

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 24 July 2024

DOCKET NUMBER: AR20230014466

APPLICANT REQUESTS:

- physical disability retirement in lieu of honorable administrative discharge due to unsatisfactory performance/physical standards
- personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- self-authored statement
- DA Form 3349 (Physical Profile), dated 17 August 2010
- DD Form 214 (Certificate of Release or Discharge from Active Duty), Member Copies 1 and 4, reflecting a separation date of 14 January 2013
- Memorandum for Record (MFR), dated 30 July 2013
- DD Form 2697 (Report of Medical Assessment), dated 14 August 2013
- DD Form 2807-1 (Report of Medical History), dated 14 August 2013
- DD Form 2808 (Report of Medical Examination), dated 14 August 2013
- email correspondence, dated 4 October 2013
- DD Form 2648 (Preseparation Counseling Checklist), dated 15 November 2013

FACTS:

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

2. The applicant states:

a. He is Black American and Panamanian born in New Jersey. He was raised by both of his parents in the same household along with his sister. He had a pretty good childhood, which has made him the man he is today. He became an All American in track and field in high school and received a scholarship for track at Liberty University, where he studied computer programming and marketing advertising. He was only able

to stay a short amount of time because his mother became ill, battling breast cancer and diabetes, so he decided to stay home to help take care of her.

b. While at home, he concluded he really needed to do more, so he joined the Army National Guard (ARNG) in the rank of private first class (PFC), because he had participated in Junior Reserve Officer Training Corps (JROTC) in high school. He served one year in the ARNG before going full-time in the Army. His first active duty assignment was in Germany in 1997, then he was assigned to Fort Campbell from 1999 – 2000. He went back to Germany for about 30 days until his mother passed away, which was very devastating for him. After the death of his mother, he stayed in the States and was transferred to Fort Hood, TX, where he spent most of his career. In 2007 or 2008, he was transferred to Fort Lewis, WA and in 2011 he was transferred to Fort Bragg, NC, where he decided to remain instead of moving back to New Jersey.

c. In these years, he was on three deployments. He deployed to Iraq twice, which was okay, and once to Afghanistan, which was very different. He was a cook who became a platoon sergeant, but was able to drive heavy vehicles as a Master Driver.

d. In 2009, his whole life changed when he had to go on a night mission to the forward operating base (FOB). When he was getting ready to leave, he went back to check the straps on the vehicle's load handling system (LHS) to make sure everything was secure. He found some of the straps were still loose, so he climbed up to tighten them down. When he got to the last strap to tighten it, the strap popped and he fell 15 feet onto his left arm. He had to be airlifted to two different hospitals for surgeries. The first surgery was to prep him so he could have the second surgery, which consisted of an external fixator. He still has the pictures showing how the fall destroyed his elbow. The radial head bone had to be cut out and his range of motion is still not up to par.

d. After leaving Afghanistan, he reported back to Fort Lewis, WA, where he had another surgery to take out the external fixator to put in another one, as well as an anchor and some screws. He struggles every day to care for himself and to be able to do the things he did before all of this happened to him. He was unable to bathe himself or put clothes on without being in so much pain and discomfort, but he had to go through it to get back to work again. He was on leave until he was able to report back to Fort Bragg, NC.

e. As time went on, he felt that Fort Bragg, NC, was the last place for him because he was getting tired of all the moving. He had travelled the world and it was just time. After 6 months at Fort Bragg, an infection was discovered in his arm where the screws had come loose and he had to have two more surgeries at the University of North Carolina Hospital to clear the infection. During this time, he was trying to get in shape again, but it was very hard for him to work. While out of work, he was out of shape, overweight, and it became very hard for him to get back into shape. He was doing

physical therapy twice a day to get him arm back to where it needed to be. He was doing well to get the weight off, but it was breaking him down mentally knowing that only had one good arm.

f. This was so frustrating; he could not even do push-ups any longer. AS he was trying to focus on himself and getting back, his father passed away and it seemed that it just made things even more difficult. He had failed two Army Physical Fitness Tests (APFT) and another one was coming up again. When he went to the APFT, he thought he did well, but he guesses that was not that case. He tried to do what was asked of him. He did not get an alternate event, because he could not do the push-ups and running was difficult; it was like choking on air. The day before the APFT, he had gone to the doctor to have some blood work done and he was diagnosed with type two diabetes.

