

IN THE CASE OF: [REDACTED]

BOARD DATE: 26 November 2024

DOCKET NUMBER: AR20240003374

APPLICANT REQUESTS: in effect, honorable physical disability discharge in lieu of general administrative discharge due to a pattern of misconduct.

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

- DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States)
- two self-authored statements
- Department of Veterans Affairs (VA) letter, 10 May 2024

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.

2. The applicant states:

a. He is writing to request a corrective action to change the category of his discharge on his DD Form 214 (Certificate of Release or Discharge from Active Duty). Too many times has he thought of the incidents leading up to his discharge and wonders what happened to taking care of Soldiers.

b. Rather than letting him get the mental health help he so desperately needed and that he was told that he needed, and be being started in a program, his first sergeant (1SG) took it as an opportunity to have him chaptered out of the Army. This is because 9 months earlier, when he started having problems, he told his 1SG he had no plans to reenlist. He was broken in his heart and in his head.

c. Having been in Iraq and Afghanistan, he lost several friends, other combat engineers, supporting the 1st Regiment, 75th Ranger Battalion at Fire Base Cobra. They had seen enough and he had done enough for every detail, reconnaissance, and every other mission, he went. However, when he got to Fort Carson, CO, he started to

drink and to think about lost friends. Suffering from post-traumatic stress disorder (PTSD), he turned to drinking.

d. He went from program to program. He saw psychiatrist after psychiatrist. The programs on post were inadequate. They determined the onset of his drinking was due to PTSD. Once it was determined he suffered from PTSD, his PTSD symptoms were worsened by his drinking, which he did in his struggle to come to grips with all the demons brought on by his combat experiences. Throughout his time at Fort Carson, CO, he was considered a successful Soldier, until he came up positive on a urinalysis and his 1SG said he would throw him out of "his Army."

e. So, he stayed in and continued in the programs, getting mental health help, and was doing well. With about 2 months until he would reach his expiration term of service (ETS), the 1SG said he would promote him after he reenlisted. He told the 1SG that with everything he was feeling mentally and he guessed spiritually, he needed to go home and be with family who could give him comfort for his sorrow and love for his grief. So, he did not think about anything but his mental health and the Medical Evaluation Board (MEB). Do not get him wrong, he still did his job and he still had the young privates looking to him for help and he still helped them all.

f. While he was doing all this, the 1SG was secretly clearing him from the post – secretly! His room was ransacked. All his TA-50 equipment was gone. Two days later he was told to report to the 1SG and when he did, he was told he was "putting him out." He handed him papers and told him to "pack up and get off post." He could not even look at the papers; he just signed and initialed then took them and went. When he asked for time to clear the post, his 1SG had already done that. He displayed honor, dignity, and loyalty as he distinguished himself under combat conditions. He did not deserve this type of discharge.

g. He has asked two family members to assist him by emailing medical documents supporting his PTSD, in hopes they would be received in time for him to submit them with this application. As he understands it, the documents show his service-connection for sleep apnea based on a study done during an inpatient stay at [REDACTED]
[REDACTED] in [REDACTED]

h. He very humbly asks that he be considered for a medical retirement as he was pulled from the hospital and discharged against his wishes during his treatment. He truly thanks the Board for their time and assistance in this matter and is enclosing a disability breakdown provided by the VA.

3. The applicant enlisted in the Regular Army on 4 January 2008.

4. The applicant served in:

- Iraq from 15 February 2009 through 30 April 2009
- Afghanistan from 1 May 2009 through 9 February 2010

5. On 14 May 2010, the applicant's immediate commander was notified that based on laboratory results on the enclosed DD Form 2624 (Specimen Custody Document – Drug Testing), a specimen collected via urinalysis from the applicant on 23 April 2010, confirmed by Tripler Army Medical Center, Toxicology Drug Testing Laboratory, tested positive for tetrahydrocannabinol (THC)/marijuana.
6. A DA Form 8003 (Army Substance Abuse Program (ASAP) Enrollment), shows the applicant was enrolled in ASAP on 19 May 2010, due to testing positive for marijuana on a company urinalysis on 23 April 2010.
7. The applicant's service records contain five DA Forms 4856 (Developmental Counseling Form), all dated 19 and 20 May 2010, which show:
 - a. The applicant was counseled by his squad leader on 19 May 2010, regarding testing positive for THC during a company urinalysis on 23 April 2010.
 - b. The applicant was again counseled by his squad leader on 19 May 2010, for reporting late to a detail on 1 May 2010, and showing up with alcohol on his breath. He was taken to the military police (MP) station where a breathalyzer tested his blood alcohol content as 0.024.
 - c. He was counseled for a third time by his squad leader on 19 May 2010, for being out of ranks for the company accountability formation at 0630 on 6 May 2010, despite having been made aware of his time and place of duty the day prior. The plan of action shows the applicant was already referred for Uniform Code of Military Justice (UCMJ) action and had already been command referred to ASAP.
 - d. The applicant was then counseled by his platoon sergeant on 19 May 2010, regarding testing positive for THC during a urinalysis on 23 April 2010. UCMJ action was recommended.
 - e. He was again counseled by his platoon sergeant on 20 May 2010, for without authority, failing to be at his place of duty at the 0600 accountability formation on 20 May 2010. When he did show up around 0845, alcohol could be smelled on his breath and he was escorted to the Provost Marshall's office where he was administered a Breath Alcohol Test, with a result of .042, which is under the .05 considered drunk on duty, but still shows a continued pattern of poor behavior. UCMJ action was recommended.

