

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 17 July 2024

DOCKET NUMBER: AR20230013837

APPLICANT REQUESTS: a physical disability retirement in lieu of an honorable discharge due to disability that existed prior to service (EPTS).

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

- DD Form 149 (Application for Correction of Military Record)
- Operative Report, 15 December 2003
- Operative Report, 3 May 2004
- Discharge Summary, 6 October 2004
- DD Form 2807-2 (Medical Prescreen of Medical History Report), 29 August 2008 and 18 September 2008
- DD Form 2807-1 (Report of Medical History), 18 September 2008
- DD Form 2808 (Report of Medical Examination), 18 September 2008
- Continuation of DD Form 2808, 18 September 2008
- Standard Form 507 (Clinical Record), 18 September 2008
- DA Form 5500 (Body Fat Content Worksheet (Male)), 18 September 2008
- Standard Form 519-B (Radiologic Consultation Request/Report), 18 September 2008
- Standard Form 513 (Consultation Sheet) 18 and 22 September 2008
- DA Form 5500, 1 October 2008
- Standard Form 507, 1 October 2008
- DD Form 2795 (Pre-Deployment Health Assessment), 24 March 2009
- Standard Form 600 (Chronological Record of Medical Care), 29 November 2011
- 4th Infantry Brigade Combat Team memorandum for record, 12 December 2011
- Walter Reed National Military Medical Center (WRNMMC), Specialized Care Program Summary, 15 December 2011
- Department of Veterans Affairs (VA) Disability Evaluation System (DES) Proposed Rating, 27 August 2012
- DD Form 214 (Certificate of Release or Discharge from Active Duty) ending 3 February 2013
- Department of Veterans Affairs (VA) Form 21-4138 (Statement in Support of Claim), 7 September 2023

FACTS:

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

2. The applicant states:

a. The separation narrative on his DD Form 214 reflects disability EPTS, when in fact it did not. He was medically discharged due to having Cerebral Palsy. He was never diagnosed with Cerebral Palsy prior to enlisting in the military, so the condition could not have been an EPTS condition.

b. He submitted evidence dating back to when he processed through the Military Entrance Processing Station (MEPS), which shows no diagnosis for Cerebral Palsy existed, in addition to pre and post deployment health assessments related to this condition.

c. Cerebral Palsy was the basis for his separation and he believes it should qualify him for a medical retirement. He humbly requests correction to his discharge narrative to reflect medical retirement.

3. The applicant provided multiple medical documents from when he was 13 and 14 year old child, which show:

a. An Operative Report, dated 15 December 2003, shows he underwent left proximal femoral derotation osteotomy and internal pin fixation due to a diagnosis of severe bilateral external rotation of the hip.

b. An Operative Report, dated 3 May 2004, shows he underwent right femoral osteotomy with internal fixation due to a diagnosis of right femoral external rotation.

c. A Discharge Summary, dated 6 October 2004, shows the applicant underwent take down and repair of right femur nonunion, right femur osteotomy with a final diagnosis of take down and repair of right femur nonunion.

4. A physical profile is used to classify a Soldier's physical disabilities in terms of six factors or body systems, 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).

5. The applicant provided numerous medical documents emanating from the time of his Regular Army enlistment, which show:

a. A DD Form 2807-2, dated 29 August 2008, shows the only “yes” answers to conditions relate to the applicant’s left and right proximal femoral derotation osteotomy and internal pin fixation as a child. The medical officer reviewed the prescreening comments and on 18 September 2008 signed the form authorized further processing.

b. A DD form 2807-1, dated 18 September 2008, shows the applicant provided his medical history for the purpose of Regular Army enlistment examination. The only condition indicated is left and right proximal femoral derotation osteotomy with internal pin fixation in 2003 and 2004.

c. A DD Form 2808 shows the applicant underwent medical examination on 18 September 2008, for the purpose of Regular Army enlistment. He was initially found not qualified for service with a PULHES of 113111, with the “3” rating in the factor L for lower extremities due to congenital hip deformity status post-surgery. A request for medical waiver was submitted and approval of the waiver, which was at the discretion of the service, was dependent upon an orthopedic consult.

