

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 13 September 2024

DOCKET NUMBER: AR20240000425

APPLICANT REQUESTS:

- physical disability retirement in lieu of physical disability separation with severance pay
- personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Operative Report, dated 28 September 2015
- Operative Report, dated 29 January 2016
- Operative Report, dated 20 April 2016
- Enlisted Record Brief (ERB), dated 23 June 2016
- Department of Veterans Affairs (VA) Form 21-0819 (VA/Department of Defense (DOD) Joint Disability Evaluation Board Claim), dated 27 June 2016
- DA Form 7652 (Physical Disability Evaluation System (PDES) Commander's Performance and Functional Statement), dated 13 July 2016
- Integrated Disability Evaluation System (IDES) Narrative Summary (NARSUM), dated 4 August 2016
- DA Form 3947 (Medical Evaluation Board (MEB) Proceedings), dated 4 August 2016
- U.S. Army Physical Evaluation Board (PEB) memorandum, dated 23 August 2016
- DD Form 214 (Certificate of Release or Discharge from Active Duty) covering the period ending 19 February 2017
- VA Rating Decision, dated 9 March 2017
- VA Rating Decision, dated 22 August 2017
- Physical Disability Board of Review (PDBR) email correspondence, dated 11 April 2022 and 4 January 2023

FACTS:

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

2. The applicant states:

a. Her disability rating of 20 percent awarded by the Army for her unfitting conditions needs correction. She underwent an MEB for her left and right hips and should have been medically retired with a rating of 30 percent instead of medically separated with a 20 percent rating.

b. Because she was medically boarded for her hips, everything involving her hips should be considered part of her evaluation. Her scarring for her right hip is rated 20 percent by the VA but was never considered. She was rated 20 percent for left lower extremity radiculopathy and 20 percent for right lower extremity radiculopathy by the VA within months of her discharge (see her VA Rating Decision dated 22 August 2017).

c. She also complained about having numbness, burning, and aching pain in both legs while service. She had left hip surgery on 28 September 2015, bilateral sympathectomy on 29 January 2016, and right hip surgery on 20 April 2016. Her medical board process was started on 4 August 2016, and she did not get the chance to properly rehabilitate for each of the surgeries before the medical board process as she was not meeting her Military Occupational Specialty (MOS) standards.

d. Based on the VA Rating Decisions she included, she should have been medically retired with a disability rating of 30 percent, which includes higher VA ratings for both hips within less than 6 months of her discharge. Additionally, the bilateral sympathectomy should be increased to 30 or 40 percent. Furthermore, she has been rated at 30 percent for major depressive disorder, anxiety disorder rated at 50 percent, hyperhidrosis, bilateral sympathectomy rated at 30 percent. She believes all of these conditions should have been considered by the Army in her final disability rating for medical retirement.

3. The applicant enlisted in the Regular Army on 9 June 2014 and was awarded the MOS 68D (Operating Room Specialist).

4. The applicant provided copies of the following Operative Reports, which have been provided in full to the Board for review, and in pertinent part show:

a. An Operative Report, dated 28 September 2015, shows the applicant underwent the following surgeries on the date of the report:

- left hip diagnostic arthroscopy
- left hip fractional lengthening of the iliopsoas tendon
- left hip acetabuloplasty
- left hip femoral osteochondroplasty
- left hip labral repair

b. An Operative Report, dated 29 January 2016, shows on the date of the report she underwent bilateral video assisted sympathectomy for her diagnosis of hyperhidrosis.

c. An Operative Report, dated 20 April 2016, shows the applicant underwent right hip arthroscopy on the date of the report.

5. A VA Form 21-0819, dated 27 June 2016, provides the applicant's VA/DOD Joint Disability Evaluation Claim and that her listed medical conditions to be considered as the basis of a fitness for duty determination were hip injury/impingement; bilateral hip surgery.

6. A DA Form 7652 provides the applicant's commander's PDES performance and functional statement pertaining to the applicant and shows:

- the applicant was not performing duties in her MOS; she could not stand for extended periods of time
- she had been diagnosed with moderate to severe depression and anxiety and through continuing treatment and medication she appeared to be improving
- her medical conditions/limitations affect unit mission accomplishment
- he did not recommend the applicant's retention
- she had periods of diminished attention or performance; outside stressors contributed to outbursts and becoming significantly stressed
- she occasionally cannot refrain from verbalizing differences of opinion to superiors in a tactful manner.

