ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [redacted]

BOARD DATE: 30 August 2024

DOCKET NUMBER: AR20230014698

APPLICANT REQUESTS: through Counsel, physical disability retirement in lieu of honorable administrative discharge due to a condition, not a disability

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

- DD Form 149 (Application for Correction of Military Record)
- Counsel's letter
- Application Documents List
- Table of Contents
- List of Cited Exhibits
- Counsel's brief
- Applicant's Affidavit
- DD Form 2808 (Report of Medical Examination), dated 28 July 2003
- DD Form 2795 (Pre-Deployment Health Assessment), dated15 March 2005
- DD Form 2796 (Post-Deployment Health Assessment), dated 17 March 2006
- DA Form 2166-8 (Noncommissioned Officer Evaluation Report (NCOER)), covering the period ending 29 February 2008
- Army Commendation Medal (ARCOM) Certificate, dated 3 March 2008
- Standard Form 600 (Chronological Record of Medical Care), dated 3-4 March 2008
- DD Form 2796, dated 2 April 2008
- Standard Form 600, dated 24 April 2008
- DD Form 2900 (Post-Deployment Health Re-Assessment), dated 15 September 2008
- NCOER, covering the period ending 5 November 2008
- DA Form 4856 (Developmental Counseling Form), dated 14 April 2009
- DA Form 2627-1 (Summarized Record of Proceedings under Article 15, Uniform Code of Military Justice (UCMJ)), dated 2 June 2009
- Enlisted Record Brief (ERB), dated 17 August 2009
- DA Form 4856, dated 17 August 2009
- Army Europe (AE) Form 40-6A (Unit Commander Request for Mental Health Evaluation), dated 18 August 2009
- DA Form 3822-R (Report of Mental Status Evaluation), dated 26 August 2009

- DA Form 3349 (Physical Profile), dated 27 August 2009
- Standard Form 600, dated 28 August 2009
- Standard Form 600, dated 13-14 October 2009
- Standard Form 600, dated 15 October 2009
- Comanche Troop, 1st Squadron, 91st (Airborne) Cavalry Regiment memorandum, dated 13 November 2009
- DD Form 214 (Certificate of Release or Discharge from Active Duty) covering the period ending 17 December 2009
- Psychiatry Attending Note, dated 26 January 2010
- Initial Service-Connection for Post-Traumatic Stress Disorder (PTSD) Report, dated 24 June 2010
- Department of Veterans Affairs (VA) Rating Decision, dated 3 September 2010
- VA letter, dated 11 February 2022

FACTS:

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

2. Counsel states:

a. The applicant is a decorated combat veteran who served on active duty in the U.S. Army from 2004 through 2009. Over the course of two back-to-back deployments to Afghanistan, he witnessed horrific violence and experienced threats to his life and the lives of his Soldiers. As a result, he began experiencing severe symptoms of PTSD-nightmares, difficulty sleeping, conflict with his loved ones, and worrying about losing control and hurting someone. He felt numb and self-medicated with alcohol. When he was arrested for misconduct in 2009, his commander began processing him for an administrative discharge and ordered a mental health evaluation. The evaluator diagnosed the applicant with PTSD, assigned him a limited duty profile, recommended that he not be discharged for misconduct, and told his commander that he might be eligible for Disability Evaluation System (DES) referral. DES processing would have been appropriate because of the applicant’s duty-limiting diagnosis of PTSD.

b. Army regulations required DES processing for the applicant, but neither the evaluator nor the applicant’s commander referred him to DES. The Army never referred him for mental-health treatment of any kind. Instead, his commander recommended him for administrative separation using a regulation reserved for congenital and developmental conditions, not for compensable disabilities like PTSD. If he had been referred for DES processing, the Physical Evaluation Board (PEB) would have found his

PTSD to be unfitting and awarded a medical retirement. Indeed, shortly after his discharge, the VA found his PTSD qualified him for a 70 percent disability rating. Today the applicant asks the Board to correct the Army's error. The Board, after applying liberal consideration of his PTSD, should grant him medical retirement backdated to the day of his discharge, 18 December 2009.

c. The applicant enlisted in the Army in January 2004 as an Infantryman. He had no history of mental health symptoms, diagnosis, or treatment, and the enlistment medical examination cleared him to enlist. He was assigned to the 503rd Infantry Regiment in Vincenza, Italy, and he reported no mental-health concerns during his first pre-deployment medical assessment.

d. The applicant first deployed to Afghanistan in March 2005 and spent 27 of the next 36 months in combat. As a junior-enlisted airborne Infantryman, this was not an easy deployment. He was conducting combat missions on the front-lines, constantly operating in dangerous, hostile, and unforgiving environments. His day-to-day existence was one of stress, heightened awareness, and the fear that he or one of his fellow soldiers could be seriously injured or killed. On many occasions during his first deployment the applicant experienced severe trauma, which he details at length in his affidavit.

e. After returning from his first deployment, the applicant underwent a post-deployment health assessment in March 2006. At his assessment, in reflecting on his traumatic experiences, he indicated that within the past month he had experienced a situation "so frightening, horrible, or upsetting" that it gave him nightmares and made him feel numb and detached. He stated that he was interested in "receiving help for a stress, emotional, alcohol, or family problem" and reported that he was worried he might have serious conflicts with his spouse, family, or friends, to the extent that he thought he might lose control or hurt someone. Even though the applicant reported these symptoms associated with PTSD, the medical provider who conducted his assessment did not refer him for mental-health evaluation or treatment. Instead, the examiner indicated no "combat or mission related" concerns. The applicant’s PTSD symptoms, however, did not abate, and he began to self-medicate by drinking heavily.

f. The applicant should have received help and treatment for his PTSD at this time, but instead, he was transferred to the 82nd Airborne Division at Fort Bragg, NC. Shortly after his transfer-and less than 10 months after his return from his first deployment-he was deployed to Afghanistan again, this time for 15 months.

g. The applicant spent most of his second deployment, which began in January 2007, in a forward posture at the Afghanistan/Pakistan border. He was "involved continuously" in combat. He frequently took part in dangerous "seek-and-destroy" missions, spent little time in secure areas, and he often was exposed to friendly and

enemy casualties. On one mission, insurgents ambushed his unit, and when they pinned him down, he "was sure he would die." Ultimately, air support arrived and "took out" the insurgents. But after the battle, the applicant and others were ordered to play "meat puzzle"-to pick up the insurgents' scattered body parts and piece them together to get an accurate casualty count.

h. The applicant quickly noticed his mental state deteriorating. He was already experiencing severe PTSD symptoms before he was deployed, and he began to "s[ee] himself transformed." When he first enlisted, he "fe[lt] bad and remorseful about pulling the trigger," but gradually he developed a "numb sense of not caring" and eventually a desire for "revenge for his many fellow Soldiers who he had seen killed."

i. Despite these struggles, the applicant was an exemplary Soldier during his second deployment. In March 2007, he was promoted to sergeant, and in February 2008, his supervisor rated him "[e]xcellen[t]" in every category, designated him "[a]mong the [b]est," and noted he was an "outstanding NCO whose performance and abilities supersede that of his peers."

j. Three days after the applicant's exemplary NCO evaluation, a suicide bomber drove a dump truck filled with explosives into the building where he was located. The explosion killed two members of his fireteam in the building, both close personal friends of his, and left the survivors with no immediate combat capability. Enemy dismounts attempted to overrun the compound and others fired with automatic weapons at the applicant and the remaining survivors. The blast and debris seriously injured the applicant and he sustained lacerations on his head, abrasions on his back, and a traumatic brain injury (TBI) when a ceiling beam fell on him. Despite these injuries, he rescued several fellow Soldiers from the rubble and evacuated on the last helicopter out. He was awarded the Army Commendation Medal and the Purple Heart for his "valiant actions" and "total disregard of his own safety," which "saved the lives of his fellow paratroopers."

