ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [redacted]

BOARD DATE: 6 November 2024

DOCKET NUMBER: AR20240002625

APPLICANT REQUESTS: through Counsel, reconsideration of his prior requests for:

- correction of item 28 (Narrative Reason for Separation) on his DD Form 214 (Certificate of Release or Discharge from Active Duty) to show Retirement for Length of Service in lieu of Permanent Disability Retirement
- correction of his Expiration Term of Service (ETS) date or in effect, date of retirement, to 1 June 2001 in lieu of 14 October 2000
- the voiding of all independent contractor created documents pertaining to the applicant and his Disability Evaluation System (DES) processing
- approval of his claim for Combat Related Special Compensation Pay (CRSC)
- in effect, eligibility for Concurrent Retirement and Disability Pay (CRDP)

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

- DD Form 149 (Application for Correction of Military Record)
- Counsel's brief
- applicant's self-authored statement
- Medical Record Report, dated 27 September 1990
- U.S. Total Army Personnel Command memorandum, dated 11 March 1991
- DA Form 2166-7 (Noncommissioned Officer Evaluation Report (NCOER) covering the period ending February 1996
- Joint Military Decoration Recommendation, undated, covering service ending August 1996
- Consultation Sheet, dated 29 August 1996
- Standard Form 600 (Chronological Record of Medical Care), dated 20 May 1997
- DA Form 3349 (Physical Profile), dated 11 June 1997
- DA Form 2166-7, covering the period ending September 1997
- DA Form 3349, dated 15 April 1998
- DA Form 2166-7, covering the period ending April 1998
- Standard Form 600, dated 12 November 1999
- Standard Form 600, dated 3 December 1999
- Operation Report, dated 17 February 2000
- Standard Form 600, dated 29 March 2000

- Standard Form 502 (Narrative Summary (NARSUM) (Clinical Resume))/Addendum to Medical Evaluation Board, dated 17 April 2000
- Standard Form 600, dated 28 April 2000
- DA Form 3349, dated 28 April 2000
- Standard Form 93 (Report of Medical History), dated 15 May 2000
- partial DD Form 2697 (Report of Medical Assessment), undated
- applicant self-authored memorandum, dated 18 May 2000
- Orthopedic Clinical Note, dated 24 May 2000
- partial NARSUM, dated 1 June 2000
- DA Form 2166-7, covering the period ending June 2000
- Medical Chronology List from unknown source, covering the period February 1981 – June 2000
- U.S. Army Intelligence Center and Fort Huachuca Orders 206-0104, dated 24 July 2000
- partial DA Form 199 (Physical Evaluation Board (PEB) Proceedings), dated 29 June 2000
- DD Form 214, covering the period ending 14 October 2000
- Department of Veterans Affairs (VA) Consult Requests, dated September – October 2006
- VA Progress Notes, dated October – November 2006
- Office of the Inspector General memorandum for Under Secretary of the Army, Subject: Report on the Army Disability Evaluation System (APDES) Inspection and Follow-up Actions (1 May 2006 – 17 November 2006), dated 6 March 2007
- VA Progress Notes/Neuropsychology Consult Report, dated February – March 2016
- VA Progress Notes, dated February – April 2016
- VA Consult Requests, dated February – April 2016
- VA Problem List, dated June 2007 – June 2016
- VA Progress Notes, dated 14 July 2016

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous considerations of the applicant's cases by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20080018357 on 11 June 2009, Docket Number AR20150010737 on 1 November 2016, Docket Number AR20210006591 on 10 February 2022, and Docket Number AR20220010831 on 17 November 2023.

2. Counsel states:

a. The applicant respectfully submits this application to change his Narrative Reason for Separation from “Disability, Permanent” to “Completion of Required Active Service” (20 years active service) with an updated ETS date to his end of contract obligations of 1 June 2001, for the purpose of eligibility for Combat Related Special Compensation Pay (CRSC) consideration.

b. The applicant enlisted into the U.S. Army on 19 May 1981 and served for approximately 19 years, 4 months, and 26 days before he was separated for disability on 14 October 2000. See Exhibit 1. Over his 19 years of service he received training for and acted as both an Intelligence Analyst and Computer Programmer/Systems Analyst together. He was stationed in Wobeck, Germany, in 1982 serving for the border surveillance unit along the East-West German border. See Exhibit 2. Between the years 1986 and 1989, the applicant was assigned to various other positions in Germany, Korea, and the United States all while working in an intelligence role. He was stationed in Darmstadt, Germany, where he worked as a Senior Electronic Intelligence Analyst

c. During his stationing in Germany, the applicant was diagnosed with diabetes that was initially controlled with diet and oral medication. See Exhibit 3. However, in September 1990, the applicant started on insulin and was marked as insulin dependent. His medical records conflict as to the type of diabetes he suffered from while in the Army as some state that he was diagnosed with type I diabetes; however the bulk of his records indicate that he was diagnosed with type II diabetes with a poor HbA1C rising up to the unhealthy level 13 .4 percent while assigned to deployable units. See Exhibits 4 and 5. Following this change in his health there was a push by the applicant’s command to discharge him from service on medical separation, however on 11 March 1991, the Physical Evaluation Board determined that he was still fit for military service in accordance with his physical profile as a type 2 diabetic. See Exhibit 6.

d. After this victory, the applicant was able to serve again with relativize ease working for the National Security Agency (NSA) on matters relating to the Tactical Related Application Broadcast system. See Exhibits 2 and 7. His NCOER from that time showed that he exhibited strong mental and emotional maturity, and exceeded his peers in technical expertise. See Exhibit 7. While at NSA, the applicant wrote and published a unclassified 250+ page intelligence threat reference aid for all military services usage, resulting with a Military Intelligence Knowlton Award recommendation and awarded rare Joint Services Commendation Medal. See Exhibit 8.

e. He was later transferred to Germany to assist in mission field training, serving as a Platoon Sergeant. See Exhibit 2. As he was routinely ordered to deploy against physician hazardous warnings to his commanders, the applicant was unable to properly monitor his blood sugar levels while participating in multiple simulated war exercises. He was given a P-3 profile stating that he could do physical training (PT) at his own pace and must have all his diabetic meals provided to him at a specified time. See

Exhibit 9. The Meals Ready to Eat (MREs) themselves were not diabetic meals since they were both unlabeled, and the insulin dosages per meal were also not given, which in tum acted as a major hurdle to the applicant's ability to control his diabetes. During this time, he was also diagnosed with major depressive disorder responding partially to medication in 1998. See Exhibit 3.

f. Further, the applicant's participation in simulated war exercises was overall detrimental to his health, especially considering the context of him consuming non-diabetic MREs, as prewarned by his doctors to his commanders. However, his commanders still required multiple hazardous service/simulated war deployments of the applicant "despite serious diabetic condition", and seemingly ignored the severe health risks that he was facing. See Exhibit 10. A second Physical Profile additionally reaffirmed his medical condition as diabetes type II and further indicated that he required insulin in regular intervals. See Exhibit 11. The Profile also required that he have no assignment where physician and emergency room are not available 24 hours a day, where there was no ability to cool and store his medication at all times, and where there is not the availably of diabetic meals. Still, at that time the applicant's NCOER represented that regardless of his medical profile, he was still maintaining fitness standards. See Exhibits 12 and 13.

g. After his Physical Profile was changed and with approval of the PEB authorities, the applicant was stationed at Fort Huachuca, Arizona, and worked in mission training support with no simulated war deployment obligations. As his security clearances were taken away as a result of his diagnoses with depression, he was placed in a position reviewing Army training requirements. See Exhibit 2.

h. The physician treating the applicant's diabetes, an independent contractor, Doctor of Medicine, changed the type of insulin and dosages making control of diabetes increasingly difficult, but overall manageable. The contractor started the Medical Evaluation Board (MEB) process to remove the applicant and disregarded the one remaining year until his planned retirement. The independent contractor asked for a mental health assessment from a military psychiatrist and this senior medical officer provided an MEB Addendum showing the recent start of medication and no profile for mental health was initiated. See Exhibit 14. Four Days later, the independent contractor impersonated a profiling officer from the orthopedic clinic on 28 April 2000, and described his medical conditions as unstable diabetes, depression, and derangement of right knee. See Exhibit 15.The applicant was ultimately determined as "Not Deployable" and unable to take the Army Physical Fitness Test (APFT).

i. The applicant became aware this doctor was trying to send him to another MEB and he attempted to postpone the board by requesting input from the real Orthopedic Clinic, wrote a memorandum for the medical treatment facility commander. See Exhibit 16. However, the applicant had reason to believe that this memorandum was

intercepted by the independent contractor since, to his knowledge, his command never received the document. The independent contractor's MEB NARSUM was also riddled with errors and contained inconsistent information as well, which will be further described in the sections below. Ultimately, the independent contractor determined that "at this point [the applicant] is completely unfit for military service and it is recommended that he be separated In accordance with Army Regulation 40-501 (Standards of Medical Fitness), Chapter 3-11 b, 3-34, and 3- l 3c(2)." See Exhibit 3.

j. The documents were forwarded to the MEB for Army retention determination. Composed of independent contractors only, the MEB determined the did not meet Army retention standards, to include his erectile dysfunction, did not meet Army Retention Standards. Other health diagnoses not meeting Army retention standards included: peripheral neuropathy without a neurologist assessment; arthritis after the arthritis was surgically removed; left ankle instability injured a decade before; unstable diabetes without an endocrinologist assessment; partial meniscectomy without a signed orthopedic doctor assessment; and major depression without a required mental health professional voting member. See Exhibits 17 and 18. The PEB, assuming the MEB legal and accurate, voted the applicant unfit for military service with less than 1 year remaining until his planned retirement.

k. The applicant’s final NCOER showed that despite his profile, there was no hinderance on his duty performance as he led 27 Soldiers. See Exhibit 19. He was released from assignment with an effective date of retirement set for 14 October 2000, he was separated with the rank of sergeant first class, assigned a disability rating of 50 percent with 40 percent being for his diabetes and another 10 percent for his knee injuries, and was added to the Permanent Disability Retirement List (PDRL). See Exhibit 20 and 21.