g. His first sergeant discharged him with an honorable discharge instead of a medical discharge. He was not aware of the difference between an honorable discharge and a medical discharge until after the fact. He has spoken to the Defense Finance and Accounting Service (DFAS) as well as the U.S. Army Human Resources Command (AHRC) about getting it changed to a medical discharge, to no avail. He was not given the opportunity to apply for a medical discharge at the time of his separation and is requesting a review of his files to apply for a medical retirement. When he was discharged he came out with a 70 percent disability, presumably from the Department of Veterans Affairs (VA), yet he wasn't given an opportunity for medical retirement, despite having over the 30 percent disability rating required to retire.

3. After 1 year, 6 months, and 15 days of prior inactive service (presumably in the ARNG, although his available service records do not contain documentation pertaining to that service) the applicant enlisted in the Regular Army on 3 January 1997, and was awarded the Military Occupational Specialty (MOS) 92G (Food Service Specialist).

4. The applicant deployed during the following timeframes to the following locations:

- Iraq, from 15 March 2003 through 26 March 2004
- Iraq, from 20 November 2005 through 15 November 2006
- Afghanistan, from 9 July 2009 through 21 March 2010

5. 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).

6. A DA Form 3349 shows the applicant was given a permanent physical profile rating of 2 on 17 August 2010, for injury status post left elbow fracture dislocation, with a profile rating of 1 in all other factors. His profile limited him to no APFT push-ups and no combatives.

7. The applicant's available service records do not contain any medical documentation pertaining to his elbow surgeries and they have not been provided by the applicant.

8. The applicant's DA Form 2166-8 (Noncommissioned Officer Evaluation Report (NCOER) covering the period from 23 January 2012 through 22 January 2013, provides the applicant's rating in his duty description as Food Operations Manager. It shows:

a. His Rater evaluated him with "Success" or "Excellence" in all sections of Part IV (Rater) – Values/NCO Responsibilities.

b. Part IVc (Physical Fitness and Military Bearing) shows in the APFT block that the applicant was on physical profile effective 23 October 2012, and that he met the height and weight standards.

c. The remarks in Part IVc include that his profile did not hinder him from his daily duties and he displayed hard work and dedication to successfully meet the standards of Army Regulation 600-9 (The Army Body Composition Program), which removed him from the overweight program.

d. His Senior Rater evaluated his overall performance as "Successful/2/3" and his overall potential as "Superior/2."

9. The applicant's DA Form 3349 dated 23 October 2012, referenced in his NCOER, is not in his available records for review.

10. An MFR from the applicant's immediate commander, dated 30 July 2013, shows it was his intent to separate the applicant under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), paragraph 13-2a/e for unsatisfactory performance/physical standards. The applicant has demonstrated he is unable to meet the Army standards outlined in Army Regulation [sic Field Manual] 20-21 (Physical Fitness Training), chapter 14 (APFT), which is incompatible with continued satisfactory service. The applicant was informed of his intent to separate him under these provisions.

11. A DD Form 2697, dated 14 August 2013, shows the applicant provided his medical assessment of his overall health on the date of the form, which shows:

- he assessed his overall health as the same compared to his last medical assessment/physical examination
- since his last medical assessment/physical exam, he “smashed” his elbow in Afghanistan, causing him to miss duty for longer than 3 days
- since his last medical assessment/exam, he had not been treated by a health care provider, admitted to a hospital, or had surgery
- the medication he was not taking Metformin
- he did not have any conditions which currently limited his ability to work in his primary specialty or required geographic or assignment limitations

12. A DD Form 2807-1, dated 14 august 2013, shows the applicant provided his medical history for the purpose of separation, which shows:

a. He indicating he had:

- asthma or breathing problems related to exercise, weather, pollens
- shortness of breath
- painful shoulder, elbow or wrist
- arthritis, rheumatism, or bursitis
- foot trouble
- impaired use of arms, legs, hands, or feel
- swollen or painful joint
- bone, joint, or other deformity
- plate(s), screw(s), rod(s), or pin(s) in any bone
- broken bone(s)
- high or low blood sugar
- refused employment or unable to hold a job or stay in school because of inability to perform certain motions or other medical reasons
- he had been a patient in a hospital and undergone surgery

b. The examiner’s summary shows:

- the applicant was taking Metformin
- he had no known drug allergies
- he had a history of surgery to repair his left elbow in 2010; hardware in place; hospitalization for 15 days; P2 profile
- he had no other history of fractures or hospitalizations
- he had right should pain for 2 weeks

13. A DD Form 2808, dated 14 August 2013, shows the applicant underwent medical examination on the date of the form for the purpose of separation, where he was found qualified for separation with a physical profile rating of 2 in factor U. The summary of defects and diagnoses shows right Achilles tendinitis, chronic left elbow pain status post-surgery, and diabetes mellitus.

14. On 13 September 2013, the applicant was notified by his company commander of his initiation of action to separation him with a general discharge under the provisions of Army Regulation 635-200, paragraph 13-2e for unsatisfactory performance/physical standard. The reason for his proposed action were his failure of two consecutive record APFTs on 30 April 2013 and 30 July 2013. The applicant was advised of his right to consult with counsel, submit written statements in his behalf, and entitlement to a hearing before an administrative board.

15. On 13 September 2013, the applicant acknowledged receipt of the notice from his commander, informing him of the basis for the contemplated action to separate him under the provisions of Army Regulation 635-200, chapter 13 and the right available to him, including the right to consult with counsel prior to submitting his election of rights.

16. On 17 September 2013, the applicant acknowledged having been advised by his consulting counsel of the basis for the contemplated action to separate him for unsatisfactory performance under the provisions of Army Regulation 635-200, chapter 13 and its effect, the rights available to him. He understood he was entitled to have his case heard by an administrative separation board because he had 6 or more years of active and Reserve service at the time of notification of separation. He was afforded the opportunity to consult with counsel and voluntarily waived consideration of his case by an administrative separation board contingent upon receiving a characterization of service no less favorable than honorable. He did not submit statements in his own behalf.

17. On 19 September 2013, the applicant's battalion commander recommended approval of the applicant's honorable discharge under the provisions of Army Regulation 635-200, paragraph 13-2e, physical standard.

18. Email correspondence from the applicant's Battalion Command Sergeant Major to his Brigade Command Sergeant Major, dated 4 October 2013, shows:

a. This information was provided to support the request for the applicant's separation under the provisions of Army Regulation 635-200, chapter 13. The applicant had been in the Army for almost 17 years, with 9 years' time in grade as a sergeant (SGT)/E-5, 4 years past his retention control point. He was a non-promotable SGT who had never been to the staff sergeant (SSG) Promotion Board.

b. He had three deployments; tow to Iraq an one to Afghanistan. He got injured (broke his arm) on his last tour in a non-combat related injury. He had a good work ethic in the Dining Facility and completed every task to standard, but could not overcome his weight and APFT challenges. He failed the APFT run a few times before, but proper counseling, medical evaluation, and remedial training were never completed until now.

c. His expiration term of service date was 4 December 2015. He could get 19 years of service maximum if they kept him in. He did nothing to lose the weight or to pass the APFT since he was notified of the separation proceedings. He was content with an honorable discharge and was ready to move on with the next phase of his life. His concerns were about the length of time it would take to process the separation and his ability to utilize education benefits.

19. On 9 October 2013, the approval authority directed the applicant's honorable discharge under the provisions of Army Regulation 635-200, paragraph 13-2e.

20. U.S. Army Installation Management Command Orders 319-0255, dated 15 November 2013, reassigned the applicant to the U.S. Army Transition Point at Fort Bragg, NC, effective the date of the orders for discharge effective 14 January 2013. (Note they typographical error in the date of discharge; it should read 14 January 2014.

21. The applicant provided Member Copy 1 and 4 of his DD Form 214, signed by himself and the transition point official authorized to sign on 19 November 2013, which shows he was honorably discharged on 14 January 2013 (note the typographical error in the year, which should show 2014), under the provisions of Army Regulation 635-200, paragraph 13-2e, due to physical standards, with corresponding separation code JFT. He was credited with 17 years and 12 days of net active service.

