

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 27 September 2024

DOCKET NUMBER: AR20240000887

APPLICANT REQUESTS: through Counsel:

- reconsideration of his prior request for physical disability retirement in lieu of physical disability separation with severance pay through the inclusion of post-traumatic stress disorder (PTSD) as a rated unfitting condition
- personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Counsel's Brief, dated 14 November 2023
- Power of Attorney
- Army Review Boards Agency (ARB) Memorandum for ARBA Personnel, dated 12 March 2020
- Army Board for Correction of Military Records (ABCMR) Record of Proceedings in Docket Number AR20210005533, dated 3 November 2021
- ABCMR letter to the applicant, dated 22 September 2022
- Counsel's letter to the Secretary of Defense, dated 16 May 2023, including certified mail envelope and receipt
- Counsel's letter to the Under Secretary of Defense, dated 16 May 2023, including certified mail envelope and receipt
- Counsel's letter to the Deputy Secretary of Defense, dated 16 May 2023, including certified mail envelope and receipt
- Counsel's letter to the Secretary of the Army, dated 16 May 2023, including certified mail envelope and receipt
- letters, email correspondence, and Privacy Act Releases from three Members of Congress, dated August - September 2024

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 Docket Number AR20210005533 on 3 November 2021.

2. Counsel states:

a. On behalf of the applicant, Counsel respectfully requests reconsideration of the Board's denial of his application for relief in Docket Number AR20210005533 based upon a failure to comply with Department of Defense (DoD) policy and a denial of due process. Specifically, the Board's prior decision failed to apply DoD policy for cases raising PTSD or PTSD-related mental health conditions. Furthermore, the original Board denied him due process when it relied on medical and behavioral health opinions without first affording him an opportunity to respond. The applicant has not previously requested reconsideration.

b. The Board should incorporate and consider the military records, evidence, and legal arguments listed and summarized in the original decision. The applicant's reconsideration request raises facts and arguments the Board did not previously entertain. This request for reconsideration is also timely because it is being made within 1 year of receiving the Board's original decision. Additionally, the applicant requests a personal appearance should the written submission be deemed insufficient to grant relief and requests all correspondence be sent to the undersigned, using the contact information below, with a copy to him.

c. Counsel respectfully request that the Board apply the liberal consideration policies and change the applicant's medical discharge with severance pay to a medical retirement. Alternatively, he requests referral of his unfitting medical and behavioral health conditions to the Army's Office of the Surgeon General for entry into the Legacy Disability Evaluation System (DES).

d. The Board should adopt all facts, evidence, and exhibits described in its original Decision on 14 July 2022 and sent by correspondence dated 22 September 2022. The Board's prior decision references and relies on the opinion of a psychologist employed by ARBA. The applicant did not receive a copy of the advisory opinion, nor was he afforded an opportunity to respond.

e. In declining his application for a medical retirement, the Board found that the letters from the applicant's Battalion Commander and from a former Soldier could not substantiate a diagnosis of PTSD while he was on active duty orders in the Army. According to the Board, "[t]he applicant's military records do not support the presence of *boardable* behavioral health conditions of PTSD or other behavioral health conditions."

f. The Department of Veterans Affairs (VA) granted the applicant a 100% service-connected disability rating for PTSD incurred as a result of his experiences in Kosovo; however, this evidence was largely dismissed by the Board given the delay between his discharge and the aforementioned rating. The evidence contained within the previous petition established that the applicant actively displayed symptoms of PTSD that

impacted his ability to function, let alone perform the duties of his military occupational specialty (MOS), grade, rank, and position prior to his discharge. This evidence further highlights the lack of knowledge about, and attention to, PTSD at the time of the applicant's physical evaluation board (PEB) as well as the stigma associated with seeking mental health treatment. Soldiers, and especially leaders, were advised that seeking treatment would ruin their careers - a fact confirmed by both his peers and superiors. As a result, the applicant, like many others before and after him, attempted to hide their conditions by self-medicating and putting on a front at work. Thankfully, policies, evaluation methods, and treatment for PTSD has changed dramatically since the start of the 21st century, which make it far more difficult for a Soldier's PTSD to escape detection by medical professionals in routine evaluations, let alone the medical evaluation board (MEB) process. While this serves to help the current generation of Soldiers, it does nothing for those who fell through the cracks at the dawn of the 21st century.

g. Since receiving the Board's decision, the applicant, by and through Counsel, has filed complaints regarding the due process violations and the failure to apply the DoD liberal consideration policies to his case. As of the date of this petition, no response has been received, amounting to a constructive denial of his request for relief.

