ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [redacted]

BOARD DATE: 26 March 2025

DOCKET NUMBER: AR20240005237

APPLICANT REQUESTS: in effect, reconsideration of his prior requests for physical disability retirement in lieu of physical disability separation with severance pay

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

- DD Form 149 (Application for Correction of Military Record)
- Acting Under Secretary of Defense memorandum, 4 April 2024
- Principal Deputy Assistant Secretary of the Army (Manpower and Reserve Affairs) letter, 22 May 2024

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's cases by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20190013890 on 25 February 2021 and Docket Number AR20220007691 on 22 March 2023.

2. A letter from the Principal Deputy Assistant Secretary of the Army (Manpower and Reserve Affairs) to the applicant's representing Counsel, 22 May 2024, shows:

a. The Principal Deputy Assistant Secretary of the Army (Manpower and Reserve Affairs) read Counsel's letter to the Secretary of Defense, regarding the outcomes of the applicant's previous Physical Disability Board of Review (PDBR) and ABCMR determinations, considered her contentions regarding due process, the review of the applicant's records from the Department of Veterans Affairs (VA), the ABCMR's application of current Department of Defense (DOD) policy in cases of requests for medical disability separation or retirement and the statutory language applicable to his requests.

b. The actions she requested the Secretary of Defense take regarding the applicant's request for a records correction were also considered. Following a thorough review of Counsel's correspondence, the ABCMR has opened a new case, reference number AR20240005237, for reconsideration of the applicant's previous Board review.

c. Counsel's correspondence to the Secretary of the Army, referenced in the Principal Deputy Assistant Secretary of the Army (Manpower and Reserve Affairs) letter to Counsel, is not in the available records for review.

3. The applicant enlisted in the Regular Army on 26 October 1999, and was awarded the Military Occupational Specialty (MOS) 11B (Infantryman).

4. The applicant deployed to the following locations during the following time periods:

- Iraq, from 15 March 2003 through 13 March 2004
- Afghanistan, from 12 February 2005 through 2 November 2005

5. The acronym "PUHLES" describes the following six physical factors used in the profiling system to classify medical readiness: "P" (Physical capacity or stamina), "U" (Upper extremities), "L" (Lower extremities), "H" (Hearing), "E" (Eyes), and "S" (Psychiatric). Physical profile ratings are permanent (P) or temporary (T). A service member's level of functioning under each factor is represented by the following numerical designations: 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.

6. A DA Form 3349 (Physical Profile) shows on 15 February 2006, the applicant was given a permanent physical profile rating of 3 in factor L for lower back pain, L5-S1 disc protrusion impinging left S1 nerve root, which limited him in multiple functional activities and all Army Physical Fitness Test (APFT) events. His PULHES was 113111

7. A DA Form 3947 (Medical Evaluation Board (MEB) Proceedings) shows and MEB convened on 19 October 2006, with the following findings:

a. The applicant's conditions found to be medically unacceptable in accordance with Army Regulation 40-501 (Standards of Medical Fitness), chapter 3 were:

- lumbago (MEB diagnosis (Dx) 1)
- herniated nucleus pulposus (Dx 2)
- lumbar degenerative disk disease (Dx 3)
- testicle pain (Dx 4)

b. The applicant's conditions found to be medically acceptable in accordance with Army Regulation 40-501, chapter 3 were:

- right ankle pain (Dx 5)

- left ankle pain (Dx 6)
- adjustment disorder with anxiety (Dx 7)
- tinnitus, bilateral (Dx 8)
- moderate high frequency sensorineural hearing loss (Dx 9)

c. The applicant was referred to a Physical Evaluation Board (PEB).

d. On 20 October 2006, the applicant signed the form indicating he agreed with the MEB's findings and recommendations.

8. A DA Form 199 (PEB Proceedings) shows:

a. A PEB convened on 24 January 2007, where the applicant was found physically unfit with a recommended combined rating of 10 percent and that his disposition be separation with severance pay.

b. The applicant's condition determined to not meet medical retention standards was chronic back pain with a history of a herniate disc with pain radiating to the testicular area. (MEB Dx 1-4); 10 percent.

c. His conditions determined to meet medical retention standards were MEB Dx 5-9, as they were not listed on the Physical Profile as limiting any of the applicant's functional activities, were not commented upon by the commander as hindering the applicant's performance, and the case file contains no evidence that these Dx independently or combined rendered him unfit for his assigned duties.

