

IN THE CASE OF: [REDACTED]

BOARD DATE: 3 October 2024

DOCKET NUMBER: AR20230013438

APPLICANT REQUESTS:

- Medical disability retirement at a 70 percent disability rating or no less than 30 percent disability rating effective 1 November 2004 or
- Return the case to the Disability Evaluation System (DES) with instructions to consider all conditions in determining his fitness to serve or the extent of his medical disabilities
- Payment of Combat Related Special Compensation (CRSC)
- Retroactive Retirement Pay
- Tricare insurance
- Personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
 - Petition for Correction of Records
 - List of Enclosures
 - Enclosure 1 - Power of Attorney
 - Enclosure 2 - Physical Disability Board of Review (PDBR) Decision
 - Enclosure 3 - DD form 214 (Certificate of Release or Discharge from Active Duty)
 - Enclosure 4 - Military Awards, Certificates, Badges, and Medals
 - Enclosure 5 - Personal Statement
 - Enclosure 6 - Employment Assistance Program (EAP) Records
 - Enclosure 7 - Military Treatment Records
 - Enclosure 8 - Department of Veterans Affairs (VA) Disability Ratings
 - Enclosure 9 - Hagel Memorandum
 - Enclosure 10 - Kurta Memorandum
- Supplemental Submission, 16 December 2024
 - Letter from Attorney Supplemental Information
 - Enclosure 1 - Certified Mail Return Receipt
 - Enclosure 2 - PDBR Application
 - Enclosure 3 - PDBR Record of Proceedings

- Enclosure 4 - Patient Chart from Dr. [REDACTED]
- Enclosure 5 - Trigger Episodes and Appointment Journal
- Enclosure 6 - Recommendation for Medical Retirement Consideration

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. Regarding the applicant's request for payment of CRSC, because he is not retired, he is not currently eligible for CRSC. If a correction of his record results in his retirement, he may apply to the CRSC Branch, U.S. Army Human Resources Command. Therefore, this portion of his request is currently outside the purview of the Board and will not be discussed further in these proceedings.

3. The applicant states:

a. While securing a town in Iraq, he took cover behind a wall but due to the reverberations of the tanks, instead of providing safety, the wall came down on him causing significant injuries to his shoulder, back, neck, and head.

b. He was Medevac'd and during the process, he was left out in the open, unarmed, and unable to defend himself while remaining in an active combat zone. While being treated in theater, he witnessed countless atrocities impacting innocent bystanders, and as a result, he developed post traumatic stress disorder (PTSD).

c. When his shoulder did not heal enough to allow him to return to service as a 13B (Cannon Crewmember), a Medical Evaluation Board (MEB) was initiated, but it was limited to his shoulder despite the back and neck injuries, traumatic brain injury (TBI), and PTSD all stemming from the same incident. This resulted in a medical discharge with severance instead of the appropriate disability retirement.

d. The PDRB decided his case on 28 July 2016, but the decision letter indicated the decision was final without any reference to the limited scope of the PDRB and the option to pursue relief through the Board for matters outside the scope of the PDRB. Because of this, his pursuit of relief to this Board was delayed. It is in the interest of justice to consider this case on the merits, especially in light of the language disclaiming options for recourse from the Army.

4. Petition for Correction of the applicant's military record states:

a. The law firm was retained by the applicant to represent him regarding his request for a medical disability retirement which was erroneously and unjustly denied, when he was discharged from the service in 2004 without regard to the plainly unfitting nature of multiple injuries he incurred, during his deployment to Iraq in 2003. He executed a Representational Power of Attorney, containing a Privacy Act waiver, on behalf of the law firm to effectuate their representation. This is his first request to the Board seeking the correction of his records. He previously exhausted all administrative avenues for relief, as evidenced by the PDBR issued on 28 July 2016. This action is now properly before the Board as the only entity vested with the authority to correct this injustice. They respectfully request the Board forward all future correspondence related to this matter to the law office with a copy to the applicant.

b. While deployed to Iraq, the applicant's unit was actively securing a town with tanks firing shells weighing over 100 pounds, which causes significant reverberations. He took cover behind the wall of an abandoned building to shield himself from incoming fire, but the building in question was unstable, and the firing of the tanks caused the wall to sway. Shortly after taking cover, the wall collapsed on him causing significant injuries to his shoulder, back, neck, and head. After being extricated from the rubble, he was medically evacuated first to Balad, Iraq where he was left alone, out in the open, and vulnerable to enemy attacks. He was then evacuated to Central Command (CENTCOM) Theater of Operations. He underwent surgery and rehabilitation for his should, the most obvious injury and the one that required urgent intervention to create any meaningful chance of him returning to duty. His other injuries were largely overlooked - a fact acknowledged by the Department of Defense (DoD) after looking back on the numerous cases where Soldiers, Sailors, Airmen, and Marines were pushed out of the military with minimal benefits because they were rushed through the DES and specifically because TBIs and PTSD were not properly evaluated.

