

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: Cato, Charles D.

BOARD DATE: 9 October 2024

DOCKET NUMBER: AR20230012350

APPLICANT REQUESTS: through counsel, honorable physical disability retirement or alternately, honorable administrative discharge under Secretarial Authority.

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

- DD Form 149 (Application for Correction of Military Record)
- Counsel's brief
- DD Form 214 (Certificate of Release or Discharge from Active Duty), covering the period ending 10 June 1991
- DA Form 2166-8 (Noncommissioned Officer Evaluation Report (NCOER), covering the period ending September 2003
- six DA Forms 4856 (Developmental Counseling Form) dated between 14 April 2004 – 1 October 2004
- DD Form 2807-1 (Report of Medical History), dated 24 September 2004
- Army Europe (AE) Form 40-6A-R (Unit Commanders Request for Mental Health Evaluation), dated 28 September 2004
- DA Form 3822-R (Report of Mental Status Evaluation), dated 1 October 2004
- partial Department of Veterans Affairs (VA) Form 21-526 (Veteran's Application for Compensation and/or Pension), dated 29 November 2004
- 94th Engineer Combat Battalion (Heavy) memorandum, undated
- 94th Engineer Combat Battalion (Heavy) memorandum, dated 26 January 2005
- Vilseck Transition Center Orders 31-01, dated 31 January 2005
- DD Form 214, covering the period ending 12 February 2005
- Compensation and Pension (C&P) Exam Report, Initial Evaluation for Post-Traumatic Stress Disorder (PTSD) Exam, dated 20 September 2005
- 9 pages of VA medical records, dated between December 2005 – January 2006
- VA Rating Decision, dated 5 April 2006
- Privacy Act Waiver, dated 10 December 2021
- VA letter, dated 26 January 2022
- VA letter, dated 25 March 2022
- VA letter, dated 27 June 2022

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. Counsel states:

a. The applicant requests that his records be corrected to reflect that he was medically retired for PTSD rather than administratively separated for unsatisfactory performance. In 1991, the applicant began suffering from PTSD, which he developed while serving in the Army and which subsequently impaired his duty performance in the following years of his service. Due to his inability to fulfill his duties, the applicant was recommended for Uniform Code of Military Justice (UCMJ) disciplinary action in 2004, and was erroneously diagnosed with adjustment disorder. Had he been correctly diagnosed with PTSD during the UCMJ action, his commander would have been required to forward Mr. Cato's case through the proper medical channels pursuant to paragraph 13-5 of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations).

b. Once referred through these medical channels, the applicant would have been found to be unfit for service and would have been medically retired with a 30 percent disability rating. As such, his records must be updated and corrected to reflect medical retirement. In the alternative, the applicant's discharge characterization should be upgraded to honorable and the discharge reason should be changed to Secretarial Authority.

c. The applicant served in the Army National Guard (ARNG) for 8 years, from 1988 until 1996. From 27 September 1991 to 30 September 1992, he served on active duty for Operation Desert Storm, an armed air and ground campaign in response to the Iraqi invasion of Kuwait. Stationed at the Iraqi border as a combat engineer, the applicant was tasked with building main supply routes and mass graves and had to drive through oil fires and dead bodies. He was a "changed person" after his experiences in the first Gulf War.

d. From 26 October 1999 until 12 February 2005, the applicant served in the Army as a concrete and asphalt equipment operator in a headquarters and support company of an engineer combat battalion. On 21 March 2003, he deployed to Iraq until 30 January 2004. During this time, he again was exposed to dead bodies and even lost a friend to an improvised explosive device (IED) explosion. Despite the difficulty of his deployment on his mental health, the applicant was praised for his performance in his December 2003 NCOER. His commander recognized his reliability, ability to listen to his Soldiers, stamina, and his continuous effort to ensure all missions were completed no matter how mentally tough. His commander also recognized that the applicant

demonstrated an ability for increased responsibility and that he had an unsurpassed dedication to missions.

e. The applicant first sought out medical help in August 2002, after experiencing anger and problems in his marriage. The psychiatrist diagnosed him with moderate-severe PTSD and also started him on Celexa at that time. However, after almost another year of active duty in Iraq, the applicant continued to struggle not only with PTSD symptoms but also chronic back pain. In 2004, after he returned from Iraq, doctors prescribed him several medications to treat both his PTSD and pain, but the combination of these medications caused him to experience extreme drowsiness, so much so that he had difficulty getting up in the morning.

f. Between April and July 2004, the side effects of the applicant's medications caused him to miss several mandatory accountability formations. Each time the applicant missed formation, his command counseled him about his performance. As part of these counseling statements, he received counseling forms in which he indicated that his disabilities, particularly his PTSD, were the reason he was missing formations. On the 14 April 2004 form, the applicant wrote that due to his medical problems, he was seeking a medical discharge and that he was getting burnt out between this last deployment, divorce, and medical problems. On the 23 April 2004 form, he attributed his performance issues to his PTSD and chronic back pain, stating that the combination of medications made it difficult for him to get out of bed and that he was seeking a medical discharge because he felt he was not 100 percent able to perform his duties and obligations as a soldier. The applicant's command also recognized his PTSD and combination of medications as the reason why he was missing formations. On the 30 June 2004 counseling form, the applicant's command noted that Mr. Cato had visited the mental health clinic one month prior for a medication readjustment and had a follow-up appointment scheduled.