22. U.S. Army Installation Management Command Orders 353-0264, dated 19 December 2013, amended the applicant's prior discharge orders dated 15 November 2013, to reflect his date of discharge as 14 January 2014, in lieu of 14 January 2013.

23. The applicant's service records contain a Service Copy 2 DD Form 214, which shows he was honorably discharged on 14 January 2014, under the provisions of Army Regulation 635-200, paragraph 13-2e, due to physical standards, with corresponding separation code JFT. He was credited with 17 years and 12 days of net active service and 1 year, 6 months, and 15 days of total prior inactive service.

24. The applicant's available service records do not show:

- he was issued a permanent physical profile rating of 3 or 4

- he suffered from a medical condition, physical or mental, that affected his ability to perform the duties required by his MOS and/or grade or rendered him unfit for military service
- he was diagnosed with a condition that failed retention standards and/or was unfitting

25. The applicant has not provided a copy of his VA Rating Decision and it is not in his available record for review.

26. 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.

27. 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. He states in part:

“When discharged, I cam out with 70% when I wasn’t given an opportunity to medically retire when I was over 30% to medically retire ... Never given the opportunity to medically retire. I had broken my arm, 6 surgeries, one for infection, came up with type 2 diabetes whey they knew before. I never once had an alternate event on APFT [Army Physical Fitness Test].”

c. The Record of Proceedings outlines the applicant's military service and the circumstances of the case. The applicant's DD 214 shows he entered the regular Army on 3 May 1997 and was discharged on 14 Janaury 2014 under the provisions in paragraph 13-2e of AR 635-200, Active Duty Enlisted Administrative Separations (17 December 2009) for having failed two consecutive Army physical fitness test.

d. The applicant was placed on a permanent duty limiting profile on 17 August 2010 for “S/P left elbow fracture dislocation” which made him non-deployable. As can be

seen in block 5 of his profile, any “NO” for one of more of the required Soldier functional activities should result in a serial of “3” for upper extremity “U”, not the “2” he was given, with subsequent referral to the DES. It is this physical profile which should have resulted in his referral to the DES.

e. The EMR shows the applicant was placed on metformin after diagnosed with type II diabetes mellitus on 7 August 2013. Paragraph 3-11d of AR 40-501, Standards of Medical Fitness (4 August 2011), states the diabetes mellitus fails medical retention standards and is a cause for referral to the DES “unless hemoglobin A1c can be maintained at <(less than) 7% using only lifestyle modifications (diet, exercise).” When The applicant’s placement on oral medication should have resulted in a second duty limiting permanent physical profile and a second automatic referral to the DES.

f. This referral to the DES is not optional and addressed in several ARs. Paragraph 7-1 of AR 40-400, Patient Administration (8 July 2014), states in part: “If the Soldier does not meet retention standards, an MEB is mandatory and will be initiated by the physical evaluation board liaison officer (PEBLO).” Note there is no mention of component or duty status.

g. Paragraph 2-9c of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (8 February 2006), identifies the error made by his command:

“The unit commander will –

c. Refer a soldier to the servicing MTF for medical evaluation when the soldier is believed to be unable to perform the duties of his or her office, grade, rank, or rating.”

h. Finally, paragraph 1–33a of AR 635-200, Active Duty Enlisted Administrative Separations (6 June 2005), notes that disposition through medical channels takes precedence over almost all administrative separations:

a. Except in separation actions under chapter 10 and as provided in para 1–34b, disposition through medical channels takes precedence over administrative separation processing.

i. Chapter 10 addresses separations in lieu of courts-martial. Paragraph 1-34b:

b. Regular Army soldiers will be transferred to the IRR to complete their statutory or contractual MSO {military service obligation, whichever expires later.

j. It is the opinion of the ARBA Medical Advisor the applicant should be referred to the DES for diabetes mellitus and his left elbow condition, both of which failed retention standards long before his inappropriate involuntary administrative separation.

k. It is more likely than not that the applicant will be permanently retired for physical disability and subsequently entitled to Combat Related Special Compensation (CRSC). However, CRSC is subject to a 6-year statute of limitations (31 U.S.C., Section 3702(b)). To receive the full retroactive CRSC entitlement, a claimant must file their CRSC claim within 6 years of any VA rating decision that could potentially make them eligible for CRSC or the date they become entitled to retired pay, whichever is more recent. If a claimant files a claim more than 6 years after initial eligibility, they are restricted to 6 years of any retroactive entitlement.