c. Unfortunately, despite his efforts to overcome his injuries, he remained physically unable to perform his duties. Because the focus had been his shoulder injury, this was what was referred to the MEB, and the rest of his conditions were minimized and deemed as either meeting retention standards or not severe enough to be labeled as unfitting. As a result, he was separated from the Army with severance as a result of the 10 percent disability rating for his shoulder when he was actually suffering from orthopedic, neurological, and mental health conditions that also prevented him from performing the duties of his military occupational specialty (MOS), grade, and rank. While the MEB failed to thoroughly assess these conditions, the VA acknowledged the remaining injuries, determined them to be combat related, and directed compensation accordingly.

d. Title 10 U.S. Code (USC) 1552(b) provides that applications for correction of military records must be filed within three years after the discovery of the alleged error or injustice. The Board may also waive or excuse and untimely filing in the interest of

justice if the Board determines it to be in the interest of justice to do so. The applicant separated from the Army in 2004. In 2014, he applied to the PDBR, which had been created specifically to review medical disability discharges occurring between 2001 and 2009 to assess whether the unfitting condition was properly rated. In 2016, the PDBR denied relief, but did so based upon the limited purview of the board's statutory authority. In the letter of denial. The PDBR incorrectly stated that its decision was final and that, "[r]ecourse within the Department of Defense [and] the Department of the Army is exhausted," so he reasonably assumed he had no other options to correct his disability rating.

e. Upon learning the Board is available to redress the errors in his MEB/Physical Evaluation Board (PEB) processing that fall outside the purview of the PDBR, he immediately began pursuing this petition. All of his administrative remedies have been exhausted, and the Board is the only agency vested with the authority to grant the relief requested herein. They therefore respectfully request the Board waive the three year filing limit, in the interest of justice.

f. The applicant enlisted in the U.S. Army on 16 October 1997, and he entered active duty on 22 July 1998. He served honorably through the intense early phases of the Global War on Terror and invasion of Iraq, until his discharge on 1 November 2004. During the five years and eleven months he served, the entirety of which was served as a 13B, he earned two Army Commendation Medals, Six Army Achievement Medals, two Army Good Conduct Medals, and the National Defense Service Medal.

g. On 29 March 2003, he deployed with his unit to Kuwait and Iraq as part of Operation Iraqi Freedom. He received commendation for "his attention to detail, adherence to standards, and mission accomplishment was instrumental in the unit being able to travel well over 1000 kilometers as it kept up with elements of the divisional cavalry squadron of the 4th Infantry Division (Mechanized)" as well as having "tirelessly manned perimeter guard points, traffic control points, and provided security for the unit's many convoys in and around Iraqi towns, villages, and cities in temperatures well above 100 degrees Fahrenheit and other adverse conditions."

h. While deployed, the applicant took cover behind a brick wall, and due to the reverberations from the tank firing, the wall gave way and fell on top of him causing him to tear his rotator cuff, aggravate his lower back condition, and suffer a TBI. He was first Medevac'd to Balad, Iraq where he reporting being under constant mortar and direct enemy fire, and he - without his weapon - was forced to take cover under his cot. During his time in Baghdad, Iraq, he developed PTSD based upon both fear caused by his complete and utter vulnerability and the atrocities witnessed, while there. He was finally Medevac'd to Landstuhl Regional Medical Center in Germany for evaluation and treatment of his shoulder only. He underwent surgery for the tear in rotator cuff in December 2003 and began a long regimen of physical therapy. Throughout the time, he

made repeated complaints of lower back pain, the lack of any relief from conservative treatment and/or medications, and the need for assistance to alleviate his pain. His records show the providers acknowledged his back pain but were unable to determine the specific etiology of the pain, so they referred him for pain management. Several entries in the record indicate he is being medically discharged as a result of his shoulder injury, so he should follow-up with pain management until, and after, his discharge.

i. He reported witnessing the horrors of war such as "children, civilians, and or Soldiers with missing limbs" and "a civilian get his head blown off by our .50 caliber" causing him to fear for his life throughout his deployment - that fear intensified, when he was transported from the site of his injury to the medical clinic since he was left alone, strapped to a stretcher, and without a weapon. While he did not indicate a desire to seek mental health treatment immediately following his deployment, he was most certainly suffering from PTSD. Following his discharge, his symptoms were severe and he attempted to mask the pain (physical and mental) with alcohol, marijuana, and narcotics. On instance he noted in his EAP records he blacked out and was in a physical altercation with his stepson - scaring his wife and children. This altercation, along with his addition to medication prescribed for his back pain, have cause an enormous amount of strain on him and his family.

j. The DES is the mechanism for determining return to fitness for duty, separation, or retirement of servicemembers because of disability in accordance with DoD Instruction 1332.18 as implemented in Army Regulation (AR) 40-501 (Medical Services: Standards of Medical Fitness). A careful review an application of these requirement reveals the applicant's case was not handled properly and denied him appropriate consideration of the full extent of his disabling conditions thereby resulting in a severe and ongoing injustice for both the applicant and his family. Instead of a thorough and impartial review, he was rushed through the separation process with a referral for only his shoulder injury as opposed to the extent of his disabling conditions incurred at the same time - let along those that progress over time and caused him to be designated an unfit individually and/or in conjunction with the other conditions. This deprived him of a meaningful opportunity receive a medical retirement, but due to the lack of guidance afforded a servicemember, he was not aware that this was important and would forever impact his life. Allowing the medical discharge with severance to stand under these circumstances would be perpetuating this flagrant injustice, and this Board is vested with the authority to correct this for the benefit of the applicant and his family.

k. In determining a servicemember's disability rating, medical and procedural standards are applicable to every disability evaluation and these standards must be consistently and equitably applied to every servicemember. The Army is required to consider all medical conditions that, individually or collectively, render the Soldier unfit to perform the duties of that Soldier's office, grade, rank or rating.

