ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [redacted]

BOARD DATE: 15 January 2025

DOCKET NUMBER: AR20230012082

APPLICANT REQUESTS:

- A medical disability retirement with a rating no less than 30 percent with combat related compensation; or
- In the alternative, referral into the Integrated Disability Evaluation System (IDES) or the Legacy Disability Evaluation System (DES)

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

- DD Form 149 (Application for Correction of Military Record)
- Attorney Brief
- Enclosure 1 - Power of Attorney
- Enclosure 2 - Personal Statement
- Enclosure 3 - MRI
- Enclosure 4 and Enclosure 5 - Ankle and Foot Doctor Visit
- Enclosure 6 - Medical Evaluation Board (MEB) Proceedings
- Enclosure 7 - Physical Evaluation Board (PEB) Proposed Rating
- Enclosure 8 - Request for Reconsideration Decision

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 defers to his counsel.

3. The applicant's attorney states, on behalf of the applicant,

a. They respectfully contend the applicant suffered injuries to his ankle and foot following a hard landing from an airborne jump in September 2012. His chain of command and multiple medical professionals were duty bound to refer him into the IDES upon discovery of these injuries. Rather than comply with the applicable

regulations, his superiors and multiple medical professionals chose to exercise discretion, which they did not possess. Their negligence has resulted in the applicant's discharge from the Army without being properly evaluated for his clearly unfitting medical condition. They respectfully ask that the honorable Board to take the proper steps to correct this clear injustice.

b. Prior to his separation from the Army, he was diagnosed with an unfitting medical condition that was aggravated by injuries he received, during his time in service. He has exhausted all administrative remedies available to him and the Discharge Review Board does not have the authority to grant the relief requested. Therefore, the honorable Board is the only agency vested with the power to correct these clear injustices.

c. The applicant enlisted in the United States Army on 30 September 2004, as an infantryman and completed basic training at Fort Benning, Georgia. Upon completion of basic training, he was assigned a duty station at Fort Campbell, Kentucky as a grenadier.

d. He went on to serve the next three years of his enlistment in a reconnaissance (recon) platoon, deploying twice to Iraq in support of Operation Iraqi Freedom. His service also included completion of Ranger School and the Warrior Leader Course.

e. In May 2009, he was reassigned to an airborne infantry unit (Geronimo) in support of Joint Readiness Training Center (JRTC) in Fort Polk, Louisiana. Under this assignment, he was required to perform a minimum of one jump every three months. He completed over 50 jumps throughout his time at this duty station. However, only 24 of the jumps were recorded into the jump log.

f. On 13 September 2012, he completed his 18th career jump. Prior to jumping, the manifested paratroopers were given previous instruction that the jump would be a nighttime, combat jump, simulating combat in a manner consistent with that required for Combat Related Special Compensation. A night combat jump meant that a paratrooper would have to carry on his/her person a full combat load that consisted of their T10D parachute, night vision goggles, assigned weapon, full combat loaded magazines (blank rounds for simulation), a radio, radio batteries, and rucksack with prescribed packing list.

g. He and his team were bussed to Alexandria International Airport to conduct the jump and follow-on mission to assault an objective within the Geronimo Drop Zone. On arrival, the applicant rigged up and put on his T10D parachute at the Alexandria International Airport. However, the jump was delayed due to a tornado that landed on the Geronimo Drop Zone. After multiple delays, he finally received confirmation from the Drop Zone Safety Officer that the weather had cleared.

h. He loaded up and flew back to the Geronimo Drop Zone. Prior to being pushed out the door, he was informed by the Jump Master that it was zero knots outside. He knew, at this point, that he would not be able to make a proper landing. The jump was supposed to simulate a night airborne insertion, so the Geronimo Drop Zone was completely black. Upon jumping from the C130, his parachute opened immediately, but the landing came quicker than he expected. He remembers the point of impact, his feet hit the ground first, then his buttocks, and he laid back. He felt excruciating pain throughout his entire body, coupled with a tingling sensation throughout his limbs. The pain was so intense that he could not make any attempts to move.

i. He laid back motionless in fear that he may have broken his back. He realized that he landed on a pile of rocks and could hear other paratroopers around him shouting in agony from their injuries. He could hear the medic and Field Litter Ambulance going frantically back and forth between the multiple casualties that night. The medic examined him and determined him to be ambulatory, despite the fact he was still unable to move, at that point. He was instructed not to remove his boots to contain the swelling until he was able to be treated by medical professionals.