g. Despite acknowledging the difficulties the applicant was experiencing, his command recommended a UCMJ disciplinary action against him for his missed formations. In a response letter, the applicant noted his PTSD and his medical records indicating as such, along with the stress he was dealing with in his personal life in regard to a pending divorce and separation from his children.

h. The applicant underwent a medical exam on 24 September 2004, indicating his current medications as 40 milligrams (mg) daily of Celexa and 50 mg daily of trazadone. He noted that he was experiencing the following symptoms: dizziness; frequent or severe headaches; head injury, memory loss or amnesia; nervous trouble; memory loss; frequent trouble sleeping; depression or excessive worry; and attempted suicide. The examiner wrote, "counseling treatment ongoing" in reference to his PTSD.

i. On 1 October 2004, the applicant underwent a command-directed mental health evaluation after being processed for UCMJ disciplinary action due to his missed formations. His command attributed his depression and significantly reduced performance at work to his marital problems, and despite his documented struggles with PTSD for which he was being treated, he was diagnosed with adjustment disorder with anxious and depressed mood that manifested as "disturbances of emotional control sufficiently severe that the soldier's ability to effectively perform military duties is significantly impaired." Unlike PTSD, adjustment disorder does not merit Disability Evaluation System (DES) processing, and therefore he was not recommended to be evaluated by the medical board. Rather, the applicant's evaluator recommended separation under Army Regulation 635-200, paragraph 5-17 (administrative separation for conditions that do not amount to disability) and on 26 January 2005, his commander recommended him for discharge under Army Regulation 635-200, chapter 13 (separation for unsatisfactory performance). Further, the applicant's commander stated that he was not aware of any "medical or other data meriting consideration." On 12 February 2005, the applicant was separated for unsatisfactory performance, with a general (under honorable conditions) characterization of service.

j. The applicant's struggle with PTSD did not end with his separation from the Army. On 20 September 2005, he underwent a VA C&P exam for PTSD, stating that he had continuing symptoms of anger, depressive episodes, nightmares, insomnia, frequent panic attacks, and intermittent suicidal ideation, once sitting with a loaded gun in his lap for several hours while contemplating suicide. A 1 December 2005 VA treatment record also indicated his ongoing symptoms. On 5 April 2006, the applicant was granted a service-connection by the VA for PTSD with a 30 percent disability rating, effective 13 February 2005.

k. The ABCMR may change military records of any veteran in order to correct an error or remove an injustice. Specifically, under Title 10 U.S.C. section 1552(a), the Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice. As a guideline, the BCMRs generally follow Discharge Review Board (DRB) standards of review when determining whether there was an error or injustice. In determining whether there was an error, the Secretary should consider whether the service branch properly followed its own rules and regulations for the discharge. To determine if an injustice must be removed, the Secretary should consider whether the service branch applied the rules and regulations equally to the same set of circumstances.

l. Here, the Army has failed to follow its own regulations. Because the applicant had a documented struggle with PTSD, he should have been processed through DES when his PTSD caused him to repeatedly fail to attend mandatory formations and subsequently should have been evaluated by the Medical Evaluation Board (MEB) and

Physical Evaluation Board (PEB). Because he was evaluated only for administrative separation, the Army failed to follow its own regulations.

m. Further, it was an injustice for the applicant to not have received DES processing for his documented PTSD. He struggled greatly with PTSD after years of excellent service and when it became known that he was failing to meet all of the requirements of his duties due to his mental health condition, he should have been properly evaluated and processed by DES. It is an injustice for the applicant to not receive the same medical treatment opportunities that other service members receive for the same or similar medical problems. For example, in *LaBonte v. United States*, plaintiff LaBonte suffered from PTSD as a result of his deployment and was initially denied DES processing, but upon review by the United States Court of Federal Claims, the court found that Mr. LaBonte was entitled to DES processing because there was a question as to the "Soldier's ability to perform the duties of his or her office, grade, rank, or rating because of physical disability." The applicant deserves the same. He also suffers from PTSD as a result of his service in the Army, and because there was continued documentation questioning his ability to perform his duties as a result of his PTSD, the applicant should have been processed by DES. Further, liberal consideration must be given to a veteran's claim who seeks discharge relief when their reason for discharge relates to their PTSD, and such liberal consideration requires the ABCMR to correct the injustice here.

n. The applicant should have been medically retired as opposed to administratively separated, and in the alternative, his discharge characterization should be changed to honorable. The applicant suffered from PTSD and was erroneously diagnosed with adjustment disorder. It is clear from his medical records, counseling forms, and treatment history that he suffers from PTSD. In August 2002, 2 1/2 years before he was separated from the Army, the applicant sought psychiatric help and was diagnosed with moderate-severe PTSD. He was also prescribed medication to treat his PTSD and often noted his PTSD as the source of his performance issues on various counseling forms. Further, he was diagnosed by the VA with PTSD in September 2005.

o. Instead, the applicant's current discharge erroneously indicates that he suffered from adjustment disorder, a condition in which one has an abnormal reaction to ordinary stressors. Although he was dealing with personal issues such as a pending divorce and separation from his children, his counseling forms and visits to the mental health clinic for medication readjustments make clear that his PTSD and effects of his medications were the cause of his missed formations, not a reaction to ordinary stressors. Moreover, adjustment disorder is limited in time. The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-V-TR) provides that adjustment disorders must resolve within 6 months of the termination

of the stressor, and the applicant clearly has suffered from PTSD for more than 6 months as he first sought help for his mental health in 2002 and was still receiving treatment from the VA into 2006.

