ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [redacted]

BOARD DATE: 21 March 2025

DOCKET NUMBER: AR20240005235

APPLICANT REQUESTS: reconsideration of the applicant's previous request for:

- a disability retirement with a combined rating of 70 percent based on post-traumatic stress disorder (PTSD) and traumatic brain injury (TBI) or in the alternative
- a disability retirement with a combined rating of 50 percent based on PTSD and TBI

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

- DD Form 149, Application for Correction of Military Record
- Legal Brief with 11 enclosures

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:

a. Docket Number AR20180016264, dated on 19 September 2019, shows the Board granted partial relief by directing the OTSG to review the applicant's case for any diagnosis that would not have met retention standards at the time of his retirement, and if said conditions existed, to refer him into the Integrated Disability Evaluation System (IDES). On 9 February 2021, the OTSG determined that the applicant did not have records indicating the need for a Medical Evaluation Board (MEB).

b. Docket Number AR20210016948, dated on 18 May 2022, shows the applicant presented new evidence. After review of this new evidence the applicant's request was denied. However, the medical advisory was not provided to the applicant and this error is the basis for the current reconsideration.

2. Counsel's complete legal brief, as well as counsel's previous arguments, are provided in the supporting documents for the Board's full review. Counsel states, in summary –

a. The applicant's request is based on new and material evidence, specifically including, but not limited to a Physical Profile, Notification of Medial Unfitness for Retention, and the applicant's election for a standard Reserve retirement.

b. The applicant was not provided a copy of the ex parte medical advisory from ABCMR Docket Number AR20210016948. As such, this memorandum serves a request for meaningful reconsideration of the original and subsequent decisions based upon new and material evidence, specifically including the memorandum from the Office of the Under Secretary of Defense, 26 April 2024, referring this complaint about the Board's slipshod review of their previous request for reconsideration back to the Army Review Boards Agency "for appropriate action."

c. This case is proof that the Board abandoned its mandate to fully and fairly scrutinize actions by the Army and has instead begun looking for ways to justify denying relief to worthy veterans. It is one thing to rely upon the presumption of regularity, but it another to search through records and obtain opinions with the sole intent being to discount or disprove assertions by the veteran, especially in light of the Hagel, Carson, Kurta, and Wilkie memorandums, which direct the Boards to grant liberal consideration to petitions claiming TBI and PTSD, or other mental health conditions. Secret advisory opinions are not "liberal consideration."

d. When the Board issued its original decision in 2019 recommending the applicant's case be reviewed by the OTSG to determine if an MEB was appropriate, it was acting fairly, impartially, and in accordance with the guidance received from the Department of Defense. Unfortunately, the OTSG then took an inherently biased approach in evaluation of the applicant's records to claim he was "fine" in 2010 and therefore not worthy of an MEB.

e. When the applicant sought reconsideration in 2022, this biased decision was viewed under the presumption of regularity and was bolstered by an unnoticed and unjust Medical Advisory Opinion. Because this opinion was not provided to the applicant, he was never afforded a chance to bring to light the errors in the advisory opinion or its general non-compliance with the DoD policy on liberal consideration for PTSD and TBIs. The Board, relying upon the presumption of regularity and the biased Medical Advisory Opinion, upheld the previous decision pushed out by the OTSG asserting the applicant had provided insufficient evidence to prove that he should have been medically retired from the military.

f. The 2021 medical opinion seeks to downplay the applicant's documented symptoms claiming they are subjective and somehow unworthy of consideration because he had positive performance evaluations at the same time. In 2022, the Medical Advisor focused on record entries that minimized the applicant's symptoms rather than focus on the fact that he had documented symptoms reflected in several

evaluations and used that to decide an MEB was appropriate. The Medical Advisor continued the same path as the OTSG did in 2021 – looking for ways to discredit the applicant's claim of unfitness. Additionally, the Medial Advisor attempted to minimize the value of the Department of Veterans Affairs (VA) Rating Decision issued in 2014. While the medical opinion the Board relied upon acknowledged that the applicant had PTSD, they did not apply liberal consideration.

g. The medical opinions go out of the way to locate references to the applicant reporting that he was doing "well," that he did not want to undergo additional testing, and that he wanted to be weaned off his medications. All of this was used to claim his condition was not a big deal when in reality, it is evidence that the applicant was trying to hide his conditions to avoid the stigma associated with mental health conditions prevalent in the early 2000's.

