ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [redacted]

BOARD DATE: 30 January 2025

DOCKET NUMBER: AR20230011542

APPLICANT REQUESTS:

- In effect, the voiding of U.S. Army Physical Disability Agency (USAPDA) Orders Number D158-07, which removed him from the Temporary Disability Retired List (TDRL) and separated him with severance pay
- In effect, the issuance of a new order placing him on the Permanent Disability Retired List (PDRL), effective 6 June 2012, and with a combined disability rating of at least 60 percent
- Permission to appear personally before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- USAPDA Orders
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- Two Department of Veterans Affairs (VA) Letters
- Two VA Disability Rating Decisions
- Psychological Consultation
- DA Form 5889 (Physical Evaluation Board (PEB) Referral Transmittal Document)
- Three U.S Army Medical Department Activity (MEDDAC) Memoranda
- List of Medications
- Two VA Compensation and Pension (C&P) Examinations
- TDRL Neuropsychological Assessment
- DA Form 199 (PEB Proceedings)

FACTS:

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

2. The applicant states in 2008 he underwent a medical evaluation board (MEB); in January 2009, they placed him on the TDRL with a combined disability rating of

60 percent. In June 2012, the Army removed him from the TDRL and separated him with 20 percent disability rating and severance pay. The applicant argues the Army should have placed him on the PDRL with at least a combined 60 percent disability rating.

a. The applicant declares that he does not understand why the Army did not permanently retire him for disability; that decision has meant that he cannot apply for a retiree identification card, receive Tricare for Life, or gain approval for Combat-Related Special Compensation (CRSC). The applicant points out that he has a Combat Infantryman Badge and was deployed to Iraq from 2003 to 2004.

b. The applicant maintains that his medical records and Combat Infantryman Badge validate that he incurred an injustice by being separated with severance pay.

(1) In support, the applicant provides a TDRL Consolidated Summary for the National Capital Region PEB, dated 21 November 2011; this report affirms his history of a loss of consciousness due to his exposure to improvised explosive device (IED) and rocket-propelled grenade (RPG) explosions.

(2) The applicant also has attached medical records from his current doctor, which detail all of his conditions and state that the applicant's conditions have not improved since his separation from the Army.

c. The applicant acknowledges that, if the Board approves his request, the Army will recoup his severance pay, but he believes that back retired pay will offset his debt.

d. The applicant contends that, because of his confusion and memory problems, he did not realize the difference between being discharged with severance pay and placement on the PDRL. Had he understood what was going on, he would have appealed the PEB's decision. Instead, the applicant simply did what he was told and signed all of his paperwork, trusting that the Army was doing the right thing.

e. Over the years, his VA disability rating has steadily increased to the point where, now, he has a combined rating of 90 percent. He concludes, "I truly believe an injustice has been done to me and my family…The documented incidents (from his deployment to Iraq) are just the tip of the iceberg for what I had to do and see over there. I have earned my right to be medically retired not discharged and to use all government benefits that I should be entitled."

3. The applicant provides documents from his service record and his Physical Disability Evaluation System (PDES) processing; in addition, he submits VA documents and a psychological consult from his physician, which lists diagnoses of post-traumatic stress

disorder (PTSD), generalized anxiety disorder, persistent depressive disorder, and insomnia.

4. A review of the applicant's service record shows the following:

a. On 31 October 2002, after obtaining his parents' consent, the applicant enlisted into the Regular Army for 4 years; he was 17 years old. Upon completion of initial entry training and the award of military occupational specialty 11B (Infantryman), orders assigned him to an infantry battalion in Germany, and he arrived at his assigned unit, on or about 28 February 2003.

b. On 15 April 2003, the applicant deployed to Iraq; he redeployed on 15 July 2004. On 1 February 2006, the applicant immediately reenlisted for 4 years. On 20 March 2005, the applicant completed his tour in Germany and orders reassigned him to Fort Riley, KS; he arrived at his new duty station on or about 25 March 2005.

c. On 1 April 2009, a PEB found the applicant was unfit for continued military service. The PEB recommended his placement on the TDRL at a combined disability rating of 60 percent. The PEB determined the following medical conditions to be unfitting:

(1) Anxiety Disorder, not otherwise specified with elements of post-traumatic stress disorder (PTSD); due to the requirement to apply section 4.129 (Mental Disorders due to Traumatic Stress), the PEB recommended a disability rating of 50 percent.