9. On 5 February 2007, the applicant non-concurred with the PEB's findings and recommendations and submitted a rebuttal, which shows:

a. On 24 January 2007, he went through a PEB. The PEB found him unfit for duty with a disability rating of 10 percent and recommended separation with severance pay. He is appealing this finding based on the board's argument that his Parachute Jump injury happened in March 2002 and that his MEB started in 2005, and that he continued to jump and perform his duties to the best of his abilities. Yes, he did go back to duty after 6 months of rehabilitation; however it is noted that he started to complain of hip pain/discomfort immediately. He was given 1000 mg Motrin and told to drive on. He deployed to Iraq and in pain and suffering he did his duty.

b. He deployed to Afghanistan and when his lower back and hip pain started to protrude to his right testicle, he could no longer bear the hardship of driving on. Once all test were done at Landstuhl Regional Medical Center, the full picture of his situation appeared a lot clearer. His right leg was shorter than my left leg, his hips were shifted and he had a herniated disc at L-5, S-1 and a restriction of his spinal canal. Obviously

throughout time, subconsciously correcting his walking posture because of the shorter leg has brought on other illnesses.

c. He is a Soldier and his job is to do his duty, a doctor's job is to find out what is wrong with you, not administer pain medication like if it was candy. He is not accusing anyone of wrong doing, but he is convinced that if a doctor would have done all the testing possible back when, he would not be in this position today. For the Army to say that his illness/injury is not derived from his Parachute Malfunction is a blatant lie. To hold him responsible for his physical condition because he "drove on" with selfless service is just outright despicable. He is not the same man physically/mentally that he was when he joined the Army. He has always accepted his responsibilities; he believes very strongly that the Army needs to face theirs. You cannot ask a man to lay his life on the line to defend his country and then once he is broken discard him like a peace of scrap metal. He is asking that he at least receive a rating of 30 percent disability, which will allow him to receive medical help and provide for his daughter. He has visited with Lieutenant Colonel (LTC) P____ Behavioral Health today, 5 February 2007 at Vicenza Health Clinic. She will write an addendum for his mental conditions that were not properly inserted on my Narrative Summary (NARSUM). Having to review his files and information, she will need a few days to complete that. He asks the board that time to be able to send it forward to you.

10. A U.S. Army Physical Disability Agency (USAPDA) memorandum, 12 February 2007, informed the applicant that they noted his disagreement with the PEB and reviewed his entire case, including his rebuttal. The agency's conclusion is that his case was properly adjudicated by the PEB, which correctly applied the rules that govern the Physical Disability Evaluation System (PDES) in making its determination. The findings and recommendations of the PEB are supported by substantial evidence and are affirmed.

11. The applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) shows the applicant was honorable discharged under the provisions of Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation) due to disability with severance pay with corresponding Separation Code JFL. He was credited with 7 years, 4 months, and 15 days of net active service.

12. A DD Form 294 (Application for a Review by the Physical Disability Board of Review (PDBR) of the Rating Awarded Accompanying a Medical Separation from the Armed Forces of the United States) shows the applicant applied to the PDBR in February 2014, requesting, in effect physical disability retirement in lieu of physical disability separation with severance pay through the finding of unfitness for major depressive disorder with post-traumatic stress disorder (PTSD), which the Army erroneously rated as adjustment disorder with anxiety and did not find unfitting.

Additionally the VA rated his degenerative disc disease at 20 percent where the Army rated it at 10 percent.

13. A PDBR Record of Proceedings, 20 May 2016, shows:

a. The applicant contends his adjustment disorder adjudicated by the service should have been PTSD.

b. The rating comparison shows:

(1) The PEB rated the applicant's chronic back pain with a history of a herniated disc at 10 percent and his adjustment disorder with anxiety as not unfitting, for a combined rating of 10 percent.

(2) The VA rated his degenerative disc disease of the lumbar spine with radiation to the right testicle area and right lower extremity at 10 percent and his adjustment disorder with anxiety at 10 percent, for a combined rating of 30 percent.

c. Board findings show in the matter of the back condition, the PDBR unanimously recommended no change in the PEB adjudication. In the matter of the contended adjustment disorder with anxiety condition, the PDBR unanimously agreed that it cannot recommend it for additional disability rating. There were no other conditions within the PDBR's scope of review for consideration. The PDBR, therefore, recommended that there be no recharacterization of the applicant's disability and separation determination.

14. As a result of the finality of the PDBR's decision, the scope of the current Board's review is limited to those conditions which were not considered by the PDBR and not determined by the PEB to be unfitting for continued military service.

15. The applicant previously applied to the ABCMR through Counsel in October 2019, requesting physical disability retirement in lieu of physical disability separation with severance pay. Provided in that application were numerous medical documents, service records, and Counsel's brief, all of which have been provided in full to the Board for review.

