGB determined the applicant's medical condition was "NOT IN LINE OF DUTY – NOT DUE TO OWN MISCONDUCT."

(3) "Two NGB legal reviews explicitly recognized that the Army had obtained signed, written statements regarding the disease and injuries from the applicant without the benefit of the warning required by paragraph 40-3 (The Line-of-Duty Investigation Process – Informal Investigations – Evidence Collection) of Part Five, AR 600-8-1 (Army Casualty Operations/Assistance/Insurance, dated 1986; LOD guidance superseded in 2004 by AR 600-8-4 (Line of Duty Policy, Procedures, and Investigations)) and had incorporated those statements into the LDI (line-of-duty investigation)."

(a) "The ARNG Chief Surgeon, COL [redacted], noted the applicant's unwarned statement in his opinion, concluding that the applicant's 'original (24 July 1999) and revised (20 October 1999) statements show this acute myocardial infarction' did not occur in the line of duty."

(b) "It is noted that although the Chief Surgeon's medical opinion that the acute MI occurred as a result of the underlying atherosclerotic coronary artery disease (ASCAD) is medically correct, the LD recommendation that flowed from his medical opinion was applied against outdated law and regulation."

(c) "The NGB, in effect, determined that the applicant's medical conditions were not incurred in the line of duty (NLD), were not due to his own misconduct (NDOM), existed prior to his military service (EPTS), and were not aggravated by his service (NO AGGRAVATION)."

(4) "There is no current Army regulation governing LD determinations. Part Five of the 18 September 1986 edition of AR 600-8-1, Army Casualty and Memorial Affairs and Line of Duty Investigations (Part Five), the most recent Army regulation that governed LD determinations, was superseded in 1994. When AR 600-8-1 was revised and reissued on 20 October 1994 as Army Casualty Operations/Assistance/Insurance, the PERSCOM (U.S. Army Total Personnel Command, later renamed U.S. Army Human Resources Command) omitted LD determinations. Although it appears that the PERSCOM temporarily resurrected Part Five by message in 1995, that second life has since lapsed. Part Five, superseded but not replaced, is no longer a regulation. Because the 1986 AR 600-8-1 has been superseded, Part Five is no longer available in the Army publications system."

(5) "Under Part Five, State Adjutants General functioned as the reviewing authority for ARNG LD determinations, and a delegation of this authority was permitted in writing." Additionally, "Under Part Five, the fundamental ground-rule of LD determinations is that '[t]he …determination is presumed to be 'LD YES.' Paragraph 39-2a (Requirements for LD Investigations), Part Five. In other words, '[a] member of the Army is presumed to have been in sound physical and mental condition on entering active service or authorized training.'"

(a) "'To overcome this' presumption under the policy set out in September 1986 in Part Five, the Army 'must … show [ ] by substantial evidence that the injury or disease, or condition causing it, was sustained or contracted while neither on active duty nor in authorized training.'"

(b) "It is further presumed that, even if the provisions of (1) above [foregoing] are overcome by such evidence, any other condition, resulting from the pre-existing injury or disease, was caused by service aggravation. Specific findings of natural progress of the pre-existing injury or disease, based upon well-established medical principles, as distinguished from medical opinion alone, are [required] to overcome the presumption of service aggravation."

(6) "Despite the fact that the 1986 LD regulation is no longer in effect, many sources still consider Part Five to be the Army's official LD guidance." "Since the initial promulgation of Part Five in September 1986, however, extensive changes to the statutes governing these entitlements have overridden many of Part Five's key provisions. Many of these changes created new distinctions between the bases of the LD determinations relevant to each of the six disparate purposes described in Part Five.

Because of these statutory changes, an LD determination made under the unaltered provisions of Part Five can no longer be used to determine a Reserve Component service member's eligibility for entitlements to health care, compensation for temporary disablement during training, disability separation or retirement, and veterans' benefits for an injury, illness, or disease incurred during IDT. The changes in the underlying statutes have rendered many of the substantive provisions of Part Five either void or irrelevant."

(7) "Current Army regulations and policies implementing entitlements to health care, compensation for temporary disablement during training, and disability separation or retirement continue to require an LD determination. As a matter of general practice, the Army continues to follow the scheme set out in Part Five of conducting a single LD investigation, arriving at a single LD determination that is then applied to each of the distinct statutory entitlements requiring an LD determination. When a single LD determination involving a Reserve Component soldier is made on the basis of the policies and procedures embodied in Part Five, that determination is frequently inconsistent with current law. Existing Army regulations make no provision for the disparate bases of the LD determinations required for each of the distinct entitlements affected by the determination."

