IN THE CASE OF: [redacted]

BOARD DATE: 30 December 2024

DOCKET NUMBER: AR20240004596

APPLICANT REQUESTS:

- correction of his DD Form 261 (Report of Investigation Line of Duty (LOD) and Misconduct Status) to show his condition of melanoma was incurred in the line of duty (LOD)
- reconsideration of his previous request for medical retirement
- personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Counsel's 8-page Memorandum of Law
- four DD Forms 214 (Certificate of Release or Discharge from Active Duty)
- four awards certificates
- DA Form 2-1 (Personnel Qualification Record – Part II)
- military medical records (345 pages)
- DA Form 2173 (Statement of Medical Condition and Duty Status), dated 21 September 2015
- DD Form 261
- Memorandum from Headquarters (HQ), 99th Regional Support Command (RSC), Chief, Health Services Branch, dated 6 June 2016, subject: Formal LOD Recommendation Regarding (the applicant)
- Memorandum from the U.S. Army Human Resources Command (AHRC), Casualty and Mortuary Affairs Operations Center, dated 21 September 2016, subject: LOD Determination
- HQ, 99th Readiness Division Orders 18-038-00059, dated 7 February 2018
- military medical records (345 pages)
- Department of Veterans Affairs (VA) benefits decision letter, dated 1 June 2017, and VA medical progress notes
- [redacted] Hospital medical records
- various medical articles regarding melanoma among military personnel

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 AR20190000068 on 2 August 2019.

2. The applicant states he was assigned to the Retired Reserve because of loss of vision in his right eye due to melanoma. The 2015 line of duty (LOD) investigation stated his cancer condition was not incurred during his active duty in Afghanistan in 2012-2013. This finding is contrary to the scientific evidence that melanoma occurs in service members at a higher rate than the civilian population due to excessive exposure to ultraviolet (UV) radiation. His tour of duty in Iraq during 2009-2010 was in a desert climate. His tour of duty in Afghanistan during 2012-2013 was in a high altitude desert climate where he was exposed to smoke from burn pits. He should have had a medical board hearing in 2014 before his release from active duty.

3. In an 8-page Memorandum of Law, the applicant's counsel states:

a. The applicant, a Reserve military police (MP) officer, was called to active duty for deployment to Iraq in 2009-2010 and again to active duty in Afghanistan in 2012-2013. Upon his return to the United States, he discovered a black speck in his right eye. The VA medical personnel diagnosed the "speck" as a malignant melanoma. He was transferred to Wills Eye Hospital where eye surgeons removed the tumor, leaving him no vision in his right eye. The VA subsequently awarded him 100% service connection for melanoma in his right eye on 1 June 2017 for the loss of the eye.

b. The Army, after conducting an LOD investigation in 2016, concluded that the applicant's tumor was not related to nor incurred during his active duty tour in Afghanistan. His pre-deployment physical exam was negative for any black spots in his right eye. The LOD Investigative Report did not consider whether his melanoma was the result of excessive exposure to UV radiation in Iraq and Afghanistan despite copious medical evidence that military personnel have a much greater risk of developing skin cancers due to exposure to UV radiation. The PACT Act provides that melanoma incurred by military personnel stationed in Afghanistan or Iraq would be presumptively service-connected for purposes of award of VA benefits. Although not binding upon the U.S. Army, the Army should recognize that substantial medical evidence supports a similar result for purpose of disability retirement from the Army. The applicant contends that his Reserve retirement should be changed to medical retirement for purposes of award of military disability retirement benefits.

c. The applicant served two tours of duty in the U.S. Navy. Following his discharge, he received a commission as captain in the U.S. Army Reserve (USAR). His specialty was MP. He served on active duty in Iraq from 15 August 2009 to 18 September 2010.