16. Counsel's brief argued, in pertinent part

- the applicant's initial evaluation was incomplete and inaccurate
- the MEB/PEB used performance evaluations without regard to the duty changes
- the MEB/PEB placed too much emphasis on the Commander's Statement
- the PEB limited its inquiry to the incomplete and inaccurate records from the MEB

- the PDBR relied heavily upon the inaccurate records and limited scope of purview and disregarded reliable medical information due to arbitrary guidance on timelines

17. The ABCMR Record of Proceedings in Docket Number AR201900139890, which includes the medical review, has been provided in full to the Board for review and shows on 25 February 2021, the Board denied the applicant's request, determining he evidence presented does not demonstrate the existence of a probable error or injustice and the overall merits of the case were insufficient as a basis for correction of the applicant's records.

18. A VA letter, 14 January 2021, shows the applicant has a combined service-connected evaluation of 100 percent effective 1 December 2020.

19. The applicant again applied to the ABCMR through Counsel in May 2022, requesting reconsideration of his prior request for physical disability retirement in lieu of physical disability separation with severance pay. Provided in that application were several medical documents, Counsel's brief, Counsel's supplement, and a VA letter, all of which have been provided in full to the Board for review.

20. The arguments raised in Counsel's brief are consistent with the previously presented arguments, with the inclusion of the new argument that the advisory opinion considered by the Board was not provided to the applicant and that his diagnosis of obstructive sleep apnea was not properly considered.

21. The ABCMR Record of Proceedings in Docket Number AR20220007691, which includes the medical review, has been provided in full to the Board for review and shows on 22 March 2023, the Board denied the applicant's request, determining he evidence presented does not demonstrate the existence of a probable error or injustice and the overall merits of the case were insufficient as a basis for correction of the applicant's records.

22. 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.

23. Title 38, CFR, Part IV is the VA's schedule for rating disabilities. The VA awards disability ratings to veterans for service-connected conditions, including those conditions detected after discharge. As a result, the VA, operating under different policies, may award a disability rating where the Army did not find the member to be unfit to perform his duties. Unlike the Army, the VA can evaluate a veteran throughout his or her lifetime, adjusting the percentage of disability based upon that agency's examinations and findings.

24. MEDICAL REVIEW:

1. The Army Review Boards Agency (ARBA) Medical Advisor reviewed the supporting documents, the Record of Proceedings (ROP), and the applicant's available records in the Interactive Personnel Electronic Records Management System (iPERMS), the Health Artifacts Image Management Solutions (HAIMS) and the VA's Joint Legacy Viewer (JLV). The applicant requests reconsideration of his prior requests for physical disability retirement in lieu of physical disability separation with severance pay. He requests a rating of at least 30% and specifically mentioned lower back pain, hip pain, pain radiating to the right testicle, leg length discrepancy and a mental health condition. The mental health condition will be reviewed under separated cover by an ARBA Medical Reviewer BH specialist. He underwent PDBR proceedings 20May2016 whose purview was limited to only conditions found unfitting by the PEB.

2. The ABCMR ROP summarized the applicant's record and circumstances surrounding the case. The applicant enlisted in the Army Reserve 14Sep1999. He entered active service on 26Oct1999. His MOS was 11B Infantryman. He was deployed in Iraq 20030315 to 20040313 and Afghanistan 20050212 to 20051102. He served in Italy 20000523 to 20020522. He was separated on 10Mar2007 under AR 635-40, para 4-24-B(3) for disability through Army MEB/PEB disability processing. He received $35271.60 in severance pay.

3. Disability processing summary

a. 15Feb2006 permanent L3 Physical Profile (DA Form 3349) for lower back pain-L5-S1 disc protrusion impinging left S1 nerve root showed multiple functional activity limitations; APFT restrictions; 20-pound weight carrying/lifting limit; and 30-minute standing limit.

b. 19Oct2006 MEB (DA Form 3947). Lumbago, Herniated Nucleus Pulposus and Lumbar Degenerative Disk Disease were conditions that were determined to be medically unacceptable. The applicant concurred with the MEB findings.

c. 24Jan2007 record of PEB Proceedings. The PEB (DA Form 199) found that Chronic low back pain with a history of a herniated disc was unfitting for continued service. The condition was rated at 10% under code 5237. The recommended disposition was separation with severance pay. The condition was deemed to not be the result of combat related injury. A formal PEB hearing followed ((DA Form 199-1) with no changes made to the informal proceedings. The applicant's signature on 05Feb2007 demonstrated non concurrence.

d. The PEB ratings were based on exam findings in the 16Nov2006 DD Forms

2807 and 2808, the exam of record for the MEB. These documents were not available for the undersigned's direct review. Findings pertinent for rating included: Thoracolumbar forward flexion to 75 degrees (normal 90) and combined ROM 190 degrees (normal 240). For corroboration, the 12Oct2006 Orthopedics VCZ exam showed forward flexion to 80 degrees (normal 90). There was a positive right straight leg raise test. He was walking with a cane.