p. The applicant's record reflects that he suffers from PTSD, not adjustment disorder, and he should have been referred to the DES. Had he been referred to the DES, it is likely that he would have been medically retired rather than administratively separated for unsatisfactory performance .

q. The applicant's case should have been referred for DES processing because he suffered from PTSD. Mr. Cato's commander recommended him for separation under Army Regulation 635-200, chapter 13, Separation for Unsatisfactory Performance after the applicant missed several mandatory formations, however his commander should not have pursued an administrative separation. The applicant should have received DES processing. Notably, Army Regulation 635-200 Chapter 13-5(c) provides that "[w]hen *appropriate*, [a unit commander may] forward the case recommending that the soldier be processed through medical channels" such as DES. It would have been appropriate for the applicant's commander to do so here because of his documented struggles with PTSD since 2002. But in his recommendation his commander stated that he was not aware of any medical or other data meriting consideration of the applicant's separation despite his existing diagnosis as well as several conversations with him regarding his PTSD, pain, and medications as the reason for missing formations .

r. Army Regulation 635-200, paragraph 13-5(d) further states that forwarding the case recommending that the Soldier be processed through medical channels "is *required* when UCMJ action is not initiated and when the Soldier has an incapacitating physical or mental illness that was the direct or substantial contributing cause of the conduct for which separation action is being considered." Here, the applicant was processed for a UCMJ violation for missed formations on 28 July 2004, but the contributing cause of his conduct, his PTSD, chronic back pain, and the combination of medications to treat these issues, was well-documented and well-known by his commander. The applicant indicated on several counseling forms leading up to the recommendation and processing of the UCMJ action that his PTSD and pain were why he was missing formations, and command also acknowledged this. Because the command knew that he had an incapacitating mental illness that was causing him to miss mandatory formations before UCMJ action was taken, command was required to forward his case to DES. Thus, forwarding the applicant's case to DES was both required and appropriate under Chapter 13-5.

s. Moreover, DES processing should have taken priority over the applicant's administrative separation action. The Army's 2015 information paper on the "[I]mpact of Misconduct During Army Physical Disability Evaluation System Process" provides guidance on the process of separating soldiers for misconduct who are undergoing DES

processing and provides that DES processing should be given priority unless the separation action authorizes separation under other than honorable (OTH) conditions. DES processing should have been prioritized because the applicant's separation action authorized only a general (under honorable conditions) characterization.

t. Had the applicant's case been properly forwarded to DES, the MEB would have found he failed medical retention standards and the PEB would have found him unfit with a rating of at least 30 percent. When a service member is referred for DES processing, the member's condition must be evaluated by an MEB. Army Regulation 40-501 (Standards of Medical Fitness), chapter 3 provides medical fitness standards for retention and separation of Soldiers, and a service member will be found to have failed medical retention standards if they meet one of the listed conditions. In particular, Army Regulation 40-501, paragraph 3-33 provides that a service member may fail medical retention standards if they exhibit "(a) persistence or recurrence of symptoms sufficient to require extended or recurrent hospitalization; (b) persistence or recurrence of symptoms necessitating limitations of duty or duty in a protected environment; or (c) persistence or recurrence of symptoms resulting in interference with effective military performance."

u. Here, had the applicant been properly referred to DES, the MEB would have found him to fail medical retention standards per Army Regulation 40-501, paragraph 3-33.51 From April to June 2004, the applicant himself noted in each of his counseling forms that his PTSD and pain made him unable to effectively perform his duties and obligations as a Soldier, and his command recognized this as well. Therefore, it is likely the MEB would have found that he failed medical retention standards under Army Regulation 40-501, paragraph 3-33(c).

v. Once the MEB completes its evaluation, the PEB makes a determination of fitness or unfitness. According to the Department of Defense Instruction 1332.38 Enclosure 3, Part 3, Para.2, "[a] service member shall be considered unfit when the evidence establishes that the member, due to physical disability, is unable to reasonably perform the duties of his or her office, grade, rank, or rating..." In determining whether a member has the ability to perform his or her duties, the PEB may consider whether the medical condition (1) represents a medical risk to the health of the member and (2) imposes unreasonable requirements on the military to maintain or protect the member. Both criteria are satisfied here. The applicant's medical and treatment records show that his PTSD put him at risk of suicide. Further, it would have been unreasonable for the military to maintain him when both he and his command acknowledged that he was unable to fulfill his duties due to his PTSD and pain. Therefore, it is likely that had the PEB had the opportunity to review the applicant's case, he would have been found to be unfit for duty, making him eligible for medical retirement.

w. When a service member is determined to be unfit for duty based on a disability, the service branch assigns a rating percentage to the disability using the Veterans Affairs Schedule for Rating of Disabilities (VASRD). A service member needs a disability rating of 30 percent to be retired from the military. Had the applicant been found unfit by the PEB, it is likely that he would have received at least a 30 percent disability rating. First, in April 2006, when the applicant was granted a service connection by the VA for PTSD, he was assigned a 30 percent rating, effective 13 February 2005. The VASRD assigns a 30 percent rating to mental disabilities based on the frequency and severity of the member's symptoms and their occupational and social impairment such that the member's work efficiency decreases occasionally and the member has an intermittent inability to perform occupational tasks. Further, an individual with a 30 percent rating for a mental condition experiences symptoms such as "depressed mood, anxiety, suspiciousness, panic attacks...chronic sleep impairment, [and] mild memory loss."