l. Here, a grave injustice was committed during the applicant’s service time due to a fraudulent MEB that he underwent. This request is therefore within the jurisdiction of this honorable Board. Additionally, the applicant has been denied before this Board in the past and maintains that the presumption of administrative regularity should be waived in order for him to receive a full and fair review of his matter.

m. The applicant submits that his command made an egregious error in fact for the entirety of his military service. For the entire duration of his service to the Army it was mostly believed that he suffered from type II diabetes. However, his medical records conflict with this notion as there are documents stating that he has type I, others stating he has type II, and others that just simply state "Diabetes." See Exhibits 4 and 5. For the majority of his service in the Army it was believed by many, including the applicant , that he suffered from type II diabetes.

n. As it was well believed that the applicant was suffering from type II diabetes, he was provided with medication for type II diabetes for the entirety of his military service. It was not until he was discharged from the Army that he learned he was incorrectly diagnosed. See Exhibits 21 and 22. In 2018 the VA officially recognized that the applicant was incorrectly diagnosed in 1990. Not only was the applicant separated from the Army in part of his diagnoses as type II, but for almost 20 years of service he was out of the army as a type II diabetic and with the wrong medications. There were also several times when he would be seen for a medical evaluation, where his condition would be described as "unstable diabetes." See Exhibit 3. Official documents used in his own MEB provided the applicant with an incorrect diagnosis of a much more severe form of diabetes than he actually sufferers from, which itself is an egregious error that could have caused substantial harm with this misdiagnosis. See Exhibit 20. Although he was diagnosed with "unstable diabetes" late into his military career, he has no recollection of being treated for this rare form of diabetes.

o. There were medical evaluations done that made no mention of "unstable diabetes." Records of the applicant medical care from 12 November 1999, only mention that he has diabetes and makes no reference to it worsening to "unstable." See Exhibit 24. This holds true for subsequent evaluations where there is no reference to "unstable diabetes" or any treatment of "unstable diabetes." See Exhibit 25. As late as 28 April 2000 his condition is only listed as "diabetes" and his only treatment is regular use of insulin. See Exhibit 26. After removal from the Army, VA never diagnosed unstable diabetes. The only person diagnosing "unstable diabetes" was a non-endocrinologist, a Doctor of Medicine, independent contractor.

p. The applicant argues that inaccurate records about the true state of his condition put bias on the review of his case, had he been properly diagnosed from the outset of his career he could have received the proper treatment and might have been able to avoid the problems he faces now with his diabetic complications (peripheral neuropathy, diabetic retinopathy, hypothyroid, high blood pressure, erectile dysfunction, carpal tunnel in both hands, hammer toes in both feet, depression and other future developments). Since the review itself was based on a fraudulent MEB, the MEB and subsequent PEB should both be voided, and the applicant’s Army records changed to reflect retirement for service at his ETS date of 1 June 2001.

q. The applicant also argues that his command erred at several points during his MEB proceedings as he was examined and tried by "independent contractors" and not official army personnel. DODI 332.38 states that service members designated by the Secretary concerned as primary participants in the Disability Evaluation System (DES) shall be trained and educated in a timely and continuing manner concerning the policies and procedures of this Instruction. DoDI 1332.38. Primary participants in the DES include, but are not limited to, medical officers who prepare MEBs, patient administration officers, disability counselors, PEB and appellate review members, and

judge advocates. The instruction further requires that MEB Narrative Summary preparers must be a "medical officer" and that MEB voting members must also be a "medical officer", not a contractor. PEBLO's, MEB Officers, PEB members must be "trained and educated in a timely and continuing manner concerning the policies and procedures of this Instruction." Training must include continuing training to keep DES members qualified.

r. One of the major issues with having independent contractors overseeing MEBs is that there was no uniform training implemented while the applicant was going through his MEB. For additional background, the Department of the Army Inspector General (DAIG) reported to Congress and the Under Secretary of the Army in March 2007, this required DoD training in DoDI 1332.38 and DoDD 1332.18 were not in existent between 1996 and 2007 within the Army and no one in the Army was trained, nor certified, to perform any DES functions in the Army. See Exhibit 27. Inspector General LTG G____ stated: "Army policy is inconsistent and does not fully and accurately integrate DOD policy. DOD and the Army have different standards for processing MEB cases. The Army, acting through the Medical Command (MEDCOM), meets neither DOD nor Army standards. There is not enough formal training for personnel working throughout the APDES process. The Army has not developed a standardized or mandatory course to train and educate the primary staff personnel (Physical Evaluation Board Liaison Officer (PEBLO), MEB physicians and PEB personnel involved in the Army Physical Disability Evaluation System)."

s. The importance of uniform training, given the complexity of medical cases regarding Soldiers specifically is that MEBs have certain nuances that must be adhered to in order to ensure fairness throughout the MEB process. Here, the applicant maintains that, given how flawed his MEB process ended up being, the independent contractors over the MEB did not sufficient training. And if he knew how while he was going through the MEB itself, he would have objected to the inclusion of the contractors and requested that the MEB be restarted to ensure that he was given proper due process.

t. Next, by nature of an independent contractor's independence from the Army, there are a number of limitations that contractors must not violate to ensure a just MEB process, and in the applicant's case, the independent contractor overstepped these bounds. Title 10 U.S. Code, Section 924: Article 124, additionally prohibits Soldiers from knowingly creating fraudulent documents like the independent contractor created. However, these sections apply to servicemembers specifically and independent contractors fall outside the reach of the Uniform Code of Military Justice when they commit violations. Army Regulation 40-502 (Medical Readiness) states independent contractors may create temporary profiles; however, permanent profiles must be made by profiling officers, not contractors. Additionally, independent contractors cannot determine deployability, as this is reserved to PEB upon a fitness determination.

u. Title 48, C.F.R., Subsections 7.500 -7.503 prohibit independent contractors from performing Inherently Governmental Functions like creating permanent physical profiles, referrals to medical boards, voting on Soldier medical boards, determining deployability of soldiers, determining fitness of Soldier careers and recommending to a PEB. Required as medical officer requirements, this independent contractor also impersonated military officers illegally in the creation of these documents.

v. This honored Board reinforced the idea that certain "Inherently Governmental Functions" cannot be performed by contractors in case docket number AR20040010425 where the Board referenced Office of Federal Procurement Policy Letter 92-1. This Policy Letter indicated that: As a matter of policy, an "inherently governmental function" is a function that is so intimately related to the public interest as to mandate performance by Government employees. These functions include those activities that require either the exercise of discretion in applying Government authority or the making of value judgments in making decisions for the Government. Governmental functions normally fall into two categories: (1) the act of governing, i.e., the discretionary exercise of Government authority, and (2) monetary transactions and entitlements. OFPP 92.1.

w. OFPP 92.1 then gave eight specific guidelines for agencies to assist in the application of whether a contractor has improperly performed an inherently governmental function, with the most relevant being the exercise of discretion I and the degree of reliance on prohibited functions included those activities that required either the exercise of discretion in applying government authority or the making of value judgments in making decisions for the government such as - the determination of agency policy, the determination of Federal program priorities or budget requests, and the direction and control of Federal employees; "using a contractor to perform an inherently governmental function - is not the current policy of the Department of Defense (DOD)"; and "If the Army policy is not following DOD's desires for outsourcing, it should be brought to the Secretary's attention".

x. To be consistent as required by Case Neil C. WILHELMUS, Plaintiff, v. Pete GEREN, Defendant, the honored Board is requested to compare their case precedence of "Inherently Governmental functions" in case AR20040010425 versus independent contractor illegal usage of Inherently Governmental Functions within this case for the 2000 MEB referral, 2000 permanent physical profile, 2000 MEB NARSUM "non-deployability" determination MEB determination and voting.

y. Here, the independent contractor vastly overstepped his implemented limitations throughout the MEB and assumed responsibilities that were considered inherently Governmental functions in that he assumed the applicant was from the "Ortho Clinic" rather than the "Internal Medicine Clinic", and further took on the role of a profiling officer. The independent contractor was presumably aware there was a proper

procedure for MEB and that limitations existed to prevent him from performing certain Army functions. However, he took it upon himself to determine the applicant's MEB process, especially after documenting on a medical page "Rx Start Board (i.e. to be sent to Ft Lewis)". See Exhibit 28. Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation) identifies who can make referrals to MEB to be determined by "The Commander, PERSCOM, upon recommendation of TSG", "Commanders of Medical Treatment Facilities (MTFs)", or "commanders". The independent contractor was not on the list of legitimate individuals authorized to make referrals as contactor Dr W____ performed in the MEB NARSUM and Physical Profile. See Exhibits 14 and 15.

z. The independent contractor also illegally referred the applicant for the MEB process within the Permanent Physical Profile. Though depression was one of the listed medical conditions, the was no restrictions and the PUHLES code for psychiatry remained a "1". The condition of "unstable diabetes" was fabricated as the applicant was not treated for "unstable diabetes" requiring multiple hospitalizations with repeated episodes of diabetic ketoacidosis. The "derangement of right knee" was a pre-operative diagnosis of his knee surgery 2 months before. Post-operative was a partial meniscectomy. See Exhibits 29 and 30. The independent contracting doctor insisted on an MEB referral not permitting recovery treatment for the right knee or optimal depression medication result determinations. See Exhibit 15.

aa. The MEB NARSUM, illegally created by the same independent contractor, was also riddled with errors. The applicant's diabetes was referred to as "insulin dependent diabetes", "slightly unstable", ICD code reflecting type 2 non-insulin dependent diabetes. The right knee made a reference to arthritis when the arthritis was surgically removed during the partial meniscectomy. See "2000 - Feb 17 - Surgery - partial meniscectomy". The depression was escalated from Dr. F____'s mild diagnosis to "his major depressive disorder means that he cannot assume any leadership role", while using the Army Regulation 40-501 chapter 3 reference of 3-34 for dementia. Finally, the independent contractor made the illegal assessment of "At this point he is completely unfit for military service and it is recommended that he be separated In accordance with Army Regulation 40-501 , Chapter 3- 11 b, 3-34, and 3-13c(2)" See Exhibit 3.