I. AR 40-501, chapter 3 explains the Army's medical standards for retention and separation of Soldiers - including factors for consideration as to whether a medical disability retirement is warranted. A non-exhaustive list of disqualifying conditions is provided to assist providers in determining what conditions to refer to an MEB. Not all disqualifying conditions result in an unfitting determination, so the regulation directs an assessment of whether the Soldier's medical conditions and/or physical defects:

(1) Significantly limit or interfere with the Soldier's performance of their duties as substantiated by the Soldier's commander or supervisor.

(2) Require medication for control, which requires frequent monitoring by a physician due to debilitating or serious side effects, medical care, or hospitalization with such frequency as to interfere with satisfactory duty performance.

(3) Restrict performance of any of the profile function activities listed in Section 4 of DA Form 3340 (Physical Profile) prevent the performance of all aerobic events of the Army Physical Fitness Test, have met a clinic medical retention determination point, or have been temporarily profiled for more than 365 days.

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

(5) May compromise the heal or well-being of other soldiers.

(6) May prejudice the best interest of the U.S. Government if the individual were to remain in military service.

m. The applicant suffered a variety of injuries, both visible and unseen, during his military service and combat deployment in 2003. His medical records clearly establish he began suffering from disqualifying medical conditions, during and after his combat deployment in 2003. Though he was evaluated and separated only on the sole basis of limitations in the range of motion of his arms, his medical records reveal that he was experiencing and being treated for lower back pain, rhinitis, ankle pain, and ear pain. Furthermore, his military service reflects he was also suffering from PTSD and TBI but was never treated for such conditions - largely due to the lack of scientific knowledge on TBIs and the overwhelming Operational Tempo associated with the war that forced expedited evaluations, treatments, and dispositions for all those servicemembers unlikely to return to the fight. These conditions are potentially disqualifying per AR 40-501, chapter 3. Because these diagnosed conditions can, either singularly or in combination, limit his fitness for duty. His healthcare providers were required to initiate a permanent medial profile, thereby initiating referral to the DES. Neither occurred.

Further, since he was already referred to an MEB, his providers were required to assess all of his conditions to determine his individual and collective fitness for service, but not only did they fail to separately refer his conditions to an MEB, they failed to incorporate these into the already pending MEB leaving that entity with only a snippet of his medical fitness upon which to base their overall fitness determination. Without the inclusion of these other conditions, the board was unable to make any collective fitness determinations, and specifically the failure to include the TBI and PTSD negated the board's ability to determine whether he could return to duty from an emotional and cognitive standpoint. The failure to include these conditions unjustly denied him the possibility of a disability retirement, especially because orthopedic conditions are typically rated far less than mental health and cognitive conditions.

n. The applicant suffered from lower back pain that failed to respond to adequate conservative treatment. He was suffering from recurrent low back pain, which effectively prevented him from running or lifting any type of weight and should have been referred to DES. Per AR 40-501, paragraph 3-20h, nonradicular pain involving the cervical, thoracic, lumbosacral or coccygeal spine is unfitting when the medical condition fails to respond to adequate conservative treatment and necessitates significant limitation of physical activity. It is not in his medical records that he could not lift heavy weights, and his physical abilities were limited to only lower body movement. He could not march over two miles with weight because of both his shoulder and back pain. His condition and/or symptoms were notated, during his separation physical and were actually known well before his separation took place. This condition rendered him unfit as a 13B2P, cannon crewmember, because cannon crewmembers must have the ability to lift heavy artillery shells into cannon chambers. Also, artillery batters are not stationary and must be able to fire and maneuver in order to avoid counter battery fire. Given the fact he could not lift heavy weights or run without experiencing extreme pain, it is readily apparent he should have been referred to the DES for this specific condition.

o. His head injury has resulted in frequent disabling migraines for which he receives 10 percent service connected disability for TBI and 50 percent for migraine headaches from the VA. When the wall fell on top of him, he injured not only his shoulder and back, but he suffered a blow to the head as well. Given the limited knowledge of, and attention to, TBI in the early 2000s, this was not sufficiently evaluated or treated, but afterwards, he began suffering from frequent prostrating migraines. AR 40-501, paragraph 3-31 indicates migraine, tension, or cluster headaches are cause for referral to the DES when those migraines "[r]equire medication for control that requires monitoring by a physician due to debilitating or serious side effects, medical care, or hospitalization with such frequency as to interfere with the satisfactory performance of duty." Also, when such medical condition "[m]ay 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...frequent special treatments, or requirement for frequent clinical monitoring." While it may not have been classified as such, he began feeling the effects

of TBI, after his return from Iraq as evidenced in is post deployment health assessment (PDHA) wherein he reported he was suffering from "difficulty remembering."