4. Back Condition

a. 03Oct2000 x-ray showed normal lumbosacral spine. The film was ordered for complaint of pain localized to the L5 area and pain in the paraspinous area to the right of the spine after his car was rearended in a motor vehicle accident the night prior.

b. 03Mar2004 x-ray showed early lumbar osteophytosis at T12, L1 and L2. The applicant complained of having difficulty keeping up in Iraq with full combat load due to low back pain (LBP) and right hip pain. He had been having the LBP and right hip pain for 1 year, worse in the past 6 months.

c. 16Mar2006 Orthopedics VCZ. MEB NARSUM (narrative summary). He reported constant LBP that radiated to his right hip, right groin, and right testicle which he first noticed approximately 8 months after sustaining a closed fracture of his right ankle during a parachute landing 15Mar2002. He also reported painful popping in the right sacroiliac joint area. He stated that the pain markedly worsened after being deployed to Iraq. He was evaluated by urology and neurosurgery.

d. 22Aug2006 Orthopedics VCZ. He experienced a flair of back pain and was ultimately hospitalized from 24-29 Aug2006 due to acute paraplegia acute and retention of urine. Vascular surgery, neurology, neurosurgery, and psychiatry services were consulted. Discharge diagnosis: Paraplegia Secondary to Herniated Disc. A contrast MRI of the thoracic spine and the lumbosacral spine showed L4-L5 and L5-S1 disc disease without signs of HNP (herniated nucleus populous) nerve compression. As there was no significant change from the previous MRI study, the cause of change in symptoms was unknown. He made a full recovery to prior functioning.

e. 27Sep2006, 12Oct2006 and 19Oct2006 Orthopedics VCZ. The applicant stated that he needed more physical activity restrictions to be added to his permanent profile. He was walking with a cane. The MEB for the back was in process. The orthopedist noted that reflexes and strength were intact. Back exam: There was forward flexion to 80 degrees. Straight leg raise test was positive with pain radiation to the right iliac area.

f. 16Nov2006 MEB Exam (DD Forms 2807 and 2808). The forms were not available for direct review. PDBR proceedings mentioned that the record showed the "right leg was 1 cm shorter than the left".

g. 09Jan2007 Medical Certificate from a physician in Italy. Two main points from this report that bear mentioning: There was no motor deficit of the lower extremity. The specialist endorsed that back symptoms and right hip symptoms were contributing to the applicant's decreased function.

h. 22Jan2007 lumbar MRI revealed beginning signs of degenerative joint disease at L4-L5 with mild bulging disc. There was significant median protrusion in L5-S1. The size and shape of the spinal canal at the lower limit of normal.

5. Lumbar Radiculopathy

a. 11Jan2006 MRI lumbar spine revealed L5-S1 posterocentral to left paracentral focal protrusion, impinging left S1 nerve root. He was having paresthesias in the right anterolateral thigh.

b. 16Mar2006 Orthopedics VCZ. MEB NARSUM. He reported infrequent tingling of the right foot which usually occurred with prolonged standing or sitting and resolved when he moved around. He also reported intermittent numbness and tingling of the anterolateral left thigh.

c. 01Sep2006 Orthopedic VCZ. He was walking with cane and moving slowly due to back pain. He toe-walked with the right leg. ("If I put weight on my right leg, I really feel it...'

d. 27Sep2006 Neurology VCZ. During that visit, the applicant endorsed right lower extremity pain posterior to the knee. He also had weakness of the right lower extremity. The exam revealed patchy sensory deficit to pain right L5 and S1 dermatome only; motor deficit right anterior tibial of moderate degree; and mild motor deficit right gastrocnemius group. Impression: Herniated Intervertebral Disc.

e. 27Sep2006, 12Oct2006 and 19Oct2006 Orthopedics VCZ. He was walking with a cane. The orthopedist noted that reflexes and strength were intact. Straight leg raise test was positive with radiation to the right iliac area.

f. 29Aug2006 Neurosurgery Discharge Letter. On day of discharge from the hospital, neurosurgery wrote there was "no evidence of sensory-motor deficit". The MRI showed L4-L5 and L5-S1 disc disease without HNP. The mild right-inguinocrural pain with weightbearing persisted. Medication list included Gabapentin (to treat nerve pain).

g. 09Jan2007 Medical Certificate from a physician in Italy. There was no motor deficit of the lower extremity.