bb. Army Regulation requires that MEBs be composed of two or more physician members, where one is a senior medical officer with detailed knowledge of directives pertaining to standards of medical fitness and disposition of patients, disability separation processing, and the Veterans Affairs Schedule of Rating Disabilities (VASRD). It is further encouraged that the physician uses the VA Physicians' Guide for Disability Evaluation Examinations to describe the nature and degree of severity of the member's condition. The other members are required to be familiar with these matters as well. In consideration of mental competency, the MEB will consist of at least three members, one of whom will be a psychiatrist. The physicians on the MEB that examined

the applicant, Dr. W___ and Dr. R____, had not been trained nor certified knowledge of DOD Directives nor the VASRD. At most the two just had some knowledge over the applicant's current health conditions, knowledge that would have been inaccurate for the time due to his incorrect records.

cc. Army Regulation 635-40 also requires that the Physical Evaluation Board Liaison Officer (PEBLO) only go so far as to advise the applicant on his Board proceedings and that the PEBLO or any other physicians may not inform any Solider of the following before PEB action: (1) that the Solider has been found physically fit or unfit for duty, (2) that the Solider will be discharged or retired from the service, (3) what disability percentage rating the Solider will receive for his condition. According to the applicant, the civilian PEBLO he was assigned misguided him during his MEB. The applicant also stated that his PEBLO told him that "[his] career was at an end because the MEB NARSUM determined [him] to be unfit." See Exhibits 2 and Exhibit 3. The applicant's civilian PEBLO violated Army Regulations and provided an opinion that wrongfully influenced the applicant's decision making during his separation proceedings.

dd. The decision to separate the applicant from the Army was made by contractors in violation of Army regulations, DoD Policies, 48 C.F.R 7.500-7.503 and Title 10 U.S. Code and as the PEBLO did not send the MEB back to check for legality prior to forwarding to the PEB and such the proper information was not provided to the PEB. The applicant maintains that if had he known that these contractors were the individuals deciding his matter before he MEB and within the 12-month presumptive period for a fitness determination, he would have previously called into question their expertise and requested that he was given a proper review by Army personnel at Fort Lewis to ensure that he was given a fair evaluation. And although it is impossible to say what the outcome of the MEB would have been had it been held by appropriately trained military officials, this still stands as an error by his command and would have been more than sufficient grounds for a completely new review by Army personnel.

ee. When a servicemember is being separated, DoD Instruction 6040.46 (The Separation History and Physical Examination (SHPE) for the DoD Separation Health Assessment (SHA) Program) outlines the examination standards that physicians must follow for a Separation History and Physical Examination (SHPE). The SHPE requires completion and submission of either a DD Form 2807-1 (Report of Medical History), DD Form 2808 (Report of Medical Examination), or an equivalent electronic template. In addition to these forms, the SHPE must also include "additional testing appropriate to the Service member's health status, as determined by the examining credentialed provider and in accordance with current DoD policy." DoDI 6040.46.3.(h). If, during the course of the SHPE, the physician discovers a condition not previously discovered: "The examining provider will evaluate the complaint objectively within the scope of a screening physical examination. Any serious, potentially unfitting condition found

requires a new SHPE to be completed and referral for further evaluation and treatment of the new condition as may be clinically indicated." DoDI 6040.46.3.f (i).

ff. To be eligible for a military medical retirement, an applicant must demonstrate that the injuries were caused or exacerbated by military service; the injuries were not the result of his misconduct; and the injuries rendered him unfit for continued service at the time of his discharge. DoDI 1332.38. The process begins with a physician's consult request based on a service member's existing disabilities and proceeds for formal review. If the examining body determines that the servicemember's collective disability rating equals or exceeds a 30 percent threshold, the servicemember is entitled to medical retirement along with its associated benefits.

gg. The applicant was not properly examined upon his separation from the Army, He was separated under Army Regulation 40-501 due to diagnoses of depression and diabetes. Both are sufficient to require recurrent hospitalization and recurrent limitation of duty. Yet his last evaluations as a NCO show him as being fully capable in his position. See Exhibit 19. His medical records also indicated that the applicant was able to keep his blood sugar under control when he keeps to a schedule. See Exhibit 31. Records at that time also indicated that he was a type I diabetic and not type II.

hh. The limitations to his performance were exaggerated by health professionals during his separation and there was no hospitalization for depression following his separation. Furthermore, there are no records that indicate that Mr. Hillman received a proper separation exam after his Board proceedings. If a proper exit exam would have occurred it is possible that the applicant could have been properly diagnosed prior to his separation or received a higher disability rating with that represented the proper information. He would have also been provided with referrals for further evaluation of his depression.

ii. Although the applicant was discharged from the Army over 22 years ago, the mistakes of the past have manifested in his continued declining health and inability to find gainful employment. The entirety of his military career and training had been in intelligence. See Exhibit 1. However, ever since his diagnosis with depression, he has been unable to properly obtain a position in the intelligence field as his diagnoses prevents any kind of security clearance needed for a position in that field.

jj. The applicant has reported to the VA on several occasions that ever since his discharge he has been, "having a very severe problem finding a job." See Exhibit 32. He reported at one point that he was offered a job with a lower security, just "secret" and not "top-secret" clearance which he worked at for 2 months before his clearance was revoked. He later found out that he lost that position because of his mental health diagnoses. The applicant has explored his interest in working in other fields, but he has already worked with Vocational Rehabilitation and feels that he is too old to look for

work in any other areas, and that it is too hard to compete with other veterans who have retired. See Exhibit 33. He later had an incident where his insulin meter malfunctioned resulting in an overdose which left his hands shaky and he has noted a cognitive decline in memory, concentration and general mental health. See Exhibit 34.

kk. The applicant's outstanding military service has been overshadowed by the diagnoses that he received prior to his discharge, and he is now rated 100 percent unemployable. See Exhibit 35. The applicant served for approximately 19 years, 4 months, and 26 days, making him only 7 months short of receiving his full military retirement before he was separated. He currently receives financial support through disability but his military record and reason for separation does not warrant the challenges he has had to endure as a civilian and he was "Honorably" discharged for reasons that were out of his control and continuing to allow him to suffer without the assistance of his rightfully earned military retirement would only serve to punish him further for nothing less than meritorious service to the Army. A complete list of the applicant's debilitating medical conditions has been provided for brevity's sake. See Exhibits 36 and 37 .

ll. In light of the facts and arguments presented herein, the applicant respectfully requests that his NARSUM be amended to "Completion of Required Active Service" (20-year active service) with an updated ETS date to reflect his end of contract obligations (1 June 2001). He requests all independent contractors created documents affecting his career, be determined as invalid and/or voided. The applicant was set to retire from the Army only 7 months after his discharge which resulted in the loss of his CRDP and was within the presumptive period for fitness determination during the MEB process. The applicant has worked tirelessly even since his discharge to correct his record. He has been the victim of his command's errors for too long and continues to suffer from the injustices. These errors in medical care, procedure, and proper documentation have caused him great hardship both while in the service and as a civilian. He is merely seeking to right the wrongs of the past and fight to correct iniquities within the Army.

3. The applicant states:

a. He begins his statement, which has been provided in full to the Board for review, by listing all of his duty assignment from 1981 through 1989. He then states from 1989-1994 he was assigned to Darmstadt, Germany. As a Senior Electronic Intelligence Interceptor (ELINT) Analyst, his unit had little time with me. He was sent on temporary duty (TDY) to support multiple U.S. Army Europe (USAREUR) missions. At the remote location of Mount Meissner (mission classified), he was the Signals Intelligence (SIGINT) noncommissioned officer in charge (NCOIC) at another east-west border intelligence gathering unit, instantly put in charge for his past experience at Detachment Wobeck. With 852 surveillance parts, he was able to assemble the parts into a viable

ELINT collection platform. With this new system, he taught Airmen and Soldiers on live ELINT collection analysis and reporting.

b. During this mission, he was sent to the hospital for diabetes where he was misdiagnosed as a type 2 diabetic. He was actually type 1 diabetic and his career should have ended here. Instead, as a misdiagnosed type 2 diabetic, he was redeployed to Mount Meissner before my PEB, as mission essential during Desert Shield/Storm. At this point any deployment of a type 1 diabetic is considered high risk, per Army Regulation 635-40, "Young adults with type I Diabetes (insulin-dependent) are a high risk for retention." He was placed into hazardous service (a CRSC qualification) unknowingly. MREs during this time were not labeled with calorie/carbohydrates needed to determine insulin dosages, therefore, qualifying him for CRSC under Instrumentality of War. MRE's were issued during live missions and simulated war environment, qualifying him for CRSC under Simulated War. He was a high risk for retention.

c. At 32 Air Defense Command (mission classified), he assisted in integrating an ELINT system into the AADCOM air defense network deployed to Desert Shield/Storm. Without getting into details, 32 AADCOM identified him as a SCUD Hunter. Implemented the first Army Single Soldiers Program, escorting Congressmen, Newsmen and the Sergeant Major of the Army into the new barracks. He redeployed to Third Corps Artillery/Close Air Support, mission training. There he helped design and implement connectivity, using both MOS's simultaneously to provide targeting information to Artillery from intelligence gathering source at a non-SCI level. While located closely with Third Corps G-2, he was able to create a couple documents on the side. One document was a guide to help Soldiers on promotion boards. The other document was an Electronic Order of Battle (EOB) Training Aide, a replacement for the Army Publication outdated weapons guide. Corps publishing published these documents. The impact of these documents was high, getting recognition from the Corps Commander, (a 3-Star general).

d. From 1994-1996, he was assigned at National Security Agency (NSA), Fort Meade (mission classified), working for W-Group Division as a Senior ELINT NCO. Became a voting member over the usage of a multi-service, multi-billion dollar satellite communications system. His qualifications as a field Intelligence NCOIC and a Senior ELINT Programmer made him more qualified than the field grade officers from the various services. He had access to various classified and unclassified information at the NSA Library. He rewrote his ELINT publications from 80 pages to 250+ pages. NSA agreed to permitting him the publications as long as he maintained a "For Official Use Only" (FOUO) classification. His sources for his publications were mostly from the Russian advertisement of their equipment rather than classified sources. NSA printed it. The impact was great as all Army Intelligence units and schools requested copies. Air Force combat squadrons, Army Infantry, close air support and artillery, Navy and Marines requested copies of his document, so that a second printing was issued. After

retiring, the intelligence schools were still issuing copies to their graduates. He set-up and managed two Unit Funds hosting two annual NCO Balls. He was nominated as the Ml Corps Knowlton Award candidate. Received the rare Defense Joint-Services Commendation Medal for his multi-service impacts. At the arrival to NSA, the doctors noted his diabetes was irregular, but still identified it as type 2 based on the initial diagnosis. His A1C was at unsafe level of 11 and 12 (below 7 is recommended). He was sickened from the previous deployments of his past unit. Before leaving NSA, he was in a stable environment and was able to stabilize his diabetes.

