IN THE CASE OF: [redacted]

BOARD DATE: 20 June 2024

DOCKET NUMBER: AR20230012147

APPLICANT REQUESTS:

- physical disability retirement in lieu of honorable administrative discharge from the Army National Guard (ARNG) due to a physical or mental condition failing to meet medical retention standards
- personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- [redacted] ARNG ([redacted] ARNG) letter to Member of Congress, dated 29 June 2023
- self-authored letter to Member of Congress, dated 17 August 2023

FACTS:

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

2. The applicant states:

a. He was advised he was supposed to receive a medical board due to back issues. Right before everything was supposed to process, the [redacted] ARNG advised that they do not support “chronic conditions;” therefore, a medical board was not provided. Sergeant First Class (SFC) [redacted] advised him that he could either take an honorable discharge or reclassify and manipulate physical training. The ultimatum was unjust. They were setting him up for failure by trying to force him to cross-train into a job he could not physically succeed in doing in order to push him out by other punitive means.

b. His back gave out while attempting to complete the Army Physical Fitness Test (APFT) while he was in a drilling status, and he was taken to the emergency room (ER) by his supervisor immediately after he sustained the injury. The drill dates are part of the unit’s historical record. The [redacted] ARNG determined the injury occurred while he was

not in the line of duty (LOD) and subsequently denied his LOD. From the drill dates and his ER documents, it is clear the injury was sustained while he was in a duty status. Since joining this unit, he was never well received by his leadership, to include with tenure and promotions, which he feels this is due to being of Hispanic descent and a clear bias against his race and ethnicity.

d. He has a 100 percent permanent and total disability rating from the Department of Veterans Affairs (VA), mostly due to his back issues. If the VA can see it, why can't the [redacted]ARNG see it and retire him? With this VA rating, he has no chance of reenlisting. This also stems from complaints he had while on active duty in the Air Force in 2008. The [redacted]ARNG found him unfit for duty along with the chiropractor. If he is found unfit for duty due to a duty-related incident, there should be no reason he should not be medically retired.

e. The applicant also indicated by marking block 13 on his DD Form 149 that other mental health issues are also related to his request.

3. A DD Form 214 (Certificate of Release or Discharge from Active Duty) shows the applicant enlisted in the U.S. Air Force (USAF) on 30 October 2007 and was honorably discharged on 30 June 2010, after 2 years, 8 months, and 1 day of net active service due to completion of required active service. Among his decorations and medals is the Global War on Terrorism Expeditionary Medal, indicating he deployed overseas, but his dates and locale of deployment are not in his available records for review.

4. After a break in service, the applicant enlisted in the [redacted]ARNG on 11 April 2012.

5. Two additional DD Forms 214 show:

a. The applicant entered active duty training (ADT) on 10 September 2012 for completion of Basic Combat Training (BCT) and was honorably released from ADT with transfer back to the [redacted]ARNG on 22 November 2012, due to completion of required active service. He was credited with 2 months and 13 days of net active service this period.

b. The applicant entered ADT on 5 June 2015, for the completion of Advanced Individual Training (AIT), where he was awarded the Military Occupational Specialty (MOS) 88M (Motor Transport Operator). He was honorably released from ADT with transfer back to the [redacted]ARNG on 21 July 2015, due to completion of required active service. He was credited with 1 month and 17 days of net active service this period.

6. A [redacted]ARNG memorandum, dated 28 April 2017, shows:

a. A Physical Evaluation Board (PEB), conducted on 20 April 2017, determined the applicant fell below medical retention standards in accordance with Army Regulation 40-501 (Standards of Medical Fitness), chapter 3.

b. Based on the PEB findings, the applicant's administrative separation was directed under the provisions of National Guard Regulation 600-200 (Enlisted Personnel Management), paragraph 6-35, with assignment/loss reason code MG (physical or mental condition failing to meet medical retention standards).

7. The applicant's medical board or PEB documentation, as well has his LOD submission, and ER medical documentation from the date of his back injury, are not in his available records for review and have not been provided by the applicant.

8. A National Guard Bureau (NGB) Form 22 (National Guard Report of Separation and Record of Service) shows the applicant was honorably discharged from the [redacted] ARNG on 28 April 2017, under the provisions of National Guard Regulation 600-200, paragraph 6-35, due to medical, physical, or mental conditions failing medical retention standards. He was credited with 5 years and 18 days of service this period, with 2 years, 8 months, and 1 day prior active Federal service, amounting to 8 years, 1 month, and 12 days service for retired pay.