(a) (Title 38, Code of Federal Regulation (CFR) (Pensions, Bonuses, and Veterans' Relief), section 4.129 states, when a mental disorder develops in service as a result of a highly stressful event that is severe enough to bring about the Veteran's release from active military service, the rating agency shall assign an evaluation of not less than 50 percent and schedule an examination within a six month period following the Veteran's separation to determine whether a change in evaluation is warranted).

(b) (In accordance with Army Regulation (AR) 635-40 (Physical Evaluation for Retention, Retirement, or Separation), in effect at the time, PEBs were required to apply the Department of Veterans Affairs Schedule for Rating Disabilities (VASRD) when determining a Soldier's disability rating. The Soldier's rating could either be increased or decreased based upon the results of follow-up examinations).

(2) Chronic Back Pain with a rating of 10 percent.

(3) Residuals of Traumatic Brain Injury (TBI), rated at 10 percent.

d. On 2 April 2009, the applicant concurred with the PEB's findings and recommendations and waived his right to a formal hearing. On 1 July 2009, the Army retired the applicant, and effective 2 July 2009, placed him on the TDRL.

e. On 2 May 2012, a PEB again found the applicant physically unfit but amended its earlier findings. Based on those revised findings, the PEB recommended the applicant's removal from the TDRL and his separation with severance pay at a disability rating of 20 percent. The PEB described the applicant's disabling conditions as follows:

(1) Lumbosacral Strain, referred as low back pain. The PEB found the applicant "continues to have pain that radiates down his left leg. Reflexes, strength and muscle tone are normal, which signifies that a left lower extremity radiculopathy would not be separately unfitting. Lumbar spine x-rays in September 2010 were normal, flexion of 60 degrees." The PEB rated this condition at 20 percent.

(2) Anxiety Disorder, not otherwise specified, with elements of PTSD. The PEB rated this condition at 0 percent and stated:

(a) "Soldier continues to relate symptoms of irritability, insomnia, and avoidance behavior. However, neuropsychological testing concluded that he was 'found to blatantly malinger on various tests.' The evaluator concluded that 'Given that this Veteran is able to work, where he is highly regarded, and shows consistent evidence of being able to function not only independently, but at a fairly high level of competence, his performance cannot be accounted for by any known neuropsychological process.'"

(b) "This evaluator also noted that, 'A review of this Veteran's VA medical chart finds him actively dating and developing serious romantic relationships to the point of contemplating marriage.' This condition is more appropriately rated as one that has been formally diagnosed but is not severe enough to interfere with occupational and social functioning."

(3) Post-concussive Syndrome, initially coded as residuals of TBI. The PEB considered this condition no longer unfitting. "Prior testing concluded that, 'Based on the information made available for this exam process, there is no objective evidence supportive of a TBI.' It was also concluded that ' Post-concussive Syndrome' is mild and has minimal to no limitations."

f. On or about 11 May 2012, the applicant concurred with the PEB's findings and recommendations and waived his right to a formal hearing. On 6 June 2012, USAPDA

issued Orders Number D158-07, which removed the applicant from the TDRL and separated him with severance pay at a 20 percent disability rating.

5. Per Army Regulation (AR) 15-185 (ABCMR), applicants do not have a right to a hearing before the ABCMR; however, the Director or the ABCMR may grant a formal hearing.

MEDICAL REVIEW:

1. The Army Review Boards Agency (ARBA) Medical Advisor reviewed the supporting documents, the Record of Proceedings (ROP), and the applicant's available records in the Interactive Personnel Electronic Records Management System (iPERMS), the Health Artifacts Image Management Solutions (HAIMS) and the VA's Joint Legacy Viewer (JLV). The applicant desires permanent disability retirement. He stated that he was placed on TDRL (Temporary Disability Retirement List) at 60% and removed at 20%. He believes that this was an error and that he should have been discharged and placed on the Permanent Disability Retirement List (PDRL) at 60% disability rating. He stated that his conditions have worsened, and he desires to have retirement medical benefits and CRSC pay.