p. He must take medication everyday simply to mitigate his TBI, PTSD, and migraines, which raises a concern he may become addicted to his medication. While the medication helps, it does not resolve these conditions entirely, and as a result, he is struggling to maintain relationships. If he were to have continued his military service, his symptoms would have been exacerbated by near constant triggers. Further, the possibility of future deployments in and of itself triggers his symptoms, let alone him actually being required to deploy. As a result, he would have required a profile designating him as nondeployable and imposing special limitations to allow for the continuous treatment for his mental health conditions. In fact, to this day, he requires frequent clinical monitoring even without the constant exposure to other service members. While he may not have displayed such obvious symptoms of PTSD and TBI that third parties could not help but notice, his action in raising his difficulty remembering in his PDHA warranted follow-up evaluation and treatment by his medical providers. The VA has determined his migraines and TBI were proximately caused by the wall falling on him in Iraq in 2003, and this lends support to the overarching injustice caused by his rushed DES processing.

q. His PTSD was unfitting prior to his separation from the Army, and the Army's failure to understand and appreciate the existence and severity of his condition cannot be used to deny him relief now in light of the known deficiencies in mental health screenings in the early 2000s. He has suffered from PTSD, since his combat deployment in 20023, and his emotional instability following his return emphasizes the severity of his condition. There can be no doubt that a Soldier who suffers from the effects of severe PTSD - such as lacking self-control and engaging in physical altercations with family members - is unfit for continued military service. Per AR 40-501, paragraph 3-33, the causes for the referral to the DES are as follows:

(1) Anxiety obsessive-compulsive, dissociative, somatic symptom, and related disorders (excluding factitious disorder), and trauma and stressor related disorders.

(2) Persistence or recurrence of symptoms sufficient to required extended or recurrent hospitalization.

(3) Persistence or recurrence of symptoms that interfere with duty performance and necessitate limitation of duty or duty in a protected environment.

r. The applicant receives 50 percent service connection disability through the VA for PTSD resulting from the anxiety, panic, and helplessness associated with being injured, under fire, and lacking a weapon or other means of defending himself. While he was not treated for PTSD, while on active duty, this was largely due to the lack of scientific

knowledge concerning PTSD available to military medical providers, at the time. Even with this limited knowledge, had military medical provider thoroughly evaluated him, they would likely have recognized some of his symptoms and referred him for further evaluation - either within the DES or by a specialist to make that determination. In either instance, the subsequent specialized review would have acknowledged that his symptoms were so severe that he was unfit for duty as a cannon crewmember because just the sounds of cannon fire - whether deployed or in training - would have triggered acute exacerbations of his PTSD necessitating he remain in a limited duty status to avoid such exposure.

s. He suffered from sleep apnea, an unfitting medical condition both individually and in combination with PTSD and TBI, prior to his separation from the Army. He was diagnosed with obstructive sleep apnea (OSA) after undergoing a polysomnogram in October 2009 following his separation from service. Per AR 40-501, paragraph 3-32b(2), referral to DES for OSA is warranted when the condition causes "daytime hypersomnolence or snoring that interferes with the sleep of others and cannot be corrected with weight loss, positive airway pressure, surgery, or an oral appliance."

t. Here, while he was not diagnosed with OSA until after his separation from service, this, like his PTSD and TBI, is the result of a lack of knowledge and inquiry into this condition. The VA assigned him a 50 percent service connected rating for his sleep apnea after determining he required the use of a CPAP machine, and while the diagnosis was post-discharge, the VA recognized it existed prior to his discharge. Had he been referred for in-depth evaluations for his PTSD and TBI, it is probable that the providers would have observed the associated sleep symptoms and ordered a sleep study prior to his MEB getting underway. This is another example of the significance of both PTSD and TBI being underappreciated by the military, during these early years of wars in Iraq and Afghanistan, and had the providers been properly educated and trained, his OSA would have warranted referral to the DES.

u. The Hagel and Kurta memorandums provide additional support for referring him to the DES. On 3 September 2014, then Secretary of Defense, [REDACTED] sent a memorandum to the Secretaries of the Military Departments to provide guidance for the Board for Correction of Military/Naval Records in reviewing applicants' petition where a diagnosis of PTSD is at issue.

v. This includes a requirement that the Board conduct a comprehensive review of all materials and evidence provided by the petitioner. Quite often, however, the records of servicemembers who served before PTSD was recognized...do not contain substantive information concerning medical conditions in either service treatment records or personnel records. Special consideration will be given to VA determinations, which documents PTSD or PTSD-related conditions connected to military service. In cases where service records or any document from the period of service substantiate the

existence of one or more symptoms of what is now recognized as PTSD or a PTSD-related condition, during the time of service, liberal consideration will be given to finding that PTSD existed, at the time of service.

