

IN THE CASE OF: [REDACTED]

BOARD DATE: 3 October 2024

DOCKET NUMBER: AR20230012194

APPLICANT REQUESTS: processing through the Physical Disability Evaluation System (PDES) for a medical retirement from the United States Army Reserve (USAR).

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- Counsel Brief with 23 Exhibits (84 pages)

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code (USC), 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. In Exhibit 2, the applicant provides a self-authored statement that is available in its entirety for the Board's consideration. He provides a synopsis of his upbringing, education, participation in the Reserve Officers' Training Corps (ROTC), employment as a civilian police officer, military service in the USAR, and the efforts he has made in seeking relief.

a. While serving as a first lieutenant (1LT)/O-2, he attended active duty for training (ADT) at Fort Jackson, SC, in October 1988. On the 16th day while training Soldiers on the confidence course, he was working atop the rappelling tower, commonly referred to as Victory Tower. Preparing to take a break from atop the tower, he attempted to rappel by pushing away from the tower as he was trained to do, and suddenly he fell to the ground. He landed flat on his back and his head struck the ground. Everything was dark and blurred when he came to. He heard voices over him asking repeatedly if he was alright. He is unsure of how long this went on, but after gaining some awareness, he asked to be helped to his feet. Trying to impress upon the officers who were there that he was a dedicated and strong military officer, he told them he was good as he was helped to his feet. He tried to shake it off and continued with training, suddenly he felt dizzy and weakness in his legs. He fell to the ground again and his body felt awkward.

He was once again helped to his feet and was transported to [REDACTED] for treatment.

b. After being treated at [REDACTED], a doctor informed him that an x-ray showed he had some cervical swelling. The doctor told him to bed rest and not return to training for the duration of their unit training cycle. He was advised to take his medications, relax, and to return for follow-up care if his condition worsened. Within two days of following the doctor's order, he went back to the training site, but did not participate in any physical training. Again, he wanted to impress upon the senior officers that he was a strong and dedicated officer. It was hard to describe his body's feeling. He was experiencing numbness in his back, neck, and legs.

c. While at the training site, Fort Jackson active-duty Range Control Soldiers came on the scene. Upon examining the ropes that they were using for rappelling, the Range Control noncommissioned officer (NCO) asked for the officer in charge (OIC). The Range Control NCO was directed to the applicant. He did not know at the time that he was the only officer there on site. The Range Control NCO told him the ropes they were using were not rappelling ropes. They were not the right width in diameter and not proper to train with. He was advised that if training continued with the wrong equipment, he would put the safety and lives of the Soldiers in jeopardy. As the OIC, everything would be on him.

d. He made the decision to halt the training and tasked the training NCOs to get with range control to get the proper ropes to continue training. Unknowingly the senior officers became aware of his decision before he had a chance to inform them himself. Upon the higher-ranking officers' arrival, it appeared they were not too happy with his decision. Before he could explain, he was asked what he was doing back at training? He responded with "No Pain, No Gain Sirs!" They said very little to him. After that day he did not return to any of the physical training sites but worked in a light administrative duty status.

e. On the final day of his unit's 1988 active duty for training, his battalion executive officer (XO) inquired about how he was feeling. He told the XO he had continual pain in his back, neck, and leg that was not going away. The XO said the unit administrator would provide him his medical documents along with the authorization form which would allow him to receive medical treatment and incapacitation pay. The XO assured him that all of his paperwork was in order, and he would be taken care of as long as he needed. He was also informed he would receive additional information from headquarters.

f. In November 1988, when the unit returned to weekend training, he learned that he was being transferred out [REDACTED], to a unit in [REDACTED]. In January 1989, he started his assignment with the new unit. He was concerned his condition was not improving, so he made it known to his new unit administrator that he was dealing with

an in line of duty (LOD) injury while with the [REDACTED]. The administrator advised him to keep the paperwork his old unit gave him to present for his medical treatment.