2. The ABCMR ROP summarized the applicant's record and circumstances surrounding the case. The applicant joined the Army age 17 and entered active service 31Oct2002. His MOS was 11B, Infantryman. The applicant served in Germany from 20030228 to 20050320 during which he was deployed in Iraq 20030415 to 20040715. He was placed on TDRL on 01Jul2009. He was removed from TDRL and discharged due to permanent disability on 06Jun2012 at 20% rating and paid $17500.00 severance pay.

3. Summary of PEB Proceedings.

a. 01Apr2009 PEB. The PEB found the following conditions unfitting for continued service: Anxiety Disorder Not Otherwise Specified (NOS) with elements of PTSD under 9413 at 50%; Chronic Back Pain under 5237 at 10%; and Residuals of TBI (with Post Concussion Syndrome, primarily manifested as headaches as the ongoing sequela) under 8045 at 10%. The mental health condition was manifested as anxiety, depressed mood, and difficulties in interpersonal occupational relationships resulting from the applicant's 2003-2004 Iraq deployment. The mental health condition required re-examination under VASRD 4.129. The Chronic Back Pain and Residuals of TBI conditions were determined to be unstable for permanent rating. Therefore, placement on TDRL was recommended with total rating at 60% and re-examination was required. The applicant concurred and waived a formal hearing.

b. 02May2012 PEB. The MEB found the applicant's conditions were stable enough

for permanent rating. The PEB convened to determine fitness for duty. For the Lumbosacral Strain condition referred as low back pain, the lumbar spine films in September 2010 were normal. The most recent exam showed back forward flexion to 60 degrees. The condition was rated at 20% under 5237 for forward flexion to 60 degrees. Anxiety Disorder, NOS was rated at 0% under 9413. The PEB narrative indicated that "This condition is more appropriately rated as one that has been formally diagnosed but not severe enough to interfere with occupational and social functioning". Post-concussion Syndrome initially coded as Residuals of TBI was found to no longer be unfitting; therefore, this condition did not receive a disability rating. The PEB narrative indicated that "Post-concussion Syndrome is mild and has minimal to no limitations". The recommended disposition was separation with severance pay at 20% total disability. The applicant concurred and waived a formal hearing.

4. Anxiety Disorder Not Otherwise Specified (NOS)

a. Background for the applicant's mental health condition: After his parents divorced at approximately age 5, he underwent counseling for approximately 5 years. He was reportedly diagnosed with Bipolar Disorder age 9. While in active service, he underwent counseling due to marital issues in the spring of 2008.

b. 05May2008 through 07Oct2008 Psychology Clinic Irwin ACH. These visits/evaluations took place PRIOR to placement on TDRL and provide background. He was seen for rule out PTSD, cognitive disorder, and somatization disorders. He also had auditory hallucinations. He denied suicide ideation. He had completed cognitive testing in 20Nov2007 which was considered valid and suggested some cognitive disorder symptoms consistent with TBI. On 12May2008, he was admitted to inpatient psychiatry at Salina Regional (5 days) with auditory hallucinations and paranoia, for stabilization and medication management. His diagnosis was Major Depression with Psychotic Features. Repeat psychological testing on 22May2008 (Personality Assessment Inventory and Trauma Symptom Inventory) suggested possible malingering or a "cry for help". The results were invalid and could not be used for clinical interpretation of his condition. Finally, additional testing results from Miller Forensic Assessment of Symptoms Test (M-FAST) and Structured Interview of Reported Symptoms (SIRS) completed on 12Jun2008 were interpreted as probable or definite malingering. Because there was still a question of his diagnosis, he underwent a Neuropsychological Evaluation tested again 16Jul2008 the results of which could not be interpretated due to questionable validity secondary to variable effort. A final battery of psychological testing completed 30Sep2008 summarized that overall, it was found that the service member had fairly significant psychological maladjustment and was one who would quickly decompensate and quickly shift into a depressed mood with corresponding deterioration in cognitive functioning and potentially present with psychotic features. In speaking with multiple providers, the consensus was that although the applicant likely did over exaggerate and malinger symptoms, this could

possibly be viewed as a cry for help. He had a preexisting Bipolar Disorder diagnosis, which the military provider assessed was more likely a Personality Disorder in reality. During the 07Oct2008 encounter, he disclosed that he was diagnosed with Bipolar Disorder age 9. Currently, he was diagnosed with Anxiety. He was functioning well on multiple medications for his BH condition (Abilify, Celexa, Ambien and Depakote). He did not appear to have cognitive impairment (Mini Mental Status Exam 30/30, normal) scoring all points without difficulty. Diagnoses: Anxiety; and Post-concussive Syndrome, Mild.

