

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 20 December 2024

DOCKET NUMBER: AR20240005716

APPLICANT REQUESTS, in effect:

- to be retired due to disability with a disability rating of 100%, effective 20 October 2008
- back pay and allowances resulting from this correction
- in the alternative, to have his medical conditions referred to the Integrated Disability Evaluation System (IDES) for proper disposition

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

- DD Form 149, Application for Correction of Military Record
- Legal Brief
- Applicant's Narrative Statement
- Combat Action Badge orders
- Purple Heart orders
- Separation Packet
- DD Form 214, Certificate of Release or Discharge from Active Duty
- Medical Records
- Psychologist letter
- Internal Medicine letter
- Department of Affairs (VA) benefits information
- Americans with Disabilities Act (ADA), Statute and Regulations, chapter 1
- Army Regulation (AR) 635-200, Personnel Separations-Active Duty Enlisted Administrative Separations, extract

FACTS:

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

2. Applicant's counsel cites Army Regulation (AR) 635-200, Personnel Separations-Active Duty Enlisted Administrative Separations and AR 635-40, Personnel Separations-Physical Evaluation for Retention, Retirement, or Separation, in support of the applicant's request. Counsel states, in effect:

a. The applicant did not have a "condition not a disability." Instead, he clearly suffered from several documented disabilities, including post-traumatic stress disorder (PTSD), depression, and a traumatic brain injury (TBI). These three disabilities are well documented in his medical records, before he was separated for a "condition not a disability." Strikingly, the "condition not a disability" is never named in the applicant's medical or military record. This violates paragraph 5-17e, because it does not provide the applicant proper notice as to why he was actually being separated. It also violates paragraph 5-17c, because the applicant was never informed what condition he supposedly had, what his deficiencies were, and how he could have overcome the unnamed deficiencies. The question before the Board is what was the applicant actually separated for? A personality disorder, (which has stringent requirements)? Sleepwalking? Dyslexia? Claustrophobia? This is a clear violation of the two provisions listed in this paragraph that should have never been allowed. Finally, while counsel is not a doctor, he does not even see a condition in his medical records that would qualify as a "condition not a disability."

b. Additionally, there is no evidence that the applicant's diagnosis was reviewed by the Installation Military Treatment Facility (MTF) Chief of Behavioral Health and confirmed by the Director, Proponency of Behavioral Health, Office of the Surgeon General, as is required by AR 635-200, paragraph 5-17(b).

c. It is clear what happened in this case. The applicant's chain of command was sick of dealing with the applicant and took the easy wrong over the harder right. Instead of referring the applicant to the IDES process, which a doctor specifically recommended on 21 August 2008, they separated him for having a "condition not a disability," and did not even take the time to comply with AR 635-200, paragraph 5-17 or even name the alleged "condition not a disability."

d. While the applicant expressed that he wanted to leave the Army as soon as possible, he was clearly suffering at the time. The command, and the providers, clearly had a duty to take care of their Soldier; they failed. Of note, the applicant could not waive IDES processing without being educated about what rights were available to him and the benefits of the IDES process, in accordance with AR 635-40, paragraph 4-4; this did not happen.

e. This provision is meant to protect mentally ill and injured Soldiers, such as the applicant.

f. His record at the time of his separation contained overwhelming evidence that he was unfit for duty for PTSD, depression, and a TBI. He should have been referred to the IDES process which would have resulted in a medical retirement. Additionally, the applicant has provided additional evidence, in the form of two medical opinions, further demonstrating this.

g. The applicant's command and medical providers should be ashamed. What the Board has before them in this application is a Soldier wounded in action who was not taken care of by his chain of command, his medical providers, or the Army. Right this wrong and grant his application; he should have been medically retired in 2008.

3. The applicant provides is narrative statement wherein he states, in effect:

a. He joined the Army on 29 June 2005 and was assigned to Fort Hood, Texas. He deployed to Iraq from 31 October 2005 to 11 November 2006. During this deployment he was wounded in action when his vehicle was hit by an Explosively Formed Penetrator (EFP) and subsequently crashed into a canal. He took shrapnel to the head and hand, suffered blunt force trauma from the blast, and lost consciousness. Despite his injuries, he elected to stay in theater until the end of his deployment. He was awarded a Purple Heart and Combat Action Badge. Upon returning from deployment, he struggled with PTSD, depression, sleeping problems, flashbacks, and anxiety. He also suffered a bone infection from the shrapnel in his hand and had to have emergency surgery.

