

IN THE CASE OF: [REDACTED]

BOARD DATE: 24 October 2024

DOCKET NUMBER: AR20240001390

APPLICANT REQUESTS: through Counsel:

- reconsideration of his prior requests for an increase to his physical disability retirement rating from 40 percent to 70 percent
- 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
- partial DA Form 199 (Informal Physical Evaluation Board (PEB) Proceedings), dated 30 September 2014
- excerpt, Title 38, Code of Federal Regulations (CFR), Section 4.129

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous considerations of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20160016440 on 24 January 2020, and in Docket Number AR20220002154 on 9 June 2022.

2. Counsel states:

a. The applicant hereby requests correction of his military records. He respectfully requests, in the interest of propriety and equity, that this Board favorably consider this petition and change his Department of Defense (DoD) military disability retirement percentage to at least 50 percent in accordance with federal law and the official policy of the DoD.

b. This law firm represents the applicant in his application for correction of his military records due to his inappropriately assigned DoD military disability retirement percentage. They submit that the appropriate percentage should actually have been 70 percent based on corrections to the behavioral health unfitness. Although not controlling, as of 2010, the medical opinion of the Department of Veterans Affairs (VA),

based on its medical review, rated the applicant with a 70 percent behavioral health rating. They respectfully submit that the Narrative Summary (NARSUM) and DA Form 199 were erroneous, pursuant to the federal law and the official policy of the DoD. The applicant relies on mistake of law in the analysis of his previous submission as the basis for this submission and requests an appearance before this honorable Board to present his case.

c. The ABCMR erred by mistake of law when it denied the applicant's prior petition for an increase in DoD disability percentage. Due to Title 38 CFR, Section 4.129 (under authority of 38 U.S.C. 1155), and DoD Instruction 1332.18 (Discharge Review Board (DRB) Procedures and Standards), it would be an injustice if the Board did not fully consider the new information contained in this petition which evidences a clear mistake of law in past interpretation (Federal law and DoD policy. The applicant's case should have been analyzed under 38 CFR, Section 4.129 (under authority from 38 USC 1155), and DoD Instruction 1332.18. It was analyzed under the "Administrative Finality Doctrine." This was incorrect.

d. The applicant was discharged due to severe post-traumatic stress disorder (PTSD). PTSD is a mental disorder due to traumatic stress. Title 38 CFR, Section 4.129 states that when mental disorder that develops in service as a result of a highly stressful event is severe enough to bring about the veteran's release from active military service, the rating agency shall assign an evaluation of not less than 50 percent and schedule an examination within the 6-month period following the veteran's discharge to determine whether a change in evaluation is warranted.

e. The DoD created a DoD Instruction based on Title 38 CFR, Section 4.129. DoD Instruction 1332.18 states in section 8.2(b), in part, that the DoD must "assign a rating of at least 50 percent to the behavioral disorder due to traumatic stress, combine ratings in accordance with the VA Schedule for Rating Disabilities (VASRD), temporarily retire the service member for disability, and schedule an examination to determine whether a change in rating and disposition is warranted." This review and evaluation will show a mistake of law in the evaluation of the applicant's case. Federal law and DoD Instruction take precedent to "Administrative Finality" when a mistake of law is being argued. The applicant's case was last evaluated in 2021 and deserves re-evaluation under the appropriate analysis. Under this more appropriate analysis, his military disability retirement percentage should be immediately raised to at least 50 percent.

f. This is an appeal of the percentage of DoD disability given to the applicant upon his medical retirement. This appeal is based on a mistake of law in the legal analysis of his past claims. The applicant's case was formerly in front of this board on 24 January 2020. In that matter the Board rejected his argument and found that the evidence presented did not demonstrate the existence of a probable error or injustice.

g. Throughout his approximately 10-year Army career, the applicant served as an 11A (Infantryman), deployed twice to Kuwait, once to Iraq, and once to Afghanistan. He endured significant injuries, resulting in a 40 percent DoD disability rating broken down as a 30 percent rating for PTSD and a 10 percent rating for anterior instability, left knee.

h. The applicant first entered active duty on 16 December 2004, and served in Kuwait and Iraq from January 2005 to January 2006. He was honorably released from active duty on 14 February 2006. He again entered active duty on 2 January 2007 and served in Afghanistan from January 2007 to March 2008. He was honorably released from active duty on 26 March 2008. He entered active duty for the last time on 25 June 2009 and served in Kuwait from 1 July 2009 to October 2009. He was honorably released from active duty on 9 November 2009.