k. The applicant received another health assessment after his second deployment in April 2008. He told his examiner that he had spent significant time in combat and seen enemies, coalition fighters, and civilians killed and wounded. He also stated that a traumatic experience gave him nightmares and made him feel detached, avoidant, and numb. He reported that he had lost interest and pleasure in daily activities over the previous two weeks and stated that he was worried he might have serious conflict with friends and family. Despite these symptoms, the examiner reported no combat exposure concerns and did not refer him for mental-health treatment or evaluation. This was the second evaluation in which the applicant's clear symptoms of PTSD were disregarded and he was forced to cope by himself.

l. A neurologist also evaluated the applicant around the same time. He had frequent headaches, neck pain, memory lapses, and anxiety. He was irritable and had trouble concentrating and sleeping. The neurologist diagnosed him with a concussion for which he underwent 4 months of therapy. Despite this, the applicant had difficulty sleeping, and he continued drinking heavily to relieve his symptoms and to help himself sleep.

m. The applicant's emotional and psychological troubles continued to worsen. In a follow-up examination in January 2008, he reported "somewhat difficult" emotional problems that made it difficult to work, take care of things at home, and get along with people. As he had feared, he began having serious conflicts with friends and family. He was having trouble sleeping, concentrating, and making decisions. He was frequently irritable, he engaged in risk-taking behavior, he lost interest and pleasure in doing things, and he often drank more than ten drinks in a sitting.

n. Still, the medical provider stated that the applicant had "no evidence of alcohol-related problems." Though the provider recognized the applicant showed "depression symptoms" and had "social/family problems," the provider did not refer him to Behavioral Health or Mental Health Specialty Care. The provider suggested the applicant visit Military OneSource (a general-purpose website that includes resources on things like "Moving," "Recreation," "Relationships," "Travel," and "Discounts and Perks"). The applicant, after two traumatic combat deployments, was asking for help, but the Army provided none.

o. The applicant's undiagnosed PTSD began to harm his performance at work. On his second NCOER in November 2008, his rating in every category declined. In December 2008, he was transferred to the 91st Cavalry Regiment in Schweinfurt, Germany, and a few months later, he was arrested in Munich for stealing a bicycle after a night of drinking. As punishment for this offense, he was assigned 2 weeks' extra duty.

p. The applicant was arrested for driving under the influence and fleeing apprehension in August 2009. His commander sought to administratively discharge him and, for the first time ever, ordered that he undergo a psychological evaluation. This time, in an evaluation in August 2009, the examiner stated, "PTSD [was] found on evaluation and needs further work-up and treatment." The examiner also concluded the applicant was "in urgent need" of substance-abuse and behavioral-health treatment, and found he "may be eligible for a medical board." The medical provider officially diagnosed the applicant with PTSD and placed him on a limited duty profile in which he could not use weapons or be deployed. Most significantly, the provider reported the applicant's condition "would contravene" an administrative separation for misconduct.

q. The applicant began therapy in September 2009, with a licensed clinical social worker. He reported he "d[id] not enjoy things like he used to, ha[d] difficulty sleeping at night, d[id]n't care about much of anything, and fe[lt] angry most of the time." He

believed his combat trauma, especially the suicide bombing that nearly killed him and did kill several of his friends, directly caused his PTSD symptoms. The social worker agreed that the applicant's depression and anxiety were "deployment[-]related." Then, in October 2009, a psychiatrist diagnosed him with PTSD once again, and in November 2009, another medical provider found that there was "evidence of PTSD." Despite his PTSD diagnosis, the Army administratively separated the applicant.

r. The applicant's company commander recommended that he be administratively separated under Army Regulation 635-200 (Active duty Enlisted Administrative Separation), paragraph 5-17. The commander stated the "specific factual reason" for his discharge was "[The applicant] was diagnosed with PTSD." The applicant's battalion and garrison commanders agreed and also recommended the applicant be discharged under Chapter 5-17. He was discharged on 17 December 2009, and characterization of service was honorable. Despite his having been diagnosed with PTSD, his narrative reason for separation was condition, not a disability under paragraph 5-17.

s. During his separation, the applicant applied to the VA for service-connected-disability compensation. In June 2010, a VA clinical examiner diagnosed the applicant with PTSD. The VA found that he experienced sleep disturbances, anger issues, apathy, irritability, flashbacks, and nightmares and his PTSD caused him "moderate difficulty in social [and] occupational function." Furthermore, the VA found that he self-medicated with alcohol and his PTSD caused the end of his marriage and the loss of his job. The VA granted the applicant service-connected disability compensation for PTSD, rated at 70 percent disabling, effective 18 December 2009, the day after his discharge.

t. The applicant should not have been administratively separated. He was unfit at the time of his discharge due to PTSD and he should have been medically retired. He requests that his military records be corrected to change the reason for his separation from the Army. Specifically, instead of administrative separation and a narrative reason for separation of condition, not a disability, his records should reflect a medical retirement with a disability rating of 70 percent under Title 10, U.S. Code, section 1201 , Department of Defense Instruction (DODI) 1332.38 (Discharge Review Board (DRB) Procedures and Standards), Army Regulation 40-501 (Standards of Medical Fitness), and Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation) as a result of a disability that rendered him unfit for further military service.

u. When a Soldier suffers from a mental disorder that calls into question the Soldier's continued fitness (for instance, PTSD), the Army must refer the Soldier to a Medical Evaluation Board (MEB) and PEB. The MEB determines whether a Soldier has fallen below retention standards because of a condition and then the PEB decides whether the Soldier is unable to perform the duties of his office, grade, rank, or rating. When the Army administratively separated the applicant, it failed to comply both with its own regulations and with DoDI 1332.38, which required the Army to refer the applicant

for DES processing after his PTSD called his continued fitness into question. Because his PTSD rendered him unfit for continued service at the time of his separation, the ABCMR should correct his records to reflect medical retirement, retroactive to the date of his discharge.

v. Certain conditions qualify a servicemember for administrative separation. For instance, servicemembers with adjustment disorders and personality disorders (conditions not disabilities) may be administratively separated. Even a condition that "interfere[s] with assignment to or performance of duty" might qualify a servicemember for administrative separation instead of medical retirement, but only if the condition does not rise to the level of a compensable disability as defined by Army Regulation 635-40 and the VA Schedule for Rating Disabilities (VASRD).

w. PTSD does rise to that level. At the time of his discharge, PTSD was a compensable disability under Army Regulation 635-40 and the V ASRD. Army Regulation 635-40 provides that a servicemember should be considered for DES referral whenever his condition "appears to significantly interfere with the performance of duties appropriate to [his] office, grade, rank or rating." Furthermore, an anxiety disorder like PTSD that interferes with effective military performance requires referral to an MEB. DES processing is required for any compensable disability that results in "limitations of duty" or "interference with effective military performance"). An MEB must determine whether such a servicemember's "medical fitness for return to duty is questionable, problematical, or controversial," and when it is, "it becomes essential that all abnormalities in his or her condition be thoroughly evaluated." Any soldier whose symptoms "persist[] or recur[]" in a way that "necessitate[es] limitations of duty or duty in a protected environment" must be referred to DES. The applicant's PTSD, which was well documented, certainly prevented his return to full duty. The medical provider who first diagnosed him with PTSD placed him on a duty profile under which he could not use weapons or be deployed.

x. The applicant's first PTSD diagnosis and accompanying limited duty profile made him eligible for DES processing and ineligible for administrative separation for his disability. In fact, the provider who evaluated him told his commander to halt the misconduct-related administrative-separation proceedings because the applicant's PTSD qualified him for DES processing and his commander should have submitted him for DES processing, but instead, his commander ignored Army Regulation 635-40 and incorrectly changed the reason for the administrative separation from misconduct to "condition, not a disability," even though he explicitly stated that he was discharging him because of his PTSD.

y. Administrative separation is not the correct vehicle for discharging a servicemember because of PTSD. The Army should have referred the applicant to DES when he was diagnosed with PTSD instead of separating him under a regulation

authorizing separation *only* for conditions "not amounting to disability." He should have been medically retired because of his PTSD. and the MEB would have found that he did not meet retention standards and referred him to the PEB for medical retirement.