(8) The Board came to the following conclusions:

(a) "On 19 July 1999, the attending physician reflected his medical opinion that the applicant's initial injury, the acute MI (Myocardial Infarction), was in the line of duty. His opinion regarding the LD determination for the MI and ASCAD is ultimately correct. The Board concludes that the undated NGB advisory opinion to the Board is both factually and legally flawed. Contrary to the NGB opinion, the colonoscopy performed on the applicant in September 1999 at WRAMC was not an elective procedure. The colonoscopy was a follow-up to the emergency hemicolectomy and ileostomy performed at WRAMC in July 1999, in preparation for the reduction of the ileostomy later that month. Further, the unconditional statement that 'when a determination is made that an illness or injury is not in the line of duty, the Soldier is financially liable for any costs incurred in the treatment of his … condition' is not true under all circumstances, as shown in the foregoing evidence."

(b) "The applicant is entitled to correction of his records to show he is entitled 'to receive pay and allowances, health care and subsistence, and compensation for temporary disablement, for an illness or injury that he incurred during IDT.' He is not entitled to disability separation or retirement."

(c) "Reviewed in light of the statutes, directives, regulations, and policies in effect at the time of the incidents, the overall LD determination is wrong as a matter of law. The Investigating Officer, the Appointing, Reviewing, Approving and Appellate

Authorities, and various other reviewing officials appear to have conducted the investigation and made their determinations based solely upon provisions of the outdated and superseded 1986 Part Five. Their failure to take into account changes in the enabling statutes resulted in determinations that are clearly contrary to the requirements of the law. As a matter of law, the correct LD determination for the gangrenous cecum and all related medical procedures is LD YES for all purposes. The substituted finding that the gangrenous cecum is NLD - NDOM - EPTS - NO AGGRAVATION is unsupported by the evidence, inconsistent with the law, and was arrived at in a manner that violated both the law and the policies and procedures embodied in the superseded regulation."

(d) "As for the substance of the application, the LD determination that the applicant's acute MI, the treatment of his acute and impending MIs, and the gangrenous cecum with microperforation and all related medical procedures are NLD - NDOM - EPTS - NO AGGRAVATION is legally and factually wrong. The applicant's request should be granted. Both the LDI conducted by the NGB and the action on appeal by the NGB and the PERSCOM misapplied the surviving policies and procedures of Part Five, failed to apply the correct law, repeatedly violated many of the applicable laws and policies, and incorporated gross factual errors." "The appropriate LD determination for the acute and impending MIs and all related medical procedures is LD YES for all purposes."

(e) "The LDI contains a substantive defect so grave that it alone renders the entire investigation void. Both of the NGB legal reviews not only failed to recognize the statutory requirement that the unwarned statement not be considered, but explicitly approved of the use of the statement as a basis of the LDI findings, contrary to both the statute and paragraph 40-3 of Part Five. It contains a statement obtained from the applicant on 24 July 1999 without the required warning. No unwarned statement may be used in any way to arrive at the LD determination. Just as clearly, the unwarned statement made by the applicant formed a key factual basis of the LD determination. Likewise, the factual basis of the PERSCOM decision on the applicant's appeal of the LD determination is also drawn largely from the applicant's unwarned statement." "After the initial call of LD YES, the LDI Appointing Authority, LTC [redacted], entered a substituted finding of NLD - NDOM that was apparently based on the applicant's unwarned statement." "Because the LD determination in the applicant's case was based largely upon the applicant's unwarned 24 July 1999 statement obtained in violation of (Title) 10 USC (section) 1029, the LD determination itself is invalid."

(f) "The Reviewing, Approving, and Appellate Authorities and various other officials repeatedly and consistently reversed and misapplied the fundamental presumptions and burdens of proof appropriate to LD determinations involving injuries, illnesses or diseases incurred by a soldier on IDT as they are set out in Part Five...The Reviewing Authority did not support her conclusion with the required evidentiary findings

demonstrating that the underlying condition of ASCAD existed prior to service and that based upon well-established medical principles, the MI resulted from the natural progression of the pre-existing ASCAD. Because no such findings exist in the record, it appears that the Reviewing Authority simply ignored these requirements."