d. A Continuation of his DD Form 2808 describes the applicant’s tattoo on his upper right arm.

e. A Standard Form 507, dated 18 September 2008, shows the applicant passed a hearing test.

f. A DA Form 5500, dated 18 September 2008, shows the applicant was in compliance with Army authorized body fat percentages.

g. A Standard Form 519-B shows on 18 September 2008, a radiologic consultation was requested for bilateral femoral views due to status post left and right proximal femoral derotation osteotomy with pin placement.

h. A Standard Form 513 shows on 18 September 2008, consultation with/evaluation by orthopedics was requested regarding the applicant’s hip surgeries. The follow-on consultation report on the bottom portion of the form shows on 22 September 2008, an orthopedic doctor indicated the site was well-healed and should not pose any difficulty.

i. A second DA Form 5500, dated 1 October 2008, shows the applicant was in compliance with Army authorized body fat percentages.

j. A Standard Form 507 shows on 1 October 2008, the applicant's request for medical waiver was approved and he was given a PULHES of 111111.

6. The applicant enlisted in the Regular Army on 1 October 2008 and was awarded the Military Occupational Specialty (MOS) 13B (Cannon Crewmember).

7. A DD Form 2795 (Pre-Deployment Health Assessment), dated 24 March 2009, shows the pre-deployment health provider did not indicate any referrals after review and the applicant was deemed deployable.

8. The applicant deployed to Iraq from 30 August 2009 through 25 June 2010.

9. Standard Form 600, dated 29 November 2011, shows:

a. The applicant was referred to the Irwin Army Community Hospital, Fort Riley, KS, with concerns he could have been exposed to mustard gas at base.

b. His health concerns include:

(1) Bilateral leg pain from hips downward; began 2010, while deployed.

(2) Low back pain; began in 2009, prior to leg pain, carrying artillery rounds during deployment.

(3) Headaches; began 2009, before back pain; throbs with dizziness and nausea.

(4) Knee buckling; began 2009, after headaches and before leg pain.

(5) Ankle pain; began 2009; associated with feet turning purple with distended veins and tingling in legs from calf downward.

(6) Tingling in legs; began 2009, prior to leg pain.

(7) Memory problems; began 2009, after headaches.

(8) Anxiety; began 2010.

c. The assessment/plan shows pain management of headache syndromes with acupuncture and a referral to the sleep disorders clinic for breathing-related sleep disorder.

10. A 4th Infantry Brigade Combat Team memorandum for record, dated 12 December 2011, shows the applicant's last Army Physical Fitness Test (APFT) was taken on 2 June 2010. He was unable to take another record APFT due to multiple temporary and permanent physical profiles he received starting in September 2010.

11. A WRNMMC, Specialized Care Program Summary, dated 15 December 2011, shows:

a. The applicant was deployed to Iraq from August 2009 through July 2010 and was referred for treatment of post-traumatic stress disorder (PTSD) and a history of persistent physical symptoms with the onset of the symptoms after service in Iraq. These symptoms include disordered mood and sleep, bilateral leg pain, weakness, tingling, and swelling, low back pain, headaches, knee buckling, ankle pain, tiredness, and memory problems.

b. To investigate the symptoms, he completed a careful general internal medicine evaluation and a series of comprehensive specialty assessments. These evaluations included those by Orthopedics, Neurology (Kansas University), Pain Management (Topeka, KS), and Behavioral Health. It was decided to refer the applicant to Track II of the Specialized Care Program at WRNMMC. He participated satisfactorily in the multidisciplinary treatment.

c. His discharge diagnoses were:

- PTSD/anxiety
- multiple persistent physical symptoms, including disordered mood and sleep, bilateral leg pain, weakness, tingling, and swelling, low back pain, headaches, knee buckling, ankle pain, tiredness, and memory problems
- bilateral lower extremity pain with external rotation of legs, status post osteotomy and internal fixation for successful correction of childhood external rotation, requiring forearm crutches for ambulation
- chronic widespread pain syndrome
- lumbago
- midback pain
- headache syndrome with migrainous component
- bilateral ankle and knee instability with knee buckling
- pedal edema, intermittent
- disordered sleep with fatigue and memory problems, rule out sleep apnea
- esophageal reflux
- tinnitus
- exercise-induced asthma
- functional diarrhea
- vitamin D insufficiency