x. The applicant's inability to perform his duties is well-documented- he missed many mandatory formations and both he and his command attributed this issue to his PTSD and pain. Moreover, the symptoms he has experienced since 2002 are also well-documented and are consistent with a 30 percent disability rating. Therefore, it is likely that, just as the VA assigned the applicant's PTSD a 30 percent rating in 2006, he would have been assigned at least a 30 percent rating had his case been sent through the DES. Had he been assigned a 30 percent rating for his unfitting PTSD, the applicant would have been awarded medical retirement rather than being administratively separated for unsatisfactory performance. Thus, DES processing in this case, which was both required and appropriate, would have entirely altered the characterization of the applicant's retirement or discharge. The accurate characterization of medical retirement should be reflected in the applicant's record. In the alternative, his discharge characterization should be upgraded to honorable and discharge reason changed to Secretarial Authority .

y. The ABCMR is required to evaluate claims for review of a discharge or dismissal with a liberal consideration standard when the claim relates to a member's PTSD. Specifically, the Board must "review the claim with liberal consideration to the claimant that PTSD or traumatic brain injury (TBI) potentially contributed to the circumstances resulting in the discharge or dismissal or to the original characterization of the claimant's discharge or dismissal." The Department of Defense issued a series of interpretative memoranda to provide boards with clarification on the liberal consideration standard. For one, the Hagel Memo establishes three guiding principles for boards to follow when reviewing a discharge claim by any veteran alleging PTSD in connection with their claim:

1) When documents from the period of service show the existence of one or more symptoms of a PTSD-related condition, liberal consideration should be given to help find that PTSD existed during the time of service;

2) Special consideration should be given to VA determinations which show PTSD or PTSD-related conditions; and

3) In circumstances where PTSD or PTSD-related conditions may be reasonably determined to have existed at the time of discharge, those conditions will be considered potentially mitigating factors in the misconduct that caused the under other than honorable conditions characterization of service.

z. Providing further guidance, the Department of Defense issued the Kurta memorandum, which provides that a "veteran's testimony alone...may establish the existence of a condition or experience..."The Kurta memorandum also identifies four questions that the Board will consider when reviewing requests for discharge relief:

1) Did the veteran have a condition or experience that may excuse or mitigate the discharge?

2) Did that condition exist/experience occur during military service?

3) Does that condition or experience actually excuse or mitigate the discharge?

4) Does that condition or experience outweigh the discharge?

aa. Finally, the ABCMR must also consider factors outlined in the Wilkie memorandum, which centers around fairness and states, "[i]t is consistent with military custom and practice to honor sacrifices and achievements, to punish only to the extent necessary, to rehabilitate to the greatest extent possible, and to favor second chances in situations in which individuals have paid for their misdeeds." The memorandum further provides that "[r]elief should not be reserved only for those with exceptional aptitude; rather character and rehabilitation should weigh more heavily than achievement alone."

bb. Given the liberal consideration the ABCMR must give to the applicant's claim, his request for a record change to medical retirement must be granted. Multiple PTSD diagnoses, including by the VA, ongoing treatment and numerous counseling forms detailing his PTSD, and his own statements regarding his PTSD make clear that he was in fact suffering from PTSD and that it was the contributing cause of his inability to perform his duties in 2004.

cc. The Board must also consider the applicant's excellent service prior to missing formations. He was part of the Army for many years and received outstanding evaluations from his commander in the past. It was only when the applicant began struggling with PTSD symptoms that his performance declined, and from the onset of his symptoms, the applicant was proactive in seeking treatment. He sought psychiatric help and began a treatment regime, he visited the mental health clinic when he noticed his difficulty fulfilling his duties as a soldier, and he continued to be treated for PTSD even after being discharged. When the applicant's performance was called into question, he deserved to be processed through the proper medical channels available to service members and should have been medically retired.

dd. If the Board finds that medical retirement is not appropriate, the Board should still grant the applicant a discharge upgrade to honorable. An honorable characterization is appropriate when the quality of the veteran's service generally has met the standards of acceptable conduct and performance of duty for military personnel or is otherwise so meritorious that any other characterization would be clearly inappropriate. The applicant clearly meets the standards of an honorable discharge characterization. Until the onset of his PTSD symptoms, he performed in an outstanding manner. Further, his review request is entitled to liberal consideration because his PTSD was the cause of his underperformance. As an alternative to granting the applicant medical retirement, his discharge characterization should be upgraded to honorable. For the foregoing reasons, the applicant requests that his records be corrected to reflect a medical retirement or, in the alternative, a discharge upgrade to honorable characterization.

3. The applicant's National Guard Bureau (NGB) Form 22 (Report of Separation and Record of Service) shows he enlisted in the ARNG on 7 April 1988. He was awarded the Military Occupational Specialties (MOS) of 62H (Concrete and Asphalt Equipment Operator) and 51B (Carpentry and Masonry Specialist)

4. A DD Form 214 shows the applicant was ordered to active duty in support of Operation Desert Shield/Desert Storm as a member of his ARNG unit on 6 December 1990, with service in Southwest Asia from 7 February 1991 through 12 August 1991. He was honorably released from active duty due to expiration term of service (ETS) and transferred back to his ARNG unit on 10 June 1991. He completed 6 months and 5 days of active service.

5. The applicant's NGB Form 22 shows he was given a general discharge from the ARNG on 4 January 1993, due to unsatisfactory performance. He was credited with 4 years, 8 months, and 28 days of net service this period.