w. Further, in providing clarifying guidance for consideration of cases addressing military sexual trauma and mental health conditions, Under-Secretary of Defense Kurta stated, "[i]nvisible wounds, however, are some of the most difficult cases they review and there are frequently limited records for the boards to consider, often through not fault of the veteran, in resolving appeals for relief." Understanding the difficulties for servicemembers suffering from mental health conditions, Undersecretary Kura explained that "[s]tandards for review should rightly consider the unique nature of these cases and afford each veteran a reasonable opportunity for relief even if the...mental health condition was not diagnosed until years later."

x. The applicant was discharged in 2004, long before the guidance of this memo, but squarely within the window of time that prompted the issuance of this memo. As such, while his PTSD, TBI, and secondary conditions were not diagnosed until after his discharge, they were directly tied to his service by the VA - a fact weighing in favor of relief now under the liberal review mandate espoused by the Undersecretary. These circumstances are the very ones intended to be corrected by the issuance of this memo, and as such, the Board should grant the applicant a medical disability retirement based upon his numerous unfitting medical and mental health conditions that were overlooked or underappreciated, at the time of his discharge.

y. The applicant was suffering from numerous unfitting medical conditions prior to his separation from service that warranted referral to the DES. It is without question that a servicemember whose main responsibility is to operate artillery and who can no longer effectively do so due to severe PTSD, anxiety, and should/spinal issues should have been referred to the DES, prior to his separation from service. Per AR 40-501, each medical provider was required to refer him to the DES upon discovery of his potentially unfitting medical conditions. The failure to promptly refer him to the DES upon discovery of his numerous and clearly unfitting medical conditions was contrary to the mandates and provisions discussed. As such, they respectfully asked the Board take the appropriate steps to correct the clear errors and injustices described.

5. The applicant provides the following documents:

a. A personal statement of the applicant, which states:

(1) He served for six years in the U.S. Army and made the rank of sergeant (SGT)/E-5 (Promotable). His plan was to retire from the Army and had just reenlisted for three more years. He was supposed to get pinned his E-6 in Iraq, but it never happened.

(2) In 2003, he was in Iraq, and they settled in what was once considered a gym for the local town. The compound had weak walls, structurally unstable walls, and had Constantine wire and polls running through them. The shooting of tanks and incoming fire made the wall unstable which caused a whole section of a wall to collapse on him. It fell on his right side and on his head.

(3) He was bleeding from the entire right side of his body. His head was bleeding, his left shoulder was as big as a soft ball, and he was bleeding on his arms and legs because the wire cut through his uniform. The weight of the wall fell on his left shoulder and to the ground, which tore his rotator cuff and other tissues.

(4) He had surgery on his shoulder, and he got medically discharged from the Army in November 2004, as he could minimally meet Army Soldier standards. The Army medically discharged him with 10 percent disability because of his shoulder injury. He was also discharged with a total percentage of 40 percent that included his back, both ankles, and ringing in the ears.

(5) Because of his injuries, he has had other mental and physical disabilities, all service connected. In 2008, he became 100 percent and in 2020 he became 100 percent permanent and total with the VA.

(6) He has dealt with other problems like headaches, PTSD, sleep apnea and he must use a machine, fusion surgery on his neck, and he almost overdosed on pain medications. He is now still being treated with counseling and therapy with the VA. He is taking medications and seeing a psychiatrist on a regular basis. He also has a social worker and uses his jobs employee assistant program for extra counseling. For his physical disabilities, he uses VA community care to see chiropractors/pain management and the VA pays the bills to the private providers.

(7) The main thing that his disabilities have affected are the relationships with his wife, family, and employment. He is in the middle of a separation with his wife because she cannot understand him, and she will not forgive him for what he has done over the years. He takes out his anger on his family, when his disabilities get triggered like when he gets headaches.

(8) When the wall fell on him a MEDEVAC helicopter was called to pick him up. They strapped him in a litter to where he could not move, and they left him laying on the floor for about 30 minutes. The whole time, he was being bitten by mosquitos and he was screaming out loud for help and no one could hear him because of the helicopter noise.

(9) He was getting eaten by mosquitoes on his bloody face and the whole right side of his body where he was cut and bleeding from the Constantine wire. The

helicopter was not close by him, but it was far away enough to allow mosquitoes and for them not to hear him call out for help.

(10) This incident is very hard to cope with and sometimes triggers his depression. After he was airlifted, he ended up in Balad, which is one of the worst places to be and it is close to Baghdad. He ended up in a city tent hospital without his weapon and he believes the name was camp Anaconda.

(11) As soon as he got there, he saw that he had come to a more dangerous place. The enemy would shoot in any direction into the city test with artillery mortars. He was high on pain medication drugs, and he had no weapon to defend himself with. The projectiles landed so close they rattled his jaw. They were told to just get under their cots for protection. This was a very scary time for him because he felt defenseless without his weapon. He saw children, civilians, and Soldiers with missing limbs. He saw civilian get his head blown off by our .50 caliber.

(12) His quality of life is terrible because he also deals with so much pain that causes him stress and anxiety. He has a bulge disc on his lower back, he has arthritis in his neck which required a fusion, his left shoulder is weak and the VA said they recommended surgery, his right shoulder is giving him pain, he has arthritis on both of his ankles, and now his knees are giving him issues.