j. He was still unaware that his right foot was the first point of contact with the ground. He continued to lay there until the pain started to subside. About an hour passed, when he started to regain feeling in his body. He began to look around and noticed he landed on a slope of a man-made ditch. With assistance of his friend, he slowly rose to his knees and gathered his parachute. He almost lost his balance, due to the pain in his right foot, and it was at this moment when he knew he sustained an injury to his right foot.

k. He endured a grueling 2-hour, 3 kilometer trek back to his assembly area. He was relegated to taking half steps and inched his way up every incline. On arrival, he did not participate in the follow-on assault mission because his leaders witnessed him physically struggling to walk and instructed him to sit out of the follow on mission, due to his injuries. On 14 September 2012, he went to the 509th Infantry Aid Station on Fort Polk, Louisiana and was diagnosed with a right ankle sprain.

l. Since the accident, he has suffered a plight to regain normalcy in the use of his right foot, his career, and his qualify of life. Due to his injuries, he can no longer run, march, or walk more than two tenths of a mile on level ground without experiencing excruciating pain in his right foot and debilitating numbness that shoots up his mid-calf.

m. On 1 April 2016, he underwent an MEB for post-surgical right foot and ankle pain, which determined he was unfit for military service because his injuries were not expected to improve or resolve with additional treatment or therapy. On 5 May 2016, he was issued a proposed rating of 10 percent for his ankle injury. On 13 June 2016, he filed a request for reconsideration and underwent an Informal PEB Proceedings. The

board's findings concluded that his injuries rendered him unfit for service and maintained a 10 percent rating for his ankle injury. The improper evaluation resulted in him being discarded from the military without receiving a proper evaluation and rating for his injuries. The extent of his injuries resulted in the loss of the ability to perform his duties as an infantryman and led to his exit from the military without receiving a proper evaluation. It was in these moments he realized that he was mistreated, during the medical process, because he felt that he was rushed out of the military and was not given amble time and support, during the MEB, to plead his case.

n. After being forced out of the military, he entered the civilian health care system for continued care and was diagnosed with an osteochondral talus defect in his right foot. Today, he still experiences constant pain and cannot stand for long periods of time without needing to relieve the weight on his right foot. He is unable to perform activities that he enjoys such as cooking, hiking, rucking, fishing, or simply playing sports with his children. In addition to the physical pain that he has endured, he has also suffered both mental and emotional anguish from these injuries. The combination of these conditions has taken its toll, causing him to experience severe depression.

o. The injuries suffered by the applicant, during his service, directly contributed to his unfitting medical conditions. He has undergone multiple x-rays including 4 MRIs and has attended countless physical therapy sessions in at least two different military installations. However, despite the numerous amounts of treatment, military doctors continued to ignore the events that led to his current disability, The military doctors disregarded his repeated concerns regarding his excruciating pain and limited mobility, ultimately waiting too long to perform surgery.

p. His commander and multiple physicians were aware of his medical conditions, to include the ankle and foot conditions as stated. Both his commander and physicians had the duty to refer him to the IDES. Both breached their duty to refer, which led to him being pushed out of the military without an adequate evaluation. The failure of his chain of command and multiple medical professionals to refer him to the appropriate medical board constitutes a breach of duty and negligence on the part of those individuals. This blatant disregard for the applicable regulations has deprived him of his right to be evaluated for a medical disability retirement; thereby constituting a clear error and injustice. His chain of command and multiple physicians were negligent in their failure to report him to the appropriate medical board. His chain of command and attending physicians were duty bound to refer him to the IDES of the Legacy DES upon discovery of his unfitting medical condition. Both breached their duty to refer, which led to him being improperly evaluated and pushed out.

q. Army Regulation 40-501 (Standards of Medical Fitness), paragraph 3-3 states, "Soldiers with conditions listed in this chapter who do not meet the required medical standards will be evaluated by an MEB as defined in Army Regulation 40-400 (Medical

Services Patient Administration) and will be referred to a PEB as defined in Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation) with the following caveats:

(1) "Physicians who identify Soldiers with medical conditions listed in this chapter should initiate an MEB, at the time of identification. Physicians should not defer initiating the MEB until the Soldier is being processed for non-disability retirement."

(2) Army Regulation paragraph 3-5 states, "the causes for referral to an MEB are as follows: feet (1) hallux valgus when moderately severe, with exostosis or rigidity and pronounced symptoms, or severe with arthritic changes; (2) pes planus, when symptomatic, moderately severe, with pronation on weight-bearing which prevents the wearing of military footwear, or when associated with vascular changes; (3) pes cavus, when moderately severe, with moderately severe discomfort on prolonged standing and walking, metatarsalgia, and which prevents the wearing of military footwear; (4) plantar fasciitis or heel spur syndrome that is refractory to medical or surgical treatment, interferes with the satisfactory performance of military duties, or prevents the wearing of military footwear; (5) hallux limitus, hallux rigidus...residual instability following conservative or surgical measures, if more than moderate in degree; and (6) ankle dorsiflexion to 10 degrees or planter flexion to 10 degrees."