h. The applicant's behavioral health evidence was sufficient to prove that he suffered PTSD during his military service, which should have been evaluated as part of his DES processing. Beginning with the 3 September 2014, memorandum from the Secretary of Defense ("Hagel Memo"), the DoD has implemented policies guiding review of BCM/NR applications that raise PTSD or other mental health conditions. The DoD understood that PTSD was not recognized as a diagnosis in the past, and even when it was, that service members often received diagnoses after their separation from the military. Guidance attached to the Hagel Memo set the following requirement: "Special consideration will be given to VA determinations which document PTSD or PTSD-related conditions connected to military service."

i. The 25 August 2017, memorandum from the Acting Under Secretary of Defense for Personnel and Readiness provided clarifying guidance for applications involving mental health conditions (Kurta Memo). This guidance said that a VA determination of service-connected mental health conditions, including PTSD, "is persuasive evidence that the condition existed or experience occurred during military service." Here, the Board has evidence that the applicant received a 100 percent disability rating from the VA for PTSD.

j. The Kurta Memo also acknowledged that evidence of mental health conditions could come from sources other than veterans' service records, such as statements from family members, friends, roommates, co-workers, fellow Service members, or clergy. Here, the applicant's original application included letters from fellow Soldiers who

witnessed what he went through firsthand. These letters furnish evidence of the onset of PTSD or PTSD-related symptoms while he was in the Army and deployed to Kosovo and the impact it had on him prior to his discharge.

k. On 25 July 2018, the Under Secretary of Defense issued further guidance to Discharge Review Boards and BCM/NRs (Wilkie Memo). The Wilkie Memo stated: "A veteran or Service member's sworn testimony alone, oral or written, may establish the existence of a fact supportive of relief. " Here, again, the applicant wrote a personal statement about his condition and submitted it to the Board. He also supplemented that statement by submitting email correspondence regarding the self-doubt he experienced regarding the events in Kosovo, reminiscing with Colonel (COL) W\_\_\_\_\_ and sharing their personal struggles over what they went through in 1999, and his continued efforts to manage his symptoms and alleviate the impact on his family.

l. The Board's original decision paid lip service to the DoD requirement to liberally consider applications that raise PTSD or PTSD-related conditions. The decision mentions liberal consideration only once-in endnote. Had the Board actually applied liberal consideration, it would have given credence to the VA disability rating for PTSD and the statements from the applicant and his fellow Service members. And had the Board weighed this evidence correctly, it would have concluded that the applicant should have received a medical retirement.

m. The applicant was denied his right to respond to advisory opinions. In its original decision, the Board considered at least one medical opinion without disclosing it to the applicant. Under ARBA policy, opinions from the agency's Medical Office are not external or ex parte communications and do not have to be provided to applicants under Title 10, U.S. Code, Section 1556. This reasoning is flawed.

n. The ARBA Medical Office and staff are external to the ABCMR. They are not voting members of the Board. When the ABCMR requests an opinion from the ARBA Medical Office, it is going outside its purview for an opinion, even though the ABCMR falls under the ARBA umbrella. DoD Directive 1332.41 supports this interpretation. The DoD requires the Secretaries of the Military Departments to ensure that applicants "seeking correction action" from the BCMR are "provided a copy of *a// correspondence to or from the agency or board* with an entity or person outside the agency in accordance with (Title 10, U.S. Code, section 1556)."

o. The ARBA policy constricts the meaning of "agency" to squeeze out a loophole in the statute to expedite their process at the expense of the due process rights of service members. The ABCMR is also an agency, and "the highest level of administrative review within the Department of the Army with the mission to correct errors in or remove injustices from Army military records Correspondence to the members from a person outside the ABCMR is external and ex parte and must be divulged to applicants, even if

the correspondence comes from another agency within the ARBA or individual employed by the ARBA. The ARBA's current policy prevents applicants from responding to medical or psychological opinions that pertain directly to their case and may have a material effect on the ABCMR's analysis and decision.

p. The ABCMR's original decision in the applicant's case erred in three main ways. First, the decision discounted the VA's PTSD determination and gave insufficient weight to the character letters from two individuals who served with the applicant in Kosovo in 1999. Second, the decision on its face did not apply liberal consideration to his request to modify or change his discharge. Finally, the Board relied on ex parte medical communications to reach its decision without affording the applicant an opportunity to respond. To ensure fundamental fairness, the ABCMR must reconsider his application for correction of his military records in accordance with DoD policy.

q. Counsel's letters to the Secretary of Defense, Under Secretary of Defense, Deputy Secretary of Defense, and the Secretary of the Army, all dated 16 May 2023, and provided to the Board for review, are identical in content and are discussed in full in the following paragraphs. They show the applicant's deployment to Kosovo in 1999 exposed him to harrowing scenes of humanity's capacity for inhumanity. An Army Reserve Lieutenant, he arrived in theater as a member of a peacekeeping mission. He tried to keep the peace in Kosovo, but would know no peace after the deployment. The shocking sights, sounds, smells, and situations he experienced are never far from his mind to this day. The applicant has PTSD.

