

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 27 November 2024

DOCKET NUMBER: AR20240002391

APPLICANT REQUESTS:

- physical disability retirement with a disability rating of no less than 80 percent, with retroactive compensation, in lieu of transfer to the Retired Reserve due to completion of 20 qualifying years of service, or
- referral to the Disability Evaluation System (DES) for disability retirement evaluation, and
- in effect, eligibility for Combat Related Special Compensation (CRSC)

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

- DD Form 149 (Application for Correction of Military Record)
- Counsel's brief
- Power of Attorney
- applicant's self-authored statement
- birth certificate
- Standard Form 88 (Report of Medical Examination), dated 23 September 1993
- DD Form 1966 (Record of Military Processing – Armed Forces of the United States), dated 27 October 1993
- DD Form 372 (Request for Verification of Birth), dated 29 October 1993
- DD Form 2366 (Montgomery GI Bill Act Of 1984), dated 19 March 1994
- DD Form 3286-59 (Statement for Enlistment), dated 22 June 1994
- DD Form 4 (Enlistment/Reenlistment Document), dated 17 October 1994
- DD Form 3286-66 (Statement of Understanding), dated 17 October 1994
- Army Achievement Medal Certificate, dated 10 October 1995
- DD Form 4, dated 29 January 1997
- DD Form 3286-59, dated 29 January 1997
- DA Form 3340-R-E (Request for Reenlistment or Extension in the Regular Army), dated 29 January 1997
- Army Commendation Medal Certificate, dated 9 June 1997
- Marriage Certificate, dated 18 July 1997
- SGLV-8286 (Servicemembers' Group Life Insurance Election and Certificate), dated 21 July 1997

- DA Form 2-1 (Personnel Qualification Record – Part II), dated 29 September 1997
- Standard Form 312 (Classified Information Nondisclosure Agreement), dated 2 October 1997
- DA Form 4991-R (Declination of Continued Service Statement), dated 6 January 1999
- DD Form 2648 (Privacy Act Statement), dated 14 January 1999
- U.S. Army Transportation Center Orders 322-0002, dated 18 November 1999
- Army Achievement Medal Certificate, dated 27 December 1999
- DD Form 214 (Certificate of Release or Discharge from Active Duty) covering the period ending 28 January 2000
- DA Form 4187 (Personnel Action), dated 3 February 2000
- U.S. Army Reserve Personnel Command Orders C-02-004428, dated 15 February 2000
- DA Form 4836 (Oath of Extension of Enlistment), dated 9 March 2002
- 63rd Regional Support Command Orders M-040-0003, dated 9 February 2003
- DA Form 4836, dated 19 March 2003
- 257th Transportation Company memorandum, dated 22 July 2003
- 63rd Regional Readiness Command Orders 04-010-00020, dated 10 January 2004
- Headquarters, U.S. Army Air Defense Artillery Center and Fort Bliss Orders 082-0023, dated 22 March 2004
- DD Form 214, covering the period ending 4 May 2004
- DA Form 4856, dated 4 May 2004
- 257th Transportation Company memorandum, dated 27 September 2004
- DD Form 4, dated 4 November 2004
- DA Form 3540 (Certificate and Acknowledgment of U.S. Army Reserve (USAR) Service Requirements and Methods of Fulfillment), dated 4 November 2004
- DA Form 5261-2-R (Selected Reserve Incentive Program – Reenlistment/Extension Bonus Addendum), dated 4 November 2004
- DA Form 5261-4-R (Student Loan Repayment Program Addendum), dated 4 November 2004
- DA Form 2-1, dated 12 May 2005
- Headquarters, 63rd Regional Readiness Command Orders 05-276-00033, dated 3 October 2005
- DA Form 1059 (Service School Academic Evaluation Report), dated 22 July 2006
- 257th Transportation Company memorandum, dated 1 August 2006
- DA Form 2166-8 (Noncommissioned Officer Evaluation Report (NCOER)) covering the period ending 31 October 2006
- SGLV 8286, dated 15 April 2007
- Certificate of Training, dated 26 July 2007

- DA Form 2168-8, covering the period ending 31 October 2007
- DD Form 93 (Record of Emergency Data), dated 3 November 2007
- Headquarters, 257th Transportation Company Orders 07-332-00009, 28 November 2007
- Camp Atterbury permanent Orders 087-007, dated 27 March 2008
- DD Form 93, dated 11 September 2008
- DA Form 2166-8, covering the period ending 31 October 2008
- 6th Transportation Battalion Permanent Order 023-01, dated 23 January 2009
- DA Form 2166-8, covering the period ending 31 January 2009
- DD Form 214, covering the period ending 6 April 2009
- DA Form 2166-8, covering the period ending 31 January 2010,
- DA Form 2166-8, covering the period ending 31 January 2011
- two 257th Transportation Company memoranda, both dated 22 June 2011
- Certificate of Training, dated 1 January 2012
- DA Form 2166-8, covering the period ending 31 January 2012
- Headquarters, 63rd Regional Support Command orders 12-129-00032, dated 8 May 2012
- nine Certificates of Completion, dated between 13 December 2012 – 29 January 2013
- DA Form 1380 (Record of Individual Performance of Reserve Duty Training), dated 18 March 2013
- DD Form 4, dated 2 March 2014
- DA Form 3540, dated 2 March 2014
- U.S. Army Human Resources Command (AHRC) Orders D-03-404544, dated 4 March 2014
- AHRC Orders C-05-406294, dated 8 May 2014
- AHRC memorandum, subject: Notification of Eligibility for Retired Pay at Non-Regular Retirement (20-Year Letter), dated 19 February 2015
- DA Form 2166-8, covering the period ending 29 April 2015
- Headquarters, 88th Regional Support Command Orders 16-166-00018, 14 June 2016
- Department of Veterans Affairs (VA) medical records in excess of 570 pages
- undated witness statement from applicant's former spouse D____ A____

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. Counsel states:

a. Counsel is retained to represent the applicant regarding his request for a medical disability retirement, which should have been issued before he retired from the USAR. The applicant suffered injuries while deployed to Iraq, causing him to become unfit for duty, but his command and medical professionals failed to refer him to a medical evaluation board (MEB). The applicant requires prosthetics and multiple surgeries to compensate for two toes that were crushed during his second deployment to Iraq by a high mobility multipurpose wheeled vehicle (HMMWV) causing hallux rigidus. He also suffered from debilitating post-traumatic stress disorder (PTSD) which was caused by witnessing a traumatic event during his first deployment to Iraq and further aggravated by his second deployment. The applicant's hallux rigidus was caused by an instrumentality of war; therefore, he is eligible for a medical disability retirement and CRSC. This is the applicant's initial attempt at requesting relief from this honorable Board, and he has exhausted all administrative remedies available to him.

