

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 22 November 2024

DOCKET NUMBER: AR20240003086

APPLICANT REQUESTS:

- reconsideration of her previous request to correct her record to show she was retired due to a permanent disability
- in lieu of a medical retirement, referral to the Disability Evaluation System (DES)

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

- DD Form 149 (Application for Correction of Military Record)
- Counsel's Request for Reconsideration, 29 December 2023
- Applicant's Supplemental Declaration, 27 December 2023
- Memorandum in Support of Application, with exhibits A through L
 - Exhibit A: DD Form (Certificate of Release or Discharge from Active Duty), for the period ending 30 September 2000
 - Exhibit B: Applicant's Declaration, 29 January 2019
 - Exhibit C: Spousal Declaration, 29 January 2019
 - Exhibit D: Military Medical Records
 - Exhibit E: Separation Memoranda, Counseling, and Examination
 - Exhibit F: Emergency Room Medical Records
 - Exhibit G: Department of Veterans Affairs (VA) Notice of Decision
 - Exhibit H/I: VA Notice Requesting Additional Evidence
 - Exhibit J: VA Notice of Disagreement
 - Exhibit K: VA Decision on Notice of Disagreement
 - Exhibit L: Letter of Recommendation

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20190003244 on 1 April 2021.

2. Counsel states:

a. The applicant served her country honorably in the U.S. Army from 25 August 1999 to 20 September 2000. She was administratively separated because of "personality disorder;" a narrative that the Army used in direct violation of applicable Department of Defense (DOD) and Army Regulations (AR) and guidelines and that is wholly unsupported by her military and medical records. The applicant was suffering from major depressive disorder (MDD) as a result of repeated, documented sexual harassment and sexual assault by her superiors. Instead of being administratively separated, she should have been medically retired due to a compensable disability, specifically, MDD resulting from the military sexual trauma (MST) she endured during active service.

b. The applicant previously sought to correct this error. On 29 January 2019, she petitioned the Board to change the Separation Authority, Separation Code, and Narrative Reason for Separation from administrative separation under AR 635-200 (Active Duty Enlisted Administrative Separations), paragraph 5-13, Personality Disorder, to a medical retirement under Title 10, U.S. Code, section 1201 and AR 635-40 (Personnel Separations-Physical Evaluation for Retention, Retirement, or Separation), as unfit by reason of disability due to MDD, and recurrent, moderate migraines as a secondary diagnosis.

c. After reviewing her application, the Board granted her only partial relief. Acknowledging the trauma she experienced, the Board concluded there was sufficient evidence to change the narrative reason for separation to "Condition, not a Disability," the separation authority to Chapter 5-17, and the separation code to JFV. However, the Board determined there was insufficient evidence to grant a medical retirement. In reaching this determination, the Board stated:

"The applicant met retention standards at the time of her discharge. It is acknowledged that she has a service-connected disability for MDD and migraine headaches. This determination alone, however, does not automatically mean that military medical disability/retirement is warranted She had depressive symptoms but still met retention standards at the time of discharge. Military medical retirement/disability is not warranted."

d. The applicant files this Request for Reconsideration to supply materials not previously presented to or considered by the Board in making its prior determination - a medical report from a highly-qualified clinical psychologist. In addition, she also presents a supplemental declaration. This new evidence clearly demonstrates that the applicant did not meet retention standards at the time of her discharge, that medical retirement was in fact warranted, and that a further correction of her record is necessary.

e. The Board's decision to change the narrative reason for separation for the applicant is a welcome start, but it does not go far enough. Almost immediately upon arriving at her first duty station, the applicant suffered repeated sexual trauma by multiple superiors and, as a direct result, she experienced anxiety, stress, and depression-symptoms that she never experienced prior to her enlistment. Ultimately, as a direct result of her continued, documented sexual trauma, the applicant could no longer continue to effectively perform her duties and serve in the Army. She was released from active duty on 20 September 2000.

f. The medical report provided as new evidence definitively concludes that the applicant did not meet retention standards at the time of her discharge from the Army due to MDD caused by MST. Therefore, her records should reflect a medical retirement under Title 10, U.S. Code, section 1201 and AR 635-40 for being unfit due to MDD. She presents the report of Dr. RM (clinical psychologist), Ph.D., and Ms. KH (clinical psychologist). RM is a licensed clinical psychologist and Fellow of the American Psychological Association. She is a Clinical Professor at the George Mason University and is the director of its Center for Psychological Services. Dr. RM has been working with the VA for 10 years assessing veterans with PTSD and other mental health conditions. She has been supervising comprehensive assessments and medical record reviews for veterans with mental health concerns for the past nine years. Ms. KH is a clinical psychology doctoral student at George Mason University. She has four years of research expertise in trauma in military populations and three years of expertise assessing and treating veterans using evidence-based practices. Dr. RM and Ms. KH reviewed the applicant's military and medical records at length, and concluded the following:

"By definition, a personality disorder is an enduring pattern of thinking, feeling, and behaving that is relatively stable over time (DSM-IV; American Psychiatric Association, 1994; DSM- V; American Psychiatric Association, 2013). The applicant's symptoms were not stable over time, e.g., her mental health symptoms only appeared *after* exposure to trauma via MST. Furthermore, the DSM warns against the exact circumstances the applicant was diagnosed under, "these [personality disorders] must be distinguished from characteristics that emerge in response to specific situational stressors." She did not qualify for a diagnosis of a personality disorder, given that she did not present any mental health symptomology before being exposed to a specific situational stressor, MST.

