

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 27 September 2024

DOCKET NUMBER: AR20230015276

APPLICANT REQUESTS: reconsideration of his prior requests for correction of his records to show:

- his disability resulted from a combat-related injury and his disability severance pay was awarded for disability incurred in the line of duty (LOD) in a combat zone or as the result of performing combat-related operations
- an increase in his disability rating through the inclusion of additional unfitting conditions
- in effect, concurrent receipt of his disability severance pay and Department of Veterans Affairs (VA) disability pay, without monetary offset

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

- DD Form 149 (Application for Correction of Military Record)
- Self-Authored Statement
- Installation Management Agency Orders 034-0004, dated 3 February 2006
- DD Form 214 (Certificate of Release or Discharge from Active Duty) for the period ending 13 April 2006
- VA Disabilities printout
- witness statement, dated 12 June 2018
- Defense Finance and Accounting Service (DFAS) letter, dated 17 July 2018

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Dockets Number:

- AR20150018983 on 29 August 2017
- AR20190009279 on 16 February 2021

2. The applicant states:

a. The injuries he sustained were due to a vehicle accident incurred while on duty traveling from one point of duty to another during his service in Kuwait from 15 September 2002 to 21 May 2003, while in an imminent danger pay area for a contingency operation. He received the Global War on Terrorism Expeditionary Medal for that period of service.

b. The medical board failed to consider his disability as being in the LOD as a direct result of armed conflict or cause by an instrument of war and incurred in the LOD during a war period as defined by law. The medical board also failed to consider the disability resulted from a combat-related injury as defined in Title 26, U.S. Code, section 104.

c. Due to the failure to identify his disability as such, he has been paying back his severance pay through his VA disability compensation, but if he were considered a combat veteran, then all he paid toward his severance pay should be compensated back to him and stop the payments coming out of his VA disability pay.

d. Also, at the time of his medical board, his unit was already deployed, and they had a policy that if you could not deploy, then you would be "chaptered out" due to the need for bodies going downrange. At that time, the medical board ignored all the medical conditions he had as they would take a longer time to investigate and since they did not have time, they concentrated on a main condition to get Soldiers separated faster.

e. After his medical discharge in April 2006, he tried over and over again to prove the injuries he sustained in 2003 were in the LOD and during a time that he was deployed and present in an imminent danger pay locale for a contingency operation. His included discharge orders reflect his disability was not based on injury or disease in the LOD as a direct result of armed conflict or caused by an instrumentality of war and incurred in the LOD during a period of war as defined by law. He has provided a memorandum for record from Chief Warrant Officer Three (CW3) M_____ R_____ to confirm he was in the LOD while the incident occurred causing his disability. His discharge orders also claim that his disability did not result from a combat-related injury as defined in Title 26, U.S. Code, section 104, although the highlighted portion of his DD Form 214 shows he was in an imminent danger pay area for a contingency operation and awarded the Global War on Terrorism Expeditionary Medal for his time there.

f. He received a letter from DFAS informing him he needed to amend his taxes for the year 2006 in order to receive his taxes that were taken out when he received his severance pay in 2006. This letter references the Fair Tax Act of 2016. He amended his tax return and received the taxes that were taken out for his severance pay in 2006. Since he received the tax exemption for the severance pay, he believes the recoupment taken out of his monthly VA compensation should be stopped and what he previously paid back be reimbursed.