6. After a break in service, a second NGB Form 22 shows the applicant again enlisted in the ARNG on 29 June 1998.

7. A physical profile is used to classify a Soldier's physical disabilities in terms of six factors, as follows: "P" (Physical capacity or stamina), "U" (Upper extremities), "L" (Lower extremities), "H" (Hearing), "E" (Eyes), and "S" (Psychiatric) and is abbreviated as PULHES. Each factor has a numerical designation: 1 indicates a high level of fitness, 2 indicates some activity limitations are warranted, 3 reflects significant limitations, and 4 reflects one or more medical conditions of such a severity that performance of military duties must be drastically limited. Physical profile ratings can be either permanent (P) or temporary (T).

8. A Standard Form 88 (Report of Medical Examination) shows the applicant underwent medical examination on 18 October 1999, for the purpose of Regular Army enlistment. The clinical evaluation shows he had his tonsils removed, and had mild scoliosis, scars, and tattoos. He was found qualified for service with a PULHES of 111221, with the ratings of 2 for factors H and E.

9. The applicant's second NGB Form 22 shows he honorably discharged from the ARNG on 25 October 1999, for the purpose of enlistment in any component of the Armed Forces. He was credited with 1 year, 3 months, and 27 days of net service this period and 6 years and 26 days of total service for pay.

10. The applicant enlisted in the Regular Army on 26 October 1999, and retained the MOSs he was awarded while in the ARNG, albeit under different MOS numbers, 21V (Concrete and Asphalt Equipment Operator) and 21W (Carpentry and Masonry Specialist).

11. The applicant deployed to Iraq on 21 March 2003.

12. The applicant's NCOER, covering the period of June 2003 through September 2003, while forward deployed to Iraq, shows in Part IV (Rater) (Values/NCO Responsibilities) he received a rating of "Success" in all portions, with comments including displayed volumes of stamina required to complete missions as night shift battle staff NCO. Senior Rater comments include reliable NCO whose dedication to missions was unsurpassed.

13. The applicant returned from Iraq on 30 January 2004.

14. The applicant's service records contain numerous DA Forms 4856, dated between March 2004 to October 2004, detailing the counseling he received, and in pertinent part show:

a. On 14 April 2004, the applicant was counseled for missing formation that morning, which was becoming a trend for him. This was not the first or second time within the last month that he missed formations. His squad leader knew he was going

through a difficult time in his life and had recommended the applicant attend counseling, but he chose not to go. The applicant indicated he knew he was not at his full potential. He was burned out between the last deployment, divorce, and his medical problems. Once his wife returns to the U.S. in June, he would move into the barracks. With his medical problems, he was seeking a medical discharge.

b. On 15 April 2004, he was again counseled for missing formation that morning. His squad leader recommended the applicant move into the barracks and/or receive UCMJ action as he only had so many options available to him. The applicant responded he understood.

c. On 23 April 2004, he was again counseled for missing morning formation. His squad leader indicated he gave him ample time to get himself right and numerous references for help and been patient, while he was going through his family problems, but he had come to a point where he was forcing the chain of command to act; therefore he would recommend UCMJ action against him. The applicant responded that the different medications he takes at night sometimes put him into a deep sleep and he doesn't hear his alarm. Also, there were days he would be in such pain that it takes him 30 minutes or more to get out of bed. He is in the process of getting a medical board started with a goal of receiving a medical discharge.

d. On 29 April 2004, he was again counseled for missing morning formation. His squad leader indicated he knew the applicant told him and the chain of command that his medications were messing up his sleep, but he could not keep missing formations and was going to recommend him for UCMJ action.

e. On 11 May 2004, he was again counseled for missing morning formation and was once again called out of ranks with his whereabouts unknown. UCMJ action would be recommended.

f. On 12 May 2004, he was again counseled for missing morning formation and informed that UCMJ action would be taken against him.

g. On 1 June 2004, he was counseled for not being at his place of duty on 27 May 2004 and for missing the entire work day on 27 May 2004. He missed the first formation of the day and his platoon sergeant indicated he knew the applicant was taking some medication that may cause him to be drowsy, but that was no excuse for repeatedly not making formations. But on 27 May 2004, not only did he miss morning formation, he missed the entire work day. Multiple individuals in his NCO support chain called him on 27 May 2004 to find out if there was a problem keeping him away from work, but he refused to come to the phone, although he could be heard talking to his wife in the background. He would be recommended for UCMJ action. He had been given all the corrective training available at that level without success.

h. On 25 June 2004, he was counseled because the chain of command received a notification there was a problem with his vehicle registration and he was advised he needed to go to the Vehicle Registration Office in Vilseck to correct the problem. The applicant responded that he did not understand why he was being recommended for UCMJ action. He understood he missed formations, but his explanations have fallen on deaf ears. He has PTSD that is documented in his medical records, which is something he had been dealing with since 1991 when he got home from Operation Desert Storm. He also had several other medical problems for which he was awaiting an MEB. There were days when his body was in such pain that he had to drag himself out of bed to get to work. Secondly, he was separated from his wife and pending divorce due to her adultery while he deployed to Iraq. He was stressed out due to the pending divorce and his separation from his children. Additionally, the times he missed formations or work coincide with the days after he had duty. After duty his body is worn out, plus he is not able to take his medications as prescribed or get the proper rest he needs. His PTSD is enough stress to handle as it is, but the separation from his children and divorce were extra stressors rendering him unable to function in his duties. Why should he receive punishment under Article 15 of the UCMJ for medical conditions beyond his control? He wasn't to take leave to get time away from Germany and the military and all he wants is to be able to start the MEB process to be discharged with pride and dignity. He felt he was being treated unjustly.

i. On 30 June 2004, he was again counseled for being out of ranks at the physical training formation. The applicant stated he had nightmares due to his PTSD and this in combination with his medication caused him to oversleep. He indicated he went to Mental Health Clinic in Vilseck to have his medication adjusted, but did not notice a change in his sleep patterns. He had a follow-up appointment with Mental Health on July 2004, to address these issues.

j. On 9 July 2004, he was counseled for missing accountability formation on 7 July 2004. He stated he overslept and did not wake up until 1330. On 6 July 2004, he had an appointment at Landstuhl and did not arrive back at his room until 2200, and went to sleep around 2230.