h. When taking into consideration the guidance directing liberal consideration and the fact that the applicant was notified -in 2010- that he was medically disqualified for further military service, there is no doubt he should have gone through a MEB. His medical records and the letters from his supervisors are corroborative of his conditions, and the letters reflect the seriousness of his conditions that were underreported in the medical records.

i. The Board must push passed the various details raised in the medical reviews and look at the big picture – in 2010, the applicant was found to be medically disqualified for further service -but due to erroneous guidance, lost out on the opportunity for complete processing through the DES and the actions since then have focused on justifying the Army's actions and denying him relief rather than looking at where he should have been fully and fairly considered for a medical disability retirement.

j. After a thorough review of the records, VA Rating Decisions, letters from friends and family, and colleagues, it becomes readily apparent that the applicant's military career was cut short due to his PTSD and TBI. He should have been evaluated by an MEB and referred to a duty-related PEB, which, if rating him appropriately based upon his symptoms, would have medically retired him at either 50 or 70 percent.

k. The applicant was incorrectly told that a Reserve Retirement and a medical retirement would produce the same results. This was heinously unjust. The difference between a Reserve Retirement and a medical retirement is astronomical. Had he been medically retired in 2010, he would receive between $2,085.00 and $4,867, and he would have received payment immediately.

3. The record shows that the applicant was appointed as a Reserve Commissioned Officer on 23 May 1992.

4. His records contain a SF 600, Health Record-Chronological Record of Medical Care, 4 May 2007. This record shows the applicant requested to have his medical records updated to reflect previous Improvised Explosive Device (IED) blasts which occurred on 5 October 2006, 23 November 2006, 31 December 2006, and 12 January 2007. A retroactive assessment of the stated past exposures found that a concussion at the time of exposure was presumptive, as there were no residuals allowing confirmation through findings from the examination completed that day.

5. The record contains an Officer Evaluation Report rendered when the applicant was serving as the Battalion Executive Officer for an Engineering Battalion. This report covered the period 1 September 2008 through 31 August 2009, and shows that the applicant failed his Army Physical Fitness Test, and he did not meet the established height and weight on 19 August 2009. There were no deficiencies reported with his performance or potential.

6. On 23 July 2010, the Command Surgeon notified the applicant's commander that the applicant's medical condition (TBI) was medically unacceptable.

7. The applicant was notified on 24 August 2010 that as the result of his medical evaluation, he was medically disqualified for continued service in the U.S. Army Reserve. He was required to select an option regarding his medical disqualification; however, his election was not found in the record.

8. The applicant was transferred to the Retired Reserve on 31 December 2010.

9. The record contains a confirmation of the applicant's exposure to IED detonation during Operation Iraqi Freedom, 26 March 2011.

10. Permanent Order 287-13, 14 October 2011, published by U.S. Army Human Resources Command, awarded the applicant the Purple Heart for wounds received as a result of hostile actions on 12 January 2007.

11. The applicant provides:

a. His initial PTSD VA medical examination, conducted on 23 July 2008. This examination shows he was diagnosed with PTSD in partial remission with severe psychosocial stressors due to combat trauma. He did not meet the criteria of PTSD but would likely meet the criteria if he were not receiving treatment.

b. A VA Rating Decision, 15 September 2008, which shows the VA deferred a decision for PTSD.

c. The Army Review Boards Agency Medical Advisory Opinion, 1 July 2019, which found that the applicant's medical records did support the existence of a boardable behavioral health condition at the time of discharge. The applicant did not meet medical retentions standards in accordance with AR 40-501, Medical Services-Standards of Fitness, and there was no misconduct. This official recommended the applicant be submitted to the MEB for their review and consideration.

d. The MEB Psychologist findings, 9 February 2021. This official stated in effect, that at the time of the applicant's retirement he was stable and discontinued all Behavioral Health related treatment. There was no objective data/evidence to support any cognitive deficits/disorder and no evidence that any neuropsychological assessment was completed to further identify any potential defects. The OTSG endorsed this advisory on 9 February 2021 and found an MEB was not warranted.