e. From 1996-1999, he was sent to the ACE Detachment, 502nd Ml BN, Germany (mission field training). In this unit he was the Rear Detachment First Sergeant supporting the Bosnia Mission of forward deployed Soldiers and their return to Germany. Upon return, he was a Platoon Sergeant. This unit routinely deployed numerous times. His health instantly worsened. His doctors were confused about whether he was a type 1 or type 2 diabetic. He still believed he was a Type 2 diabetic. His doctors warned his unit to not deploy him to Bosnia. His doctors warned his commanders that he should not be deployed to field events. His doctors warned his commanders about deploying type 1 and type 2 diabetics. His doctors wrote profiles to support their recommendations. His commanders informed him to either deploy or his career was at an end and that is the commander's prerogative to accept or deny profiles. He deployed under the commanders' orders. He got sick as the doctors warned and he had seizures, to include one leaving him unconscious for a couple hours, face in the dirt between trucks and no one saw him on the ground. One Soldier complained to his wife that they Army would kill him. He invoked his profile after a years' worth of deployment to my commanders and my commanders immediately tried to remove him from service. They gave me over 10 additional duties expecting him to fail them, ordered him to singularity paint the orderly rooms (a lower Soldier's duty) and gave him a negative evaluation when he could not fulfill their multiple taskings. The hardship of removal from service in this undignified way led him into depression, seeing a psychiatrist. They even put his depression in my evaluation. They were eager to remove him, as my battalion (BN) commander stated, he was filling in an unreplaceable senior NCO slot and the only way to replace him was to make the slot vacant.

f. His command referred him to the Military Medical Review Board (MMRB). His lawyer then, classified it illegal as the president of the board was a field grade officer and he signed the vote in some illegal fashion. The MMRB sent him to the MEB. The MEB classified him as a type 2 diabetic because he did not have diabetic ketoacidosis (DKA) in 1990. But, he did have DKA in 1990. The MEB was forwarded to the PEB. The PEB realized he did not have the proper medical care to stabilize him and therefore retained him. His unit, enraged, deployed him to Dexheim. On TDY, he was able to stabilize his diabetes. My BN commander told his security clearance investigators, he was deployed outside of Germany and his clearance investigation was stopped because the investigators could not find him. My BN commander refused to sign his

evaluation until the Sr. Evaluator left the unit. He ended up having two evaluations, signed the same date for different periods upon his departure from the unit. He contested the evaluation and ABCMR refused to do it. Upon time to leave the unit, his doctor asked the PEB if he needed to be re-boarded if his diabetes was under control from the Dexhiem posting. The PEB stated that it was not necessary.

g. From 1999-2000, he was assigned to Fort Huachuca in assorted positions (mission training support). With no clearance, he was placed in a position reviewing Army training requirements. He also performed language testing once a week for Army linguists. He also instructed PT for students who failed the running portion of the PT tests, mostly because of the thin air density of Fort Huachuca. After training breathing techniques and running, all Soldiers passed. The PEB began in October 1999. He did not need to be re-boarded, but a contracting general practitioner did.

h. This contracting doctor changed his medications prescribed by a senior officer endocrinologist, causing his diabetes to be uncontrolled. Throughout his visits with this doctor, he classified his diabetes as uncontrolled. This only mentioned unstable diabetes in his Profile and MEB Summary; his medical records state uncontrolled diabetes. Depo-Medrol injections raise sugar level in diabetics. The afternoon after receiving a Depo-Medrol injection, this doctor started referral to the MEB. There was no receipt of full medical care before starting the MEB.

i. The diagnoses of uncontrolled diabetes and unstable/Brittle/Labile Diabetes is different. Unstable Diabetes require DKA. He had no blood test testing for DKA. This false diagnosis requires hospitalizations. He had not hospitalizations at Fort Huachuca. This diagnosis requires type 1 diabetes, were this doctor used the code for type 2 diabetes. He cannot be a type 2 unstable diabetic. A blood test drawn for his final physical stated there was no DKA. This doctor used incorrect mathematics to determine my A1C rather than doing blood tests. He calculated them to be 8.8 and 9.2 when they were both under 7.0. Unstable Diabetics have A1Cs in the 9-12 levels. FAR 7.500-7.503 prohibits contractors from effecting Soldier careers. His MEB and PEBLO were all contractors. There was no required Senior Medical Officer on his MEB according to Army Regulation 40-3. There were no medical officers on his MEB. The MEB was illegal. His legal rights were voided. The PEBLO, also civilian, did not represent him legally, but misguided me, stating that his career was at an end because the MEB NARSUM determined him to be unfit. The law states MEB cannot make this illegal determination reserved for the PEB. No one was legally trained between 1996 and 2000 as identified by Army Inspector General LTG Stanley Green. All Army MEB and PEB were illegal and should be contested. The Army Review Boards Agency (ARBA) refuses to do so.

j. On 14 October 2000, he was illegally removed from the Army after serving

19 years, 4 months and 26 days. He lost my military retirement through CRDP illegally. If the Army states he should have been separated in 1990, which he should have, then he should be eligible for CRSC as the Army retained a high risk diabetic, placing him in hazardous service with every simulated war deployment.

4. The applicant enlisted in the Regular Army on 19 May 1981 and was awarded the Military Occupational Specialty (MOS) 98J (Non-Commo Intelligence Interceptor/Analyst).

5. 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).

6. A Medical Record Report, dated 27 September 1990, shows:

a. The applicant was admitted and discharged from the 97th General Hospital on 17 September 1990, with a chief complaint of polyuria (excessive urination), polydipsia (feeling of extreme thirstiness), and weight loss. He indicated blurry vision and generalized weakness and fatigue.

b. He was diagnosed with type II diabetes in January 1989 and treated with diet and oral hyperglycemic agent Glucotrol for 3-4 months.. His glucose went from 180 to 140 and he was followed by Internal Medicine at Fort Monmouth, NJ.

c. He received diabetic education on the day of admission and learned how to do home glucose monitoring with Accu-check glucometer and also learned how to give himself insulin. He was initially placed on a sliding scale with regular insulin then switched to before breakfast and before dinner regular insulin therapy. An ophthalmology consult was pending.

d. Since his discharge, most of his daily finger sticks were slightly greater than 200 [very high] and he was having hypoglycemic episodes with a glucose level of 70 [very low] at lunchtime on the days he did PT in the morning.

e. His final diagnoses were:

- type II diabetes mellitus

- peripheral neuropathy secondary to diabetes
- mild proteinuria, secondary to diabetes
- hypertriglyceridemia, secondary to diabetes

f. The recommendations show he would be given a P3 profile stating he could do PT at his own pace; he must have all meals provided on time; and that he cannot be deployed to any area where his insulin may become unstable.

6. A copy of the DA Form 3349 referenced in the Medical Record Report, dated 27 September 1990, is not in the applicant's available records for review.

7. A U.S. Total Army Personnel Command memorandum, dated 11 March 1991, shows the findings of the Army PEB which convened on 13 February 1991, at Fort Gordon, GA, in the case of the applicant were approved. The applicant was determined fit for military service. He was found physically fit to perform the duties of his office, grade, rank, and MOS in accordance with his physical profile limitations.

8. The applicant's PEB Proceedings, dated 13 February 1991, are not in his available records for the Board's review.

9. A DD Form 4 (Enlistment/Reenlistment Document) shows the applicant's final immediate reenlistment in the Regular Army on 25 June 1996, for a period of 5 years. Although not listed on the form, an additional 5 year commitment beginning on 25 June 1996, would be completed on 24 June 2001.

10. The applicant's NCOER, covering the period from March 1995 through February 1996, shows he was rated "Success" or "Excellence" in all portions of Part IV (Rater) (Values/NCO Responsibilities).

11. A Consultation Sheet, dated 29 August 1996, shows the on the date of the form a consultation was requested form the Dexheim Clinic. The applicant was a type I diabetic for 6 years and was followed briefly by the Internal Medicine Clinic. His last A1C was 13.4. He has had an MEB and failed fitness. His listed provisional diagnosis is type I diabetes.

12. A Standard Form 600, dated 20 May 1997, shows:

a. The applicant was seen for consultation for diabetes. The comments show the applicant was an insulin dependent diabetic who was currently assigned to a Table of Organization and Equipment (TOE) unit with relatively frequent deployments and long work days with altered diet. The applicant has poor control of his sugars during these deployments and his unit is not adequately understanding of his situation.

b. The assessment/plan shows type 1 diabetes with fair control; however, poor control while in field conditions with MREs, long days, stress, dehydration and less sleep. Have discussed possibility of applicant reassignment to a Table of Distribution and Allowances (TDA) unit with regular hours.

13. A DA Form 3349, initially signed on 11 June 1997, shows:

a. The applicant was given a permanent physical profile rating of 3 in factor P due to diabetes mellitus, type II, insulin requiring, with a rating of 1 in all other factors.

b. Assignment limitations include availability of diabetic meals at all times. Availability of cool storage and medication at all times. No assignments where physician and emergency room are not available 24 hours per day. He may do PT at his own pace in addition to duty hours.

c. His physical restriction codes were:

- F (no assignment to isolated areas where definitive medical care in not available)
- H (no assignment to unit where sudden loss of consciousness would be dangerous to self or others, such as working on scaffolding, handling ammunition, vehicle, d riving, work near moving machinery
- U (limitation not otherwise described to be considered individually

d. He could participate in most functional activities with some limitations and all APFT events, with aerobic conditioning exercises done at his own pace and distance.

e. He required quarterly visits with internist/endocrinologist. No operation of heavy machinery, working at heights, scuba diving, piloting aircraft or security guard detail; no exercise when glucose is greater than 250 mg/dl.

f. The profiling officers are a Medical Corps (MC) Major, Endocrinology Service, who signed the form on 11 June 1997, and a MC, Colonel, Chief, Internal Medicine, who likewise signed the form on 11 June 1997. The approving authority, a MC Colonel, approved the profile on 13 June 1997. The issuing clinic was the Endocrinology Clinic, Landstuhl Regional Medical Command.

g. The applicant’s unit commander signed the form on 20 January 1998, indicating the permanent change to the applicant’s profile serial did require a change in the applicant’s duty assignment because he was unable to meet the unit’s deployment and mission requirements.