z. The applicant's PTSD became disabling long before his official diagnoses and second deployment worsened his PTSD symptoms. These symptoms would have qualified him for medical retirement. First, an MEB would have found that he fell below retention standards when a servicemember experiences anxiety-disorder symptoms that continually interfere with the effective performance of his military duties. On the basis of this finding, the MEB would have referred him to a PEB, which would have found he was unfit for service because he was unable to perform the duties of his office, grade, rank, or rating.

aa. The applicant met both criteria. First, he could not perform common military tasks. His limited-duty profile as a result of his PTSD prevented him from carrying or firing a weapon and from deploying. His commander even acknowledged his unfitness for duty; he said the applicant was no longer "a satisfactory member of the service" because of his PTSD. Second, he posed a risk to others around him as his PTSD, as he stated to multiple medical providers, made him irritable and conflict-prone to the point where he worried he might lose control and hurt someone. His commander agreed that because of the applicant's PTSD, it was no longer "feasible or appropriate" for him to remain in the Army. His multiple PTSD diagnoses, his limited duty profile, his commander's appraisal that he was no longer fit to serve, and the severity of his PTSD symptoms make clear that the MEB would have found that he fell below retention standards and referred him to the PEB, and the PEB would have found that he was unfit to perform the duties of his office, grade, rank, or rating due to a compensable disability.

bb. Once the PEB found him unfit, it would have assigned the applicant a disability rating based on the VASRD. The proper VA rating for his PTSD is not ambiguous. The VA evaluated him just months after his discharge and found he had "occupational and social impairment, with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood," which corresponds to a 70 percent disability rating under the VASRD. At the very least, the PEB could not have rated the applicant any lower than 50 percent, because his PTSD arose from his traumatic experiences in combat. Title 38 Code of Federal Regulations (C.F.R.), section 4.129 ("when a mental disorder that develops in service as a result of a highly stressful event is severe enough to bring about the veteran's release from active military service, the rating agency shall assign an evaluation of not less than 50 percent and schedule an examination within the si6-month period following the veteran's discharge to determine whether a change in evaluation is warranted").

cc. Thus, Mr. [applicant] should be medically retired with the same 70 percent disability rating the VA awarded him when it examined him after his discharge. His

condition was permanent and stable and he must be granted retirement pursuant to Title 10, U.S. Code, section 1216a. At the very least, he should receive a disability rating of 50 percent under Title 38 C.F.R., section 4.129 because his PTSD arose from combat trauma, and it would be neither proper nor possible to place him on the temporary disability retired list (TDRL) instead of medically retiring him.

dd. The ABCMR must apply liberal consideration to the applicant's request for medical retirement. Title 10 U.S. Code, section1552(a) empowers the Board to "correct any military record" in order to "correct an error or remove an injustice." DoD memoranda have clarified that Boards for the Correction of Military and Naval records should afford liberal consideration to veterans seeking discharge-status upgrades and medical retirement when service-connected PTSD forms part of the veterans' claims. The principle animating these memoranda is now codified and requires that when a veteran seeks review of a discharge by the Board and his application is based in part on PTSD "related to combat...trauma," the Board "shall...review the claim with liberal consideration to the claimant that PTSD ... potentially contributed to the circumstances resulting in the discharge."

ee. The Federal Circuit recently clarified the meaning and extent of section1552(h). liberal consideration, the court held, must be applied not just to discharge-status-upgrade applications but to claims for retroactive medical retirement based on PTSD as well. *Doyon v. United States,* 58 F.4th 1235, 1243 (Fed. Cir. 2023). The *Doyon* court further held that§ 1552(h) applies to cases that arose prior to its codification. *Doyon,* 43 F.4th at 1245.

ff. Application of liberal consideration in the applicant's case requires that, for instance, the Board credit his own testimony as to the circumstances under which he incurred his injury and his symptoms. See the Kurta Memo ("The veteran's testimony alone, oral or written, may establish the existence of a condition or experience, that the condition or experience existed during or was aggravated by military service, and that the condition or experience excuses or mitigates the discharge."). It also requires that the Board treat "a diagnosis rendered by a licensed psychiatrist or psychologist" as "evidence the veteran had a condition that may excuse [misconduct]." See also LaBonte v. United States*,* 43 F.4th 1357, 1374 (Fed. Cir. 2022) ("The Kurta memo...make[s] clear that this liberal consideration applies not only to upgrades to the character of a discharge, but also to requests for changes to the narrative reason for separation on a veteran's DD Form 214"). Thus, the Board must liberally consider the applicant's PTSD in evaluating his claim for medical retirement.

gg. The applicant is a decorated combat veteran who served honorably and returned home with serious physical and mental wounds. The disturbing things he saw and participated in on back-to-back combat deployments, the deaths of his friends and fellow service members, a suicide bombing, and counting insurgents' body parts-caused

him to develop PTSD. Though he reported symptoms associated with PTSD as early as his return from his first deployment, preventative care to assist the applicant with effectively navigate such symptoms was not provided. Without appropriate care, the applicant was left to suffer through his PTSD symptoms on his own.

hh. Indeed, this failure to assist the applicant led to his administrative discharge because of his PTSD. But administrative discharge was inappropriate as PTSD qualifies a servicemember for medical retirement, not administrative separation. The Army failed to follow its own regulations when it discharged the applicant. If the Army had, as it should have, referred the applicant for DES processing, a PEB would have found that the severity of his symptoms qualified him for a 70 percent disability rating, just as the VA did months after his discharge. He should have been medically retired.

ii. Now the Board has an opportunity to correct this injustice that has changed the course of the applicant's life. It should apply liberal consideration and order the applicant's records corrected to reflect medical retirement at 70 percent (and in any event no lower than 50 percent), back dated to 18 December 2009.

3. The applicant states:

a. He served in the Army form 2005 – 2009 and deployed to Afghanistan in 2005. He was frequently involved in dangerous "seek-and-destroy" missions and spent significant amounts of time away from secure areas, exposed to many friendly and enemy casualties.

b. His first deployment involved front-line combat in dangerous, hostile, and unforgiving environments. He frequently experienced severe stress, heightened awareness, and the fear that he or one of his fellow Soldiers could be seriously injured or killed.

c. During his first deployment, he was stationed in Afghanistan, where at the time, the situation was highly kinetic (circumstances developed rapidly and frequently required firefights). During this deployment his platoon was often out and away from base. They conducted frequent raids and missions to kill or capture high-value enemy targets. These missions were dangerous and involved significant live fire. His platoon's schedule was strenuous. They would frequently spend 10 days away from base and then return for just 1 day of rest before leaving again for the next mission.

d. During this deployment he experienced events he now recognizes were highly traumatic. In one such instance, his platoon embarked on a high value target mission in eastern Afghanistan. On about the 3rd or 4th day of their 10-day patrol, they raided a village in search of a high value target. After the search, their platoon departed from the village and while they travel they needed to cross a river and began walking slowly over

a rickety bridge. After about half of the platoon had crossed the bridge, a group of hidden insurgents opened fire on them with machine guns and rocket-propelled grenades (RPGs). They quickly took cover and returned fire.

e. At that point, another group of insurgents began shooting at them from the side. He recognized the insurgents had engaged them in an L-shaped ambush. L-shaped ambushes are particularly deadly because they present two axis of fire. They are hard to flank and make it difficult to focus on a particular target or set of targets. He jumped behind a rock the size of a small car to escape the gunfire. He was pinned down and if he had left cover he would have been shot. The rock he was using as cover sustained fire from multiple sides.

f. After 30-45 minutes, he saw tracer fire hit the ground near him. Tracers are bullets with small explosive charges that explode when they hit a target and create a small flash of light that allows distant shooters to see what they are hitting. He saw the tracer fire on the ground moving closer and closer towards him. The tracer fire was coming from an elevated position on a ridge and it began moving closer toward him from the side. There was nowhere he could go to escape it. At that point, he felt with absolute certainty that he was going to die. He prayed and gave himself the last rites.