e. Current Under Secretary of Defense clarifying guidance regarding liberal consideration of discharge relief requests and fitness determinations, 4 April 2021. This guidance states, in effect, in the case of an applicant who seeks a correction to their records to reflect eligibility for a medical retirement or separation, the Board for Correction of Military Records (BCM) will bifurcate its review. First, the BCM will apply liberal consideration to the eligible applicant's assertion that combat- or Military Sexual Trauma-related PTSD or TBI potentially contributed to the circumstances resulting in their discharge or dismissal to determine whether any discharge relief, such as an upgrade or change to the narrative reason for discharge, is appropriate. After making that determination, the BCM/NR will then separately assess the individual's claim of medical unfitness for continued service due to that PTSD or TBI condition as a discreet issue, without applying liberal consideration to the unfitness claim or carryover of any of the findings made when applying liberal consideration.

MEDICAL REVIEW:

1. The applicant is applying to the ABCMR requesting a disability retirement with a combined rating of 70 percent based on Posttraumatic Stress Disorder (PTSD) and Traumatic Brain Injury (TBI) or in the alternative, a disability retirement with a combined rating of 50 percent based on PTSD and TBI. 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) Docket Number AR20180016264, dated on 19 September 2019, shows the Board granted partial relief by directing the OTSG to review the applicant's case for any diagnosis that would not have met retention standards at the time of his retirement, and if said conditions existed, to refer him into the Integrated Disability Evaluation System (IDES). On 9 February 2021, the OTSG determined that the applicant did not have records indicating the need for a Medical Evaluation Board (MEB), 2) Docket Number AR20210016948 dated on 18 May 2022, shows the applicant presented new evidence. After review of this new evidence the applicant's request was

denied. However, the medical advisory was not provided to the applicant and this error is the basis for the current reconsideration, 3) the new material evidence includes Physical Profile, Notification of Medial Unfitness for Retention, and the applicant's election for a standard Reserve retirement, 4) the applicant was appointed as a Reserve Commissioned Officer on 23 May 1992, 5) the record contains an OER rendered when the applicant was serving as the Battalion Executive Officer, covering the period from 01 September 2008 through 31 August 2009 and shows that the applicant failed his APFT and he did not meet the established height and weight. There were no deficiencies reported with his performance or potential, 7) On 23 July 2010, the Command Surgeon notified the applicant's commander that the applicant's medical condition (TBI) was medically unacceptable, 8) the applicant was notified on 24 August 2010 that as the result of his medical evaluation, he was medically disqualified for continued service in the U.S. Army Reserve. He was required to select an option regarding his medical disqualification, 9) The applicant was transferred to the Retired Reserve on 31 December 2010, 10) The record contains a confirmation of the applicant's exposure to IED detonation during Operation Iraqi Freedom, 26 March 2011, 11) The applicant was awarded the Purple Heart on 14 October 2011 for wounds he sustained as a result of hostile actions on 12 January 2007.

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. All records were independently reviewed by this Advisor. Lack of citation or discussion in this section should not be interpreted as lack of consideration.

3. In-service medical records for treatment completed through the VA and DoD were available for review via JLV from 03 May 2002 through 22 December 2010. Additional in-service medical records that were included as part of his previous petitions to the ABCMR are integrated into this review.

- The applicant presented for a medical appointment on 04 May 2007 requesting an update to his medical records to document his previous exposure to IED blasts. He reported a history of exposure to at least four previous blasts (05 October 2006; 23 November 2006; 31 December 2006; 12 January 2007). The evaluating provider documented that his MACE and neurological examinations were normal. It was concluded that a concussion at the time of the events was deemed presumptive as there were no residuals allowing confirmation during the examination. The provider diagnosed the applicant with Concussion without Loss of Consciousness (LOC) and he was released without limitations.

- A Report of Medical History dated 09 November 2007 was completed for the purposes of retention. Review of the form shows the applicant marked 'no' to all BH-related items (17a-i) and 'no' to history of head injury. He marked 'yes' to

item 15g and noted a possible concussion due to IED detonation in Iraq. The provider documented the applicant's neurological examination was within normal limits and that he denied having headaches, dizziness, blurry vision, or weakness. The Report of Medical Examination dated 09 November 2007 shows his PULHES (which was dated as 06 December 2007) as 111111, indicating no duty limitations were documented. A Functional Capacity Certificate dated 09 November 2007 shows the applicant marked 'no' to all items and it was determined that no duty limitations were required.