(13) He had to change jobs and used the union to accommodate him because of his physical disabilities, which caused him to lose money. He had to use the union to help protect him from his job because of harassment because management said it was too slow.

(14) He is respectfully asking for the max benefits available to him to include full payment of CRSC, Tricare, back pay, and all benefits that come with retirement. It is unfair, ridiculous, and unconscionable that others who abuse the system benefit from it, yest some like him, a veteran, a patriot, and a taxpayer has to pay out of pocket thousands of dollars and use a lawyer to obtain his earned benefits.

b. EAP records, which show he assessed EAP to help him with his VA disability claim and discussed his PTSD, martial problems, and work. The entire documents are available for the Board's review.

c. Military treatment records, which include his PDHA and show when he saw a physician and what he saw the physician for to include his surgery on his shoulder and his complaints of back pain. The documents are available for the Board's review.

d. Document which shows his VA rated disabilities as:

- Degenerative joint disease, left ankle, 10 percent, 2 November 2004
- Healed left rotator cuff tear with residual strain, 20 percent, 2 November 2004
- Eustachian tube dysfunction with healed left tympanic membrane perforation, 0 percent, 2 November 2004
- Bilateral hearing loss, 0 percent, 30 September 2008
- Mechanical low back pain and arthritis of the lumbar spine, 20 percent, 2 November 2004
- Gastroesophageal reflux disease, 10 percent, 11 December 2016
- Sleep apnea, 50 percent, 15 October 2009
- Degenerative joint disease, right ankle, 10 percent, 2 November 2004
- Degenerative disc disease, cervical spine, 20 percent, 1 July 2015
- Tinnitus, 10 percent, 2 November 2004
- PTSD with depressive disorder, 50 percent, 15 Jun 2015
- Erectile Dysfunction, 0 percent, 24 August 2011
- TBI, 10 percent, 11 December 2016
- Migraine headaches, 50 percent, 17 July 2015
- Left shoulder scar, 10 percent,

6. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

7. On 16 December 2024, the applicant's attorney sent a letter requesting a status update with supplemental information, which states:

a. In 2014, the applicant filed his application with the PDBR and specifically raised two main issues: 1) that he was removed from treatment to perform details at the direction of the commander and was therefore, denied the full opportunity to rehabilitate and continue serving before his MEB, and 2) that he was suffering from additional disabling conditions, at the time of his discharge, that were overlooked - specifically including spinal injuries, TBI, and PTSD.

b. In the record of proceedings conducted by the PDBR, it is explicitly stated that they are not authorized to consider the various medical and mental health conditions that were overlooked, during his original DES processing. These conditions greatly impacted him both, at the time of his discharge and now. He remains symptomatic despite treatment and coping techniques, and this has resulted in a recommendation he retire from civilian employment.

c. While the newly provided exhibits post-date the applicant's separation by several years, they are still useful to this Board in understanding and recognizing the severity of his injuries even away from the military environment and the egregiousness of the decision not to medically retire him in 2004. His shoulder injury was the primary

consideration for his discharge, and his condition was severely minimized by the board, but what was more egregious was that his other conditions were entirely overlooked, despite their significant impact on his ability to perform his duties. The PDBR did not have the authority to take these conditions into consideration, but his Board does.

d. His PTSD continues to plague him on a daily basis. He and his son worked together to prepare a journal documenting his symptoms and his appointments as a tool to help him manage his condition more effectively by being able to accurately convey these symptoms to his provider despite memory issues and through the use of the coping mechanisms he has been taught to utilize over the past two decades. Despite having these tools, he continues to suffer significantly from his symptoms to such a degree that his provider has recommended he be considered for medical retirement from his position with the U.S. Postal Service (USPS).

e. While nearly two decades have passed since he left military service, the fact that his PTSD and TBI symptoms remain at such a level that medical retirement is being considered in a civilian environment is telling as to the severity of his condition over the years. He remains triggered by loud noises and feelings of helplessness but has not been in a military setting in the past 20 years. His symptoms would be far worse in such an environment, which is precisely what he is dealing with, when he was separated in 2004.

f. For the reasons set forth above and in the earlier petition, they respectfully request the Board overturn the separation of the applicant and order his medical retirement as of 1 November 2004 for his spinal injuries, TBI, and PTSD all incurred, at the same time as his shoulder injury, which caused his separation in the first place. Alternatively, they request the Board direct the Army to reconsider him for retirement through the IDES by assessing all conditions that were known, or should have been known, to the Army in 2004 rather than just the one that was most significant, at that time.

