

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 18 October 2024

DOCKET NUMBER: AR20240001183

APPLICANT REQUESTS; in effect:

- Increase in his disability percentage
- Include new service-connected disabilities to his Physical Evaluation Board (PEB)
- Correction of his Internal Revenue Service (IRS) Form 1099R to reflect code 3 (disability) rather than code 7 (normal distribution)
- All taxes paid from 29 April 2014 be restored/repaid as the Code 3 (disability)
- Section V of DA Form 199-1 (Formal PEB Proceedings) to show the disabilities were combat-related
- Award of Combat-Related Special Compensation (CRSC)

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

- DD Form 149 (Application for Correction of Military Record)
- Self-Authored Statement in Support of Application

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. He is asserting that the PEB disability percentage was higher than originally awarded. He is unable to maintain substantial gainful employment. While filing taxes, he discovered an error in the tax distribution code. He currently has a rating of 40 percent from the Department of Veterans Affairs (VA).

b. He requests the percentage awarded be increased for the amount of retirement income he receives as the impact of his service-connected disabilities are far greater than originally perceived by the PEB regarding his ability to acquire and maintain

substantial employment. He requests that an administrative correction be made to reflect code 3 (disability) rather than code 7 (normal distribution) as it pertains to his IRS Form 1099R statement. The wrong code was applied as the basis for retirement and was solely the result of the associated medical disabilities.

c. He requests that all taxes paid from 29 April 2014, the date of the original PEB, be restored/repaid as the box 7 classification should have always been a code 3 from the beginning and never code of 7.

d. He requests that Section V of DA Form 199-1 be corrected to state that the disabilities did occur as a result of a combat-related injury. Per Title 26 U.S. Code (USC) 104:

Compensation for injuries or Sickness, (b) (3) Special Rules for Combat Related Injuries (A) incurred (i) as a direct result of an armed conflict, (ii) while engaged in extra hazardous service, or (iii) under conditions simulating war; or (B) which is caused by an instrumentality of war.

Paragraph (A)(i) is applicable in that the disabilities occurred as a direct result of performing multiple missions during his 13 month Operation Iraqi Freedom (OIF) deployment, specifically completion of many line haul sustainment convoys operating M915A1 tractors pulling M872A2 trailers in an austere environment, composed of battle damaged infrastructure of both theater and corps theaters of war. Though a specific incident cannot be defined, the injuries sustained were a cumulative result of high optempo, worn out trucks whose suspension systems were overburdened by armor plating, antiquated seat design and associated seat suspension assembly, and the mission required off-road operation of trucks for which they were not designed or intended. Furthermore, if combat-related cannot be awarded pursuant to Title 26 USC 104 (A)(i), then paragraph (B) instrumentality of war applies. This is per combat-related definitions, 24 April 2023, as communicated on the U.S. Army Human Resources Command (AHRC) website and includes combat vehicles as an instrument of war. It was these comments regarding vehicle operation, to also include the physical demands of wearing Interceptor Body Armor and Kevlar helmets, surely connecting his injuries of the lumbar and cervical areas to combat activity.

e. He is requesting award of CRSC and award of total disability based on individual unemployability. Where he currently would fall under the extra schedular definition, being unable to obtain substantially gainful employment since being medically retired on 18 June 2014, schedular applicability may apply through the additional service-connected disabilities he is applying for.

f. He is requesting an increase in his disability percentage for existing service-connected disabilities:

(1) 5295: Lumbar and thoracic strain to include misaligned joints (20 percent 23 April 2010); he cannot perform common tasks of pulling, pushing, lifting without the joints of his spine misaligning. Most common is low to mid back, though at times his upper back is affected as well. Aggravation is caused by extended periods of standing, sitting, or walking. This and the existing issues with his neck have negatively impacted his ability to maintain employment. All treatment for this injury occurs at Chalmers P. Wylie VA Ambulatory Outpatient Care Center by Dr. R- F-. The injury occurred performing his military occupational specialty (MOS) functions, while deployed to a combat theater of operations.