- The applicant presented for a BH evaluation on 15 November 2007 due to experiencing anxiety, feeling edgy, increased startle response, heightened arousal, increased anxiety when seeing dead animals on the side of the road, needing to write things down more frequently, and forgetfulness. It was documented that he screened positive for TBI though declined further evaluation. The applicant engaged in BH treatment via medication management from 04 December 2007 through 13 February 2009, with appointments occurring approximately every three months. The prescribing psychiatrist diagnosed the applicant with Adjustment Disorder with Anxiety and prescribed Citalopram (antidepressant) for management of his symptoms. Review of the psychiatry records show he consistently reported improvement in mood, irritability, temper, and sleep at each visit since starting the medication. At the time of his last appointment on 13 February 2009, the applicant requested to taper off of his medication due to improvement in symptoms, with the planned time for taper documented as two weeks. He consistently denied experiencing suicidal or homicidal ideation (SI/HI). A note from a VA case manager dated 15 January 2009 shows the applicant reported he was "doing well and had been very satisfied with health care at the VA." A subsequent case management note the following year dated 04 August 2010 shows the applicant reported he was interested in reconnecting with VA benefits [*Advisor's Note:* the requested services were not documented]. A physician's note dated 23 November 2010 shows the applicant denied experiencing depression, panic attacks, or SI/HI. The provider documented the applicant screened positive for symptoms of PTSD (PC-PTSD=4); however, it was documented that he refused further treatment.

- A DA 3349 shows the applicant was issued a permanent profile for Traumatic Brain Injury and Right Knee Pain, with his PULHES documented as 312111. Item 4c (statement regarding whether the Soldier meets retention standards IAW AR 40-501) shows "needs ND-PEB" under the 'no' column. In the remarks section it was documented "TBI 3-30j, Soldier must complete cognitive evaluation. Chronic right knee pain 3-12." The profiling officer signed the profile on 21 June 2010 and was subsequently signed by the senior profiling officer on 17 August 2010. A Medical Determination memorandum dated 23 July 2010 shows the applicant's records were reviewed by the 99th Regional Support Command Surgeon and

determined that his medical condition was medically unacceptable, noted as TBI, IAW AR 40-501, Chapter 3-30j. A Notification of medical Unfitness for Retention Reference dated 24 August 2010 shows that the applicant was deemed medically disqualified for continued service based on his medical evaluation under the provisions of AR 40-501, Chapter 3. A memorandum dated 23 September 2010 entitled, "Acknowledgement and Election Option for medical Evaluation Board/Physical Evaluation Board shows the applicant selected option a: "I request reassignment to the Retired Reserve (20 qualifying years of service for retired pay at age 60 per AR 140-10, chapter 6). Attached is my 20 year letter."

4. A review of JLV shows the applicant is 100% service-connected through the VA for several health conditions, to include 70% for PTSD (current rating effective date 09 August 2014) and 10% for Residuals of Traumatic Brain Injury (current rating effective date 26 august 2007).

- The applicant underwent an initial VA Compensation and Pension (C&P) examination for PTSD on 23 July 2008. The evaluating provider documented his ongoing symptoms at the time of the evaluation as irritability (though not losing his temper and not yelling or screaming as he was prior to starting Citalopram), sleeping fitfully, noting occasional dreams but denied experiencing nightmares, experiencing memories on a daily basis but did not find them distracting or upsetting, startle reactions which last for a few minutes, and denied avoidance behaviors. The evaluating provider documented several stressors associated with his diagnosis of PTSD to include witnessing casualties, frequently under fire, and vehicle exploded by IEDs. Since returning from deployment, the applicant reported he had difficulty adjusting to work, was finding he was "more brisk and direct with people," though denied that his employers or workers noticed any impairment and stated his irritability improved with treatment. The evaluating provider documented that his diagnosis of PTSD was in Partial Remission (due to current treatment). A VA Rating Decision Letter dated 12 November 2008 shows he was initially granted 10% service-connection for PTSD.