b. They request the following relief for the applicant:

(1) Grant the applicant a medical disability retirement at a rate no lower than 80 percent and retroactively compensate him beginning at a date commensurate with his initial discharge; or

(2) In the alternative, should this honorable Board not be willing to grant the medical disability retirement, then they request that he be referred to the DES to be evaluated for a medical disability retirement.

c. They contend that the applicant is a combat veteran who has served honorably in the USAR for more than 21 years before retiring. He sustained two injuries while deployed to Iraq in 2004 and 2008 that adversely affected his ability to perform the duties of his rank, grade, or rating for the remainder of his military service. In 2004, during his first deployment to Iraq, the applicant experienced a traumatic event that caused PTSD. His PTSD was further aggravated during his second deployment to Iraq. The applicant's second deployment to Iraq resulted in two crushed toes by a HMMWV, an armored vehicle qualifying as an instrumentality of war, resulting in hallux rigidus. He was limited in his ability to participate in Army Physical Fitness Tests (APFTs) and he also exhibited signs of poor impulse control resulting in arguments between command staff and himself. The applicant was also required to undergo surgery for his injured toes resulting in the use of prosthetics. As a result, he was never promoted beyond the rank of sergeant (SGT) and retired from the USAR with 21 years of honorable service. The applicant was failed by both his command and the medical professionals who treated him. He should have been medically retired and should be collecting the benefits of a medically retired Soldier, which both he and his family would benefit from greatly. They request that this honorable Board consider this application and grant the requested relief.

d. The applicant joined the Army to serve his country. He joined because he felt duty-bound and a sense of commitment. He enlisted into the Army as an 88M (Motor Transport Operator). When the applicant enlisted in the USAR, his initial medical examination showed he was in good health and there were no indications of physical or mental impairment.

e. Between 6 April 2003 to 17 March 2004, the applicant deployed to Iraq in support of Operation Iraqi Freedom. This deployment was particularly taxing on him because he witnessed a fellow Soldier perish while being crushed between two vehicles during a vehicle accident. After this experience, the applicant recalls looking in the mirror and feeling lost. Upon returning from Iraq, he recalled consuming alcohol every day for approximately 2 months to "forget and deal with feelings of panic and adjustment" and also experienced "severe panic attacks in public places" while "avoiding people and memories related to his trauma."

f. The applicant continued to perform his duties. No evidence necessitated any duty limitations upon his return from Iraq until he deployed to Iraq a second time. Between 29 January 2008 to 6 April 2009, the applicant deployed in support of Operation Iraqi Freedom a second time. During his deployment, a military vehicle ran over the applicant's big toes. At the time, he did not seek treatment because he did not think that his injury was serious. Furthermore, he felt a sense of duty to his fellow Soldiers and did not want to leave their side.

g. Upon returning from his second deployment, the applicant continued to mask his symptoms with alcohol and recalls drinking beer every day for 2-3 months. During a VA appointment on 2 July 2009, he was diagnosed with hallux rigidus. Medical examiners noted, "(a)dvanced degenerative change is demonstrated at the bilateral first metatarsophalangeal (MTP) joints as well as at the first interphalangeal (IP) joints."

h. The applicant's evaluations from 1 February 2009 to 31 January 2010 show that he completed an APFT on 7 January 2010 and was rated as "Fully Capable." He completed another APFT one month later on 13 February 2010. On 10 May 2010, the applicant underwent surgery to repair the hallux rigidus on his right foot, and on 15 November 2010, he had surgery to repair the hallux rigidus on his left foot. The surgeries resulted in him obtaining prosthetic toes. The applicant recovered from his surgery. His records show that he passed an APFT on 9 July 2011, and was rated as "Fully Capable."

i. On 2 May 2013, the applicant went to the VA with symptoms of "acute" prostheses complication. It was noted that his prostheses were "abnormal" and required medical attention. He was also treated for possible PTSD and depression disorder. According to his mental health screening, the applicant endorsed nightmares, avoiding situations that remind him of his combat deployment, constantly on guard, and feeling numb or

detached from activities. Medical doctors all noted that his hallux rigidus surgical scar was tender and also stated the need for additional surgery on his left foot.

j. On 11 July 2013, the applicant returned to the VA to treat symptoms of PTSD. His Global Assessment Functioning (GA) score was 61, and medical providers noted that he met the criteria for PTSD. On 23 August 2013, the applicant was seen in mental health by C____ A____. During his appointment, he described experiencing panic attacks "each time he goes grocery shopping." He also stated that he sleeps 4-5 hours and awakes 5-6 times a night. His score for PTSD was 60 after expressing:

- disturbing memories and dreams
- reliving stressful experiences
- feeling upset about past stressful experiences
- experiencing physical reactions to something that reminded him of a stressful past experience
- avoiding thinking or talking about stressful past experiences
- trouble remembering important parts of stressful past experiences
- loss of interest or enjoyment
- feeling distant or cut off from other people
- feeling emotionally numb
- feeling as if his future would be cut short
- trouble staying or falling asleep
- feeling irritable or having angry outbursts
- having difficulty concentrating
- feeling super altered
- feeling jumpy and easily startled

k. The applicant's PTSD continued to progress, and he became homeless on 1 April 2014. During this time, his service records show that he did not participate in another APFT until 5 December 2014, where his evaluation was lowered from "Fully Capable" to "Marginal." His rater also notes that although the applicant passed the APFT, he showed apparent signs of " physical stress ."

l. The applicant continued to suffer from PTSD symptoms until his discharge in 2016. Prior to his discharge, he recalled losing his temper because he did not take his medication resulting in a verbal altercation with his first sergeant.

m. According to D____ A____ (hereinafter "Ms. A____"), the applicant continues to feel chronic pain . She observed the " toll [the applicant's] PTSD and anxiety have taken on his daily activities to the point, at times, he will not go to the store when needed because of his mind state." Ms. A____ expresses how the applicant's PTSD is a challenge to the entire family.

n. The applicant served honorably in the Army and USAR for 21 years before retiring from the Ready Reserve. He suffered from injuries while deployed to Iraq that should have resulted in a medical disability retirement long ago, but his command and medical staff failed to properly refer him to the MEB. The applicant is entitled to a medical disability retirement at no less than 80 percent for injuries he received in the line of duty .