6. Right ankle.

a. The applicant fractured his right ankle lateral malleolus (Unstable Weber B fracture) in March 2002 reportedly during a parachute jump. He underwent ORIF (open reduction and internal fixation) on 19Mar2002 for repair. He had full active ROM following removal of the hardware (03May2004 Physical Therapy VCZ) and full weightbearing.

b. The 02Apr2002 right ankle film showed the fracture at distal fibula was well fixed by plaque and screws.6Mar2006 Orthopedics VCZ. He was being evaluated for the MEB. reported infrequent tingling of the right foot which usually occurred with prolonged standing or sitting and resolved when he moved around.

c. 25Apr2006 bilateral ankle films were normal.

7. Right Hip Pain.

a. 03Mar2004 right hip film showed faint soft tissue calcifications in the femoral neck. Follow up right hip ultrasounds were normal (19Mar2004 and 23Apr2004) and right hip MRI (20Oct2004) was normal.

b. 05Mar2004 Physical Therapy VCZ. The applicant reported a past medical history of right SIJ (sacroiliac joint) dysfunction associated with an ankle fracture in March 2002, which resolved with physical therapy (MET/Mob). He experienced recurrent pain during heavy rucking, lifting and jumping in Iraq, in the past year, with worsening the last 6 months. He had one treatment and then did not return per 26May2004 PT Progress Note.

c. 17Aug2005 Internal Medicine VCZ. The parachute jump resulted in impaction of the right femur into hip joint with resultant discrepancy in leg length leading to chronic LBP and hip pain. Diagnoses: Right Testicular Pain; Lumbago; and Sacroiliitis.

d. 23Aug2005 (Internal Medicine VCZ) for chronic hip pain. During a recent physical therapy evaluation, the provider endorsed that the leg length discrepancy after injury contributed to chronic hip pain. Diagnosis: Acquired Deformity Limb. Gait was normal. Manual distraction of right hip relieved the pain.

e. 28Nov2005 Orthopedic VCZ. He reported that he developed pain in the right lower back/hip/groin/testicle after he was injured in a parachute accident 2002. 'I landed on my right leg only.' For pain location, he pointed to right SIJ area and to right groin area. He reported painful popping of the hip. The pain was constant but worse with flutter kicks, sit-ups, running, and jumping. He infrequently took Tylenol. The exam showed normal gait, and the hips had full ROM. There was no guarding of hip

movement. The left leg .5 to 1.0 cm longer than the right. The was tenderness in the right testicle in epididymis area. The specialist impression: Snapping Hip Syndrome; Right Groin Pain; Lumbago; and Meralgia Paresthetica. He was referred to Orthopedics at Landstuhl.

f. 28Nov2005 right SIJ film was normal.

g. 10Jan2006 bone scan was normal for the right hip.

h. 11Jan2006 right hip MRI was also normal.

i. 16Mar2006 Orthopedics VCZ. The orthopedist endorsed back condition as the origin of hip pain: He had "constant lower back pain that radiates to his right hip, right groin, and right testicle" and "painful popping in the right sacroiliac joint area". Symptoms started after the parachute landing fall 15Mar2002.

j. 01Jun2006 right hip film was normal.

k. 01Jun2006 Physical Therapy VCZ. The visit was for MEB ROM measurements. Measured average active right hip ROM: Right hip flexion rounded to 100 degrees (normal 125 degrees); and extension rounded to 8 degrees (normal 30).

l. 19Oct2006 Physical Therapy VCZ. The visit was for MEB ROM measurements. Measured average active right hip ROM: Right hip flexion rounded to 80 degrees; extension rounded to 10 degrees; and external rotation rounded to 20 (normal 45 degrees). ROM was limited by pain. The reason for the repeat ROM was not documented. There had not been a new injury or change in condition. It was noted that the applicant was seen on the same date stating that he needed more physical activity restrictions to be added to his permanent profile. The physical profile was not altered.

m. 09Jan2007 Medical Certificate from a physician in Italy. Their impression included that the applicant suffered from Post-traumatic Periarthritis, Right Hip The physician did not explain their diagnosis in relation to the lack of hip pathology findings after investigation by multiple modalities (03Mar2004 right hip film, 20Oct2004 pelvic MRI, 28Nov2005 right SIJ film, 10Jan2006 right hip MRI, 10Jan2006 bone scan, and 01Jun2006 x-ray pelvis and right hip).

8. Groin pain/Testicular Pain, Right

a. 18Aug2005 testicular ultrasound showed a normal scrotum and right testicle.

b. 11Jan2006 LSL Urology. He was seen for right testicular pain of 7 months. The

pain was worse with exertion. He also reported burning with urination at times. There was tenderness in the right scrotum and right testicle. There was no testicular swelling. There was no hernia. There was no abnormal urethral discharge. The urologist ordered a CT of the abdomen and ureter which was normal. There was no urological pathology to explain his symptoms (26Jan2006 Orthopedics VCZ).

c. 01Sep2006 Orthopedic VCZ. 'I had the testicle pain before, but it went away after my chiropractor did about 3 sessions about 3 months ago.'