c. 03Jun2009 Initial PTSD DBQ. The applicant reported his parents divorced when he was 9. He reported receiving counseling for 5 years. He was never hospitalized or treated with medication. Currently, he endorsed intermittent episodes of mania and depression. He reported severe depression with hallucinations around the time he was hospitalized. The hallucinations resolved on Abilify. Stressors: Their plane was fired upon by 2 missiles (September 2003); he and 4 others were ambushed and returned fire (November 2003); and he witnessed his Brigade SGM get blown up in his Humvee (December 2003). DSM IV diagnoses: Bipolar Disorder I, Severe with history of Mood-Congruent Psychotic Features; PTSD, Chronic, Moderate; and Panic Disorder with Agoraphobia. Psychological tests were completed and were considered valid.

d. In August 2009, the month following placement on TDRL, the applicant presented to psychiatry at VAMC with post-traumatic stress features as evidenced by repeated intrusive thoughts of traumatic event with irritability and hypervigilance. He was also diagnosed with Bipolar Disorder manifested as episodes of depression and hypomania. While on TDRL, he participated twice per month in adjustment counseling (readjustment from active-duty Army life and combat deployments to civilian life). And his medication was managed by psychiatry. During his time on TDRL he was divorced and was given sole custody of his two children (under age 5). He also had 2 significant romantic relationships, becoming engaged twice. He worked fulltime as a security guard from August 2009 until he had an on-the-job injury to the left wrist in February 2011 requiring surgical repair (28Feb2011), pin removal (21Apr2011) and wearing a cast/splint until May 2011. Due to the surgery and rehab afterward, he was unable to work his security job or exercise. Loss of the structure in his day led to increased depression, irritability, and isolation (except for his family). He did ultimately return to work fulltime in Jun2011. Later, as he had longtime struggles with finding meaning in his security job, he enrolled in school online but asked to attend some classes in person to increase social interaction. He also resumed going to the gym with a friend.

e. 08Jun2011 Mental Disorders TDRL Exam. He was deployed to Iraq in 2003. He reported experiencing combat with loss of friends and IED blasts with loss of consciousness. He was in weekly therapy and met monthly with a psychiatrist. He reported chronic sleep issues, hyperarousal, irritability, depressed mood low energy and re-experiencing and nightmares of combat/military service. He was living with his

mother with whom he had an “ok” relationship and his 2 children. He was working fulltime at NY Presbyterian Hospital as a security guard in the psychiatric emergency room since October 2009. He got along well with co-workers and patients. He had not missed work due to emotional symptoms. There was no substance abuse. Currently, there was no violence, psychosis, delusional thinking, or suicide ideation and no history of suicide attempt. His judgement and insight were fair. The examiner opined the applicant had moderate to severe symptoms of PTSD related to his military experience and these symptoms resulted in deficiencies in most areas of his life.

f. 21Nov2011 TDRL Consolidated Summary for NCR PEB. Based on the applicant’s report of mental health symptoms and report of social and occupational impact, the examiner opined that the applicant’s PTSD signs and symptoms resulted in deficiencies in most of the following areas: Work, School, family relations, judgment, thinking and mood (70% disability level).

g. 21Dec2011 Psychiatry Attending Note VAMC. The mental health provider indicated that the applicant’s situation was improving. He continued to have mood changes, anxiety, irritability with mild fluctuations; however, he was generally stable and sleeping well. He was working full time and continued to deliberately pursue further social interaction, as advised. Recently, he bought new house and was planning to start school next month. He was taking Celexa and Seroquel only as he had been successfully weaned off Klonopin and Ambien. Of note, he was also on CPAP after recently being diagnosed with OSA (Obstructive Sleep Apnea, which can impact sleep). There was no suicide ideation. This visit took place 6 months after the PEB convened to remove him from TDRL. This was the last mental health visit prior to being discharged from the Army.