r. The applicant petitioned the ABCMR in 2021 for a physical disability retirement based, in part, on his post-service diagnosis of PTSD. The circumstances of his deployment and bases for relief are described in his application. The VA has assigned him a service-connected disability rating of 100 percent for this condition. He included with his petition his VA disability rating as supporting documentation. He also provided statements from individuals who attested to the atrocities that he and the unit encountered and observed in Kosovo and their lasting effect on him.

s. The Board did not find the applicant's PTSD evidence persuasive and denied relief. The Board noted "an absence of any available behavioral health related notes in military-medical records during his time in service. The decision also asserted that letters from military compatriots "cannot serve to substantiate a diagnosis as such without military-medical documentation." This analysis was erroneous.

t. The Board's decision compounded this error when it referred to an ex parte communication from an agency psychologist. The psychologist's communication with the Board was not disclosed to the applicant or his attorney. Nor did the Board provide him or counsel with the opinion from the ARBA's Medical Advisor, which was also referenced in the decision denying correction.

u. The Board failed to follow law and policy in the applicant's case. His case, and possibly others, warrant review from your office(s). Veterans like the applicant depend on the ABCMR to get the legal authorities right. When it does not, applicants lose confidence in the service and feel left behind.

v. The Board's first error in the applicant's case is that the decision does not say whether the members applied liberal consideration. Although the decision references DoD guidance, the analysis does not explicitly apply the required standard of review. Under DoD policy, the Board must liberally consider applications that raise PTSD. It is unknown if the members in the applicant's case adhered to the policy when they failed to mention it in their analysis.

w. The second error in the applicant's case occurred when the Board failed to give sufficient weight to both his VA disability rating and witness statements concerning his mental health symptoms. The Hagel Memo requires "special consideration" for VA decisions documenting PTSD or PTSD-related conditions connected to military service. The guidance also permits "any other evidence which may reasonably indicate that PTSD or a PTSD-related disorder existed at the time of discharge..." Furthermore, the Kurta Memo guidance state that a "veteran's testimony alone, oral or written, may establish the existence of a condition or experience, [and] that the condition or experience existed during or was aggravated by military service..." In denying the applicant's petition, the Board failed to follow DoD policy.

x. The final error occurred when the Board did not give the applicant an opportunity to respond to medical advisory opinion. The ARBA policy on ex parte communications is inconsistent with legal and regulatory requirements. ARBA's reasoning is that the providers' opinions to the ABCMR are in-house and qualify as internal analysis and are not, therefore, ex parte communications. This reasoning is flawed.

y. The ARBA Medical Office and staff are external to the ABCMR. When the ABCMR requests an opinion from the ARBA Medical Office, it is going outside its purview for an opinion. DoD 1332.41 supports this point. The DoD requires the Secretaries of the Military Departments to ensure that applicants "seeking correction action" from the ABCMR are "provided a copy of *all correspondence to or from the agency or board* with an entity or person outside the agency in accordance with (Title 10, U.S. Code, section 1556)."

z. The ARBA policy constricts the meaning of "agency" to squeeze out a loophole in the statute. The ABCMR is also an agency, and "the highest level of administrative review within the Department of the Army with the mission to correct errors in or remove injustices from Army military records." Correspondence to the Board from a person outside the Board must be divulged to applicants, even if the correspondence comes from another agency under the ARBA umbrella. The ARBA's current policy prevents

applicants from responding to medical or psychological opinions that pertain directly to their case and may have a material effect on the Board's decision.

aa. As an honorably discharged Soldier and officer, the applicant came to the Board requesting relief for an error or injustice in his military records. Like many before him , he came away from the experience disheartened, not because he was denied relief but rather because the Board went out of its way to disregard valid evidence supporting his petition and effectively dismissing his sacrifice of his mental health for his country. He is likely not the only applicant who has not received the full consideration that DoD policy mandates for PTSD or PTSD-related conditions, and he is certainly not the only veteran denied due process under existing ARBA policy.

bb. For the aforementioned reasons - before too many veterans experience the same defeat the applicant has and, God forbid, take irrevocable action in response to their service and sacrifice being so casually dismissed - Counsel requests that your office correct the Board's and ARBA's misinterpretation of law and policy, review the Board's analysis in the applicant's case, and either unilaterally grant the requested relief or direct automatic reconsideration of his petition using the corrected guidance. Thank you for your time, attention, and thorough consideration of this matter.