The act of erroneously diagnosing MST survivors with personality disorders, instead of medically retiring MST survivors due to post-MST disorders (e.g., MDD, post-traumatic stress disorder (PTSD), etc.), has been well documented by organizations such as the Human Rights Watch (HRW, 2016). It is our expert opinion that the applicant's diagnosis of personality disorder and subsequent discharge was

erroneous and inappropriate given the nature and onset of her symptoms. There is no evidence of her having a personality disorder during her time serving in the Army. Her symptoms are clearly attributable to another mental health disorder: MDD. As such, it is more likely than not that she should have been diagnosed with MDD. We are also reasonably certain that her symptoms (sleep disturbance, nightmares, avoidance, negative affect, feeling isolated, hypervigilance, etc.) also fit the diagnosis of post-traumatic stress disorder (PTSD) in addition to major depressive disorder (MDD). Further evidence of this conclusion can be found in her psychiatric evaluation completed in September 2013. While she was diagnosed with MDD, as likely as not related to military service, she was not diagnosed with PTSD. However, based on our review of records, the applicant did meet criteria for PTSD at this time, more likely than not resulting from her military service.”

g. Dr. RM and Ms. KH further concluded that the applicant’s MDD - acquired as a result of the MST she suffered - caused persistent impairment during her time in the military (and after discharge), including occupational and social impairment, difficulty engaging in work relationships, isolation from others, and a decrease in work efficiency, which rendered her unable to continue to perform her military duties.

h. The applicant first joined the Army on 25 August 1999. Before enlisting, the Army evaluated her physical and mental health. The records from these examinations, dated 23 April 1999, reflect that she had a “normal” psychiatric profile. She later excelled in basic training. Her commanding officer during basic training, described the applicant as “one of the most competent Soldiers in the unit.” He also attested to the strength of her character, touted her physical accomplishments, and commended her enthusiasm and attention to detail. She subsequently completed all training to become an executive administrative assistance, primary military occupational specialty (MOS) 71L.

i. On 14 March 2000, she received orders to join the 2nd Infantry Division in South Korea as an executive administrative assistant for a colonel. The job required a security clearance, which she never obtained. As a result, she was transferred to work for the Division Inspector General (IG). Almost immediately upon her transfer, a noncommissioned officer (NCO) began visiting her room privately to make unwanted sexually charged comments and advances towards the applicant. One night, the applicant woke up to find him at her bed nibbling on her leg in a sexual manner. After this sexual assault, she started to experience problems sleeping, migraines, and other physical ailments. She reported the sexual assault to her command, but the command did not remove the NCO from the unit, nor did it prevent any future interaction between the assailant and the applicant. The Army failed to ensure the applicant’s safety, and she continued to interact with the NCO on a day-to-day basis until the arrival of First Sergeant (1SG) B. Only then did the Army transfer the NCO to a different unit.

j. 1SG B joined the applicant's unit not long after the NCO's sexual assault, but, unfortunately, his arrival did not result in an improvement in her situation. In part due to his arrival soon after the initial sexual assaults, 1SG B quickly gained the applicant's trust and confidence. This trust was short-lived. Just as the NCO had, 1SG B began to make unwanted sexual advances towards the applicant, including inappropriate touching and hugging. He created an environment of harassment and constantly asked the applicant about her dating life and personal life, even accompanying her around the base when it was not appropriate.

k. As the situation escalated, she felt overwhelmed and powerless, as she was coping with sexual harassment, and sometimes assault, by 1SG B. Her stress and depression became worse, and her problems with sleeping, migraines, and other physical ailments continued. She started to entertain suicidal thoughts, and one night she even poured a bottle of pills onto her bed in considering whether to take her own life. Fortunately, she saved herself by calling the suicide hotline. The suicide hotline, however, chose to notify 1SG B. He came to the room and placed his hand on her face in an intimate fashion, causing even more discomfort for the applicant. That very night she saw her commanding officer, who scolded her for faking a suicide attempt in order to get out of the Army. This accusation happened a mere few months after (and in stark contrast to) when her previous commanding officer commended her for her enthusiasm and competence.

l. Considering the attempted suicide, the Army placed the applicant on suicide watch, and she was transferred to work directly for 1SG B. The Army also conducted a medical evaluation on 26 June 2000. The examining physician opined that the applicant was not amenable to coercion or retraining because the additional stress could cause further deterioration. He ultimately diagnosed the applicant with a personality disorder. In recommending discharge, he noted, "[t]he above disorder is so severe that this Soldier's ability to function effectively in the military environment is significantly impaired." The applicant continued to work under 1SG B following the medical evaluation. At first, she performed mundane tasks such as shining his trophies. During this time, he further engaged in sexual harassment, including placing his hand on her face to "calm" her, placing his hand on her leg, and other intimate gestures when he would go to her room to check on her. The applicant felt that she could not report his behavior because she worried that no one would believe her considering her commanding officer's accusation that her suicide attempt was "fake."

m. In the course of her discharge proceedings, an investigator spoke with the applicant about 1SG B, and the applicant told him the full story of 1SG B's sexual harassment and sexual abuse. Despite reporting his behavior, the applicant was forced to continue to report to 1SG B. Moreover, 1SG B found out about her report and began to give her more laborious tasks, including scrubbing floors. 1SG B then moved her to the motor pool to work under his friends. His friends knew that the applicant reported his

behavior, and they treated her like a pariah. They made nasty comments, sent threatening letters, and she felt as if the male Soldiers were teaming up against her. It became increasingly difficult for her to maintain any positive relationships with her fellow Soldiers.

n. As a result of these events, her mental state continued to get worse. Her suicidal thoughts persisted. She did not want to end her life, but she felt that it was the only means to escape her situation. She became increasingly isolated and alone. She experienced night terrors, frequent migraines, and struggled to sleep. Due to her lack of sleep and exhaustion, she was unable to focus during the day on her tasks. She even exaggerated pain in order to sit out physical activities and field training. She lost any concept of time and does not know if this period of time in the Army lasted for days, weeks, or months. To this day, she suffers from memory loss and only remembers some of the worst parts of her experience in the Army.

o. At some point, a new 1SG and commander came to the unit, and they spoke to the applicant regarding her circumstances almost immediately. Following the meeting, she was processed out of the military quickly. On 7 August 2000, she was counseled by the new commander regarding her separation from the military. The commander's report stated that the applicant was not likely amenable to coercion or retraining, and on 30 August 2000, her commander initiated action to separate her based on the misdiagnosed personality disorder. He described mitigating circumstances "surrounding her mental state" that were "no fault of her own," including "continued sexual harassment by a NCO within" her company, for which "nothing was done and she was forced to deal with these unwanted sexual advances." The Army discharged her on 20 September 2000.

p. After her discharge, the applicant continued to experience symptoms, including anxiety, nightmares, fear, and depression, and she did not receive proper medical treatment for many years. Eventually, the applicant managed to secure employment, enabling her to help support her family, but she often called in sick when she was coping with symptoms aggravated by stress and anxiety. When faced with a difficult situation with a male supervisor, the applicant would quit her job without securing another position due to the overwhelming fear and anxiety. She never experienced these symptoms before her service in the military.

q. On 29 October 2012, the applicant went to the emergency room for a migraine and dehydration due to nausea and vomiting. After this experience, the applicant began to reevaluate her situation and sought help from the VA. The VA required her to be evaluated by medical personnel to diagnose her physical condition and to determine whether her condition was service connected. In a report, dated 3 September 2013,