g. He thought if he was going to die, he would rather die on his feet and he prepared to spring through the fire toward another rock. At that moment, their air support arrived. A flight of Apache helicopters killed the combatants on the ridgeline, just in time for him to survive. This ambush was the closest he had ever come to dying. He was never the same after that. Today he feels that something inside of him snapped that day and it has never been fixed.

h. On another occasion, his patrol responded to an attack by a vehicle-borne explosive device (VBED). Their job was to assess the damage and secure the scene. When they arrived, he saw cars and people on fire. He approached a vehicle and saw that there was an occupant inside. He saw that the occupant was severely burned, but he was not sure whether he was dead or alive. He opened the door and tried to pull him out of his seat by his arm when he saw that he was dead. When he pulled the occupant’s arm, the skin and muscle on his arm separated from the bone and came off in his hand. At that point, a fire truck hit the vehicle with a high-pressure water hose. The water cooled the dead occupant’s charred skin and debris from his body mixed with the water and shot into him, with flakes of burnt skin and viscera hitting him in the eyes and mouth. When they returned from the patrol, he showered and washed his uniform several times, but he could not remove the smell from his uniform and ultimately had to dispose of it. To this day, he cannot grill meat because of this experience.

i. In another instance, his platoon had se up a force protection compound inside of an old Afghan police building. A force protection compound is a structure away from

base from which patrols operate. When patrols would leave from force protection compounds, they would generally leave small fire teams behind to protect the structure and the stored supplies and munitions. During one patrol in August 2005, he was a member of the four-person fire team left behind while the rest of the platoon when out on a mission.

j. He and the four-person fire team monitored the local radio frequencies that insurgents often used. At one point, they began hearing radio chatter between people planning an attack. One of the voices on the radio said, “they left,” and referred to a group of 50-100 people approaching their position. The voice on the radio indicate the group was 10 miles away.

k. The rest of the platoon was not able to return to help they four of them protect the compound because their mission was highly time sensitive. They heard on the radio that the group of insurgents would arrive at their position between 6 pm and midnight. The four of them spoke together and decided they would not let themselves be captured. They prepared for the assault and each of them went alone to a corner of the compound and waited. Eventually, a group of insurgents arrived and as they approached the compound, their air support arrived. A Predator drone observed the insurgents on its thermal camera and killed many of them. Another jet aircraft passed low overhead in a show of force and the remaining insurgents disbanded. In total, they spent 8 – 10 hours preparing for the fight.

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

5. A DD Form 2808 shows the applicant underwent medical examination on 28 July 2003, for the purpose of Regular Army enlistment. He was found qualified for service with a PULHES of 111111.

6. The applicant enlisted in the Regular Army on 13 January 2004, and was awarded the military occupational specialty (MOS) 11B (Infantryman).

7. A DD Form 2795, dated 15 March 2005, provides the applicant’s pre-deployment health assessment, wherein he indicated having no medical problems, physical profiles, or concerns about his health and the medical provider did not indicate referral for any medical conditions were indicated.

8. The applicant deployed to Afghanistan for the first time from 27 March 2005 through 26 March 2006.

9. A DD Form 2796, dated 17 March 2006, provides the applicant's post-deployment health assessment, and shows:

a. The applicant indicated:

- his health got worse
- during this deployment, he felt he was in great danger of being killed
- he was interested in receiving help for a stress, emotional, alcohol, or family problem
- in the past month he had nightmares about an experience that was so frightening, horrible or upsetting that he thought about it when he did not want to
- he felt numb or detached from others, activities, or his surrounding
- he thought he may have serious conflicts with his spouse, family members or close friends
- he did not seek during his deployment or intend to seek counseling or care for his mental health
- he did not have any concerns about possible exposures or events during his deployment that he felt may affect his health

b. The medical provider indicated after interview with and exam of the applicant and review of this form, there was not a need for further evaluation.

10. The applicant again deployed to Afghanistan on 10 January 2007

11. The applicant's NCOER, covering the period from 1 March 2007 through 29 February 2008, shows he was rated "Excellence" in all portions of Part IV (Rater) – Values/NCO Responsibilities, with comments including:

- conducted over 100 mounted/dismounted patrols in Afghanistan
- led a search team of 3 soldiers to recover a buried Soldier after a VBEID attack on a coalition force fire base resulting in a successful recovery
- outstanding NCO whose performance and abilities supersede that of his peers

12. An Army Commendation Medal Certificate, dated 3 March 2008, shows the applicant was awarded the Army Commendation Medal for his valiant actions and dedication to duty while conducting security operations under fire in Afghanistan which saved the lives of his fellow paratroopers with total disregard for his own safety.

13. A Standard Form 600, dated 3-4 March 2008, shows:

a. The applicant was seen in a Theater Clinic for Military Acute Concussion Evaluation (MACE) after injury from terrorist explosion blast.

b. He was diagnosed with injury due to the bast form a terrorist explosion and injury from fragments from a terrorist explosion. Laceration with edema over right temporal, panetal midline; right foot, crushing injury. The assessment shows injury from terrorist explosion and head injury right above right temporal, panetal, midline; procedure done through cleaning and staples. Tetanus shot was given.

c. A review of systems shows symptoms of headache and high irritability.

d. he was released without limitations with follow up as needed in 1 day or sooner if there were problems.

14. A DD Form 2796, dated 2 April 2008, provides the applicant's post-deployment health assessment, and shows:

a. The applicant indicated:

- he saw people wounded, killed, or dead during this deployment
- he was engaged in direct combat where he discharged his weapon
- he felt during this deployment he was in great danger of being killed
- he was not interested in receiving help for a stress, emotional, alcohol, or family problem
- in the past month he had nightmares about an experience that was so frightening, horrible or upsetting that he thought about it when he did not want to
- he was constantly on guard, watchful, or easily startled
- he felt numb or detached from others, activities, or his surrounding
- he thought he may have serious conflicts with his spouse, family members or close friends
- he was exposed during deployment to a blast, improvised explosive device (IED), car bomb, suicide explosion that cause a blow or jolt to his head
- while deployed, he was involved in a motor vehicle accident, a fall, a sports accident, or any other event that cause d ablow to his head or neck whiplash
- he did seek during his deployment or intend to seek counseling or care for his mental health
- he did not have any concerns about possible exposures or events during his deployment that he felt may affect his health

b. The medical provider indicated after interview with and exam of the applicant and review of this form, there was not a need for further evaluation.

15. The applicant's DD Form 214 shows he returned from deployment to Afghanistan on 14 April 2008.

16. A Standard Form 600, dated 29 April 2008, shows:

a. The applicant was seen in the Neurology Clinic at Womack Army Medical Center with a chief complaint of head injury evaluation.

b. He was assessed with concussion with no loss of consciousness with neck pain.

c. A memory/cognitive therapy appointment was to be made and an insomnia/sleep disorders consult was placed.

d. He was released without limitations and was to follow up in 3-4 weeks or sooner if there were problems.

17. A DD Form 2900, dated 15 September 2008, provides the applicant's post-deployment health re-assessment and shows:

a. The applicant indicated:

- his health during the past month was fair
- his physical health problems in the past 4 weeks made it somewhat difficult for him to do his work or other regular activities
- his health was somewhat better now than before he deployed
- emotional problems in the past 4 weeks made it somewhat difficult for him to do his work, take care of things at home, or get along with other people
- his deployment-related conditions or concerns included bad headaches, trouble hearing, problems sleeping or still feeling tired after sleeping, trouble concentrating, forgetful, hard to make up his mind, increased irritability, taking more risks such as driving faster
- since returning from deployment, he had serious conflicts with his spouse, family members or close friends or at work that caused him to worry
- in the past month he had 0 drinks containing alcohol
- on a typical day when he is drinking he has 10 or more drinks that contain alcohol
- he had little interest or pleasure in doing things nearly every day
- he did not want to schedule a visit with a healthcare provider to discuss his health concerns

b. The alcohol screening result shows no evidence of alcohol-related problems.

c. The medical provider indicated there was a need for referral for depression symptoms, social family conflicts, they were both major concerns, and the applicant was not already under care for those issues.

