ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [redacted]

BOARD DATE: 18 April 2025

DOCKET NUMBER: AR20240000275

APPLICANT REQUESTS: with counsel, a medical retirement; or in the alternative, referral to Integrated/Legacy Disability Evaluation System (IDES/LDES), so he may be evaluated for a medical retirement.

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

- DD Form 149 (Application for Correction of Military Record)
- 5-Page Self-Authored Statement, Undated
- 3-Page Self-Authored Statement, Undated
- Counsel Power of Attorney, 17 August 2023
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- Statement, OK, 24 November 2020
- Statement, SS, 30 November 2020
- Numerous Medical and Treatment Records
- 6 Photographs
- Several Department of Veterans Affairs (VA) Rating Decisions and Associated Documents

FACTS:

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

2. The applicant states, in effect:

a. He suffered numerous injuries to both knees while serving in the U.S. Army. He was treated at several military hospitals and clinics. After he was discharged, he was treated by numerous civilian doctors and VA hospitals and clinics. While in the Army, he was returned to duty after treatment although not fully recovered and he reinjured his knees. Some instances of reinjury are not contained in medical records because he was able to recover without seeing a doctor.

b. Upon discharge, the VA determined his injuries were severe. He believes the severity of his injuries was compounded by being returned to duty as opposed to being recommended for medical discharge. He believes if the VA determined his injuries were severe a month after discharge, why were they considered less severe while on active duty? Why wasn't he considered for a medical discharge?

c. Since his discharge, his condition has deteriorated. He believes the decision not to recommend a medical discharge contributed greatly to his suffering. He has endured great pain, three surgeries, countless days unable to work, and many bouts of inflamed knees which has contributed to mental challenges and financial loss.

3. Counsel states, in part:

a. The applicant suffered from traumatic injuries to his knees which were anterior cruciate ligament (ACL) tears, arthritis, and degenerative joint disease. His symptoms were instability of the bilateral knees, buckling and failure of the knee, knee drainage, inflammation, swelling, constant pain, and would have to follow up with physical therapy. Throughout his career, he was in constant pain due to his knees. He could not perform his duties as a Soldier to the standard required in the Army yet was never referred to the DES process. While in the Army, he was returned to duty after being treated for his knee injuries, although he was not fully recovered. There were times when he reinjured his knees while walking, stepping off curbs, twisting, and there were other times when one of his knees would buckle and give out. At the time, he wanted to return to duty, and he had the impression that when he returned to duty, he would be capable of physically performing as he had been prior to his injuries. However, this was not the case, and he only further injured his knees while continuing to serve in the Army. His medical conditions clearly fell below retention standards, and it was both an error and injustice to allow him to separate from the Army without first being evaluated for a medical disability retirement.

b. The applicant has a history of injuries from his military service from 1978 to 1987. The VA determined his anterior lateral rotary instability of the bilateral knees due to the chronic tear of his ACL were due to his military service as shown in treatment records. In addition, he has mild early clinical degenerative joint disease secondary to the ACL tears. The applicant underwent vigorous rehabilitation and physical therapy prior to his expiration term of service (ETS) in 1987.

c. He was originally injured in 1983 while playing in a pickup basketball game with fellow Soldiers on a remote site in Germany as a form of physical training. He tore the ligaments in his left knee and was not immediately able to go to the hospital because of his location. He saw the medic who gave him an ice pack and crutches that night; the medic somehow did not, consider the injury an emergency. The next day, he was supposed to get on the currier van back to the main base, then go to the hospital. By

then, his knee had filled with fluid. He attempted to make it to the van pick up point but didn't make it because he was in pain and on crutches while being unable to move quickly. As he arrived, the van pulled off and he had to wait for the next one, which took another day or two. Once he arrived at the main base, he went to the dispensary the next morning where they treated him and made an appointment at the Army hospital in Stuttgart, Germany. The appointment was a few days later. When he arrived at the appointment, the physician's assistant drained his knee. This was a very painful procedure, and he was told it should not be repeated. Afterwards, he was treated and followed up with physical therapy.