3. The applicant enlisted in the Regular Army on 12 March 1996. He held military occupational specialties 21B (Combat Engineer), and 98G (Cryptologic Linguist).
4. The applicant served in Kuwait from 15 September 2002 through 21 May 2003.
5. 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).
6. A 9-page MEB NARSUM, dated 5 January 2006, which has been provided in full to the Board for review, shows in pertinent part:
 - a. The applicant's chief complaint was chronic low back pain. He stated he was initially injured during a microbus rollover in February 2003, while deployed to Kuwait. He recalled instant lower back pain but did not have loss of consciousness or any other significant injuries (other than trauma to his right knee). Following the incident, he was taken for x-rays, which he stated were negative for fracture or other abnormality.
 - b. His other active conditions were:
 - chronic intermittent bilateral knee pain
 - bilateral shin splints
 - history of carpal tunnel syndrome of the right wrist
 - elevated blood pressure
 - hyperlipidemia
 - smoking
 - c. Profile and duty restriction shows the physical demands for his MOSp are "very heavy" and he has a permanent PULHES of 1-2-3-1-1-1, effective 21 December 2005, with assignment limitations to all functional activities aside from wearing of protective mask and all chemical defense equipment. He cannot do any Army Physical Fitness Test (APFT) events aside from the alternate walk event, and no unlimited running, walking, biking or swimming; these events may be done at his own pace and distance. His lifting or carrying maximum weight is 20 pounds.

d. The applicant's diagnosis failing retention standards in accordance with Army Regulation 40-501 (Standards of Medical Fitness) is chronic lower back pain with L5-S1 disk herniation, right S-1 radiculopathy and degenerative disk disease.

e. The applicant's diagnoses meeting retention standards are:

- chronic bilateral knee pain/retropatellar pain syndrome, resulting in permanent L2 profile in the past
- history of bilateral shin splints, resulting in permanent L2 profile in the past
- chronic right wrist pain secondary to carpal tunnel syndrome, status post carpal tunnel release, resulting in permanent U2 profile
- mild hyperlipidemia
- elevated blood pressure without diagnosis of hypertension
- smoking

f. The applicant was referred to the PEB for adjudication of fitness for duty.

7. A partial DA Form 199 shows:

a. A PEB convened on 31 January 2006, where the applicant was found physically unfit with a recommended combined rating of 20 percent and that his disposition be separation with severance pay, if otherwise qualified. His unfitting conditions are:

- chronic radiating low back pain with onset in February 2003 after a motor vehicle accident while deployed to Kuwait; MEB diagnosis (Dx) 1; 10 percent
- right lower extremity with onset after motor vehicle accident above; MEB Dx 1; 10 percent

b. Conditions listed as MEB Dx 2, 3, 4, 5, 6, and 7 were considered by the PEB and found to be not unfitting and therefore not ratable.

8. Headquarters, U.S. Army Garrison, Fort Carson Orders 034-0004, 3 February 2006, discharged the applicant effective 13 April 2006 with disability severance pay and a disability rating of 20 percent. The orders further show his

- disability is not based on injury or disease received in the LOD as a direct result of armed conflict or caused by an instrumentality of war and incurred in the LOD during a war period as defined by law
- disability did not result from a combat-related injury as defined in title 26 U.S. Code, section 104.

9. The applicant's DD Form 214 shows:

a. He was honorably discharged on 13 April 2006, under the provisions of Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation), due to disability with severance pay, with corresponding separation code JFL.

b. He completed 10 years, 1 month, and 2 days of active service.

c. He was awarded or authorized the Global War on Terrorism Expeditionary Medal and credited with service in Kuwait from 15 September 2002 through 21 May 2003, which are the inclusive dates of his service in an imminent danger pay area for contingency operations.

d. He was paid disability severance pay in the amount of \$53,700.00 and awarded a disability rating of 20 percent.

10. A DD Form 294 (Application for a Review by the Physical Disability Board of Review (PDBR) of the Rating Awarded Accompanying a Medical Separation from the Armed Forces) shows the applicant applied to the PDBR on 26 April 2010, requesting an increase to his Army disability rating and consideration of his conditions as combat-related.

11. A PDBR Record of Proceedings shows:

a. On 2 July 2013, the PDBR considered the applicant's requests. The scope of their review was limited to those conditions determined by the PEB to be unfitting for continued military service and those conditions identified, but not determined to be unfitting by the PEB if/when specifically requested by the applicant.

b. The ratings for the applicant's unfitting low back pain with a rating of 10 percent and right lower extremity radiculopathy with a rating of 10 percent, for a combined disability rating of 20 percent, were considered by the PDBR and no other conditions.

c. The PDBR Record of Proceedings also noted the PDBR did not have the jurisdiction or authority to render an opinion on the assertion that his conditions should be considered combat-related.

d. The PDBR recommended no recharacterization of the applicant's disability and separation determination for the unfitting conditions of chronic radiating low back pain, rated 10 percent, and right lower extremity radiculopathy, rated 10 percent, for a combined disability rating of 20 percent.