(2) 5237: Cervical strain to include misaligned joints (10 percent 23 April 2010; 20 percent 15 August 2016); even after chiropractic treatment, he notices a popping/cracking sound when moving his head in all directions. Sometimes his neck will lock up or seize, where he is unable to move it in any direction. The injury occurred performing MOS functions, while deployed to a combat theater of operations. These should also be reviewed, based on comments from his VA Chiropractor to possibly include as secondary service-connection for VA disability codes 5002 multi-joint arthritis; 5003 degenerative arthritis, other than post-traumatic spine, or 5242 degenerative arthritis, degenerative disc disease other than intervertebral disc syndrome.

g. He is requesting, in effect, that the following service-connected disabilities be included in his PEB:

(1) 5269: plantar fasciitis or 5276: flatfoot: acquired; based on a podiatry exam and issue of custom orthotics (shoe inserts/arch supports). Deployment exam notes exist for injury where his foot rolled under his ankle and there was a popping sound. This was in tennis shoes while he was conducting physical training, but it also occurred several times, while wearing boots, that he did not seek medical attention for and was not examined for.

(2) 6847: Obstructive Sleep Apnea: he was diagnosed by the VA of having sleep apnea and currently uses a CPAP every night after his spouse complained about his excessive snoring. He is excessively tired, during the day, and it may have caused two seizures he endured in March and May of 2019. He has also had an overnight sleep study, which records are available at the VA via their online records system. Per the website [news.va.gov](https://news.va.gov), 15 February 2022, "if veteran experiences persistent excessive sleepiness during the day = 30 percent, use of a CPAP device = automatic 50 percent." This could be related to the PACT Act and service-connected via their unit conducting Iraqi Express, a sustainment mission that ran from Camp Arifjan, Kuwait to Logistics

Support Area Anaconda, Balad, Iraq home of one of the most well-known burn pits spanning more than ten acres.

(3) 6260: Tinnitus: it most notably occurs on the right side of his head. He is constantly hearing a high-pitched noise. He never addressed concerns of tinnitus, during his post-deployment medical screening, rather he just voiced concerns of hearing loss in general.

(4) 6100: Hearing loss: this was a concern he presented during his post-deployment medical screening. Though test result show, at the time, his hearing was sufficient within established standards used at the time, results show that he has hearing loss at other frequencies that he now believes are being considered to determine hearing loss. He has the results of the tests; however, there are some around 2009 through 2011 that he does not have, but they should be available via the Ohio Army National Guard (OHARNG) medical command records. During his deployment, he was a platoon leader in a line-haul transportation company. As a convoy commander, he could not wear hearing protection and he had to monitor and communication on several echelons of radio equipment. Normally, the noise he was exposed to were those of a diesel truck engine while driving or as a passenger in a HMMWV or M915A1 tractor truck for durations of 8 to 10 hours per day four to five days per week. When not on mission, he had to constantly endure the loud, monotonous sound of an electric generator operating within the camp, which located in close proximity to his tent. Returning from deployment, he voiced his concern for hearing loss. He found himself constantly asking others to talk louder, slow down, repeat what they said, or mistakenly interpret their words. His wife, coworkers, and others have noted on many occasions that he leans in very close to others when they are speaking to him or that he talks very loudly in an effort to be sure that he is being heard. While watching TV, he either has to have it at a higher than normal volume or he turns on the closed captioning feature. It has also been pointed out that he uses his phone and radio at higher volumes. All of this is very embarrassing, not only for him but those that accompany him as well. In response, he now prefers to be alone and withdraws from conversations or social settings, which should be considered for secondary service connection. Hearing how loud he talks, from his spouse or seeing the faces on others, has made him feel depressed and ashamed.

(5) 6522: Rhinitis: he continually finds himself short of breath. He cannot breathe easily through his nose because of nasal congestion. His nose, ears, eyes, and throat constantly itch. He sneezes violently and has clear drainage. He snores loudly and always seems tired. It is hard to ignore these same symptoms as related to his sleep apnea and question if one is secondary to the other or both are related to burn pit exposure, during his Iraq deployment. He noted symptoms of a consistent runny nose on his post-deployment checklist.