3. The applicant states:

a. In current his DA Form 149, the applicant states he is requesting reconsideration of his original application to correct his medical discharge with severance pay to a physical disability retirement effective 5 July 2001. For a full description of the errors and injustices that occurred with his medical separation from the Army, please consider the facts, evidence, and exhibits presented in the legal brief that accompanied his original application and the legal brief and supporting documentation attached to this request for reconsideration.

b. His informal and formal PEBs made errors that caused him to receive a medical separation rather than a medical retirement. Furthermore, the Army overlooked his severe PTSD that existed at the time of his discharge, and the Board perpetuated the error by dismissing the evidence of PTSD symptoms observed during his service, based solely on the lack of in-service treatment records. This is contrary to the liberal consideration policy and warrants reconsideration.

c. In the applicant's previous 7-page self-authored statement to the Board, which was provided in full to the previous Board and has been provided in full to this current Board for review, he states in pertinent part, he is requesting the Board correct multiple errors made by the MEB and PEB. His listed concerns/errors include:



- having been immediately referred to the MEB after minimal medical treatment for his right knee condition
- a rushed and unsupported diagnosis of a congenital condition of connective tissue disorder of general global laxity
- failure to review the totality of his injuries and conditions, to include left hip, hamstring, and fractured feet
- improper emphasis by the PEB on prior surgery and perceived congenital condition
- ineffective assistance of Counsel
- Army stigmatization of mental health, which explains lack of treatment
- post discharge mental health impact
- eventual medical treatment
- prejudicial impact of PEB decision to rate him at 0 percent disabled

d. With regard to his mental health, the applicant states the Army culture of the 1990s and early 2000s was not open to any type of mental health treatment or post-deployment mental healthcare. The Army was not fully knowledgeable about PTSD, so they were certainly not receptive to reports of PTSD symptoms during or after deployments, whereas now there are standard questions built into post-deployment health assessments to identify personnel who may be in need of mental health evaluation and treatment.

e. He deployed in July 1999 as part of the post-war peacekeeping mission of Task Force Falcon, Operation Joint Guard, to Macedonia and Kosovo. This deployment exposed him to many atrocities. His strongest intrusive memories and nightmares are the sign and smell of the corpses at the 12 mass grave sites where their battalion had been assigned the secondary mission of providing security for the International Crimes Tribunal forensics experts, with which he was heavily involved and details in his letter.

f. When the deployment ended in December 1999, they went on block leave and resumed their garrison duties as if nothing had happened. There was no re-integration process. He began drinking heavily once they were no longer subjected to General Order Number 1 prohibiting alcohol. He used alcohol as self-medication to numb the pain of the visions and smells that disturbed his days and nights, but he kept his dark secrets to himself in order to advance his military career.

g. The MEB/PEB process only furthered his anxiety and depression and he felt the PEB personnel constantly acted against his interests. He felt useless to stop them, so he settled, accepting the 0 percent rating. He was depressed, not sleeping well, and so frustrated and in such mental and physical pain that he could not fight anymore.

h. Life after the Army was confusing and transition assistance was poor. The VA did little to help, although he mental and physical pain from active duty followed him every



step of the way, he did not want to seek any type of treatment for mental health or substance abuse/alcohol abuse and dependence since that would have risked his security clearance and jeopardize his post-Army career in the Federal government. He tried to seek informal assistance from other sources, such as his primary care physician, neurologist, optho-neurologist, to receive medication to mitigate his symptoms, but that wasn't enough. To counter his intrusive thoughts and guilt, he became a workaholic, but due to the migraines and stress, this was no longer a feasible outlet. He has struggled with alcohol abuse for 20 years and attempted to end his own life 3 times.

i. After recognizing informal treatment was insufficient, he turned to the AA for assistance and filed for service-connection in 2017. After an extended period of time, he was granted service-connection and was able to received treatment through the VA. Since 2019, he has been in intense Substance Abuse Recovery Program (SARP), Initial Outpatient Program and aftercare, trauma and SARP individual therapy and trauma (PTSD) Dialectical Behavior Therapy and Cognitive Processing Therapy.

4. The applicant was appointed a Reserve commissioned officer of the Army and entered active duty on 18 May 1997.

5. The applicant deployed to Kosovo from July 1999 through December 1999.

6. 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).

7. The applicant's available service records contain three DA Forms 3349 (Physical Profile), which show:

a. On 18 April 2000, he was issued a temporary physical profile rating of 3 in factor L for right kneecap dislocation, with assignment limitations including no running, jumping, marching, squatting, no unit physical training (PT). All remaining factors were rated 1.

b. On 28 April 2000, he was issued a permanent physical profile rating of 2 for dislocating kneecaps. He was limited in multiple functional activities and all Army Physical Fitness Test (APFT) events. All remaining factors were rated 1.

c. On 10 May 2000, he was issued a permanent physical profile rating of 3 in factor U and a rating of 4 in factor L, due to patellar instability, knee pain, and shoulder instability. He was limited in multiple functional activities and all APFT events. An MEB was initiated. All remaining factors were rated 1.