9. [redacted] ARNG Staff Element, JFHQ-CO Orders 158-003, dated 7 June 2017, honorably discharged the applicant from the ARNG effective 28 April 2017, under the provisions of National Guard Regulation 600-200, paragraph 6-35l, with assignment/loss reason code MG.

10. A [redacted] ARNG letter to the applicant's Member of Congress, dated 29 June 2023, shows:

a. They were responding to the applicant's claim that he was denied an MEB. They researched the applicant's records and found that a medical retention board was conducted by [redacted] National Guard State Surgeon, Colonel [redacted] and based on the medical evidence provided by the applicant, was found to be unfit for duty for a non-LOD-related medical condition. The applicant was counseled on his options regarding that determination and chose to request an honorable discharge from the [redacted] ARNG rather than appealing the decision.

b. If the applicant would now like to appeal this decision, he must go through the ABCMR, as the medical retention board was an administrative decision. He must provide to them the evidence that the injury was LOD related, and they may reverse the determination.

11. The applicant's VA Rating Decision is not in his available records for review and has not been provided by the applicant.

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

13. MEDICAL REVIEW:

a. 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 requests medical retirement for his back condition. He stated that the [redacted] National Guard found him unfit for duty. He indicated that Other Mental Health was related to his request.

b. The ABCMR ROP summarized the applicant's record and circumstances surrounding the case. The applicant enlisted in [redacted] ARNG 11Apr2012. He completed 2 periods of active duty training 20120910 to 20121122 (BCT) and 20150605 to 20150721 (AIT). His primary MOS was 88M Motor Transport Operator. Of note, he had prior service in the Air Force 20071030 to 20103006 with a break in military service from 20100701 to 20120410. He was discharged from the ARNG 28Apr2017 for medical, physical, or mental condition retention standards IAW NGR 600-200.

(1) 08Nov2007 chest x-ray showed the applicant had a long thoracal lumbar spinal curvature which measured approximately 12 degrees (scoliosis). No acute bony pathology was evident.

(2) 15Apr2008 Student Health Care Clinic 82nd Medical Group. The applicant presented requesting evaluation of his scoliosis which he divulged he had been diagnosed with several years prior. He reported that since beginning his military training he had noticed increased discomfort in the back which he attributed to his scoliosis worsening. He denied any radiation of the discomfort to the lower extremities. He did not take medication for the discomfort. He denied any history of trauma to the back during his training. Back exam: A mild degree of scoliosis was observed. Mild discomfort was elicited upon palpation of the paraspinous muscles. No muscle spasms were noted. Diagnosis: Backache.

c. Unless otherwise noted, the following excerpts were obtained from the 20170418 Chronological Record of Medical Care notes which were found in HAIMS.

(1) 26Feb2016 UCHealth Emergency Department. The applicant reported experiencing back pain during a PT test earlier that morning while running 2 miles. There was no direct trauma to the back. He felt pain in the lower back which radiated upward. The exam showed visible paraspinal muscle spasm left lower thoracic upper lumbar area. There was no midline tenderness to palpation of the thoracic or lumbar spine. Muscle strength (5/5) was normal, and sensation was intact.

(2) 11Mar2016 UCH. Further details were documented concerning the 2-week history acute lower thoracic midback pain while running 2 miles during Army Fitness Test: He was able to complete the 2 miles. He was treated with Valium, Flexeril and Ibuprofen. Physical therapy was ordered.

(3) 11Mar2016 Thoracolumbar film, University [redacted]. Mild rotary s-shaped curvature of the thoracolumbar spine without significant degeneration or acute bony abnormality. LOD was initiated. Temporary profile. He was instructed to follow up with his primary care physician.

(4) 26Apr2016 MRI lumbar spine showed mild facet degenerative changes at L3-S1; and the MRI thoracic spine revealed minimal disc bulge at T6-7 and T10-11.

(5) 02Aug2016 Back Conditions DBQ VAMC. The previous history of presentation for backache and x-ray findings were noted. The applicant reported that he had back pain throughout his active duty. He recently had an MRI which showed bulging discs in the thoracic spine and facet degenerative changes in the lumbar spine. The exam showed forward flexion 0 to 40 degrees (normal 0 to 90 degrees; and extension 0 to 25 degrees (normal 0 to 30 degrees). Painful motion was present with all ROMs. There was no evidence of pain with weight bearing. There was muscle spasm not resulting in abnormal gait or abnormal spinal contour. There was localized tenderness not resulting in abnormal gait or abnormal spinal contour. Straight leg testing was negative. Neuromuscular and sensory examinations were normal. He reported not being able to bend, stoop or squat repeatedly. Diagnoses: Lumbosacral Strain; Degenerative Arthritis of the Lumbar Spin; and Bulging Discs Thoracic spine.