7. 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).

8. An IDES NARSUM, dated 4 August 2016, has been provided in full to the Board for review, and in pertinent part shows:

a. The applicant's following conditions were identified as failing the retention standards of Army Regulation 40-501 (Standards of Medical Fitness):

- right femoral acetabular impingement syndrome
- right iliopsoas tendinitis
- status post right hip arthroscopic repair of labral tear and debridement
- right hip status post arthroscopic fractional lengthening of psoas tendon
- left iliopsoas tendinitis
- status post left hip arthroscopic repair of labral tear and debridement

b. The applicant's following conditions were identified as meeting retention standards:

- right ear, normal hearing
- left hear, normal hearing
- tinnitus
- status post right hip arthroscopic surgery with scars
- status post left hip arthroscopic surgery with scars
- status post right axillary area sympathectomy with scars
- status post left axillary area sympathectomy with scars
- hyperhidrosis
- right ankle lateral collateral ligament sprain
- left ankle lateral collateral ligament sprain
- lumbosacral strain
- lumbar spine scoliosis
- migraine including migraine variants
- hyperhidrosis status post sympathectomy
- right lower extremity neuropathy (subjective)
- left lower extremity neuropathy (subjective)
- right long thoracic nerve neuropathy
- major depressive disorder, recurrent, moderate to severe without psychosis
- anxiety disorder related to medical conditions
- somatic symptom disorder

c. The applicant's DA Form 3349 (Physical Profile) was reviewed and discussed. Her PULHES was 113111, with the rating of 3 in factor L for lower extremities. Per her physical profile, she cannot perform certain basic Soldier functional activities, including wearing a helmet, body armor, and load bearing equipment for 12 hours per day, living in an austere environment without worsening of medical condition because of hip pain and she was unable to complete the Army Physical Fitness Test (APFT) events. [The applicant's DA Form 3349 is not in her available records for review.]

9. A DA Form 3947 shows:

a. An MEB convened on 4 August 2016, to consider the applicant's diagnosed conditions.

b. The following conditions were determined to fail retention standards in accordance with Army Regulation 40-501:

- right femoral acetabular impingement syndrome
- right iliopsoas tendinitis
- status post right hip arthroscopic repair of labral tear and debridement
- right hip status post arthroscopic fractional lengthening of psoas tendon
- left iliopsoas tendinitis
- status post left hip arthroscopic repair of labral tear and debridement

c. The following conditions were determined to meet retention standards:

- right ear, normal hearing
- left hear, normal hearing
- tinnitus
- status post right hip arthroscopic surgery with scars
- status post left hip arthroscopic surgery with scars
- status post right axillary area sympathectomy with scars
- status post left axillary area sympathectomy with scars
- hyperhidrosis
- right ankle lateral collateral ligament sprain
- left ankle lateral collateral ligament sprain
- lumbosacral strain
- lumbar spine scoliosis
- migraine including migraine variants
- hyperhidrosis status post sympathectomy
- right lower extremity neuropathy (subjective)
- left lower extremity neuropathy (subjective)
- right long thoracic nerve neuropathy

- major depressive disorder, recurrent, moderate to severe without psychosis
- anxiety disorder related to medical conditions
- somatic symptom disorder

d. The applicant's case was referred to a PEB.

e. On 12 August 2016, the applicant signed the form indicating she agreed with the MEB's findings and recommendations.

10. A U.S. Army PEB memorandum for the VA, dated 23 August 2016, shows the PEB found the applicant physically unfit to continue military service for the following PEB referred unfitting conditions and requested the VA provide a disability rating percentage with rationale to the PEB for the referred conditions:

- right femoral acetabular impingement syndrome, right iliopsoas tendinitis, status post right hip arthroscopic repair of labral tear and debridement, right hip status post arthroscopic fractional lengthening of psoas tendon (MEB diagnoses (Dx) 1-4)
- left iliopsoas tendinitis, status post left hip arthroscopic repair of labral tear and debridement (MEB Dx 5-6)

11. The VA Proposed IDES Rating Decision is not in the applicant's available records for review.

12. A DA Form 199 (Informal PEB Proceedings) shows:

a. A PEB convened on 21 October 2016, where the applicant was found physically unfit with a recommended rating of 20 percent and that he disposition be separation with severance pay.

b. The applicant's conditions determined to be unfitting were:

(1) Left iliopsoas tendinitis, status post left hip arthroscopic repair of labral tear and debridement (MEB Dx 5, 6); 10 percent.