8. A DA Form 268 (Report to Suspend Favorable Personnel Actions (FLAG)) shows a non-transferrable adverse action flag was initiated for the applicant on 20 May 2010.

9. A DA Form 2627 (Record of Proceedings under Article 15, Uniform Code of Military Justice (UCMJ)) shows on 28 June 2010, the applicant accepted nonjudicial punishment (NJP) for:

- without authority, failing to go to his appointed place of duty at the time prescribed on 6 May 2010
- without authority, failing to go to his appointed place of duty at the time prescribed on 20 May 2010
- wrongfully using THC between on or about 23 March 2010 and 23 April 2010

10. 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).

11. A DD Form 2808 (Report of Medical Examination), 1 July 2010, shows:

- a. The applicant underwent medical examination where he was found qualified for service/separation with a PULHES of 111111.
- b. The summary of defects and diagnoses shows ethyl alcohol or ethanol (ETOH) abuse, cannabis use, traumatic brain injury (TBI), and depression.
- c. The recommendations are to schedule an appointment for evaluation of left leg and knee pain.

12. A DD Form 2807 (Report of Medical History), shows on 18 August 2010, the applicant provided his medical history, where he indicated having left knee and thigh pain, anxiety, and trouble sleeping.

13. A DA Form 3822-R (Report of Mental Status Evaluation) shows:

- a. The applicant underwent a command referred mental status evaluation on

24 August 2010, for the purpose of administrative discharge under the provisions of Army regulation 635-200 (Active Duty Enlisted Administrative Separations), chapter 14, due to a pattern of misconduct.

b. He was found to have the mental capacity to understand and participate in the proceedings; was mentally responsible; and met the retention requirements of Army Regulation 40-501 (Standards of Medical Fitness), chapter 3.

c. The applicant stated he did not want to get out of the Army and wanted to finish his enlistment. He stated he would like to start school but could not do this until he is no longer flagged. He stated he had plans for the future that he wanted to begin working toward and appeared to have strong convictions toward this.

d. He was deemed to meet the retention standards prescribed in Army Regulation 635-200. There was no psychiatric disease or defect warranting disposition through medical channels. The applicant was psychiatrically cleared for any administrative action deemed appropriate by command.

14. A final DA Form 4856 shows the applicant was counseled by his unit 1SG on 25 August 2010, regarding his pending administrative separation under the provisions of Army Regulation 635-200, chapter 14, based on his illegal use of THC.

15. On 10 September 2010, the applicant was notified by his immediate commander of his initiation of action to separate him under the provisions of Army Regulation 635-200, chapter 14, for a pattern of misconduct. The reason for the proposed action was testing positive for THC on 23 April 2010, being late to a detail on 1 May 2010 with alcohol on his breath, being out of ranks on 19 May 2010, and failing to be at his appointed place of duty on 20 May 2010. The applicant's immediate commander indicated in the notification that he recommended the applicant's retention in the active service. He was advised of his right to consult with counsel and submit statements in his own behalf.

16. On 14 September 2010, a legal review of the applicant's discharge packet under the provisions of Army Regulation 635-200, chapter 14 for patterns of misconduct was reviewed and found legally sufficient.

17. On 17 September 2010, the applicant acknowledged receipt of the notification of initiation of his discharge under the provisions of Army Regulation 635-200, chapter 14 and was advised of his right to consult with counsel prior to making an election of rights.

18. On 21 September 2010, the applicant acknowledged having been afforded the opportunity to consult with appointed counsel and accepted the opportunity. He indicated he was submitting statements in his own behalf and he requested representation by military counsel.