(g) Additionally, "The decision of the Appellate Authority failed to recognize that specific evidentiary findings based upon well-established medical principles, as opposed to medical opinion, are required to overcome the presumption of service aggravation. 'It is further presumed that, even if the provisions of (1) above [the foregoing] are overcome by such evidence, any other condition, resulting from the pre-existing injury or disease, was caused by service aggravation. Specific findings of natural progress of the pre-existing injury or disease, based upon well-established medical principles, as distinguished from medical opinion alone, are [required] to overcome the presumption of service aggravation.'"

(9) Based on the foregoing, the corrections to the applicant's records included the following: "expunging the existing void LDI containing the substituted finding of NLD -NDOM - EPTS - NO AGGRAVATION" and "executing a corrected LDI by the PERSCOM for the acute and impending myocardial infarctions suffered on 17 and 19 July 1999, the coronary artery bypass graft performed on 21 July 1999, and all related procedures, containing a finding of LD YES."

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found partial relief is warranted. The applicant's contentions, medical records, service records, advisory opinions obtained in connection with the Board applications, and regulatory guidance were all carefully considered.

2. The Board unanimously found the determination that the applicant's Hodgkin's Lymphoma was not in the line-of-duty to be unjust and in error. While the condition may have existed prior to applicant's service, it was not apparent during his entrance exams and he did not exhibit symptoms until he was in basic training. This created the presumption that the condition was aggravated by his active duty military service. The presumption could be rebutted with specific evidence of natural progression of the condition by well-established medical principles. However, the Board determined the preponderance of the evidence showed the presumption was not overcome. As such, the Board was unanimous that the LOD investigation should be changed to reflect that the condition was in the line of duty.

3. The Board unanimously determined that all Department of the Army records of the individual concerned should be corrected by directing the applicant be entered into the Disability Evaluation System (DES) to determine whether the applicant's Hodgkin's lymphoma met medical retention standards on 24 February 2015 (date of final action on the LOD). The Board determined that applicant should be referred to the DES for processing consistent with the determination/recommendation below. The Board recommended partial relief in the form of allowing the MEB/PEB to determine whether applicant should be retired for reason of permanent disability and appropriate Veterans Affairs Schedule for Rating Disabilities (VASRD) rating. The Board determined that it is appropriate for the MEB/PEB to make disability percentage and retirement decisions in this case.

BOARD VOTE:

Mbr 1	Mbr 2	Mbr 3	
:	:	:	GRANT FULL RELIEF
[redacted]	[redacted]	[redacted]	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined the evidence presented is sufficient to warrant a recommendation for partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by:

a. Amending his 24 February 2015 line-of-duty determination to reflect that the disease (Hodgkin's lymphoma) was found to be in the line of duty.

b. Entering him into the Disability Evaluation System (DES) to determine whether his condition(s), to include Hodgkin's lymphoma, met medical retention standards on 24 February 2015 (date of final action on the line of duty determination).

(1) In the event that a formal physical evaluation board (PEB) becomes necessary, the individual concerned will be issued invitational travel orders to prepare for and participate in consideration of his case by a formal PEB. All required reviews and approvals will be made subsequent to completion of the formal PEB.

(2) Should a determination be made that the applicant should have been separated or retired under the DES, these proceedings will serve as the authority to void his administrative separation and issue him the appropriate separation retroactive to his original separation date with entitlement to all back pay and allowances and/or retired pay, less any entitlements already received.

3. The Board determined the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to any relief in excess of that described above.

X [redacted]

CHAIRPERSON

[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. AR 600-8-4, in effect at the time, prescribed policies and procedures for LOD determinations.

a. Paragraph 2-1 (General).

(1) Line of duty determinations were essential for protecting the interests of both the individual concerned and the U.S. Government where service was interrupted by injury, disease, or death.

(2) Soldiers who were on active duty for a period of more than 30 days were not to lose their entitlement to medical and dental care, even if the injury or disease was found to have been incurred not in line of duty and/or because of the Soldier's intentional misconduct or willful negligence, per section 1074 (Medical and Dental Care for Members and Certain Former Members), Title 10 (Armed Forces), United States Code (USC).