On 12 August 2012, he was called to active duty to serve in Afghanistan. He remained on active duty until 8 September 2013. On 17 February 2018, he was medically disqualified and transferred to the Retired Reserve. The cause of his medical disqualification was eye cancer.

d. The applicant's pre-deployment and post-deployment physical examinations were negative for any eye conditions. After release from active duty in 2013, he noted a black speck in his right eye and in April 2014, he visited the Wilmington, DE Veterans Affairs Medical Center complaining of itching and burning in his right eye. The ophthalmology clinic referred him to Wills Eye Hospital. On 6 June 2014, he was seen by Dr. S who made the diagnosis of diffuse melanoma in his right eye. Wills Eye Hospital surgeons treated the melanoma using plaque radiation. He developed diplopia after surgery requiring him to wear a patch over one eye. He eventually lost all vision in his right eye. Subsequently, the VA found that his melanoma was service connected and awarded him 100 % service connection for loss of all vision in his right eye.

e. The applicant argues that his melanoma was caused by exposure to desert sunlight, burn pit residue, or other known carcinogens while on active duty in Afghanistan. The VA awarded him 100% service connection for loss of vision in his right eye in 2017, prior to the enactment of the PACT Act in August 2022, setting up presumptive service connection for any veteran suffering from melanoma who served in Afghanistan. Competent medical evidence published in the Journal of Academic Dermatology showing a statistical relationship between development of melanoma in veterans who served in Afghanistan and Iraq compared to the civilian population.

f. The applicant did not file an application for change of discharge immediately after his separation from the Army on 7 July 2013 because his melanoma was not discovered until 2 June 2014, after separation from active duty. The Army conducted an LOD/Misconduct investigation in 2015. The report stated that his melanoma was not incurred in LOD but not due to misconduct, The Director, Casualty and Mortuary Affairs expressed a lay opinion stating the applicant never had a Medical Evaluation Board nor a hearing before the Physical Evaluation Board prior to his transfer to Retired Reserve reserve in 2016. He received a transfer to discharge for disability granted by the Army based on incurrence of his melanoma in his right eye. His LOD determination was" not in line of duty," which he appealed in 2016. He appealed that finding which was sustained. He was unaware of the right to petition the ABCMR for correction of discharge to "medical" until June 2023 when he consulted a staff attorney for the Widener University Delaware Law School Veterans Law Clinic.

g. The applicant is currently on the Retired Reserve for a nonservice-connected disability i.e., melanoma, causing loss of vision in his right eye. This classification is in error because he had no prior history of any form of skin cancer or eye cancer prior to deployment to Afghanistan in 2012. He developed melanoma after his return from

Afghanistan as shown by VA and [redacted] Hospital records. Medical research into the prevalence of melanoma among service members shows that service members have much greater risk of developing melanoma than the general population. Experts believe that the greater rate of melanoma among service members is related to increased UV exposure in desert climates such as Iraq and Afghanistan. He served two one-year deployments to Iraq and Afghanistan. He was exposed to desert conditions during both deployments, including increased exposure to UV light under desert conditions.

h. After the applicant's radiation treatment in 2014, the Army Reserve conducted an LOD investigation in 2015. The investigating officer erroneously offered an incorrect medical option that his cancer must have pre-existed before his deployment to Afghanistan. The applicant's LOD investigation conducted in 2015 is flawed because it ignored the medical evidence that military personnel, including veterans of Operation Iraqi Freedom and Operation Enduring Freedom were much more likely to develop melanoma than the civilian population. The definitive report was published in 2014 available to the investigating officer. Instead, the investigating officer and the Director, Casual and Mortuary Affairs narrowly focused their report and conclusions on the lack of medical or scientific evidence of a connection between exposure to burn pits and melanoma. The author of the 21 September 2015 Statement of Medical Examination expressed no opinion on service connection for the applicant's melanoma.