(3) "Arthritis. Due to trauma, when surgical treatment fails or is contraindicated and there is functional impairment of the involved joints so as to meet the definition of disqualifying medical condition or physical defect."

(4) "Osteoarthritis. With severe symptoms associated with impairment of function supported by x-ray evidence and documented history of recurrent incapacity for prolonged periods. "

(5) "Joints. (1) Arthroplasty with severe pain, limitation of motion, and of function; (2) bony or fibrous ankylosis, with severe pain involving major joints or spinal segments in an unfavorable position, and with marked loss of function; (3) contracture of joint, with marked loss of function and the condition is not remediable by surgery; and (4) loose bodies within a joint, with marked functional impairment and complicated by arthritis to such a degree as to preclude favorable results of treatment or not remediable by surgery."

r. In the present matter, the applicant suffers from soft tissue swelling around his ankle indicative of stage 2 osteochondral injury as a result of his hard landing. In those findings, the physician recommended orthopedic or podiatric surgery.

s. A 2018 MRI revealed scarring of the anterior talofibular and calcaneofibular ligaments which may have predisposed the applicant to impingement. Furthermore, the

physician notes that the applicant suffers from a chronic medial ankle ligament injury. The physician also notes he was exhibiting the following symptoms: persistent pain and numbness in the ankle, distal fibula, plantar fascia, and Achilles. He is relegated to wearing soft shoes and is only able to alleviate the pain in his ankle through elevation.

t. When the above-mentioned information, regarding his medical condition, is taken into account in accordance with applicable Army regulations, it is clear that his condition rendered him unfit for continued Army service, and that the medical officer and his commander were aware of the severity of his symptoms. As such, both individuals were required to refer him to the appropriate medical board, so that he could be evaluated for his unfitting medical condition. Rather than follow the applicable regulations, which mandate referral upon discovery of an unfitting condition, he was separated from the service before being properly evaluated.

u. His medical condition was permanently aggravated by his military service. He was diagnosed with stage 2 osteochondral injury in his right ankle, as a result of his hard landing. He also experiences persistent pain and numbness in the ankle, distal fibula, plantar fascia, and Achilles. He was forced to walk on his injured ankle and foot following his hard landing.

v. His chain of command were aware of his injuries as evidenced by them not allowing him to continue forward with his duties. These medical conditions, both individually and collectively, clearly rendered him incapable of performing his military duties and warranted referral to the DES. As stated, certain conditions must be referred to the DES upon their discovery. These conditions include any condition in which the ability of the Soldier to perform his or her assigned duties is called into question. Per Army Regulation 40-501 paragraph 3-22(5) a Soldier who is prevented from wearing military footwear should be referred to the DES.

w. Here, medical records indicate that he was limited to wearing soft shoes and his only method of pain relief was elevating his right foot. He continues to suffer from these conditions today. His chronic pain symptoms clearly warranted referral to the DES, at the time of his separation, and it was both an error and injustice to allow him to separate from the service without first considering him for a medical disability retirement.

x. His disability should be referred to the IDES or in the alternative to the legacy DES. On 23 February 2016, he was given a DES rating of 10 percent for his post-operative right ankle. However, this rating is inadequate because when the symptoms associated with a disability are such that two percentage evaluations could be applied, the servicemember shall receive the higher of the two percentages, when his or her disability more nearly approximates the criteria for that rating. 38 Code of Federal Regulation section 4.71a sets forth the general disability rating criteria for ankle and foot conditions, to include plantar fasciitis. The regulation states that a 30 percent disability

evaluation is proper when the service member exhibits no relief from both nonsurgical and surgical treatment.

y. The following are used to determine eligibility for a 30 percent disability rating for pes planus: "pronounced; marked pronation, extreme tenderness of plantar surfaces of the feet, marked inward displacement and sever spasm of the Achilles tendon on manipulation, not improved by orthopedic shoes or appliances." The following are used to determine eligibility for a 40 percent rating for arthritis: "symptom combinations productive of definite impairment of health objectively supported by examination findings or incapacitating exacerbations occurring three or more times a year."