15. A DA Form 2627 (Record of Proceedings under Article 15, UCMJ) shows the applicant accepted nonjudicial punishment (NJP) under Article 15 of the UCMJ on 28 July 2004, for the following misconduct:

- a. Without authority, failing to go to accountability formation on 14 April 2004.
- b. Without authority, failing to go to accountability formation on 23 April 2004.
- c. Without authority, failing to go to accountability formation on 29 April 2004.

- d. Without authority, failing to go to accountability formation on 11 May 2004.
- e. Without authority, failing to go to accountability formation on 12 May 2004.
- f. Without authority, failing to go to accountability formation on 27 May 2004.

16. A DD Form 2807-1 (Report of Medical History) shows the applicant provided his medical history on 24 September 2004, for the purpose of separation. He indicated his current medications included Celexa, Methocarbamol, and Trazadone. He also marked the blocks for numerous conditions, to include sinus problems, hearing loss, dislocated shoulder, neck, back, hip and knee pain, difficulty eating, PTSD, periods of excessive sleep and/or sleep deprivation,

17. An AE Form 40-6A-R shows on 28 September 2004, the applicant's commander requested the Vilseck Mental Health Clinic provide the applicant with a mental health evaluation for separation under the provisions of Army Regulation 635-200, paragraph 5-17. The form shows the applicant's immediate commander made the following observations:

a. The applicant's behavior was noticed by the chain of command soon after redeployment from Iraq in February 2004. Martial problems appear to have caused the applicant's severe depression and significantly reduced performance at work.

b. He had shown improvement by correcting problems in being present at accountability formations, but was still challenged by extreme lack of enthusiasm and depression at work.

c. He was even-tempered and maintained bearing at work. He did not demonstrate animosity toward co-workers or superiors.

d. He experienced significant marital problems during the latter half of the unit's deployment to Iraq, undergoing divorce proceedings with his spouse.

e. He underwent Article 15 proceedings for repeated absences from his place of duty. Prior to this, he was counseled orally and in writing as well as was subjected to corrective action by his chain of command.

f. It was in the Army's and the Soldier's best interest that he be separated from the service. While demonstrative high potential during the majority of his assignment to the unit, the recent events in his personal life rendered him unfit for continued service.

18. A DA Form 3822-R shows the applicant underwent a mental status evaluation on 1 October 2004, reflecting:

a. He had the mental capacity to understand and participate the proceedings, was mentally responsible, and met the retention requirements of Army Regulation 40-501, chapter 3.

b. He was diagnosed with adjustment disorder with anxious and depressed mood. The diagnosis represents a medical condition not amounting to disability and not appropriate for separation under Army Regulation 635-200, paragraph 5-11 or 5-13, but which manifests disturbances of emotional control sufficiently severe that the Soldier's ability to effectively perform military duties was significantly impaired.

c. He was psychiatrically cleared for any administrative action deemed appropriate by his command. He was not appropriate for a medical board.

d. This condition and the problems presented by the applicant were not, in the opinion of the examiner, amenable to hospitalization, treatment, transfer, disciplinary action, training or reclassification to another type of duty within the military. It was unlikely that efforts to rehabilitate or develop him into a satisfactory member of the military would be successful.

e. It was recommended the applicant be separated under the provisions of Army Regulation 635-200, paragraph 5-17, as expeditiously as possible. Prolonged retention on active duty may result in management problems for the command.

19. A DD Form 2808 shows the applicant underwent medical examination on 21 October 2004, for the purpose of Army separation. The notes show the applicant had a decreased range of motion in his right hip and by history PTSD with normal mental status today. He was found qualified for separation with a PULHES of 111111.

20. A partial VA Form 21-526, dated 29 November 2004, shows the applicant submitted an application for compensation and/or pension.

21. An undated memorandum shows the applicant was notified by his immediate commander of his initiation of action to separate him with an honorable discharge under the provisions of Army Regulation 635-200, chapter 13, due to unsatisfactory performance. The reason for the proposed action was the applicant's failure to continue to perform satisfactorily as reflected in his repeated incidents of failure to report. He as advised of his right to consult with counsel, submit written statements in his own behalf, and entitlement to a hearing before an administrative board if he had 6 or more years of active and Reserve military service at the time of separation.

22. On 12 January 2005, the applicant acknowledged receipt of his commander's notification of separation memorandum.

23. On 18 January 2005, the applicant indicated he had been advised by his consulting counsel of the basis for the contemplated action to separate him under the provisions of Army Regulation 635-200, chapter 13 for unsatisfactory performance, its effects, and the rights available to him. He indicated he waived consideration of his case by an administrative board, waived consulting counsel, did not submit statements in his own behalf, and understood he may expect to encounter substantial prejudice in civilian life if he were issued a general discharge.

24. On 26 January 2005, the applicant's battalion commander recommended the applicant's general, under honorable conditions discharge under the provisions of Army Regulation 635-200, chapter 13 for unsatisfactory performance.