i. In 2013-2014, the applicant entered the Disability Evaluation System (DES). A Medical Evaluation Board (MEB) diagnosed him with PTSD among other conditions and referred him to a Physical Evaluation Board (PEB). On 30 September 2014, an informal PEB convened and considered his medical conditions as part of the Integrated Disability Evaluation System (IDES).

j. For PTSD, the PEB noted that the applicant was deployed to Afghanistan and Iraq in 2007-2008. The behavioral health examiner attributed his condition to combat stressors. This was rated at 30 percent by the PEB. Along with PTSD, the PEB found that he had left knee anterior instability and rated it at 10 percent, found him physically unfit, assigned a 40 percent combined disability rating, and his disposition was permanent disability retirement.

k. On 14 April 2015, the U.S. Army Physical Disability Agency (USAPDA) published orders releasing the applicant from his assignment and placing him on the retired list as a result of physical disability, in the rank of captain, effective 19 May 2015. He was honorably retired due to his disability on 18 May 2015.

l. On 10 September 2018, the USAPDA provided an advisory opinion which stated that due to the "Administrative Finality Doctrine", the applicant is precluded from reopening an administrative decision based on error of judgment or changed opinion subject to cert in exceptions that were at that time not applicable (i.e. fraud, mistake of law). On 24 January 2020, the ABCMR determined that the overall merits of the applicant's case were insufficient as a basis for correction of his records.

m. Army Regulation 15-185 (Army Board for Correction of Military Records (ABCMR)), chapter 2-15(b) permits resubmission to the ABCMR when there is a mistake of law. The applicant is arguing a mistake of law. Specifically, Army Regulation 15-185, Chapter 2-159 (b) permits him to submit this brief if "substantial relevant

evidence submitted showing fraud, *mistake of law*, mathematical miscalculation, manifest error, the existence of substantial relevant new evidence discovered contemporaneously or within a short time after the ABCMR's original consideration." The applicant was given a 40 percent combined disability rating from the DoD. Federal law states that given his PTSD, he *must* be given *at least* a 50 percent rating, as applied to his behavioral health condition.

n. DoD Instruction 1332.18 - Disability Evaluation System DoD Instructions are released for the purpose of guiding DoD components on the implementation of a policy, DoDI 1332.18 Section 8.2(b) specifically addresses the applicant's situation. It states in part, "When a behavioral disorder develops on active duty because of a highly stressful event severe enough to bring about a Service member's release from active military service, the Secretary of the Military Department concerned will...for all other service members, assign a rating at least 50 percent to the behavioral disorder due to traumatic stress, combine ratings in accordance with the VASRD, temporarily retire the service member for disability, and schedule an examination to determine whether a change in rating and disposition is warranted. The reexamination will be scheduled within 6 months from the date of placement on the TDRL, but completed no earlier than 90 days after placement on the TDRL." This instruction is specifically designed to assist DoD officials on the implementation of federal laws.

o. DoD Instruction 1332.18 Section 9.2(f) states that the Administrative Finality Doctrine cannot be used if the Service member is attempting to correct an error. The applicant was informed by the DoD that due to the "Administrative Finality Doctrine" his determination was final. That was incorrect. The DoD erred by a mistake of law. This is an "error" which the Service member is attempting to correct by submitting this petition. If his case is analyzed under the appropriate analysis, it would result in a correction of error in his favor. The "Administrative Finality Doctrine" cannot be used as a justification to prevent him from obtaining his legally permitted entitlement of at least 50 percent DoD disability rating. Therefore, the applicant is entitled to the appropriate legal analysis given circumstances. The appropriate analysis in accordance with federal law is that a percent DoD valuation is warranted given that he was medically retired due to his diagnosed PTSD.

p. The applicant's 40 percent DoD disability rating reflects a mistake of law and should be at least 50 percent or 70 percent based on medical evidence upon which the VA relied and the PEB overlooked. The applicant was found unfit for military duty due to his PTSD and knee. The PEB found that combat stressors related to his military service in Iraq and Afghanistan were the reason for his PTSD. He was also found to have not responded adequately to treatment and the PEB found that the diagnosed PTSD represented a decided medical risk to his mental health.