z. In the present matter, the applicant also experiences persistent pain and numbness in the ankle, distal fibula, plantar fascia, and Achilles. He is limited in his daily activities due to his inability to stand for long periods of time and must often sits down to elevate his foot in order to relieve the pain. He also suffered both mental and emotional anguish from these injuries. The combination of these conditions has taken its toll, causing him to experience severe depression. Therefore, a higher rating is warranted based on the extent of his injuries.

aa. This honorable Board has previously voted in favor of relief when an applicant has presented evidence showing the presence of a medical condition that calls into question the ability of the applicant to perform his or her military duties, at the time of separation, and when certain conditions were not afforded consideration, during separation processing. The applicant should be afforded similar treatment and, at the very least, be referred to the DES for evaluation of all medical conditions identified herein.

bb. In ABCMR Docket Number AR20170000508, this Board voted in favor of referring a servicemember to the DES after evidence was presented showing the applicant "met criteria for post-traumatic stress disorder (PTSD) and traumatic brain injury (TBI), during his time in service" and that the applicant suffered from "social and occupational impairment." In this case, the Board determined that the applicant's PTSD and TBI were not "appropriately considered, during separation processing" even though the applicant" was "deemed medically acceptable," during his separation physical.

cc. In ABCMR Docket Number AR20180013251, this Board voted in favor of referring the applicant to the DES after finding that prior DES proceedings failed to consider the applicant's lumbar spine degenerative joint/disc disease. In explaining their decision, the Board noted that the applicant had a 20 percent disability rating from the Department of Veterans Affairs (VA) for degenerative disc disease of the lumbosacral spine, which was issued approximately two years before the applicant was released from service. This Board found the failure to consider the applicant's back condition, during DES processing to constitute as sufficient to warrant relief.

dd. Here, the applicant was suffering from numerous medical conditions, which were known of and documented, prior to his separation His civilian medical provider noted his symptoms of chronic pain, limited mobility, and the lack of improvement from surgical procedures and physical therapy on numerous occasions. His symptoms clearly warranted referral to the DES, prior to his separation. Therefore, granting him relief is consistent with past Board precedent and there is no reason to deviate form this Board's prior decisions.

ee. The failure of his chain of command and medical professionals to refer him to the appropriate MEB was in contradiction to the applicable regulations, which mandate referral upon discovery of an unfitting condition. In light of the reprehensible conduct of Army personnel, and the failure to refer him to the DES. They respectfully request that this honorable Board grant the relief requested herein.

4. The applicant provides the following documents:

a. A personal statement, which states, in effect:

(1) He enlisted in the U.S. Army on 30 September 2004, as an 11B (Infantryman). He completed one station unit training at Fort Benning, Georgia. After which, he was assigned to the Bravo Company, 3rd Battalion, 187th Airborne Infantry Regiment (Rakkasans) under the 101st Airborne Division (Air Assault) at Fort Campbell, Kentucky as a grenadier. After three months, he was reassigned to the Recon Platoon, Headquarters and Headquarters Company.

(2) From there, he spent the next three and a half years with the Recon Platoon, having the honor and the privilege to serve two deployments in Iraq during Operation Iraqi Freedom from September 2005 to September 2006 and again from December 2007 to November 2008. He continued to enhance his proficiency and skill by completing Ranger School and earning his Ranger Tab and attending the Warrior Leader Course. While with the Recon Platoon, he held the positions of a Junior Reconnaissance Specialist and later was promoted to a Reconnaissance Team Leader, during his second deployment in 2007.

(3) He had to leave the Rakkasans in May 2009, to be reassigned to Headquarters and Headquarters Company, 1st Battalion - Airborne, 509th Infantry Regiment (Geronimo) in support of the JRTC at Fort Polk, Louisiana. Due to his past experience, he was again assigned to the Recon Platoon as a squad leader.

(4) The mission of Geronimo was to provide realistic and practical opposition force for purposes of training in a combat environment. The Geronimo Soldiers were still required to remain deployable and ready to infiltrate any location through airborne

insertion. Thus, he was required to complete air assault and airborne training, upon his arrival to the unit in 2009 in order to be mission ready. A monthly jump pay was accompanied with airborne status. A paratrooper was required to perform a minimum of one jump quarterly (every three months) for pay purposes. All jumps performed will be annotated on the paratroopers DA Form 13078 (Individual Jump Record). The jump log is maintained by the jump master of the unit. He may have performed more than 50 jumps throughout his truncated career, although only 24 of them were documented from a reconstructed jump log.