h. The 02May2012 PEB rated Anxiety Disorder, NOS at 0% under 9413. The PEB narrative indicated that the Anxiety Disorder NOS condition was more appropriately rated as one that has been formally diagnosed but not severe enough to interfere with occupational and social functioning. In support, the narrative noted that various results of neuropsychological testing were consistent with malingering; the evaluator noted that the applicant was working where he was highly regarded and that he was functioning at a fairly high level of competence; and he was actively dating and developing serious relationships to the point of contemplating marriage.

i. 18Aug2022 CH, PsyD with [redacted] The BH examiner assessed that DSM-5 criteria were met for Diagnoses: PTSD; Generalized Anxiety Disorder with Panic; Persistent Depressive Disorder; and Insomnia. Almost all (90%) symptoms listed in the PTSD or Mental Disorders DBQ were endorsed. The examiner endorsed that the applicant was re-experiencing trauma related to military service in the form of nightmares and flashbacks, coupled with intense psychological distress while re-experiencing. While on TDRL, the applicant worked a security job at a local hospital.

After discharge from the military, he worked at the Federal Reserve in law enforcement for 10 years. The applicant endorsed that due to his mental health condition, he was not as productive as he used to be, he had missed out on advancement and promotion, and he had concerns about career longevity. He did not endorse substance abuse issues, legal or financial consequences. Current DSM-5 diagnoses included: PSTD, Generalized Anxiety Disorder, Persistent Depressive Disorder, and Insomnia. He was not taking medication for his mental health condition. He endorsed that the prior medication made him feel "too zombie-ish", so he stopped them. There was no mention of engagement in mental health treatment at the time.

5. Residuals of TBI/Post-concussion Syndrome

a. Background for concussion history: In high school (football) he reported having sustained 3-4 concussions with loss of consciousness (LOC) up to 1 hour each. He reported having sustained 1-2 concussions while in theatre due to blast exposure (2003/2004). He received the first headache diagnosis on 17Nov2006: Headache Syndrome. 07Sep2007 CT of the head (Irwin ACH) was normal as well as the 25Aug2008 brain MRI (Geary Community Hospital). It should be noted that the concussion history was inconsistently reported and/or recorded in records. There were no contemporaneous notes for the reported concussive events that were available for this review.

b. 03Jun2009 Initial PTSD DBQ. Psychological tests were completed and were considered valid. DSM IV diagnoses: Bipolar Disorder I, Severe with history of Mood-Congruent Psychotic Features; PTSD, Chronic, Moderate; and Panic Disorder with Agoraphobia.

c. 12Aug2009 PM&R Physician TBI Outpatient Initial Evaluation. The applicant sustained TBI due to explosion in December 2003 with LOC. He woke up later in the Armored Personal Carrier. Of note, he had amnesia for the event and had shrapnel in the right leg. Afterwards, he had vision (photosensitivity) and balance problems for which he received balance training per physical therapy at Fort Riley. He was on Topamax for headache prophylaxis.

d. 02Mar2011 Neurology Outpatient Note VAMC). He was taking Topamax twice daily which helped with his headaches, and he was happy with the results.

e. 09Mar2011 Neurologic Examination C&P TDRL Exam Brooklyn VAMC. The applicant reported he had headaches since 2004 although he was first seen for headaches in 2007. The headaches were currently occurring 2-3 times per month which was less than before. He was taking Topamax 100mg twice per day for maintenance. He was taking Midrin for acute attacks (abortive medication). The

headaches occasionally were accompanied by photophobia. He usually did not have nausea or emesis.