12. On 17 September 2013, the applicant was advised by the Acting Deputy Assistant Secretary (Army Review Boards) that he reviewed the PDBR recommendation and

record of proceedings and accepted the PDBR's recommendation, thereby denying his application.

13. The applicant previously applied to the ABCMR on 29 November 2015, requesting correction of his records to show the disabilities for which he received physical disability separation with severance pay were combat-incurred. On 29 August 2017, the Board denied the applicant's request, determining the evidence presented does not demonstrate the existence of a probable error or injustice and the overall merits of his case are insufficient as a basis for correction of his records.

14. The applicant provided an undated VA Disabilities printout, presumably pertaining to himself although his name is not reflected on the document, which shows he was awarded the following service-connected disability ratings for the following conditions:

- bilateral tinnitus, 10 percent, effective 14 April 2006
- degenerative joint disease, right knee, 10 percent, effective 1 July 2018
- scars, right knee, 0 percent, effective 3 July 2017
- degenerative joint disease, left knee, with left femoral condyle, 10 percent, effective 1 July 2018
- scars, left knee, 0 percent, effective 23 September 2014
- post-traumatic stress disorder (PTSD), 70 percent, effective 15 September 2017
- degenerative disc disease lumbar spine with right lower extremity intervertebral disc syndrome nerve root sciatic, 20 percent, effective 14 April 2006
- traumatic brain injury (TBI), 10 percent, effective 15 September 2017
- migraine including migraine variants, 50 percent, effective 6 November 2018
- erectile dysfunction, 0 percent, effective 23 September 2010
- degenerative disc disease, cervical spine, 20 percent, effective 23 September 2010
- DeQuervain's tenosynovitis, right wrist, 10 percent, effective 1 September 2014
- right wrist scars, 0 percent, effective 15 June 2017
- painful right wrist scars, 10 percent, effective 15 June 2017

15. The applicant provided a witness statement from CW3 M____ R____, 12 June 2018, which shows he was assigned to the same unit as the applicant in 2002 when they were deployed with their unit to Camp Doha, Kuwait in 2002. Their duties in Kuwait involved driving in two commercial vehicles on a daily basis in Kuwait City. During one of their daily drives, CW3 R____ was in the front vehicle and the applicant was in the rear vehicle, when he observed the rear vehicle being struck by another vehicle, causing it to flip on its side and slide approximately 40 meters. Three of the five passengers, including the applicant, sought medical treatment at Camp Doha immediately upon their return from the accident. He is not aware of any specific outcomes from the medical consultations.

16. The applicant provided a letter from DFAS in care of the Department of the Treasury Internal Revenue Service (IRS), dated 17 July 2018, which shows:

a. The applicant was advised of the Combat-Injured Veterans Tax Fairness Act of 2016, which the President of the United States signed into law on 16 December 2016, providing eligible veterans the right to seek a refund of taxes they may have paid on disability severance pay. DFAS and the IRS are jointly responsible for ensuring notification of rights under this law.

b. Their records show the applicant received disability severance pay in the amount of \$55,410.00 upon his separation from military service in 2006. If his disability severance pay was taxed, he may be eligible for a refund of those taxes. His eligibility for a refund depends upon the circumstances of his separation.

c. Disability severance pay is not taxable or subject to Federal income tax withholding if he meets the circumstances below:

(1) He has a combat-related injury or illness as determined by his military service at separation that:

- resulted directly from armed conflict, or
- took place while he was engaged in extra-hazardous service, or
- took place under conditions simulating war, including training exercises such as maneuvers, or
- was caused by an instrumentality of war

(2) He was receiving VA disability compensation or had received notification from the VA approving such compensation.

d. The applicant was advised that if he believed he was eligible for or would like to request a refund of taxes, you must seek a refund from the IRS by following their enclosed instructions.