(3) A person who became a casualty because of his or her intentional misconduct or willful negligence could never be said to be injured, diseased, or deceased in the line of duty. Such a person stood to lose substantial benefits as a consequence of his or her actions; therefore, it was critical that the decision to categorize injury, disease, or death as not in the line of duty was only made after following the deliberate, ordered procedures described in this regulation.

b. Paragraph 2-2e (Reasons for Conducting Line of Duty Investigations – Medical and dental care for Soldiers on duty other than AD for a period of more than 30 days). An ARNG or U.S. Army Reserve (USAR) Soldier is entitled to hospital benefits, pensions, and other compensation, similar to that for Soldiers of the Active Army for injury, illness, or disease incurred in the line of duty, while performing active duty for 30 days of less, or while performing inactive duty training.

c. Paragraph 2-3 (Requirement for Line of Duty Investigations). Line of duty investigations were conducted essentially to arrive at a determination of whether misconduct or negligence was involved in the disease, injury, or death and, if so, to what degree. Investigations could be informal or formal, but a formal investigation was required in the following cases:

- Injury or death due to the abuse of alcohol or drugs
- Self-inflicted injuries or possible suicide
- Injury or death while AWOL
- Injury or death occurring while the Solder was en route for final acceptance in the Army

- Death of a USAR or ARNG Soldier participating in authorized training or duty
- Disability due to disease for a USAR or ARNG Soldier serving on an active duty tour of 30 days or less
- When requested or directed for other cases

d. Paragraph 2-6 (Standards Applicable to Line of Duty Determinations). An injury, disease, or death was presumed to be in the line of duty unless refuted by substantial evidence contained in the investigation. LOD determinations had to be supported by substantial evidence and by a greater weight of evidence than supported any different conclusion.

(1) The evidence contained in an investigation had to establish a degree of certainty so that a reasonable person could be convinced of the truth or falseness of a fact, after considering:

- All direct evidence (i.e., evidence based on actual knowledge or the observation of witnesses)
- All indirect evidence (referring to the facts or statements form which reasonable inferences, deductions, and conclusions could be drawn to establish an unobserved fact, knowledge, or state of mind)

(2) In deciding line of duty determinations, the rules in Appendix B (Rules Governing Line of Duty and Misconduct Determinations) were to be applied.

e. Chapter 3 (The Line of Duty Investigation Process). The process began with the Medical Treatment Facility commander's initiation of a DA Form 2173 (Statement of Medical Examination and Duty Status)

(1) The unit commander completed section II (To be Completed by Unit Commander or Unit Advisor), indicating the Soldier's duty status as the time of the injury or disease diagnosis.

(2) Unit commanders conducted an informal line of duty investigation when circumstances warranted; the final determination of an informal LD investigation often resulted in a determination of in the line of duty; however, a formal investigation was required when the circumstances were unusual or warranted by the case's complexity.

(3) When a formal investigation was needed, the appointing authority designated an IO in writing. Upon completion of the investigation, the appointing authority reviewed the investigation results prior to forwarding it to the reviewing authority. The final approving authority reviewed the investigation for completeness and accuracy and either approved or disapproved the determinations of the lower headquarters; if approved, the approval occurred by the authority of the Secretary of the Army.

f. Chapter 4 (Special Considerations and Other Matters Affecting Line of Duty Investigations).

(1) Paragraph 4-8 (Medical Treatment). This paragraph addressed conditions that existed prior to service and for which there were presumptions concerning the respective injuries or diseases.

(a) Paragraph 4-8e (Injury or Disease Prior to Service). "The term 'EPTS' is added to a medical diagnosis. It shows that there is substantial evidence that the disease or injury, or underlying condition existed before military service or it happened between periods of active service. Included in this category are chronic diseases with an incubation period that clearly precludes a determination that it started during short tours of authorized training or duty."

(b) Paragraph 4-8e (continued). "If a line of duty determination is required, information from the medical records will be used to support a determination that an EPTS condition was or was not aggravated by military service. If an EPTS condition was aggravated by military service, the determination will be "in the line of duty." If an EPTS condition is not aggravated by military service, the determination will be "not in line of duty—not due to own misconduct." "Specific findings of natural progress of the pre-existing injury or disease based upon well-established medical principles alone are enough to overcome the presumption of Service aggravation."