8. A memorandum from the applicant's battalion commander addressed to the MEB, dated 22 June 2000, shows he wanted to render his evaluation of the applicant based on his permanent physical profile and the observations of the applicant's supervisors as well as his own observations. It was his belief the applicant could no longer perform in his grade and position in the combat arms, as a result of his knee and hip problems and recommended the board to separate him.

9. An MEB Narrative Summary (NARSUM) dated, 12 September 2000, shows:

a. The applicant's chief complaint was pain and instability in both knees, onset March 2000.

b. Past medical history shows the applicant fell in 1994 while at a Reserve Officer Training Corps (ROTC) field training exercise, leading to a pop in the right knee which was diagnosed as an anterior cruciate ligament (ACL) tear. He underwent reconstruction of this ligament using a bone tendon bone graft at Notre Dame University. The graft wound subsequently became infected, requiring hospitalization and IV antibiotics for a period of 6 weeks, after which he recovered.

c. The applicant's diagnoses (Dx) were:

- recent right patellar dislocation with disruption of the medial patellar retinaculum and vastus medialis obliquus, right knee
- continued weakness despite physical therapy, secondary to above Dx
- status post ACL reconstruction right knee
- global connective tissue laxity as manifested by joint hyper-extendibility and markedly increased skin elasticity
- left ischial bursitis

d. He was deemed to be medically unfit for continuation on active duty in accordance with Army Regulation 40-501 (Standards of Medical Fitness), chapter 3 and was referred to a PEB for final determination.

10. A DA Form 3947 (MEB Proceedings) shows:

a. On an unspecified date, an MEB convened to consider the applicant's diagnoses:

- recent right patellar dislocation with disruption of the medial patellar retinaculum and vastus medialis obliquus, right knee; onset March 2000
- continued weakness despite physical therapy, secondary to above Dx; onset March 2000
- global connective tissue laxity as manifested by joint hyper-extendibility and markedly increased skin elasticity; onset May 2000
- left ischial bursitis; onset August 1997
- status post ACL reconstruction right knee; onset April 1994; existed prior to service (EPTS)

b. The applicant was found medically unfit for continuation on active duty in accordance with Army Regulation 40-501, chapter 3 and referred to a PEB.

c. The findings and recommendations of the MEB were approved on 22 October 2000.

d. On 1 November 2000, the applicant signed the form indicating he agreed with the MEB's findings and recommendation.

11. A memorandum from the U.S. Army PEB to the U.S. Army Medical Department Activity (MEDDAC) Wuerzburg, dated 21 November 2000, returned the applicant's disability case for additional action and information:

- a. Page 2 of the NARSUM was missing
- b. Is the global connective tissue laxity a congenital condition?
- c. Is the patellar dislocation a secondary result of the applicant's prior ACL reconstruction?
- d. What was the date of the MEB?

12. A Standard Form 501 (MEB NARSUM Addendum), dated 20 December 2000, shows:

- a. The missing NARSUM page has been included.
- b. Global connective tissue laxity is a congenital condition; the DA Form 3947 erroneously indicated otherwise and has been corrected.
- c. The patellar dislocation is not a secondary result of the applicant's previous ACL reconstruction, but is an independent medical condition acquired while on active duty.

13. A DA Form 199 (PEB Proceedings) shows:

a. A PEB convened on 4 January 2001, where the applicant was found physically unfit with a recommended combined rating of 0 percent and that his disposition be separation from service without disability benefits.

b. The applicant's unfitting condition is global connective tissue disorder as manifested by joint hyper-extendibility and markedly increased skin elasticity. This is a congenital condition as noted in the 20 December 2000 response to the PEB inquiry. The applicant is not taking any pain medication. The physical examination reveals marked increase in skin laxity and multiple hyper-extendable joints. The applicant sustained a right patellar dislocation and as a result, quadriceps weakness. There is some tenderness noted in the area of the left ischial tuberosity; (MEB Dx 2-4); 0 percent.

c. MEB Dx 5 is not unfitting and not ratable.

d. The PEB reviewed the medical evidence of record and concluded there is sufficient evidence to substantiate an EPTS condition for which the applicant is now unfit. His condition has not been permanently aggravated by service, but is the result of natural progression.

e. In that EPTS conditions are not compensable under the Army DES, the proper disposition is separation from the Army without entitlement to disability benefits.

f. On 23 January 2001, the applicant signed the form indicating he had been advised of the findings and recommendations of the PEB and did not concur and demanded a formal hearing with personal appearance. He did not attach a statement identifying his issues of disagreement with the informal PEB and requested counsel to represent him.