q. Due to the above factors, the applicant was wrongly rated at 30 percent for PTSD

and at 40 percent total by the DoD due to an additional knee injury. He developed PTSD (a diagnosed mental disorder) because of a highly stressful event (combat in Iraq and Afghanistan) while serving on active duty in the U.S. Army. He was assigned a DoD evaluation of 40 percent. This is not in accordance with the regulations. Since he developed a diagnosed mental disorder as the result of a highly stressful event while on active duty in the U.S. Army, he *necessarily* is entitled to a 50 percent DoD disability rating per federal law. He should have been assigned an initial evaluation of at least 50 percent and then had an examination within 6 months of being discharged to determine if the evaluation was warranted. This did not occur. He should therefore be given the opportunity to be rated at 50 percent, in accordance with the law, and then subsequently evaluated. Secondly, the clear evidence from the medical evidence from 2010 to 2014 was that his behavioral health caused severe occupational and social limitations.

r. In accordance with Title 38 CFR, Section 4.129 (under authority of 38 U.S.C. 1155) and DoDI 1332.18, the applicant should be assigned a DoD rating of at least 50 percent for his behavioral health disorder due to traumatic stress. He is providing a new and compelling argument outlining a plain mistake of law in the prior analysis of his case. Therefore, it would be an injustice to not allow the applicant the opportunity to be evaluated under the appropriate legal analysis as it relates to a behavioral disorder due to traumatic stress and as outlined above.

3. A National Guard Bureau Form 22 (Report of Separation and Record of Service) shows after 3 years, 8 months, and 7 days of prior honorable enlisted service in the Army National Guard (ARNG), from 17 November 1988 through 23 July 1992, the applicant was honorably discharged for the purpose of appointment as a commissioned officer in the ARNG, which an Oath of Office reflects transpired on 25 July 1992.

4. A second NGB Form 22 shows the applicant honorably resigned and was transferred to the U.S. Army Reserve (USAR) Control Group (Reinforcement) on 11 July 1995, after 2 years, 11 months, and 17 days of net ARNG service this period.

5. U.S. Army Human Resources Command (AHRC) Orders C-10-424801, dated 27 October 2004, released the applicant from the USAR Control Group (Reinforcement) effective 13 October 2004, for the purpose of appointment and reassigned him to the [REDACTED] ARNG. The applicant signed an Oath of Office in the [REDACTED] ARNG on 13 October 2004.

6. Multiple DD Forms 214 (Certificate of Release or Discharge from Active Duty) show:

a. The applicant was ordered to active duty in support of Operation Iraqi Freedom (OIF) on 16 December 2004, with service in Kuwait/Iraq from 27 January 2005 through 18 January 2006. He was honorably released from active duty due to completion of

required active service on 14 February 2006, and transferred back to his ARNG unit in [REDACTED]. He was credited with 1 year, 1 month, and 29 days of net active service this period.

b. The applicant was ordered to active duty in support of Operation Enduring Freedom (OEF) on 2 January 2007, with service in Afghanistan from 11 April 2007 through 31 March 2008. He was honorably released from active duty due to completion of required active service on 26 May 2008, and transferred back to his ARNG unit in [REDACTED]. He was credited with 1 year, 4 months, and 25 days of net active service this period.

c. The applicant was ordered to active duty in support of OEF on 25 June 2009, with service in Kuwait from 2 July 2009 through 25 October 2009. He was honorably released from active duty due to completion of required active service on 9 November 2009, and transferred back to his ARNG unit in [REDACTED]. He was credited with 4 months and 15 days of net active service this period.

7. The applicant's DA Form 3349 (Physical Profile), DA Form 7652 (Disability Evaluation System (DES) Commander's Performance and Functional Statement), MEB NARSUM, DA Form 3947 (MEB Proceedings), VA Compensation and Pension (C&P) Exam, and VA Proposed Rating Decision for DES purposes are not in his available records for review and have not been provided by the applicant.

8. A DA Form 199 shows:

a. An Informal PEB convened on 30 September 2014, while the applicant was in an ARNG drilling member status, and found the applicant was physically unfit with a recommended rating of 40 percent and that his disposition be permanent disability retirement.

b. The applicant's medical conditions determined to be unfitting, based on the NARSUM, DA Form 7652, DA Form 3349. C&P Exam, and VA Proposed Rating Decision, are:

(1) PTSD (MEB Diagnosis (Dx) 1); 30 percent; the applicant was deployed to Afghanistan in 2007 – 2008 and Iraq in 2004 – 2006. The behavioral health examiner attributes this condition to combat stressors. It has not responded adequately to treatment and represents a decided medical risk to his mental health; therefore, it is unfitting and related to military service.