d. He was placed on a profile during treatment and once all the treatment was completed, returned to duty. Return to duty included doing mandatory daily physical training. His injured knee buckled regularly after that, and was often inflamed, swollen and painful. He also injured his right knee after feeling weakness in his lower extremities. Walking (to include numerous times walking in the woods during regular unit maneuvers night and day), standing, running, getting on and off equipment, and getting into and out of trucks was difficult and painful. There were times that he could not do what he needed to do. For example, he would head out to do a task at the motor pool, missile site area, walk to a guard post, and injure himself on the way there and couldn't perform the task after resting and waiting for the pain to stop. ln Germany, he reinjured both knees numerous times. There were times he was able to rest and recover enough without seeing a doctor. He attempted to perform all the duties assigned to him as best he could while dealing with the injuries. The injuries caused him great stress and effected his ability to concentrate due to the pain and instability. He would fall and stumble a lot at times, which continued throughout the rest of his tour.

e. When he returned to Fort Sill, he continued to experience buckling, swelling, stiffness and pain in both of his knees. He remembers one time while on maneuvers he stepped on a tree root and had to lay where he fell. He was left alone and in the hot sun with swollen knees until he was able to head back to the platoon. On the way a combustion fire ignited in the brush near him, so he had to put out the fire. He was in terrible pain but realized he could not outrun the fire. He had to beat down the fire until it was out. He finished the maneuvers without seeking medical assistance.

f. He went to see the medics when he returned to the main base and was treated, went to the hospital, placed on physical therapy and returned to duty. He once again attempted to play basketball but reinjured his knee and was placed in a cast for about eight weeks with his knee drained again. Shortly after the recovery, he was again stationed in Germany for the remainder of his service, about 18 months. At this point, he was in constant agony, with the knees bone on bone and he would fall and stumble. He was in a constant state of self-care. His focus became dealing with the injuries but he knew he could not perform most if not all physical duties yet continued to try anyway.

g. He had to run every morning and do whatever was next while in agony. He could barely walk at this point without reinjuring his knees. Most days and nights were filled with suffering from his injuries that were traumatic and caused anxiety. He was often afraid he would fall, or almost fall and reinjure himself because he already fell from trucks, going up stairs, coming downstairs and even in the street, and stepping off curbs. Some days he would feel fine when he woke up then ran physical training and was miserable for days, sometimes weeks afterwards. He could not continue in the Army due to his injuries and related issues he was suffering through.

h. Shortly after discharge, the VA determined his injuries were severe. The severity of the injuries was compounded by being returned to duty while not being recommended for medical discharge. He has received service connection for his knees at 30% each from the VA. They specifically noted that he had medical records from 16 March 1978, to 19 October 1987, while he was in the military. The injuries were noted as anterior lateral rotary instability secondary to chronic tear of the ACL of the right and left knee. The VA also noted he suffered from numerous injuries while in the Army.

i. Miss SS has witnessed her father have problems with both his knees all her life. She has seen him in pain from walking and sitting, as well as unable to run or even walk fast. He has been forced to continually ice his knees after a long day. If he seeks to do an activity that would require a lot of movement with his knees, he must stabilize his knees with a bandage to prevent pain or instability.

j. Mr. OK has been a friend of the applicant since 1991. He has witnessed the limited ability he has to perform anything related to movement of his knees. The knee disability has limited his ability to perform activities of daily functioning. The applicant specifically discussed with Mr. OK how his disability started while in the Army.

k. The failure to promptly refer him to the appropriate medical board upon discovery of his medical conditions constitutes a breach of duty and is in direct violation of Army Regulation 40-501 (Standards of Medical Fitness) and Army Regulation 635-40 (Disability Evaluation for Retention, Retirement or Separation). The Army's DES policies and procedures are found in Army Regulation 635-40. In determining whether a Soldier is unfit bf cause of physical disability to reasonably perform the duties of his office, grade, rank, or rating, the Army considers the unfitting conditions or defects and those which contribute to unfitness in arriving at the rated degree of incapacity warranting retirement or separation for disability. Furthermore, paragraph 3-2 states disability compensation is not an entitlement acquired by reason of service-incurred illness or injury; rather, the government compensates 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. Soldiers become eligible for retirement or

severance pay benefits for service-connected disabilities in certain circumstances. They must meet line of duty criteria. The criteria are:

(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.

l. In the present matter, the applicant suffered injuries to his knees, including tom ACLs to both knees, while he was in service with the Army. These injuries were not caused by his negligence, misconduct, or while in a period of unauthorized absence. He was never subject of an investigation to review how he was injured. Further, he was on orders when injured, evaluated by medical, and sent to therapy/rehabilitation. Therefore, he has met the line of duty requirements. Army Regulation 40-501, Chapter 3, lists medical conditions and defects that may render a Soldier unfit for further military service. Medical conditions and physical defects, individually or in combination, which may render a Soldier unfit for further military service are those that:

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

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

(3) Restrict performance of any of the profile function activities listed in Section 4 of DA Form 3349 (Physical Profile), prevent the performance of all aerobic events of the Army Physical Fitness Test, have met a clinic medical retention determination point, or have been temporarily profiled for more than 365 days.

