

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 27 November 2024

DOCKET NUMBER: AR20240003038

APPLICANT REQUESTS: in effect, honorable disability discharge or retirement in lieu of general administrative discharge under honorable conditions due to misconduct (serious offense).

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

- DD Form 149 (Application for Correction of Military Record)
- two self-authored statements
- DA Form 638 (Recommendation for Award), 16 September 2019
- Army Achievement Medal Certificate, covering the period 12 July 2019 through 27 August 2019
- DA Form 2166-9-1 (Noncommissioned Officer Evaluation Report (NCOER) (SGT)), covering the period ending 1 December 2020
- 3rd Battalion, 10th Special Forces Group (Airborne) Permanent Order 068-005, 9 March 2021
- 33 pages of Office and Clinic Notes, dated between September – December 2021
- partial DD Form 2807-1 (Report of Medical History), 7 December 2021
- Intrepid Spirit Center Consultation Notes, 7 January 2022
- DA Form 3822 (Report of Mental Status Evaluation), 22 February 2022
- partial Forward Support Company, 3rd Battalion memorandum, Subject: Notification of Separation, 15 March 2022
- Forward Support Company, 3rd Battalion memorandum, Subject: Election of Rights for Separation, 15 March 2022
- Forward Support Company, 3rd Battalion memorandum, Subject: Commander's Report for Separation, 22 March 2022
- 3rd Battalion, 10th Special Forces Group (Airborne) memorandum, Subject: Commander's Recommendation for Separation, 24 March 2022
- Headquarters, 10th Special Forces Group (Airborne) memorandum, Subject: Commander's Recommendation for Separation, 12 April 2022
- Headquarters, 1st Special Forces Command (Airborne) memorandum, Subject: Administrative Separation, 29 July 2022

- Member copies 1 and 4 of DD Form 214 (Certificate of Release or Discharge from Active Duty), covering the period ending 11 August 2022
- 12 character statements
- Department of Veterans Affairs (VA) letter, 8 March 2023
- American Military University Bachelor of Arts Certificate, 1 April 2023

FACTS:

1. The applicant states:

a. He is requesting reinstatement of his medical board. His command did not consider or care about his mental and physical health after his deployment in Ukraine. He was unjustly punished without any consideration of his well-being. He is a 100 percent disabled veteran due to the injuries he sustained in Ukraine.

b. His injuries were not factored in whatsoever when his command knew his injuries affected his actions and behavior, as he was placed in a psychiatric ward, intensive outpatient program (IOP), showed signs of post-traumatic stress disorder (PTSD), and was diagnosed with adjustment disorder and traumatic brain injury (TBI). They knew these were all factors but they were heavily ignored by the command, in addition to all of his physical injuries he is still dealing with.

c. He returned early from his deployment to Ukraine due to his injuries resulting in multiple broken bones/fractures in his face and ribs, PTSD, TBI, and a broken hand. Furthermore, he ended up in a psychiatric hospital for mental health issues resulting from that deployment, which required him to undergo a Medical Evaluation Board (MEB), that was completely ignored by his command at the time. They refused to allow him treatment and treated him as a burden to the unit. The commander knew of his injuries before he came back to the U.S yet none of his conditions were considered. He was unjustly disciplined for surviving his attack, which led him to have serve depression and attempted suicide, leading to even further over punishment.

d. He genuinely feels he was abandoned by his unit, command and family while he struggled with PTSD and TBI and difficulty finding worth in his life. His therapist told his command that he is a risk factor and did not clear him for separation under an administrative discharge; however, that was ignored.

2. The applicant enlisted in the Regular Army on 17 February 2015, and was awarded the Military Occupational Specialty (MOS) 89B (Ammunition Specialist).

3. The applicant provided an Army Achievement Medal Certificate, which shows he was awarded the Army Achievement Medal for outstanding leadership while supervising and directing the Task Force-10 ammunition movement for the forward support

company, 3rd Battalion, 10th Special Forces Group (Airborne) from 12 July 2019 through 27 August 2019.

4. A DA Form 2166-9-1 provides the applicant's NCOER covering the period from 2 December 2019 through 1 December 2020, and shows in all portions of Part IV (Performance Evaluation, Professionalism, Attributes, and Competencies (Rater)) he was rated "Met Standard."

5. 3rd Battalion, 10th Special Forces Group (Airborne) Permanent Order 068-005, 9 March 2021 awarded the applicant the Army Good Conduct Medal (2nd Award) for the period of service from 17 February 2018 through 16 February 2021.