18. The applicant's NCOER, covering the period from 1 March 2008 through 5 November 2008, shows the applicant was rated "Success" in all portions of Part IV, with comments including:

- leads from the front in combat and in garrison
- demonstrates confidence, judgment, and exceptional time management skills
- unlimited potential for positions of increased responsibility

19. An ERB, dated 17 November 2008, shows the applicant's PULHES as of the date of the form was 111111.

20. A DD Form 2708 (Receipt for Inmate or Detained Person) shows after the U.S. Army Garrison Garmisch Directorate of Emergency Services received the applicant from the German police for the offense of larceny of private property, they released him to his unit of assignment at Conn Barracks on 11 April 2009

21. A DA Form 4856 shows the applicant was counseled by his platoon sergeant on 14 April 2009, for misconduct during non-duty hours, in which he and two of his subordinate Soldiers were arrested by the German Police in Munich on 10 April 2009, for allegedly stealing bicycles. They were taken to the Garmisch Military Police Station, where they were picked up by a member of the unit.

22. A DA Form 2627-1 shows the applicant accepted summarized nonjudicial punishment (NJP) under Article 15 of the UCMJ on 2 June 2009, for wrongfully appropriating a bicycle of a value of about $500 or less, the property of a Germany National, on 10 April 2009.

23. A DA Form 4856 shows the applicant was counseled by his first sergeant on 17 August 2009, for driving under the influence and fleeing from apprehension on 15 August 2009, when he was arrested for evading arrest and driving under the influence with a blood alcohol content of .17 percent.

24. An ERB 17 August 2009, shows the applicant's PULHES as of the date of the form was 111111.

25. An AE Form 40-6A shows on 18 August 2009, the applicant's commander requested the applicant's mental health evaluation for the purpose of administrative discharge under the provisions of Army Regulation 635-200, chapter 14, for misconduct,

due to twice being arrested for alcohol related offenses. It shows the applicant socializes with subordinates, causing leadership difficulties.

26. A DD Form 2697 (Report of Medical Assessment) shows the applicant provided his medical assessment for the purpose of separation on 18 August 2009, showing:

- his overall health was the same compared to his last medical assessment
- he did not have any conditions with limited his ability to work in his primary military specialty or required geographic or assignment limitations
- he was uncertain if he intended to seek VA disability for a possible PTSD diagnosis

27. A DD Form 2807-1 (Report of Medical History) shows the applicant provided his medical history for the purpose of separation on 18 August 2009, showing he indicated he had numerous conditions, the most pertinent being:

- head injury/memory loss
- period of unconsciousness or concussion
- frequent trouble sleeping
- he received counseling of any type
- depression or excessive worry
- he'd been evaluated or treated for a mental condition

28. A DD Form 2808 (Report of Medical Examination) shows the applicant underwent medical examination for the purpose of separation on 18 August 2009, wherein he was found qualified for service with a PULHES of 111111 and no listed disqualifying defects, no summarized defects and diagnose, and no recommendations for further specialist examinations indicated.

29. A DA Form 3822-R shows the applicant underwent a mental status evaluation conducted by a psychiatric nurse practitioner, on 26 August 2009, which shows:

a. The applicant was evaluated on the date of the form at the Schweinfurt Behavioral Health Clinic for administrative discharge under chapter 14 of Army Regulation 635-200.

b. The applicant was found to have the mental capacity to understand and participate in the proceedings and met the retention requirements of Army Regulation 40-501, chapter 3, but needed further examination.

c. There were psychiatric conditions that would contrive separation under this chapter for misconduct. The applicant was in need of both Army Substance Abuse

Program (ASAP) and behavioral health treatment and cannot be cleared for separation under chapter 14. ASAP has urgently requested he start treatment on 27 August 2009.

d. PTSD was found on evaluation and needs further work-up and treatment. This Soldier may be eligible for medical board proceedings.

e. It is not appropriate for this Soldier to engage in field duty at this time.

30. A DA Form 3349 shows:

a. The applicant was given a temporary physical profile rating of 2 in factor E for Eyes/vision (presumed to be a typographical error intended to indicate factor S for Psychiatric) due to PTSD on 27 August 2009.

b. The temporary profile expiration date was 25 November 2009.

c. It limited him in the functional area of being able to carry and fire his individual assigned weapon. No other activities were limited.

31. Multiple additional Standard Forms 600 show:

a. On 28 August 2009, the applicant was seen as a walk-in at the Social Work Clinic, requesting clinical services after command referral for alcohol evaluation due to a driving while under the influence. He was assessed with depression with anxiety. The short-term goal was to remain alcohol free. The long-term goal was to be able to recall traumatic combat events without becoming overwhelmed.

b. The applicant was seen for a follow-up at the Social Work Clinic on 13 October 2009 for counseling. He was assessed with depression with anxiety. Assessment of patient's condition work status post-deployment examination was conducted and he was able to recount stories of combat encounters with his distress levels decreasing with the recounting of the story. The applicant was to continue with group counseling concerning his alcohol issued and take medication as prescribed, continuing to meet weekly with his therapist for counseling. The long-term and short-term goals remained the same.

c. On 15 October 2009, the applicant was seen in the Psychiatry Clinic for psychiatric exam. He had been participating in prolonged exposure therapy with Mr. L____ and felt his PTSD symptoms were much improved. He wanted to discuss with the psychiatrist the MEB he discussed with Dr. A____ before she went on leave. He

was looking toward having an administrative discharge out of the Army, which he would prefer if he could possibly do that; he would rather be discharged quickly and hassle with the VA later. They discussed that at length and that given his current level of symptoms, it was reasonable that PTSD alone would not impair his function enough to need and MEB. His mood was euthymic, no sleep complaints, normal enjoyment of activities, no dangerous thought reported. He was assessed with PTSD and was to continue psychiatric therapy and prescribed medications. He was released without limitations.

32. A Commander's Report, dated 13 November 2009, shows the applicant's commander proposed the applicant's separation under the provisions of Army Regulation 635-200, paragraph 5-17, for other designated physical or mental conditions. The specific, factual reason for the recommended action was he was diagnosed with PTSD on 15 October 2009.

33. On 13 November 2009, the applicant's immediate commander notified him of his initiation of action to honorably separate him under the provisions of Army Regulation 635-200, paragraph 5-17 for other physical or mental conditions. The reason for his proposed action was the applicant was diagnosed with PTSD on 15 October 2009. The applicant was advised of his right to consult with counsel, submit statements in his own behalf, and entitlement to a hearing before an administrative board.

34. On 13 November 2009, the applicant acknowledged receipt of notice from his commander informing him of the basis for the contemplated action to separate him under the provisions of Army Regulation 635-200, paragraph 5-17, for other designated physical or mental conditions, and the rights available to him.

35. On 13 November 2009, the applicant acknowledged having been advised by consulting counsel of the basis for the contemplated action to separate him under the provisions of Army Regulation 635-200, paragraph 5-17, for other designated physical or mental conditions, and the rights available to him. He waived his right to appearance before an administrative board, indicated he requested consulting counsel representation, and submitted statements in his own behalf. The applicant's submitted statement in his own behalf is not in his available records for review.

36. On 13 November 2009, the applicant's battalion commander recommended approval of the applicant's honorable discharge under the provisions of Army Regulation 635-200, paragraph 5-17 due to other designated physical or mental conditions. Furthermore, he felt the applicant possessed the potential for useful service if ordered to active duty under conditions of full mobilization and therefor recommended

his transfer to the Individual Ready Reserve (IRR) to complete his statutory service obligation.