(2) Right femoral acetabular impingement syndrome, right iliopsoas tendinitis, status post right hip arthroscopic repair of labral tear and debridement, right hip status post arthroscopic fractional lengthening of psoas tendon (MEB Dx 1-4); 10 percent.

(3) Right femoral acetabular impingement syndrome, right iliopsoas tendinitis, status post right hip arthroscopic repair of labral tear and debridement, right hip status post arthroscopic fractional lengthening of psoas tendon (flexion) (MEB Dx 1-4); 0 percent.

(4) Left iliopsoas tendinitis, status post left hip arthroscopic repair of labral tear and debridement (flexion); 0 percent

c. The applicant was found fit for MEB Dx 7-27 (listed above) because the MEB indicates these conditions meet retention standards, these conditions do not cause any profile limitations of functional activities, and no performance issues are due to these conditions.

d. On 24 October 2016, the applicant signed the form indicating she had been advised of the findings and recommendations of the Informal PEB and received a full explanation of the results of the findings and recommendations and legal rights pertaining thereto and concurred, waiving a formal hearing of her case. She also indicated she did not request a reconsideration of her VA ratings.

13. The applicant's DD Form 214 shows on 19 February 2017, she was honorably separated under the provisions of Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation) due to disability with severance pay, non-combat, with corresponding separation code JEB. She was credited with 2 years, 8 months, and 11 days of active service.

14. A VA Rating Decision, dated 9 March 2017, shows the applicant was granted a service-connected disability rating for the following conditions effective 20 February 2017:

- major depressive disorder, anxiety disorder, and somatic symptom disorder, 50 percent
- hyperhidrosis, 30 percent
- migraine, 30 percent
- painful scars, residuals bilateral hip arthroscopic surgery, 20 percent
- left ankle lateral collateral ligament sprain, 10 percent
- left hip iliopsoas tendonitis, status post right hip arthroscopic fractional lengthening of psoas tendon, 10 percent
- lumbosacral strain with scoliosis, 10 percent
- right ankle lateral collateral ligament sprain, 10 percent
- right hip femoral acetabular impingement syndrome with iliopsoas tendonitis status post right hip arthroscopic fractional lengthening of psoas tendon and repair of labral tear and debridement, 10 percent
- tinnitus, 10 percent
- left hip impairment of flexion iliopsoas tendonitis, status post right hip arthroscopic fractional lengthening of psoas tendon, 0 percent
- left upper extremity radiculopathy, residual status post bilateral sympathectomy (minor), 0 percent

- right hip impairment of flexion, femoral acetabular impingement syndrome with iliopsoas tendonitis, status post right hip arthroscopic fractional lengthening of psoas tendon and repair of labral tear and debridement, 0 percent
- right upper extremity radiculopathy, residual status post bilateral sympathectomy (major), 0 percent
- scars, residuals status post bilateral hip arthroscopic surgery and bilateral axillary area sympathectomy, 0 percent

15. A VA Rating Decision, dated 22 August 2017, shows the applicant was granted a service-connected disability rating for the following conditions effective 7 July 2017:

- right upper extremity radiculopathy, residual status post bilateral sympathectomy (major) increased from 0 percent to 40 percent
- left upper extremity radiculopathy, residual status post bilateral sympathectomy (minor), increased from 0 percent to 30 percent
- left lower extremity radiculopathy, 20 percent
- right lower extremity radiculopathy, 20 percent

16. The applicant provided email correspondence she had with officials at the PDBR on 11 April 2022 and again on 4 January 2023, wherein she was advised that her application to the PDBR was received, but that she was not deemed a covered individual. The purpose of the PDBR is to reassess the accuracy of the combined disability ratings assigned to former service members who were medically separated with disability severance pay due to unfitness, with a combine disability rating of 20 percent or less and found not eligible for retirement, between the period of 11 September 2001 and 31 December 2009. The applicant's disability separation with severance pay from the Army falls outside this timeframe, thus she is ineligible for PDBR review and was advised to apply to the ABCMR.