o. The applicant was suffering from multiple unfitting mental health conditions that were caused by injuries that occurred while he was deployed to Iraq. Medical providers and his command were aware of the incidents and the effects they had on his ability to perform his assigned duties. The failure to promptly refer him to the appropriate medical board upon discovery of his medical conditions constitutes a breach of duty and is in direct violation of Army Regulations.

p. Army Regulation 40-501 (Standards of Medical Fitness), Chapter 3, lists medical conditions and defects that may render a Soldier unfit for further military service. Medical conditions and physical defects, individually or in combination, which may render a Soldier unfit for further military service are those that:

- Significantly limit or interfere with the Soldier's performance of their duties as substantiated by the Soldier's commander or supervisor;
- Require medication for control which requires frequent monitoring by a physician due to debilitating or serious side effects, medical care, or hospitalization with such frequency as to interfere with satisfactory duty performance;
- Restrict performance of any of the profile function activities listed in Section 4 of DA Form 3349 (Physical Profile), prevent the performance of all aerobic events of the APFT, have met a clinic medical retention determination point, or have been temporarily profiled for more than 365 days;
- May compromise or aggravate the Soldier's health or well-being if they were to remain in military service. This may involve dependence on certain medications, appliances, severe dietary restrictions, frequent special treatments, or a requirement for frequent clinical monitoring;
- May compromise the health or well-being of other Soldiers; and
- May prejudice the best interests of the U.S. Government if the individual were to remain in military service.

q. Chapter 3 provides a list, mainly by body system, of physical conditions or defects that *may* render a Soldier unfit for further military service; however, "(m)any of the conditions listed in (chapter 3) fall below retention standards only if the condition has precluded or prevented successful performance of duty as described in paragraph 3-1." Under paragraph 3-33 , the causes for referral to the DES are as follows: c. Anxiety, obsessive-compulsive, dissociative, somatic symptom, and related disorders

(excluding factitious disorder), and trauma and stressor-related disorders. (1) Persistence or recurrence of symptoms sufficient to require extended or recurrent hospitalization. (2) Persistence or recurrence of symptoms that interfere with duty performance and necessitate limitation of duty or duty in a protected environment. Under paragraph 3-22, the causes for referral to the DES are as follows: b. Feet (7) Hallux limitus, hallux rigidus.

r. Here, the applicant's PTSD was caused by duties he performed in the line of duty because he was deployed to Iraq. His first psychological injury occurred when a fellow Soldier died during a vehicle accident. The applicant began exhibiting signs of a potential injury upon returning from his first deployment; however, his PTSD was aggravated during his second deployment, demonstrating that deployments to combat environments adversely affected his mental health. In 2013, he showed signs of unfitness. While he was seemingly able to mask his symptoms during weekend drills, it is clear that any activation to a combat environment would compromise or aggravate his PTSD. The applicant could no longer be around other people in public, he experienced nightmares, and depression. The applicant also abused alcohol which led to homelessness in 2014. He was also taking medication to control his anger and when he was not on medication, his temper erupted causing arguments with his superiors, negatively affecting unit cohesion. His performance began to drop in 2014, when he was rated as "Marginal" and his command hid his declining duty performance when they no longer evaluated him for the next 2 years. Therefore, an error was committed when medical providers and his command refused to refer the applicant to the DES for PTSD incurred and aggravated in the line of duty.

s. Regarding the applicant's hallux rigidus, it is likely that his condition occurred when he returned from his second deployment from Iraq. Before deploying to Iraq in 2008, he did not exhibit any signs of a toe injury. His medical records are silent as to any diagnosis of hallux rigidus. It was not until 2009, after he returned from Iraq, that the applicant was diagnosed with hallux rigidus. While he scored well on his APFT, his records show that continuing his military service was adversely affecting his condition. The applicant eventually required surgery in May 2010 and November 2010. After healing from his surgery, he participated in another APFT in July 2011, which likely aggravated his condition because he did not take another APFT until 2014, 3 years later. Medical records from 2013 show that his condition was aggravated, requiring further surgery on his left toe. After having a second surgery, the applicant barely passed the APFT in 2014. Attempting to pass the APFT in 2014 caused noticeable pain and anguish for the applicant, as noted by his rater when his rater wrote that the applicant was experiencing "physical stress." After completing the 2014 APFT, the applicant never ran another APFT again to avoid aggravating his condition. Instead of allowing him to skip APFTs, his Command and medical providers should have referred him to the DES.

t. The regulatory provisions cited above placed a duty on the Army to refer the applicant to the appropriate medical board upon discovery of his unfitting medical conditions. Unfortunately, the applicant was never referred to the DES for evaluation before he retired from service. The command simply waited him out until he left without the benefit of an immediate pension and adequate health insurance. It was both an error and an injustice for the applicant to be separated from the USAR without first evaluating him for a medical disability retirement.

u. The applicant was diagnosed with PTSD and hallux rigidus. These medical conditions, both individually and collectively, rendered him incapable of performing his military duties and also warranted referral to the DES. As stated above, certain conditions must be referred to the DES upon their discovery. These conditions include any condition in which the ability of the Soldier to perform his or her assigned duties is called into question. Per Army Regulation 40-501, paragraph 3-33c, a Soldier who experiences persistence or recurrence of symptoms that interfere with duty performance and necessitate limitation of duty or duty in a protected environment should be referred to the DES.

v. Here, medical records indicate that the applicant experienced persistent symptoms of PTSD in 2013, which required him to be in a protected environment because he could not deploy to a combat area without further aggravating his PTSD. Per Army Regulation 40-501, paragraph 3-22b(7), a Soldier who is diagnosed with hallux rigidus should be referred to the DES. Here, the applicant was diagnosed with hallux rigidus in 2009, upon returning from his second deployment to Iraq. His injury occurred when a military vehicle ran over his toe. He should have been referred to the DES upon discovery of his hallux rigidus. Alternatively, he should have been referred to the DES when his hallux rigidus prevented him from completing an APFT for 3 consecutive years. The applicant continues to suffer from these conditions approximately 14 years later. His injuries and associated symptoms warranted referral to the DES at the time of his separation, and it was both an error and injustice to allow him to separate from service without first considering him for a medical disability retirement.