37. A second DA Form 3822-R shows the applicant underwent a mental status evaluation conducted by a psychiatrist, on 25 November 2009, which shows:

a. The applicant had the mental capacity to understand and participate in the proceedings and met the retention requirements of Army Regulation 40-501, chapter 3.

b. The applicant had been evaluated at Schweinfurt Behavioral Health by Dr A____, Mr. T____ L____, and the undersigned psychiatrist.

c. He has been diagnosed with adjustment disorder with mixed emotional features and alcohol abuse and dependence.

d. There is no psychiatric disease or defect which warrants disposition through medical channels.

e. The applicant was recommended for separation from the Army under the provisions of Army Regulation 635-200, paragraph 5-17. In the opinion of the undersigned, the problems presented by the applicant are not responsive to hospitalization, treatment, transfer, disciplinary action, training, or reclassification to another type of duty within the military. It was unlikely that efforts to rehabilitate or develop him into a satisfactory member of the service would be successful.

f. The applicant was psychiatrically cleared for any administrative action deemed appropriate by the command.

g. There is evidence of PTSD, but in the opinion of the examiner, it does not rise to the level of psychiatric impairment which would prevent the applicant from his military duties. There is a history of TBI, but has completed the mild(m)TBI program with resolution of symptoms.

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

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

39. An undated U.S. ARM Garrison Schweinfurt memorandum shows the approval authority directed the applicant's honorable discharge under the provisions of Army Regulation 635-200, paragraph 5-17, due to other designated physical or mental conditions and he would be transferred to the IRR based on the recommendation of his battalion commander.

40. The applicant's DD Form 214 shows:

- He was honorably released from active duty on 17 December 2009, under the provisions of Army Regulation 635-200, paragraph 5-17, for a condition, not a disability, with corresponding separation code LFV and transferred to the U.S. Army Reserve (USAR) Control Group (Reinforcement).
- Among his decorations and badges awarded or authorized are the Army Commendation Medal, Purple Heart, and the Combat Infantryman Badge.
- He was credited with 6 years, 4 months, and 20 days of net active service.

41. A Psychiatry Attending Note, dated 26 January 2010, shows the applicant's provided military history, social history, and mental health history related to combat exposure in Afghanistan. He was diagnosed with PTSD and started on Lorazepam. An alcohol screening test was negative.

42. A VA Report of Initial Evaluation for Service Connection for PTSD, dated 24 June 2010, has been provided in full to the Board for review and shows he was diagnosed with PTSD.

43. A VA Rating Decision, dated 3 September 2010, shows the applicant was granted a service-connected disability rating for the following conditions effective 18 December 2009:

- PTSD and alcohol abuse, 70 percent
- posttraumatic headaches, 30 percent
- gastroesophageal reflux disease (GERD), 10 percent
- tinnitus, 10 percent
- residuals of TBI, 10 percent
- hearing loss, 0 percent
- entitlement to individual unemployability was deferred

44. A VA letter, dated 11 February 2022, shows the applicant has a combined service-connected disability rating of 100 percent effective 1 December 2021 and that he is considered to be totally and permanently disabled due to his service-connected disabilities.

45. 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.

46. Title 38, USC, Sections 1110 and 1131, permit the VA to award compensation for disabilities which were incurred in or aggravated by active military service. However, an award of a VA rating does not establish an error or injustice on the part of the Army.

47. Title 38, CFR, Part IV is the VA's schedule for rating disabilities. The VA awards disability ratings to veterans for service-connected conditions, including those conditions detected after discharge. As a result, the VA, operating under different policies, may award a disability rating where the Army did not find the member to be unfit to perform his duties. Unlike the Army, the VA can evaluate a veteran throughout his or her lifetime, adjusting the percentage of disability based upon that agency's examinations and findings.

48. MEDICAL REVIEW:

1. The Army Review Boards Agency (ARBA) Medical Advisor reviewed the supporting documents, the Record of Proceedings (ROP), and the applicant's available records in the Interactive Personnel Electronic Records Management System (iPERMS), the Health Artifacts Image Management Solutions (HAIMS) and the VA's Joint Legacy Viewer (JLV). The applicant through counsel stated that instead of administrative separation, he should have been medically retired. He contends that he should be given a rating at 70% for his PTSD just as the VA gave him. The applicant wants Liberal Consideration applied to be considered for Army medical disability.

2. The ABCMR ROP summarized the applicant's record and circumstances surrounding the case. The applicant entered active-duty service 13Jan2004. His MOS was 11B, Infantryman. He was deployed to Afghanistan twice (20070110 to 20080414 and 20050327 to 20060326). He was released from active duty 17Dec2009 under provisions of AR 635-200 para 5-17 for a condition, not a disability. His service was characterized as Honorable.

3. TBI

a. 17Mar2006 PDHA (for first Afghanistan deployment). He reported '0' visits to sick call. He endorsed headaches, ringing in ears. He denied dizziness, fainting and lightheadedness.

b. 03Mar2008 and 04Mar2008 Sick Call Clinic (in theatre visits). The applicant

sustained trauma to the right side of the head when debris from the collapsing roof fell onto him as a result of an VBIED blast in the compound. The exam revealed bruising and a laceration approximately 1 inch in length, about 2 inches above his right ear. He complained of a headache. There was no observed confusion and no LOC (loss of consciousness), no nausea, dizziness, or balance issues. Glasgow Coma Scale 15 (normal). Diagnosis: Head Injury. The laceration was closed with 3 staples.

c. 29Apr2008 Neurology Clinic Womack AMC. The applicant reported decreased concentrating ability and difficulty multitasking. His SLUMS score was 28/30 (suggests normal cognitive function). Diagnosis: Concussion with No Loss of Consciousness. He was referred for cognitive therapy.

d. 28May2008 Neurology Clinic Womack AMC. The applicant reported headaches (frontal area) 1-2 x week for 5-10 min. There was also sleep disturbances with possible sleep apnea and sleepwalking. A consult was placed for sleep study. He was issued a profile for modified PT, and he was not to perform activities where he may hit his head.

e. 06Aug2008 Neurology Clinic Womack AMC. After cognitive rehab, the applicant underwent a Cognitive Linguistic Evaluation. He completed testing specifically designed to assess cognitive deficits associated with TBI. Testing results showed average normal range for recall and average normal range for reasoning. They determined further cognitive/linguistic rehabilitation was not warranted at the time. They recommended reevaluation if symptoms persisted after he had first established a healthy sleep regimen.

f. 06Aug2008 Neurology Clinic Womack AMC. The applicant was seen for follow up for headache, sleep, and cognitive complaints after the TBI. He was getting headaches 2-3 times per week while at work and treating them with a muscle relaxant as needed. He endorsed not getting enough sleep and he was working 18 hours/day. He was prescribed low dose Seroquel as a sleep aid. He was cleared by TBI Clinic.

g. 18Aug2009 Report of Medical Exam (DA Form 2808 for separation) showed no abnormalities. In the Report of Medical History, the applicant endorsed good health. He reported a head injury, and also endorsed a period of loss of consciousness, and cognitive problems for which he received rehab. He denied frequent or severe headaches.

h. 15Jan2010 Incidental Note, VAMC. The applicant reported that he had undergone 2-3 months of cognitive rehab for the TBI and endorsed not having any symptoms from the head injury.

i. 24Jun2010 C&P Initial PTSD Exam. The applicant reported memory issues after injury from a suicide bomber. He endorsed that he no longer had memory issues.

j. 07Jul2010 C&P General Medical Exam. He was diagnosed with a TBI which occurred 03Mar2008. He underwent cognitive rehabilitation therapy for three months which improved his symptoms. There was a complaint of mild memory loss but without objective evidence on testing. The examiner assessed that his judgement was mildly impaired as manifested during making complex or unfamiliar decisions. He also had one or more neurobehavioral effects that did not interfere with workplace interaction or social interaction; and he had three or more subjective symptoms that mildly interfered with work; instrumental activities of daily living; or work, family, or other close relationships.