17. 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.

18. MEDICAL REVIEW:

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

Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant is applying to the ABCMR requesting an increase in her current military disability rating and subsequent change in her disability discharge disposition from separated with disability severance pay to permanently retired for physical disability. She states:

“I was Medical Boarded for my left and right hip. A correction should be made because if I am Medical Boarded for my hips then everything involving my hips should be considered part of my evaluation. My scarring for my right hip is rated 20% but never considered. I was rated for left lower extremity radiculopathy at 20% and right lower extremity radiculopathy at 20% within months after my discharge (Please see attached VA Rating Decision 08/22/2017).

In addition, I complained about having numbness, burning, and aching pain in both legs while serving. I had left hip surgery on 09/28/2015, I had Bilateral Sympathectomy on 01/29/2016, and I had right hip surgery on 04/20/2016. My Medical Boarded process started on 08/04/2016.

I did not get a chance to properly rehab for each of the surgeries before getting Medical Boarded as I was not meeting my MOS retention standards. I should have been medically retired with 30% instead of 20% based on VA Rating Decisions which included both hips on 07/07/2017, which is less than six months postdate of service discharge 02/19/20 17, both hips from 0% to 20%. Additionally, the Bilateral Sympathectomy from 0% to 30% and 40%.

Furthermore, I have been diagnosed with Migraines rated at 30%, Major Depressive Disorder, Anxiety Disorder rated at 50% and Hyperhidrosis, Bilateral Sympathectomy rated at 30%. I believe these conditions should have been considered in my Army Final Disability Rating Awarded By Service For Unfitting Conditions at 20% to 30%, for medical retirement. I have received the VA disability ratings that includes those conditions for which I was found unfit for retention of Military Service.”

c. The Record of Proceedings details the applicant’s service and the circumstances of the case. The DD 214 for the period of Service under consideration shows he entered the regular Army on 9 June 2014 and was separated with \$11,779.20 of disability severance pay on 19 February 2017 under provisions provided in chapter 4 of

AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (19 January 2017).

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

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

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

g. On 22 June 2016, the applicant was referred to the IDES for "Hip Injury/Impingement. Bilateral hip surgery." The applicant claimed five additional conditions: hyperhidrosis s/p bilateral sympathectomy, tinnitus, mood disorder, depression, and anxiety. A medical evaluation board (MEB) determined her left and right hip conditions failed the medical retention standards of AR 40-501, Standards of Medical Fitness. They MEB determined 21 conditions met medical retention standards, including bilateral hip scars, hyperhidrosis, major depressive disorder, and anxiety disorder.

h. The narrative summary writeups for her mental health conditions were very similar.

“Major depressive disorder, recurrent. moderate to severe, without psychosis. She was seen briefly in 2014 with diagnosis of adjustment disorder. She was again seen in 07/2016 and diagnosed with adjustment disorder. She was started on medication in 07/2016. Not enough time to assess effect of medication on condition. No profile noted for this condition.

Anxiety disorder related to medical conditions. She was seen briefly in 2014 with diagnosis of adjustment disorder. She was again seen in 07/2016 and diagnosed with adjustment disorder. She was started on medication in 07/2016. Not enough time to assess effect of medication on condition. No profile noted for this condition.”

i. Paragraphs 3-32 and 3-33 of AR 40-501, Standards of Medical Fitness (4 August 2011 and 22 December 2016), address the medical retention standards for mood disorders (e.g., depression) and anxiety disorders respectively, and are the same:

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.
- j. There in no probative evidence the applicant’s mental health conditions met any of these criteria.
- k. At that time, Adjustment disorders were not considered disabilities. Paragraph 3-36 of AR 40-501 (4 August 2011):

“3–36. Adjustment disorders

Situational maladjustments due to acute or chronic situational stress do not render an individual unfit because of physical disability but may be the basis for administrative separation if recurrent and causing interference with military duty.”

l. On 12 August 2016, the applicant agreed with the MEB findings and recommendation and her case was forwarded to a physical evaluation board (PEB) for adjudication.

m. On 3 March 2017, the applicant's informal PEB determined four conditions associated with her hip were unfitting condition for continued military service:

"Left iliopsoas tendonitis, status post left hip arthroscopic repair of labral tear and debridement (MEB diagnoses 5, 6)."