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

(5) May compromise the health or well-being of other Soldiers; and

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

m. Counsel provides extract of Army Regulation 40-501, Chapter 3, which notes, in part, the causes for referral to the DES for internal derangement of the knee, joint ranges of motion, arthritis, arthritis due to trauma, osteoarthritis, and miscellaneous conditions and defects.

n. The applicant suffered injuries to his knees while in service that have been documented in his service treatment records. The issues stem from the ACL tear he suffered in both knees as well as arthritis in both knees. He was unable to perform his duties satisfactorily because of these medical conditions. The ACL tears directly led to instability in both his knees as well as arthritis in both knees due to his injuries while in service with the Army. Additionally, he had mild early clinical degenerative joint disease secondary to the ACL tears, and he underwent vigorous rehabilitation and physical therapy prior to his ETS from the Army in 1987. It is clear all these conditions related to his knees led to him being unable to perform any duties required of a Soldier. He was injured multiple times and sent back to full duty which aggravated his conditions to a debilitating degree.

o. The regulatory provisions cited above placed a duty on the Army to refer the applicant to the appropriate medical board upon discovery of his medical conditions. Unfortunately, he was never referred to the DES for evaluation prior to his separation from service. It was both an error and injustice for him to be separate from active duty without first evaluating him for a medical disability retirement. The applicant had arthritis due to the trauma his knee underwent with ACL tears and the lack of adequate medical care. Remaining in the Army was a detriment to his health which had a direct negative affect on his knees and should have led to his referral to the DES.

p. His medical conditions, individually and in combination, rendered him unfit for further military service. He was diagnosed with ACL tears and arthritis in both knees. In addition, he had mild early clinical degenerative joint disease secondary to the ACL tears, and he underwent vigorous rehabilitation and physical therapy prior to his ETS. These medical conditions, both individually and collectively, rendered him incapable of performing his military duties and warranted referral to the DES.

q. As state above, certain conditions must be referred to the DES upon their discovery. These conditions include any condition that limits the ability of the Soldier to perform his or her assigned duties. Per Army Regulation 40-501, Chapter 3, a Soldier who experiences an injury that was incurred or aggravated while entitled to basic pay may be referred to the DES. The applicant suffered a traumatic injury to his knee with the ACL tears that led to arthritis and degenerative joint disease The ACL tear, arthritis, and associated symptoms clearly warranted referral to the DES at the time of his separation, and it was both an error and injustice to allow him to separate from service without first considering him for a medical disability retirement. All the conditions and symptoms in combination should have led to him being referred to the DES.

r. This Board has previously voted in favor of relief when an applicant has presented evidence showing the presence of a medical condition that calls into question the ability of the applicant to perform his or her military duties at the time of separation and when certain conditions were not afforded consideration during separation processing. The applicant should be afforded similar treatment and, in the very least, referred to the DES for evaluation of all medical conditions identified herein. Counsel identifies Docket Numbers AR20180013251, AR20170000508, and AR2015000040 to support this argument and claims the applicant was suffering from numerous medical conditions which were documented in his service treatment records prior to his separation. He was displaying symptoms typically associated with traumatic knee injuries. His symptoms clearly warranted referral to the DES prior to his separation. Granting relief is consistent with past Board precedent and there is no reason to deviate from this Board's prior decisions.

4. The applicant enlisted in the Regular Army on 16 March 1978. He served as a Pershing Missile Crewman. He was honorably discharged on 19 October 1987, upon the expiration term of service (ETS). He served 9 years, 7 months and 1 day of net active service with 6 years and 27 days foreign service. He was awarded or authorized the:

- Army Service Ribbon
- Overseas Service Ribbon (3rd Award)
- Noncommissioned Officer Professional Development Ribbon
- Army Good Conduct Medal (3rd Award)
- Marksmanship Qualification Badge with Rifle Bar (M-16)
- Army Superior Unit Award

5. The applicant provides a/an:

a. Final diagnosis and associated records of a VA evaluation which appears to have been conducted on 27 February 1989, which notes:

(1) Anterior lateral rotary instability bilateral knees, most likely secondary to a chronic tear of the ACL.