14. The applicant submitted seven witness statements/statements of support to the PEB, dated between February 2001 and March 2001, all of which have been provided in full to the Board for review, which show in pertinent part:

a. A DA Form 2823 (Sworn Statement) from Captain (CPT) M\_\_\_\_ C\_\_\_\_, dated 7 February 2001, shows she served together with the applicant over a 2 year period including Combat Maneuver Training Center rotations, Officer Basic Course, and while deployed to Kosovo from July – December 1999. In that period she witness him completing numerous physically challenging tasks and endure both mental and physical stress associated with deployment without any trouble until his injury during platoon PT in March 2000, after which he is unable to participate in PT or field training exercises.

b. A statement from Major (MAJ) J\_\_\_\_ S\_\_\_\_, dated 20 February 2001, shows he worked with the applicant in a variety of positions and conditions from June 1998 through July 2000, and during that period there were never any indications he had any physical disabilities and by all measures was in excellent physical condition during that period.

c. A statement from CPT B\_\_\_\_ S\_\_\_\_, dated 22 February 2001, shows he worked with the applicant since his arrival in June 1998. The applicant's performance during PT and road marches was always exceptional and he scored above 280 on the APFT. Unfortunately, on 13 March 2000, he dislocated his knee during PT when he witnessed him slipping while sprinting on wet pavement and has been unable to return to his prior level of physical fitness since his injury. He also developed hip pain due to overcompensation for his knee pain.

d. A statement from First Lieutenant (1LT) C\_\_\_\_ W\_\_\_\_, dated 22 February 2001, shows that prior to his injury, the applicant was able to engage in active sports, to include mountain climbing and hiking and well-exceeded the Army standard on the APFT from 1993 through March 2000. After his injury in March 2000, which he sustained in the line of duty (LOD), he was unable to engage in PT or field exercises.

e. A statement from 1 LT K\_\_\_\_ P\_\_\_\_, dated 28 February 2001, shows he knew the applicant for 2 1/2 years and observed him undergoing extremely challenging PT routines and field training exercised, to include long runs and road marches without ever falling out or quitting.

f. A statement from the Division Surgeon, Lieutenant Colonel (LTC) R\_\_\_\_ D\_\_\_\_, dated 23 February 2001, shows the applicant presented to him with a question on the results of the PEB, stating his hyper-extendibility of his joints is a congenital problem and that it is EPTS. It makes no mention of the traumatic injury to his right knee sustained on 13 March 2000, and states his hip pain is a result of the natural progression of his hyper-extendable joint condition. He agreed that the hyper-extendable joints are a congenital EPTS condition, but disagrees that his traumatic knee injury is part of a natural progression of this joint condition. His injury to the medical quadriceps muscle, contusion of the medical facet joint of the knee and medical retinaculum on 13 March 2000, is well documented on a magnetic resonance imaging (MRI) dated 4 April 2000. As a consultant to the Army Surgeon General on Sports Medicine (Rehabilitation), he assures the PEB this traumatic injury to his knee was not an EPTS condition.

g. A statement from MAJ C\_\_\_\_ N\_\_\_\_, dated 8 March 2001, shows he knew the applicant for 2 years and deployed with him to Kosovo. His injury while leading his platoon in PT was a great loss to his platoon and the battery. His injury prevented him

from performing in any normal military capacity outside of the office and his injured knee prevented him from conducting PT or deploying to any field environment.

15. A second DA Form 199 shows:

a. A formal PEB convened on 15 March 2001, where the applicant was found physically unfit with a recommended combined rating of 0 percent and that his disposition be separation with severance pay if otherwise qualified.

b. The applicant's unfitting condition is right knee instability and pain status post ACL reconstruction prior to service which was permanently service aggravated by a traumatic patellar dislocation with injury to medical quadriceps muscle and contusion of the medial facet joint of the knee and medical retinaculum. While the global connective tissue disorder may have been a predisposition to such an injury, the tense effusion, the disrupted retinaculum and the bone contusion argue for an independent traumatic event and are not elements of the natural progression of the disorder. This is the professional opinion of both the treating orthopaedic surgeon and the consultant to the Surgeon General for Sports Medicine (Rehab); MEB Dx 5; 0 percent

c. Global connective tissue disorder as manifested by joint hyper-extendibility and markedly increased skin elasticity. Physical examination revealed marked increase in skin laxity and multiple hyper-extendable joints. This is a congenital condition which is not compensable; (MEB Dx 1-4).

d. On 15 March 2001, the applicant signed the form indicating he had been advised of the findings and recommendations of the formal PEB and received a full explanation and concurred.

16. A DD Form 2807-1 (Report of Medical History), dated 18 April 2001, shows the applicant provided his medical history in conjunction with a medical exam on the date of the form for the purpose of Army separation. The applicant marked "no" to all conditions related to nervous trouble or mental health conditions of any sort, including depression or excessive worry and frequent trouble sleeping.