4. Behavioral health diagnoses while in service included the following: Acute PTSD; Depression with Anxiety; Alcohol Abuse; and Adjustment Disorder with Mixed Emotional Features and Alcohol Abuse and Dependence

a. 18Jul2003 Report of Medical Exam (DA Form 2808) showed a normal psychiatric exam. He was deemed qualified for service.

b. 17Mar2006 PDHA (for Afghanistan deployment). He reported '0' visits to sick call.

c. 31Aug2006 Mental Health AHC Robinson. He was post deployment and was having more relationship issues with his wife than usual. Also noted sleep and appetite changes. Diagnosis: Acute PTSD. He was prescribed Ambien and he was referred to the PTSD group at WAMC as well as linked with the Couples Communication Workshop via ACS. No BH follow up visits were in the available record.

d. 01Dec2006 RHC Team 3, AHC Robinson. The applicant was seen for contusion in left hand after punching a wall the night prior. All 4 CAGE questions (to screen for alcohol use problems) were positive.

e. 20070301 thru 20080229 NCO ER showed 'excellence' in all categories and for overall performance and potential, the senior rater rated him 'among the best'.

f. 02Apr2008 PDHA (for second Afghanistan deployment). He endorsed headaches. He denied dizziness, fainting and lightheadedness. He also endorsed a number of PTSD related symptoms.

g. 15Sep2008 PDHRA. He endorsed that his health was 'fair' during the past month but somewhat better now than before he deployed. He also endorsed that during the past 4 weeks, his emotional problems made it somewhat difficult to do his work, take care of things at home, or get along with others. Some of his concerns included problems sleeping, trouble concentrating, trouble remembering things, difficulty making decisions and increased irritability.

h. 20080301 thru 20081105 NCO ER showed 'success' in all categories and for

overall performance and potential, the senior rater rated him 'fully capable'

i. 14Apr2009 Developmental Counseling for wrongfully appropriating a bicycle on 10Apr2009.

j. 17Aug2009 Developmental Counseling for evading arrest and driving under the influence 15Aug2009. He was advised to attend Army Substance Abuse Program (ASAP) Counseling and Mental Health Evaluation for possible separation.

k. 18Aug2009 Report of Medical Exam (DA Form 2808 for separation) showed no abnormalities. In the Report of Medical History, the applicant endorsed good health although he did report frequent trouble sleeping, depression or excessive worry and having received counseling related to PTSD. He denied nervous trouble of any sort and suicide attempt. Physical profile was PULHES 111111.

l. 26Aug2009 Psychiatry AHC Schweinfurt. Report of Mental Status Evaluation. He was referred for possible chapter 14 separation evaluation for misconduct after second DUI in 3 years. He was referred to ASAP where evidence of alcohol dependence was found. He had also been diagnosed with PTSD but reportedly deferred treatment because he did not want to appear weak. Prior to the first deployment he was a social drinker. His drinking escalated to drinking until blacked out when he returned. Diagnosis: PTSD. The examiner endorsed a nexus between his drinking and self-medicating for his PTSD. They advised he would benefit from treatment or if he did not want to remain in the military, he could have a MEB. He was prescribed Trazadone for sleep with follow up in 1 week. The psychiatrist noted flat affect, the psychiatric exam was otherwise normal. He had the mental capacity to understand and participate in separation proceedings. He met retention standards of AR 40-501. He was not cleared for administrative action. He needed BH treatment for PTSD and substance abuse (ASAP). It was recommended that he not engage in field duty at the time.

m. 27Aug2009 temporary profile prohibited the applicant from carrying and firing individual assigned weapon and from deployment. The profile expired 25Nov2009.

n. 28Aug2009 Social Work Note AHC Schweinfurt. Psychiatric History: The applicant was previously treated for combat stress in April 2008 and was prescribed Paxil and Zoloft. He denied suicide or homicidal ideation. He stated that he had good support from his wife, family and friends and he was committed to getting better. Diagnosis: Depression with Anxiety. Recently, he had been started on Trazadone and Prazosin.

o. 15Oct2009 Soc Work Note AHC Schweinfurt. Behavioral Health Service Discharge Summary was completed by the applicant's treating therapist (from 28Aug2009 through 15Oct2009) which consisted of a combination of Cognitive

Behavioral Therapy and PET (Prolonged Exposure Therapy). The issues they worked on were sleep problems, combat stress memories, depression, alcoholism, addiction to internet porn and anger. He was also working with ASAP to address his alcoholism. He was working with a psychiatrist for medication management. Overall status at termination: The patient had made progress on all of his issues. His mood and sleep improved, and he had remained abstinent from alcohol. Past memories of combat were not as distressing. Termination occurred because the applicant received an administrative chapter out of the Army. He was recommended to continue to receive counseling and to continue taking the prescribed medications through the Veterans Administration. Diagnosis: Depression with Anxiety and Combat Stress Reaction.

p. 15Oct2009 Psychiatry Note AHC Schweinfurt. The applicant presented with the history of having night sweats 3 or 4 times a week. These had decreased in frequency and severity since starting Trazodone and Prazosin. He was not having unacceptable side effects. He was sleeping pretty well in general. He had been participating in PET and felt his PTSD symptoms were much improved. There was a discussion “at length” of MEB versus administrative chapter out of the Army. He preferred the later as he would rather be discharged quickly. The psychiatrist wrote that given this and his current level of symptoms, it was reasonable that the PTSD alone would not impair his function enough to need a MEB: “Mood was euthymic, no sleep complaints, normal enjoyment of activities, no dangerous thoughts reported, a desire for health recovery, a desire to continue living, no homicidal thoughts, no fear of loss of control, no abnormal thoughts reported, and no change in thought patterns”. The psychiatrist indicated he appeared improved since last psychiatric visit, with good progress in treatment. Diagnosis: PTSD. He was released without limitations. He was to continue his medications.

q. 13Nov2009 memo from command indicated the applicant was being separated due to PTSD diagnosis on 15Oct2009.

r. 25Nov2009 Report of Mental Status Evaluation (DA Form 3822]. The applicant was evaluated by a psychiatrist. They documented the psychiatric exam was without any abnormalities observed in behavior, mood, thinking process, thought content or memory. The diagnosis was Adjustment Disorder with Mixed Emotional Features and Alcohol Abuse and Dependence. The psychiatrist also indicated there was evidence of PTSD however they opined that it did not rise to the level of psychiatric impairment that would prevent performance of military duties. They also noted a history of TBI for which the applicant had completed mTBI program with resolution of symptoms. He had the mental capacity to understand and participate in separation proceedings. The applicant met retention standards of AR 40-501 and was cleared for any administrative action. The psychiatrist recommended a chapter 5-17 separation from service.

s. 24Jun2010 Initial PTSD C&P Exam. He was infantry. He went on kill and capture

missions for days and then had 48 hours to recuperate. He reported being the victim of a suicide bomber and sustained TBI for which he was in a cognitive rehab unit from April 2008 to July 2008. He endorsed that he no longer had memory issues. He drank alcohol while in college but not to excess. After his first tour he drank "enough to put me to sleep". He reported being found guilty of assault and driving to endanger rather than the OUI charge listed on his record. He endorsed 6 months of treatment in ASAP with benefit. He endorsed sleep issues and nightmares, anger issues and problems with close relationships. He had anxiety which he offset by being very organized to the point of being compulsive. He stated Xanax helped. He was in the process of a divorce and living with different relatives. He was unemployed and anticipating going to college in the fall. The examiner opined that his current mental health signs and symptoms resulted in deficiencies in most areas of his life.

t. 26Jan2010 VA Psychiatry Attending Note. The applicant reported multiple significant combat stressors to include continuous involvement in search and destroy missions close the Pakistan border and the suicide bomber VBIED incident on 03Mar2008. He endorsed a range of symptoms attributable to PTSD: Nightmares, sleep issues, hypervigilance, intrusive recollections of his combat experience, and depression. He described prior therapies and prior medications. He endorsed some benefit from both but also noted some side effects from the medication. He noted worsening symptoms since separation from service (trying to adjust to being a civilian again) and moving back to Maine. He wanted to resume treatment.

u. 03Sep2010 VA Rating Decision. Service connection was granted for PTSD and Alcohol Abuse together at 70% and Residuals of TBI at 10% effective 18Dec2009.