(2) Mild early clinical degenerative joint disease, secondary to diagnosis (1).

b. Numerous documents pertaining to treatment from the Orthopedic & Spine Center from 21 June 2017 thru 10 April 2018, noting bilateral knee osteoarthritis, bilateral knee injuries. Associated radiology reports from The Fauquier Hospital are present.

c. Various VA Rating Decisions which appear to culminate in a summary of benefits dated 5 September 2022, noting service-connection at 90%, although determined totally and permanently disabled effective 1 June 2019.

d. 5 photographs of medical assistance devices and a letter of support from his daughter and a close friend previously referenced by counsel.

6. Army Regulation 635-40 establishes the Army DES 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. Paragraph 3-2 states 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.

7. Army Regulation 40-501 provides that for an individual to be found unfit by reason of physical disability, he/she must be unable to perform the duties of his or her office, grade, rank or rating. Performance of duty despite impairment would be considered presumptive evidence of physical fitness.

8. Defense Directive-Type Memorandum (DTM 11-015, 19 December 2011, provides for the IDES. The IDES is the joint Department of Defense (DOD) - VA process by which DOD determines whether wounded, ill, or injured Service members are fit for continued military service and by which DOD and VA determine appropriate benefits for Service members who are separated or retired for a service-connected disability.

9. Title 38, U.S. Code, sections 1110 and 1131, permit the VA to award compensation for disabilities, which were incurred in or aggravated by active military service.

10. 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 applying to the ABCMR in essence requesting a referral to the Disability Evaluation System (DES). He states:

> "I suffered numerous injuries to both knees while in the Army. I was treated ... While in the Army, I was returned to full duty after being treated, though not fully recovered."

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. His DD 214 shows he entered the regular Army on 15 August 1978 and was honorably discharged on 19 October 1987. The ROP states this was after having completed his required active service under provisions provided in chapter 4 of AR 635-200, Active Duty Enlisted Administrative Separations (5 July 1984).

d. In his claim, the applicant stated he had torn ligaments in both knees and running caused pain. An VA exam performed on 3 March 1989 revealed bilateral knee instability most likely due to chronic ACL tears. The radiographs were normal with mild early arthritis on clinical exam.

e. A VA ratings decision shows the applicant was awarded 10% for each knee for tri-compartmental arthritis on 1 April 2000 and that these ratings have gone up over the years.

f. His self-authored statement is consistent with the picture of chronic ACL tears which clearly would have interfered with his performance.

g. There is no probative military evidence the applicant had a physical condition which failed the medical retention standards of chapter 3 of AR 40-501, Standards of Medical Fitness, prior to his voluntary separation. However, it is certainly more likely than not that these injuries were incurred during his service.

h. Paragraph 2-1 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (13 December 1985) states:

> "The mere presence of an impairment does not, of itself, justify a finding of unfitness because of physical disability. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the member reasonably may be expected to perform because of his or her office, grade, rank, or rating, given due consideration to his or her availability for worldwide deployment under field conditions."

i. The issue is that the DES only compensates an individual for service incurred medical condition(s) which have been determined to disqualify him or her from further military service and consequently prematurely ends their career. The applicant ended his career voluntarily. The DES has neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions which were incurred or permanently aggravated during their military service; or which did not cause or contribute to the termination of their military career. These roles and authorities are granted by Congress to the Department of Veterans Affairs and executed under a different set of laws.

j. The ARBA Medical Advisor opinion of this case difficult case that there is not enough contemporaneous evidence to warrant a referral of his case to the DES is not 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. In addition, the applicant's military and medical records, as well as the findings of the Army Review Boards Agency (ARBA) Medical Advisor, confirms there is insufficient evidence to support referral to the Disability Evaluation System (DES) or to warrant medical retirement. Army Regulation (AR) 635-40 clearly states that disability compensation is reserved for Soldiers whose service is interrupted due to a physical disability that renders them unable to reasonably perform their duties. The applicant completed his active-duty service under the provisions of AR 635-200, chapter 4, and was honorably discharged after fulfilling his service obligation, which indicates no interruption due to medical unfitness. Furthermore, AR 40-501 establishes that continued performance of duty despite impairment is presumptive evidence of fitness, and there is no probative evidence that the applicant failed to meet retention standards prior to separation.

BOARD VOTE:

Mbr 1	Mbr 2	Mbr 3	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:XXX	:XXX	:XXX	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.