14. Documentation pertaining to the applicant's referenced MMRB is not in his available records for review.

15. The applicant's NCOER covering the period from March 1997 through September 1997, shows the applicant was rated "Success" or "Excellence" in all portions of Part IV, with comments that include:

- maintained good physical stamina despite serious diabetic condition
- acted as NCOIC of a highly successful brigade Command Post Exercise

16. A DA Form 3349 shows on 15 April 1998, the applicant was given a permanent physical profile of 3 in factor P for diabetes mellitus type II, insulin requiring.

a. Assignment limitations include availability of diabetic meals at all times. Availability of cool storage and medication at all times. No assignments where physician and emergency room are not available 24 hours per day.

b. His physical restriction codes were:

- D (No strenuous physical activity)
- E (No assignment to units requiring continued consumption of combat rations)
- F, H, and U (as listed above)

c. He could participate in most functional activities with some limitations. He could not participate in the run APFT event, and all aerobic conditioning exercises could be done at his own pace and distance.

d. He required quarterly visits with internist/endocrinologist. No operation of heavy machinery, working at heights, scuba diving, piloting aircraft or security guard detail; no exercise when glucose is greater than 250 mg/dl.

e. The profiling officers are a MC Lieutenant Colonel, Chief, Endocrinology Service, who signed the form on 15 April 1998, and a MC, Colonel, Chief, Department of Medicine, who likewise signed the form on 15 April 1998. The copy of the form provided has been cut off, therefore the action by the applicant's unit commander is not available. The physical profile was approved by the approving authority.

17. The applicant's NCOER covering the period from October 1997 through April 1998 shows he was rated "Success" or "Excellence" in all portions of Part IV, with comments that include:

- maintained tough physical fitness at all times

- ensured all his Soldiers were prepared for deployment to Bosnia and field training exercises (of note, none of the comments reference the applicant participating in field training exercises or deploying to Bosnia)

18. A Standard Form 600, dated 12 November 1999, shows:

a. The applicant was seen at the Internal Medicine Clinic by Dr. M____ W____ on the date of the form. The Clinic Notes show diabetes started in 1990, initially controlled with diet an tablets and 1 year later insulin was started. Hypothyroid for 6 months; depression for 1 year; had MEB in Europe and was found fit with deployment limitations. Knee problems for 9 months with worsening pains.

b. The diagnosis shows uncontrolled diabetes. It was prescribed he exercise the same amount every day and check his baseline labs at follow-up in 1-2 weeks.

19. A Standard Form 600, dated 3 December 1999, was again seen by Dr. M____ W____ at the Internal Medicine Clinic for follow up. The applicant's insulin was changed from regular insulin to Humalog sliding scale.

20. An Operation Report, dated 17 February 2000, shows the applicant had a preoperative diagnosis of right knee internal derangement. On the date of the form he underwent right knee arthroscopic partial medial meniscectomy and abrasion chondroplasty of lateral tibial. He had a postoperative diagnosis of right knee posterior horn medial meniscus tear and grade 2 chondromalacia of lateral tibial plateau.

21. A Standard Form 600, dated 29 March 2000, shows the applicant was seen at the Internal Medicine Clinic and Dr. P____ injected the right knee. The applicant's affect was flat and he felt depressed, stating he needed to see somebody. He had some numbness in both big toes. His diagnoses were uncontrolled diabetes, depression, meniscectomy, right knee. A medical board was to be started and sent to Fort Lewis. A Psychiatry Consult was needed.

22. A NARSUM/Addendum to MEB, signed by MC Dr, Major F____, Psychiatry, on 24 April 2000, shows the applicant underwent examination on 17 April 2000, after referral by Dr. M____ W____, Internal Medicine, for MEB evaluation. This was an addendum to the applicant's MEB for major depressive disorder, recurrent, moderate.

23. A DA Form 3349, dated 28 April 2000, shows:

a. On 28 April 2000, the applicant was given a permanent physical profile rating of 3 in factors P and L, for unstable diabetes [unstable diabetes, also known as brittle diabetes (type I diabetes) or labile diabetes (type I diabetes), refers to difficult-to-manage diabetes, characterized by frequent, severe swings in blood sugar, ranging

from too high (hyperglycemia) to too low (hypoglycemia)], depression, and derangement of right knee.

b. His assignment limitations shows not deployable, no APFT.

c. His physical restriction code was C (No crawling, stooping, running, jumping, marching, or standing for long periods).

d. He was limited in all functional activities aside from lifting up to 10 pounds, could not participate in any APFT events, and could only walk at his own pace and distance.

e. Dr. M____ W____ signed the form on 28 April 2000 as the first profiling officer and Captain V. M____, of unknown occupation, signed at the second profiling officer on the same date. The portion including the action by the approving authority is cut off on the available copy of the form.

24. Standard Form 600, 28 April 2000, shows the applicant was seen by Dr. M____ W____ on the date of the form for his diabetes. He was on new regimen as of 29 March. He has had several overnight insulin reactions. Celexa is helping the depression; Naprosyn for persisting knee pain. The doctor would like to reduce the insulin dosage, but the applicant was reluctant to do this. He was awaiting knee evaluation, then they could proceed with the MEB.

25. A Standard Form 93 shows on 15 May 2000, the applicant provided his medical history for the purpose of MEB/PEB. His diagnoses were listed as diabetic, left knee problems, right ankle problems, hypothyroid, recurrent major depressive disorder, peripheral neuropathy, erectile dysfunction, recurring stress fractures in both legs. The form continues over multiple pages detailing treatment locations and dates for these and additional conditions.

26. A partial, undated DD Form 2697, shows the applicant provided his medical assessment, indicating his overall health was worse compared to his last physical exam, due to diabetes getting progressively worse with recurrent major depressive disorder, hypothyroid, erectile dysfunction and peripheral neuropathy in both feet, bilateral pain in deformed left ankle and in right knee where the knee underwent arthroscopic surgery with a partial meniscectomy.

27. A Standard Form 88 (Report of Medical Examination) shows the applicant underwent medical examination on 15 May 2000, for the purpose of MEB/PEB. He was found qualified for MEB, with a PULHES of 313111. The summary of defects and diagnoses shows diabetes requiring insulin, decreased range of motion right knee, and major depressive disorder.

28. In a self-authored memorandum, signed and dated by the applicant on18 May 2000, and signed as reviewed by Dr. W___, the applicant requested that his MEB dictation be extended until input could be provided by Orthopedics. The PEB will heavily depend on the input that Orthopedics could provide and Orthopedics had a 4-month backlog.

29. An Orthopedic Clinical Note, from Dr. L____, Orthopedic Clinic, dated 24 May 2000, shows the applicant was evaluation for conditions related to his right knee and left ankle. The impression shows mild to moderate degenerative arthritis of the right knee, status post arthroscopic partial medial meniscectomy and left ankle instability. The plan shows the applicant had associated diagnoses besides his orthopedic diagnoses including diabetes controlled with insulin. This dictation was meant to be an addendum to his MEB dictation.

30. The MEB NARSUM, signed by Dr. M____ W____, on 1 June 2000, shows:

a. The reason for the MEB were insulin-dependent diabetes, major depression, and bone and joint defects.

b. The complete history, medications, physical exam, mental state are in the NARSUM for review. With regard to his diabetes, it states he take Ultralente insulin twice a day and regular insulin three to four times a day on a sliding scale. The fluctuations in his blood sugars were exacerbated by the requirement to do PT some days of the week and not others. When they arranged that he should perform the same amount of PT every day, control improved somewhat, though he still runs some blood sugars over 200 mg and experiences overnight hypoglycemic attacks about once a week.

c. The list of consultations includes Dr. L____, Orthopedic Surgeon (whose consultation report was discussed above) and Dr. F____, Psychiatrist (whose consultation report was discussed above).

d. His diagnoses are:

(1) unstable insulin -dependent diabetes complicated by peripheral neuropathy and erectile dysfunction

(2) major depressive disorder

(3) moderate degenerative arthritis of the right knee, status post arthroscopic partial medical meniscectomy

(4) left ankle instability

e. Profile shows nondeployable, no PT TS, P3 and L3 profile.

f. Discussion shows the applicant's unstable diabetes renders him undeployable. His major depressive disorder means he cannot assume any leadership role. His left ankle instability and right knee degenerative arthritis preclude running and walking more than a short distance at a slow pace. At this point, he is completely unfit for miliary service and is recommended he be separated in accordance with Army Regulation 40-501.

31. A DA From 3947 (MEB Proceedings) shows:

a. An MEB convened on 20 June 2000, where the applicant's following diagnoses were considered:

- unstable insulin-dependent diabetes
- complicated by peripheral neuropathy
- erectile dysfunction
- major depressive disorder
- moderate degenerative arthritis of the right knee
- status post arthroscopic partial medical meniscectomy
- left ankle instability

b. The MEB recommended the applicant be referred to the PEB.

c. The signing physicians are Dr. M____ and Dr. P____ R____.

d. Colonel W____ C____ MC, signed the form as the approving authority on 21 June 2000, indicating the findings and recommendation of the board were approved.

e. The applicant signed the form on 23 June 2000, indicating he had been informed of the approved findings and recommendation of the board and agreed with the board's findings and recommendations. The applicant also marked the form indicating he did not desire to continue on active duty under Army Regulation 635-40.