6. The applicant deployed to Ukraine from 17 June 2021 through 2 September 2021.

7. The applicant provided 33 pages of Office and Clinic Notes, dated between September – December 2021, all of which have been provided in full to the Board for review and in pertinent part show:

a. The applicant was seen on 5 and 7 September 2021 for hand pain/swelling; other fracture of fourth metacarpal bone, left hand, fracture of one rib; pain in left knee.

b. He was admitted to Behavioral Health on 22 September 2021, for medical clearance; suicide attempt last week; per the applicant he had a loaded weapon in his hand. He stated he was jumped approximately 1 month prior, resulting in a broken tooth and rib.

c. He was discharged from the hospital on 27 September 2021. Hospital course shows he was stable throughout his hospital course and consistently denied suicidal/homicidal ideation. Tramadol was helpful for pain and insomnia and he will continue a trial of Cymbalta and Wellbutrin. Prazosin was well-tolerated and showed promising early response for nightmares. He anticipated upcoming legal and marital issues. His diagnoses were adjustment disorder with anxiety and depressed mood and alcohol abuse.

d. Numerous Behavioral Health appointments are annotated between October – December 2021. On 4 November 2021, he completed the IOP intake and accepted a start date of 15 November 2021.

8. A DA Form 268 (Report to Suspend Favorable Personnel Actions (FLAG)) shows a non-transferrable adverse action flag was initiated against the applicant on 7 December 2021.

9. Page one of a DD Form 2807-1 shows the applicant provided his medical history on 7 December 2021, for the purpose of separation examination. He indicated he had left knee pain and night terrors. Page 3 of the form, which is signed 4 March 2022, includes the examiners comments, showing injection in left knee with follow up appointment with orthopedics; fractures as stated by the applicant; was seen for TBI; was in treatment for behavioral health; currently in MEB process.

10. On 8 December 2021, the applicant's battalion commander requested of the Commander, 10th Special Forces Group (Airborne) that he issue the applicant a General Officer Memorandum of Reprimand (GOMOR). An enclosed Police Report [which is not in the applicant's available records for review by the Board] details offenses involving the applicant. On 15 September 2021, he assaulted his wife at their on-post residence after having a verbal altercation where he brandished a weapon during the altercation and pushed his wife down, causing her to sprain her ankle. He was additionally found in possession of two unregistered firearms.

11. Additional medical documents show on 13 December 2021, he was referred to Medical Service Neurology, Neuro/TBI for a history of concussion due to poor memory since return from Ukraine when he was the victim of an assault.

12. Intrepid Spirit Center Consultation Notes, 7 January 2022, include a Neurological Examination, which shows in the assessments and recommendations his history is compatible with a mild TBI event with brief loss of consciousness last August while deployed in Ukraine. He has residual symptoms from that incident, including pain from polytrauma from the assault; headaches; light sensitivity; memory loss; suicidal ideation; sleep issues. He was diagnosed with migraine without aura.

13. A DA Form 2627 (Record of Proceedings under Article 15, Uniform Code of Military Justice (UCMJ)) shows the applicant accepted nonjudicial punishment under Article 15 of the UCMJ on 3 February 2022, for the following misconduct:

- wrongfully not registering his privately own weapons on 15 September 2021
- wrongfully not properly storing his privately owned weapons in his quarters on 15 September 2021
- committing a violent offense against his spouse on 15 September 2021, by pushing her with an open hand.

14. A DA Form 3822 shows:

a. The applicant underwent a mental status evaluation on 22 February 2022, for the purpose of separation for misconduct under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), chapter 14.

b. He currently did not meet medical retention standards, had reached medical retention determination point, and Disability Evaluation system (DES) referral already occurred.

c. His diagnosis is listed as adjustment disorder.

d. He was not cleared for separation under Army Regulation 635-200, chapter 14; he was currently in the IDES process.

15. 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).

16. A DD Form 2808 (Report of Medical Examination) shows the applicant underwent medical examination on 4 March 2022, for the purpose of separation. He was found medically qualified for separation with a PULHES of 311111.