l. It is therefore recommended the Board consider authorizing the applicant to apply for CRSC beyond the 6-year statute of limitations, and if CRSC is granted, receive retroactive payments for this disability and other combat related disabilities he may have incurred IAW Chapter 63, Volume 7B of Department of Defense 7000.14R, Financial Management Regulation - Combat-Related Special Compensation (CSRC). This should also include interest and COLAs. Because one criterium for receiving CRSC is that the Veteran be in a retired status (e.g., length of Service, permanent disability, etc.), this authorization could only be used by the applicant if/when he was retired.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that partial relief was warranted. The Board carefully considered the applicant's 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, the Board concurred with the advising official finding applicant should be referred to the DES for diabetes mellitus and his left elbow condition, both of which failed retention standards long before his inappropriate involuntary administrative separation. The opine noted, the applicant's placement on oral medication should have resulted in a second duty limiting permanent physical profile and a second automatic referral to the DES

2. The Board determined there is sufficient evidence to support the applicant contentions for referral to the disability evaluation system. The Board noted the advising official recommendation for the applicant to apply for CRSC. The Board recognized to receive the full retroactive CRSC entitlement, a claimant must file their CRSC claim within 6 years of any VA rating decision that could potentially make them eligible for CRSC or the date they become entitled to retired pay, whichever is more recent. If a claimant files a claim more than 6 years after initial eligibility, they are restricted to 6 years of any retroactive entitlement, Furthermore, The Board found authorizing the applicant to apply for CRSC beyond the 6-year statute of limitations, and if CRSC is

granted, receive retroactive payments for this disability and other combat related disabilities he may have incurred IAW Chapter 63, Volume 7B of Department of Defense 7000.14R, Financial Management Regulation - Combat-Related Special Compensation (CSRC). The Board determined based on the advising official and the applicant's service record, partial relief is warranted for referral to DAES.

3. The applicant's request for a personal appearance hearing was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

:	:	:	GRANT FULL RELIEF
■	■	■	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined the evidence presented is sufficient to warrant a recommendation for partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by directing the applicant be entered into the Disability Evaluation System (DES) and a Medical Evaluation Board concerned to determine whether the applicant's conditions(s), met medical retention standard at the time-of-service separation.

a. In the event that a formal physical evaluation board (PEB) becomes necessary, the individual concerned may be issued invitational travel orders to prepare for and participate in consideration of his case by a formal PEB if requested by or agreed to by the PEB president. All required reviews and approvals will be made subsequent to completion of the formal PEB.

b. Should a determination be made that the applicant should have been separated under the DES, these proceedings will serve as the authority to void his administrative separation and to issue him the appropriate separation retroactive to his original separation date, with entitlement to all back pay and allowances and/or retired pay, less any entitlements already received.

c. Recommend authorizing the applicant to apply for CRSC beyond the 6-year statute of limitations, and if CRSC is granted, receive retroactive payments for this disability and other combat related disabilities he may have incurred.

2. The Board further determined the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to the applicant's request for a physical disability retirement in lieu of honorable administrative discharge due to unsatisfactory performance/physical standards.

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

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

REFERENCES:

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

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

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

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

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

finding of fitness for continued duty. A Soldier is physically unfit when a medical impairment prevents reasonable performance of the duties required of the Soldier's office, grade, rank, or rating.

3. 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.

4. 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.

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

a. Chapter 13 contains policy and outlines procedures for separating individuals for unsatisfactory performance and provides that commanders will separate a member under this chapter when, in the commander's judgment, the member will not develop sufficiently to participate satisfactorily in further training and/or become a satisfactory Soldier.

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

c. Paragraph 13-2e, in effect at the time, specifies initiation of separation proceedings is required for soldiers without medical limitations who have two consecutive failures of the Army Physical Fitness Test (APFT), or who are eliminated for cause from Noncommissioned Officer Education System courses, unless the responsible commander chooses to impose a bar to reenlistment.

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

//NOTHING FOLLOWS//