(6) 9411: Post-traumatic stress disorder (PTSD) and other mental health related disabilities: on his post-deployment checklist, 18 February 2005 he answered yes to the question "during this deployment, did you ever feel that you were in great danger of being killed?" In his post-deployment health reassessment, 10 March 2007, he noted a symptom of increased irritability and answered yes to the question "since return from your deployment, have you had serious conflicts with your spouse, family members, close friends, or at work that continue to cause you worry or concern?" He answered yes to "constantly on guard, watchful, or easily startled?" and to "felt numb or detached from others, activities, or your surroundings?" He indicated he had these symptoms few or several days with little interest or pleasure in doing things, more than half the days he was feeling down, depressed or hopeless. He answered it was somewhat difficult to how difficult these problems made it for him to do his work, take care of things at home, or get along with other people. He is currently a patient of Dr. J- C- at Chalmer P. Wylie VA Outpatient Care Center and has been for many years. The symptoms of the medical issues, the physical limitations and change of lifestyle, the loss of being in the Army and an integral part of the mission as both an officer in the logistics community and supporting the OHARNG as a contracting officer has really taken a toll that is not visible to most. He cannot assign how he is feeling to a specific illness or injury as to the other service-connected issues or pinpoint a definitive moment that he started feeling this way, he can say that he's not the same man who barded an Iraq-bound plane all those years ago. Some of these feeling coincide with the injuries and illnesses he's claiming and he's confident that secondary service connection is involved.

3. The Board does not have purview to correct his IRS Form 1099R, make corrections regarding taxes paid to the IRS, and does not have jurisdiction over the IRS, these portions of his request will not be discussed further in the record of proceedings. The Board will make a determination regarding his requests to increase his disability percentage, that they were combat-related disabilities, and whether additional disabilities should be added to his PEB.

4. In reference to his request for award of CRSC, on 24 April 2024, the CRSC Branch of AHRC awarded him CRSC at 20 percent disability beginning in May 2023. This decision was made after he submitted his application to the Board. This portion of his request will not be before the Board. If the applicant desires a change in his CRSC awarded, he will need to submit a new application to the Board with supporting documentation to request a change.

5. The applicant's service record contains the following documents:

a. Oaths of Office shows he took the oath of office in the OHARNG on 10 May 1999.

b. Certificate of Release or Discharge from Active Duty shows he was ordered to active duty, as a member of the ARNG, on 2 January 2004 and was honorably released on 28 March 2005. He was ordered to active duty in support of OIF and had service in Kuwait from 3 February 2004 through 27 February 2005.

c. Formal PEB Proceedings, 29 April 2014 shows he had mild degenerative joint disease of the thoracolumbar spine and cervical strain due to misaligned joints. The disability disposition was not based on disease or injury incurred in the line of duty in combat with an enemy, as a direct result of armed conflict, caused by an instrumentality of war, or incurred in the line of duty during a period of war. The board found him physically unfit for duty, recommended a rating of 30 percent, and that he be permanently retired for disability. The applicant concurred with the findings and did not request reconsideration of his VA ratings.

d. Order D 139-07, published by United States Army Physical Disability Agency, 19 May 2014 placed him on the retired list on 23 June 2014 with a 30 percent disability rating.

e. National Guard Report of Separation and Record of Service shows he was honorably transferred to U.S. Army Reserve Control Group (Retired) on 22 June 2014. He had 17 years, 9 months, and 4 days of net service. He was issued a DD Form 214 for OIF from 2 January 2004 through 28 March 2005.

f. Memorandum Notification of Eligibility for Retired Pay for Non-Regular Service (15 Years), 3 March 2015 informed him he had completed 15 years but fewer than 20 years of qualifying service and would be eligible for retired pay, upon application, at age 60 unless he qualified for a reduced eligibility age.