g. The applicant was the XO of his new company, and his company commander was Captain (CPT) [REDACTED]. The applicant explained to CPT [REDACTED] that he was injured while on ADT in 1988 and was dealing with some ongoing problems and assured him that he would give his best effort. CPT [REDACTED] stated, "The goal is to accomplish the mission." CPT [REDACTED] evaluation of the applicant's performance in his Officer Evaluation Report (OER) was that he should be promoted to CPT as soon as possible.

h. In November 1989, CPT [REDACTED] was promoted out of the unit and the applicant was appointed as the interim company commander. He earned the respect of every Soldier in Delta Company and was confident he could do his job above standards.

i. Around January 1990, Major (MAJ) [REDACTED] an officer who was in the applicant's old unit in [REDACTED] assumed command of the applicant's battalion. At weekend training in either June or July 1990, MAJ [REDACTED] called the applicant into his office and said, "I decided to split your company up and send your men to other companies for our 1990 annual training... You won't be needed at annual training. If you want to fulfill your two-week obligation, you can come to the unit and do some work around here."

j. When the applicant asked MAJ [REDACTED] why he decided to separate his company and take his job, MAJ [REDACTED] responded, "look at your appearance, you look like a football player, you are overweight." The applicant responded, "Sir with all due respect, I passed the physical training test, qualified with the M-16 [rifle]. and met the weight requirement using the military tape test. I didn't just pass the requirement. I scored high despite being in pain, I pushed myself and worked hard!" MAJ [REDACTED] then reminded him of the run that he took the officers on and the fact that the applicant had dropped out of the run. The applicant reminded him that physically things were not the same for him since his injury. He told MAJ [REDACTED] that after an extended period of constant running, his back and leg pain get the best of him. The applicant stated, "Sir, you were in the [REDACTED] battalion when I was injured." MAJ [REDACTED] also said, "your paperwork went up for promotion to CPT with a flag for your weight and I recommended that you not be promoted to CPT. If you wish to come work here for the two weeks that we are gone, you can, you probably could use the money." My response was, "Sir, again with all due respect, I can handle my family finances, but if you sent my paperwork up for promotion without having my results in it from the military tape test to show I was in compliance and you recommended for me to not be promoted, well, I don't have a future in this unit and I would likely be better off with another unit." Their conversation ended.

g. At this point, the applicant tried to accept the fact that his injury had likely ended his military career. In September 1990, during the height of the Gulf War, he decided to leave his unit. He was advised that no one could enter or exit the unit at that time

because they were on standby for deployment. In November 1990, he was transferred from the unit in [REDACTED] back to a unit at [REDACTED]. Upon receipt of his transfer order, he spoke with his unit administrator and informed them that 6 December 1990 would mark his 6-year anniversary and he would separate from the USAR. He stated he was injured in the LOD, and his injuries would likely interfere with the performance of his duties. The administrator said headquarters would contact him with further guidance.

h. Around August 1991, he went to the [REDACTED] Emergency Room (ER) for medical care related to his LOD injuries. He presented the documents he was given to the medical staff hoping to see a doctor without issues. He was put through the wringer and had to jump through hoops for medical treatment because many staffers took issue with or claimed they did not understand the paperwork. He told the staff the document authorized treatment. Eventually, he was seen by a doctor. In December 1991, he went to the [REDACTED] ER again for medical care related to his LOD injuries. When he presented the documents his Reserve unit gave him, the intake person stated he was not familiar with the forms. He asked him to speak with his supervisor or someone who may be familiar with the documents. The intake person stated everyone was at a Christmas luncheon and he should have been directed to the Department of Veterans Affairs (VA) for medical care. The applicant was persistent and eventually medical care was authorized. He shared the incident with a local attorney who helped open the doors to the VA for him. He was directed to the AMVET [American Veterans] service organization. Afterward, when his condition called for medical care, he sought treatment outside of [REDACTED] and the VA Hospital.