25. An undated memorandum shows the approval authority directed the applicant's general discharge under honorable conditions under the provisions of Army Regulation 635-200, chapter 13, for unsatisfactory performance.

26. An NCOER covering the period from October 2004 through January 2005, shows the applicant was rated "Success" in all portions of Part IV. He did not take an Army Physical Fitness Test (APFT) due to having a profile beginning September 2004. The only comment is that his profile did not hinder his duty performance.

27. The applicant's DD Form 214 shows he was given a general discharge under honorable conditions on 12 February 2005, under the provisions of Army Regulation 635-200, chapter 13, due to unsatisfactory performance, with corresponding separation code JHJ. He was credited with 5 years, 3 months, and 17 days of net active service this period; 1 year, 9 months, and 26 days of prior active service, and 0 total prior inactive service.

28. The applicant's available service records do not contain a DA Form 3349 (Physical Profile) or show:

- he was ever issued a permanent physical profile rating
- he was diagnosed with a condition that failed retention standards and/or was unfitting

29. A C&P Exam Report for Initial Evaluation for PTSD, dated 20 September 2005, shows the applicant underwent examination on 27 August 2005, which shows in pertinent part:

a. He reported a past psychiatric history remarkable for previous diagnoses of dysthymia and PTSD; his first contact with a psychiatrist occurred in August 2002, when he experienced anger and problems in his marriage and was started on Celexa.

b. He reported intermittent suicidal ideation and was never psychiatrically hospitalized

c. He reported a past medical history remarkable for degenerative disk disease in the cervical and lumbar spine along with headaches with pain in the right occiput and numbness on the right side of his face

d. The impression shows the following diagnoses:

- alcohol abuse, ongoing (primary diagnosis) and PTSD
- neck and low back pain secondary to cervical and degenerative disc disease
- moderate psychosocial stressors

30. The applicant provided multiple VA medical records, dated between December 2005 – January 2006, all of which have been provided to the Board in full for review.

31. A VA Rating Decision, dated 5 April 2006, shows the applicant was granted the following service-connected disability ratings effective 13 February 2005:

- PTSD, 30 percent
- chronic neck pain, 10 percent
- tinnitus, 10 percent

32. 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.

33. 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 requesting an upgrade of his 12 February 2005 discharge characterized as under honorable conditions (general) and, in essence, a referral to the Disability Evaluation System for PTSD. He states through counsel:

“Mr. [Applicant] should have been provided Disability Evaluation System (DES) for his PTSD (erroneously diagnosed at discharge by a medical examiner during a command-directed mental health exam as adjustment disorder) rather than administratively separated for Unsatisfactory Performance due to his PTSD symptoms.

If the Army had properly diagnosed the Mr. [Applicant]'s condition as PTSD, and provided the requisite DES processing, Mr. [Applicant] would have been awarded a medical retirement with a 30 percent rating for his unfitting PTSD.”

c. The Record of Proceedings outlines the applicant's military service and the circumstances of the case. The applicant's DD 214 for the period of Service under consideration shows he entered the regular Army on 26 October 1999 and was discharged on 12 February 2005 under the provisions in chapter 13 of AR 635-200, Active Duty Enlisted Administrative Separations (1 November 2000) for unsatisfactory performance. It shows a period of Service in Iraq from 21 March 2003 thru 1230 January 2004.

d. From March thru July 2004, the applicant received multiple counselings and one Article 15 for multiple episodes of failure to repair.

e. The applicant underwent a command directed mental health evaluation on 1 October 2004. The senior psychiatrist documented a normal examination after which he diagnosed the applicant with “Adjustment Disorder with Anxious and Depressed Mood.” She went on to opine the applicant had the mental capacity to understand and participate in the proceedings, was mentally responsible, met the medical retention standards in chapter 3 of AR 40-501, Standards of Medical Fitness, and was psychiatrically cleared for any administrative action deemed appropriate by command. She stated:

“Diagnosis: 309.28 Adjustment Disorder with Anxious and depressed Mood

1. The Diagnosis as shown above represent a medical condition not amounting to Disability (AR 635-40) and not appropriate for separating under AR 635-200. Paragraphs 5-11 or 5-13, but which manifests disturbances of emotional control sufficiently severe that the soldier's ability to effectively perform military duties is significantly impaired.

2. This individual is psychiatrically cleared for any administrative action deemed appropriated by command.

3. Individual is not appropriate for a medical board.

4. This condition and the problems presented by this individual are not, in the opinion of the examiner, amenable to hospitalization, treatment, transfer, disciplinary action, training or reclassification to another type of duty within the military. It is unlikely that efforts to rehabilitate or develop this individual into a satisfactory member of the military will be successful ...”

f. On 12 January 2005, his company commander informed him of the initiation of action to separate the applicant under provisions in chapter 13 of AR 635-200: “The reason for my proposed action is due to a failure to continue to perform satisfactorily as reflected in your repeated incidents of failing to report.” The initiated action was later approved by the commander to the 100th Area Support Group with the directive he receive an under honorable conditions (general) characterization of service.

g. There are no mental health related clinical encounters in the EMR. His pre-separation medical examination notes he was taking Celexa and Trazadone and had a history of PTSD, after which the examining provider wrote “Normal mental status today.”

h. There is insufficient probative evidence the applicant’s PTSD or any other medical condition failed the medical retention standards of chapter 3, AR 40-501 prior to his discharge. Thus, there was no cause for referral to the Disability Evaluation System. Paragraph 3-1 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (1 September 1990) states:

“The mere presences of an impairment does not, of 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 with the requirements of the duties the soldier reasonably may be expected to perform because of his or her office, grade, rank, or rating.

i. JLV shows he has been awarded multiple VA service-connected disability ratings, including a 30% rating for PTSD effective 13 February 2005, the day after his separation from the Army. However, the DES compensates an individual only for service incurred medical condition(s) which have been determined to disqualify him or her from further military service. 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. These roles and authorities are granted by Congress to the Department of Veterans Affairs and executed under a different set of laws.

j. It is the opinion of the Agency Medical Advisor that a referral to the DES is not warranted.

k. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? PTSD

(2) Did the condition exist or experience occur during military service? His PTSD is VA service connected and appears due to his Service in Iraq.