17. A DD Form 2697 (Report of Medical Assessment), dated 18 April 2001, shows the applicant provided his medical assessment. He indicated injuries to his right knee, left ischial bursitis, global laxity, shoulder instability and did not list any mental health concerns. He marked the box "no" he did not suffer from any injury or illness while on active duty for which he did not seek medical care.

18. A DD Form 2808 (Report of Medical Examination), undated, shows the applicant underwent medical examination for the purpose of Army separation and was given a

PULHES of 134111. The summary of defects and diagnoses shows he underwent an MEB for patellar instability, knee pain, and shoulder instability.

19. The applicant's DD Form 214 (Certificate of Release or Discharge) shows he was honorably discharged on 5 July 2001, 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. He was credited with 4 years, 1 months, and 18 days of net active service.

20. A VA Rating Decision, dated 4 April 2018, shows the applicant was granted a service-connected disability rating for the following conditions:

- PTSD, 70 percent, effective 18 August 2017
- status post right knee reconstruction surgery, 10 percent, effective 8 February 2018
- painful scar, 10 percent, effective 8 February 2018
- right knee scars, 0 percent, effective 8 February 2018
- status post right knee reconstruction surgery with residual subluxable patella and instability, continued at 20 percent

21. A VA Rating Decision, dated 22 May 2018, shows the applicant was granted a service-connected disability rating for the following conditions:

- tinnitus, 10 percent, effective 8 February 2018
- osteophytes and degenerative changes of the navicular bone, left foot, 0 percent, effective 18 August 2017
- left hamstring tear, 0 percent effective 8 February 2018

22. The applicant previously provided four statements by K\_\_\_\_ P\_\_\_\_, all dated 27 November 2018, which have been provided in full to the Board for review, and in pertinent part show he served with the applicant from 1998 – 2000, and provided witness details regarding the applicant's knee pain, knee instability, hip, back pain, gait impact, laser exposure, stress and migraines from Kosovo deployment, and noise exposure.

23. A VA Decision Review Officer Decision, dated 4 February 2020, shows the applicant was granted service-connection for migraine headaches with an evaluation of 50 percent effective 10 February 2018.

24. The applicant previously provided three statements from his wife, all dated 24 February 2020, which have been provided in full to the Board for review. She details the applicant's orthopedic issues with his knee, feet, and left hip as well as obstructive sleep apnea. She also writes at great length regarding his trouble sleeping with bad



dreams and heavy drinking related to his stressful deployment to Kosovo, anxiety, and depression, and how Soldiers did not dare use resources for mental health for fear of being branded weak and potential Army expulsion.

25. A VA Rating Decision, dated 29 April 2020, shows the VA made the following decisions regarding the applicant:

- PTSD with somatic symptom disorder, unspecified depressive disorder and alcohol use disorder, moderate in early remission, currently 70 percent disabling was increased to 100 percent effective 22 February 2020
- entitlement to special monthly compensation based on housebound criteria being met was granted effective 22 February 2020
- evaluation of osteophytes and degenerative changes of the navicular bone, left foot was continued at 10 percent

26. The applicant previously applied to the Board in June 2020 and all prior supporting evidence, to include Counsel's briefs, the applicant's self-authored statement and application, witness statements, medical records, and VA records have been provided in full to the current Board for review.

27. After the submission of his initial application in June 2020, and prior to the Board review, the applicant submitted additional VA Rating Decisions, which show:

a. A VA Rating Decision, dated 9 September 2020, shows effective 12 May 2020, the applicant was granted service connection for the following conditions:

- degenerative arthritis of the thoracolumbar spine as secondary to status post right knee reconstruction surgery, 20 percent
- left lower extremity sciatic nerve radiculopathy secondary to degenerative arthritis of the thoracolumbar spine, 10 percent
- right lower extremity sciatic nerve radiculopathy secondary to degenerative arthritis of the thoracolumbar spine, 10 percent
- left thigh limitation of extension secondary to status post right knee reconstruction surgery, 0 percent
- left thigh limitation of flexion secondary to status post right knee reconstruction surgery, 0 percent
- scar left hip secondary to disability of left hip degenerative arthritis status post hip replacement, 0 percent effective 27 July 2020
- left hip degenerative arthritis secondary to status post right knee reconstruction surgery, 20 percent with a temporary evaluation of 100 percent effective 2 June 2020 and an evaluation of 50 percent effective 1 August 2021

b. A VA Rating Decision, dated 14 October 2020, shows the applicant was granted:

- service connection for erectile dysfunction, 0 percent effective 10 May 2020
- entitlement to special monthly compensation based on loss of use of a creative organ effective 10 May 2020

c. A VA Rating Decision, dated 17 February 2021, shows the applicant was granted service connection for gastroesophageal reflux disease (GERD), 60 percent effective 12 May 2020.