w. The applicant's injuries were sustained in Iraq and were caused by an instrumentality of war. Therefore, he is entitled to CRSC. For a disability to qualify for CRSC entitlements, the applicant must show that: (1) they are retired; (2) they are entitled to retired pay; (3) they have a qualifying disability rating; and (4) the injury is combat-related. To determine whether a disability is combat-related this Board must determine whether the disability was a result of: (1) armed conflict; (2) while engaged in hazardous service; (3) in the performance of duty under conditions simulating war; or (4) through an instrumentality of war. An Instrumentality of War is defined as a "vehicle, vessel, or device designed primarily for Military Service and intended for use in such Service at the time of the occurrence or injury. It may also include such instrumentality

not designed primarily for Military Service if the use of or occurrence involving such instrumentality subjects the individual to a hazard peculiar to Military Service." The regulation goes to note " [a] determination that a disability is the result of an instrumentality of war may be made if the disability was incurred in any period of service as a result of such diverse causes as wounds caused by a military weapon, accidents involving a military combat vehicle, injury or sickness caused by fumes, gases, or explosion of military ordnance, vehicles, or materiel." Finally, the regulation offers an example, explaining, "if a member is engaging in a sporting activity while on a field exercise and falls and strikes an armored vehicle, the injury would not be considered the result of an instrumentality of war (armored vehicle) because it was the sporting activity that was the cause of the injury, not the vehicle. On the other hand , if the individual was engaged in the same sporting activity and the armored vehicle struck the member, then the injury would be considered the result of an instrumentality of war." Here, the is retired from the USAR. His toes were run over by a HMMWV, which is an armored military vehicle designed primarily for military service and therefore qualifies as an instrumentality of war. Because the applicant's injury was caused by an instrumentality of war, his hallux rigidus qualifies as combat-related for CRSC purposes.

x. The applicant' symptoms were so severe at the time of his separation that the only equitable rating he should receive is 80 percent under the Department of Defense Manual, the rating system for Service Members who are pending Disability Retirement is governed under Title 38 C.F.R. and the "Secretaries of the Military Departments may not deviate from the VA Schedule for Rating Disabilities (VASRD), including any applicable interpretation of the VASRD by the U.S. Court of Appeals for Veterans Claims, U.S. Court of Appeals for the Federal Circuit, or U.S. Supreme Court." Under the general rating formula for mental disorders, a Service Member should be awarded seventy percent when: Occupational and social impairment, with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood, due to such symptoms as suicidal ideation; obsessional rituals which interfere with routine activities; speech intermittently illogical, obscure, or irrelevant; near-continuous panic or depression affecting the ability to function independently, appropriately and effectively; impaired impulse control (such as unprovoked irritability with periods of violence); spatial disorientation; neglect of personal appearance and hygiene; difficulty in adapting to stressful circumstances (including work or a work-like setting); inability to establish and maintain effective relationships .Under the general rating formula for musculoskeletal system injuries, a Service Member suffering from severe hallux rigidus should be rated as "hallux valgus, severe." A Service Member should be rated at ten percent for unilateral hallux valgus.

y. This Board has previously voted in favor of relief when an applicant has presented evidence showing the presence of a medical condition that calls into question the ability of the applicant to perform his or her military duties at the time of separation and when certain conditions were not afforded consideration during separation

processing. The applicant should be afforded similar treatment and, at the very least, referred to the DES for evaluation of all medical conditions identified herein. In ABCMR Docket No. AR20170000508, this Board voted in favor of referring a service member to the DES after evidence was presented showing the applicant "met criteria for PTSD and traumatic brain injury (TBI) during his time in service" and that the applicant suffered from "social and occupational impairment." In that case, the Board determined that the applicant's PTSD and TBI were not "appropriately considered during separation processing" even though the applicant "was deemed medically acceptable" during his separation physical. In Docket No. AR20150000040, this Board referred the applicant to IDES as a matter of equity after determining that the applicant's PTSD called into question his ability to perform his military duties prior to the applicant's transfer to the Retired Reserve. In that case, the applicant "was diagnosed with several medical conditions, including PTSD, before or near the date of his transfer to the Retired Reserve. However, the VA concluded that his PTSD was not likely to have been incurred, or caused by the claimed in-service injury, event, or illness. The VA later amended their decision and granted the applicant a 70 percent service-connected disability rating for PTSD effective 22 June 2012 ." In explaining their decision , the Board indicated that because the applicant was displaying symptoms associated with a PTSD diagnosis, including depression, loss of energy/fatigue, irritability, and anger, coupled with an in-service traumatic event and subsequent VA rating decision, equity, and good conscious mandated relief. In Docket No. AR20180013251, this Board voted in favor of referring the applicant to the DES after finding that prior DES proceedings failed to consider whether the applicant's lumbar spine degenerative joint/disc disease. In explaining their decision , the Board noted that the applicant had a 20 percent disability rating from the VA for degenerative disc disease of the lumbosacral spine, which was issued approximately 2 years before the applicant was released from service. This Board found the failure to consider the applicant's back condition during DES processing to constitute as sufficient to warrant relief. Here, the applicant was suffering from numerous medical conditions which were documented in his VA treatment records before his separation. He was diagnosed with PTSD and hallux rigidus prior to his separation from service. His PTSD symptoms were unfitting as they necessitated limitation of duty in a protected environment. He was being seen by a civilian medical provider for PTSD and hallux rigidus. His symptoms clearly warranted referral to the DES before his separation. Granting relief is consistent with past Board precedent and there is no reason to deviate from this Board's prior decisions.

z. The applicant was suffering from numerous unfitting medical conditions prior to his separation from service. These conditions drastically interfered with his ability to perform his military duties and were of sufficient severity to warrant referral to the DES. The failure to refer the applicant to the DES upon discovery of his numerous medical conditions and their clear impact on his abilities was a direct violation of Army Regulation 40-501 , which mandates prompt referral. This Board has previously granted relief in similar circumstances and the applicant should be afforded similar treatment.

Accordingly, they respectfully request this honorable Board grant the relief requested herein.

3. The applicant states:

a. He retired from the Army after over 21 years of service to his country. While he appreciates everything the Army has done for him throughout the last 21 years, he is requesting corrections to his military records because he deserves medical disability retirement for the injuries he sustained while serving my country.

b. He joined the Army because he wanted to serve his country and obtain job skills. When he entered the Army, he was perfectly healthy. He learned about physical fitness and stayed in peak condition. In 2004, he deployed to Iraq and was a driver for M1070 Heavy Equipment Transport (HET) and MI000 Trailer. They convoyed a lot, oftentimes, on little sleep. During a convoy, one time they stopped to rest and a HET vehicle pulling an M1 Abrahams tank was going too fast. As the vehicle tried to stop, another Soldier who did not notice the HET, did not move fast enough out of the way and was crushed by the HET.

c. After returning from Iraq, he started to feel symptoms of PTSD. He was easily agitated, on edge, and constantly alert. He tried to mask his feelings with alcohol and drank a lot. He did not say anything to anyone because he was a sergeant and he felt a sense of responsibility to the younger Soldiers in my unit.