9. Summary/Opinion

a. The applicant reported that his right hip pain was due to a bad parachute landing in March 2002. Contemporaneous records documented that a hard landing resulted in fracture of the right ankle and subsequent records frequently endorsed the parachute landing as the cause of his low back pain, hip pain and testicular pain. The ankle fracture was surgically corrected with subsequent recovery. In 2004 after return from Iraq deployment, the applicant first presented with complaints of both back and right hip pain during the same visit, describing both as having been present for one year.

b. Leg Length Discrepancy, Snapping Hip Syndrome and Post-traumatic Periarthritis, Right Hip were considered at least at some point as causing/contributing to the right hip pain. The leg length difference was approximately 0.5 -1.0 cm. The leg length discrepancy was correctable with exercises and use of shoe inserts. Per AR 40-501 chapter 3-13e. Shortening of an extremity that exceeds 2 inches did not meet retention standards. Snapping Hip Syndrome is also correctable, and it was noted that the symptom was not documented in later exams/visits. The lack of objective medical evidence of hip pathology in MRIs, films etc., was insufficient to support a medical basis for the Post-traumatic Periarthritis, Right Hip diagnosis.

c. Per AR 40-501 3-13d(1), the cause for referral for an MEB is hip flexion that does not equal or exceed 90 degrees or hip extension to 0 degree. In 1 of 2 ROM exams for the MEB, the right hip ROM failed medical retention standards. It was unclear from the available record, if the applicant underwent right hip treatment to include physical therapy (which may improve ROM) after the one visit in March 2004. A discrete right testicle/groin or right hip condition had not been found to fail medical retention standards.

d. Orthopedics endorsed that the back condition as the origin of hip pain. This was diagnosed as Sacroiliac Joint Dysfunction (pain in the lower back, SIJ and into the buttocks). Due to pyramiding, the hip pain of back origin could not also be rated in accordance with §4.66 Sacroiliac Joint (“lumbosacral and sacroiliac joints should be considered as one anatomical segment for rating purposes”). In addition to orthopedics, the applicant’s condition was evaluated by neurology, neurosurgery, urology and

vascular services. The back condition was rated at 10% for limitation of flexion (greater than 60 degrees but not greater than 85 degrees) in accordance with VASRD principles. The higher 20% rating was not as there was no muscle spasm or guarding severe enough to result in an abnormal gait or spinal contour.

e. Lumbar Radiculopathy was not found unfitting as a separated condition. The applicant had constant lower back pain that radiated to his right hip, right groin, and right testicle. He also had intermittent radiation of pain into the right lower extremity and paresthesias into the right or left extremity. The record indicated that the applicant walked with a cane due to lower back pain. Muscle strength and reflexes were within normal limits in both lower extremities— there was no significant motor or sensory deficit that was contributing to the applicant's functional limitations. Therefore, an additional rating for Lumbar Radiculopathy was not warranted. In the ARBA Medical Reviewer's opinion, no change is recommended to the PEB findings.

BEHAVIORAL HEALTH REVIEW:

a. Background: The applicant is requesting reconsideration of his prior request of referral to the DES for a change in his discharge from disability severance pay to permanent retirement for physical disability. He contends PTSD as partially related to his request.

b. 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:

- Applicant enlisted in the Regular Army on 26 October 1999.
- Applicant deployed to: Iraq, from 15 March 2003 through 13 March 2004 and Afghanistan, from 12 February 2005 through 2 November 2005.
- A DA Form 3349 (Physical Profile) shows on 15 February 2006, the applicant was given a permanent physical profile rating of 3 in factor L for lower back pain, L5-S1 disc protrusion impinging left S1 nerve root, which limited him in multiple functional activities and all Army Physical Fitness Test (APFT) events. His PULHES was 113111.
- A DA Form 3947 (Medical Evaluation Board (MEB) Proceedings) shows an MEB convened on 19 October 2006 and found the applicant's lumbago, herniated nucleus pulposus, lumbar degenerative disk disease, and testicle pain were medically unacceptable, while his Adjustment Disorder with Anxiety was medically acceptable in accordance with Army Regulation 40-501, chapter 3.
- A PEB convened on 24 January 2007, where the applicant was found physically unfit with a recommended combined rating of 10 percent and disposition of separation with severance pay.
- Applicant's DD Form 214 shows he was honorably discharged under the provisions of Army Regulation 635-40 (Physical Evaluation for Retention,

Retirement, or Separation) due to disability with severance pay with corresponding Separation Code JFL. He was credited with 7 years, 4 months, and 15 days of net active service.