(3) Does the condition or experience actually excuse or mitigate the discharge? YES. As the condition is associated with avoidant behaviors and resistance to authority, it fully mitigates the multiple failures to repair which resulted in his separation for unsatisfactory performance.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that partial relief was warranted. The Board carefully considered the applicant's request, supporting documents, evidence in the records, and published Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement, through counsel, and record of service, the frequency and nature of the applicant's misconduct and the reason for separation. The applicant was discharged based on unsatisfactory performance with the command citing a record of nonjudicial punishment and several counselings from March 2004 to October 2004 for infractions including missing formations.

2. The Board found no error or injustice in the designated characterization of service assigned during separation. The Board noted the applicant's assertion of post-traumatic stress disorder (PTSD); however, reviewed the medical advisor's review and determined his PTSD, although rated through the Department of Veterans Affairs (VA), is insufficient to warrant the requested relief.

3. Additionally, the Board concurred with the medical advising official finding that the applicant's VA rating determinations are based on the roles and authorities granted by Congress to the Department of Veterans Affairs and executed under a different set of laws. Based on this, the Board determined referral of his case to the Disability Evaluation System (DES) is not warranted.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
TS:	KS:	TC:	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.

 Revoked certificate

X Tamara Sorrell

CHAIRPERSON

Signed by: SORRELL.TAMARA.LATRICE.1095521920

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 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 court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds. This guidance does not mandate relief, but rather provides standards and principles to guide BCM/NRs 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. 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.

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 (DES) 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 (Physical 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 (MMRB); 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.

c. The percentage assigned to a medical defect or condition is the disability rating. A rating is not assigned until the PEB determines the Soldier is physically unfit for duty. Ratings are assigned from the Department of Veterans Affairs (VA) Schedule for Rating Disabilities (VASRD). The fact that a Soldier has a condition listed in the VASRD does not equate to a 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. There is no legal requirement in arriving at the rated degree of incapacity to rate a physical condition which is not in itself considered disqualifying for military service when a Soldier is found unfit because of another condition that is disqualifying. 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.

5. 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.

6. Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), in effect at the time, sets forth the basic authority for the separation of enlisted personnel.

a. Chapter 3 (Character of Service/Description of Separation) provides guidance on the appropriate type of discharge and characterization of service.

(1) An honorable discharge is a separation with honor. The honorable characterization is appropriate when the quality of the Soldier's service generally has met the standards of acceptable conduct and performance of duty for Army personnel or is otherwise so meritorious that any other characterization would be clearly inappropriate.

(2) A general discharge is a separation from the Army under honorable conditions. When authorized, it is issued to a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

b. Chapter 5 (Separation for the Convenience of the Government) provides for separation for the convenience of the Government.

(1) Unless the reason for separation requires a specific characterization, a Soldier being separated for the convenience of the Government will be awarded a character of service of honorable, under honorable conditions, or an uncharacterized description of service if in an entry-level status.

(2) Paragraph 5-3 (Secretarial plenary authority) states separation under this paragraph is the prerogative of the Secretary of the Army. Secretarial plenary separation authority is exercised sparingly and seldom delegated. Ordinarily, it is used when no other provision of this regulation applies, and early separation is clearly in the best interest of the Army.

c. Chapter 13 (Separation for Unsatisfactory Performance) states a Soldier may be separated per this chapter when it is determined that he/she is unqualified for further military service because of unsatisfactory performance. Commanders will separate a Soldier for unsatisfactory performance when it is clearly established that:

(1) In the commander's judgment, the Soldier will not develop sufficiently to participate satisfactorily in further training and/or become a satisfactory Soldier.

(2) The seriousness of the circumstances is such that the Soldier's retention will have an adverse impact on military discipline, good order, and morale.

(3) The Soldier will likely be a disruptive influence in duty assignments.

(4) The circumstances forming the basis for initiation of separation proceedings will likely continue or recur.

(5) The Soldier's ability to perform duties effectively is unlikely.

(6) The Soldier's potential for advancement or leadership is unlikely.

d. Paragraph 13-5 (Action by unit commander when Soldier is under military control) shows when separation for unsatisfactory performance is appropriate, the unit commander will:

(1) Take action specified in the notification procedure

(2) Forward the case recommending separation for unsatisfactory performance

(3) Ensure that a medical examination and mental status evaluation is obtained.

(4) When appropriate, forward the case recommending that the Soldier be process through medical channels. This is required when UCMJ action is not initiated and when the Soldier has an incapacitating physical or mental illness that was the direct or substantial contributing cause of the conduct for which separation action is being considered.

e. The service of Soldiers separated because of unsatisfactory performance will be characterized as honorable or under honorable conditions as warranted by their military records.

7. 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.

8. 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.

//NOTHING FOLLOWS//