- The applicant underwent a VA C&P examination for TBI on 17 October 2008. The evaluating provider documented four exposures to IED blasts (10 October 2006; 23 November 2006; 21 December 2006; 12 January 2007). The evaluating provider documented that at the time of each event the applicant endorsed experiencing an altered level of consciousness which lasted a few minutes though denied experiencing LOC. The applicant endorsed experiencing headaches 1 to 2 times per week that would last a few hours though were relieved with Tylenol. He also reported sleeping 6 to 7 hours per day with some sleep disturbance, in addition to experiencing moderate fatigue, malaise, moderate memory impairment, slowness of thought, and decreased attention. He

also endorsed the following symptoms: mood swings, anxiety, depression, behavioral changes, irritability, tinnitus, hypersensitivity to light, and restlessness, nothing that symptoms were improving. The provider documented that the applicant would benefit formal speech evaluation or neuropsychological testing; however, it was noted that he refused a referral to the Polytrauma Support Clinic for further evaluation. The evaluating provider diagnosed him with TBI, mild, Patellofemoral Syndrome, and Adjustment Reaction/Anxiety Disorder. It was also noted that he had post-concussive syndrome with residual symptoms as a result of TBI. A VA Rating Decision letter dated 24 March 2009 shows the applicant was granted 10% service-connection for TBI, mild, with an effective date of 26 August 2007.

5. The previous Medical Advisory opinion in Docket Number AR20180016264 dated 19 September 2019 was reviewed. At the time of his initial petition to the ABCMR, the Medical Advisor found that the applicant did have a medically boardable condition at the time of discharge that did not meet medical retention standards IAW AR 40-501 and thus it was recommended that his file be submitted to the Medical Evaluation Board (MEB) for further review and consideration. An Advisory Opinion from an MEB psychologist dated 09 February 2021 was subsequently provided. The evaluating provider opined that at the time of the applicant's retirement, his BH condition was stable and he had discontinued all BH-related treatment. The provider further noted that there was no objective data or evidence to support that the applicant had any cognitive deficits or a disorder and no evidence of a neuropsychological assessment was completed to identify and delineate any potential deficits. The provider documented that the applicant did not meet the Medical Retention Determination Point (MDRP) as his condition was deemed in remission which allowed him to terminate from BH treatment. It is of note that the MEB provider documented that the applicant's VA C&P examination(s) were not available for review at the time of the initial case review. Additionally, it was not documented that the MEB provider had access to the applicant's permanent profile that was submitted for TBI in 2010 at the time of their review nor the letter from the Surgeon's office finding him to be medically unfit due to TBI. In summary, the MEB provider documented that an MEB was not warranted and recommended no further action.

6. The Medical Advisory for the applicant's subsequent petition to the ABCMR in Docket Number AR20210016948 dated 18 May 2022 was reviewed. The evaluating provider summarized the applicant's treatment history, VA C&P examinations, and subsequent VA service-connected ratings which were granted both in-service and since being discharged from the military. It was documented, and can be seen via review of JLV, that the applicant's VA disability ratings increased for PTSD since being discharged from the military, from 10% to 70%, effective 09 April 2014. The Advisor opined that a VA rating determination alone does not automatically determine that a military medical disability/retirement is warranted as the VA and DoD operate under

different rules and laws. After further review of the records, the Advisor concluded that medical retirement/disability for PTSD or TBI was not warranted.

7. Based on the available information, it is the opinion of the Agency Medical Advisor that there is sufficient evidence that the applicant was diagnosed with TBI in-service and was subsequently issued a permanent P3 profile rendering the applicant medically unfit for service IAW AR 40-501, Chapter 3. Although the applicant's initial review by an MEB psychologist at the time of his initial petition to the ABCMR in 2018 shows the provider determined that an MEB was not warranted, it does not appear that the evaluating psychologist had access to the applicant's VA C&P examinations confirming his diagnosis of TBI, his permanent profile that was submitted in July 2010, nor the memorandum from the Surgeon's Office specifying that he was found to be medically unfit due to TBI, all of which are now available via the applicant's application files to the ABCMR. While it is acknowledged that it appears the applicant elected a non-regular retirement after being notified that he was medically unfit in Lieu of an MEB, as there is evidence that the applicant was issued a permanent profile for TBI and was found to be medically disqualified for continued service, it is recommended that the applicant's case be referred back to DES IAW AR 40-501 for further evaluation and processing.