i. The LOD report was followed up by a memorandum stating that "there is no definitive link between exposure to burn pits and chronic illnesses of any kind in Service Members" which ignored the copious evidence that veterans of the mid-eastern military operations were exposed to greater UV light than the comparable civilian population. Military personnel were more likely to suffer from melanoma and other skin cancers than the civilian population. The investigating officer and Director, Casualty and Mortuary Affairs completely ignore a highly probable connection between the applicant's eye melanoma and exposure to desert sunlight.

j. The VA has recognized the connection between exposure to high intensity UV radiation and the development of melanoma, as shown by the VA Rating Decision granting the applicant 100% disability for residuals of his uveal eye melanoma. The LOD investigating officer's conclusion is also out of line with the PACT Act passed in 2022. That statute listed "melanoma" as presumptively service connected for purposes of VA medical, and the Board should take notice of the PACT Act's determination that "melanoma" 's causally related to in-service exposure to UV and residues from burn pits.

k. Conclusion: The applicant should receive a medical discharge for ocular melanoma resulting from exposure to desert climate UV radiation. He should be given an appropriate disability rating by the ABCMR for loss of vision in one eye, and should be placed on the Permanent Disability Retired List.

4. After having prior enlisted service in the U.S. Navy, the applicant enlisted in the Army National Guard (ARNG) on or around September 1996.

5. The applicant was appointed as a Reserve commissioned officer and he executed an Oath of Office in [redacted] ARNG ([redacted] ARNG) on16 August 2003. He was transferred to a U.S. Army Reserve (USAR) troop program unit effective 6 September 2005.

6. The applicant's record shows he served in Iraq from 28 August 2009 to 1 August 2010 and in Afghanistan from 11 October 2012 to 29 June 2013.

7. The applicant's Notification of Eligibility for Retired Pay at Age 60 (20-Year Letter) is dated 24 July 2008. This letter informed him that having completed the required years of qualifying reserve service, he is eligible for retired pay at age 60.

8. The applicant's DA Form 2173, dated 21 September 2015, and medical records show he was diagnosed and treated for choroidal melanoma (eye cancer). The DA Form 2173 preparer indicated a formal LOD investigation was required.

9. A DD Form 261 shows the applicant developed eye cancer after returning from deployment to Afghanistan. The investigating officer indicated the disease was incurred in LOD. The DD Form 261 further shows the approval authority approved the in LOD determination, however, the final approval authority approved for "not in the line of duty."

10. In a Memorandum for Record dated 6 June 2016, subject: Formal LOD Determination Regarding (the applicant), the 99th RSC Chief, Health Services Branch, the final LOD determination approval authority, stated the following:

a. After a full review of documents provided by the applicant, investigative officer, and the medical officers review, there is not enough evidence to substantiate that the applicant’s claim that his LOD request for choroidal (uveal) melanoma cancer of the eye was sustained from the performance of his military duties.

b. In the vast research she conducted in choroidal (uveal) melanoma, the overall cause is not completely known. However, there is a small and unsubstantiated correlation to the exposure of UV light as the cause as cited by the RSC Surgeon’s review. The known significant risk factors for choroidal melanoma includes being of Caucasian ethnicity and having light-colored eyes (blue or gray), age, and certain inherited skin disorders. Lastly there is a possible genetic marker that is also associated with this type of cancer. The test was recommended by the Will Eye Clinic but not performed to ascertain if the applicant has the genetic marker and is more susceptible to this type of cancer.

c. The adverse finding is upheld by the RSC approval authority, for review by AHRC.

11. In a memorandum dated 21 September 2016, subject: LOD Determination (for the applicant), addressed to the applicant, the AHRC Director, Casualty and Mortuary Affairs Operations Center, stated the following:

> The Army's Casualty and Mortuary Affairs Operations Center has completed its review of your line of duty investigation in which you were diagnosed with choroidal melanoma (eye cancer) in [redacted] on 2 June 2014. This office regrets to inform you that we support the original finding of "Not in Line of Duty-NOT Due to Own Misconduct." Currently, there is no definitive link between exposure to burn pits and chronic illnesses of any kind in service members. Based on the documented growth rate of choroidal tumors, Army medical professionals opined the tumor existed prior to your deployment in 2012 and was not service aggravated.