17. On 11 March 2022, the applicant was issued a GOMOR, wherein he was reprimanded for domestic violence.

a. On 3 January 2021, during a verbal altercation that turned physical, he assaulted his wife when he brandished a pistol and pushed her down, causing her to sprain her ankle.

b. Additionally, on 15 September 2021, he assaulted his wife by pinning her to the stairs and drawing a fist as to strike her.

c. Also, on 7 December 2020, he assaulted his wife by strangulation. Furthermore, the Fort Carson Military Police conducted a consent search of his on-post quarters, which revealed he was in possession of a loaded pistol and rifle, both firearms were unregistered.

d. The applicant was advised this reprimand was administrative in nature and not imposed as punishment under the UCMJ. He was to acknowledge receipt of the GOMOR and was advised of his right to submit a written rebuttal.

18. On 15 March 2022, the applicant acknowledged receipt of the GOMOR and did not submit any matters in extenuation or rebuttal.

19. On 15 March 2022, the applicant was notified by his immediate commander of his initiation of action to separate him with a general discharge under the provisions of Army Regulation 635-200, chapter 14, for commission of a serious offense. The reasons for the proposed action was the assault of his wife and being found in possession of two unregistered, improperly stored, loaded weapons. He was advised of his right to consult with counsel. The remaining pages of the notification are not in the applicant's available records for review.

20. On 15 March 2022, the applicant acknowledged having been advised by his consulting counsel of the basis for the contemplated action to separate him for commission of a serious offense under the provisions of Army Regulation 635-200, chapter 14 and the rights available to him. He waived consideration by an administrative separation board and waived consulting counsel representation. He indicated he believed he does suffer from PTSD or TBI as a result of deployment overseas during the previous 24 months.

21. In an undated, self-authored statement in his own behalf, the applicant indicated:

a. He would like to make a statement for those reviewing his case to clear up any doubts about his rehabilitation and treatment since the incident with his wife. Prior to the incident with his wife, he was suffering for an attack he sustained while deployed in Ukraine. He was viciously beaten, extorted, and robbed, which led to his many injuries, both physical and mental. After the attack, he had four broken teeth, a broken rib, and a broken hand and the company he was with did nothing to help him with these injuries. He felt abandoned by his unit, which led him to have severe mental instability along with his physical ailments.

b. For months he wanted to end his life while in Ukraine. He reached out to Behavioral Health while in Ukraine and also back in the States, after knowing they were finally sending him back early in September. However, at the time, he was completely unaware of everything wrong with him other than depression and physical pain. Nonetheless, when he was at the airport in Ukraine, a translator there noticed his pain by the way he looked and feeling moved, offered to take him to a nearby hospital there at the airport in Kyiv, to evaluate his injuries. While there they found he had multiple broken bones in his face, hand, and ribs, which resulted in him getting a morphine shot and morphine packets for his trip back. That was the only treatment he received up to that point, with over 2 months of constant pain and the refusal of a medic to professionally treat him. This led to his poor mental state when he came back to the States with his family.

c. When he came home, his wife could tell there were more issues with him than just physical ones. He was mentally unstable and developed alcoholic behavior, which was the only self-treatment he had in Ukraine, and led to many arguments. This led to his mental breakdown the day of the incident, also leading to him getting help. He was depressed and is still depressed. In Ukraine, he felt nobody cared about him and he felt that way when he got back home. He believed he was better off dead and didn't want to live anymore. After he and his wife argued, he grabbed his gun and ran upstairs. He put the gun to his head and was ready to end it, but something told him to wait and get help first because he could hear his daughter downstairs asking his wife if daddy was okay. He never meant to cause a scene or spread his misery to his family or company. He didn't know what was wrong with him, but he knew he truly needed help, which led him to the psychiatric ward.

d. After the incident, he immediately went to the psychiatric ward and told them everything he was feeling and attempted in suicide. They enrolled him and he finally began to get the help he needed. While there, they were able to identify his mental issues, which were adjustment disorder, depression, severe anxiety, and PTSD. He was under constant stress and had daily nightmares of the attack in Ukraine. He is truly grateful to be alive; however, that took a toll on his stability and he was not aware of these issues and their severity due to the lack of treatment prior to the psychiatric ward. This began his rehabilitation back to the stable condition he now is in as a result of the treatment he received since the incident with his wife.

e. Once he was released from the psychiatric ward, he had proper medication that treated his mental instabilities and was finally able to get his life back together, as it is now. Since then, he has gone to IOP, which is the Intensive Outpatient Program to continue making progress on treating his PTSD, suicidal ideations, and depression. After he graduated from IOP, he immediately went to Addictions Medicine Intensive Outpatient Program (AMIOP) to treat the alcoholism he developed in Ukraine. Additionally, he has gone to Behavioral Health every week since September 2021 until March 2022. He has gone to marriage counseling to address his wife's insecurities, which has dramatically helped to make their life great again. Since all this occurred, he can say he is sorry all of this happened, especially to his wife and kids, but he is grateful for all the treatment he was able to get and return to the stable ideology he has today.

f. He wishes he could take away all his mental agony and that all of this never happened, but he cannot. However, he can truly say he is a better man than he has ever been and can only ask for forgiveness for waiting to get the treatment he truly needed. Please take into consideration everything that happened to him, how he was truly in a bad mental state, and sought treatment to prevent himself from getting worse or killing himself. He now has a reason to live and has found peace within. He asks for empathy in your decision making.