32. A DA Form 199 shows:

a. A PEB convened on 29 June 2000, wherein the applicant was found physically unfit with a recommended combined rating of 50 percent and that his disposition be permanent disability retirement.

b. His unfitting conditions are:

(1) unstable diabetes mellitus requiring up to four supplemental insulin injections per day to control blood sugar. In addition, must regulate diet and physical activities, which have failed to prevent the development of a peripheral neuropathy and diabetic related erectile dysfunction; 40 percent; MEB diagnoses 1, 2, 3)

(2) right knee pain with findings of a parrot beak tear of the posterior horn of the medial meniscus and chondromalacia lateral tibial plateau, status post resection of the medial meniscus and abrasion chondroplasty. Residual of chronic pain and limited range of motion; 10 percent; MEB diagnoses 5, 6)

c. MEB diagnoses 4 and 7 were considered by the PEB and found not to be unfitting and therefore not ratable.

d. The portion of the form containing the applicant's signature indicating concurrence or nonconcurrence is not in the available records for review.

e. The President of the Board, Colonel J____ C____ signed the form on 29 June 2000.

33. The applicant's NCOER covering the period from September 1999 through June 2000, shows he was rated "Success" in all portions of Part IV, with comments that include:

- profile did not hinder Soldier's duty performance; unable to physically participate in PT
- relentlessly pursued mission accomplishment despite all obstacles

34. U.S. Army Intelligence Center and Fort Huachuca Orders 206-0104, dated 24 July 2000, show:

a. The applicant was released from assignment and duty because of physical disability incurred while entitled to basic pay and under conditions that permit his retirement for permanent disability, effective 14 October 2000, with a disability rating of 50 percent.

b. Disability is not based on injury or disease received in the line of duty (LOD) as a direct result of armed conflict or caused by an instrumentality of war and incurred in the LOD during a war period as defined by law. Disability did not result from a combat-related injury as defined in Title 26, U.S. Code, Section 104.

35. The applicant's DD Form 214 shows he was honorably retired on 14 October 2000, due to permanent disability. It does not reference any deployments in which the applicant participated.

36. Despite Counsel's assertion that the applicant was "set to retire" after 20 years of service, only 7 months after his physical disability retirement, there is no evidence of record the applicant had ever applied for or was approved for voluntary retirement due to length of service at any point within 12 months of completing 20 qualifying years of service for retirement (completion of 20 years' service would have been 18 May 2001, thus eligibility to request voluntary regular retirement would have been 18 May 2000) and/or prior to the onset of the MEB/PEB process (which was April 2000). Therefore, there is no evidence of record the applicant was in the presumptive period during the DES process, wherein it will be presumed the Soldier is physically fit if the date of the referral to the DES is after the Soldier's request for voluntary retirement has been approved.

37. Notwithstanding Counsel's assertion that the Office of the Inspector General memorandum for Under Secretary of the Army, dated 6 March 2007, references MEB contract providers' lack of training and certification from 1996 through 2007, the memorandum provided speaks to the Army policy and DOD policies regarding to MEB processing being different and the Army's inconsistency with regard to formal training for personnel working throughout the DES process, to include MEB physicians and PEB personnel. Contract providers are not specified in the memorandum and the timeframes discussed in the memorandum include only Calendar Year 2001, Fiscal Years 2002, 2005 and 2006.

38. The applicant applied to the U.S. Army Human Resources Command (AHRC), CRSC Division on numerous occasions requesting CRSC.

a. An AHRC CRSC Division letter, dated 19 June 2008, advised the applicant they received his request for reconsideration and were unable to approve his request for CRSC for the following conditions for the following reasons:

- diabetes; VA rating 40 percent; no evidence to show combat-related event caused condition
- erectile dysfunction; VA rating 0 percent; no evidence to show combat-related event caused condition
- hemorrhage of the eye; VA rating 10 percent; does not meet criteria for CRSC
- hypothyroidism; VA rating 10 percent; does not meet criteria for CRSC
- limited extension of right knee; VA rating 10 percent; documentation does not show accident or incident to connect disability to a combat-related event
- limited motion of left ankle; VA rating 10 percent; documentation does not show accident or incident to connect disability to a combat-related event
- lumbosacral or cervical strain L spine; VA rating 10 percent; documentation does not show accident or incident to connect disability to a combat-related event

- major depressive disorder; VA rating 50 percent; no evidence to show combat-related event caused condition
- paralysis of external popliteal nerve right leg; VA rating 10 percent; no evidence to show combat-related event caused condition
- paralysis of external popliteal nerve left leg; VA rating 10 percent; no evidence to show combat-related event caused condition
- paralysis of median nerve left arm; VA rating 10 percent; no evidence to show combat-related event caused condition
- paralysis of medical nerve right arm; VA rating 10 percent; no evidence to show combat-related event caused condition

b. A second AHRC CRSC Division letter, dated 18 August 2008, advised the applicant they received his request for reconsideration and were unable to approve his request for CRSC for the above-listed conditions for the above-listed reasons. An additional condition not previously claimed for tinnitus of the ears with a VA rating of 10 percent was also denied as there was no official evidence of acoustic trauma or combat noise exposure.

c. A third AHRC CRSC Division letter, dated 23 October 2008, informed the applicant they reviewed all evidence he provided and were still unable to reverse their prior CRSC decisions and advised him of his right to apply to ARBA to correct any perceived injustice in the CRSC decisions.

39. The applicant subsequently applied to the ABCMR requesting approval of his CRSC requests. The complete Record of Proceedings pertaining to this case can be found in ABCMR Docket Number AR20080018357, and has been provided in full to the Board for review. On 11 June 2009, the Board denied the applicant's request for CRSC, determining the evidence presented does not demonstrate the existence of a probable error or injustice and the overall merits of his case were insufficient as a basis for correction of his records.

40. Numerous additional VA Progress Notes, Consult Requests, and Problem Lists, postdating the applicant's service and dated between September 2006 through July 2016, have been provided in full to the Board for review and detail the applicant's diagnoses and treatment of conditions through the VA during those periods.

41 The applicant applied to the ABCMR for a second time, requesting correction of his DD Form 214 to reflect, in effect, retirement for length of service, eligibility for CRDP, and voiding of his medical records associated with his MEB/PEB process. The complete Record of Proceedings pertaining to this case can be found in ABCMR Docket Number AR20150010737, and has been provided in full to the Board for review. On 1 November 2016, 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 were insufficient as a basis for correction of his records.

42. The applicant applied to the ABCMR for a third time, requesting correction of his DD Form 214 to reflect, in effect, retirement for length of service, or alternatively placement on the Temporary Disability Retired list (TDRL), or retirement under Temporary Early Retirement Authority (TERA), eligibility for CRDP, and voiding of his medical records associated with his MEB/PEB process. The complete Record of Proceedings pertaining to this case can be found in ABCMR Docket Number AR20210006591, and has been provided in full to the Board for review. On 10 February 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 were insufficient as a basis for correction of his records.

43. The applicant applied to the ABCMR for a fourth time, requesting reconsideration of his prior request denied on 10 February 2022. The complete Record of Proceedings pertaining to this case can be found in ABCMR Docket Number AR20220010831, and has been provided in full to the Board for review. On 17 November 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 were insufficient as a basis for correction of his records.

44. An AHRC CRSC Division letter, dated 11 September 2023, shows the AHRC CRSC office reviewed the applicant's reconsideration request for CRSC and made a final disapproval of all claimed conditions as they were unable to verify any of them as caused by a combat-related event. The complete list of conditions is in the provided letter, made available for the Board's review and overlaps considerably with the applicant's prior claims for CRSC, with the inclusion of the additional claimed conditions of peripheral neuropathy and carpal tunnel , right and left upper and lower extremities, hypogonadism, diabetic retinopathy, peripheral vascular disease, right and left lower extremities, and right and left foot hammer toes.

45. 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.

46. 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.

47. Of note, the prior ABCMR case for a different applicant in Docket Number AR20040010425 which is referenced by Counsel, is entirely unrelated to the applicant's case. It does not pertain to medical contractors participating in MEB proceedings in any capacity, the focal point of Counsel's reference to this case, and as such, has not been provided to the Board. Nonetheless, all four applicable citations of policy letters and circulars referenced in that case pertaining to Executive Branch policy and statue relating to services contracting and inherently Governmental functions have been provided in this Record of Proceedings in the Reference section, for the Board's review.

48. 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 again applying to the ABCMR requesting another reconsideration of his previous applications. Requested through counsel:

> "Mr. [Applicant] respectfully requests that his Narrative Reason for Separation be amended to "Completion of Required Active Service" (20-year active service) with an updated ETS [Expiration – Term of Service] date to Mr. [Applicant] end of contract obligations (01 Jun 2001).
>
> Mr. [Applicant] requests all independent contractors created documents affecting Mr. Hillmans career, be determined as invalid and/or voided. Mr. [Applicant] was set to retire from the Army only seven (7) months after his discharge which resulted in the loss of his CRDP and was within the presumptive period for fitness determination during the MEB Process.
>
> Mr. Applicant has worked tirelessly even since his discharge to correct his record. He has been the victim of his command's errors for too long and continues to suffer from the injustices. These errors in medical care, procedure, and proper documentation have caused Mr. [Applicant] great hardship both while in the service and as a civilian. He is merely Seeking to right the wrongs of the past and fight to correct iniquities within the Army."