i. Twenty-two years later, in January 2021, he began receiving information from the Army Human Resources Command (HRC) in reference to applying for retired pay and to do it at least 3 to 6 months prior to his 60th birthday. He submitted the application for pay in January 2022, four months prior to his 60th birthday. Sometime around April 2022, he began receiving mail and electronic mail (email) communication from HRC inquiring why his 20-year letter was missing from his application for retired pay documents. He explained to them his retirement was not based on 20 years; he qualified for retirement because he had 6 or more years of service, had at least a 20 percent (%) disability rating from the VA, and his injury occurred in the LOD. The back and forth with HRC led him to reach out for legal representation.

j. From the date of the incident, 16 October 1988 to the present, his life has been a struggle with severe pain, countless numbers of ER visits, countless numbers of physical therapy sessions, and a lifetime of medications. His life is a revolving door with the LOD injury he sustained. One physical therapist said something to him that clicked, and he has held on to it to this day. She said, physical therapists cannot rid you of pain, but they can teach you how to manage your pain. His family doctor advised him that he cannot do anything but rest when he experiences back spasms, but he should get some

exercise when he can. Because of his inability to exercise on a consistent basis over the years, he had developed high blood pressure, diabetes, and high cholesterol. He cannot recall a pain-free day since the 1988 incident. Sleepless nights, nightmares, fear of heights, and dark thoughts have controlled and are controlling his life non-stop. He is very sad that his military career was cut short due to his LOD injuries. When he received retirement orders, it gave him a sense of pride and belonging. To find out after 23 years there are issues with his retirement is beyond words and very disappointing. His dark space is closing in and he cannot control it.

3. Counsel provides a legal brief and 23 exhibits that are available in their entirety for the Board's consideration. Counsel provides a synopsis of the applicant's stellar military service, including how he injured himself while serving on active duty. Counsel contends the applicant has suffered a material injustice due to a material error of discretion by his command to not recommend that he undergo a Physical Evaluation Board (PEB) to determine if he was eligible for a medical retirement from the USAR.

a. While rappelling during a training event, the applicant was unable to brake during his descent, fell to the ground, and injured his back. The applicant tried to get up after falling but felt dizzy and had shooting pain throughout his back and legs. He was examined and x-rays were done. No breaks were found but it was recommended that the applicant be excused from all activity for 14 days. He received a preliminary physical therapy consultation on 19 October 1988 and received paperwork for incapacitation pay on 28 October 1988, which listed his medical condition as a "back strain." Despite the paperwork that his medical care entitlements should be referred to [REDACTED], he had difficulty obtaining the correct care for his injury which caused him to experience back spasms and pain in his back and leg when doing daily activities such as running.

b. Even after his injury, the applicant continued to receive positive OERs. He suffered from chronic pain due to his injury, but he pushed through to continue to complete his duties to a high level of satisfaction. His rating chain officials continually praised his performance and recommended him for advanced schooling, promotion, and duties of increasing responsibility. That is until the applicant got a new commander who took exception with his weight and physical fitness. This commander forwarded the applicant's paperwork for promotion to CPT along with a flag due to his weight, even though he was within standard at the time, and it had been years since he had been out of standard.

c. In January 1999, the applicant received paperwork explaining that he could either resign his commission and receive an "Honorable" characterization of service, or he could request to be transferred to the Retired Reserve, if he met the specific conditions. To be transferred to the Retired Reserve, the applicant needed to have served on active duty for at least 6 years and have sustained an injury with at least a 20% disability rating. Despite these options being presented to the applicant due to his injury and its

effect on his ability to perform certain duties, a medical retirement was not considered by the applicant's command. He applied to be transferred to the Retired Reserve.

d. On 16 August 1999, the applicant was assigned to the Retired Reserve. In June 2021, the applicant received a Retirement Alert stating that he was now in the eligibility window to apply for retirement pay. However, after sending in the necessary paperwork, the applicant was told he was ineligible because he did not have 20 years of service, despite time in the Retired Reserve counting toward longevity service for retired pay.