8. Although the applicant's medical records show the applicant was diagnosed and treated for PTSD (also diagnosed as Adjustment Disorder with Anxiety, which is subsumed by his diagnosis of PTSD) in-service, it is of note that a diagnosis of PTSD or VA disability rating in-service is not automatically unfitting and would not automatically result in medical separation processing. Furthermore, it is of note that VA examinations are based on different standards and parameters, 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. Per AR 40-501, Chapter 3-33c, a referral to DES is required if there is 1) persistence or recurrence of symptoms sufficient to require extended or recurrent hospitalization and/or 2) persistence or recurrence of symptoms that interfere with duty performance and necessitate limitation of duty or duty in a protected environment. The available documentation does not show that the applicant required hospitalization or duty limitations (e.g., a BH profile) due to his diagnosed condition of PTSD. Review of his medical records show improvement in his condition with treatment, ultimately terminating treatment in 2009 due to resolution of his symptoms. Given the available medical documentation showing an improvement in the applicant's symptoms associated with PTSD while he was in-service, and no indication that he failed medical retention standards IAW AR 40-501, a referral to DES is not warranted for this condition.

9. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? N/A

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

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

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that partial relief was warranted. Counsel's contentions, the applicant's miliary records, and regulatory guidance were carefully considered.

a. The evidence shows the applicant's documented exposure to multiple IED blasts in 2006-2007, with presumptive concussions. The command surgeon notified the applicant's commander that his medical condition (TBI) was medically unacceptable and the applicant was subsequently notified of his disqualification for continued service. He was transferred to the Retired Reserve on 31 December 2010.

b. The Board noted that the applicant was awarded the Purple Heart for wounds sustained on 12 January 2007.

c. The Board further noted the medical advisor's review finding:

(1) Documented anxiety, forgetfulness, and positive TBI screening;

(2) A permanent profile listed TBI and noted "needs ND-PEB," indicating failure to meet retention standards;

(3) VA records confirm service connection for residuals of TBI (10%) effective 26 August 2007 and PTSD (70%) effective 9 August 2014.

(4) His VA Compensation and Pension Examination in October 2008 documented residual symptoms of TBI, including headaches, memory impairment, decreased attention, mood swings, and post-concussive syndrome.

d. The Board found the applicant has demonstrated by a preponderance of evidence an error or injustice warranted referral to the DES. Specifically, the Board

found the applicant met his burden of proof that he incurred service-related injuries that warrant consideration through the DES.

e. Based on the preponderance of the evidence available for review, the Board determined the evidence presented was sufficient to warrant a recommendation for partial relief by:

(1) Directing the applicant be entered into the DES and a MEB convened to determine whether his conditions met medical retention standards at the time of service separation;

(2) Denying of so much of the applicant's request that pertains to a disability retirement with a combined rating of 70% based on PTSD and TBI or a disability retirement with a combined rating of 50% based on PTSD and TBI without referral to the DES.

BOARD VOTE:

Mbr 1	Mbr 2	Mbr 3	
:	:	:	GRANT FULL RELIEF
:XXX	:XXX	:XXX	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined that the evidence presented was sufficient to warrant a recommendation for partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by:

a. Directing the applicant be entered into the Disability Evaluation System (DES) and a medical evaluation board convened to determine whether the applicant's condition(s) met medical retention standards at the time of service separation.

b. In the event that a formal physical evaluation board (PEB) becomes necessary, the individual concerned may be issued invitational travel orders to prepare for and participate in consideration of his case by a formal PEB if requested by or agreed to by the PEB president. All required reviews and approvals will be made subsequent to completion of the formal PEB.

c. Should a determination be made that the applicant should have been separated under the DES, these proceedings will serve as the authority to void his administrative separation and to issue him the appropriate separation retroactive to his original separation date, with entitlement to all back pay and allowances and/or retired pay, less any entitlements already received.

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 a disability retirement without evaluation under the DES.

//SIGNED//

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. Title 38, U.S. Code, permits the Veterans Administration (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 error or injustice in the Army not separating the individual for physical unfitness. An Army disability rating is intended to compensate an individual for interruption of a military career after it has been determined that the individual suffers from an impairment that disqualifies him or her from further military service.