(2) Left knee strain (MEB Dx 2); 10 percent; onset was July 2007 in Afghanistan when his position came under fire and he was injured getting into a high mobility multi-purpose wheeled vehicle (HMMWV) to man the weapon system. A line of duty (LOD) investigation is on file. Reasonable performance requires him to perform all DA Form

3349 functional activities and his profile restrictions prevent him from moving 40 pounds while wearing usual protective gear at least 100 yards.

c. His medical conditions determined not to be unfitting because these conditions met medical retention standards, they are not listed on the Physical Profile as limiting any of his functional activities, are not commented on by the commander as hindering performance of assigned duties, and they do not put undue burden on the military to protect the Soldier in the performance of his duties are:

- mild osteoarthritis of the right knee (MEB Dx 3)
- allergic rhinitis (MEB Dx 4)
- irritable bowel syndrome (MEB Dx 5)
- tinnitus (MEB Dx 6)
- bruxism (MEB Dx 7)

d. On 15 October 2014, the applicant signed the form indicating he had been advised of the findings and recommendations of the Informal PEB and concurred, waiving a formal hearing of his case. He did indicate he requested the VA reconsider his disability ratings.

9. USAPDA Order D 104-07, dated 14 April 2015, released the applicant from assignment and duty because of physical disability incurred while entitled to basic pay and under conditions that permit his retirement for permanent physical disability, placing him on the retired list effective 19 May 2015, with a disability rating of 40 percent.

10. The applicant's NGB Form 22 shows he was honorably discharged from the ARNG on 18 May 2015, due to medical disqualification for further military service and placed on the Permanent Disability Retired List (PDRL). He was credited with 10 years, 7 months, and 6 days of net service this period and 16 years, 6 months and 2 days of total service for retired pay.

11. A VA Decision Review Officer Decision, dated 27 July 2016, shows the applicant was granted the following service-connected disability ratings retroactively effective 10 December 2009, after review of his Notices of Disagreement dated 27 February 2012 and 28 March 2013:

- PTSD, currently 30 percent, was increased to 50 percent
- anterior instability, left knee, 20 percent
- asthma, 10 percent
- chronic sinusitis, 10 percent
- allergic rhinitis, 0 percent
- entitlement to an earlier effective date for service connection for limitation of flexion, left knee, with history of left knee strain was granted because a clear and

unmistakable error was made; therefore, a 10 percent evaluation was granted effective 10 November 2009

- entitlement to an earlier effective date for service connection for right shoulder arthropathy granted because a clear and unmistakable error was made; therefore, a 10 percent evaluation was granted effective 10 November 2009
- entitlement to an earlier effective date for service connection for tinnitus was granted because a clear and unmistakable error was made; therefore, a 10 percent evaluation was granted effective 10 November 2009

12. The applicant previously applied to the ABCMR in 2016, requesting an increase in the physical disability rating for his knee condition from 10 percent to 20 percent and for his PTSD from 30 percent to 50 percent, based on the VA recently increasing their service-connected disability ratings for those conditions.

13. In the adjudication of that case, an advisory opinion was provided by the USAPDA legal advisor on 10 September 2018, which has been provided in full to the Board for review, and in pertinent part shows:

a. Administrative finality doctrine precludes reopening administrative decisions based on error of judgment or changed opinion subject to certain exceptions that are presently not applicable (i.e. fraud, mistake of law, mathematical miscalculation, substantial new evidence discovered contemporaneously with or within a short time following action, etc.) DoDI 1332.18, App 4 to Encl 3, Para 2(f). Once the Secretary of the Army (SA), or his/her designee, has authenticated a Soldier's DES, absent 'good cause' specified above or comparable to, it is determined Soldiers have exhausted their administrative due process rights provided for in DoD directives, instructions, and applicable Army regulations.

b. The intent behind the finality doctrine is to prevent disability retired/separated Soldiers with ongoing or prolonged VA appeals from requesting increases to their military disability percentage, which could be finalized years after discharge. Similarly, when/if the VA readjusts a disability percentage to a lower figure, the retired Soldier's percentage is similarly protected. Here, it is understood and acknowledged the applicant is requesting an increase to his DES retirement percentage contrary to the purpose and intent of the Administrative Finality Doctrine. We hold the year difference between PDRL placement (19 May 2015) is not contemporaneous with the VA's 27 July 2016 communication. As a result, the applicant's request was found to be legally insufficient.