e. Counsel contends that a material error occurred in the discharge of the applicant. He should have been given a "Medical/Disability Retirement" based on his back injury that occurred during his service. The applicant has experienced chronic pain in his back and legs and frequent back spasms due to his injury. He was unable to complete his daily tasks without pain, but he pushed through the pain so he could continue to serve his country. Despite the applicant's injury and continued pain, once x-rays were done and no broken bones were found, his injury was listed as a "back sprain", and he was on his own to seek treatment and physical therapy. However, his injury was more serious than a back sprain, evidenced by him still having pain and back spasms over 20 years after the injury occurred. The applicant has been given a 20% disability rating from the VA for this injury. It was a material error of discretion by his command to not recommend that he undergo a PEB to determine if he was eligible for a medical retirement.

f. Counsel contends the applicant has suffered a material injustice due to the material error of not giving him a medical retirement. The applicant's disabilities greatly affect his ability to function normally in society. His injury has caused him to be unable to exercise daily which has led to him developing high blood pressure, diabetes, and high cholesterol. Without a "medical retirement," the applicant is unable to receive certain benefits he may be entitled to and is left attempting to deal with his medical issues with only assistance from the VA. With a medical retirement the applicant can receive more help and assistance in dealing with his medical issues that significantly affect his ability to be successful in day-to-day life.

g. Numerous people have written on behalf of the applicant in support of his request for a medical retirement, all agreeing that he has been dedicated to his service and work. He has persevered through his injury and the struggles he has been presented due to the injury.

h. The applicant's injury is what led to his transfer to the Retired Reserve, and he has been unable to receive regular retirement benefits despite being in the Retired Reserve since 1999.

i. Counsel provides the following exhibits (available in their entirety):

- Exhibit 1 - Applicant's self-authored statement
- Exhibit 2 - USAR Cadet enlistment
- Exhibit 3 - Appointment letter
- Exhibit 4 - College Transcript
- Exhibit 5 - DA Form 67-8 (OER) thru 23 August 1985
- Exhibit 6 - OER thru 11 July 1987
- Exhibit 7 - OER thru 11 July 1988
- Exhibit 8 - DA Form 2496 (Disposition Form) Subject: Preliminary Medical Evaluation (Weight Control) showing the applicant exceeded the weight for height tables and his progress while in the weight control program
- Exhibit 9 - DA Form 2173 (Statement of Medical Examination and Duty Status) showing a synopsis of the applicant's accident and the LOD determination
- Exhibit 10 - Medical Record extract showing his treatment following the accident
- Exhibit 11 - [REDACTED] Form 19 (Profile Sheet TL-2) showing the applicant's physical restrictions during the 14 days following his accident
- Exhibit 12 - Physical Therapy referral
- Exhibit 13 - memorandum advising the applicant that he may be entitled to Incapacitation Pay as a result of his injury and how to apply
- Exhibit 14 - OER thru 31 December 1988
- Exhibit 15 - OER thru 31 December 1989
- Exhibit 16 - USAR Personnel Command letter informing him of his need to make a decision about his military career and providing him two options:
  - First option - Terminate his Individual Ready Reserve (IRR) membership by either resigning his commission (which, in effect, means discharge) or if qualified, requesting voluntary reassignment to the Retired Reserve
    - If he qualified for retirement, he could transfer to the Retired Reserve upon request
    - If he was not eligible for retirement, he would be discharged
  - Second option - continue his IRR membership, which would require him to become qualified as a mobilization asset and meet all participation requirements
- Exhibit 17 - Transfer orders to Retired Reserve
- Exhibit 18 - Notification that he was in the eligibility window to apply for retirement pay and guidance on how to apply
- Exhibit 19 - 2012 Insider's Guide for Army National Guard and Reserve members to applying for 20-year retirement information article

- Emails exchanged between the applicant and a Retirement Services representative regarding his ineligibility for retirement based upon either completion of 20 years of Reserve service and or medical disability
- Exhibits 20, 21, 22, and 23 - 11 letters of recommendation and support rendered by friends, colleagues, and associates who all render favorable comments about the applicant and recommend that he be granted the requested relief

4. On 26 August 1982, the applicant enlisted in the USAR for a period of 6 years as a Cadet while participating in the ROTC program at [REDACTED]. Upon graduation, he was appointed as a Reserve commissioned officer in the rank/grade of 2LT/O-1 effective 13 December 1984.