- Applicant previously applied to the ABCMR through Counsel in October 2019, requesting physical disability retirement in lieu of physical disability separation with severance pay. On 25 February 2021, the Board denied the applicant's request.
- Applicant again applied to the ABCMR through Counsel in May 2022, requesting reconsideration of his prior request for physical disability retirement in lieu of physical disability separation with severance pay. On 22 March 2023, the Board denied the applicant's request.

c. Review of Available Records: The Army Review Board Agency's (ARBA) Behavioral Health Advisor reviewed the supporting documents contained in the applicant's file.

d. The active-duty electronic medical records available for review show on 1 November 2005, the applicant was seen by Social Work Services and diagnosed with Major Depression, single episode, related to partner relational problems. He was distressed due to his wife allegedly having an affair and seeking a divorce while the applicant wanted to remain married. He participated in four sessions in November 2005. On 15 November 2005, he met with a medical provider and reported anxiety, he requested and was prescribed Xanax. On 28 November 2005, he met with psychiatry for a medication refill, he was evaluated and diagnosed with Adjustment Disorder with Anxiety, the note indicates a remission of his anxiety. Two social work supportive counseling sessions, on 29 November 2005 and 12 December 2005, indicate no BH diagnosis and were labeled as Partner Relational Problem. On 8 June 2006, the applicant was seen by psychiatry for Anxiety Disorder due to marital separation, a contentious divorce, and child custody issues. On 1 December 2006, a session with social work for supportive counseling regarding child custody issues again did not provide a BH diagnosis and was labeled as Partner Relational Problem. On 5 February 2007 he was seen by psychiatry who diagnosed him with Adjustment Disorder with Anxiety. The applicant reported continued marital and custody issues. The psychiatrists assessed the applicant for PTSD and specifically indicated that he did not meet criteria for PTSD. Although he reported occasional nightmares, he did not report dissociative episodes or flashbacks, and his mood and affect were unremarkable. In addition, there is no evidence the applicant was unable to perform his duties or had a mental health condition disqualifying him from further military service. In contrast, the NCOER covering period July 2005 through June 2006, shows his overall performance as "fully demonstrated his potential to supervise and manage squad size and larger elements". Although the NCOER covering period from July 2006 through February 2007 shows his overall performance was limited by medical conditions, there was no mention of any

issues related to mental health and he maintained an S1 profile during his military service.

e. The VA's Joint Legacy Viewer (JLV) was reviewed and indicates the applicant is 100% service connected, including 70% for PTSD.

f. Based on the information available, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence, at this time, to support a referral to the IDES process. Although the applicant has been 70% service connected for PTSD, 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 would not imply failure to meet Army retention standards at the time of service. A subsequent diagnosis of PTSD through the VA is not indicative of an injustice at the time of service. Furthermore, even an in-service diagnosis of PTSD is not automatically unfitting per AR 40-501 and would not automatically result in the medical separation processing. Based on the documentation available for review, there is no indication that an omission or error occurred that would warrant a referral to the IDES process.

g. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Not applicable.

(2) Did the condition exist or experience occur during military service? Not applicable.

(3) Does the condition or experience actually excuse or mitigate the discharge? Not applicable**.**

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation. Upon review of the applicant's petition, available military records and medical review, the Board concurred with the advising official. Based on this, the Board determined the applicant's PEB decision at the time of separation was appropriate and a change in his retired status or change to a physical disability retirement is not warranted.

2. Consideration was given to the Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Not applicable.

(2) Did the condition exist or experience occur during military service? Not applicable.

(3) Does the condition or experience actually excuse or mitigate the discharge? Not applicable.

BOARD VOTE:

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

BOARD DETERMINATION/RECOMMENDATION:

The Board found 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 to amend the decision of the ABCMR set forth in Docket Number AR20190013890 on 25 February 2021 and Docket Number AR20220007691 on 22 March 2023.

X //SIGNED//

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. On 25 August 2017, the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to Discharge Review Boards (DRBs) and Boards for Correction of Military/Naval Records (BCM/NRs) when considering requests by veterans for modification of their discharges due in whole or in part to: mental health conditions, including post-traumatic stress disorder (PTSD), traumatic brain injury (TBI), sexual assault, or sexual harassment. Boards are to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based, in whole or in part, on those conditions or experiences.