//SIGNED//

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. 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, under the operational control of the Commander, U.S. Army Human Resources Command (HRC), is responsible for administering the Physical DES and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61

and in accordance with Department of Defense Directive 1332.18 and Army Regulation 635-40.

a. Soldiers are referred to the Physical Disability Evaluation System (PDES) when they no longer meet medical retention standards in accordance with Army Regulation 40-501, Chapter 3, as evidenced in a medical evaluation board, when they receive a permanent medical profile, P3 or P4, and are referred by an military occupational specialty Medical Retention Board, when they are command-referred for a fitness-for-duty medical examination, and when they are referred by the Commander, HRC.

b. The PDES assessment process involves two distinct stages: the Medical Evaluation Board (MEB) and the 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 are either 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 retirement payments and have access to all other benefits afforded to military retirees.

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

3. Army Regulation 40-501 provides that for an individual to be found unfit by reason of physical disability, he or she must be unable to perform the duties of his or her office, grade, rank or rating. Performance of duty despite impairment would be considered presumptive evidence of physical fitness.

4. Army Regulation 635-40 establishes the PDES 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 their office, grade, rank, or rating. It provides that an MEB is convened to document a Soldier's medical status and duty limitations insofar as duty is affected by the Soldier's status. A decision

is made as to the Soldier's medical qualifications for retention based on the criteria in Army Regulation 40-501. 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 service.

a. Paragraph 2-1 provides that the mere presence of impairment does not of itself justify a finding of unfitness because of physical disability. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the member reasonably may be expected to perform because of their office, rank, grade, or rating. The Army must find that a service member is physically unfit to reasonably perform their duties and assign an appropriate disability rating before they can be medically retired or separated.

b. Paragraph 2-2b(1) provides that when a member is being processed for separation for reasons other than physical disability (e.g., retirement, resignation, reduction in force, relief from active duty, administrative separation, discharge, etc.), his or her continued performance of duty (until he or she is referred to the PDES for evaluation for separation for reasons indicated above) creates a presumption that the member is fit for duty. Except for a member who was previously found unfit and retained in a limited assignment duty status in accordance with chapter 6 of this regulation, such a member should not be referred to the PDES unless his or her physical defects raise substantial doubt that he or she is fit to continue to perform the duties of his or her office, grade, rank, or rating.

c. Paragraph 2-2b(2) provides that when a member is being processed for separation for reasons other than physical disability, the presumption of fitness may be overcome if the evidence establishes that the member, in fact, was physically unable to adequately perform the duties of his or her office, grade, rank, or rating even though he or she was improperly retained in that office, grade, rank, or rating for a period of time and/or acute, grave illness or injury or other deterioration of physical condition that occurred immediately prior to or coincidentally with the member's separation for reasons other than physical disability rendered him or her unfit for further duty.

d. Paragraph 4-10 provides that MEBs are convened to document a Soldier's medical status and duty limitations insofar as duty is affected by the Soldier's status. A decision is made as to the Soldier's medical qualification for retention based on criteria in Army Regulation 40-501, chapter 3. If the MEB determines the Soldier does not meet retention standards, the board will recommend referral of the Soldier to a PEB.

e. Paragraph 4-12 provides that each case is first considered by an informal PEB. Informal procedures reduce the overall time required to process a case through the disability evaluation system. An informal board must ensure that each case considered

is complete and correct. All evidence in the case file must be closely examined and additional evidence obtained, if required.

f. The regulation states that after the Soldier has been processed through the PDES and a PEB has determined that the Soldier is qualified for disability retirement but for the fact that their disability is determined not to be of a permanent nature and stable can be placed on the temporary disability retired list (TDRL). The TDRL is used in the nature of a "pending list." It provides a safeguard for the Government against permanently retiring a Soldier who can later fully recover, or nearly recover, from the disability causing him or her to be unfit. Conversely, the TDRL safeguards the Soldier from being permanently retired with a condition that may reasonably be expected to develop into a more serious permanent 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. Title 38, U.S. Code, sections 1110 and 1131, permits the VA to award compensation for medical conditions incurred in or aggravated by active military service. The VA, however, is not empowered by law to determine medical unfitness for further military service. The VA, in accordance with its own policies and regulations, awards compensation solely on the basis that a medical condition exists and that said medical condition reduces or impairs the social or industrial adaptability of the individual concerned. Consequently, due to the two concepts involved, an individual may have a medical condition that is not considered medically unfitting for military service at the time of processing for separation, discharge, or retirement, but that same condition may be sufficient to qualify the individual for VA benefits based on an evaluation by that agency.

7. Section 1556 of Title 10, United States Code, 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//