5. The applicant's OERs rendered for the periods ending on 23 August 1985, 11 July 1987, and 21 October 1988 all show his raters and senior raters rendered favorable comments regarding his performance and potential. His OERs show his weight fluctuated significantly from 190 pounds to 225 pounds (exceeded height/weight standards but was within body fat allowance) to 195 pounds, respectively.

6. A Standard Form 513 (Consultation Sheet), dated 21 October 1988, shows the applicant was treated in an ER and referred to the Physical Therapy department following a fall from Victory Tower while rappelling. It was noted he landed on his back. When he got up, he felt the pain soar. The provisional diagnosis was thoracic-lumbar back sprain.

7. A DA Form 2173, dated 29 October 1988, shows the applicant fell backwards rappelling off Victory Tower on 16 October 1988 at [REDACTED]. He tried to brake himself, but the rope would not support the brake. He fell to the ground injuring his back. The nature and extent of his injury was back strain. He was evaluated and treated at [REDACTED]. At the time, he was not under the influence of alcohol or drugs, he was mentally sound, and his injury was not likely to result in a claim against the Government for future medical care. It was noted the accident occurred while he was serving on ADT. The injury was considered to have been incurred in the LOD. On 2 November 1988, the LOD investigation and determination was reviewed for completeness and determined to be in the LOD.

8. The applicant's OERs rendered for the periods ending on 31 December 1988 and 31 December 1989 show his raters and senior raters rendered favorable comments regarding his performance and potential. His OERs show his weight fluctuated significantly from 220 pounds to 238 pounds, respectively. In each case, he exceeded height/weight standards but was within body fat allowance. There were no comments about either his medical condition or his weight having an adverse impact on his ability to perform his duties.



9. Orders C-08-926085 issued by USAR Personnel Command, St. Louis, MO on 16 August 1999, show the applicant was released from USAR Control Group (Reinforcement) and assigned to the Retired Reserve as a result of completion of 20 or more years of Reserve duty. The authority for this action was Army Regulation 140-10 (Army Reserve Assignments, Attachments, Details and Transfers), paragraph 6-2.

10. In reaching its determination, the Board shall consider the applicant's petition, available records and/or submitted documents in support of the petition.

11. 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 (EMR – AHLTA and/or MHS Genesis), 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 in essence requesting a referral to the Disability Evaluation System (DES).

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. Orders published by the U.S Army Reserve Command show the former USAR Officer was transferred to the Retired Reserve effective 16 August 1999 under authority in AR 140-10, Assignments, Attachments, Details, and Transfers. The cited reason is "Completion of 20 or more years reserve duty."

d. The applicant was found medically qualified for commissioning after a military medical examination on 19 November 1984.

e. A Statement of Medical Examination and Duty Status (DA Form 2173) show the applicant sustained a "Back strain" when he fell to the ground from an unmentioned height while rappelling on 16 October 1988. Medical documentation from that day shows the applicant was evaluated in the emergency department and diagnosed with lumbar strain.

f. Follow-up documentation dated 28 October 1988 stated the applicant's strain was slowly resolving and he desired to return to police work and discontinue the medications he was taking.

g. There is no further medical documentation in the supporting documentation and his period of Service predates the EMR.

h. An Officer Evaluation Report with a covered period of 1 January 1989 thru 31 December 1989 shows he passed his Army Physical Fitness Test in July 1989 and was a successful Officer.

i. Though JLV shows the applicant was treated for chronic low back pain during the 1990's at VA facilities, there is insufficient evidence the applicant had a low back condition or any duty incurred medical condition which would have failed the medical retention standards of chapter 3 of AR 40-501, Standards of Medical Fitness, prior to his apparently voluntary separation. Thus, there was no cause for referral to the Disability Evaluation System. Furthermore, there is no evidence that any medical condition prevented the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his discharge.

j. Review of his records in JLV shows he has been awarded multiple VA service-connected disability ratings, including a 20% rating for degenerative arthritis of the spine. However, the DES only compensates an individual for service incurred medical condition(s) which have been determined to disqualify him or her from further military service and consequently prematurely ends their career. The DES has neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions which were incurred or permanently aggravated during their military service; or which did not cause or contribute to the termination of their military career. These roles and authorities are granted by Congress to the Department of Veterans Affairs and executed under a different set of laws.

k. It is the opinion of the Agency Medical Advisor that a referral of his case to the Disability Evaluation System is unwarranted.