2. On 4 April 2024, the Office of the Undersecretary of Defense provided clarifying guidance to Boards for Correction of Military/Naval Records consideration cases involving both liberal consideration discharge relief requests and fitness determination in light of Doyon v. United States, 58F.4th 1235 (Fed. Cir. 2023), and is consistent with that decision.

a. It is Department of Defense (DOD) policy that he application of liberal consideration does not apply to fitness determinations, an entirely separate Military Department determination regarding whether, prior to "severance from military service," the Applicant was medically fit for military service (i.e., fitness determination). While the BCM/NRs are expected to apply liberal consideration to discharge relief requests seeking a change to the narrative reason for discharge in accord with *Doyon,* they should not apply liberal consideration to retroactively assess the applicant's medical fitness for continued service prior to discharge in order to determine how the narrative reason should be revised.

b. Consistent with the Doyon court's interpretation of 10 U.S.C. § 1552(h), BCM/NRs will apply liberal consideration to all applications where the Applicant alleges that combat- or military sexual trauma (MST)-related post-traumatic stress disorder (PTSD) or traumatic brain injury (TBI) "potentially contributed to the circumstances resulting in [severance from military service]." However, any request for a medical retirement or separation necessarily asserts the existence of an error or injustice in the previous failure of the Service to discharge the individual for unfitness, rather than in the circumstances of individual's actual discharge or dismissal. As such, Title 10 U.S. Code, section 1552(h) cannot be read to require the application of liberal consideration to assess whether a qualifying PTSD or TBI condition potentially contributed to the circumstances resulting in a medical discharge which never occurred.

c. Accordingly, in the case of an applicant described in Title 10 U.S. Code, section 1552(h)(l) who seeks a correction to their records to reflect eligibility for a medical retirement or separation, the BCM/NR will bifurcate its review. First, the BCM/NR will

apply liberal consideration to the eligible applicant's assertion that combat- or MST-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.

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

a. Soldiers are referred to the disability system when they no longer meet medical retention standards in accordance with Army Regulation 40-501 (Standards of Medical Fitness), chapter 3, as evidenced in a Medical Evaluation Board (MEB); when they receive a permanent medical profile rating of 3 or 4 in any factor and are referred by an Military Occupational Specialty (MOS) Medical Retention Board (MMRB); and/or they are command-referred for a fitness-for-duty medical examination.

b. The disability evaluation assessment process involves two distinct stages: the MEB and Physical Evaluation Board (PEB). The purpose of the MEB is to determine whether the service member's injury or illness is severe enough to compromise his/her ability to return to full duty based on the job specialty designation of the branch of service. A PEB is an administrative body possessing the authority to determine whether or not a service member is fit for duty. A designation of "unfit for duty" is required before an individual can be separated from the military because of an injury or medical condition. Service members who are determined to be unfit for duty due to disability either are separated from the military or are permanently retired, depending on the severity of the disability and length of military service. Individuals who are "separated" receive a one-time severance payment, while veterans who retire based upon disability receive monthly military retired pay and have access to all other benefits afforded to military retirees.

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

Reasonable performance of the preponderance of duties will invariably result in a finding of fitness for continued duty. A Soldier is physically unfit when a medical impairment prevents reasonable performance of the duties required of the Soldier's office, grade, rank, or rating.

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

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

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

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

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

c. The percentage assigned to a medical defect or condition is the disability rating. A rating is not assigned until the PEB determines the Soldier is physically unfit for duty. Ratings are assigned from the Department of Veterans Affairs (VA) Schedule for Rating Disabilities (VASRD). The fact that a Soldier has a condition listed in the VASRD does not equate to a finding of physical unfitness. An unfitting, or ratable condition, is one which renders the Soldier unable to perform the duties of their office, grade, rank, or rating in such a way as to reasonably fulfill the purpose of their employment on active duty. There is no legal requirement in arriving at the rated degree of incapacity to rate a physical condition which is not in itself considered disqualifying for military service when a Soldier is found unfit because of another condition that is disqualifying. Only the unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability.

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

6. Department of Defense Instruction (DODI) 6040.44 (Physical Disability Board of Review (PDBR)) designates the Secretary of the Air Force as the lead agent for the establishment, operation and management of the PDBR for the DOD.

a. The PDBR reassesses the accuracy and fairness of the combined disability ratings assigned former service members who were separated, with a combined disability rating of 20 PERCENT or less during the period beginning on 11 September 2001 and ending on 31 December 2009, due to unfitness for continued military service, resulting from a physical disability.

b. The PDBR may, at the request of an eligible member, review conditions identified but not determined to be unfitting by the PEB of the Military Department concerned.

c. As a result of a request for PDBR review, the covered individual may not seek relief from the Board for Correction of Military Records operated by the Secretary of the Military Department concerned.

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

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

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

//NOTHING FOLLOWS//