17. The applicant again applied to the ABCMR on 28 May 2019, requesting an increase to his physical disability separation rating of 20 percent and correction of his records to show his disabling conditions were based on injury received in the LOD as a direct result of armed conflict or caused by an instrumentality of war and incurred in the LOD during a period of war as defined by law and resulted from a combat-related injury as defined in Title 26 U.S. Code, section 104.

18. On 16 February 2021, the Board denied the applicant's request, determining the evidence presented does not demonstrate the existence of a probable error or injustice and the overall merits of his case are insufficient as a basis for correction of his records.

19. 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.

20. 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 (AHLTA), 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 again applying to the ABCMR requesting reconsideration of their prior denials of finding the unfitting disability (back pain and an associated radiculopathy) which lead to his disability separation as having been either incurred in a combat zone or incurred during the performance of duty in combat-related operations as designated by Secretary of Defense. He is also requesting to have additional conditions determined to have been unfitting for continued service, so in essence, a referral to the Disability Evaluation System.

c. This Record of Proceedings along with the prior records of proceedings detail the applicant's service and the circumstances of the case. His DD 214 shows he entered the regular Army on 12 March 1996 and was discharged with disability severance pay on 13 April 2006 under provisions provided in paragraph 4-24b(3) of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (8 February 2006). It also shows he served in Kuwait, an imminent danger pay area for contingency operations, from 15 September 2002 thru 21 May 2003.

d. This request was most recently denied by the ABCMR on (AR20190009279). The applicant made a similar request which was denied in full on 29 August 2017 (AR20150018983). In that request, the ROP stated:

1. The applicant requests, in effect, a combat association reclassification for a February 2003 motor vehicle accident injury, which occurred during his service in Kuwait.

2. The applicant states one of the injuries for which he was medically discharged occurred during a deployed contingency operation.

e. Rather than repeat their findings here, the board is referred to the records of proceedings and the medical advisory opinions for those cases. This review will concentrate on the new evidence submitted by the applicant.

f. A 12 June 2018 MFR states the applicant was in a commercial motor vehicle accident while deployed in Kuwait and that he along with two other passengers sought medical care following the accident. This does not meet the definition of a combat related injury as defined in Section b(3) of 26 U.S. Code § 104. The law requires there be a cause-and-effect relationship to establish the finding that a medical condition is combat related:

(3) Special rules for combat-related injuries: For purposes of this subsection, the term “combat-related injury” means personal injury or sickness—

(A) which is incurred—

(i) as a direct result of armed conflict,

(ii) while engaged in extra-hazardous service, or

(iii) under conditions simulating war; or

(B) which is caused by an instrumentality of war.

g. The MFR notes the vehicles involved in the accident were civilian vehicles. An instrumentality of war is defined as a vehicle, vessel, or device designed primarily for military service and intended for use in such Service at the time of the occurrence or injury. They may also include such instrumentalities not designed primarily for military service if use of or occurrence involving such instrumentality subjects the individual to a hazard peculiar to military service.

h. For a disability to be incurred as a result of an “instrumentality of war” under the Department of Defense’s 2004 Program Guidance, (1) the “disability must be incurred incident to a hazard or risk of the service” and (2) there “must be a direct causal relationship between the instrumentality of war and the disability.”

i. In addition, there is no evidence the applicant sustained an injury that was later the cause for his involuntary separation with disability severance pay, and the MFR writer states such: "I am not aware of any specific outcomes from the medical consultations." Finally, his medical evaluation board narrative summary shows he continued to work in his primary military occupational specialty until January 2005.

j. Supporting documentation and JLV again confirm that he has been awarded multiple VA service-connected disability ratings. However, the DES compensates an individual only for condition(s) which have been determined to disqualify him or her from further military service. The DES has neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions which were incurred or permanently aggravated during their military service; or which did not cause or contribute to the termination of their military career. That role and authority is granted by Congress to the Department of Veterans' Affairs and executed under a different set of laws.