- shaking of the right arm/tremor
- male erectile disorder
- history of prematurity as infant
- history of pes planus
- history of alcohol use disorder, episodic
- history of tobacco use disorder
- history of left elbow fracture, age 10
- history of occasional erectile dysfunction
- history of crushed 4th left finger during deployment, healed
- history of Rondec DM hypersensitivity allergy

d. Diligent coordination with specialty care and primary care providers in behavioral health, pain management, neurology, sleep clinic, orthopedics, and acupuncture was anticipated for follow-up.

12. The complete facts and circumstances surrounding the applicant's discharge are unknown as his DA Form 3349 (Physical Profile), DA Form 7652 (Disability Evaluation System (DES) Commander's Performance and Functional Statement), Medical Evaluation Board (MEB) Narrative Summary (NARSUM), DA Form 3947 (MEB Proceedings), DA Form 199 (Informal Physical Evaluation Board (PEB) Proceedings), DA Form 199-1 (Formal PEB Proceedings), and/or his request for waiver of PEB evaluation are not in his available records for review and have not been provided by the applicant.

13. A VA DES Proposed Rating, dated 27 August 2012, shows the following service-connected disability ratings were proposed:

- cerebral palsy, right lower extremity, 20 percent
- cerebral palsy, left lower extremity, 20 percent
- cerebral palsy, right upper extremity (dominant), 20 percent
- cerebral palsy, left upper extremity, 20 percent
- tinnitus, 10 percent
- pes planus, 10 percent
- lumbar strain, 10 percent
- right hip strain, 10 percent
- left hip strain, 10 percent
- right knee strain, 10 percent
- left knee strain, 10 percent
- right ankle strain, 10 percent
- left ankle strain, 10 percent
- Bell's palsy, non-compensable
- right hip strain, limitation of extension, non-compensable

- left hip strain, limitation of extension, non-compensable
- right hip strain, limitation of abduction, non-compensable
- left hip strain, limitation of abduction, non-compensable
- tension headaches, non-compensable
- vesicular rash of fingers, non-compensable
- hearing loss, not proposed

14. A Headquarters, 2nd Armored Brigade Combat Team, 1st Infantry Division memorandum, dated 16 October 2012, shows the request for the applicant's medical extension beyond his expiration term of service (ETS) for the purpose of physical disability processing was approved for a period of 3 months, providing a new ETS date of 3 February 2013.

15. The applicant's DD Form 214 shows he was honorably discharged on 3 February 2013, under the provisions of Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation), chapter 4, due to disability, EPTS (Enhanced), with corresponding separation code JEE. He as credited with 3 years, 4 months, and 3 days of neat active service.

16. 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.

17. MEDICAL REVIEW:

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

b. The applicant is applying to the ABCMR in essence requesting referral to the Disability Evaluation System (DES). He states:

"Separation narrative reflects disability existed prior to service when in fact it did not. I was medically discharged due to having Cerebral Palsy. I was never diagnosed with Cerebral Palsy prior to enlisting in the military so the condition could not have

existed prior to service. I am asking to have narrative changed to 'Medically Retired.'"

c. The Record of Proceedings details the applicant's service and the circumstances of the case. His DD 214 shows he entered the Regular Army on 1 October 2008 and was honorably separated without disability benefits on 3 February 2013 under provisions provided in Chapter 4 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (20 March 2012).

d. A Soldier is referred to the Integrated Disability Evaluation System (IDES) when they have one or more conditions which appear to fail medical retention standards reflected on a duty limiting permanent physical profile. At the start of their IDES processing, a physician lists the Soldiers referred medical conditions in section I the VA/DOD Joint Disability Evaluation Board Claim (VA Form 21-0819). The Soldier, with the assistance of the VA military service coordinator, lists all other conditions they believe to be service-connected disabilities in block 8 of section II of this form, a separate Statement in Support of Claim (VA Form 21-4138), or on a separate Application for Disability Compensation and Related Compensation Benefits (VA Form 21-526EZ).