12. HQ, 99th RSC Orders 18-038-00059, dated 7 February 2018, directed the applicant's reassignment to the Retired Reserve effective 15 March 2018 by reason of "medically disqualified – not result of own misconduct."

13. The applicant's DA form 5016 (Chronological Statement of Retirement Points) shows he was credited with 30 years, 1 month, and 3 days of qualifying service for non-regular retirement.

14. During the processing of the applicant's previous case, the Army Review Boards Agency (ARBA) Medical Advisor provided a medical advisory opinion. The ARBA's Medical Advisor stated, in part:

a. The applicant’s medical conditions were duly considered during medical separation processing. A review of the available documentation found no evidence of a medical disability or condition that would support a change to the character and/or reason for the discharge in this case. After a comprehensive review of the medical and other records, the ARBA Medical Advisor concludes that there is no cause to recommend a change in the final LOD recommendation for the contended condition (uveal/choroidal melanoma).

b. The Army has neither the role nor the authority to compensate for progression or complications of service-connected conditions after separation. Congress grants that role and authority to the VA, operating under a different set of laws. *The complete medical advisory was provided to the Board for their review and consideration*.

15. The applicant was provided the medical advisory opinion and given the opportunity to provide additional evidence or comments. He responded and provided a public health assessment for Camp Lejeune, NC, drinking water from the Agency for Toxic

Substances and Disease Registry and a VA Fact Sheet, titled: V A's Final Rule to Consider Certain Diseases Associated with Exposure to Contaminants in the Water Supply at Camp Lejeune as Presumptive for Service Connection. He also stated that he was at Camp Lejeune when the water was deemed contaminated. The contaminated water could cause cancer. When the 99th RSC conducted their investigation, they deemed his cancer condition was most likely hereditary, however they have no basis for this. No one in his family has or had cancer. As for the medal review board, they say that the cancer was most likely caused by him being a middle aged European decent. Again, there is no proof for this.

16. The applicant provided a benefits decision letter, dated 1 June 2017, showing he was granted service-connected disability compensation for various conditions that include right uveal melanoma with a 100% rating.

17. AHRC Orders C09-498134, dated 12 September 2024, as amended by AHRC Orders C09-498134A01, dated 31 October 2024, directed the applicant's placement on the Retired List effective 6 December 2024.

18. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. Documentation reviewed included the applicant's ABCMR application and accompanying documentation, the military electronic medical record (AHLTA), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, the Army Aeromedical Resource Office (AERO), and the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

> The applicant widow has applied to the ABCMR requesting reconsideration of the ABCMR's denial of his request for a reversal of the United States Army Human Resources command Not in of Line of Duty – Not Due to Own Misconduct finding for the choroidal melanoma of his right eye; and a medical retirement.
> The Records of Proceedings details the applicant's military service and the circumstances of the case.

b. This request was previously denied by the ABCMR on 2 August 2019 (AR201090000068). Rather than repeat their findings here, the board is referred to the record of proceedings and medical advisory opinion for that case in which his eye disease is addressed on pages 519-521 of the supporting documentation. This review will concentrate on the new evidence submitted by the applicant.