(6) 02Feb2017 Physical Therapy Consult VAMC. The visit was for TENS unit instruction. He was going to receive physical therapy outside the system.

(7) 21Feb2017 Physical Therapy (non VA, Non Army). Their assessment Included the opinion that driving a truck was contraindicated due to the applicant's complaint of significant pain (for example, with sitting > 15 minutes). Anticipated recovery time was 4-6 months. They deemed that he was permanently unable to wear load bearing equipment, ride in a military vehicle, move 40 lbs 100 yrds, carry/fire weapon, and perform APFT sit-ups. They recommended fitness for duty evaluation.

(8) 25Feb2017 Chronological Record of Medical Care (SF 600). The provider's note indicated the plan included profiling, physical therapy, and injections. The applicant was placed on a temporary nondeployable profile (exp 26May2017) for his back.

(9) 26Feb2017 UCHealth Emergency Department. He presented with acute back pain radiating to the left leg. He had a history of chronic back pain. He denied any new trauma. He was already in treatment with physical therapy for back pain at the time. He was on profile. His back exhibited full ROM. There was no midline tenderness. Muscle strength was normal. He was given a Toradol injection and Oxycodone for pain, with improvement in symptoms.

(10) "09Mar2017 Soldier's Worksheet-Soldier does not wish to be retained. No LODs located within eMMPS for this condition."

(11) "20Apr2017 MRB: Service Member was found unfit IAW AR 40-501 ch 3-39h. This is a non-LOD issue, and the Soldier has been recommended for medical separation. The Service member was placed on permanent L3 profile. Current PULHES 113111."

(12) 23Jun2017 Back Conditions DBQ. Pain was in the lower thoracic/lumbar region. For back pain, he took ibuprofen or Tylenol once per week. He had not had injections or surgery. He could lift 40-50 lbs a few times; however, 20-30 lbs was more comfortable. Thoracolumbar active ROM when specifically being measured was limited to 10 degrees of flexion and extension. This was not consistent with spontaneous motion and with other aspects of the examination. Spontaneous motion was significantly better and without pain behavior then that when being specifically measured. The following measurements reflect spontaneous ROM: Forward flexion 0 to 65 degrees (normal is 0 to 90); extension 0 to 20 degrees (normal is 0 to 30 degrees). No pain was noted during the exam including no evidence of pain with weight bearing. Bilateral lower extremity strength, sensation, and reflexes were normal and straight leg testing was negative.

d. Behavioral health condition:

(1) 01Feb2010 Initial ADAPT (Alcohol and Drug Abuse Prevention and Treatment) Evaluation. The applicant was referred for evaluation after receipt of DUI. He was 20 years old and had first started drinking age 15. He had just returned from a 6-month deployment on 07Jan2010. He denied any prior treatment for mental health problems. He reported the following symptoms: Depressed or hopeless, feelings of guilt associated with this incident and pending administrative actions. He denied past history

of attempted suicide. His mental status exam was normal. Assessment: There was no indication of a significant alcohol diagnosis or other mental health issue at this time.

(2) 25May2010 Mental Health Clinic. The applicant had an ADAPT evaluation to evaluate his current alcohol use. He had received an Article 15 for DUI on 04Jan2010 and recent second offense for being a passenger in a car with open container. He stated he did not think he had a problem and that he was not aware of the open container law [redacted].

(3) 28Jul2013 [redacted] Hospital. The applicant was hospitalized after he Was placed on mental health hold for active suicide ideation (he had been drinking and planned to stab himself). This occurred 2 months after he had been charged with domestic violence and his cohabiting girlfriend and child moved out the previous week.

(4) 13Oct2015 Primary Care Note VAMC. New VAMC intake note: PTSD Symptoms were the primary issue for the visit. The applicant reported hypervigilance, nightmares, and regression from social interaction. There was no suicide or homicide ideation. PTSD screen was positive. Depression screen was negative. He stated that he wanted treatment but did not respond to attempts to contact him for an appointment. He declined BH treatment 26May2016 Primary Care Outpatient Note.