#### 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.

2. The Board concurred with the conclusion of the ARBA Medical Advisor that the available records do not show the applicant had any duty-incurred medical conditions which would have failed medical retention standards and would have been a basis for referring him to the Disability Evaluation System. Based on a preponderance of the evidence, the Board determined the applicant's separation was not in error or unjust.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
■	■	■	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.

3/29/2025

X

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, USC, 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, Section 1556, provides the Secretary of the Army shall ensure that an applicant seeking corrective action by ARBA is provided a copy of all correspondence and communications, including summaries of verbal communications, with any agencies or persons external to agency or board, or a member of the staff of the agency or Board, that directly pertains to or has material effect on the applicant's case, except as authorized by statute.

3. Army Regulation 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The regulation provides that 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. It is not an investigative body.

4. Title 10, USC, Section 12731, provides the legal age and service requirements for age and service for Reserve non-regular retirement. It states that a person is entitled, upon application to retired pay if the person has attained the applicable eligibility age, has performed at least 20 years of service computed under Section 12732 of this Title, and is not entitled, under any other provision of law, to retired pay from an armed force or retainer pay as a member of the Fleet Reserve or the Fleet Marine Corps Reserve.

5. Army Regulation 135-180 (Qualifying Service for Retired Pay Non-Regular Service) states in paragraph 2-1 that to be eligible for retired pay an individual does not need to have a military status at the time of application for retired pay but must have:

(1) attained age 60, (2) completed a minimum of 20 years of qualifying service, and (3) served the last 8 years of his or her qualifying service as a Reserve Component (RC) Soldier. During the period October 1991 to December 2001, the requirement to serve the last 8 years in an RC was amended to the last 6 years, and on 26 April 2005 this requirement was reduced to zero years. Only Soldiers assigned to an active status in a RC or individuals in active Federal service are authorized to earn retirement point credits. This regulation also specifies, in part, that each RC Soldier who completes the service required to be eligible for retired pay at age 60 will be notified in writing with a 20-year letter within 1 year after he/she completes the service.

6. Army Regulation 140-10 covers policy and procedures for assigning, attaching, removing, or transferring USAR Soldiers.

a. Chapter 6 provides for transfer to the Retired Reserve. Paragraph 6-1 states assignment to the Retired Reserve is authorized and eligible Soldiers must request transfer, for a variety of reasons such as:

- entitlement to receipt of retired pay because of prior military service
- completion of 20 years of active and inactive service
- medical disqualification
- reaching a certain age and completing a minimum of 8 years of qualifying service
- non-selection for promotion

b. Chapter 7 relates to the removal of Soldiers from an active status and states that Soldiers removed from an active status will be discharged or, if qualified and if they so request, will be transferred to the Retired Reserve.

7. Title 10, USC, Chapter 61, provides for the retirement and discharge of members of the Armed Forces who incur a physical disability in the line of duty while serving on active or inactive duty. However, the disability must have been the proximate result of performing military duty. It further provides for disability retirement or separation for a member who is physically unfit to perform the duties of his office, rank, grade, or rating because of disability incurred while entitled to basic pay.

8. Title 38, USC, Section 1110 provides: 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, USC, Section 1131 provides: 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. Army Regulation 40-501 (Medical Services - Standards of Medical Fitness) provides information on medical fitness standards for induction, enlistment, appointment, retention, and related policies and procedures. Chapter 3 (Medical Fitness Standards for Retention and Separation, Including Retirement) provides a listing of all medical conditions and specific causes for referral to a Medical Evaluation Board (MEB). It states:

a. The various medical conditions and physical defects which may render a Soldier unfit for further military service and which fall below the standards required for all enlisted Soldiers of the Active Army, Army Reserve National Guard, and USAR. The medical conditions and physical defects, individually or in combination, are those, that:

(1) Significantly limit or interfere with the Soldier's performance of their duties.