d. He deployed to Iraq again in 2008. During this deployment, he felt in constant fear for his life. Also, they were losing a lot of Soldiers to injury and as a sergeant, he did not want to leave his Soldiers' side. He had experience from his previous deployment. One day, a HMMWV ran over his foot. He felt the pain; however, he did not say anything because he did not want to leave. He told the enlisted medics what happened, and he was offered Ibuprofen for the pain.

e. When they returned from their deployment, he felt worse than he did after returning from his first deployment. He returned to drinking alcohol to mask feelings of constant anxiety, and depression. He felt guilty for losing Soldiers and continued to feel extremely agitated. He was getting into arguments with his family members often. He could not go to the grocery store. He initially visited the VA in 2009 for his foot and was told by the doctor that his big toe joints were completely crushed. The doctor also said he needed surgery.

f. When he went back to his unit, he told them that he would need surgery for his toes. Medical told him that they were going to profile him for my toes as well and put him on limited duty. To meet the APFT requirement during that physical year, he took

the APFT earlier than everyone else, before his surgery, because he knew he could not take it while he was healing from surgery.

g. His toes were surgically repaired in 2010 and prosthetic toe joints were put in place. He continued to live with my PTSD symptoms until he could no longer take the constant arguing and feeling on guard. He went back to the VA to attempt to treat his PTSD in 2013. During that same appointment, his toes were checked and the doctor noted there were abnormalities. He told him he would require a second surgery for his toe. He was also formally diagnosed with PTSD.

h. He continues to be treated for PTSD, however it has been a long and difficult journey. It has been very difficult to contain his emotions and figure out his medications. When he was not on his medication, he was getting into verbal altercations with leadership and his fellow Soldiers. He also could not run an APFT because of his toe injury.

i. He believes his PTSD and toe injury should be reconsidered. These injuries made doing Soldierly tasks very difficult. He dreaded the thought of another deployment to Iraq and it was difficult to maintain relationships with other Soldiers. He should have been referred to a Medical Evaluation Board (MEB) based on his symptoms. Thank you for giving his application full and fair consideration.

4. A DD Form 4 shows the applicant enlisted in the Regular Army on 17 October 1994. After completion of basic combat training (BCT) and advanced individual training (AIT), he was awarded the Military Occupational Specialty (MOS) 88M.

5. A second DD Form 4 shows the applicant reenlisted in the Regular Army on 29 January 1997. A provided Marriage Certificate shows he married J____ A____ on 18 July 1997.

6. A DA Form 4991-R, shows on 6 January 1999, the applicant declined continued service. His subsequent DD Form 214 shows he was honorably released from active duty on 28 January 2000, due to completion of required active service and transferred to the USAR Control Group (Reinforcement). He was credited with 5 years, 3 months, and 12 days of net active service.

7. A DA Form 4187 shows the applicant requested transfer to a Selected Reserve Troop Program Unit (TPU) assignment on 3 February 2000 and U.S. Army Reserve Personnel Command Orders C-02-004428, dated 15 February 2000, released the applicant from the USAR Control Group (Reinforcement) due to voluntary request, and transferred him to a USAR TPU in Las Vegas, NV, effective 9 February 2000.

8. Multiple DA Forms 4836 show the applicant extended his enlistment in the USAR by 1 year on 9 March 2002, and he again extended his enlistment in the USAR by 1 year on 19 March 2003,
9. A second DD Form 214 shows the applicant was ordered to active duty in support of Operation Enduring Freedom on 10 February 2003, with service in Southwest Asia from 6 April 2003 through 17 March 2004. He was honorably released from active duty on 4 May 2004, due to completion of required active service and transferred back to his USAR TPU in Las Vegas, NV. He was credited with 1 year, 2 months, and 25 days of net active service this period.
10. An additional DA Form 4836 shows the applicant again extended his enlistment in the USAR for an additional period of 6 months on 4 May 2004.
11. An additional DD Form 4 shows the applicant reenlisted in the USAR on 4 November 2004, for a period of 6 years.
12. Headquarters, 63rd Regional Readiness Command Orders 05-276-00033, dated 3 October 2005 promoted the applicant to the rank/grade of sergeant (SGT)/E-5 effective 1 October 2005.
13. A DA Form 1059, dated 22 July 2006, shows the applicant successfully completed Warrior Leader Course by achieving course standards from 7 July 2006 through 22 July 2006.
14. Multiple DA Form 2166-8 provide the applicant's NCOERS covering the rating periods ending 31 October 2006, and 31 October 2007. They show in all categories of Part IV (Rater) (Values/NCO Responsibilities) he was rated as "Success" or "Excellence" and that he passed his APFT in April 2006.
15. A Divorce Decree shows the applicant and D____ A____ divorced on 20 March 2007.
16. A third DD Form 214 shows the applicant was again ordered to active duty in support of Operation Iraqi Freedom on 29 January 2008, with service in Kuwait/Iraq from 2 April 2008 through 27 January 2009. He was honorably released from active duty on 6 April 2009, due to completion of required active service and transferred back to his USAR TPU in Las Vegas, NV. He was credited with 1 year, 2 months, and 8 days of net active service this period.
17. Five additional DA Forms 2166-8 provide the applicant's NCOERs from 2008 – 2012 and show he was rated in all categories of Part IV as "Success" or "Excellence" on all of his NCOERS covering the rated periods ending 31 October 2008, 31 January

2009, 31 January 2010, 31 January 2011, and 31 January 2012. He passed his APFT in June 2008 scoring 294, January 2010 scoring 300, February 2010 scoring 300, and July 2011 scoring 300.

18. Headquarters, 63rd Regional Support Command Orders 12-129-00032, dated 8 May 2012, reassigned the applicant, due to voluntary request, from his USAR TPU in Las Vegas, NV, to the USAR Control Group (Reinforcement).

19. The applicant provided 9 Certificates of Completion, dated between 13 December 2012 – 29 January 2013, reflecting his completion of multiple lesson modules in the Structured Self-Development – Level 3.

20. A DD Form 4 shows the applicant reenlisted in the USAR for a period of 5 years on 2 March 2014.

21. AHRC Orders D-03-404544, dated 4 March 2014, honorably discharged the applicant from the USAR effective 4 March 2014.

22. AHRC Orders C-05-406294, dated 8 May 2014, released the applicant from the USAR Control Group (Reinforcement) and reassigned him to a USAR TPU in Colorado Springs, CO, effective 30 April 2014, due to voluntary request.