14. On 24 January 2020, 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.

15. The applicant subsequently applied to the ABCMR for reconsideration of his prior request for an increase to his physical disability retirement percentage, based on an increased VA rating.

16. The Record of Proceedings reflected in Docket Number AR20220002154, shows in the adjudication of that request for reconsideration, an Army Review Boards Agency (ARBA) medical advisor stated that the applicant's IDES PTSD VA C&P Examination indicated the 30 percent rating for PTSD was appropriate as the applicant did not manifest the criteria for a 50 percent rating. It was the ARBA medical advisor's opinion that neither an increase in his military disability rating nor a referral of his case to the DES was warranted.

17. On 9 June 2022, 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.

18. 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.

19. 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.

20. 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.

21. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting reconsideration of his prior requests for an increase to his physical disability retirement rating from 40 percent to 70 percent.

b. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Pertinent to this advisory are the following:

- The applicant had prior enlistment time prior to signing an oath of office in the [REDACTED] ARNG on 13 October 2004.
- He entered active duty on 16 December 2004 until 14 February 2006 and was deployed to Kuwait and Iraq. He again entered active duty on 2 January 2007 through 26 March 2008 and served in Afghanistan. He entered active duty for the last time on 25 June 2009 through 9 November 2009 and served in Kuwait.
- The applicant's DA Form 3349 (Physical Profile), DA Form 7652 (Disability Evaluation System (DES) Commander's Performance and Functional Statement), MEB NARSUM, DA Form 3947 (MEB Proceedings), VA Compensation and Pension (C&P) Exam, and VA Proposed Rating Decision for DES purposes are not in his available records for review and have not been provided by the applicant.
- On 15 October 2014, the applicant signed the form indicating he had been advised of the findings and recommendations of the Informal PEB, and he concurred, waiving a formal hearing of his case.
- The applicant's NGB Form 22 shows he was honorably discharged from the ARNG on 18 May 2015, due to medical disqualification for further military service and placed on the Permanent Disability Retired List (PDRL). He was credited with 10 years, 7 months, and 6 days of net service this period and 16 years, 6 months and 2 days of total service for retired pay.

c. Review of Available Records: The Army Review Boards Agency (ARBA) Behavioral Health Advisor reviewed the supporting documents contained in the applicant's file. The applicant asserts his military retirement disability should have been 70% based on corrections to the behavioral health unfitness for PTSD. The application included an Informal Physical Evaluation Board (PEB) Proceedings document dated 30 September 2014, which showed that the applicant was diagnosed with PTSD by the MEB with a rating of 30%. A VA Decision Review Officer Decision letter dated 27 July 2016 showed that the applicant's rating for PTSD was increased from 30% to 50%. There was sufficient evidence that the applicant was diagnosed with PTSD.

d. The Joint Legacy Viewer (JLV), which includes medical and mental health records from DoD and VA, was also reviewed and showed the applicant initiated mental health care through the VA on 20 July 2010, and he reported depressive symptoms in response to stressor of "working for the [REDACTED]," and he reported receiving a Purple Heart due to an injury incurred during a gunfight while deployed. He declined treatment and noted he was primarily pursuing service connection and documenting PTSD. He was seen next by mental health in July 2011, and he reported worsening symptoms of nightmares, flashbacks, hypervigilance, anxiety attacks, and sleep problems over the previous six months. He was diagnosed with PTSD, Adjustment Disorder with Depressed Mood, and history of Alcohol Abuse, and he elected to engage in treatment where he attended two group educational sessions and did not follow up. He initiated medication management through the VA and was started on an

antihistamine for anxiety and a medication for sleep. In 2012 an antidepressant was added, but he dropped out of treatment in March 2013. In 2016 he reengaged with medication management and had quarterly contacts with some medication adjustments through 2019 before being lost to follow up.