(c) Paragraph 4-8f (Injury or Disease while Not on Active Duty or in a Status defined by Paragraph 2-2e). "A Soldier is presumed to have been in sound physical and mental condition upon entering active duty or a status defined in paragraph 2–2e. To overcome this, it must be shown by substantial evidence that the injury or disease, or condition causing it, was sustained or contracted while neither on active duty nor in authorized training. The following will be sufficient evidence of EPTS:"

- "Lesions or symptoms of chronic disease so near the date of entry on active duty or authorized training that they could not have started after entry, or"
- "Disease within less than the minimum incubation period after entry on active duty or authorized training"

(d) Paragraph 4-8f (continued). "It is further presumed that, even if the provisions (in subparagraph (c) above) are overcome by such evidence, any other condition, resulting from the pre-existing injury or disease, was caused by service aggravation. Specific findings of natural progress of the pre-existing injury or disease based upon well-established medical principles, as distinguished from medical opinion alone are enough to overcome the presumption of Service aggravation." "Any physical condition having its inception in line of duty during one period of Service or authorized training in

any of the Armed Forces that recurs or is aggravated during later Service or authorized training, regardless of the time between, should be in line of duty."

g. Glossary, Section II (Terms).

(1) Service Aggravation refers to a medical condition that existed prior to service and which worsened or was aggravated as a result of military service more than it would have been worsened or aggravated in the absence of military service.

(2) Presumption is the inference of the truth of a proposition or fact, reached through a process of reasoning and based on the existence of other facts. Matters that are presumed need no proof to support them, but the matters may be rebutted by evidence to the contrary.

2. AR 635-40, in effect at the time, prescribed policies and procedures for

a. Paragraph 3-2 (Presumptions). Before and during active service, a Soldier is presumed to have been in sound physical and mental condition, except for any physical disabilities noted and recorded at the time of entry. Any disease or injury discovered after a Soldier entered active service, with the exception of congenital and hereditary conditions, was not due to the Soldier's intentional misconduct or willful neglect and was incurred in line of duty. If the foregoing presumptions are overcome by a preponderance of the evidence, any additional disability or death resulting from the preexisting injury or disease was caused by military service aggravation. (Only specific findings of "natural progression" of the preexisting disease or injury, based upon well-established medical principles are enough to overcome the presumption of military service aggravation.)

b. Paragraph 3-3 (Conditions Existing before Active Military Service). According to accepted medical principles, certain abnormalities and residual conditions exist that, when discovered, lead to the conclusion that they must have existed or have started before the individual entered the military service; examples include conditions in which medical authorities are in such consistent and universal agreement as to their cause and time of origin that no additional confirmation is needed to support to the conclusion that they existed prior to military service.

c. Paragraph 4-19e (2) (Physical Evaluation Board Decisions – Common Criteria – Conditions Which Existed Prior to Entry in Service – Application of Accepted Medical Principles).

(1) After a Soldier is accepted for active duty, discovery of an impairment causing physical disability is not conclusive evidence that the condition was incurred after acceptance. Consideration must also be given to accepted medical principles in deciding whether a medical impairment was the result of, or aggravated by, military

service while the Soldier was entitled to basic pay; or in the case of a Reservist on active duty for 30 days or less, whether the disability was the proximate result of performing active duty or IDT.

(2) Accepted medical principles may not be excluded in making these decisions even when there is no other evidence indicating the impairment was present before the Soldier's entry on active duty. The Soldier's length of service must be considered when determining service aggravation. When a decision or recommendation of a PEB is based primarily on accepted medical principles, the principle must be cited as part of the rationale.

d. Paragraph 4-19e (3) (Physical Evaluation Board (PEB) Decisions – Common Criteria – Conditions Which Existed Prior to Entry in Service – Service Aggravation).

(1) The PEB may decide that a Soldier's physical defect EPTS, or inactive duty for training, or resulted from a nonservice connected condition (not in line of duty). If so, the board must further consider whether military service aggravated the unfitting defect.

(2) If the Soldier's military service makes the condition worse or hastens the natural progression of the condition beyond the normal or anticipated rate had he or she not been exposed to such service, a finding of aggravation must be considered. AR 600–8–4 contains guidance on service aggravation. When the PEB decides that a condition has been aggravated by service, the PEB will consider the degree of disability that is in excess of the degree existing at the time of entrance into service.

e. Glossary, Section II (Terms) – Service Aggravation.