8. The applicant provided the following documents, with the supplemental information:

a. PDBR Record of Proceedings (ROP), which states in pertinent part, the board is limited to those conditions determined by the PEB to be unfitting for continued military service. Any conditions outside the board's defined scope of review and any contention not requested in this application may remain eligible for future consideration by the ABCMR. In the matter of chronic pain, left shoulder, the board unanimously recommends not change in the PEB adjudication. There were no other conditions within the board's scope of review for consideration. The board therefore recommends that there be no recharacterization of the applicant's disability and separation determination. The entire ROP is available for the Board's review.

b. Patient chart from Dr. [REDACTED] and trigger episodes and appointment journal are available for the Board's review and will be reviewed by the ARBA Medical Section.

d. Letter from Dr. [REDACTED] 30 April 2024, states in pertinent part, he was writing on behalf of the applicant, employed at the USPS, who has been under the doctor's care since 7 November 2023. The applicant was diagnosed with PTSD and severe depression, which severely limit his ability to perform job duties involving team management, sales strategy development, and executive customer relationships. It is the doctor's professional opinion that the applicant is unable to meet the demands of his position and is considering medical retirement. The entire letter is available for the Board's consideration.

9. 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 additional conditions be determined to have been unfitting for continued military service with a subsequent increase in his military disability ratings and a change in his disability discharge disposition from separated with severance pay to permanent retirement for physical disability. If this is not an option, he requests referral to the Disability Evaluation System (DES). He also requests combat related special compensation (CRSC). He states through counsel:

"While securing a town in Iraq, SGT [Applicant] took cover behind a wall, but due to the reverberations of the tanks, instead of providing safety, the wall came down on SGT [Applicant] causing significant injuries to his shoulder, back, neck, and head. He was MEDEVAC'd, and during this process, he was left out in the open, unarmed, and unable to defend himself while remaining in an active combat zone.

While being treated in theater, he witnessed countless atrocities impacting innocent bystanders, and as a result, he developed PTSD. When SGT [Applicant]'s shoulder didn't heal enough to allow him to return to service as a I 13B [Cannon Crewmember], an MEB was initiated, but it was limited to his shoulder despite the back and neck injuries, TBI, and PTSD all stemming from the same incident. This

resulted in a medical discharge with severance instead of the appropriate disability retirement.”

c. The Record of Proceedings details the applicant’s military service and the circumstances of the case. His DD 214 shows he entered the Regular Army on 22 July 1998 and was discharged with \$25,567.20 of disability severance pay on 1 November 2004 under provisions in paragraph 4-24b(3) of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (1 September 1990).

d. The applicant’s sole unfitting medical condition – Chronic left shoulder pain - was reviewed by the Physical Disability Board of Review (PDBR) in 2016. On 30 March 2016, they recommended no recharacterization of his separation. Their recommendation was approved by the Deputy Assistant Secretary of the Army Review Boards on 28 July 2016. DoD PDBR decisions are final, and the issues considered by the PDBR cannot afterward be considered by the Army Board for Correction of Military Records.

e. The applicant was placed on a duty limiting permanent physical profile on 30 July 2004 for “Left shoulder (Rotator Cuff and Dislocation s/p Surgery).” This is the only medical condition on his profile. The commander wrote on the profile “Great Soldier, but unable to fulfill duties in any 13 series MOS [military occupational specialty]. Recommend MOS change.

f. As part of the DES, company commanders are required to submit an evaluation of the Soldier’s performance and how their condition(s) affect their ability to serve. His company commander’s 3 August 2004 memorandum notes his left shoulder condition was the only limitation for his “outstanding soldier:”

SGT [Applicant] is physically incapable of reasonably performing his duties as a 13B Field Artillery Cannoneer due to his shoulder injury.

SGT [Applicant]’s lack of shoulder mobility precludes him from handling artillery ammunition and gun section equipment (firing spades, breech blocks and other weapon’s components). His condition further precludes his performing critical field duties, such as digging in equipment, building field fortifications and generally lifting anything over chest/shoulder height ...

He is currently incapable of performing these requirements, and unable to perform vehicle maintenance due to his shoulder condition.

SGT [Applicant] is an outstanding soldier; however, his physical condition creates is a limitation that precludes him from fully functioning or contributing to an artillery unit.”

g. A medical evaluation board (MEB) determined his post-traumatic left shoulder pain failed the medical retention standards of AR 40-501, Standards of Medical Fitness. On 7 September 2004, the applicant agreed with the board's findings and recommendation and his case was forwarded to a physical evaluation board (PEB) for adjudication.

h. On 10 September 2004, the applicant's informal PEB found his left shoulder condition unfitting for continued military service. Using the VA Schedule for Rating Disabilities, the PEB derived and then applied a 10% military disability rating. Because his final rating was less than 30%, the PEB recommended he be separated with disability severance pay. On 13 September 2004, after being counseled on the PEB's findings and recommendation by his PEB liaison officer, the applicant concurred with the Board's findings and waived his right to a formal hearing.

i. Review of the submitted contemporaneous medical records show the applicant was evaluated and treated for several conditions during his last year of service.