e. Soldiers then receive one set of VA C&P examinations covering all their referred and claimed conditions. These examinations, which are the examinations of record for the IDES, serve as the basis for both their military and VA disability processing. The medical evaluation board (MEB) uses these exams along with AHLTA encounters and other information to evaluate all conditions which could potentially fail retention standards and/or be unfitting for continued military service. Their findings are then sent to the physical evaluation board for adjudication.

f. All conditions, both claimed and referred, are rated by the Veterans Benefits Administration (VBA) using the VA Schedule for Rating Disabilities (VASRD). The physical evaluation board (PEB), after adjudicating the case, applies the applicable ratings to the Soldier's unfitting condition(s), thereby determining his or her final combined rating and disposition. Upon discharge, the Veteran immediately begins receiving the full disability benefits to which they are entitled from both their Service and the VBA.

g. A 6 October 2004 operative note shows the applicant and undergone left and right femoral de-rotational osteotomies with internal fixation for bilateral lower extremity malrotation deformities:

"The patient is a 14-year-old male status post right femur osteotomy. The patient originally presented with pain along the inside area of both ankles and trouble with running and participating activities in November 2003. The physical examination at

that time revealed a significant external rotation. When he stood, he almost had his feet at a 90-degree angle outward so the assessment at that time was a 13-year-old with severe bilateral external tibial torsion, external rotation of the hip deformity, most marked in the femur .

It was recommended to start with the right one, so in December 2003 the patient underwent left proximal femur de-rotation osteotomy and internal fixation. This procedure went very well and then in May 2004 he underwent a right femoral osteotomy with internal fixation.

h. This was noted by the provider on his 2008 pre-entrance Report of Medical History:

“S/P left and right femoral de-rotation osteotomy with internal pin fixation 2003/2004.

Activity: Runs 1 mile every day
Bends, lift heavy loads, works on ranch.
Denies pain or limitation”

i. The applicant was evaluated by orthopedics who opined “Should not interfere with military service.” The applicant subsequently received a medical waiver for these pre-existing conditions.

j. The EMR shows he began to have significant symptoms while deployed in 2010.

k. The applicant was referred to the DES for “Congenital Spastic Diplegia (Cerebral Palsy)” on 13 June 2011. The applicant claimed eight additional conditions on his VA Form 21-0819. The medical evaluation board (MEB) determined the referred condition did not meet the medical retention standards of AR 40-501, Standards of Medical Fitness, had existed prior to service, and had not been permanently aggravated by his service. The history of this condition from the narrative summary:

“Congenital diplegic cerebral palsy with spasticity: ...

Orthopedic evaluation on Mar 26, 2011, diagnosed with cerebral palsy. Review of imaging studies note rotational abnormalities of lower extremities secondary to soft tissue contracture. "Patient was likely diagnosed with cerebral palsy, but perhaps unaware of diagnosis. Service Member remembers history of AFO [ankle foot orthosis, an “L” molded foot and ankle brace] brace wear as a child, common device for spastic diplegia related to cerebral palsy. Recommend separation, destined for severe injury should he continue to push lower extremities over the limits of significant neurological limitations."

l. They determined eight additional conditions met medical retention standards. On 29 June 2012, the applicant agreed with the MEB's findings and recommendation and his case was forwarded to a physical evaluation board (PEB) for adjudication.

m. When the informal PEB convened on 24 September 2012, they determined his Congenital diplegic cerebral palsy, rated by VA as cerebral palsy affecting all four extremities, was unfitting for continued military service and the remaining conditions were not unfitting for continued military service. The Board made the determination the condition had existed prior to service and was not permanently aggravated by his military service, and so was not compensable. On 5 October 2012, after being counseled on the informal PEB's findings by his PEB Liaison Officer, the applicant concurred with the informal PEB's findings, waived his right to a formal hearing, and declined a VA reconsideration of his disability rating.