(5) On the night of his 18th career jump, on 13 September 2012, the manifested paratroops were given previous instruction that the jump would be a night, combat jump. A night combat jump meant that a paratrooper would have to carry on his/her person a full combat load that consisted of their T10D parachute, night vision goggles, assigned weapon, full combat loaded magazines (blank rounds for simulation), a radio, radio batteries, and ruck sack with prescribed packing list.

(6) After the initial link up, the night had befallen them. They were bussed to Alexandria International Airport to conduct the jump and a follow on mission to assault an objective within the Geronimo Drop Zone. Once they arrived, they rigged up and put on their T10D parachute, then they waited at the Alexandria International Airport. They missed their time on target due to a tornado on the Geronimo Drop Zone. Time on target is used to make a paratrooper aware of the time remaining until the aircraft is directly over the drop zone. They continued their wait for multiple hours, until the storm had cleared up. Some time had passed, when they finally received confirmation from the Drop Zone Safety Officer that the weather had cleared. They loaded up the C130 and flew back to the Geronimo Drop Zone. Before they were pushed out the door, they were signaled by the jump master that it was zero knots outside. The applicant already knew, at this point, that he would not be able to make a proper landing. The jump was supposed to simulate a night airborne insertion, so the Geronimo Drop Zone was completely black.

(7) Once outside the door of the C130, his parachute opened immediately, but the landing came quicker than he expected. He remembers at the point of impact, his feet hit the ground first, than his butt, then he laid back. He felt excruciating pain throughout his entire body, coupled with a tingling sensation throughout his limbs. The pain was so intense that he could not make any attempts to move. He just laid there still. He thought that he broke his back. As he laid there, he realized that he was on a pile of rocks. He could hear other paratroopers shouting in agony from their injuries. He could hear the medic and Field Litter Ambulance going frantically back and forth between the multiple casualties that night. The medic had finally come to access him. The medic did not identify any urgent injuries and classified the applicant as ambulatory, even though he was still unable to move, at that point. He was instructed not to remove his boots to contain the swelling until he was able to be seen by medical professionals.

(8) He was still unaware that his right foot was the first point of contact with the ground. He continued to lay there, until the pain started to subside. He estimated about an hour had passed, when he started to regain feeling to his body. He began to assess the area. He had landed on a slope of a man-made ditch. The pile of rocks where he laid on top of, was at the west opening of a buried concrete pipe that extended to the other side of Centerline Road. His rucksack, which had a 50 foot lowering line, was right next to him and he was only an arm's length from the concrete slab. He slowly tried to get on his knees and started to gather his parachute. His buddy, Sergeant M-, who had landed a couple meters to his right, had assisted him up on his feel. He almost lost his balance from the pain in his right foot and that is when he knew that his injury was to his right foot. Since they were right next to the road, they placed their chutes on Centerline Road for the detail to collect. They gathered their gear and proceeded north to the assembly area.

(9) The trek back to the assembly area was about 3 kilometers north of them with rolling hills. He had to take half steps and inched his way up every incline. It took them an estimated two hours to reach the assembly area. Once there, he did not participate in the follow-on assault mission. His leaders saw that he was physically struggling to walk and instructed him to sit out of the follow-on mission, due to his injuries. Since that night, until the present, his foot has never presented any major swelling, only discoloration and pain around his ankle and the front of his foot.

(10) The very next morning on 14 September 2012, once end-ex was called, he went to the 509th Infantry Aid Station on Fort Polk, Louisiana. He was initially diagnosed as a right ankle sprain. An x-ray of his foot was taken and with that began his plight to regain normalcy in the use of his right foot, his career, and his life.

(11) Since the accident, he has been suffering a degradation of his qualify of life. He could no longer run, ruck, or force march with or without weight, uphill or downhill or much less walk more than two tenths of a mile on level ground without experiencing excruciating pain in his right foot and debilitating numbness that shoots up his mid-calf. He is in constant pain in his right foot all the time and cannot stand for long periods of time without needing to relief the weight on his right foot nor can he do activities that he enjoys such as cooking, hiking, rucking, fishing, or simply playing sports with his children. With the loss of his abilities to perform his duty as an infantryman and to simply serve in the military, led to his exit from the military through the Military Medical Review Board process.

(12) He has had multiple x-rays and four MRIs and has attended countless physical therapy sessions in at least two different military installations; Louisiana and Hawaii, for physician assistants and military doctors to ignore the initial signs that led to his current disability. The military doctors disregarded his repeated concerns and waited

too long to perform surgery. After abruptly exiting the military and entry into a civilian health care system for continued care, he was informed that he has an osteochondral talus deft on his right foot after receiving his fourth MRI with Johns Hopkins Hospital. After being informed of this diagnosis, he began to second guess the procedure that was performed at Tripler Army Medical Center in Oahu, Hawaii.