23. Note, the applicant's status during the 2-year period from May 2012 through April 2014, was not assignment in a USAR TPU, but rather assignment to the USAR Control Group (Reinforcement), at the applicant's request, likely accounting for his lack of APFT and NCOER during this period of service.

24. An AHRC memorandum, dated 19 February 2015, notified the applicant of his eligibility for retired pay at non-regular retirement (20-Year Letter), due to having completed the required years of qualifying Reserve service and that he is eligible for retired pay upon application at age 60.

25. The applicant's final DA Form 2166-8, covering the period from 30 April 2014 , through 29 April 2015, shows:

- he was rated in Part IV , Responsibility and Accountability as "Needs Improvement" with the comment that he failed to keep consistent communication with the chain of command
- he was rated in Part V (Overall Performance and Potential) as "Marginal" by his rater
- he passed the APFT on 5 December 2014, with the comments that he performed at all physical fitness events; one of the best; always showed endurance through physical stress; prevailed

26. Headquarters, 88th Regional Support Command Orders 16-166-00018, dated 14 June 2016, reassigned the applicant from his current assignment in a USAR TPU in Colorado Springs, CO, to the Retired Reserve effective 13 July 2016, due to completion of 20 or more years of qualifying service for retired pay at age 60.

27. The applicant's DA Form 5016 (Chronological Statement of Retirement Points) shows he completed 20 years of qualifying service for retirement.

28. A physical profile is used to classify a Soldier's physical disabilities. PULHES is the acronym used in the Military Physical Profile Serial System to classify a Soldier's physical abilities 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).

29. A review of the AHRC Soldier Management System (SMS) shows:

- the applicant's PULHES was 211111, with a rating of 2 in factor P
- he had no significant limitations in factor P and no limitations in the remaining factors
- the date of his last physical profile was October 2014
- the date of his last physical examination was 17 January 2016

30. The applicant's available service records do not contain any DA Forms 3349 reflecting a physical profile, nor do they show:

- he was ever issued a permanent physical profile rating
- he suffered from a medical condition, physical or mental, that affected his ability to perform the duties required by his MOS and/or grade or rendered him unfit for military service
- he was diagnosed with a medical condition that warranted his entry into the Army PDES
- he was diagnosed with a condition that failed retention standards and/or was unfitting

31. An undated witness statement from the applicant's former spouse, J____ A____, shows she was writing her statement to provide support for the applicant in his claim for service-connected disability benefits related to chronic pain complications. She has

known him for over 27 years and witness the significant impact chronic pain had on his life and how it affects him both physically and emotionally, making routine tasks difficult and limiting his ability to participate in family activities. She also witnessed the toll his PTSD and anxiety took on his daily activities. The applicant's chronic pain and mental state is not a personal struggle, but a challenge their entire family face together.

32. The applicant provided in excess of 570 pages of VA medical records, all of which have been provided in full to the Board for review, which reflect lab results, treatment, and diagnoses including those pertaining to problem list, which includes:

- chronic PTSD
- erectile dysfunction
- allergic rhinitis
- hyperlipidemia
- hypertension
- restless legs
- sleep apnea
- gastroesophageal reflux disease (GERD)
- dizziness and giddiness
- subjective tinnitus
- foot pain
- chronic low back pain
- hypertensive disorder
- impairment of knee
- headache

33. 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.

34. 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.

35. MEDICAL REVIEW:

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

Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant is applying to the ABCMR requesting in essence, a referral to the Disability Evaluation System (DES) for PTSD and a surgically treated right foot injury. An ARBA behavioral health advisor will address the mental health aspects of the request.

c. The Record of Proceedings details the applicant's service and the circumstances of the case. Orders published on 14 June 2016 by Headquarters, 88th Regional Support Command show the applicant was transferred to the Retired Reserve effective 13 July 2016 after having completed 20 or more years of qualifying service for retired pay at age 60. The applicant had received his Notification of Eligibility for Retired Pay at Non-Regular Retirement (20-Year Letter) one year earlier, on 19 February 2015.

d. No medical documentation was submitted with the application. Review of the EMR did not identify an encounter related to an injury. Bilateral feet radiographs obtained on 30 January 2009 revealed "Moderate degenerative changes at the first metatarsal-phalangeal joints bilaterally, left greater than right." Repeat radiographs obtained 12 May 2009 were unchanged. The applicant was evaluated by podiatry on that day, diagnosed with bilateral hallux rigidus, and was scanned for orthotics.

e. He underwent left 1st MTP joint replacement in May 2010 and right 1st MTP joint replacement in November 2010. A 6 June 2013 podiatry consult shows that both MPT's continued to be symptomatic with pain (left greater than right) and decreased range of motion. The provider recommended no further surgery at that time, and if symptoms worsened, an arthrodesis (fusion) of the left joint. There were no further entries related to his bilateral foot conditions.

f. There is no evidence a permanent duty limiting profile was ever published for this condition and the applicant has no record in MEDCHART.

g. There is no evidence the applicant had any duty incurred physical medical condition which would have failed the medical retention standards of chapter 3 of AR 40-501, Standards of Medical Fitness, prior to his voluntary discharge; or which prevented him from reenlisting. Thus, there was no cause for referral to the Disability Evaluation System. Furthermore, there is no evidence that such a condition prevented

the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his discharge.

h. JLV shows he was first awarded 10% SC disability ratings for residuals of right foot injury and residuals of left foot injury effective 25 February 2023 and 1 July 2010 respectively.

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

j. It is opinion the ARBA Medical Advisor that a referral of his case to the DES for his toe injuries is unwarranted.

BEHAVIORAL HEALTH REVIEW:

a. Background: The applicant is applying to the ABCMR requesting consideration of a referral to the Disability Evaluation System (DES) for a disability retirement and eligibility for Combat Related Special Compensation (CRSC).

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 enlisted into the Regular Army on 17 October 1994 and reenlisted on 29 January 1997. He was honorably released from active service on 28 January 2000 and transferred to the USAR Control Group.
- The applicant was ordered to active duty in support of Operation Enduring Freedom on 10 February 2003 with service in Southwest Asia from 6 April 2003 through 17 March 2004. He was honorably released from active duty on 4 May 2004.
- The applicant was again ordered to active duty in support of Operation Iraqi Freedom on 29 January 2008 with service in Kuwait/Iraq from 2 April 2008 through 27 January 2009. He was honorably released from active duty on 6 April 2009.
- Headquarters, 88th Regional Support Command Orders 16-166-00018, dated 14 June 2016, reassigned the applicant from his current assignment in a USAR TPU

in Colorado Springs, CO, to the Retired Reserve effective 13 July 2016, due to completion of 20 or more years of qualifying service for retired pay at age 60.

c. Review of Available Records: The Army Review Board Agency (ARBA) Behavioral Health Advisor reviewed the supporting documents contained in the applicant's file. The applicant asserts his command and treating professionals allowed him to be separated without referring him to the medical evaluation board (MEB), and he indicated PTSD as a related condition. The application included 573 pages of VA medical and mental health documentation, which will be summarized below. There was sufficient evidence that the applicant was diagnosed with PTSD or another psychiatric condition while on active service.