Dr. PH, concluded that the applicant did not have a personality disorder, but rather had MDD, recurrent, moderate and alcohol abuse in full sustained remission (for which she experiences no current symptoms given the length of her sobriety).

r. After additional examinations by medical personnel, the VA granted the applicant service connection for MDD connected to the sexual harassment that she endured, rated as 50% disabling, and migraines due to mental illness (connected to MDD, also rated as 50% disabling, for a combined evaluation of 80%). Besides the one diagnosis of personality disorder in the Army, the applicant has never been diagnosed with personality disorder. As previously stated, she requested that her records be corrected to change the Separation Authority, Separation Code, and Narrative Reason for Separation from an incorrect administrative separation under AR 635-200, paragraph 5-13; personality disorder, to reflect a medical retirement under Title 10, U.S. Code, section 1201 and AR 635-40 for being unfit by reason of disability due to MDD, recurrent, moderate and migraines, as a secondary diagnosis, with at least an 80% disability rating.

s. On 1 April 2021, the Board rendered a decision, granting only partial relief. The Board determined that there was sufficient evidence to grant changing the narrative reason for separation to "Condition, not a Disability" but found insufficient evidence to warrant medical retirement.

t. The applicant suffered from compensable MDD and Not a Personality Disorder. At the time of her discharge, DOD and Army regulations permitted an administrative discharge for conditions "not amounting to disability," such as personality disorders. AR 635-200 (2000), paragraph 5-17(a); DOD Instruction (DODI) 1332.38 (1996), paragraph E4.13.1.4. By contrast, compensable mental disorders, such as affective or mood disorders, were not eligible for administrative discharge and required referral into the Disability Evaluation System (DES) per DODI 1332.38, paragraph E4.13.3. The applicant's military and medical records, in addition to her Supplemental Declaration, evidence that she suffered from MDD that originated in service following her MST. Dr. RM and Ms. KH corroborate these findings in the Medical Report. Specifically, the Medical Report states that "[The applicant's] MDD caused persistent impairment during her time in the military and after discharge." The Medical Report further states that "[The applicant] did not qualify for a diagnosis of a personality disorder, given that she did not present any mental health symptomology before being exposed to a specific situational stressor, MST." Rather, she met the criteria for MDD and PTSD, likely related to her MST. In sum, at the time of her discharge, the applicant suffered from a mood disorder-MDD-which she continues to suffer from to this day.

u. The applicant began experiencing symptoms of MDD while she was in the Army, not before. Her initial medical examinations indicated "normal" findings on her psychiatric and physical examinations. At this time on 23 April 1999, the applicant was

deemed to be physically and mentally healthy. Her medical records and her Supplemental Declaration, however, indicate a significant change in psychological functioning following the MST perpetrated against her starting in March 2000. Specifically, shortly after she arrived in South Korea, an NCO started making sexually-charged and unwanted advances towards her. After suffering a physical assault one night, she started to experience sleeping problems, migraines, and other physical ailments. She never experienced these problems before the assault.

v. The applicant's records reflect many of the symptoms she experienced, including a depressed mood, sleep disturbance and frequent waking in the middle of the night, feelings of hopelessness, recurrent thoughts of suicide, and a diminished ability to concentrate and think. According to the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV; American Psychiatric Association, 1994), which should have been used to assess her during her service, these are five of the nine symptoms of MDD. As a result, Dr. RM and Ms. KH conclude in the Medical Report that it is more likely than not that her MDD was related to her MST, which occurred while she was in military service.

w. Prior to her exposure to MST, the applicant never experienced any of the above symptoms. As stated in the Medical Report: "[e]mpirical research corroborates this conclusion; major depressive disorder is heavily correlated with military sexual trauma in female soldiers (Cogle et al., 2009; Kelly et al., 2011; Kimmerling et al., 2007). In fact, if a female Soldier experiences MST while in active duty, they are 2.3 times more likely to develop major depressive disorder (Kimmerling et al., 2007)."

x. The conclusion that the applicant's MDD developed due to her MST is also supported by her commander's statements recommending her discharge on 30 August 2000. He noted in his report that the applicant's health issues were "*the result* of unfortunate circumstances that she has been subjugated to [e.g., MST] and are no fault of her own." The health issues referred to by her commander simply did not exist prior to her experiencing MST during her service in the Army. In fact, as stated above, less than a year earlier, her medical reports showed no history of psychological issues, and her superiors gave her glowing recommendations regarding her character and mental fitness.

y. Simply put, there is no doubt that [Applicant] suffered from MDD, a compensable disability under Title 10, U.S. Code, section 1201, as a direct result of her MST that occurred while she served in the Army through the time of her discharge. Given that her symptoms do not predate her service with the Army, but rather were triggered by situational stressors-notably MST-she also did not meet the diagnostic criteria for a personality disorder.

z. [Applicant's] MDD rendered her unfit for military service. A Soldier is considered unfit when the preponderance of evidence establishes that a Soldier, due to disability, is unable to reasonably perform the duties of their office, grade, rank, or rating.

aa. In making a determination of unfitness, the Board must consider the following criteria: 1) a medical condition's risk to the health of the Soldier or to the welfare of other Soldiers were the Soldier to continue on active duty; 2) any unreasonable requirements on the Army to maintain or protect the Soldier; and 3) a Soldier's ability to perform their duties-including their ability to perform common military tasks, take the physical fitness test, deploy, and maintain any special qualifications.

bb. The applicant's MDD presented significant risk to her health. Her MDD as a result of the MST she experienced resulted in her attempting to take her own life. This represents the ultimate risk to her safety. Further the Medical Report states:

"After multiple acts of MST were perpetrated against her, her mental health and military performance experienced a significant downturn. These changes are evidenced in medical records (15 May 2000; 26 June 2000; 21 July 2000) and corroborated by Captain (CPT) G and Commander N, who recommended discharge (7 August 2000; 30 August 2000). The effects of her MST experience were stated to cause "progressive mental damage" which resulted in "a suicide gesture" (30 August 2000)."