(5) 02Aug2016 Initial PTSD DBQ VAMC. He completed one deployment while a member of the Air Force from 2009 to 2010 to Iraq and UAE. He stated he was in Iraq one month and had exposure to distant incoming fire towards the base but otherwise denied any combat exposure. Stressors: He heard about the death of 4 soldiers to an IED while in Iraq, but he was not a witness and denied knowing the soldiers personally; and he was exposed to covered bodies while completing a 2-week electrical job in the mortuary. The exam showed a mildly anxious mood with appropriate affect. The PHQ-9 depression screen result was in the mild range. MoCA (Montreal Cognitive Assessment) score was 25/30 (a score 26 or below is generally considered an indicator of cognitive impairment). At the time, he was enrolled full time at the University of Phoenix studying business management and denied any academic-related difficulties. He was employed full time at Fresh View Solutions and denied any work-related difficulties. Leisure activities included working on cars, exercising, spending time with friends and family, and watching movies. BH treatment history included being hospitalized overnight at Parker Adventist in 2013 due to suicidal ideation and he had participated in court ordered domestic violence therapy group from 2013-2014. No treatment records were available for review for these. He had completed two rounds of alcohol classes (DUIs in 2010 and 2015). He was not currently receiving any mental health treatment nor prescribed any psychiatric medication. He endorsed a history of adjustment-related depression and anxiety following his separation from service and in response to non-military related psychosocial stressors. The examiner assessed the

applicant did not currently meet criteria for PTSD or any mental health disorder— no mental disorder was diagnosed.

(6) 04Mar2017 Mental Disorders DBQ VAMC. The applicant reported a 6-month assignment in Iraq. This report and other details varied from prior accounts; therefore, the examiner noted the applicant may be an inaccurate or unreliable historian. By reported history, the applicant's current symptoms developed after he was released from the Air Force due to difficulty adjusting to civilian life including finding employment and significant relationship difficulties with the mother of his daughter. The romantic relationship began in 2011, (after Air Force, before Army service). Since May 2016 he had worked in collections at a call center without issues. MoCA score was 27/30 (normal). Assessment: 1. Generalized Anxiety Disorder (GAD) was less likely as not caused by or a result of military service and was at least as likely as not due to situational circumstances that developed after he was released from the Air Force. 2. Alcohol use disorder, was not related to military service. There was occupational and social impairment due to mild or transient BH symptoms which decreased work efficiency and ability to perform occupational tasks only during periods of significant stress or symptoms controlled by medication.

(7) 07Sep2017 Mental Disorders DBQ. The exam was completed to assess for a mental health condition related to Chronic Fatigue Syndrome. No mental disorder was diagnosed. He was not in mental health treatment, he was not taking psychotropic medication. He went to the gym 3 to 5 days a week. At the gym he used the steam room, cardiovascular equipment, and weight equipment. The score on the mental status examination was 29/30 (normal).

(8) 23Jan2019 Mental Disorders DBQ. The veteran completed his Bachelor of Science and Business with financial planning certification from the University [redacted] in August 2018. He was working at least a 40-hour week.

c. Summary

(1) The 29Jun2023 memo from the [redacted] ANG annotated he was found unfit for duty for a non-Line of Duty related medical condition. In 2008, while in the Air Force, the applicant presented with a backache and divulged that he had been diagnosed with scoliosis several years prior. While a member of ANG, he had an exacerbation of back pain necessitating an emergency room visit during completion of the 2-mile run in February 2016. He had a second exacerbation of back pain in February 2017. He participated in physical training related to military service, as well as for leisure activities (including weightlifting). The applicant presented in 2008 reporting more discomfort in his back since entering service, which he attributed to his scoliosis worsening. It is an accepted medical principle that back pain can result from scoliosis. In addition, malalignment of the spine caused by scoliosis, can cause increased pressure on

portion(s) of the impacted disc(s) which may cause bulging or herniation. Medical records were consistent with progression of a back condition that existed prior to service. According to medical records, the applicant did not sustain traumatic back injury while in service. The Lumbosacral Strain; Degenerative Arthritis of the Lumbar Spine; and Bulging Discs Thoracic spine did not meet retention standards in accordance with AR 40-501 chapter 3-39h, nonradicular pain involving the cervical, thoracic, lumbosacral, or coccygeal spine, whether idiopathic or secondary to degenerative disc or joint disease, that fails to respond to adequate conservative treatment and necessitates significant limitation of physical activity.