k. It remains the opinion of the Agency Medical Advisor that neither the awarding of a combat related designation for his unfitting disability nor a referral to the DES for reevaluation is warranted.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition, and executed a comprehensive review based on law, policy, and regulation.

a. His disability resulted from a combat-related injury and his disability severance pay was awarded for disability incurred in the line of duty (LOD) in a combat zone or as the result of performing combat-related operations: Deny. The evidence of record shows the applicant was involved in a commercial motor vehicle accident while deployed in Kuwait and that he along with two other passengers sought medical care following the accident. By law (26 U.S. Code, section 104), this motor vehicle accident does not meet the definition of a combat related injury. The law requires there be a cause and effect relationship to establish the finding that a medical condition is combat related. The Board found no evidence the motor vehicle accident was caused by a combat event or an instrumentality of war.

b. An increase in his disability rating through the inclusion of additional unfitting conditions: Deny. The evidence shows the Physical Evaluation Board (PEB) found the

applicant physically unfit with a recommended combined rating of 20% and that his disposition be separation with severance pay. The only unfitting conditions were his chronic radiating low back pain and right lower extremity. The applicant provides no medical evidence that shows his disability rating is in error. Additionally, although he may have received a higher rating for these and/or additional conditions by the Department of Veterans Affairs (VA), the disability evaluation system compensates a service member only for condition(s) which have been determined to disqualify him or her from further military service (unfitting). The VA, under its own laws, compensates service members for anticipated future severity or potential complications of conditions which were incurred or permanently aggravated during their military service; or which did not cause or contribute to the termination of their military career.

c. In effect, concurrent receipt of his disability severance pay and VA disability pay, without monetary offset: Deny. The law (38 U.S. Code, section 5305) requires that a military retiree must waive a portion of their gross retired pay, dollar for dollar, by the amount of their entitlement to VA compensation. This is commonly referred to as a "VA Waiver." A change to this law is not within the purview of this Board.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

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

BOARD DETERMINATION/RECOMMENDATION:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis for amendment of the ABCMR decision rendered in Docket Numbers AR20150018983 on 29 August 2017 and AR20190009279 on 16 February 2021.

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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. Department of Defense Instruction (DODI) 1332.38 (Physical Disability Evaluation), paragraph E3.P5.2.2 (Combat-Related), covers those injuries and diseases attributable to the special dangers associated with armed conflict or the preparation or training for armed conflict. A physical disability shall be considered combat related if it makes the member unfit or contributes to unfitness and was incurred under any of the following circumstances:

- as a direct result of armed conflict
- while engaged in hazardous service
- under conditions simulating war
- caused by an instrumentality of war

2. DODI 1332.38, paragraph E3.P5.2.2.3 (Under Conditions Simulating War), in general, covers disabilities resulting from military training, such as war games, practice alerts, tactical exercises, airborne operations, leadership reaction courses, grenade and live-fire weapons practice, bayonet training, hand-to-hand combat training, rappelling, and negotiation of combat confidence and obstacle courses. It does not include physical training activities, such as calisthenics and jogging or formation running and supervised sports.

3. Appendix 5 (Administrative Determinations) to enclosure 3 of DODI 1332.18 (Disability Evaluation System) (DES) defines armed conflict and instrumentality of war as follows:

a. Incurred in Combat with an Enemy of the United States: The disease or injury was incurred in the LOD in combat with an enemy of the United States.

b. Armed Conflict: The disease or injury was incurred in the LOD as a direct result of armed conflict (see Glossary) in accordance with sections 3501 and 6303 of Reference (d). The fact that a Service member may have incurred a disability during a period of war, in an area of armed conflict, or while participating in combat operations is not sufficient to support this finding. There must be a definite causal relationship between the armed conflict and the resulting unfitting disability.

c. Engaged in Hazardous Service: Such service includes, but is not limited to, aerial flight duty, parachute duty, demolition duty, experimental stress duty, and diving duty.