b. He deployed to Iraq again from 17 March 2008 to 31 July 2008. This deployment was very hard for him. While in theater he sought help for depression and anxiety. He was diagnosed with chronic PTSD and depression. He told the medical provider that he reported struggling with depression and anxiety for 15-16 months and that he was worried about making it through the deployment and that he had considering harming himself. After returning from Iraq, he went home on leave. He told someone he wanted to crash his car and end it all. His father took him to the nearest VA Medical Center. He was hospitalized from 12 August 2008 to 21 August 2008. The provider found that he was not fit for return to active duty and recommended he seek 30 days convalescence leave followed by an honorable medical discharge, and subsequent service-connection for his PTSD and depression. He provides several extracts of his mental health encounters leading up to his discharge, including documentation that shows he elected to be processed under AR 635-200, chapter 5-17 rather than a medical board because he wanted to be discharged as soon as possible. Although he expressed this desire to leave, he was mentally ill and suffering, essentially not in the right state of mind to make such an important decision.

c. He was separated from the Army on 20 October 2008 under the provisions of AR 635-200, chapter 5-17, for an "other designated physical or mental condition" due to

a “condition, not a disability.” However, this “condition” is not listed on any of his separation paperwork. His commander failed to identify the specific condition in his separation documents, and his condition is not listed anywhere in his military records. He has provided his medical records to support his diagnosis and the severity of his mental health conditions.

d. Furthermore, the proper steps were not followed to remedy said “condition” per AR 635-200, chapter 5-17. He believes an error occurred and that he should have been referred to a medical board, not discharged under the provisions of AR 635-200, chapter 5-17. Neither his commander or his medical providers followed proper procedure given his history of PTSD, TBI, and depression. He should have been referred to a medical board. His military record is sufficient to corroborate that he was unfit for duty. His post service medical records show that he continues to struggle with his mental health. The VA has granted him disability compensation for his service-connected major depressive disorder with TBI and other related stressor disorder, and headaches associated with major depressive disorder with TBI and other related stressor disorder.

e. His narrative statement includes several inserted snapshots of various medical records.

4. On 29 June 2005, the applicant enlisted in the Regular Army. He held military occupational specialty 13D, field artillery automated tactical data systems specialist. The highest grade held was specialist/E-4.

5. The complete facts and circumstances of his discharge are not available for review; however, the record shows that the applicant underwent a mental status evaluation on 15 September 2008 as part of his administrative separation under the provisions of AR 635-200, chapter 5-17, other designated physical or mental conditions.

a. The Behavioral Health provider diagnosed the applicant with PTSD. The provider stated that the applicant met the retention requirements of AR 40-501, Medical Services-Standards of Medical Fitness, chapter 3 and there was no psychiatric disease or defect which warranted disposition through medical channels. It was recommended that the applicant be administratively separated in accordance with AR 635-200, chapter 5-17 as expeditiously as possible, as it was thought to be unlikely that he would be able to successfully adapt to military life and stressors.

b. The medical provider further found the applicant was mentally responsible, could distinguish between right and wrong and adhere to right, and had the mental capacity to understand and participate in any administrative proceedings.

c. The diagnosis listed on the form shows Axis I: PTSD; and Axis II: No diagnosis.

6. On 1 October 2008, his immediate commander notified the applicant of his intent to initiate separation action against him under the provisions of AR 635-200, chapter 5-17. The commander cited the applicant's diagnosis with a physical or mental condition as outlined in AR 635-200, chapter 5-17 (not amounting to a disability) that interfered with assignment or performance of duty. The extent of the condition was so severe that the applicant's ability to function effectively in a military environment was significantly impaired. His commander recommended the applicant's service by characterized as honorable.

7. On the same day, the applicant was advised of the basis for the contemplated action to separate him for other designated physical or mental conditions under the provisions of AR 635-200, chapter 5-17. He waived the opportunity to consult with counsel and representation by counsel, and he elected not to submit a statement in his own behalf.

8. On an unknown date, his commander formally recommended the applicant be separated from the Army prior to the expiration of current term of service under the provisions of AR 635-200, chapter 5-17.

9. On 9 October 2008, the separation authority approved the applicant's separation under the provisions of AR 635-200, chapter 5-17 due to other designated physical or mental conditions and directed that the applicant receive an honorable characterization of service.

10. On 20 October 2008, he was discharged accordingly. He completed 3 years, 3 months, and 22 days of net active service. His DD Form 214 shows he was awarded the Purple Heart and the Combat Action Badge.

11. The applicant provides his:

a. His Combat Action Badge and Purple Heart he received for his combat actions and the wounds he sustained in Iraq on 31 July 2006.

b. Military and post-service health records that show he was diagnosed with, and treated for various illness, injuries, and mental health conditions to include chronic PTSD, TBI, and major depressive disorder.

c. A VA summary of benefits, 14 January 2024, which shows he has a combined service-connected disability evaluation of 100%.