(1) Medical treatment facilities frequently list a medical condition as "service aggravated" based on the fact that the condition becomes symptomatic under certain conditions found in the military. Symptoms arising when limits imposed by a condition have been exceeded are poor criteria of service aggravation of the condition, itself.

(2) When an EPTS condition becomes symptomatic under the stress of active duty it may be unfitting but it has not been aggravated by active duty unless it has been permanently worsened over and above natural progression.

3. NGR 600-200, in effect at the time, provided for ARNG enlisted personnel the criteria, policies, processes, procedures and responsibilities to classify; assign; utilize; transfer within and between states.

a. Paragraph 6-32 (Notification and Administrative Board Procedures). All involuntary administrative separations require commanders to notify Soldiers concerning intent to initiate separation procedures. See AR 135-178, chapter 3, section

II (Notice under the Notification Procedure) and section III (Notice under the Administrative Board Procedure). The notification and administrative board procedures contained in AR 135-178 will be used as required in this regulation.

b. Paragraph 6-35 provided reasons, applicability, codes, and board requirements for administrative separation or discharge from the Reserve of the Army, the State ARNG only, or both. Those reasons could be used for separation from the State ARNG only. Paragraph 6-35c referred ARNG units to chapter 6, AR 135-178 for further guidance on separations per this paragraph. Subparagraph 6-35c (6) stated, "Other designated physical or mental conditions. Administrative separation board procedures per paragraph 6-32 are required."

4. AR 135-178, in effect at the time, established policies, standards, and procedures governing the administrative separation of certain enlisted Soldiers of the ARNG and the USAR.

a. Paragraph 2-9a (Honorable). An honorable characterization is appropriate when the quality of the Soldier's service generally has met the standards of acceptable conduct and performance of duty for Army personnel or is otherwise so meritorious that any other characterization would be clearly inappropriate.

b. Paragraph 2-11 (Separation Where Service is Uncharacterized).

(1) Entry level status. Service will be described as uncharacterized if separation processing is initiated while a Soldier is in an entry level status. A Soldier enters entry level status upon enlistment. A member of a Reserve component who is not on active duty or who is serving under a call or order to active duty for 180 days or less begins entry level status upon enlistment in a Reserve component. Entry level status for such a member of a Reserve component terminates as follows:

- 180 days after beginning training if the Soldier is ordered to ADT for one continuous period of 180 days or more; or
- 90 days after the beginning of the second period of ADT if the Soldier is ordered to ADT under a program that splits the training into two or more separate periods of active duty

(2) The Secretary of the Army, or the Secretary's designated representative, on a case-by-case basis, can determine, under Secretarial plenary authority, that characterization of service as honorable is clearly warranted by the presence of unusual circumstances involving personal conduct and performance of military duty.

c. Chapter 6 outlined procedures for the separation of ARNG and USAR Soldiers for the convenience of the government.

(1) Paragraph 6-6 (Not Medically Qualified under Procurement Medical Fitness Standards).

(a) Discharge will be accomplished on determination that a Soldier was not medically qualified under procurement medical fitness standards when accepted for enlistment or became medically disqualified prior to entry on IADT. A Soldier Found to be not medically qualified under procurement standards will be discharged on the earliest practicable date following such determination and prior to entry on IADT.

(b) A basis for discharge exists when the following are determined:

- Staff Surgeon finds the Soldier has a medical condition that would have permanently disqualified him or her from entry in the Army, had it been detected or had it existed at the time of enlistment; and
- The medical condition does not disqualify the Soldier from retention per chapter 3, AR 40-501

(2) Paragraph 6-7 (Other Designated Physical or Mental Conditions) permitted separation authorities to approve the discharge of Soldier due to physical or mental conditions not amounting to a disability and that would potentially interfere with the assignment to or performance of military duties.

5. AR 15-185 (ABCMR), currently in effect, states the ABCMR decides cases on the evidence of record; it is not an investigative body. Additionally, the ABCMR begins its consideration of each case with the presumption of administrative regularity (i.e., the documents in an applicant’s service records are accepted as true and accurate, barring compelling evidence to the contrary). The applicant bears the burden of proving the existence of an error or injustice by presenting a preponderance of evidence, meaning the applicant's evidence is sufficient for the Board to conclude that there is a greater than 50-50 chance what he/she claims is accurate.

//NOTHING FOLLOWS//