6. On 10 May 2024, the Army Review Boards Agency requested his Army medical records and any other medical documents, to include his VA medical records, that support his stated issues. The applicant did not respond.

7. Based on the applicant's request to change his disability percentage, the Army Review Boards Agency Medical Section provided a medical review for the Board's consideration.

#### 8. MEDICAL REVIEW:

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

application, and/or 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 his military disability rating; to have multiple conditions, to include PTSD, determined to have been unfitting for continued service prior to his disability retirement; and reversal of both the United States Army Physical Disability Agency's (USAPDA) and the United States Army Human Resources Command's (USAHRC) determinations that his cervical and lumbar degenerative disc disease were non-combat related and therefore not eligible for Combat Related Special Compensation (CRSC). He states in part:

"Request the percentage awarded to be increased for the amount of retirement income I receive as the impact of service-connected disabilities are far greater than originally perceived by the Physical Evaluation Board (PEB) regarding the ability to acquire and maintain substantial employment.

Request that Section V of Form 199-1 be corrected to state that the disabilities did occur as a result from a combat related injury."

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. Orders published 19 May 2014 by the United States Army physical Disability Agency show the former ARNG logistics Officer was permanently retired for physical disability with a 30% military disability rating effective 23 June 2014 under provisions provided in chapter 4 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (20 March 2012). It shows none of his disabilities had been determined combat related.

d. A Soldier is referred to the IDES when they have one or more conditions which appear to fail medical retention standards as documented on a duty limiting permanent physical profile. At the start of their IDES processing, a physician lists the Soldier's 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 conditions they believe to be service-connected disabilities in block 8 of section II or a separate Statement in Support of Claim (VA form 21-4138).

e. Soldiers then receive one set of VA C&P examinations called Disability Benefits Questionnaires (DBQs) 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. All conditions are then rated by the VA prior to the Soldier's discharge. The physical evaluation board (PEB), after adjudicating

the case sent them by the medical evaluation board (MEB), applies the applicable VA derived ratings to the Soldier's unfitting condition(s), thereby determining their 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.

f. On 2 May 2013, the applicant was referred to the IDES for "Mild Degenerative Joint Disease of the Thoracolumbar Spine." He claimed only one additional condition – "Neck" - on his VA 21-0819. The MEB determined the referred condition failed medical retention standards and that his "Cervical Strain" met medical retention standards. The applicant non-concurred with the MEB and requested an Impartial Medical Review (IMR) of his MEB, maintaining his cervical strain should also be found to fail medical retention standards.

g. The IMR physician determined the MEB had been correct and that his cervical strain did meet medical retention standards:

"Review of available medical records were few in regards to neck condition. SM [Service Member] was seen over 24 times by chiropractor for lower back and neck condition. No MRI of the neck was seen and SM was never referred to orthopedic spine or neurosurgery for neck condition. Plain film x-rays of the cervical spine were normal.

VA C&P examination range of motion testing for cervical spine was essentially normal. Review of profiles show that SM has had temporary profiles for his cervical and lumbar back pain for the past year.

Commander's Statement states that he wishes to retain SM and that medical condition does has no impact on the performance of SM's duties as a Contracting Officer.

SM was advised that my opinion was that the evidence for his cervical condition was minimal and that most likely condition would continue to be found to meet medical retention standards."

h. The applicant's IMR along with his appeal with enclosures was reviewed and the findings and recommendations of the MEB confirmed. His case, along with his appeal and IMR, was then forwarded to a physical evaluation board (PEB) for adjudication.

i. The applicant's Informal Physical Evaluation Board (PEB) Proceedings (DA Form 199) dated 26 February 2024 show the board determined his thoracolumbar spine



condition was his sole unfitting conditions for continued military service, and that his cervical strain was not unfitting. After being counseled by his PEB Liaison Officer (PEBLO) on the PEB's findings and recommendations, he non-concurred with the PEB's findings, demanded a formal hearing with regularly appointed counsel, and declined to request a VA reconsideration of his disability ratings.