"Right femoralacetabular impingement syndrome, right iliopsoas tendinitis, status post right hip arthroscopic repair of labral tear and debridement, right hip status post arthroscopic fractional lengthening of psoas tendon (MEB diagnoses 1-4)." "Right femoralacetabular impingement syndrome, right iliopsoas tendinitis, status post right hip arthroscopic repair of labral tear and debridement, right hip status post arthroscopic fractional lengthening of psoas tendon (flexion) (MEB diagnoses 1-4)."

"Left iliopsoas tendonitis, status post left hip arthroscopic repair of labral tear and debridement (flexion) (MEB diagnoses 5, 6)."

n. The PEB, using the VA Rating Decision, grouped several to the conditions together (e.g., MEB diagnosis 1-4) as required by the VASRD to avoid "pyramiding," that is giving multiple ratings for the same symptoms from multiple conditions. Within the VASRD, §4.14 of Part 4 of Title 38 states that when symptoms overlap and could be considered under multiple codes, "the evaluation of the same disability under various diagnoses is to be avoided ... and ... the evaluation of the same manifestation under different diagnoses are to be avoided." This is known as "pyramiding," where a Veteran would receive multiple ratings for the same symptoms, e.g. breathing treatment for asthma and obstructive sleep apnea; and concentration problems in a Veteran who has both a mild traumatic brain injury and PTSD. In this case, the applicant had right and left hip pain from several related conditions.

o. They found the remaining 21 medical conditions not unfitting for continued military service. The PEB applied the Veterans Benefits Administration (VBA) derived ratings of 10%, 10%, 0%, and 0% respectively for a combined rating of 20% and recommended the applicant be separated with disability severance pay. On 24 October 2016, after being counseled on the PEB's findings and recommendation by her PEB liaison officer, the applicant concurred with the PEB, waived her right to a formal hearing, and declined to request a VBA reconsideration of her disability ratings (VARR).

p. Review of the supporting documentation, the EMR, and her PEB case file found no significant errors, omissions, or discrepancies.

q. There is no evidence the applicant had any additional duty incurred medical condition which would have failed the medical retention standards of chapter 3 of AR 40-501, Standards of Medical Fitness, prior to his discharge. Thus, there was no cause for referral to the Disability Evaluation System. Furthermore, there is no evidence that any medical condition prevented the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his discharge.

r. JLV shows he has been awarded multiple VA service-connected disability ratings, including ratings for mood disorder and tinnitus. However, 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 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.

s. It is the opinion of the ARBA Medical Advisor that neither an increase in her military disability rating nor a referral of her case back to the DES are warranted.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition, and executed a comprehensive review based on law, policy, and regulation. Upon review of the applicant's petition, available military records, and the medical review, the Board concurred with the advising official finding that the applicant's Department of Veterans Affairs rating determinations are based on the roles and authorities granted by Congress to the Department of Veterans Affairs and executed under a different set of laws. Based on this, the Board determined an increase in the applicant's rating decision at the time of separation was not appropriate and referral of her case to the Disability Evaluation System (DES) is not warranted.

2. The applicant's request for a personal appearance hearing was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable

decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

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

BOARD DETERMINATION/RECOMMENDATION:

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.

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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. 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 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records (BCM/NRs) regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. BCM/NRs may grant clemency regardless of the court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds. This guidance does not mandate relief, but rather provides standards and principles to guide BCM/NRs in application of their equitable relief authority. In determining whether to grant relief on the basis of equity, injustice, or clemency grounds, BCM/NRs shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment. Changes to the narrative reason for discharge and/or an upgraded character of service granted solely on equity, injustice, or clemency grounds normally should not result in separation pay, retroactive promotions, and payment of past medical expenses or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded service characterization.

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. Title 38, U.S. Code, section 1110 (General – Basic Entitlement) states for disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

7. Title 38, U.S. Code, section 1131 (Peacetime Disability Compensation – Basic Entitlement) states for disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during other than a period of war, the United States will pay to any veteran thus disabled and who was

discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

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

9. Army Regulation 15-185 (Army Board for Correction of Military Records (ABCMR)) prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR. Paragraph 2-11 states applicants do not have a right to a formal hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

//NOTHING FOLLOWS//