12. The Board should consider the applicant's overall record and provided statement in accordance with the published equity, injustice, or clemency determination guidance.

13. By regulation:

- a. 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 member reasonably may be expected to perform because of his or her office, rank, grade, or rating.
- b. The commander will notify the Soldier in writing that his/her separation has been recommended. The commander will cite specific allegations on which the proposed action is based and will also include the specific provisions of AR 635-200 authorizing separation.

14. Title 38, U.S. Code, permits the Department of Veterans Affairs (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.

15. MEDICAL REVIEW:

a. Background: The applicant is requesting to be retired due to disability with a disability rating of 100%, effective 20 October 2008, with back pay and allowances resulting from this correction. In the alternative, to have his medical conditions referred to the Integrated Disability Evaluation System (IDES) for proper disposition. He contends PTSD, TBI, and OMH as 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 29 June 2005.
- The complete facts and circumstances of his discharge are not available for review.
- On 1 October 2008, his immediate commander notified the applicant of his intent to initiate separation action against him under the provisions of AR 635-200, chapter 5-17. The commander cited the applicant's diagnosis with a physical or mental condition as outlined in AR 635-200, chapter 5-17 (not amounting to a disability) that interfered with assignment or performance of duty. The extent of the condition was so severe that the applicant's ability to function effectively in a military environment was significantly impaired. His commander recommended the applicant's service be characterized as honorable.

- On 9 October 2008, the separation authority approved the applicant's separation under the provisions of AR 635-200, chapter 5-17 due to other designated physical or mental conditions and directed the applicant receive an honorable characterization of service.
- On 20 October 2008, he was discharged accordingly. He completed 3 years, 3 months, and 22 days of net active service. His DD Form 214 shows he was awarded the Purple Heart and the Combat Action Badge.

c. Review of Available Records: The Army Review Board Agency (ARBA) Behavioral Health Advisor reviewed the supporting documents contained in the applicant's file. The applicant's counsel states, the applicant did not have a "condition not a disability." Instead, he clearly suffered from several documented disabilities, including post-traumatic stress disorder (PTSD), depression, and a traumatic brain injury (TBI). These three disabilities are well documented in his medical records, before he was separated for a "condition not a disability." Strikingly, the "condition not a disability" is never named in the applicant's medical or military record. This violates paragraph 5-17e, because it does not provide the applicant proper notice as to why he was actually being separated. It also violates paragraph 5-17c, because the applicant was never informed what condition he supposedly had, what his deficiencies were, and how he could have overcome the unnamed deficiencies. The question before the Board is what was the applicant actually separated for? A personality disorder, (which has stringent requirements)? Sleepwalking? Dyslexia? Claustrophobia? This is a clear violation of the two provisions listed in this paragraph that should have never been allowed. Finally, while counsel is not a doctor, he does not even see a condition in his medical records that would qualify as a "condition not a disability."

d. The applicant provides a narrative statement wherein he states, he joined the Army on 29 June 2005 and was assigned to Fort Hood, Texas. He deployed to Iraq from 31 October 2005 to 11 November 2006. During this deployment he was wounded in action when his vehicle was hit by an Explosively Formed Penetrator (EFP) and subsequently crashed into a canal. He took shrapnel to the head and hand, suffered blunt force trauma from the blast, and lost consciousness. Despite his injuries, he elected to stay in theater until the end of his deployment. He was awarded a Purple Heart and Combat Action Badge. Upon returning from deployment, he struggled with PTSD, depression, sleeping problems, flashbacks, and anxiety. He also suffered a bone infection from the shrapnel in his hand and had to have emergency surgery. He deployed to Iraq again from 17 March 2008 to 31 July 2008. This deployment was very hard for him. While in theater he sought help for depression and anxiety. He was diagnosed with chronic PTSD and depression. He told the medical provider that he reported struggling with depression and anxiety for 15-16 months and that he was worried about making it through the deployment and that he had considered harming himself. After returning from Iraq, he went home on leave. He told someone he wanted to crash his car and end it all. His father took him to the nearest VA Medical Center. He

was hospitalized from 12 August 2008 to 21 August 2008. The provider found that he was not fit for return to active duty and recommended he seek 30 days convalescence leave followed by an honorable medical discharge, and subsequent service-connection for his PTSD and depression. He provides several extracts of his mental health encounters leading up to his discharge, including documentation that shows he elected to be processed under AR 635-200, chapter 5-17 rather than a medical board because he wanted to be discharged as soon as possible. Although he expressed this desire to leave, he was mentally ill and suffering, essentially not in the right state of mind to make such an important decision.