d. Under Conditions Simulating War: In general, this covers disabilities resulting from military training, such as war games, practice alerts, tactical exercises, airborne operations, and leadership reaction courses; grenade and live fire weapons practice; bayonet training; hand-to-hand combat training; rappelling; and negotiation of combat

confidence and obstacle courses. It does not include physical training activities, such as calisthenics and jogging or formation running and supervised sports.

e. Caused by an Instrumentality of War: Occurrence during a period of war is not a requirement to qualify. If the disability was incurred during any period of service as a result of wounds caused by a military weapon, accidents involving a military combat vehicle, injury or sickness caused by fumes, gases, or explosion of military ordnance, vehicles, or material, the criteria are met. However, there must be a direct causal relationship between the instrumentality of war and the disability. For example, an injury resulting from a Service member falling on the deck of a ship while participating in a sports activity would not normally be considered an injury caused by an instrumentality of war (the ship) since the sports activity and not the ship caused the fall. The exception occurs if the operation of the ship caused the fall.

4. 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.

5. 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.

6. 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.

7. Concurrent receipt refers to a veteran's simultaneous receipt of two types of Federal monetary benefits: military retired pay from the Department of Defense and disability compensation from the Department of Veterans Affairs (VA). Prior to 1 January 2004, the law dictated that a military retiree could not receive two payments from Federal agencies for the same purpose. As a result, military retirees with disabilities recognized by the VA would have their military retired pay offset or reduced dollar for dollar by the amount of their non-taxable VA compensation. Since enactment of the law, there are two types of concurrent receipt: Combat-Related Special Compensation (CRSC) and Concurrent Retired and Disability Pay (CRDP).

a. Title 10, U.S. Code, section 1413a, as amended, established CRSC. CRSC provides for the payment of the amount of money a military retiree would receive from the VA for combat-related disabilities if it were not for the statutory prohibition for a military retiree to receive a VA disability pension. Payment is made by the Military Department, not the VA, and is tax free. Eligible members are those retirees who have 20 years of service for retired pay computation (or 20 years of service creditable for Reserve retirement at age 60) and who have a physical disability retirement with less than 20 years' service for injuries that are the direct result of armed conflict, especially hazardous military duty, training exercises that simulate war, or caused by an instrumentality of war. CRSC eligibility includes disabilities incurred as a direct result of:

- armed conflict (gunshot wounds, Purple Heart, etc.)
- training that simulates war (exercises, field training, etc.)
- hazardous duty (flight, diving, parachute duty)
- an instrumentality of war (combat vehicles, weapons, Agent Orange, etc.)

b. Subsequent to the establishment of CRSC, CRDP was added to the original legislation, which allows military retirees to receive both military retired pay and VA compensation without an offset, previously prohibited by the law. Individuals are not entitled to receipt of both CRSC and CRDP and if an individual qualifies for both, in the initial year of joint eligibility, the Defense Finance and Accounting Service (DFAS) will automatically apply the entitlement that is most beneficial to the individual, after which

the individual will make his/her own election at the next Open Season. Like regular retired pay and disability severance pay that is not combat-related, CRDP is taxable, according to the individual's current Federal Income Tax Withholding tax rate. Effective 2014, to be eligible for CRDP a Soldier must meet one of the following eligibility criteria:

- be a regular retiree with a VA disability rating of 50 percent or greater
- be a Reserve retiree with 20 qualifying years of service with a VA disability rating of 50 percent or greater and who has reached retirement age
- be retired under the Temporary Early Retirement Act (TERS) and have a VA disability rating of 50 percent or greater
- be a physical disability retiree who earned entitlement to retired pay under any provision of law other than solely by disability and have a VA disability rating of 50 percent or greater

c. Disability Severance Pay is taxable or subject to Federal Income Tax withholding except for those individuals meeting the following criteria of having a combat-related injury or illness as determined by the military service at separation that resulted directly from armed conflict, or took place while engaged in extra-hazardous service, took place under conditions simulating war, or was caused by an instrumentality of war for which the Soldier is receiving VA disability compensation.

8. 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.

9. 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.

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

//NOTHING FOLLOWS//