The applicant was present for and represented by regularly appointed counsel at his formal PEB on 29 April 2014. After the presentation of evidence and testimony from the applicant, the board reversed the informal PEB's finding and determined his cervical strain was unfitting for continued military service.

j. The PEB made the administrative determination that neither of the disabilities was combat related: They found no evidence that one of these disabilities was the direct result of armed combat; was related to the use of combat devices (instrumentalities of war); the result of combat training; incurred while performing extra hazardous service though not engaged in combat; incurred while performing activities or training in preparation for armed conflict in conditions simulating war; or that he was a member of the military on or before 24 September 1975. The noted the onset of the conditions was during the applicant's 2004 Iraq deployment "from the ear and tear of military/combat gear and riding in military vehicles.

k. Though the onset of these conditions was while the applicant was serving in Iraq, this per se does not make them combat related. Section b(3) of 26 U.S. Code § 104 requires there be a cause-and-effect relationship in order to establish the finding that a medical condition is combat related:

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

(A) which is incurred—

(i) as a direct result of armed conflict,

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

(iii) under conditions simulating war; or

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

l. There was no evidence submitted or identified showing one or both conditions met one of the above criteria.

m. The PEB applied the VBA derived rating of 20% to his lumbar spine condition and their 10% rating to his cervical strain and recommended he be permanently retired for physical disability with a combined military disability rating of 30%. On 13 May 2014, after being counseled by his PEBLO on the PEB's findings and recommendations, he concurred with the PEB and declined to request a VA reconsideration of his disability ratings.

n. 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.

o. Paragraph 3-1 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (20 March 2012) 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 their office, grade, rank, or rating.”

p. JLV shows he has several VA service-connected disability ratings, including ratings for PTSD, tinnitus, and hearing loss, all originally effective 6 April 2023. Though the applicant mentions plantar fasciitis/flat feet and sleep apnea in his self-authored letter, he does not have a VA service-connected disability rating for either condition. JLV also shows the rating for his cervical spine condition was increased to 20% effective 6 April 2023.

q. However, the awarding of a higher VA rating does not establish prior error or injustice. A disability rating is intended to compensate an individual for interruption of a military career after it has been determined that the individual suffers from an impairment that disqualifies him or her from further military service. The rating derived from the VA Schedule for Rating Disabilities reflects the disability at the point in time the VA exams were completed. The DES has neither the role nor the authority to compensate service members for anticipated future severity or potential complications

of conditions incurred during or permanently aggravated by their military service. These roles and authorities are granted by Congress to the Department of Veterans Affairs and executed under a different set of laws.

r. It is the opinion of the ARBA Medical Advisor that an increase in his military disability rating, the finding of additional conditions to have been unfitting prior to his separation, and the reversal the USAPDA's and USAHRC determination his cervical and lumbar spine conditions were not combat related are all unwarranted.

#### 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 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.

a. The evidence shows an formal Physical Evaluation Board (PEB) convened on 29 April 2014 and determined two medical conditions were unfitting for continued military service; mild degenerative joint disease of the thoracolumbar spine and cervical strain due to misaligned joints. The PEB then applied the Department of Veterans Affairs Schedule for Rating Disabilities (VASRD) derived ratings of 20 percent and 10 percent respectively to these conditions. After being counseled on the formal PEB findings, he concurred with the formal proceedings and did not request reconsideration of his VA ratings.

b. The Board noted the applicant's contention the VA increased his service-connected disability rating for his condition(s) to a higher rating and the Army should do the same. However, the awarding of a higher VA rating does not establish prior error or injustice. A military disability rating is intended to compensate an individual for interruption of a military career after it has been determined that the individual suffers from an impairment that disqualifies him or her from further military service. The rating derived from the VASRD reflects the disability at the point in time the VA examinations were completed. The military's Disability Evaluation System (DES) does not compensate service members for anticipated future severity or potential complications of conditions incurred during or permanently aggravated by their military service. The VA has those roles and authorities according to their laws. Therefore, the Board found

no error or injustice in his military disability rating. The Board determined an increase in his military disability rating was not warranted.