(2) May compromise or aggravate the Soldier's health or well-being if they were to remain in the military Service. This may involve dependence on certain medications, appliances, severe dietary restrictions, or frequent special treatments, or a requirement for frequent clinical monitoring.

(3) May compromise the health or well-being of other Soldiers.

(4) May prejudice the best interests of the Government if the individual were to remain in the military Service.

b. Soldiers with conditions listed in Chapter 3, who do not meet the required medical standards will be evaluated by an MEB. Possession of one or more of the conditions listed in this chapter does not mean automatic retirement or separation from service. Physicians are responsible for referring Soldiers with conditions listed in Chapter 3 to an MEB.

11. Army Regulation 635-40 establishes the PDES according to the provisions of Title 10, U.S. Code, chapter 61 (Retirement or Separation for Physical Disability) and Department of Defense Directive 1332.18.2. This regulation governs the evaluation for physical fitness of Soldiers who may be unfit to perform their military duties because of physical disability. It states:

a. The mere presence of an impairment does not, itself, justify a finding of unfitness because of physical disability. In each case it is necessary to compare the nature and degree of physical disability present the requirements of the duties the Soldier reasonably may be expected to perform because of tier office, grade, rank or rating. To ensure all solders are physically qualified to perform their duties in a reasonable manner, medical retention qualification standards have been established in Army Regulation 40-501. These guidelines are used to refer a Soldier to an MEB.

b. The Soldier will not be declared physically unfit for military service because of disabilities known to exist at the time of the Soldier's acceptance for military service that have remained essentially the same in degree since acceptance and have not interfered with the Soldier's performance of effective military service.

c. 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 they can no longer continue to reasonably perform because of a physical disability incurred or aggravated in service.

d. When a Soldier is being processed for separation or retirement for reasons other than physical disability, continued performance of assigned duty commensurate with his or her rank or grade until the Soldier is scheduled for separation or retirement, creates a presumption that the Soldier is fit. An enlisted Soldier whose reenlistment has not been approved before the end of his or her current enlistment, is not processing for separation; therefore, this rule does not apply. The presumption of fitness may be overcome if the evidence establishes that:

(1) The Soldier was, in fact, physically unable to perform adequately the duties of his or her office, grade, rank or rating for a period of time because of disability. There must be a causative relationship between the less than adequate duty performance and the unfitting medical condition or conditions.

(2) An acute, grave illness or injury or other significant deterioration of the Soldier's physical conditions occurred immediately prior to, or coincident with processing for separation or retirement for reasons other than physical disability and which rendered the Soldier unfit for further duty.

e. The fact that a Soldier has a condition listed in the VASRD does not equate to finding of physical unfitness. An unfitting, or ratable condition, is one which renders the Soldier unable to perform the duties of their office, grade, rank, or rating, in such a way as to reasonably fulfill the purpose of their employment on active duty.

f. The medical treatment facility commander with the primary care responsibility will evaluate those referred to him/her and will, if it appears as though the member is not medically qualified to perform duty or fails to meet retention criteria, refer the member to a MEB. Those members who do not meet medical retention standards will be referred to a PEB for a determination of whether they are able to perform the duties of their grade and military occupational specialty with the medically disqualifying condition. The PEB evaluates all cases of physical disability equitably for the Soldier and the Army. The PEB investigates the nature, cause, degree of severity, and probable permanency of the disability of Soldiers whose cases are referred to the board. Finally, it makes findings and recommendations required by law to establish the eligibility of a Soldier to be separated or retired because of physical disability.

12. 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/NR) 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 based on equity, injustice, or clemency grounds, BCM/NRs shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment.

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

//NOTHING FOLLOWS//