f. 18Apr2011 Neuropsychological Assessment C&P TDRL Exam Brooklyn VAMC. He had applied for GI Bill benefits and would be starting an on-line school program in order to earn a BS degree in homeland security and emergency management. During this exam, the applicant reported that his headaches were occurring approximately once a week and lasted for several days. He reported that the most significant head injury occurred in 2004: While a gunner in a HUMVEE, he was knocked unconscious by an IED blast and woke up in the medic's vehicle without any sense of how long he was unconscious. The examiner commented "…veteran's reports of head injury and resulting symptoms have been inconsistent". The examiner went on to highlight several inconsistencies noted in the record. The applicant did not receive care for head injury in theatre. The examiner analyzed prior BH diagnoses and treatment. Formal cognitive testing revealed evidence of symptom exaggeration and poor effort on both independent and embedded symptom validity tasks which rendered the evaluation(s) invalid. Diagnosis: Malingering (also by history), non credible cognitive performance.

g. 21Nov2011 TDRL Consolidated Summary for NCR PEB. The MEB physician endorsed that given the reported history of blast exposure with LOC and post exposure disorientation, it was in their opinion that it was as likely as not the applicant had previous TBI with some remaining residuals described in the current neuropsychological and neurologic examinations.

h. Post-concussion Syndrome initially coded as Residuals of TBI was found to no longer be unfitting due to the condition being mild and having minimal to no limitations associated. Therefore, this condition did not receive a rating.

6. Lumbosacral Strain and Lumbar Radiculopathy, Left Leg

a. 28Jan2009 MEB NARSUM. Low back pain began as a result of jumping from a 10-foot building to a hard packed surface during deployment to Iraq in 2003 while encumbered by an IBA, Kevlar, fully loaded pack, and a machine gun (about 150 lbs of gear). He participated in a variety of medical team services for conservative management of his back pain to include physical therapy and pain management. He received multiple epidural injections (Medical Associates of Manhattan, Manhattan, KS) with temporary (2-3 weeks) relief. 18Dec2008 thoracic spine film was unremarkable.

b. 14May2010 lumbar spine MRI showed straightening of the lumbar spine with minimal retrolisthesis of L5 on S1 and minimal disc bulges at L4-L5 and L5-S1 levels.

c. 30Sep2010 thoracolumbar and lumbosacral spine x-ray showed no compression fracture or spondylolisthesis. No significant disc space narrowing.

d. 09Mar2011 Peripheral Nerves C&P TDRL Exam Brooklyn VAMC. He had reportedly received 11 epidural spinal injections. Diagnosis: Lumbar Radiculopathy secondary to Lumbar Spine Degenerative Disc Disease. His exam showed normal gait. Motor/muscle function was intact. Neurologic function showed somewhat decreased left ankle reflex and absent plantar response. The sensory exam showed decreased pinprick and touch in the entire left limb extremity which was somewhat subjective.

e. 09May2011 Joints C&P TDRL Exam Brooklyn VAMC. He was status post fall injury in Iraq while wearing full combat gear. The applicant reported constant back pain. The pain radiated down the left leg into the foot. He denied back pain flares and incapacitations. There were no walking limitations; however, he had endurance for going downstairs and he was not able to run. His gait was non-antalgic. There were no incapacitating episodes of back pain in the prior 12 months. Forward back flexion was 0 to 60 (normal was to 60 degrees); extension 0 to 30 (normal was to 30 degrees); bilateral lateral flexion 0 to 30 (normal was to 30 degrees); and bilateral lateral rotation 0 to 30 (normal was to 30 degrees). There was pain at the end range of forward flexion. No other painful motion was noted to include pain with weightbearing. There was spinous process tenderness T10 to LS; and muscle tenderness L4 to S1 bilaterally without objective evidence of muscle spasm. Straight leg testing was positive bilaterally.

f. 21Nov2011 TDRL Consolidated Summary for NCR PEB. This note referenced a 05Sep2011 Orthopedic Evaluation; however, the undersigned could not locate the note. The applicant's gait was non-antalgic. Specific rating criteria included the ROMs already noted in the 09May2011 Joints C&P TDRL Exam Brooklyn VAMC. Straight leg testing was negative except for left knee pain due to left knee injury. Leg muscle strength was normal except for left knee flexion. There was slight decrease in lumbar lordosis but no other postural abnormalities. There were no incapacitations due to back pain. There was no objective evidence of muscle spasm, and no ankylosis.

g. The 02May2012 PEB rated the Lumbosacral Strain condition at 20% under 5237 for forward flexion to 60 degrees.