5. Summary/Opinion

a. Liberal Consideration guidance was reviewed. The record did contain some instances of misconduct; however, the applicant was honorably discharged. The applicant briefly took prescribed medication to assist with symptoms associated with his Acute PTSD in 2006. He was referred to PTSD group and couples counseling at the time but there was no evidence in the record that he had attended such then. He participated in cognitive rehab in 2008 with benefit. It does not appear that the applicant engaged in regular BH services until August 2009. August, September and October 2009, the applicant engaged in intense close to twice per week CBT/PET treatment and he was taking psychotropic medicines with benefit although he was not symptom free. Per review of NCO ERs, he was functioning in his MOS to standard.

b. Per AR 40-501 chapter 3, the causes for referral to an MEB are as follows: a. Persistence or recurrence of symptoms sufficient to require extended or recurrent hospitalization; or b. Persistence or recurrence of symptoms necessitating limitations of duty or duty in protected environment; or c. Persistence or recurrence of symptoms

resulting in interference with effective military performance. Near the time of discharge, the applicant was evaluated on 3 different occasions by 2 different psychiatrists. He was also well known to social work services at the time. In addition, he participated regularly with ASAP and reportedly remained abstinent from alcohol while in the program. Although there was variation in the BH diagnosis among examiners/providers, none of the treating BH specialists endorsed that the applicant's BH condition (to include PTSD) failed medical retention standards at or near the time of discharge. They noted that he was actively involved in treatment, he was motivated to get better, and he was responding to treatment. There was no history of suicide ideation or attempt, no psychosis, no mania, and no psychiatric hospitalization. There was a temporary physical profile for BH in August 2009. There was no level 3 or above BH physical profile with attributable permanent functional activity or APFT limitations. Notwithstanding the VA service connected him for PTSD at 70%, it is important to note that VA service connection for medical issues potentially incurred during active service has no bearing on the accession/retention decisions made by the US Army. VA regulations are determined by the Department of Veterans Affairs whereas the Army regulations are determined by the Department of Defense. In the ARBA Medical Reviewer's opinion, based on current evidence available for review, referral for medical discharge processing is not warranted.

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 through counsel 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. One potential outcome was to deny relief based on the advising official finding referral for medical discharge processing is not warranted. However, upon review through counsel of the applicant's petition, available military records and medical review, the Board notwithstanding the advising official finding referral for medical discharge processing is not warranted. The Board determined based on the applicant's early diagnosis of PTSD and referral for a MEB and his multiple deployments and close encounters of near-death experiences. The Board noted that review of his case to DES is warranted.

2. The Board determined; the applicant was discharged when his command was informed that he should have a medical evaluation. The Board found the applicant and his counsel demonstrated there is sufficient evidence to support a referral. Based on the medical evidence provided the Board granted partial relief for referral to DES.

3. The board considered the applicant's contention that liberal consideration should be applied when evaluating his request for a medical retirement. However, and in accordance with the Under Secretary of Defense's April 4, 2024, Memorandum for

Secretaries of the Military Departments, the board declined to apply liberal consideration to that evaluation. The board would have applied liberal consideration if the applicant were seeking an upgrade to his discharge. The applicant, however, has not requested an upgrade to his discharge. Instead, the applicant has made a claim of medical unfitness for continued service due to PTSD and / or TBI. A claim for a medical retirement or separation necessarily asserts the existence of an error or injustice in the previous failure of the Army to discharge the individual for unfitness. The Under Secretary's memorandum instructs BCM/NRs to evaluate such claims as a discreet issue, without applying liberal consideration to the unfitness claim.

BOARD VOTE:

Mbr 1	Mbr 2	Mbr 3	
:	:	:	GRANT FULL RELIEF
[redacted]	:	[redacted]	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	[redacted]	:	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.

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 physical disability retirement in lieu of honorable administrative discharge due to a condition, not a disability.

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. 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 his/her ability to return to full duty based on the job specialty designation of the branch of service. A PEB is an administrative body possessing the authority to determine whether or not a service member is fit for duty. A designation of "unfit for duty" is required before an individual can be separated from the military because of an injury or medical condition. Service members who are determined to be unfit for duty due to disability either are separated from the military or are permanently retired, depending on the severity of the disability and length of military service. Individuals who are "separated" receive a one-time severance payment, while veterans who retire based upon disability receive monthly military retired pay and have access to all other benefits afforded to military retirees.

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

4. Army Regulation 635-40 establishes the Army Disability Evaluation System and sets forth policies, responsibilities, and procedures that apply in determining whether a Soldier is unfit because of physical disability to reasonably perform the duties of his office, grade, rank, or rating. Only the unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability.

a. Disability compensation is not an entitlement acquired by reason of service-incurred illness or injury; rather, it is provided to Soldiers whose service is interrupted and who can no longer continue to reasonably perform because of a physical disability incurred or aggravated in military service.

b. Soldiers who sustain or aggravate physically-unfitting disabilities must meet the following line-of-duty criteria to be eligible to receive retirement and severance pay benefits:

(1) The disability must have been incurred or aggravated while the Soldier was entitled to basic pay or as the proximate cause of performing active duty or inactive duty training.

(2) The disability must not have resulted from the Soldier's intentional misconduct or willful neglect and must not have been incurred during a period of unauthorized absence.

c. The percentage assigned to a medical defect or condition is the disability rating. A rating is not assigned until the PEB determines the Soldier is physically unfit for duty. Ratings are assigned from the Department of Veterans Affairs (VA) Schedule for Rating Disabilities (VASRD). The fact that a Soldier has a condition listed in the VASRD does not equate to a finding of physical unfitness. An unfitting, or ratable condition, is one which renders the Soldier unable to perform the duties of their office, grade, rank, or rating in such a way as to reasonably fulfill the purpose of their employment on active duty. There is no legal requirement in arriving at the rated degree of incapacity to rate a physical condition which is not in itself considered disqualifying for military service when a Soldier is found unfit because of another condition that is disqualifying. Only the

unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability.

5. Title 10, U.S. Code, section 1201, provides for the physical disability retirement of a member who has at least 20 years of service or a disability rating of at least 30 percent. Title 10, U.S. Code, section 1203, provides for the physical disability separation of a member who has less than 20 years of service and a disability rating of less than 30 percent.

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

a. Paragraph 5-17 states a service member may be separated for other designated physical or mental conditions that potentially interfere with assignment to or performance of duty. not amounting to disability under Army Regulation 635-40 and excluding conditions appropriate for separation processing under paragraphs 5-11 (Separation of personnel who did not meet procurement medical fitness standards) or 5-13 (Separation because of personality disorder) Such conditions may include, but are not limited to, the following:

- chronic airsickness
- chronic seasickness
- enuresis
- sleepwalking
- dyslexia
- severe nightmares
- claustrophobia
- other disorders manifesting disturbances of perception, thinking, emotional control or behavior sufficiently severe that the Soldier’s ability to effectively perform military duties is significantly impaired

b. When a commander determines a Soldier has a physical or mental condition that potentially interferes with assignment to or performance of duty, the commander will refer the Soldier for a medical examination and/or a mental status evaluation in accordance with Army Regulation 40-501. A recommendation for separation must be supported by documentation confirming the existence of the physical or mental condition. Members may be separated for physical or mental conditions not amounting to disability sufficiently severe that the Soldier's ability to effectively perform military duties is significantly impaired.

c. Separation processing may not be initiated under this paragraph until the Soldier has been counseled formally concerning deficiencies and has been afforded ample

opportunity to overcome those deficiencies as reflected in appropriate counseling or personnel records. A Soldier being separated under this section will be awarded a character of service of honorable, under honorable conditions, or uncharacterized if in an entry-level separation. An under honorable conditions characterization of service which is terminated under this paragraph is normally inappropriate.

27. 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.

28. 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.

29. 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.

30. Under Secretary of Defense, Memorandum for Secretaries of the Military Departments, SUBJECT: Clarifying Guidance to Boards of Correction of Military / Naval

Records Considering Cases Involving Both Liberal Consideration Discharge Relief Requests and Fitness Determinations (April 4, 2024).

//NOTHING FOLLOWS//