e. Compensation and Pension (C&P) examinations from 2010, 2012, 2013, 2016, and 2021 were reviewed. The initial PTSD exam was conducted on 20 December 2010, and the applicant endorsed the requisite number of symptoms to warrant a PTSD diagnosis. He reported direct combat exposure during his tours to Iraq and Afghanistan and stated "the entire war experience" as his response to being asked about a specific stressor event. He reported being unemployed despite having completed a law degree after his first tour of duty, and he discussed difficulty getting along with others, being argumentative, irritable, and withdrawn. The evaluator cited an assessment completed in July 2010 as documentation of a history of diagnosis of PTSD, but there is no indication of a treatment history. Regarding prognosis, the evaluator remarked "if he does not get treatment his prognosis is poor, but he should respond well to a combination of psychotherapy and medications." A review exam was conducted on 18 July 2012, and it was noted that the applicant was receiving mental health treatment through a non-VA provider (records not available for review by this Advisor). He reported he had not worked since his last deployment due to "I was an officer and they filed false charges against me and there is an investigation," but he related he was also in school using his GI Bill and lived off his VA disability income. Another exam was conducted on 8 July 2013, and his symptom presentation was essentially the same. The applicant reported being unemployed outside of his monthly drill duty, and he discussed "investigations" and "false charges" related to his Purple Heart and other problems with the military. His occupational and social impairment was evaluated to be the same as the previous exam. Another PTSD C&P exam was conducted on 10 March 2016, and documentation supported some improvement in social functioning (i.e. church attendance; "street preaching") but continued unemployment. The applicant reported he had been seeing a non-VA psychiatrist for medication management over the previous 3-4 years, and he expressed some improvement in "repressing" his anger/irritability/agitation. He was evaluated again on 8 December 2016, and he reported continued PTSD symptoms, unemployment following discharge from the ARNG, and difficulty getting along with others as a barrier to gaining employment. His most recent C&P exam was on 20 December 2021 and was unremarkable for any significant changes in symptoms, treatment, diagnosis, or social and occupational functioning.

f. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support a referral back to the DES or making any changes in the rating of 30% for the applicant's diagnosis of PTSD. The applicant initiated an evaluation for PTSD in 2010, and he completed C&P examinations in 2012, 2013, two in 2016, and another in 2021. The available mental health

documentation from the applicant's time in service, in this Advisor's opinion, only questionably supports that the applicant was psychiatrically unfit at the time of discharge for a boardable mental health condition, which requires evidence of persistent or reoccurring symptoms requiring extended or recurrent psychiatric hospitalization or persistent and reoccurring symptoms that interfered with duty performance or necessitated duty limitations (AR 40-501, para 3-33c). Although he reported occupational problems, the available documentation does not completely attribute this to his PTSD as he primarily discussed investigations as his stressor, and there is not sufficient evidence to support that he had maximized all treatment available (i.e. utilizing evidence based psychotherapy in addition to medication). Nonetheless, on 30 September 2014 the informal PEB found his PTSD and knee strain to be unfitting medical conditions for continued service, but he was not released from active service, continuing in drill status, until 18 May 2015.

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.
2. The Board carefully considered the applicant's contentions, evidence in the military record, the reason for his separation and the disability ratings assigned at the time of his separation. The Board considered the previous considerations of the applicant's requests for correction, the PDA review advisory opinions for the previous cases and the changes in the applicant's VA ratings over time. The Board considered the review and conclusions of the medical advising official and the results of his C&P exams over time. The Board concurred with the reviews and advisory opinions in that the applicant's change in rating for PTSD was not contemporaneous with the end of his period of service. The Board did not find that the applicant provided evidence sufficient to refer the applicant back to DES for reevaluation or to change the percentage of disability for this conditions that resulted in his medical disqualification for continued service. Based on a preponderance of evidence, the Board determined that the disability ratings the applicant received upon separation were not in error or unjust.
3. 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:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	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.

X [REDACTED]

CHAIRPERSON
[REDACTED]

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 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.

X. 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.

X. 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.

X. 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.

x. DoDI 1332.18 establishes policy, assigns responsibilities and provides procedures and standards for DRB. Section 8.2 (Behavioral Disorders due to Traumatic Stress), in effect at the time, states The Secretary of the Military Department concerned will comply

with Section 1216a of Title 10, U.S.C. and Sections 4.129 and 4.130 of Title 38, CFR for disposition of Service members found unfit because of a behavioral disorder due to traumatic stress. When a behavioral disorder develops on active duty because of a highly stressful event severe enough to bring about a Service member's release from active military service, the Secretary of the Military Department concerned will:

a. Permanently retire Service members assigned a rating of 80 percent or greater for any unfitting permanent and stable condition(s) not related to the behavioral disorder due to traumatic stress.

b. For all other Service members, assign a rating of at least 50 percent to the behavioral disorder due to traumatic stress, combine ratings in accordance with the VASRD, temporarily retire the Service member for disability, and schedule an examination to determine whether a change in rating and disposition is warranted. The reexamination will be scheduled within 6 months from the date of placement on the TDRL, but completed no earlier than 90 days after placement on the TDRL.

X. 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.

X. 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.

X. 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.

x. 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//