7. Summary/Opinion

a. Assessment of the applicant's "baseline" BH condition was complicated by a preexisting Bipolar Disorder condition and 3-4 significant high school football concussions. At least one evaluator believed the applicant had a personality disorder, but this was never definitely diagnosed. The applicant was diagnosed by the VA with PTSD due to combat experiences (03Jun2009 Initial PTSD DBQ). It was also noted that he was a CIB recipient. It does appear that his pre-existing BH condition was worsened by his military service and subsequently became unfitting. While on TDRL

the general trend was steady improvement in his mental health. There was an initial setback with his divorce and death of his father with whom he was very close, and a third temporary setback when he was off work for several weeks due to the left wrist injury. The applicant was last seen by VAMC behavioral health services in December 2011 (Psychiatry Attending Note VAMC). The mental health provider noted positive improvement in the applicant's mental health condition and notable improvements in his personal life. He was scheduled to follow up in 2 months, but the record did not show any further engagement with BH services at VAMC except for 'no show' notes in November 2012 and April 2013. The 18Aug2022 note (by CH, PsyD with [redacted] indicated that the applicant was employed fulltime during this time, he was engaging in a prior hobby (working out with a friend at the gym) and he married in 2015, which suggests normal functioning in work and personal/social areas. His mental health condition was also not requiring medication or engagement with mental health services at that time. The Anxiety NOS condition was still deemed unfitting by the PEB which was appropriate in the undersigned's opinion due to the risk of decompensation under stress.

b. Near the time of discharge his mental health condition had improved and stabilized and appeared to remain so at least during the several years immediately following discharge from service. The BH symptoms manifested in the April 2022 note suggest worsening of his mental health condition. However, it should be stated, the Army and the Department of Veterans Affairs have different missions, and the Army does not have the authority to compensate for the progression of, nor for complications arising from, service-connected conditions after separation. That authority rests with the Department of Veterans Affairs, which operates under a different set of laws and standards.

c. This case was completed before the IDES was in full operation; therefore, the ratings were assessed by the PEB using VASRD principles. The ARBA Medical Advisor reviewed the PEB ratings in reference to VASRD principles. The ARBA Medical Advisor also reviewed the VA rating history for the PTSD (with Bipolar Disorder), Degenerative Disc Disease of the Lumbosacral Spine and Migraines conditions at or near the time of discharge. It was noted that the applicant was not rated separately for a TBI or cognitive disorder. Based on records currently available for this review, there was insufficient evidence to support recommending referral for further medical discharge processing or increase in ratings.

BOARD DISCUSSION:

1. The Board found the available evidence sufficient to consider this case fully and fairly without a personal appearance by the applicant.

2. The Board carefully considered the applicant's request, supporting documents, evidence in the records, a medical review, and published Department of Defense guidance for consideration of changes to discharges.

3. The Board concurred with the conclusion of the ARBA Medical Advisor that the evidence fully supports the TDRL PEB's determination that the applicant's conditions at that time warranted a 20% disability rating under the VASRD. Based on a preponderance of the evidence, the Board determined the applicant's removal from the TDRL and discharge with severance pay were not in error or unjust.

BOARD VOTE:

Mbr 1	Mbr 2	Mbr 3	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:XXX	:XXX	:XXX	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

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

REFERENCES:

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

2. Title 10, U.S. Code, 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.

3. Army Regulation (AR) 635-40 (Physical Evaluation for Retention, Retirement, or Separation), in effect at the time, established the Army Disability Evaluation System (DES), and implemented chapter 61 (Retirement or Separation for Physical Disability), Title 10, USC. The regulation set forth policies, responsibilities, and procedures that governed the evaluation for physical fitness of Soldiers who may be unfit to perform their military duties because of physical disability.

a. Chapter 3 (Policies) stated:

(1) Paragraph 3-1 (Standards of Unfitness Because of Physical Disability). The mere presence of impairment did not alone justify a finding of unfitness because of physical disability. In each case, it was necessary to compare the nature and degree of the physical disability with the requirements of the Soldier's duties, as required by his or her office, rank, grade or rating.