n. Review of his ePEB case file and records in EMR revealed no material discrepancies or errors.

o. JLV shows he has been awarded multiple VA service-connected disability ratings, including individual ratings for all four extremities.

p. The DES compensates an individual only for service incurred 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; or which did not cause or contribute to the termination of their military career. These roles and authority were granted by Congress to the Department of Veterans Affairs and are executed under a different set of laws.

q. It is the opinion of the ARBA medical advisor that a referral of his case back to the DES is unwarranted.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation. Upon review of the applicant's petition, available military records and the medical review, the Board concurred with the advising official finding that a referral of his case back to the DES is unwarranted. The opine noted, the PEB Board made the determination the condition had existed prior to service and was not permanently aggravated by his military service, and so was not compensable.
2. The Board found the medical evaluation board (MEB) determined the referred condition did not meet the medical retention standards of AR 40-501, Standards of Medical Fitness, had existed prior to service, and had not been permanently aggravated by his service. The Board determined there is insufficient evidence to support the applicant's contentions for a physical disability retirement in lieu of an honorable discharge due to disability that existed prior to service (EPTS). Based on the advising opine and evidence in the applicant's medical records, the Board denied relief.

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.

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

REFERENCES:

1. Title 10, U.S. Code, section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.
2. On 25 August 2017, the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to Discharge Review Boards (DRBs) and Boards for Correction of Military/Naval Records (BCM/NRs) when considering requests by veterans for modification of their discharges due in whole or in part to: mental health conditions, including post-traumatic stress disorder (PTSD), traumatic brain injury (TBI), sexual assault, or sexual harassment. Boards are to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based, in whole or in part, on those conditions or experiences.
3. Title 10, U.S. Code, chapter 61, provides the Secretaries of the Military Departments with authority to retire or discharge a member if they find the member unfit to perform military duties because of physical disability. The U.S. Army Physical Disability Agency is responsible for administering the Army physical disability evaluation system (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 their 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 their 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.

d. Paragraph 4-19(3)(a) (Service aggravation), in effect at the time, shows the PEB may decide that a Soldier's physical defect existed prior to service (EPTS), or inactive duty for training, or resulted from a non-service-connected condition, not in the line of duty (LOD). If so, the board must further decide whether military service aggravated the unfitting defect.

e. Paragraph 4-19(4) (Conditions not aggravated by service), in effect at the time, shows Soldiers who are unfit by reason of physical disability neither incurred nor aggravated during any period of service while entitled to basic pay, or as the proximate result of performing active duty or inactive duty for training, but which effects duty performance, will be separated for physical disability without entitlement to benefits.

f. Paragraph 4-19(4)(a), in effect at the time, shows enlisted Soldiers who are eligible for discharge under chapter 5 of this regulation may be processed under the provisions of that chapter upon their application.

g. Chapter 5 (Separation for Non-Service Aggravated, EPTS Conditions upon Soldier's Waiver of PEB Evaluation), in effect at the time, provides for separation of an enlisted Soldier for non-service aggravated EPTS conditions when the Soldier requests waiver of PEB evaluation. The case must meet the following conditions:

- (1) The Soldier is eligible for referral into the disability system.
- (2) The Soldier does not meet medical retention standards as determined by the MEB.
- (3) The disqualifying defect or condition existed prior to entry on the current period of duty and has not been aggravated by such duty.
- (4) The Soldier is mentally competent.
- (5) Knowledge of information about their medical condition would not be harmful to the Soldier's well-being.
- (6) Further hospitalization or institutional care is not required.
- (7) After being advised of the right to a full and fair hearing, the Soldier still desires to waive PEB action.
- (8) The Soldier has been advised that a PEB evaluation is required for receipt of Army disability benefits, but waiver of the PEB will not prevent them from applying for Department of Veterans Affairs (VA) benefits.

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. 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.

7. 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.

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.

9. Army Regulation 15-185 (Army Board for Correction of Military Records (ABCMR)) prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR. The ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

//NOTHING FOLLOWS//