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. The applicant's DD for the period of Service under consideration 214 shows he entered the regular Army on 19 May 1981 and was permanently retired for physical disability on 14 October 2000 under provisions in paragraph 4-24b(1) of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (1 September 1990).

d. A prior request for reconsideration was denied by the ABCMR on 10 February 2022 (AR20210006591). His prior requests are the same as those in this case. His requests from AR20210006591:

> "Request MEB/PEB be removed from records; Separation Orders and DD 214 recreated to reflect full retirement EOM May 2001; LOD for Diabetes, Depression, Peripheral Neuropathy, and Diabetic Complications; TERA or TRDL if not full retirement; CRSC and CRDP eligibility - Type I Diabetes classified in medical records (instead of Type 2): restored honor."

e. A subsequent request for reconsideration was denied by the ABCMR on 17 November 2023 (AR20220010831). His requests were essentially the same as those in AR20210006591. He requests in:

> "VOID illegal MEB referral, MEB Narrative Summary, illegal MEB and PEB. Granted retirement for Time in service and CRDP backdated to CRDP start date. Reprimand ABCMR Board members of 2015 case for giving "regulatory responsibilities" to a known contractor in ABCMR denial. Counsel Board members of past case for disregarding evidence of contractor doctor violations."

f. Rather than repeat their findings here, the board is referred to the records of proceedings and medical advisory opinions for those case. This review will concentrate on the new evidence submitted by the applicant.

g. There were 1,426 pages of supporting documents in case number AR20220010831, most of which appeared to be a compilation of the supporting documents and ABCMR documents from previous cases. No new medical information was identified in that case.

h. There are 314 pages of supporting documents in the current application. No new probative medical or other probative documentation was identified. The additional medical documentation in this case if from Veterans Hospital Administration (VHA) facilities, are from 2006-2016 and therefore post-date his period of service.

i. In his brief, counsel states that one of the reasons for this request is “for the purpose of eligibility for Combat related Special Compensation (CRSC) consideration.” The requested change would have no bearing on eligibility for CRSC as the first requirement is only that the claimant be in receipt of retired pay, whether it would be from permanent disability or a length of service (LOS) retirement is irrelevant.

j. On 20 June 2000, a medical evaluation board (MEB) determined the applicant had two conditions which failed the medical retention standard in in chapter 3 AR 40-501, Standards of Medical Fitness: insulin dependent diabetes and arthritis/decreased range of motion of the right knee. They determined four additional conditions met medical retention standards; peripheral neuropathy, major depressive disorder, left ankle instability, and erectile dysfunction. On 21 June 2000, the applicant agreed with the board’s findings and recommendation and his case was forwarded to a physical evaluation board (PEB) for adjudication.

k. On 29 June 2006, the applicant’s informal PEB determined that his insulin dependent diabetes and right knee condition were unfitting conditions for continued service, and four conditions were not unfitting for continued service. The PEB made the administrative determinations neither disability was combat related as there was no evidence either disability was the direct result of armed combat; was related to the use of combat devices (instrumentalities of war); the result of combat training; incurred while performing extra hazardous service though not engaged in combat; incurred while performing activities or training in preparation for armed conflict in conditions simulating war; or that he was a member of the military on or before 24 September 1975.

l. Section b(3) of 26 U.S. Code § 104 requires there be a cause-and-effect relationship in order to establish the finding that a medical condition is combat related:

> (3) Special rules for combat-related injuries: For purposes of this subsection, the term “combat-related injury” means personal injury or sickness—
>
> (A) which is incurred—
>
> (i) as a direct result of armed conflict,
>
> (ii) while engaged in extra-hazardous service, or
>
> (iii) under conditions simulating war; or
>
> (B) which is caused by an instrumentality of war.

m. Using the VA Schedule for Rating Disabilities (VASRD), they rated the conditions at 40% and 10% respectively and recommended he be permanently retired for physical disability with a combined military disability rating of 50%. On 7 July 2000, after being counseled on the board's findings and recommendation by his PEB liaison officer, he concurred with the PEB and waived his right to a formal hearing.

n. The applicant was eligible for but declined the opportunity to be continued on active duty (COAD) until he would have been eligible for the LOS retirement he is again requesting. Paragraphs 6-2 and 6-3 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (1 September 1990) address the objective of and qualifications for continuance / COAD:

"6-2. Objective

The primary objective of this program is to conserve manpower by effective use of needed skills or experience. A soldier who is physically unqualified for further active duty has no inherent or vested right to be COAD. Disapproval of such a request has no bearing on the disposition of a case processed under other chapters of this regulation.

6-3. Qualification for continuance

To be considered for COAD under the provisions of this chapter, a soldier must be --

a. Found unfit by a PEB because of a disability that was not the result of intentional misconduct nor willful neglect, nor incurred during a period of unauthorized absence.

b. Capable of maintaining oneself in a normal military environment without adversely effecting one's health and the health of others and without undue loss of time from duty for medical treatment.

c. Physically capable of performing useful duty in an MOS for which he or she is currently qualified or potentially trainable.

d. Eligible through one of the criteria below as determined by the appropriate approving authority listed in paragraph 6-10.

(1) Has 15 years but less than 20 years of total service, or
(2) Is qualified in a critical skill or shortage MOS confirmed by PERSCOM, or

(3) Disability is the result of combat.

o. The applicant's NCO Evaluation Reports show he was performing his duties and was a successful Soldier. However, in his signed 26 June 2000 memorandum, the applicant requested separation from active duty:

"I, SFC [Applicant], 123-45-6789, hereby apply for discontinuance on active duty if found physically unfit for duty due to my disability/injury."

p. The applicant was permanently retired for physical disability as he requested on 14 October 2000.

q. Counsel notes the applicant was first diagnosed with type II, or insulin resistant, diabetes and later type I diabetes. In type II diabetes, the body may make less insulin than it used to and the body is resistant to the insulin which is present. While initially treated with diet, exercise, and oral medications, some patient's disease advances to the point where they also require insulin injections. This is what appears to have happened with the applicant.

r. It appears that after the applicant was started on insulin, someone mistakenly wrote in the record the applicant had type I, also known as juvenile, diabetes. Type I diabetes is an autoimmune disease where the body's immune system attacks the pancreas, eliminating the cells which produce insulin. There is no evidence the applicant had type I diabetes.

s. In any event, his diabetes clearly failed the medical retention standard in paragraph 3-11d of AR 40-501, Standards of Medical Fitness (30 August 1995). This paragraph states: "Diabetes mellitus when proven to require hypoglycemic drugs in addition to restrictive diet for control" fails medical retention standards and is cause for referral to an MEB.

t. Veterans do not need to apply Concurrent Retirement and Disability Pay (CRDP). If qualified, they are enrolled automatically. The applicant's retirement makes him eligible for CRSC, but the Veteran must file a CRSC application with their branch of service. It should be noted that a Veteran cannot receive both CRSC and CRDP simultaneously.

u. It is the opinion of the ARBA Medical Advisor there is insufficient probative evidence to warrant a reversal of the ABCMR's prior denials of requests or a denial of the current requests.

BEHAVIORAL HEALTH REVIEW:

a. The applicant is applying to the ABCMR requesting reconsideration of his prior requests for correction of his DD214 to show Retirement for Length of Service in lieu of Permanent Disability Retirement, and correction of his ETS to make him eligible for CRSC pay and CRDP. 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: 1) The applicant enlisted into the U.S. Army on 19 May 1981 and served for approximately 19 years, 4 months, and 26 days before he was separated for disability on 14 October 2000; 2) The applicant's only mental health condition considered during an MEB, which convened on 20 June 2000, was major depressive disorder; 3) A PEB convened on 29 June 2000, and the applicant was found physically unfit with a recommended combined rating of 50 percent and that his disposition be permanent disability retirement. The applicant's diagnosis of major depression was not found to be an unfitting condition.

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's available military service and medical records. The VA's Joint Legacy Viewer (JLV) and military and VA hardcopy medical documentation provided by the applicant were also examined.

c. There is sufficient evidence the applicant was treated for symptoms of depression starting in 1998. He was treated predominately with psychiatric medication with moderate reported symptom improvement. The applicant also experienced difficulty with side effects from his psychiatric medication. There is insufficient evidence the applicant's depression was related to combat exposure. There is sufficient evidence his major depression did not meet the criteria for a condition, which would be found to not meet medical retention standards from a psychiatric perspective.

d. A review of JLV provided evidence the applicant has been diagnosed and treated for service-connected major depression (50%SC).

e. Based on the available information, it is the opinion of the Agency Medical Advisor that the applicant has been diagnosed with service-connected major depression both while on active service and by the VA. There is insufficient evidence the applicant was exposed to combat, his major depression was related to combat, or his diagnosis of major depression was wrongly determined to meet medical retention standards from a psychiatric perspective. Therefore, from a behavioral health perspective, there is insufficient evidence to change his DD214 at this time.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the misconduct? No, the applicant has been diagnosed with service-connected major depression, both while on active service and by the VA. There is insufficient evidence the applicant was exposed to combat, his major depression was related to combat, or his diagnosis of major depression was wrongly determined to meet medical retention standards from a psychiatric perspective. Therefore, from a behavioral health perspective, there is insufficient evidence to change his DD214 at this time.

(2) Did the condition exist or experience occur during military service? N/A.

(3) Does the condition experience actually excuse or mitigate the misconduct? N/A.

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 petition, available military records and medical review, the Board concurred with the advising official finding insufficient evidence the applicant was exposed to combat, his major depression was related to combat, or his diagnosis of major depression was wrongly determined to meet medical retention standards from a psychiatric perspective. The opine noted from a behavioral health perspective, there is insufficient evidence to change his DD214 at this time. The Board noted the behavioral health opine finding sufficient evidence the applicant was treated for symptoms of depression starting in 1998. He was treated predominately with psychiatric medication with moderate reported symptom improvement. However, they too found insufficient evidence the applicant was exposed to combat, his major depression was related to combat.

2. The Board determined the PEB made the administrative determinations neither disability was combat related as there was no evidence either disability was the direct result of armed combat. Evidence shows the applicant after being counseled on the board's findings and recommendation by his PEB liaison officer, he concurred with the PEB and waived his right to a formal hearing. The Board noted, there is no evidence of record the applicant had ever applied for or was approved for voluntary retirement due to length of service at any point within 12 months of completing 20 qualifying years of service for retirement (completion of 20 years' service would have been 18 May 2001, thus eligibility to request voluntary regular retirement would have been 18 May 2000) and/or prior to the onset of the MEB/PEB process (which was April 2000). Additionally, the Board noted, that voiding all independent contractor created documents pertaining

to the applicant and his Disability Evaluation System (DES) processing is outside the purview of the Board.

3. The Board determined the applicant was eligible for but declined the opportunity to be continued on active duty (COAD) until he would have been eligible for the LOS retirement he is again requesting. Furthermore, the Board agreed the applicant's retirement makes him eligible for CRSC, but the Veteran must file a CRSC application with their branch of service. It should be noted that a Veteran cannot receive both CRSC and CRDP simultaneously. The Board determined the applicant's narrative reason for separation was not in error or unjust based on the preponderance of evidence. The Board agreed there is insufficient evidence to support the applicant's and his counsel's contentions for correction of his record to show retirement for length of service in lieu of permanent disability retirement or correction of his expiration term of service (ETS) date or in effect, date of retirement, to 1 June 2001 in lieu of 14 October 2000. Based on the medical and behavioral health opine and the preponderance of evidence the Board determined reversal of the previous Board decision is without merit and denied relief.