cc. At the time of her discharge, the applicant was experiencing serious mental issues, including suicidal thoughts. These thoughts existed because of her MDD, which in turn was brought on by MST. Continuing to work in the environment of her trauma would have likely caused her mental health to further deteriorate. The Medical Report suggests that she may even have PTSD as a result of her MST. Further, based on a September 2013 evaluation, she indicated a threat to her physical integrity due to her MST, and she responded with "intense fear and horror." The Medical Report concluded that this potential PTSD is more likely than not connected to her military service and that her continuing decline in her mental health was attributable to her MDD (as a result of MST) and possible PTSD. All of these facts support that the applicant's mental and physical health were both at substantial risk if she was forced to continue her service in the Army, particularly under the supervision of her assailants.

dd. The Army could not reasonably protect her from further trauma. On multiple separate occasions, the Army failed in its duty to provide a safe environment for the applicant. Indeed, as stated above, CPT G noted that the applicant's health issues were "the result of unfortunate circumstances that she has been subjugated to [e.g., MST] and are no fault of her own". Her record further reflects her many efforts to face her assailants and achieve a more healthy and sustainable work environment within the Army. Nevertheless, with each reassignment, and each effort on her part to trust the

Army and her superiors, she was unfortunately met with additional sexual harassment and abuse in the form of MST that caused and exacerbated her MDD. In addition to the MST itself, she was stigmatized after her efforts to report sexual assault by her superiors, and likely would have faced additional stigma and ridicule had she been forced to continue to serve in the Army. This environment created a sense of constant dread and further perpetrated abuse on the applicant.

ee. It is clear that the Army could not reasonably provide her safety and security. As a result, she was unfit to remain in active service with the Army. The applicant's MDD rendered her unfit to perform the duties of her office, grade, rank or The Army did not refer her to a Physical Evaluation Board (PEB) at discharge because she was administratively separated, rather than properly found to have a disability. Had the applicant been referred to a PEB, it is clear that she would have been found unfit for military service.

ff. In determining whether a Soldier can reasonably perform her or his duties, the following considerations are taken into account: 1) whether the Soldier is able to reasonably perform the duties of her office, grade, rank, or rating; 2) whether the Soldier is medically prohibited from taking the Soldier's required physical fitness test; 3) whether a Soldier's grade or rank requires deployability; and 4) whether the Soldier's condition causes loss of qualification for any specialized duties, and if reassignment is feasible.

gg. Even without such a finding by a PEB, it is apparent that her MDD seriously impacted her ability to carry out the duties of her rank. The Medical Report states:

"Review of the medical records and personal statements during the applicant's time in the military consistently suggest that the applicant's MDD caused persistent impairment during her time in the military and after discharge. During her time enlisted, she experienced social impairment to include difficulty engaging in work relationships and isolation from others."

hh. Social impairment following MST is common. Her experience is consistent with this diagnosis. Poor sleep, loss of concentration, a depressed mood, night terrors, and suicidal thoughts all caused a decrease in her work efficiency as shown by the change in her performance reviews. The applicant had trouble focusing on her tasks due to her lack of sleep and exhaustion. In addition, she could not maintain positive social relationships with her fellow soldiers. She was treated like a pariah and felt as if the male Soldiers were teaming up against her and blaming her for tattling on the 1SG. She felt completely isolated.

ii. At the time of her discharge, it is clear that she no longer could effectively work in the Army. She had suicidal thoughts because she felt like there was no other way to

escape. At this point, the applicant was only performing menial tasks such as shining trophies and scrubbing floors, and she still struggled to get through the day. Her migraines and night terrors became increasingly worse, and she started to lose any concept of time, not knowing whether days, months, or weeks had passed.

jj. Although there is no evidence that she was medically prohibited from taking the required physical fitness test at the time of her discharge, the applicant's physical health also had deteriorated to a point where she was unfit to serve in the Army. Her exhaustion, continued migraines, and vomiting made it difficult for her to perform certain field training. She even exaggerated some of her pain to sit out of physical activities, and she did this because she felt that she could not tell anyone in the Army about the trauma she was experiencing.

kk. Finally, reassignment was not feasible at the time of the applicant's discharge because her MDD had deteriorated to a point where discharge from the Army was the only real solution. CPT G's assessment is particularly notable. It states that she would not be "amenable to retraining" in light of the fact that she had been "transferred to three different sections." LTC N reached a similar conclusion before CPT G. In recommending discharge, LTC N stated that the applicant lacked the ability to function effectively in a military environment. At the point of her discharge, the Army clearly felt that she could no longer effectively perform in any occupational setting due to her MDD resulting from MST. Indeed, the Army separated the applicant from active duty, despite its clear belief that she was a "fit" and capable Soldier upon her enlistment in the Army just 22 months prior.

ll. In summary, the evidence demonstrates that at the time of her discharge, the applicant was no longer able to reasonably perform the duties of her rank and grade due to her MDD, she had difficulty performing the physical fitness expectations required by the Army, and reassignment was not feasible. Therefore, she was unfit for military service at the time of her discharge.

mm. The applicant served her country honorably, and desired to continue to do so. Instead, she experienced MST at the hands of several of her superiors. This MST resulted in MDD, which ultimately prevented her from continuing in active service in the Army. The Army incorrectly administratively separated her due to a personality disorder. She clearly suffered from MDD as a result of MST. Had the Army properly diagnosed her at the time of her discharge, she would have been evaluated by a PEB. This process would have found the applicant medically unfit for continued military service and would have granted her a medical retirement.

nn. The Army has partially righted this wrong. It has removed the stigmatizing narrative reason of personality disorder. But this did not result in a change of her status

to medically retired due to a compensable disability, specifically, MDD. The Medical Report confirms that the applicant had MDD at the time of her discharge and that she was unfit to continue to serve at the time of her discharge due to her service-connected disability. Her Supplemental Declaration corroborates these findings.

oo. Thus, the applicant respectfully requests that the Board correct her record and grant her a permanent disability in accordance with Title 10, U.S. Code, section 1201 due to the MDD she suffered as a result of MST during her service. If the Board rejects this request for correction, she respectfully requests in the alternative that she be admitted into the disability evaluation system and be properly assessed according to Army regulations.