(2) Concerning the BH condition, the applicant was diagnosed with GAD and Alcohol Use Disorder. His symptoms developed after he was released from Air Force due to difficulty adjusting to civilian life including finding employment and significant relationship difficulties with the mother of his daughter. He had a psychiatric admission shortly after he enlisted in the Army due to active suicide ideation that was situational and involved significant use of alcohol. He convincingly denied suicide ideation thereafter. There was no psychosis or mania. While in active military service, there were no work accommodations or prolonged absence from work attributable to his BH condition. In March 2017, the condition was assessed to be mild in severity. The 20Apr2017 MRB showed permanent S1 physical profile. After release from service the applicant did not report significant impact of his BH condition on employment or academic pursuits. Based on information available for review, evidence was insufficient to support that the applicant's BH condition failed medical retention standards of AR 40-501 chapter 3.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found relief is not warranted. The Board found the available evidence sufficient to consider this case fully and fairly without a personal appearance by the applicant.

2. The Board concurred with the findings of the ARBA Medical Advisor that the evidence does not show the applicant had any disabling conditions eligible for referral to the Disability Evaluation System to be considered for disability retirement. His back condition existed prior to service and therefore was not incurred in the line of duty, and there were no other conditions that failed medical retention standards. Based on a preponderance of the evidence, the Board determined his discharge by reason of falling below medical retention standards was not in error or unjust.

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.

12/19/2024

X [redacted]

CHAIRPERSON

[redacted]

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

REFERENCES:

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

2. On 25 August 2017, the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to Discharge Review Boards (DRBs) and Boards for Correction of Military/Naval Records (BCM/NRs) when considering requests by veterans for modification of their discharges due in whole or in part to: mental health conditions, including post-traumatic stress disorder (PTSD), traumatic brain injury (TBI), sexual assault, or sexual harassment.

Boards are to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based, in whole or in part, on those conditions or experiences.

3. Title 10, U.S. Code, chapter 61, provides the Secretaries of the Military Departments with authority to retire or discharge a member if they find the member unfit to perform military duties because of physical disability. The U.S. Army Physical Disability Agency is responsible for administering the Army physical disability evaluation system and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with DOD Directive 1332.18 (Discharge Review Board (DRB) Procedures and Standards) and Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation).

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

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

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

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

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

b. Soldiers who sustain or aggravate physically-unfitting disabilities must meet the following line-of-duty criteria to be eligible to receive retirement and severance pay benefits:

(1) The disability must have been incurred or aggravated while the Soldier was entitled to basic pay or as the proximate cause of performing active duty or inactive duty training.

(2) The disability must not have resulted from the Soldier's intentional misconduct or willful neglect and must not have been incurred during a period of unauthorized absence.

5. Army Regulation 40-501 provides information on medical fitness standards for induction, enlistment, appointment, retention, and related policies and procedures. Soldiers with conditions listed in chapter 3 who do not meet the required medical standards will be evaluated by an MEB and will be referred to a PEB as defined in Army Regulation 635–40 with the following caveats:

a. U.S. Army Reserve (USAR) or Army National Guard (ARNG) Soldiers not on active duty, whose medical condition was not incurred or aggravated during an active duty period, will be processed in accordance with chapter 9 and chapter 10 of this regulation.

b. Reserve Component Soldiers pending separation for In the Line of Duty injuries or illnesses will be processed in accordance with Army Regulation 40-400 (Patient Administration) and Army Regulation 635-40.

c. Normally, Reserve Component Soldiers who do not meet the fitness standards set by chapter 3 will be transferred to the Retired Reserve per Army Regulation 140–10 (USAR Assignments, Attachments, Details, and Transfers) or discharged from the Reserve Component per Army Regulation 135–175 (Separation of Officers), Army

Regulation 135–178 (ARNG and Reserve Enlisted Administrative Separations), or other applicable Reserve Component regulation. They will be transferred to the Retired Reserve only if eligible and if they apply for it.

d. Reserve Component Soldiers who do not meet medical retention standards may request continuance in an active USAR status. In such cases, a medical impairment incurred in either military or civilian status will be acceptable; it need not have been incurred only in the line of duty. Reserve Component Soldiers with non-duty related medical conditions who are pending separation for not meeting the medical retention standards of chapter 3 may request referral to a PEB for a determination of fitness in accordance with paragraph 9–12.

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

7. National Guard Regulation 600-200 (Enlisted Personnel Management) prescribes he criteria, policies, processes, procedures, and responsibilities to classify, assign utilize, transfer within and between States, provides special duty assignment pay, separate, and appoint to and from Command Sergeant Major ARNG and Army National Guard of the Unites States enlisted Soldiers. Paragraph 6-35 provides for the separation of Soldier found medically unfit for retention per Army Regulation 40-501.

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

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

paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

10. 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.

11. Army Regulation 15-185 (Army Board for Correction of Military Records (ABCMR)) prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR.

a. Paragraph 2-11 states applicants do not have a right to a formal hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

b. The ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

//NOTHING FOLLOWS//