(13) After knowing this, he was struck with the realization that he was wronged through this medical process. He felt that he was rushed out of the military, and he was not given ample time and legal support, during the MEB, to plead his case. Aside from the physical pain that he has endured, he has also suffered both mental and emotional anguish from this injury and subsequent separation from the military. He has lost his sense of self, dignity, and identity. He made a promise to his brothers in arms who paid the ultimate sacrifice in Iraq that he would dedicate his life and every physical effort in their memory. When he lost his ability to run or ruck march in their honor, he had to once again mourn their loss and ability to pay tribute to them. This alone has caused him so much grief and strife that he has imposed upon himself and his family. Coupled with the negligence of military doctors to delay surgery or coordinate for enhanced medical care to treat his injuries.

(14) The decision for a medical retirement would improve his life by restoring his sense of self. It would give him the satisfaction that his involuntary separation from the military would have been fair and just. He has known other Soldiers who were treated for bunions and have received bunionectomy, not combat or simulated combat training, but were still medically retired. Whereas his injuries were both combat and training related, but not regarded as significant enough for medical retirement. He feels as though the Medical Review Board were rushing his separation and trying to cover up years of mishandling of his medical care. He hopes for the decision through the administrative process.

b. Medical documents, which are available for the Board's review and will be reviewed by the Army Review Boards Agency medical section who will provide an advisory opinion.

c. DA Form 7652 (PEB Commander's Performance and Functional Statement), 26 February 2016, states in pertinent part, the applicant performs all the tasks assigned to him very well. He is very competent as a staff noncommissioned officer and works tirelessly. He does require breaks from sitting due to his foot aching and feeling numb frequently (about every thirty minutes). In addition, he has trouble walking or putting any weight on his foot, when conducting physical training. Most of his current duties require sitting and working in front of a computer - he usually needs to move about and alleviate pain from his foot. He balances the pain between sitting and walking and he manages to get through it daily. In addition to him performing his duties as an Infantryman, and as an infantry rifle squad leader and platoon sergeant, he is required to supervise his

Soldiers and participate in activities that he may not be able to handle, due to his injury. In the commander's opinion, he will not be as competitive as his healthy peers. Therefore, he will be utilized less than his optimal ability.

d. Department of Veterans Affairs (VA) DES Proposed Rating, 5 May 2016, shows the following disabilities and their proposed ratings:

- Obstructive sleep apnea with CPAP, 50 percent
- Migraines, 30 percent
- PTSD, 30 percent
- Post-Operative right ankle hallucis longus tenosynovitis (PEB referred as right ankle flexor hallucis longus tenosynovitis), 10 percent
- Left shoulder strain, 10 percent
- Right shoulder strain, 10 percent
- Right wrist strain, 10 percent
- Cervical strain, 10 percent
- Lumbosacral strain, 10 percent
- Left knee strain with shin splints, 10 percent
- Right knee strain with shin splints, 10 percent
- Tinnitus, 10 percent
- Left wrist strain, 0 percent
- Left ankle strain, 0 percent
- Bilateral pes planus with post-operative right foot hallucis longus tenosynovitis, 0 percent
- Residuals of TBI, 0 percent

The disability determination under the DES program was for the applicant who has been referred to a PEB as unfit for continued service. The disability determination is being prepared to assign evaluations to his unfit conditions for use by the Department of Defense in determining a final disposition for unfit conditions as well as to determine his potential entitlement to VA disability compensation.

e. A memorandum from the MEB Counsel to the PEB, 31 May 2016, states in effect:

(1) The applicant received his VA DES proposed rating, 5 May 2016 with a proposed rating of 0 percent for his bilateral pes planus with post-operative foot hallucis longus tenosynovitis.

(2) He respectfully requests reconsideration of his DES proposed ratings. Specifically, he requests an additional 10 percent for this condition because the evidence of record establishes moderate symptoms and pain on manipulation of the right foot. He believes this condition qualifies for a VA rating reconsideration because

his painful right foot condition is encompassed within the post-operative right flexor hallucis longus tenosynovitis diagnosis he was found unfit for.

(3) A 10 percent rating can be given for flat feet if it causes pain, deformities or any limitation in function and the limitation is moderate in severity. Injuries to the foot that cause moderation limitations in function warrant a rating of 10 percent.