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 treatment through the VA on 5 March 2009 (one month after returning from deployment) and reported symptoms of hypervigilance, sleep difficulty, and anxiety, and he was diagnosed with Adjustment Disorder. A PTSD evaluation was conducted on 7 August 2009, and the applicant endorsed the requisite number of symptoms to warrant a diagnosis of PTSD. He reported combat trauma including seeing deceased bodies and learning of a friend's death as well as the stress of being in harm's way and coming under fire. He completed a sixteen week PTSD protocol, individual therapy, and a coping skills group, and his case was closed on 29 July 2011 due to lack of follow up. In June 2013 he reengaged with mental health due to continued symptoms of PTSD, excessive alcohol use, and unemployment associated with his physical limitations. He was diagnosed with PTSD and Alcohol Abuse and started on an antidepressant and a medication for sleep. He engaged in substance abuse treatment, medication management, and utilized the VA's homeless program, and documentation indicated some improvement in symptoms. He concluded group therapy for substance abuse in December 2013 and continued with medication only through 2019. In April 2014 he started the vocational rehabilitation program. At his most recent mental health visit on 1 October 2019, the applicant reported stability on propranolol, buspar, Zoloft, prazosin, and Ambien, and his diagnoses remained PTSD and Alcohol Abuse in remission. The applicant is 100% service connected through the VA for a variety of physical health problems, and he is considered 50% disabled for Chronic Adjustment Disorder.

e. A review of MedChart and HRR showed that the applicant was placed on a psych profile by LHI (contract provider) in 2016, but the temporary profile was expired on 31 March 2016 when the applicant did not provide any documentation to support his mental health diagnosis or treatment. The following Periodic Health Assessments (PHA) and profiles were also noted:

- PHA: 15 January 2016 indicated symptoms of PTSD and depression were endorsed and the applicant noted receiving mental health treatment through the VA. Medications listed included sertraline, buspirone, temazepam, and prazosin.
- Temp profile: PTSD dated 14 January 2016 (deployment limiting)
- PHA: 27 October 2014 showed no endorsement of any mental health symptoms.
- Permanent profiles: for brain injury dated 7 August 2012 (no duty limitations); for PTSD and TBI dated 10 July 2012 (no duty limitations); for PTSD dated 28 February 2011 (no duty limitations); for PTSD dated 22 January 2010 (no duty limitations)
- Post-deployment Health Assessment (PDHA): dated 29 January 2009 showed that the applicant endorsed "no" on questions related to encountering dead bodies, seeing people killed or wounded, and engaged in direct combat. He did report hypervigilance and mild symptoms of depression.

f. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support that the applicant had a medically disabling mental health condition while on active service. The applicant was initially diagnosed with PTSD in August 2009, and VA documentation showed a treatment history of individual and group therapy for PTSD, substance abuse treatment, and medication management. Documentation from 2009 through 2019 showed that the applicant was responsive to treatment and stable on medication only by 2014. Responses to a PHA in 2014 showed no indication of mental health symptoms or treatment, but the applicant did endorse symptoms on a PHA in January 2016. The documentation during the applicant's time in service does not support that the applicant was psychiatrically unfit at the time of discharge for any boardable mental health condition as he did not have 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). The applicant's psychiatric profile history showed permanent, non-duty limiting profiles for PTSD and/or TBI in August and July 2012, February 2011, and January 2010. He remained worldwide qualified until a temporary psychiatric profile was implemented in January 2016, but it expired after 90 days when the applicant did not provide mental health records to case management. A referral to the Disability Evaluation System (DES) is not supported.

g. In regard to the applicant's request for consideration of Combat Related Special Compensation (CRSC), it is this Advisor's opinion that his trauma experience while deployed does not meet the requirement as defined in 10 U.S.C. § 1413a(e). Combat-related disability for CRSC is a disability that is "attributable to an injury for which the member was awarded the Purple Heart" or was incurred "as a direct result of armed conflict," "through an instrumentality of war," "while engaged in hazardous service," or "in the performance of duty under conditions simulating war." The traumatic events that

were disclosed while the applicant was on active duty were related to witnessing deceased bodies, learning of a friend's death, and being in harm's way and coming under fire.

h. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? NA; request is for referral to DES

(2) Did the condition exist or experience occur during military service? NA; request is for referral to DES

(3) Does the condition or experience actually excuse or mitigate the discharge? NA; request is for referral to DES

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 through counsel carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation. Upon review through counsel of the applicant's request, available military records and medical review, the Board concurred with the advising official finding insufficient evidence to support that the applicant had a medically disabling mental health condition while on active service. The opine noted the documentation during the applicant's time in service does not support that the applicant was psychiatrically unfit at the time of discharge for any boardable mental health condition.

2. The Board determined there is insufficient evidence to support the applicant's contentions for physical disability retirement with a disability rating of no less than 80 percent, with retroactive compensation, in lieu of transfer to the Retired Reserve due to completion of 20 qualifying years of service, or referral to the Disability Evaluation System (DES) for disability retirement evaluation. The Board concurred with the advising official finding the applicant's trauma experience while deployed does not meet the requirement as defined in 10 U.S.C. § 1413a(e). Combat-related disability for CRSC is a disability that is "attributable to an injury for which the member was awarded the Purple Heart" or was incurred "as a direct result of armed conflict," "through an instrumentality of war," "while engaged in hazardous service," or "in the performance of duty under conditions simulating war. The Board agreed, based on the advising official opine and public law, there is insufficient evidence to support the applicant's and his counsel's request. Therefore, the Board denied relief.

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.

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[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. Title 10, U.S. Code, section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.
2. On 25 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. 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 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 (Disability 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; and/or they are command-referred for a fitness-for-duty medical examination.

b. The disability evaluation assessment process involves two distinct stages: the MEB and Physical Evaluation Board (PEB). The purpose of the MEB is to determine whether the service member's injury or illness is severe enough to compromise his/her ability to return to full duty based on the job specialty designation of the branch of service. A PEB is an administrative body possessing the authority to determine whether or not a service member is fit for duty. A designation of "unfit for duty" is required before an individual can be separated from the military because of an injury or medical condition. Service members who are determined to be unfit for duty due to disability either are separated from the military or are permanently retired, depending on the severity of the disability and length of military service. Individuals who are "separated" receive a one-time severance payment, while veterans who retire based upon disability receive monthly military retired pay and have access to all other benefits afforded to military retirees.