28. In the adjudication of the applicant's prior case, a medical review was provided by the Agency medical advisor and was incorporated in the Record of Proceedings for Docket Number AR20210005533, which has been provided in full to the Board for review. In pertinent part, the medical advisor indicated the following conclusions were made:

a. The applicant's military records do not support the presence of boardable behavioral health conditions of PTSD or other behavioral health conditions.

b. His military records suggest he did not meet medical retention standards of Army Regulation 40-501; however, this was specific to medical condition with his knee in particular, as well as other medical conditions.

c. His behavioral health status during his time in service does not indicate separation through medical channels.

d. There is not any indication that a temporary or permanent physical profile for behavioral health conditions was initiated.

e. The compelling letters from his battalion commander and friend from Kosovo experience regarding his exposure to pronounced traumatic events and likely PTSD, cannot serve to substantiate a diagnosis as such without military medical documentation.

f. The applicant's medical conditions regarding behavioral health symptoms, diagnoses, and adverse impact on him, particularly with PTSD, were duly considered during medical separation processing.

g. It is the opinion of the Agency psychologist that a referral of the applicant's record to IDES for consideration of military medical retirement for PTSD or other behavioral health conditions is not warranted at this time.

29. On 3 November 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.

30. 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.

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

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

33. 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 reconsideration of their prior denial to determine the additional medical condition of PTSD to have been unfitting for military service with a subsequent increase in his military disability ratings and a change in his disability discharge disposition from separated with disability severance pay to permanent retirement for physical disability.

c. The Record of Proceedings and the prior denial detail the applicant's military service and the circumstances of the case. His DD 214 shows he entered the regular Army on 18 May 1997 and was discharged with \$27,914.40 of disability severance pay

on 5 July 2001 under provisions in paragraph 4-24b(3) of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (1 September 1990).

d. This request was previously denied by the ABCMR on 3 November 2021 (AR20210005533). Rather than repeat their findings here, the board is referred to the record of proceedings and medical advisory opinion for that case. This review will concentrate on the new evidence submitted by the applicant.

e. Counsel believes the policies of liberal consideration are applicable to the facts of this case. However, the Liberal Consideration Policies outlined in the Secretary Hagel and Undersecretary Kurta memorandums address a former Service Member's request to modify the discharge characterization of their service based on a pre-discharge service incurred mental health condition and do not apply discharges for preexisting medical conditions or disability processing.

f. No additional medical documentation was submitted with the application.

g. As noted in AR20210005533, there are no clinical behavioral health encounters in the record. Multiple witness statements attest to behavioral health symptoms experienced by the applicant prior to his separation, but there is no evidence these significantly affected his abilities as an officer, i.e., were unfitting for military service. His final Officer Evaluation Report covered his final year of Service and shows he was "outstanding Officer." His rater top-blocked him as "Outstanding Performance, Must Promote" opining:

"CPT [Applicant]'s performance throughout this rating period has been remarkable. He is a bright, articulate professional officer who completes every assigned mission to a standard far above that which is expected. He is a consummate professional who truly cares about the welfare of soldiers and the readiness of the unit."

h. His senior rater top-blocked the applicant as "Best Qualified" and marked him as "Above Center of Mass" opining:

"Captain [Applicant] is an outstanding officer and leader and among the very best captains I have seen in my 20-year career. He completes his tour of service in the Army with the same level of professionalism and high standards that has been his hallmark throughout. Simply put; an exceptional duty performance.

i. Paragraph 3-1 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (1 September 1990) 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 Soldier reasonably may be expected to perform because of his or her office, grade, rank, or rating.”

j. The symptoms and behaviors noted by the witnesses certainly may have been associated with his later diagnosis of and VA service-connected disability rating for PTSD first granted in 2017. However, the Disability Evaluation System (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.

k. It is the opinion of the ARBA Medical Advisor that neither an increase in his military disability rating nor a referral of his case back to the DES is 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 his 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 amendment of the ABCMR decision rendered in Docket Number AR20210005533 on 3 November 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. On 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRBs) and Service Boards for Correction of Military/Naval Records (BCM/NRs) to carefully consider the revised PTSD criteria, detailed medical considerations, and mitigating factors, when taking action on applications from former service members administratively discharged under other than honorable conditions, and who have been diagnosed with PTSD by a competent mental health professional representing a civilian healthcare provider in order to determine if it would be appropriate to upgrade the characterization of the applicant's service.
2. On 25 August 2017, the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to Discharge Review Boards (DRBs) and Boards for Correction of Military/Naval Records (BCM/NRs) when considering requests by veterans for modification of their discharges due in whole or in part to: mental health conditions, including post-traumatic stress disorder (PTSD), traumatic brain injury (TBI), sexual assault, or sexual harassment. Boards are to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based, in whole or in part, on those conditions or experiences.
3. 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.



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. 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.

8. 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.

9. 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.

10. 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//