(4) Clinical treatment records consistently note the presence of pain in the right foot and/or the joints of the right foot and complaints of ongoing whole foot pain. On examination, pain is noted in the arch of the bottom of the right foot, with resistance to dorsiflexion, and at the extreme limits of the restriction of movement of the right foot.

(5) Functionally, treatment reports note he is unable to run or weight bear on his right foot without exacerbation of his right foot and ankle pain. It has also noted he is an infantry Soldier and is unable to run or ruck march without right foot pain and that his pain is exacerbated by standing for more than short periods of time. Gait has been noted as affected by pain in the right foot. It should be noted that in the treatment reports, the foregoing is specifically annotated under the assessment of "pain in the right foot" not pain in the right ankle.

(6) Based on the foregoing, a 10 percent rating for moderate functional limitations imposed by chronic pain in the right foot, due to residuals from his post operative right flexor halluis longus tenosynovitis is warranted as the evidence of record demonstrates the existence of pain in the right foot severe enough to cause moderate functional limitations in his ability to perform daily tasks that require weightbearing to include running, walking, and standing.

f. Memorandum from the PEB, 13 June 2016, states the PEB has received the results of the applicant's request for reconsideration of his proposed DES ratings. His rating did not change.

5. The applicant's service record contains the following documents:

a. His service record did not contain his initial enlistment documents. His Enlisted Record Brief shows his pay entry basic date and his basic active service date as 30 September 2004. He remained in the Regular Army through immediate reenlistments.

b. Orders 172-0025, published by Directorate of Human Resources, U. S. Army Garrison - Hawaii, 20 June 2016 shows he was being separated from the Army with a 10 percent disability, effective 12 September 2016. He was authorized disability severance pay.

c. DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was honorably discharged effective 12 September 2016 for disability, severance pay, combat related (enhanced). He completed 11 years, 11 months, and 13 days of active service. He had service in Iraq from 4 December 2007 through 13 November 2008 and from 15 September 2005 through 15 September 2016. He received disability severance pay in the amount of $81,806.40.

d. His service record did not contain medical documentation, an MEB, or a PEB.

6. Based on the applicant's documents showing he received a PEB and now suffers mentally due to his injury, the ARBA Medical/Behavioral Health Section provided a medical review for the Board's consideration.

7. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. Documentation reviewed included the applicant's ABCMR application and accompanying documentation, the military electronic medical record (AHLTA), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant is applying to the ABCMR requesting an increase in his military disability rating and that his disability discharge disposition be changed from separated with disability severance pay to permanent retirement for physical disability. He states:

> "I was medically discharged from the Army and placed on Temporary Disability Retirement List (TDRL) status in 2012 due to a diagnosis of bipolar disorder, then removed from TDRL status following and fully discharged following a reassessment in 2014. In light of the evidence detailed in this application, I am requesting that the Army consider returning me to either Temporary Disability retired status or permanently retired status.
>
> Put simply, I recklessly downplayed and ignored increasingly severe symptoms of my bipolar disorder for a period of several years following my discharge from the Army due to fear of stigmatization and negative career impacts. Such denial is extremely common to sufferers of bipolar disorder, and mental health conditions in general.

I believe that the Army's 2014 decision to remove me from TDRL status was flawed due to its reliance on information I provided during these years of denial. This denial of my condition has since inflicted severely negative impacts on my life over many years, irreparably damaging my relationships and ability to maintain employment."

c. The Record of Proceedings details the applicant's service and the circumstances of the case. His DD 214 for the period of service under consideration shows he entered the regular Army on 20 June 2006 and was placed on the Temporary Disability Retirement List (TDRL) on 10 March 2012 under provisions in chapter 4 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (8 February 2006). His Physical Evaluation Board (PEB) Proceedings (DA Form 199) shows his percentage of disability for his sole unfitting condition of bipolar disorder was 50%.

d. Orders published by the United States Army Physical Disability Agency on 5 December 2014 show he was removed from the TDRL and separated with disability severance pay on 5 December 2014 for a military disability rating of 0%.

e. As part of the reevaluation, the provider requested a medication profile from the applicant. The applicant marked "**I DO NOT** receive prescription medications from any pharmaceutical facility(s)."

f. The applicant underwent his TDRL reevaluation in August 2014. The applicant informed the provider:

"In a stable relationship with a girlfriend of 6 months ... 'going well.'"

"He is a graduate student at George Washington University studying Public Administration and Urban Planning. He has also been working full time at a Non-Profit Solar Energy Company since Jan 2014. He reports both school and work are going well."

"No psych hospitalization since 2011 ... in previous Army records. He continues in therapy without functional deficits."