Counsel's principle arguments are that the cancer should be determined to have been incurred in the line of duty because he did not have it before he deployed to Afghanistan, his exposure to ultraviolet light and/or burn pits during the deployment (11 October 2012 – 29 June 2013) were the cause of the cancer, and because the condition has been service connected by the VA.

c. Because his cancer was discovered approximately one year after his deployment, a formal line of duty investigation was required. The Report of Investigation Line of Duty and Misconduct Status (DD Form 261) states the cancer was found "Not in line of Duty."

d. The applicant appealed the decision to the U.S. Army Human Resources Command USAHRC). USAHRC has functional responsibility for the Army's line of duty processes. Paragraph 1-6a of AR 600-8-4, Line of Duty Policy, Procedures, and Investigation (15 April 2004):

> The Commanding General (CG), U.S. Army Human Resources Command (USA HRC) will have functional responsibility for LD [Line of Duty] determinations and act for the SA {Secretary of the Army] on all LD determinations and appeals referred to Headquarters, Department of the Army (HQDA) and all exceptions to procedures described in this regulation."

e. Paragraph 4-18 of AR 600-8-4:

> "The commanding general, USA HRC, acting for the SA, may at any time change a determination made under this regulation. The correct conclusion based on the facts must be shown."

f. USAHRC correctly opined there was insufficient evidence upon which to base an In Line of Duty finding. From their 21 September 2016 memorandum to the applicant:

> "Currently, there is no definitive link between exposure to burn pits and chronic illnesses of any kind in Service Members. Based on the documented growth rate of Choroidal tumors, Army medical professionals opined the tumor existed prior to your deployment in 2012 and was not service aggravated.

g. While some conditions have since been linked to burn pit exposure, the applicant's rare cancer is not one of them.

h. Submitted documentation states the cause(s) of this rare tumor are unknown and there is no link to exposure to ultraviolet light as there is with skin cancers. From the list of risk factors on page 449 of the supporting documentation:

> "Exposure to ultraviolet (UV) light. The role of ultraviolet exposure in eye melanoma is unclear. There's some evidence that exposure to UV light, such as light from the sun or from tanning beds, may increase the risk of eye melanoma."

i. Even if a link to UV light was found, the applicant's tumor could not be linked to his 9-month Afghanistan deployment given his 46 years of exposure prior to deployment and continued exposure post-deployment.

j. Counsel notes the cancer was not identified prior to the applicant's deployment. Pre-deployment ophthalmological screenings are generally limited to visual acuity screenings for the purpose of then ensuring deploying service members have the appropriate eye ware and mask inserts if required. When initially seen for his tumor by an ophthalmologist on 2 June 2014, the uncorrected vision in his right eye was 20/25 and 20/20 in his left. For deployment purposes, this almost normal visual acuity requires neither glasses nor mask inserts.

k. As to the VA's service connection of his cancer: The requirements for an affirmative Army line of duty determination vice a VA service connection determination, though similar, are different in several respects, and neither entity is required to observe the findings of the other. The VA service connecting of a condition when a Veteran has simply been on a period of active duty for greater than 90 days and the onset of a condition within one year of being released from active duty, as in this case, are such instances where they are different. For a condition to be found to have incurred in the line of duty, evidence must show that it was either incurred during, the result of, or permanently aggravated by service while the Soldier was in an eligible duty status / entitled to base pay. This is not the case here as it became symptomatic and was identified months after his release from active duty.

l. Based on the information currently available, it is the opinion of the ARBA medical advisor there is insufficient evidence to warrant a reversal of USAHRC's Not in Line of Duty determination.

BOARD DISCUSSION:

After reviewing the application and all supporting documents, the Board determined relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. Based upon the available evidence and the findings and recommendations outlined in the medical review, the Board concluded there was insufficient evidence of an error or injustice warranting the reversal of the previously issued HRC decision on the applicant's line of duty investigation.

BOARD VOTE:

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

BOARD DETERMINATION/RECOMMENDATION:

The 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.