3. The applicant provided a declaration wherein she states:

a. The first incident of sexual assault she experienced occurred while she was stationed in South Korea working in the IG's office. She told other Soldiers who were higher ranking than her about the incident, but they said to "let it go." In addition, the incident was reported to the then 1SG of the unit. This 1SG told the person who committed the harassment to leave her alone, but nothing more.

b. She was extremely discouraged by this response. Up until this point, she had put all of her energy and faith into the Army and considered herself a "lifer." In fact, she had hesitated to report the incident, but did so because she believed that it was the right thing to do, and that the Army would then step up and handle it appropriately. The Army did not do so. Then, a new 1SG, 1SG B, began working in the unit to which she was assigned. 1SG B worked to gain her trust. In fact, he initially restored some of her confidence and faith in the Army. He spoke directly with her about the first incident and offered to transfer the assailant to a different base to protect her. This made her feel safe and encouraged that he took the situation seriously. But unfortunately, as she began to trust him, he began to take advantage of her and to initiate inappropriate relations with her.

c. 1SG B began saying inappropriate things to her and eventually sexually assaulted her. She was unsure how to respond or whether, if she reported it, the Army would take it seriously. She also began to fear that she would be punished. Things began to rapidly deteriorate, and she felt helpless. Ultimately, she felt that the only way out of the situation was to take her own life, and, one night, she even poured a bottle of pills onto a bed in preparing to do so. However, she stopped the suicide attempt because she did not actually want to die. She called the suicide hotline, ultimately saving her own life.

d. 1SG B responded to the suicide hotline late at night. That very night, he made another unwanted physical advance. She then saw her commanding officer right

afterwards, and he scolded her for faking a suicide attempt to get out of the Army. Following these events, 1SG B was tasked with monitoring her.

e. She was removed from her role in the IG's office and placed under the direct supervision of 1SG B, her second aggressor, which made matters significantly worse. She was required to be under his supervision at all times and sat across from his office on a couch by his receptionist's desk. He made her perform menial tasks for him (such as shining his trophies).

f. Everyone knew she had called the suicide hotline because it was not kept confidential. It was humiliating, and she felt even more desperate and alone. The Soldiers in the unit felt that she was "just trying to get attention."

g. The IG eventually interviewed her as part of an investigation into 1SG B's behavior. She shared everything with him. As a result of her reporting 1SG B, however, 1SG B began assigning her to more laborious tasks (such as scrubbing floors).

h. During this time, things went from bad to worse. She remembers receiving hate mail from other Soldiers for reporting 1SG B to the IG. She remembers constantly feeling everyone watching her and talking about her behind her back. She remembers everyone avoiding her saying that if they talked to her she might report them too. She felt degraded, isolated, and hopeless. She had lost all trust and faith in the Army.

i. She continued to experience suicidal thoughts and ideations. She did not want to die, she just wanted to escape. She had night terrors and trouble sleeping. She experienced intense anxiety and migraines. She had difficulty physically keeping up with her day-to-day tasks.

j. She felt like she was being accused of tattling and lying about her situation. She felt that the men in the unit were teaming up against her. It became very difficult to adjust to her social environment and to develop relationships with most of her fellow Soldiers.

k. She also experienced memory loss. She had no concept of how long time was lasting it could have been days, weeks, or months. She attributes this memory loss to the trauma she was experiencing and her general anxiety and depression at the time.

l. As a result of the trauma and its effects on her, she had difficulty performing her field training and the requirements of my position. She was often excused from running or other physical tasks due to exhaustion. She had trouble focusing and performing basic work. She was fearful and exhausted and unable to continue functioning in the Army.

m. This whole experience was devastating to her. She enlisted in the Army with aspirations of serving her country for the rest of her life. She experienced sexual assault and sexual harassment and trusted the Army to appropriately protect her and handle the situation. She was not initially afraid to report her experiences, but as the Army continued to fail her, she lost confidence in the Army and herself. She became fearful, depressed, anxious, and isolated. She watched her dreams of serving in the Army fade and ultimately looked for any escape, even death. She still experiences night terrors, anxiety, and depression to this day as a direct result of her experiences.

n. She does not believe she would have been able to continue to serve in the Army. She could not physically continue to perform her job and the ongoing harassment and degradation made it impossible for the Army to protect her. Despite her initial desire to remain in the Army for life, when the Army decided to transition her out of the service, she did not contest it.

4. The applicant enlisted in the Regular Army on 25 August 1999 and was subsequently awarded military occupational specialty 71L (Administrative Specialist).

5. On 9 March 2000, she was assigned to Headquarters and Headquarters Company, 2nd Infantry Division, Camp Red Cloud, Korea.

6. Her record contains a Report of Mental Status, 26 June 2000 which shows she underwent a mental health evaluation for a personality disorder. The psychiatrist found the applicant –

- had the mental capacity to understand and participate in the separation proceedings
- she was mentally responsible
- she met the retention requirements of chapter 4, Army Regulation (AR) 40-501, Medical Services-Standards of Medical Fitness
- was not likely to be amenable to coercion or retraining. Such additional stress could cause further deterioration and result in hospitalization, psychosis, suicide gestures or attempts, or other undesirable behaviors

7. Her record also contains an undated Separation Physical wherein the applicant reported to be in good condition, but having experienced trouble sleeping, and suffering from depression or excessive worry. The military physician noted the applicant suffered from migraines, personality disorder, and lower back pain. The applicant was found qualified for administrative separation.

8. On 30 August 2000, her commander provided a memorandum to the 2nd Infantry Division, Divisional Support Command commander addressing mitigating circumstances regarding the applicant's separation. The commander stated, in effect, that the applicant

had been subjected to continual sexual harassment by a noncommissioned officer with the company and after notifying her command, it appeared that nothing was done, and she was forced to deal with these unwanted sexual advances on her own. The noncommissioned officer was eventually transferred to another unit after the advances escalated to physical contact and the progressive mental damage to the applicant manifested itself in the form of a suicide gesture.

9. On the same day the applicant's commander notified the applicant of his intent to initiate separation action against her under the provisions of AR 635-200, Personnel Separations-Active Duty Enlisted Administrative Separations, chapter 5-13, based on her diagnosis of personality disorder with a recommendation that she receive an honorable characterization of service.

10. On 31 August 2000, she acknowledged receipt of the notification, and she was subsequently advised by counsel of the basis for the contemplated separation action. She elected not to submit a statement in her own behalf and waived her right to be represented by counsel.

11. On 7 September 2000, the separation authority approved the applicant's release from active duty in accordance with chapter 5-13 of AR 635-200 and directed that her service be characterized as honorable.

12. She was honorably released from active duty on 20 September 2000, and transferred to the U.S. Army Reserve Control Group (Annual Training). Her DD Form 214 shows she completed 1 year and 26 days of net active duty service for the period. The narrative reason for separation is listed as Personality Disorder and the separation code is listed as LFK.