"He reports no functional deficits. He has occasional disturbances of mood. He reports feeling at times depressed and anxious. He reports more difficulty adapting to stressful situations than before he became ill. Overall, he is much improved. He continues to need ongoing psychotherapy support to maintain his current level of functioning."

g. The examiner, when asked to mark an election which best summarized the Veteran's level of occupational and social impairment with regards to all mental health diagnoses, marked "A mental condition has been formally diagnosed, but symptoms are not severe enough either to interfere with occupational and social functioning or to require continuous medication."

h. Per routine, the applicant was sent the results of his reevaluation for review and comment. On 9 September 2014 the applicant marked his TDRL Election Statement:

"I have read the TDRL evaluation medical report and agree with this CMR (consolidated medical report) report(s).

i. On 29 October 2014, the TDRL PEB determined his bipolar disorder remained unfitting for continued military service and was now stable for rating purposes. Based upon the examination of record and using the VASRD, they derived and applied a 0% disability rating. Because his final rating was less than 30%, the PEB recommended he be separated with disability severance pay. On 20 November 2014, after being counseled on the PEB's findings and recommendation, the applicant concurred with the Board's findings and waived his rights to submit a written appeal and/or demand a formal hearing.

j. Review of his PEB case file in ePEB along with his encounters in AHLTA revealed no substantial inaccuracies or discrepancies.

k. JLV shows his VA service-connected disability rating for bipolar disorder was increased to 100% effective 28 August 2023.

l. The rating derived from the VA Schedule for Rating Disabilities reflects the disability at the point in time the VA exams were completed while the applicant was undergoing his TDRL reevaluation. The DES has neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions incurred during or permanently aggravated by their military service. These roles and authorities are granted by Congress to the Department of Veterans Affairs and executed under a different set of laws.

m. It is the opinion of the ARBA medical advisor that neither an increase in his military disability rating nor a referral of his case back to the DES is warranted.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation. Upon review of the applicant's petition, available military records and the medical review the Board concurred with the advising official finding that neither an increase in his military disability rating nor a referral of his case back to the DES is warranted.

2. The Board determined there is insufficient evidence to support the applicant's contentions for medical disability retirement with a rating no less than 30 percent with combat related compensation; or referral into the Integrated Disability Evaluation System (IDES) or the Legacy Disability Evaluation System (DES). The Board noted the applicant was counseled on his PEB's findings and recommendation, he concurred with the Board's findings and waived his rights to submit a written appeal and/or demand a formal hearing. The Board found the applicant's VA service-connected disability rating for bipolar disorder was increased to 100% effective 28 August 2023. The Board agreed, based on the VA Schedule for Rating Disabilities reflecting the disability at the point in time the VA exams were completed while the applicant was undergoing his TDRL reevaluation, there is no error or injustice. Therefore, the Board denied relief.

BOARD VOTE:

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

BOARD DETERMINATION/RECOMMENDATION:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.

[redacted]

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

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

a. Soldiers are referred to the disability system when they no longer meet medical

retention standards in accordance with AR 40-501, chapter 3, as evidenced in a medical evaluation board (MEB); when they receive a permanent physical profile rating of "3" or "4" in any functional capacity factor and are referred by a Military Occupational Specialty Medical Retention Board; and/or they are command referred for a fitness for duty medical examination.

b. The disability evaluation assessment process involves two distinct stages: the MEB and physical evaluation board (PEB). The purpose of the MEB is to determine whether the service member's injury or illness is severe enough to compromise his or her ability to return to full duty based on the job specialty designation of the branch of service. A PEB is an administrative body possessing the authority to determine whether a service member is fit for duty. A designation of "unfit for duty" is required before an individual can be separated from the military because of an injury or medical condition. Service members who are determined to be unfit for duty due to disability are either separated from the military or are permanently retired, depending on the severity of the disability and length of military service. Individuals who are "separated" receive a onetime severance payment, while veterans who retire based upon disability receive monthly military retired pay and have access to all other benefits afforded to military retirees.

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

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

5. Army Regulation 40-501 (Standards of Medical Fitness), provides policies and procedures on medical fitness standards for induction, enlistment, appointment, and retention. Paragraph 3-33 (anxiety, somatoform, or dissociative disorders) states the causes for referral to an MEB are as follows:

- persistence or recurrence of symptoms sufficient to require extended or recurrent hospitalization; or
- persistence or recurrence of symptoms necessitating limitations of duty or duty in

protected environment; or
- persistence or recurrence of symptoms resulting in interference with effective military performance

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

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

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

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

8. Title 10, U.S. Code, section 1556 requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that

directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//