22. On 24 March 2022, the applicant's battalion commander recommended approval of the applicant's general discharge under the provisions of Army Regulation 635-200, chapter 14, for commission of a serious offense.

23. On 12 April 2022, the applicant's brigade commander recommended approval of the applicant's general discharge under the provisions of Army Regulation 635-200, chapter 14, for commission of a serious offense.

24. On 23 May 2022, the Deputy Commanding General, 1st Special Forces Command (Airborne) directed the GOMOR pertaining to the applicant be file in his Army Military Human Resource Record (AMHRR).

25. On 29 July 2022, the approval authority directed the applicant's general discharge under the provisions of Army Regulation 635-200, chapter 14, for commission of a serious offense.

a. He indicated he reviewed the recommendation of the applicant's MEB and found the medical conditions were not the direct or substantial contributing cause of the conduct that led to the recommendation for administrative separation.

b. He further determined that other circumstances of the individual case did not warrant disability processing instead of further processing for administrative separation.

26. The applicant's DD Form 214 shows he was given a general discharge under honorable conditions on 11 August 2022, under the provisions of Army Regulation 635-200, due to misconduct (Serious offense), with corresponding separation code JKQ. He was credited with 7 years, 5 months, and 25 days of net active service.

27. An undated statement from the applicant's wife, which has been provided in full the Board for review, details her account of one of the incidents with her husband.

a. In pertinent part, she indicates she wanted to look at her husband's phone to see if he was chatting with another female because she was jealous. She confronted him and they began to argue, after which he got angry that she doesn't trust him and he began drinking. He grabbed his phone in the room and told her he would kill himself. She tried to stop him and accidentally sat down and cried because he ran upstairs and shut the bedroom door, which she couldn't open and worried he would hurt himself.

b. She further details the situation over two pages and in pertinent part states she eventually decided to call the victim advocate since she didn't have any friends to talk to, after which they called the police, and she told them what happened while she was in a very emotional state and lied. Sometimes she does things without thinking about the outcome, her story got twisted, and her husband was charged.

c. It was just a misunderstanding. He never hurt her; he is a peaceful and loving father and husband who didn't deserve to be kicked out of the Army. He does everything he needs to do and served for almost 8 years. It is very unfair; he obviously needs help and she didn't know all of his issues until he received treatment. All the stresses he has been through have been enough punishment.

28. The applicant provided 11 additional character statements written by Soldiers with whom he served, all of which have been provided in full to the Board for review, and in pertinent part reflect the applicant as a person of character and a respected Soldier.

29. A VA letter, 8 March 2023, shows the applicant has one or more service-connected disabilities with a combined evaluation of 100 percent effective 1 December 2022, and that he is totally and permanently disabled solely due to his service-connected disabilities effective 12 August 2022.

30. An American Military University Certificate shows the applicant earned the degree of Bachelor of Arts in Management and graduated Magna Cum Laude effective 1 April 2023.

31. 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.

32. 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.

33. MEDICAL REVIEW:

1. The Army Review Boards Agency (ARBA) Medical Advisor reviewed the supporting documents, the Record of Proceedings (ROP), and the applicant's available records in the Interactive Personnel Electronic Records Management System (iPERMS), the Health Artifacts Image Management Solutions (HAIMS) and the VA's Joint Legacy Viewer (JLV). The applicant requests for his MEB to be reinstated. He contends that he was unjustly punished because his injuries sustained in Ukraine affected his actions. He stated that he returned early from my deployment due to my injuries that led me to multiple broken bones/fractures in my face, ribs, PTSD, TBI, and a broken hand. In his application to ABCMR, the applicant requests that his MEB be reinstated and that he receive medical retirement. He stated that he was suffering from injuries sustained during a physical assault while in Ukraine and this contributed to the incident with his wife.