13. On 16 December 2021, the ABCMR, as the result of her petition for medical retirement, granted the applicant partial relief. She was issued a new DD Form 214 which lists the separation authority as AR 635-200, paragraph 5-17; the narrative reason for separation as Condition, Not a Disability; and the separation code as JFV.

14. The U.S. Army Criminal Investigation Division was unable to locate Sexual Assault records pertaining to the applicant.

15. Counsel provides:

a. The applicant's military dental and medical records which includes her previously discussed mental health evaluation and diagnosis of a personality disorder.

b. VA documents which include questionnaires, medical opinions, disability claims, rating decision, appeals, and medical records. These documents show the applicant

made a disability claim for numerous medical conditions; however, she is currently only receiving disability compensation for her service-connected migraine headaches and MDD (Non-PTSD Personal trauma/Sexual Harassment).

c. Letter of Recommendation, 9 February 2000, for an executive administrative assistant which attests to her technical and tactical expertise.

16. In reaching its determination, the Board can consider the applicants petition and her service record in accordance with the published equity, injustice, or clemency determination guidance.

17. The mere presence of an impairment does not, of itself, justify a finding of unfitness because of physical disability. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier reasonably may be expected to perform because of their office, grade, rank, or rating.

18. Referral to the DES begins with the issuance of a permanent physical profile contains a numerical designator of P3/P4 in any of the serial profile factors for a condition that appears not to meet medical retention standards.

MEDICAL REVIEW:

1. The applicant is applying to the ABCMR requesting a reconsideration of her previous request to correct her record to show she was retired due to a permanent disability and in lieu of a medical retirement or referral to the Disability Evaluation System (DES). More specifically, she is requesting that the Board grant her permanent disability for Major Depressive Disorder (MDD) due to Military Sexual Assault (MST) or be referred to the (DES) to be properly assessed in accordance with Army regulations. The applicant's previous consideration by the ABCMR is summarized in Docket Number AR20190003244 dated 1 April 2021. 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 in the Regular Army (RA) on 25 August 1999 and was awarded the military occupational specialty 71L, administrative specialist, 2) on 09 March 2000 she was assigned to 2nd Infantry Division (ID, Camp Red Cloud, Korea, 3) she completed a Mental Status Evaluation (MSE) on 26 June 2000 which shows the psychiatrist found that she had the mental capacity to understand and participate in the separation proceedings, she was mentally responsible, and met the retention requirements of Chapter 3, AR 40-501, 4) a separation physical shows she was found to be qualified for administrative separation, 5) a memorandum from her Commander dated 30 August 2000 described the mitigating circumstances regarding her separation which stated, in effect, that she had been subjected to continual sexual harassment by a noncommissioned officer (NCO) within the company, and, after notifying her command, it appeared that nothing was done, and she was forced to deal with these unwanted

sexual advances on her own. The NCO was eventually transferred to another unit after the advances escalated to physical contact and the progressive mental damage to the applicant manifested itself in the form of a suicide gesture. It was also noted that she was transferred to work directly for the First Sergeant while her chapter paperwork was pending, who had also been recently relieved due to sexually harassing Soldiers, to include the applicant. 6) on the same day, the applicant's commander notified her of his intent to initiate separation under the provisions of AR 635-200, Chapter 5-13 based on her diagnosis of Personality Disorder. She was honorably released from active duty on 20 September 2000. Her DD Form 214 showed the narrative reason for separation as Personality Disorder and the separation code listed as LFK, 7) On 16 December 2021, the ABCMR, as the result of her petition for medical retirement, granted the applicant partial relief. She was issued a new DD Form 214 which lists the separation authority as AR 635-200, paragraph 5-17; the narrative reason for separation as Condition, Not a Disability; and the separation code as JFV.

2. The Army Review Board Agency (ARBA) Medical Advisor reviewed the ROP and casefiles, supporting documents and the applicant's military service and available medical records. The VA's Joint Legacy Viewer (JLV) was also examined. The electronic military medical record (AHLTA) was not reviewed as it was not in use during the applicant's time in service. Lack of citation or discussion in this section should not be interpreted as lack of consideration.

3. The applicant provided in-service medical records for review as part of her application. A brief summary of her records is provided below.

- A Report of Medical Examination dated 23 April 1999 for the purposes of enlistment shows item number 42, psychiatric, as 'normal' on clinical evaluation. The associated Report of Medical History shows she marked 'no' to history of a suicide attempt, all BH-related items, and 'no' to frequent or severe headaches.
- Review of her in-service medical records shows that she sought treatment for various physical health-related concerns from 25 September 1999 through 07 August 2000. Records show throughout her time in service she had been placed on profile and/or bedrest for physical-health related concerns on several occasions (e.g., back pain, leg pain). There is no documentation available showing that the applicant was placed on profile for BH reasons.
- Regarding her history of migraines, a Health Questionnaire for Dental treatment signed by the applicant on 05 January 2000 shows that she marked 'frequent headaches' and 'asthma/hay fever' in the section regarding conditions that applied to her.
- The applicant was treated for back pain in May 2000 as it was noted she had been lifting heavy furniture and began having pain afterwards. On 15 May 2000, during a follow-up visit for her back injury, she reported there was little improvement in her condition, and she still had pain. It was further documented

that she was sleeping ok but now waking up 3-4 times per night, experienced nausea and decreased appetite. She was diagnosed with back pain. On 17 May 2000, it was noted that her back pain was somewhat improving, that she did not take the Percocet prescribed to her, and that she did not feel nauseous that day. It was also noted that her range of motion improved, and the pain was worse at night when sleeping. A medical note dated 02 August 2000 shows that the applicant reported whenever she has back and neck pain, she gets migraines for the past five years. It was noted that she had been sitting at the computer all day and that is where the pain was coming from. She reported her back pain causes migraines. At the time of the visit, she was diagnosed with Chronic Low Back [Pain] and prescribed Toradol with a note to renew a medication [illegible] and Trazodone (indication not noted). Records show she had been tried on several medications for treatment of her back pain while in service to include Flexeril, Percocet, Motrin, Valium, and Toradol injection.