3/31/2025

X [redacted]

CHAIRPERSON

[redacted]

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

REFERENCES:

1. Army Regulation 600-8-4 (Line of Duty (LOD) Policy, Procedures, and Investigations) prescribes policies and procedures for investigating the circumstances of disease, injury, or death of a Soldier providing standards and considerations used in determining LOD status.

a. The Army LOD Program is a commander's program which essentially protects the interest of both the Soldier and the U.S. Government where service is interrupted by injury, illness, disease, or death. LOD investigations determine duty status at the time of incident and whether misconduct was involved and, if so, to what degree. Additionally, LOD investigations may be required to determine an existed prior to service condition, and, if so, determine service aggravation.

b. An LOD investigation will be conducted for all Soldiers, regardless of component, if the Soldier experiences a loss of duty time for a period of more than 24 hours and:

(1) The injury, illness, or disease is of lasting significance (to be determined by a physician, physician assistant, or nurse practitioner).

(2) There is a likelihood that the injury, illness, or disease will result in a permanent disability.

(3) If a Reserve Component Soldier requires follow-on care for an injury, illness, or disease incurred during a period of active duty.

c. A formal LOD investigation is a detailed investigation that normally begins with a DA Form 2173 (Statement of Medical Examination and Duty Status) completed by the medical treatment facility and annotated by the unit commander as requiring a formal LOD investigation. The appointing authority, on receipt of the DA Form 2173, appoints an investigating officer who completes the DD Form 261 (Report of Investigation LOD and Misconduct Status) and appends appropriate statements and other documentation to support the determination, which is submitted to the general court-martial convening authority for approval.

d. An injury, disease, or death is presumed to be in LOD unless refuted by substantial evidence contained in the investigation. LOD determinations must be supported by substantial evidence and by a greater weight of evidence than supports any different conclusion. The evidence contained in the investigation must establish a degree of certainty so that a reasonable person is convinced of the truth or falseness of a fact.

2. Title 10, U.S. Code, chapter 61, provides the Secretaries of the Military Departments with authority to retire or discharge a member if they find the member unfit to perform military duties because of physical disability. The U.S. Army Physical Disability Agency is responsible for administering the Army physical disability evaluation system and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with DOD Directive 1332.18 and Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation).

3. Army Regulation 40-501 (Standards of Medical Fitness) provides information on medical fitness standards for induction, enlistment, appointment, retention, and related policies and procedures. Chapter 3 gives the various medical conditions and physical defects which may render a Soldier unfit for further military service and which fall below the standards required. These medical conditions and physical defects, individually or in combination, are those that:

a. Significantly limit or interfere with the Soldier's performance of their duties.

b. May compromise or aggravate the Soldier's health or well-being if they were to remain in the military Service. This may involve dependence on certain medications, appliances, severe dietary restrictions, or frequent special treatments, or a requirement for frequent clinical monitoring.

c. May compromise the health or well-being of other Soldiers.

d. May prejudice the best interests of the Government if the individual were to remain in the military Service.

4. Army Regulation 40-501, also states in:

a. Paragraph 9-10, normally, Reservists who do not meet the fitness standards set by chapter 3 will be transferred to the Retired Reserve or discharged from the USAR. They will be transferred to the Retired Reserve only if eligible and if they apply for it. Reservists with non-duty related medical conditions who are pending separation for not meeting the medical retention standards of chapter 3 may request referral to a Physical Evaluation Board (PEB) for a determination of fitness.

b. Paragraph 9-12, Reserve Component (RC) Soldiers with non-duty related medical conditions who are pending separation for failing to meet the medical retention standards of chapter 3 of this regulation are eligible to request referral to a PEB for a determination of fitness. Because these are cases of RC Soldiers with non-duty related medical conditions, medical evaluation boards are not required. Once a Soldier requests in writing that his or her case be reviewed by a PEB for a fitness determination, the case will be forwarded to the PEB and will include the results of a medical evaluation that provides a clear description of the medical condition(s) that cause the Soldier not to meet medical retention standards.

5. Army Regulation 15-185 (Army Board for Correction of Military Records (ABCMR)) provides Department of the Army policy, criteria, and administrative instructions regarding an applicant's request for the correction of a military record. Paragraph 2-11 states 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.

6. Section 1556 of Title 10, U.S. 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 ABCMR applicants (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//