2. He was deployed to Ukraine 20210617-20210902. He stated that he sustained 4 broken teeth, a broken rib, and a broken hand. He reported during a medical encounter that while in Ukraine, he was scammed out of money on 2 separate occasions when he was out drinking alone—he was forced to pay a large bar bill each time. On the second occasion after initially refusing, he was physically assaulted by several locals resulting in multiple injuries including a broken rib.

3. The electronic medical record did not show a clinic visit while he was in Ukraine, for injury due to physical assault. The record did reveal that he was seen on 13May2021 (prior to Ukraine deployment) and 02Jun2021 (while deployed) for reported “kicked in the chest” injury 4 days prior during combatives (13May2021 Primary Care Note Robinson Military Medical Home). He had right lower anterior lower rib pain. He was seen 04Jun2021 by dental services for OAT (oral appliance therapy) for first-line treatment for sleep apnea. No issues including trauma were noted. He was seen on 05Sep2021 reporting having been told a few days prior in the emergency room that he had multiple fractures in the left hand that may need surgery in the future. He was complaining of increased pain, and he had run out of medication. He reported that he had slipped approximately a week prior at the gym in Ukraine (05Sep2021 Emergency Department Evans Army Community Hospital). On 07Sep2021, he was seen for left hand fourth metacarpal fracture and fracture in the 9th right rib. He reported that he slipped while exercising on the ground and experienced pain and heard a 'pop' in left hand. And the rib fracture was from being jumped in a bar in the Ukraine about one month ago (Primary Care Note Robinson Military Medical Home).

4. On 15Sep2021, the applicant physically assaulted his wife (documented by Police Report). On 17Sep, he indicated that command referred him for BH services. An FAP investigation ensued. He also reported manifesting significant alcohol dependence relaying that he “gets the shakes” when not drinking and drinking “eye openers” (22Sep2021 Evans Army Community Hospital Progress Note). His BH history included FAP in 2017 for allegations of adult physical abuse and child emotional abuse. And FAP in 2018 for allegations of child physical abuse. In July 2020, he had a BH intake and 3 follow-ups in EBHT10 for Anxiety. On 22Sep2021, he was admitted to the hospital for active suicide ideation/attempt—he had a loaded gun in his hand but did not follow through because his youngest daughter was in the house.

5. On 14Dec2021, the applicant was referred into IDES by BH for Chronic Adjustment Disorder. He was command referred for Report of Mental Status Evaluation completed 28Feb2022. His behavior and impulsivity were in normal range. His cognition and perception were also normal. His risk for harm to self was ‘intermediate’. He was not cleared for administrative separation due to Adjustment Disorder and he was in the IDES process. A MEB NARSUM (narrative summary) completed on 03Mar2022 determined that the applicant’s Other Specified Trauma and Stressor-related Disorder did not meet medical retention standards. On 15Mar2022, the applicant was notified

that he was going to be separated for physically assaulting his wife, brandishing a pistol, and pushing her causing injury to her right ankle on 15Sep2021.

6. During the 11Feb2022 Initial PTSD DBQ, he reported while in Ukraine in August 2021, he sat down to eat at a restaurant, and he was told that he owed 1000K. He stated that he was dragged to the back, and he was beaten and robbed by several men. The applicant also reported during 31Jan2022 Initial TBI DBQ, having sustained TBIs: In 2015 he had a hard landing with LOC at Ft Benning during airborne operation; in 2016 during training incident in Canada he broke his leg and had LOC during a hard landing; in 2021 while serving in Ukraine, he was kidnapped and physically assaulted by Ukrainian mafia. His MOCA score 28/30 and SLUMS 28/30 were both normal.

7. Other Specified Trauma and Stressor-related Disorder was the sole condition determined to not meet retention standards. The MEB determined that Chronic Adjustment Disorder and PTSD symptoms met retention standards. The MEB did not determine that the applicant had physical conditions which failed retention standards. He did not have a P3 physical profile for any of his physical conditions including but not limited to left hand, right ribs, right knee, sleep apnea, right ankle, and bilateral flat feet and plantar fasciitis.

8. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The MEB diagnosis Other Specified Trauma and Stressor-related Disorder is potentially mitigating.

(2) Did the condition exist, or did the experience occur during military service? Yes. The applicant reported experiencing a traumatic assault while in service.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. The applicant was discharged due to physically assaulting and causing injury to his wife. He was also found in violation for having 2 unregistered firearms. These offenses are not considered part of the natural of his Other Specified Trauma and Stressor-related Disorder or TBI diagnoses. In addition, despite these conditions, he could discern right from wrong and adhere to the right. That notwithstanding, under Liberal Consideration, the applicant's assertion that his conditions contributed to his offenses is sufficient for the Board's consideration of discharge upgrade or change in reason for separation.