- A Memorandum for the Commander dated 26 June 2000 authored by the Division Psychiatrist shows she was evaluated at Division Mental Health from 17-26 June 2000 and was diagnosed with Personality Disorder, NOS. It was noted she did not have a condition to warrant medical disposition under the provisions of AR 635-40 as outlined in AR 40-501. It was recommended that she be removed from further emotional stresses pending separation under the provisions of AR 635-200, Paragraph 5-13. The provider further noted that she was 'not likely amenable to coercion or retraining [*Advisor's Note*: this is likely a typo and presumed to mean correction.]. Such additional stress could cause further deterioration and result in hospitalization, psychosis, suicide gestures or attempts, or other undesirable behaviors. The associated DA 3822 that was available for review showed all domains of her MSE as within normal limits with the exception of mood which was marked as 'depressed.'
- A Report of Medical History for the purposes of Chapter dated 21 July 2000 shows in her statement of present health the applicant indicated, "I am currently in good condition. Medications-Ibuprofen. Allergies-Pollen." She marked 'no' next to 'attempted suicide.' She marked 'yes' to several items including frequent or severe headaches, frequent trouble sleeping, and depression or excessive worry. She marked 'yes' that she had been treated for a mental condition and noted 'Casey TMC Chapter 5-13 Personality Disorder.' In the remarks section, the provider noted 'Chaptered for Personality Disorder with depression and excessive worry.' It was also noted that she reported a history of migraines once per month. The associated Report of Medical Examination noted item number 42, psychiatric, as 'normal' on clinical evaluation. A summary of diagnoses indicated SAR, history of migraines, history of thumb fracture, chaptered for Personality Disorder, and back pain. She was medically cleared for chapter.

4. An in-service counseling statement dated 07 August 2000 shows that she was being counseled for the following reasons: separation from military service, psychiatric

evaluation, report of medical history, and physical profile. The key points of discussion were noted as: Chapter 5-13 (Personality Disorder), 2) circumstances have impeded [her] performance, based upon psychiatric evaluation, medical history, recurring profile, recommending [she] be Chaptered out of the Army, and Honorable Discharge. In the plan of action the counselor noted Chapter 5-13 (Personality Disorder) and that she had been transferred to three different sections and shown that she was not likely to be amenable to 'coercion or retraining' [*Advisor's note*: this is likely a typo meant to say correction].

5. The previous ABCMR Medical Advisory was reviewed. The Advisor found that at the time of the applicant's separation physical, her migraines and depressive symptoms met retention standards and thus medical retirement was not warranted and that a VA diagnosis does not automatically mean that military medical disability/retirement is warranted. More specifically, it was noted that at the time of her separation physical, the applicant reported migraine headaches at a frequency of one per month and that she had depressive symptoms but still met retention standards at the time of discharge. The provider concluded that military medical retirement/disability was not warranted though supported changing the narrative reason for separation to Condition, not a Disability, Chapter 5-17, and to change the separation code.

6. A review of JLV shows the applicant is 100% service-connected through the VA for Major Depressive Disorder. There were two VA Compensation and Pension (C&P) examinations available for review through the Veterans Benefits Management System (VBMS) and provided by the applicant for review. At the time of her initial evaluation on 27 August 2013, she was diagnosed with Major Depressive Disorder, Recurrent, Moderate, and Alcohol Abuse, in Full Sustained Remission. It was documented that she did not have a diagnosis of Traumatic Brain Injury (TBI) or Posttraumatic Stress Disorder (PTSD). The evaluating provider cited the supporting evidence that was reviewed as part of the evaluation and noted that the applicant reported a history of MST and treatment during military service while stationed in Korea due to migraines and stress, including a 24-hour suicide watch, while being sexually harassed by her first sergeant [*Advisor's note*: there is no documentation in her military medical records indicating that she was placed on a suicide watch]. The provider noted that the impact was that she went from high performance during basic training to seeking an early discharge from the military. It was noted that her in-service mental health evaluation with the delineation of symptoms was not available to the examiner. The evaluating provider noted the applicant did not currently meet criteria for a diagnosis of a personality disorder or have features of a personality disorder. Moreover, the provider noted that the applicant was able to sustain long-term relationships without splitting, emotional lability, narcissism, sociopathy, or other chronic maladaptive behaviors to which the provider opined that her diagnosis of personality disorder in-service may have been representative of other mental health symptoms and that her experience of MST with limited options and social isolation may have accounted for the appearance of a

personality disorder. At the time of her follow-up evaluation on 17 March 2018, her diagnosis of MDD was reaffirmed and AUD was removed. Her VA Decision Rating Letter dated 10 September 2013 shows she was granted service connection for MDD (service connection for migraines due to mental illness and physical ailments was denied at the time of this letter). Regarding her rating decision, the letter noted that the applicant's service treatment records did now show any complaints of, treatment for, or diagnosis of a mental disorder during active service. A subsequent VA Rating Letter date 11 September 2015 shows service connection for migraine headaches (claimed as migraines due to mental illness) was granted.

7. As new evidence, through counsel, the applicant submitted a Report of Independent Record Review from the George Mason University Center for Psychological Services dated 21 November 2022. The evaluating providers opined that the applicant's medical records and personal statement were indicative of a significant change in psychological functioning following her experience of MST. The evaluators asserted that, based on the review of her medical records and personal statement, she experienced five of nine symptoms associated with the diagnosis of Major Depressive Disorder, the required number of symptoms in order to diagnose this condition, to include depressed mood, sleep disturbance, recurrent thoughts of death, suicidal ideation, plan or attempt, diminished ability to think or concentrate, or indecisiveness, and feelings of worthlessness and hopelessness. More specifically, they noted that multiple medical providers documented her as being depressed (June 2000; July 21, 2000), prescribed Trazodone (antidepressant/sleep) which notes the date as 26 June 2000 [*Advisor's note: review of the available medical records do not show that the applicant was prescribed Trazodone on 26 June 2000*], reported frequent trouble sleeping (15 May 2000; 21 July 2000), her personal statement which documented her feelings of worthlessness, hopelessness, and powerlessness, recurrent suicidal ideation, and a change in performance prior to the onset of depressive symptoms. Furthermore, the evaluators indicated that personality disorders are 'enduring patterns of thinking, feeling, and behaving that are relatively stable over time and the symptoms were not stable over time, only appeared after exposure to trauma via MST.' The evaluating providers opined that she met criteria for MDD and PTSD determined to be as likely as not related to military service. The providers further disagreed with her initial C&P examination and opined that she did meet criteria for PTSD, more likely than not resulting from her military service.

8. The applicant provided several civilian health records as part of her applicant from Eisenhower Medical Center. An Emergency Department note dated 29 October 2012 shows that she presented for headache, and it was noted that her migraines were usually associated with her period.

9. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is sufficient evidence that the applicant experienced an event in-

service that contributed to her discharge, MST. Review of the available in-service medical records shows that she was treated for various physical health concerns throughout her time in service and was placed on profile times as related to those physical health concerns. There is no documentation available indicating she was placed on profile for BH reasons. In-service records show that she was diagnosed with Personality Disorder NOS and recommended for Chapter 5-13 separation; however, the clinical documentation delineating the BH symptomatology was not available for review. The evaluating provider documented that she met retention standards IAW AR 40-501 and did not require disposition through medical channels. There was no other in-service BH documentation available for review. Since being discharged from the military, the applicant has been diagnosed and 100% service-connected through the VA for MDD due to MST and has also been service-connected for migraines. It was noted by the evaluating VA provider, consistent with the civilian record review provided as part of her application, that the applicant did not meet criteria for Personality Disorder and her in-service diagnosis of Personality Disorder may have been a reflection of other mental health symptoms due to her experience and sequelae of MST.

10. Consistent with the Medical Advisory provided as part of her previous ABCMR application, it is of note that VA examinations are based on different standards and parameters as they do not address whether a medical condition met or failed Army retention criteria or if it was a ratable condition during the period of service. Therefore, a VA disability rating does not imply failure to meet Army retention standards at the time of service or that a different diagnosis rendered on active duty is inaccurate. A subsequent diagnosis of MDD through the VA or non-VA/civilian providers is not indicative of a misdiagnosis or other injustice at the time of service. Furthermore, even an in-service diagnosis of MDD is not automatically unfitting per AR 40-501 and would not automatically result in medical separation processing. The available in-service medical records do not show that the applicant was diagnosed with a BH condition that falls under the purview of AR 40-501. Moreover, review of the available medical records do not provide sufficient documentation that she met criteria for an undiagnosed BH condition that falls under the purview of AR 40-501 nor that such a condition failed retention standards as there is no evidence that she required a BH profile or extended or recurrent hospitalizations in-service based on the available documentation. As such, from a BH perspective, the request for a medical discharge and/or retirement is unwarranted.

11. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? N/A. The request is for medical retirement.

(2) Did the condition exist or experience occur during military service? N/A. The request is for medical retirement.

(3) Does the condition or experience actually excuse or mitigate the discharge? N/A. The request is for medical retirement.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition, and executed a comprehensive review based on law, policy, and regulation. Upon review of the applicant's petition, available military records, and the medical review, the Board concurred with the advising official finding that the applicant's Department of Veterans Affairs rating determinations are based on the roles and authorities granted by Congress to the Department of Veterans Affairs and executed under a different set of laws. Based on this, the Board determined a disability retirement or referral of her case to the Disability Evaluation System (DES) are not warranted.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
■	■	■	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

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

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

REFERENCES:

1. Title 10, U.S. Code, section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.

2. Army Regulation (AR) 40-501, Medical Services-Standards of Medical Fitness, provides information o medical fitness standards for induction, enlistment, appointment, retention, and related policies and procedures.

a. Personality disorders may render an individual administratively unfit rather than unfit because of physical disability. Interference with performance of effective duty in association with these conditions will be dealt with through administrative channels.

b. Neurological disorders such as migraine headaches require referral to a Medial Evaluation Board when manifested by frequent incapacitating attacks.

c. Mental disorders not secondary to intoxication, infectious, toxic, or other organic causes, with gross impairment in reality testing, resulting in interference with duty or social adjustment are cause for referral to a Medical Evaluation Board.

3. AR 635-40, Personnel Separations-Physical Evaluation for Retention, Retirement, or Separation governs the evaluation for physical fitness for Soldiers who may be unfit to perform their military duties because of physical disability.

a. The mere presence of an impairment does not, of itself, justify a finding of unfitness because of physical disability. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier reasonably may be expected to perform because of their office, grade, rank, or rating.

b. When a commander believes that a soldier of his or her command is unable to perform the duties of his or her office, grade, rank, or rating because of physical disability, the commander will refer the soldier to the responsible MTF for evaluation.

c. 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 they can no longer continue to reasonably perform because of a physical disability incurred or aggravated in service.

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. 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.

4. AR 635-40, 19 February 2017, establishes the Disability Evaluation System (DES) 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 or her office, grade, rank, or rating. It states 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. The DES assessment process involves two distinct evaluations, the Medical Evaluation Board (MEB) and the Physical Evaluation Board (PEB).

a. The purpose of the MEB is to determine whether the service member's injury or illness is severe enough to compromise his or her ability to return to full duty based on the job specialty designation of the branch of service.

b. A PEB is an administrative body possessing the authority to determine whether 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 are either separated from the military or permanently retired, depending on the severity of the disability and length of military service. The overall effect of all disabilities present in an individual whose physical fitness is under evaluation must be considered both from the standpoint of how the disabilities affect the individual's performance, and requirements which may be imposed on the Army to maintain and protect him or her during future duty assignments.

c. The DES begins for a Soldier when the Soldier is issued a permanent profile approved in accordance with the provisions of AR 40-501 and the profile contains a numerical designator of P3/P4 in any of the serial profile factors for a condition that appears not to meet medical retention standards in accordance with AR 40-501 (see

glossary). Within (but not later than) one year of diagnosis, the Soldier must be assigned a P3/P4 profile to refer the Soldier to the DES.

5. AR 635-200, Personnel Separations-Enlisted Personnel, provides the basic authority for the separation of enlisted personnel.

a. Paragraph 5-13 provides that a Soldier may be separated for personality disorder, not amounting to disability under AR 635-40, that interferes with assignment to or performance of duty. The regulation requires that the condition is a deeply ingrained maladaptive pattern of behavior of long duration that interferes with the Soldier's ability to perform duty.

b. Paragraph 5-17 provides for disorders manifesting disturbance of perception, thinking, emotional control or behavior sufficiently severe that the Soldier's ability to effectively perform military duties is significantly impaired.

6. Title 38, U.S. Code section 1110, General - Basic Entitlement: 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.

7. Title 38, U.S. Code, section 1131, Peacetime Disability Compensation - Basic Entitlement: 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.

8. The Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records on 25 July 2018, regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. Boards for Correction of Military/Naval Records 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.

a. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. In determining whether to grant relief on the basis of equity, injustice, or clemency grounds, Boards 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.

b. 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.

9. Section 1556 of Title 10, United States Code, 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.

10. Army Regulation (AR) 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR.

a. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

b. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

//NOTHING FOLLOWS//