19. The applicant's undated, self-authored statement, shows he requested to be retained in the Army. His situation came about during redeployment, when he began dealing with challenges, he thought he could overcome alone. Although he tried to view his situation as a short phase, he dug himself a deeper hole. Since April, he had been actively seeking and receiving help and he found himself more focused and determined to become a more mentally and physically fit. He felt he had recovered from his issues and knew he could contribute to the organization. He felt he would never again make the mistake of using drugs nor believe he could handle issues alone. He requested Army retention, and if he could not be retained, requested an honorable discharge.

20. A 26 September 2010 memorandum from the applicant's immediate commander shows:

a. Due to the applicant's actions a chapter packet must be started and finalized. His actions are inexcusable; however, he has worked hard to regain his status as a good Soldier. He made a serious mistake, but he has changed his ways and behavior. This chapter packet should be completed, but he should be retained.

b. He recommended the applicant's retention in the Army in his current unit. Upon his redeployment from Afghanistan, he committed grievous mistakes. While this is inexcusable, he suffered from the loss of a close friend who died in a fire fight. While events during a deployment do not allow a Soldier to behave in this manner, the true testament to the applicant's commitment has come since this incident. He has served his punishment with honor and has sought the right type of help. He has since come out a stronger Soldier. He shows the makings of a leader among his peers and younger Soldiers. His actions were wrong, but he truly believed in the applicant and in his potential to continue serving.

21. On 27 September 2010, the applicant's battalion commander recommended disapproval of the applicant's separation under the provisions of Army Regulation 635-200, chapter 14, due to patterns of misconduct. The comments show the chain of command fully endorses the applicant as retainable. Some issues directly revolve around combat actions and loss of a squad member. He deserves the opportunity to overcome his actions. If disapproved, his service should be characterized as honorable.

22. On 13 October 2010, the approval authority directed the applicant's general discharge under the provisions of Army Regulation 635-200, chapter 14, due to patterns of misconduct.

23. A Parkview Medical Center, Interim Progress Summary, 19 November 2010, shows:

- a. The applicant was admitted to the Parkview Chemical Dependency Unit (CDU) on 27 October 2010
 - b. He reported intrusive nightmares, intrusive thoughts, all directly related to war-related trauma, to include the death of his friend while in Afghanistan, after he had assigned that friend to a vehicle that was destroyed in a mortar attack. He suffered from extreme guilt, including survivor guilt and significant insomnia. On polysomnogram, he exhibited severe obstructive sleep apnea with hypoxic episodes.
 - c. His medications included minipress, Depakote, Zoloft, Seroquel, ReVia.
 - d. The applicant is presently significantly impaired with war-related trauma symptoms. At the present time, he needs significant intervention to treat his symptomatic war-related trauma.

24. The applicant's available service records do not contain a DA Form 3349 (Physical Profile) nor do they show:

- he was issued a permanent physical profile rating
- he was diagnosed with a condition that failed retention standards and/or was unfitting

25. The applicant's Enlisted Record Brief (ERB), 30 November 2010, shows:

- his ETS was 25 April 2011
- his PULHES was 111111

26. The applicant's DD Form 214 shows:

- a. He was given a general discharge under honorable conditions on 30 November 2010, under the provisions of Army Regulation 635-200, chapter 14, due to a pattern of misconduct, with corresponding separation code JKA.
- b. He completed 2 years, 10 months, and 27 days of active service and item 18 (Remarks) shows he did not complete his first full term of service.
- c. Among his decorations, medals, and badges awarded or authorized is the Combat Action Badge.

27. A Front Range Institute, Discharge Summary, 23 June 2011, shows:

- a. The applicant was initially referred by his first sergeant at Fort Carson, CO, due to performance issues and alcohol being found on his breath. Although he initially came

in with some hostility, he was found to be cooperative and motivated once the therapy process began.

b. He was seen for a total of eleven therapy sessions from 11 May 2010 through 29 July 2010. During the individual therapy sessions, he was also enrolled in the ASAP at Fort Carson, CO.

c. During his military career, a number of incidents occurred while deployed to Afghanistan, leading to his war trauma. If he enters therapy in the future, he would be encouraged to address any lingering trauma from his service experience which they could not focus on at the time of his individual therapy.