3. Army Regulation (AR) 135-178, Army National Guard and Army Reserve-Enlisted Administrative Separations, establishes the policies, standards, and procedures governing the administrative separation of enlisted Soldiers from the Reserve Components (RC). It states discharge will be accomplished when it has been determined that an enlisted member is no longer qualified for retention by reason of medical unfitness unless the member requests and is granted:

- a waiver under AR 40-501
- determined fit for duty under a non-duty related Physical Evaluation Board
- is eligible for transfer to the Retired Reserve

a. Soldiers who do not meet the medical fitness standards for retention due to a condition incurred while on active duty, any type of active duty training, or inactive duty training will be processed as specified in AR 635-40, Personnel Separations-Physical Evaluation for Retention, Retirement or Separation, if otherwise qualified.

b. The separation authority may approve discharge under this paragraph on the basis of other physical or mental conditions not amounting to disability that potentially interfere with assignment to or performance of military duty.

c. Discharge processing may not be initiated until the Soldier has been counseled formally concerning deficiencies and has been afforded an opportunity to overcome those deficiencies as reflected in appropriate counseling or personnel records.

d. When a commander determines that a Soldier may have a medical or mental condition that interferes with the Soldier’s performance of duty and contemplates

initiation of separation under this paragraph, the commander will refer the Soldier for a medical or mental health evaluation (or both).

4. AR 635-40, Personnel Separations-Physical Evaluation for Retention, Retirement, or Separation, governs the evaluation of physical fitness of Soldiers who may be unfit to perform their military duties because of physical disability incurred while entitled to basic pay. It states that the mere presence of 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.

a. Under the laws governing the Physical Disability Evaluation System (PDES), Soldiers who sustain or aggravate physically-unfitting disabilities must meet several line of duty criteria to be eligible to receive retirement and severance pay benefits. The disability must have been incurred or aggravated while the Soldier was entitled to basic pay or must have been the proximate cause of performing active duty or inactive duty training.

b. Permits for permanent retirement when the disability is rated at 30 percent or more under VASRD, or the Solder has at least 20 years of active Federal service.

5. AR 40-501, Medical Services-Standards of Medical Fitness, governs medical fitness standards for retention and separation, including retirement. It states that:

a. 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.

b. Reservists who do not meet medical retention standards may request continuance in active USAR status. In such cases, a medical impairment incurred in either military or civilian status will be acceptable; it need not have been incurred only in the line of duty. Reservists with nonduty related medical conditions who are pending separation for not meeting the medical retention standards may request referral to a Physical Evaluation Board (PEB) for a determination of fitness in accordance with the procedures outlined in this regulation.

c. RC Soldiers with non-duty related medical conditions who are pending separation for failing to meet the medical retention standards 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 Board are not required, and cases are not sent through the PEB Liaison Officers at the medical treatment facilities. 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 by the USAR Command Regional Support Command or the AHRC Command Surgeon's office and will include the results of a medical evaluation that provides a clear description of the medical condition(s) that cause the Soldier to not meet medical retention standards.

6. AR 15-185, Boards, Committees, and Commissions-ABCMR prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR. The ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

7. On 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRBs) and Service Boards for Correction of Military/Naval Records (BCM/NRs) to carefully consider the revised PTSD criteria, detailed medical considerations, and mitigating factors, when taking action on applications from former service members administratively discharged under other than honorable conditions, and who have been diagnosed with PTSD by a competent mental health professional representing a civilian healthcare provider in order to determine if it would be appropriate to upgrade the characterization of the applicant's service.

8. 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 DRBs and BCM/NRs when considering requests by Veterans for modification of their discharges due in whole, or in part, to mental health conditions, including PTSD; TBI; sexual assault; sexual harassment. Boards were directed to give liberal consideration to Veterans petitioning for discharge relief when the application for relief is based in whole or in part to those conditions or experiences. The guidance further describes evidence sources and criteria and requires Boards to consider the conditions or experiences presented in evidence as potential mitigation for that misconduct which led to the discharge.

9. 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 type of court-martial. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to other corrections, including changes in a discharge, which may be warranted based on equity or relief from injustice.

a. This guidance does not mandate relief but 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, 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.

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.

10. 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.

//NOTHING FOLLOWS//