- Left tympanic membrane (eardrum) rupture of unknown etiology surgically repaired in November 2003.
- Septoplasty in April 2004.
- Neck pain: Treated conservatively medication, chiropractic therapy, physical therapy, and temporary duty limitations. Cervical radiographs were normal.
- Low back pain: Treated conservatively medication, chiropractic therapy, physical therapy, and temporary duty limitations. Lumbar radiographs and an MRI were normal. His back was evaluated by a neurosurgeon on 30 April 2004 for a four-year history of intermittent back pain. The surgeon ordered a nerve conduction study which found no evidence of a lower extremity radiculopathy.
- Chronic left ankle pain: Treated conservatively. An MRI revealed "Minor degenerative arthritis of the anterior portion of the tibiotalar joint, but otherwise unremarkable MRI of the left ankle."

j. No mental health or TBI related encounters were found in the supporting documents or the EMR.

k. His final NCO Evaluation Report covered the final 11 months of his service, from December 2003 thru October 2004. It shows he had continued to be an outstanding Soldier. His rater marked him as meeting or exceeding all Values and NCO Responsibilities, and top-blocked him as "Among the Best." Some of the rater's bullets:

- task oriented and detail minded, completes assignments to the fullest while staying focused to make sound and thoughtful decisions

- self-starter, committed to mission accomplishment, displays a high degree of initiative and seeks out ways to learn and grow
- dynamic trainer, coach, and mentor; routinely helps the platoon leadership improve performance and warfighting skills
- profile does not hinder duty performance

l. His senior rated marked also top-blocked the applicant (1's on a scale of 1 to 5) for both overall performance and overall protentional. He went on to opine:

- an outstanding motivational leader in the platoon, a definite asset during operational deployment
- unlimited potential to serve in the position of greater responsibility
- outstanding ability to accomplish any mission under the most challenging circumstances

m. There is insufficient probative evidence the applicant had any additional medical condition(s) which would have failed the medical retention standards of chapter 3 of AR 40-501, Standards of Medical Fitness, prior to his discharge. Thus, there was no cause for a re-referral of his case to the Disability Evaluation System.

n. Paragraph 3-1 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (1 September 1990) states:

“The mere presence 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.”

o. JLV shows was awarded numerous VA service-connected disability ratings, including PTSD on 30 September 2008, degenerative arthritis of the spine on 10 May 2007, traumatic brain disease on 30 September 2008, and migraine headaches on 24 August 2011. 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.

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

BOARD DISCUSSION:

1. The Board found the available evidence sufficient to consider this case fully and fairly without a personal appearance by the applicant.
2. The Board carefully considered the applicant's request, supporting documents, evidence in the records, a medical review, and published Department of Defense guidance for consideration of requests for changes to discharges. The Board concurred with the conclusion of the ARBA Medical Advisor that the evidence does not show the applicant had any conditions other than his left shoulder condition that limited his ability to perform the duties of his MOS. As such, there were no other conditions to be considered in the Disability Evaluation System process. Based on a preponderance of the evidence, the Board determined the applicant's discharge for disability with severance pay 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, 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. 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 ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

3. On 25 August 2017 the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to DRBs and BCM/NRs when considering requests by Veterans for modification of their discharges due in whole or in part to: mental health conditions, including PTSD; traumatic brain injury (TBI); sexual assault; or sexual harassment. Standards for review should rightly consider the unique nature of these cases and afford each veteran a reasonable opportunity for relief even if the sexual assault or sexual harassment was unreported, or the mental health condition was not diagnosed until years later. Boards are to give liberal consideration to Veterans petitioning for discharge relief when the application for relief is based in whole or in part on those conditions or experiences. The guidance further describes evidence sources and criteria and requires Boards to consider the conditions or experiences presented in evidence as potential mitigation for misconduct that led to the discharge.

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

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

health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment.

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

5. Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation) states:

a. The mere presence 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 their office, grade, rank, or rating.

b. An enlisted Soldier may not be referred for, or continue, physical disability processing when action has been started under any regulatory provision which authorizes a characterization of service of under other than honorable conditions.

c. Exceptions to paragraph b above are if the case comes within the limitations above, the commander exercising general court-martial jurisdiction over the Soldier may abate the administrative separation. This authority may not be delegated. A copy of the decision, signed by the General Court Martial Convening Authority (GCMCA), must be forwarded with the disability case file to the PEB. A case file may be referred in this way if the GCMCA finds the following:

(1) The disability is the cause, or a substantial contributing cause, of the misconduct that might result in a discharge under other than honorable conditions.

(2) Other circumstances warrant disability processing instead of alternate administrative separation.

d. Paragraph 4-30 (Grade on Retirement or Separation for Physical Disability) provides that the grade at which a Soldier is retired or receives disability severance pay will be the highest of the options listed below in accordance with the provisions of Title 10, USC, sections 1212 and 1372, respectively, and as implemented by AR 15-80 (Army Grade Determination Review Board and Grade Determinations) for determinations of highest grade satisfactorily held. Grade to which the Soldier would have been promoted had it not been for the physical disability for which the Soldier was determined unfit - In general, this provision pertains to Soldiers on a promotion list. For

Active Army and Reserve Component enlisted disability cases, this option is implemented under the provisions of AR 600–8–19 (Enlisted Promotions and Reductions). Promotion orders are not issued.

6. Title 38, USC, section 1110 (General - Basic Entitlement): 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.

7. Title 38, USC, section 1131 (Peacetime Disability Compensation - Basic Entitlement): 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.

8. Title 10, U.S. Code, section 1556 requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//