28. In slightly dissimilar, but not unrelated cases, the applicant previously applied to the Army Review Boards Agency (ARBA) on multiple occasions.

a. He initially applied to the Army Discharge Review Board (ADRB) in 2011, requesting an upgrade of the characterization of his discharge based on having been improperly discharged from inpatient hospitalization so the Army could administratively discharge him for misconduct instead of undergoing a medical review. On 13 January 2012, the ADRB denied his request, determining his discharge was both proper and equitable.

b. The applicant subsequently applied to the ABCMR in 2012, requesting an upgrade of his general discharge to honorable, due to the fact that his addiction was caused by his combat-related PTSD. On 25 June 2013, the Board denied the applicant's request, having determined the overall merits of his case were insufficient as a basis for correction of his records.

c. The applicant again applied to the ABCMR in 2014, requesting reconsideration of his prior request for upgrade of the characterization of his discharge to honorable as well as correction to his reentry code. On 23 April 2015, the Board denied the applicant's request, having determined the overall merits of his case were insufficient as a basis for correction of his records.

29. A VA letter, 10 May 2014, shows the applicant has a combined service-connected disability rating of 100 percent for the following conditions:

- PTSD with major depressive disorder, cannabis use disorder and residuals, TBI, 70 percent
- obstructive sleep apnea hypopnea syndrome, 50 percent
- post-traumatic headaches, 50 percent
- tinnitus, 10 percent
- left patellofemoral pain syndrome, 10 percent

- mild lumbar strain with mild lumbar degenerative disc disease, 10 percent
- pseudofolliculitis barbae, 0 percent

30. 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.

31. 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.

32. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting a physical disability discharge in lieu of his general administrative discharge due to a pattern of misconduct. 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 on 4 January 2008; 2) The applicant deployed to Iraq from 15 February-30 April 2009 and to then Afghanistan from 1 May 2009-9 February 2010; 3) The applicant tested positive for marijuana and enrolled into ASAP in May 2010; Also in May 2010, the applicant was counseled for showing up to duty with alcohol on his breath and not being at his place of duty twice; 4) On 30 November 2010, the applicant was discharged, chapter 14, due to a pattern of misconduct. He was given a general discharge under honorable conditions.

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

c. The applicant states he was experiencing a traumatic brain injury (TBI), mental health conditions including PTSD while on active service. He is requesting mitigation of his misconduct and a referral to IDES to be assessed for a physical disability discharge, as a result. The applicant was assessed by a military TBI clinic on 22 February 2010 due to his report of experiencing a TBI during his deployment to Afghanistan. The applicant denied any current symptoms associated with a concussion he reported experiencing during deployment, and he was returned to duty without any limitations. The applicant first engaged in military behavioral health services at ASAP on 26 May 2010 after receiving a positive urinalysis for marijuana in April 2010 and having alcohol on his breath while on duty. The applicant was diagnosed with alcohol abuse and cannabis abuse. He began regular substance abuse individual and group treatment at

ASAP till his discharge. On 26 September 2010, the applicant was seen as a walk-in at the Emergency Room (ER) for "lack of sleep and nightmares." He denied any suicidal or homicidal ideation, but he was reporting increased irritability and depression. He was not recommended inpatient treatment, but he was referred to a behavioral health prescriber for psychiatric medication and encouraged to continue to attend substance abuse treatment. On 28 September 2010, the applicant was seen by a behavioral health prescriber, and he was diagnosed with an Adjustment Disorder with anxiety and depression and prescribed psychiatric medication. The applicant was seen for regular psychiatric medication management appointments till his discharge. On 12 October 2010, the applicant was seen by a different behavioral health prescriber, and he was diagnosed with Anxiety Disorder Not Otherwise Specified (NOS). It was noted the applicant was reporting symptoms of PTSD related to his deployment, and he was recommended for an MEB. On 17 October 2010, the applicant again reported to the ER due to increased depression, suicidal ideation with plan, and thoughts of hurting others. He was reporting an acute increase in symptoms as a result of recent information that he was scheduled to be discharged due to patterns of misconduct rather than a substance abuse treatment failure. The applicant was admitted to a civilian psychiatric treatment program, and he was discharged from this program on 26 October 2010 and was admitted to residential treatment program for substance dependence and PTSD on 27 October 2010. On 22 November 2010, the applicant was seen for a psychiatric fitness for duty evaluation completed by a neuropsychologist. He was noted to have a history of anxiety symptoms after deployment and was involved in alcohol and substance abuse. He was also reported to have a history of TBI, but the applicant had been previously evaluated and cleared from the TBI clinic. The applicant had also previously been seen for a Chapter separation mental status evaluation (MSE) in August 2010. The applicant was cleared to participate in the Chapter proceedings. The results of this medical retention psychiatric evaluation determined the applicant met criteria for Anxiety NOS, and he was found to not meet full criteria for PTSD. Also, the applicant was not found to have demonstrated decrement in his ability to function in the military setting (per retention standards in Ch 3, AR 40-501) independent of his substance abuse. Therefore, the applicant was not recommended for a physical disability discharge for a mental health condition. There was insufficient evidence the applicant was placed on a permeant psychiatric profile during his active service or consistently attended treatment for a mental health condition including PTSD for six-months.