BOARD DISCUSSION:

After reviewing the application and all supporting documents, the Board determined relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. Based upon the available documentation and the findings and recommendations of the medical advisor, the Board concluded there was insufficient evidence of an error or injustice warranting a change to the characterization of service and/or the narrative reason for separation.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
■	■	■	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

REFERENCES:

1. 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. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records (BCM/NRs) regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. BCM/NRs may grant clemency regardless of the court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds. This guidance does not mandate relief, but rather provides standards and principles to guide BCM/NRs in application of their equitable relief authority. In determining whether to grant relief on the basis of equity, injustice, or clemency grounds, BCM/NRs shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment. Changes to the narrative reason for discharge and/or an upgraded character of service granted solely on equity, injustice, or clemency grounds normally should not result in separation pay, retroactive promotions, and payment of past medical expenses or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded service characterization.
3. Title 10, U.S. Code, chapter 61, provides the Secretaries of the Military Departments with authority to retire or discharge a member if they find the member unfit to perform military duties because of physical disability. The U.S. Army Physical Disability Agency is responsible for administering the Army physical disability evaluation system (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.

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

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

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

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

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

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. The case of a Soldier charged with an offense under the Uniform Code of Military Justice (UCMJ) or who is under investigation for an offense chargeable under the UCMJ which could result in dismissal or punitive discharge, may not be referred for, or continue, disability processing unless:

- the investigation ends without charges
- the officer exercising proper court-martial jurisdiction dismisses the charges
- the officer exercising proper court-martial jurisdiction refers the charge for trial to a court-martial that cannot adjudge such a sentence

e. An enlisted Soldier may not be referred for, or continue, physical disability processing action when action has been started under any regulatory provision which authorizes a character of service of under other than honorable conditions. If the case comes within these limitations, the commander exercising general court-martial jurisdiction over the Soldier may abate the administrative separation. This authority may not be delegated. A case file may be so referred if the general court-martial convening authority finds the following:

- the disability is the cause, or a substantial contributing cause, of the misconduct that might result in a discharge under other than honorable conditions
- other circumstances warrant disability processing instead of alternate administrative separation

5. 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.

6. Army Regulation 635-200 (Active Duty Enlisted Administrative Separations) or (Personnel Separations – Enlisted Personnel) sets forth the basic authority for the separation of enlisted personnel.

a. Chapter 3 (Character of Service and Description of Separation) provides:

(1) An honorable discharge is a separation with honor. The honorable characterization is appropriate when the quality of the Soldier's service generally has met the standards of acceptable conduct.

(2) A general discharge is a separation from the Army under honorable conditions. When authorized, it is issued to a Soldier whose military record is satisfactory, but not sufficiently meritorious to warrant an honorable discharge.

(3) A discharge under other than honorable conditions is an administrative separation from the service under conditions other than honorable. It may be issued for misconduct, fraudulent entry, security reasons, or in lieu of trial by court-martial when the reason for separation is based upon a pattern of behavior that constitutes a significant departure from the conduct expected of Soldiers of the Army or when the reason for separation is based upon one or more acts or omissions that constitutes a significant departure from the conduct expected of Soldiers of the Army. Examples of factors that may be considered include the following:

- use of force or violence to produce serious bodily injury or death
- abuse of a special position of trust
- disregard by a superior of customary superior-subordinate relationships
- acts or omissions that endanger the security of the United States or the health and welfare of other Servicemembers
- deliberate acts or omissions that seriously endanger the health and safety of other persons

b. Chapter 14 (Separation for Misconduct) establishes policy and prescribes procedures for separating members for misconduct. Specific categories include minor disciplinary infractions, a pattern of misconduct, commission of a serious offense, use of illegal drugs, and convictions by civil authorities. Action will be taken to separate a member for misconduct when it is clearly established that rehabilitation is impracticable or is unlikely to succeed. A discharge under other than honorable conditions is normally considered appropriate for a Soldier discharged under this chapter.

7. Title 38, U.S. Code, section 1110 (General – Basic Entitlement) states for disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

8. Title 38, U.S. Code, section 1131 (Peacetime Disability Compensation – Basic Entitlement) states for disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during other than a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

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

//NOTHING FOLLOWS//