(2) Paragraph 3-5 (Use of the Department of Veterans Affairs Schedule (VASRD) for Rating Disabilities). Under the provisions of Title 10, U.S. Code, chapter 61 (Retirement or Separation for Physical Disability) these ratings are assigned from the Department of Veterans Affairs Schedule for rating disabilities (VASRD).

(3) Paragraph 3-9 (The Temporary Disability Retired List (TDRL)).

(a) The TDRL is used in the nature of a 'pending list.'. It provides a safeguard for the Government against permanently retiring a Soldier who can later fully recover, or nearly recover, from the disability causing him or her to be unfit. Conversely, the TDRL safeguards the Soldier from being permanently retired with a condition that may reasonably be expected to develop into a more serious permanent disability.

(b) Requirements for placement on the TDRL are the same as for permanent retirement. The Soldier must be unfit to perform the duties of his or her office, grade, rank, or rating at the time of evaluation. The disability must be rated at a minimum of 30 percent or the Soldier must have 20 years of service. In addition, the condition must be determined to be temporary or unstable.

b. Chapter 4 (Procedures). Commanders or medical authority could refer Soldiers into the DES when there was evidence a medical condition/disability was inhibiting a Soldier's ability to perform his/her duties.

(1) Medical authority convened a medical evaluation board (MEB) to document the Soldier's medical status and determine whether the Soldier met medical retention standards, per AR 40-501. Those Soldiers who failed medical retention standards were referred to a physical evaluation board (PEB) for a fitness determination.

(2) PEBs investigated the nature, cause, degree of severity, and probable permanency of the Soldier's disability, evaluated the Soldier's physical condition against the physical requirements of the Soldier's grade/rank and military occupational specialty, and then submitted findings and recommendations as to the Soldier's disposition.

(3) Final disposition could include the Soldier being returned to duty or separated (either with severance pay, if the total disability rating is 20 percent or less, or retired, for those cases where the disability rating is 30 percent or higher).

(4) Soldiers whose conditions were determined to be unstable could be placed on the TDRL for a period up to five years; periodic medical examinations were required to assess whether the condition was sufficiently stable to result in a final determination.

c. Chapter 7 (TDRL).

(1) Paragraph 7-2 (Reasons for Placement on the TDRL). A Soldier’s name could be placed on the TDRL when it was determined that the Soldier was qualified for disability retirement but for the fact that his or her disability was determined not to be of a permanent nature and stable.

(2) Paragraph 7-4 (Requirement for Periodic Medical Examination and PEB Evaluation). A Soldier on the TDRL had to undergo a periodic medical examination and PEB evaluation at least once every 18 months to decide whether a change had occurred in the disability for which the Soldier was temporarily retired. Soldiers who failed to complete a physical examination when ordered were to have their disability retired pay suspended.

(3) Paragraph 7-7 (Prompt Removal from TDRL). Medical examiners and adjudicative bodies were required to carefully evaluate each case. They were to recommend removal of the Soldier's name from the TDRL as soon as the Soldier's condition permitted. Placement on the TDRL conferred no inherent right to remain for the entire 5-year period allowed under Title 10, U.S. Code, Section 1210.

(4) Paragraph 7-11 (Disposition of the TDRL Soldier). A Soldier on the TDRL had to be removed from the TDRL on the fifth anniversary of the date he/she was placed on the TDRL, or sooner if the result of an approved removal recommendation by a PEB.

(a) If the Soldier met the criteria for permanent disability retirement, he/she was removed from the TDRL and placed on the Permanent Disability Retired List (PDRL).

(b) If the Soldier's disabling condition(s) were deemed unfitting but the disability rating was less than 30 percent and he or she had completed less than 20 years of service, the Soldier was separated with severance pay.

4. 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.

5. 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.

6. 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.

7. AR 15-185 (Army Board for Correction of Military Records (ABCMR), currently in effect, states:

a. Paragraph 2-2 (ABCMR Functions). The ABCMR decides cases on the evidence of record; it is not an investigative body.

b Paragraph 2-9 (Burden of Proof) states:

(1) 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).

(2) 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 verifiably correct.

c. Paragraph 2-11 (ABCMR Hearings). Applicants do not have a right to a hearing before the ABCMR; however, the Director or the ABCMR may grant a formal hearing.

//NOTHING FOLLOWS//