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

impairment prevents reasonable performance of the duties required of the Soldier's office, grade, rank, or rating.

4. Army Regulation 635-40 establishes the Army Disability Evaluation System and sets forth policies, responsibilities, and procedures that apply in determining whether a Soldier is unfit because of physical disability to reasonably perform the duties of his office, grade, rank, or rating. Only the unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability.

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

b. Soldiers who sustain or aggravate physically-unfitting disabilities must meet the following line-of-duty criteria to be eligible to receive retirement and severance pay benefits:

(1) The disability must have been incurred or aggravated while the Soldier was entitled to basic pay or as the proximate cause of performing active duty or inactive duty training.

(2) The disability must not have resulted from the Soldier's intentional misconduct or willful neglect and must not have been incurred during a period of unauthorized absence.

5. Army Regulation 40-501 provides information on medical fitness standards for induction, enlistment, appointment, retention, and related policies and procedures. Soldiers with conditions listed in chapter 3 who do not meet the required medical standards will be evaluated by an MEB and will be referred to a PEB as defined in Army Regulation 635-40 with the following caveats:

a. U.S. Army Reserve (USAR) or Army National Guard (ARNG) Soldiers not on active duty, whose medical condition was not incurred or aggravated during an active duty period, will be processed in accordance with chapter 9 and chapter 10 of this regulation.

b. Reserve Component Soldiers pending separation for In the Line of Duty injuries or illnesses will be processed in accordance with Army Regulation 40-400 (Patient Administration) and Army Regulation 635-40.

c. Normally, Reserve Component Soldiers who do not meet the fitness standards set by chapter 3 will be transferred to the Retired Reserve per Army Regulation 140–10 (USAR Assignments, Attachments, Details, and Transfers) or discharged from the Reserve Component per Army Regulation 135–175 (Separation of Officers), Army Regulation 135–178 (ARNG and Reserve Enlisted Administrative Separations), or other applicable Reserve Component regulation. They will be transferred to the Retired Reserve only if eligible and if they apply for it.

d. Reserve Component Soldiers who do not meet medical retention standards may request continuance in an active USAR status. In such cases, a medical impairment incurred in either military or civilian status will be acceptable; it need not have been incurred only in the line of duty. Reserve Component Soldiers with non-duty related medical conditions who are pending separation for not meeting the medical retention standards of chapter 3 may request referral to a PEB for a determination of fitness in accordance with paragraph 9–12.

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 10, U.S. Code, section 1413a, as amended, established Combat-Related Special Compensation (CRSC). CRSC provides for the payment of the amount of money a military retiree would receive from the VA for combat-related disabilities if it were not for the statutory prohibition for a military retiree to receive a VA disability pension. Payment is made by the Military Department, not the VA, and is tax free. Eligible members are those retirees who have 20 years of service for retired pay computation (or 20 years of service creditable for Reserve retirement at age 60) or who have a physical disability retirement with less than 20 years' service for injuries that are the direct result of armed conflict, especially hazardous military duty, training exercises that simulate war, or caused by an instrumentality of war. CRSC eligibility includes disabilities incurred as a direct result of:

- armed conflict (gunshot wounds, Purple Heart, etc.)
- training that simulates war (exercises, field training, etc.)
- hazardous duty (flight, diving, parachute duty)
- an instrumentality of war (combat vehicles, weapons, Agent Orange, etc.)

8. Department of Defense Instruction (DODI) 1332.38 (Physical Disability Evaluation), paragraph E3.P5.2.2 (Combat-Related), covers those injuries and diseases attributable to the special dangers associated with armed conflict or the preparation or training for armed conflict. A physical disability shall be considered combat related if it makes the

member unfit or contributes to unfitness and was incurred under any of the following circumstances:

- as a direct result of armed conflict
- while engaged in hazardous service
- under conditions simulating war
- caused by an instrumentality of war

9. DODI 1332.38, paragraph E3.P5.2.2.3 (Under Conditions Simulating War), in general, covers disabilities resulting from military training, such as war games, practice alerts, tactical exercises, airborne operations, leadership reaction courses, grenade and live-fire weapons practice, bayonet training, hand-to-hand combat training, rappelling, and negotiation of combat confidence and obstacle courses. It does not include physical training activities, such as calisthenics and jogging or formation running and supervised sports.

10. Appendix 5 (Administrative Determinations) to enclosure 3 of DODI 1332.18 (Disability Evaluation System) (DES) currently in effect, defines armed conflict and instrumentality of war as follows:

a. Incurred in Combat with an Enemy of the United States: The disease or injury was incurred in the LOD in combat with an enemy of the United States.

b. Armed Conflict: The disease or injury was incurred in the LOD as a direct result of armed conflict (see Glossary) in accordance with sections 3501 and 6303 of Reference (d). The fact that a Service member may have incurred a disability during a period of war, in an area of armed conflict, or while participating in combat operations is not sufficient to support this finding. There must be a definite causal relationship between the armed conflict and the resulting unfitting disability.

c. Engaged in Hazardous Service: Such service includes, but is not limited to, aerial flight duty, parachute duty, demolition duty, experimental stress duty, and diving duty.

d. Under Conditions Simulating War: In general, this covers disabilities resulting from military training, such as war games, practice alerts, tactical exercises, airborne operations, and leadership reaction courses; grenade and live fire weapons practice; bayonet training; hand-to-hand combat training; rappelling; and negotiation of combat confidence and obstacle courses. It does not include physical training activities, such as calisthenics and jogging or formation running and supervised sports.

e. Caused by an Instrumentality of War: Occurrence during a period of war is not a requirement to qualify. If the disability was incurred during any period of service as a result of wounds caused by a military weapon, accidents involving a military combat

vehicle, injury or sickness caused by fumes, gases, or explosion of military ordnance, vehicles, or material, the criteria are met. However, there must be a direct causal relationship between the instrumentality of war and the disability. For example, an injury resulting from a Service member falling on the deck of a ship while participating in a sports activity would not normally be considered an injury caused by an instrumentality of war (the ship) since the sports activity and not the ship caused the fall. The exception occurs if the operation of the ship caused the fall.

11. 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.

12. 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.

13. 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.

//NOTHING FOLLOWS//