d. A review of JLV provided evidence the applicant has been actively engaged with the VA after his discharge for mental health and physical concerns. He did undergo Compensation and Pension Evaluation after his discharge, and he is currently diagnosed with service-connected PTSD and traumatic brain disease.

e. Based on the available information, it is the opinion of the Agency Medical Advisor that the applicant had been diagnosed with an Adjustment Disorder and Anxiety NOS

while on active service. After his discharge, he was also diagnosed with service-connected PTSD and traumatic brain disease by the VA. However, there was sufficient evidence the applicant was evaluated multiple times by various behavioral health providers while on active service. He was consistently found to be performing his military duties adequately from a psychiatric perspective outside of his substance abuse and did not fail to meet medical retention standards for a psychiatric condition. Therefore, there is insufficient evidence his case warrants a referral to IDES at this time. However, there is sufficient evidence to support the applicant had a condition or experience that mitigates his misconduct which led to his discharge.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the misconduct? Yes, the applicant had been diagnosed with an Adjustment Disorder and Anxiety Disorder NOS while on active service. In addition, after his discharge he was diagnosed with service-connected PTSD and traumatic brain disease.

(2) Did the condition exist or experience occur during military service? Yes, the applicant had been diagnosed with an Adjustment Disorder and Anxiety Disorder NOS while on active service. In addition, after his discharge he was diagnosed with service-connected PTSD and traumatic brain disease by the VA.

(3) Does the condition experience actually excuse or mitigate the misconduct? Partially, the applicant had been diagnosed with an Adjustment Disorder and Anxiety NOS while on active service. After his discharge, he was also diagnosed with service-connected PTSD and traumatic brain disease by the VA. The applicant did engage in substance and alcohol abuse related misconduct while on active service which can be avoidant behavior and a natural sequela to the applicant's mental health conditions including PTSD. The applicant was also involved in other minor erratic or avoidant misconduct, which is also a natural sequela to his diagnosed mental health conditions including PTSD. Therefore, there is sufficient evidence per Liberal consideration the applicant was experiencing a mitigating mental health condition. However, there was sufficient evidence the applicant was evaluated multiple times by various behavioral health providers while on active service. He was consistently found to be performing adequately from a psychiatric perspective outside of his substance abuse and did not fail to meet medical retention standards for a psychiatric condition. Therefore, there is insufficient evidence his case warrants a referral to IDES to assess his suitability for a medical discharge at this time.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that partial relief was warranted. The Board carefully considered the applicant's request, supporting documents, evidence in the records, and published Department of Defense guidance for liberal consideration of discharge upgrade requests. Upon review of the applicant's petition, available military records, and the medical review, the Board concurred with the advising official finding sufficient evidence the applicant was evaluated multiple times by various behavioral health providers while on active service; however was consistently found to be performing his military duties adequately from a psychiatric perspective outside of his substance abuse and did not fail to meet medical retention standards for a psychiatric condition. Therefore, the Board concluded a discharge upgrade to honorable was warranted; however, a physical disability discharge or referral to the Disability Evaluation System were unwarranted.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

: : : GRANT FULL RELIEF

 GRANT PARTIAL RELIEF

: : : GRANT FORMAL HEARING

: : : DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined the evidence presented is sufficient to warrant partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by amending the applicant's DD Form 214, for the period ending 30 November 2010, to show his characterization of service as honorable.
2. The Board further determined that the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to amending his narrative reason for separation to physical disability or referring his case to DES.

4/2/2025

X

CHAIRPERSON


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

REFERENCES:

1. Title 10, U.S. Code, section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.
2. On 25 August 2017, the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to Discharge Review Boards (DRBs) and Boards for Correction of Military/Naval Records (BCM/NRs) when considering requests by veterans for modification of their discharges due in whole or in part to: mental health conditions, including post-traumatic stress disorder (PTSD), traumatic brain injury (TBI), sexual assault, or sexual harassment. Boards are to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based, in whole or in part, on those conditions or experiences.
3. 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.
4. 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 their 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 their 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.

5. 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.

6. Title 10, U.S. Code, section 1201, provides for the physical disability retirement of a member who has at least 20 years of service or a disability rating of at least 30 percent. Title 10, U.S. Code, section 1203, provides for the physical disability separation of a member who has less than 20 years of service and a disability rating of less than 30 percent.
7. 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.

8. 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.

9. 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.

10. 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//