BOARD VOTE:

| Mbr 1 | Mbr 2 | Mbr 3 | |
|---|---|---|---|
| : | : | : | GRANT FULL RELIEF |
| : | : | : | GRANT PARTIAL RELIEF |
| : | : | : | GRANT FORMAL HEARING |
| [redacted] | [redacted] | [redacted] | DENY APPLICATION |

BOARD DETERMINATION/RECOMMENDATION:

The Board found 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 to amend the decision of the ABCMR set forth in Docket Number AR20080018357 on 11 June 2009, Docket Number AR20150010737 on 1 November 2016, Docket Number AR20210006591 on 10 February 2022, and Docket Number AR20220010831 on 17 November 2023.

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.

2. Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), in effect at the time, sets policies, standards, and procedures to ensure the readiness and competency of the force while providing for the orderly administrative separation of Soldiers for a variety of reasons, including retirement.

a. Chapter 12 (Retirement for Length of Service) sets policies and procedures for voluntary retirement of Soldiers because of length of service.

b. Paragraph 12-7 (Eligibility) states Soldiers who have completed 20 years of Active Federal Service and who have completed all required service obligations are

eligible to retire. Unless restricted in this section, Soldiers who have completed 19 or more years of Active Federal Service may apply for retirement. The request must be made within 12 months of the requested retirement date, except as indicated in paragraph 19-15 (which refers to notification of Qualitative Management Program selection).

3. Concurrent receipt refers to a veteran's simultaneous receipt of two types of Federal monetary benefits: military retired pay from the Department of Defense and disability compensation from the Department of Veterans Affairs (VA). Prior to 1 January 2004, the law dictated that a military retiree could not receive two payments from Federal agencies for the same purpose. As a result, military retirees with disabilities recognized by the VA would have their military retired pay offset or reduced dollar for dollar by the amount of their non-taxable VA compensation. Since enactment of the law, there are two types of concurrent receipt: Combat-Related Special Compensation (CRSC) and Concurrent Retirement and Disability Pay (CRDP).

a. Title 10, U.S. Code, section 1413a, as amended, established 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) and 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.)

b. Subsequent to the establishment of CRSC, CRDP was added to the original legislation, which allows military retirees to receive both military retired pay and VA compensation without an offset, previously prohibited by the law. Individuals are not entitled to receipt of both CRSC and CRDP and if an individual qualifies for both, in the initial year of joint eligibility, the Defense Finance and Accounting Service (DFAS) will automatically apply the entitlement that is most beneficial to the individual, after which the individual will make his/her own election at the next Open Season. Like regular retired pay and disability severance pay that is not combat-related, CRDP is taxable, according to the individual's current Federal Income Tax Withholding tax rate. Effective 2014, to be eligible for CRDP a Soldier must meet one of the following eligibility criteria:

- be a regular retiree with a VA disability rating of 50 percent or greater
- be a Reserve retiree with 20 qualifying years of service with a VA disability rating of 50 percent or greater and who has reached retirement age
- be retired under the Temporary Early Retirement Act (TERS) and have a VA disability rating of 50 percent or greater
- be a physical disability retiree who earned entitlement to retired pay under any provision of law other than solely by disability and have a VA disability rating of 50 percent or greater

c. Disability Severance Pay is taxable or subject to Federal Income Tax withholding except for those individuals meeting the following criteria of having a combat-related injury or illness as determined by military service at separation that resulted directly from armed conflict, or took place while engaged in extra-hazardous service, took place under conditions simulating war, or was caused by an instrumentality of war for which the Soldier is receiving VA disability compensation

4. 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

5. 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.

6. 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.

7. 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.

8. 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.

d. When a Soldier is being processed for separation or retirement for reasons other than physical disability, continued performance of assigned duty commensurate with his or her rank or grade until the Soldier is scheduled for separation or retirement, creates a presumption that the Soldier is fit.

e. The DES compensates disabilities when they cause or contribute to career termination. Service members who are pending retirement at the time they are referred for disability evaluation are presumed fit for military service as set forth below:

(1) Soldiers in the presumptive periods below are eligible to be referred to the DES when they have medical impairments that do not meet the medical retention standards according to Army Regulation 40-501. With the exception of unfit Soldiers approved for continuation, these Soldiers enter the PEB phase of the DES under the rebuttable presumption that they are physically fit.

(2) Presumptive period. The PEB will presume Soldiers to be pending retirement when the Soldier’s date of referral to the DES is after an of the circumstances listed below:

- the Soldier's request for voluntary retirement has been approved; revocation of voluntary retirement orders for purposes of referral into the DES does not negate application
- an officer has been approved for selective early retirement
- an officer is within 12 months of mandatory retirement due to age or length of service
- an officer or enlisted is within 12 months of their retention control point (RCP) or expiration term of service (ETS) and will be eligible for regular retirement
- a Reserve Component member is within 12 months of mandatory removal date from active status and qualifies for a 20-year letter at the time of referral to the DES
- the Soldier is a retiree recall, to include those who transferred to the Retired Reserve, with eligibility to draw retired pay upon reaching the age prescribed by statute unless he/she incurred or aggravated the medical condition while on their current active duty orders
- the Soldier has been approved for retirement under a Temporary Early Retirement Authority (TERS) so long as the Army guidance allows Soldiers to accept such offer while pending DES evaluation or before the outcome of the DES is known

(3) Overcoming the presumption of fitness rule. Soldiers may overcome this presumption by presenting a preponderance of evidence that they are unfit for military service. The presumption of fitness rule may be overcome (rebutted) when:

- within the presumptive period, an illness or injury occurs that would prevent the Soldier from performing further duty if they were not retiring or not a retiree recall
- within the presumptive period, a serious deterioration of a previously diagnosed condition, to include a chronic condition, occurs and the deterioration would preclude further duty if the Soldier were not retiring or not a retiree recall
- the condition for which the Soldier is referred is chronic and a preponderance of the evidence establishes the Soldier was not performing duties befitting his/her office, grade, rank, or MOS before entering the presumptive period; the ability to perform further duty is not a consideration

9. 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.

10. 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.

11. 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.

12. Title 48 (Federal Acquisition Regulations System), Code of Federal Regulations, Part 7 (Acquisition Planning), Subpart 7.5 (Inherently Governmental Functions) shows:

a. Section 7.500 (Scope of subpart) states the purpose of this subpart is to prescribe policies and procedures to ensure that inherently Governmental functions are not performed by contractors.

b. Section 7.502 (Applicability) states the requirements of this subpart apply to all contracts for services. This subpart does not apply to services obtained through either personnel appointments, advisory committees or personal services contracts issued under statutory authority.

c. Section 7.503 (Policy) states:

(1) Contracts shall not be used for the performance of inherently governmental functions.

(2) Agency decisions which determine whether a function is or is not an inherently governmental function may be reviewed and modified by appropriate Office of Management and Budget officials.

(3) The following is a list of examples of functions considered to be inherently governmental functions or which shall be treated as such. This list is not all inclusive:

(a) The direct conduct of criminal investigations.

(b) The control of prosecutions and performance of adjudicatory functions other than those relating to arbitration or other methods of alternative dispute resolution.

(c) The command of military forces, especially the leadership of military personnel who are members of the combat, combat support, or combat service support role.

(d) The conduct of foreign relations and the determination of foreign policy.

(e) The determination of agency policy, such as determining the content and application of regulations, among other things.

(f) The determination of Federal program priorities for budget requests.

(g) The direction and control of Federal employees.

(h) The direction and control of intelligence and counter-intelligence operations.

(i) The selection or non-selection of individuals for Federal Government employment, including the interviewing of individuals for employment.

(j) The approval of position descriptions and performance standards for Federal employees.

(k) The determination of what Government property is to be disposed of and on what terms (although an agency may give contractors authority to dispose of property at prices within specified ranges and subject to other reasonable conditions deemed appropriate by the agency).

13. Office of Federal Procurement Policy Letter 92-1, "Inherently Governmental Functions," Circular Number A-76 Supplemental Handbook, Appendix 5, dated 23 September 1992 (obtained from the Defense Logistics Agency's website) establishes Executive Branch policy relating to services contracting and inherently governmental functions. Its purpose is to assist Executive Branch offices and employees in avoiding an unacceptable transfer of official responsibility to Government contractors. The

background noted that contractors, when properly used, provide a wide variety of useful services that play an important part in helping agencies to accomplish their missions. Not all functions may be performed by contractors, however. Just as it is clear that certain functions, such as the command of combat troops, may not be contracted, it is also clear that other functions, such as building maintenance services, may be contracted. The difficulty is in determining which of the services that fall between these extremes may be acquired by contract. Agencies have occasionally relied on contractors to perform certain functions in such a way as to raises questions about whether Government policy is being created by private persons.

14. Office of Federal Procurement Policy Letter 92-1, Circular Number A-76 defines an "inherently governmental function" as a function that is so intimately related to the public interest as to mandate performance by Government employees. These functions include those activities that require either the exercise of discretion in applying Government authority or the making of value judgments in making decisions for the Government. Governmental functions normally fall into two categories: (1) the act of governing, i.e., the discretionary exercise of Government authority, and (2) monetary transactions and entitlement.

15. Circular Number A-76 was revised in 1999 to implement the statutory requirements of the Federal Activities Inventory Reform Act of 1998. The background noted that the competitive enterprise system is the primary source of national economic strength. In recognition of this principle, it has been and continues to be the general policy of the Government to rely on commercial sources to supply the products and services the Government needs. The definition of an "inherently Governmental function" remained the same. The Circular will apply to all executive agencies with certain listed exceptions, to include the Department of Defense in times of declared war or military mobilization. However, there is no evidence the applicant was authorized to use this exception.

16. The revised Circular Number A-76 also stated that it does not authorize contracts which establish an employer-employee relationship between the Government and contractor employees. An employer-employee relationship involves close, continual supervision of individual contractor employees by Government employees, as distinguished from general oversight of contractor operations. It also states such a personal services contract is not proper unless expressly authorized by Congress.

17. 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//