2. The Board also considered the applicant's request for new service-connected disabilities to his PEB. The Board again reviewed and concurred with the medical advisor's review finding the addition of unfitting conditions to his PEB is not warranted, referral to the Disability Evaluation System is not warranted, and the designation that his unfitting conditions were combat related is not warranted.

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. Title 10, USC, 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 and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with DOD Directive 1332.18 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 an MEB; when they receive a permanent medical profile rating of 3 or 4 in any factor and are referred by an MOS Medical Retention Board; 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 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.

3. Title 38 USC, 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.

4. Title 38 USC, 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.

5. AR 635-40 (Physical Evaluation for Retention, Retirement, or Separation) 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. Once a determination of physical unfitness is made, all disabilities are rated using the Department of Veterans Affairs Schedule for Rating Disabilities (VASRD).

a. Paragraph 3-2 states disability compensation is not an entitlement acquired by reason of service-incurred illness or injury; rather, it is provided to Soldiers whose service is interrupted and who can no longer continue to reasonably perform because of a physical disability incurred or aggravated in military service.

b. Paragraph 3-4 states 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.

6. AR 40-501 (Standards of Medical Fitness) governs medical fitness standards for enlistment, induction, appointment (including officer procurement programs), retention, and separation (including retirement). The Department of Veterans Affairs Schedule for Rating Disabilities (VASRD). VASRD is used by the Army and the VA as part of the process of adjudicating disability claims. It is a guide for evaluating the severity of disabilities resulting from all types of diseases and injuries encountered as a result of or incident to military service. This degree of severity is expressed as a percentage rating which determines the amount of monthly compensation.

7. Directive-type Memorandum (DTM) 11-015, dated 19 December 2011, explains the IDES. It states:

a. The IDES is the joint DOD-VA process by which DOD determines whether wounded, ill, or injured service members are fit for continued military service and by which DOD and VA determine appropriate benefits for service members who are separated or retired for a service-connected disability. The IDES features a single set of disability medical examinations appropriate for fitness determination by the Military Departments and a single set of disability ratings provided by VA for appropriate use by both departments. Although the IDES includes medical examinations, IDES processes are administrative in nature and are independent of clinical care and treatment.

b. Unless otherwise stated in this DTM, DOD will follow the existing policies and procedures requirements promulgated in DODI 1332.18 and the Under Secretary of Defense for Personnel and Readiness memoranda. All newly initiated, duty-related physical disability cases from the Departments of the Army, Air Force, and Navy at operating IDES sites will be processed in accordance with this DTM and follow the process described in this DTM unless the Military Department concerned approves the exclusion of the service member due to special circumstances.

c. IDES medical examinations will include a general medical examination and any other applicable medical examinations performed to VA Compensation and Pension standards. Collectively, the examinations will be sufficient to assess the member's referred and claimed condition(s) and assist VA in ratings determinations and assist military departments with unfit determinations.

d. Upon separation from military service for medical disability and consistent with the Board for Correction of Military Records (BCMR) procedures of the military department concerned, the former service member may request correction of his or her military records through his or her respective military department BCMR if new

information regarding his or her service or condition during service is made available that may result in a different disposition. For example, a veteran appeals VA's disability rating of an unfitting condition based on a portion of his or her service treatment record that was missing during the IDES process. If the VA changes the disability rating for the unfitting condition based on a portion of his or her service treatment record that was missing during the IDES process and the change to the disability rating may result in a different disposition, the service member may request correction of his or her military records through his or her respective Military Department BCMR.

e. If, after separation from service and attaining veteran status, the former service member desires to appeal a determination from the rating decision, the veteran has one year from the date of mailing of notice of the VA decision to submit a written notice of disagreement with the decision to the VA regional office of jurisdiction.

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

9. Title 38, Code of Federal Regulations, Part IV is the VASRD. 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.

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

//NOTHING FOLLOWS//