e. The active-duty electronic medical record available for review shows a note dated 26 February 2008 indicating the applicant was referred for deployment clearance. He was diagnosed with Chronic Post-Traumatic Stress Disorder and reported being treated via medication management by a civilian provider for PTSD and sleep disturbance. However, four months prior, he discontinued his medication and was having increased PTSD symptoms, he denied suicidal and homicidal ideation during this appointment. The applicant was assessed again the next day, on 27 February 2008. He endorsed hypervigilance, increased startle, occupational stress, feeling helpless, lightheaded, feeling discouraged, decreased energy, nervousness, headaches, thoughts of an accident, feeling "like his luck is running out", loneliness, and evidenced a pessimistic attitude. He was diagnosed with Adjustment Disorder with Depressed Mood. A note dated 3 March 2008, indicates the applicant was cleared for deployment.

f. An encounter dated 8 June 2008, indicates the applicant was receiving individual therapy while in theater and was diagnosed with Chronic Post-Traumatic Stress Disorder and Depression. On 10 June 2008, he was seen as a walk-in, he presented with complaints of anxiety and depression, and worried about making it through this deployment. On 28 June 2008, the applicant requested to be screened for a TBI due to symptoms of headaches, dizziness, fatigue, and memory issues related to injuries during his prior deployment. The provider administered the MACE and he evidenced "less than a perfect score in the following areas: immediate memory, delayed memory, and concentration." No immediate action was needed but the plan was to continue assessing him over future appointments.

g. The applicant was psychiatrically hospitalized on 12 August 2008 due to suicidal ideation with intent and plan as well as homicidal ideation towards his First Sergeant. He was discharged on 21 August 2008 and diagnosed with PTSD, chronic with severe suicidal and aggressive ideation and intent; Depression; and Alcohol Abuse. He was considered a high-risk discharge due to his poor stress tolerance, known trauma history, and past suicidal ideation. The treatment team recommended the applicant be followed by the Polytrauma Team for the traumatic brain injury he incurred. Consistent with the applicant's assertion in his statement to the Board, the discharge summary states: "We recommend that he is NOT fit for return to active duty and recommend seeking a 30-day

convalescence leave followed by an honorable medical discharge and subsequent service connection for his PTSD and depression." The applicant was assessed by behavioral health on 25 August 2008, following his hospital discharge and was seen almost daily for ongoing follow-up and assessment. On 3 September 2008, he started attending a post-hospitalization case management group. On 5 September 2008, he was seen via the Traumatic Brain Injury Clinic for a TBI evaluation. The provider noted memory lapses or loss as well as "Tremor: refer to neurology for evaluation of the tremors and review of headaches. He may get Med board for psych problem." He was further diagnosed with Depression and Post-Traumatic Stress Disorder.

h. The applicant underwent a mental status evaluation on 15 September 2008, as part of his administrative separation. He was diagnosed with PTSD and the clinician reviewed with the applicant the ramifications of a Chapter 5-17 discharge versus a possible Medical Board. The applicant wanted to be discharged as soon as possible. His primary interest was in maintaining his entitlement to his GI Bill and VA benefits. After consulting with a Major concerning the Chapter 5-17 separation, he seemed satisfied he would retain his benefits. Accordingly, and in agreement with his Commander, the clinician recommended an expeditious separation under Chapter 5-17.

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

j. Based on the information available, it is the opinion of the Agency Behavioral Health Advisor that there is sufficient evidence to support a referral to the IDES process. The applicant is 100% service connected, including 70% for Major Depressive Disorder. His in-service diagnoses of PTSD and Major Depression along with his inpatient psychiatric hospitalization were considered as potentially failing retention standards in accordance with AR 40-501, chapter 3-31. The treatment team, upon his psychiatric hospital discharge, stated the applicant was not fit to return to active duty and they recommended an honorable medical discharge. On 5 September 2008, the applicant participated in a TBI evaluation, and the provider also commented on the possibility of a Medical Board. In addition, during his mental status evaluation on 15 September 2008, as part of his administrative separation, the clinician addressed the possibility of a Medical Board. However, the applicant wanted to be discharged as soon as possible and at his urging the clinician recommended an expeditious separation under Chapter 5-17. There is evidence in the record that at least three separate medical providers considered the applicant as eligible for a Medical Board based on his diagnosed mental health condition. The applicant suffered from a mental health condition, that rendered him unfit for military service. Based on the documentation available for review, there is evidence the applicant warrants a referral to the IDES process.

k. 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 partial relief was 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 request, available military records and medical review, the Board concurred with the advising opine finding sufficient evidence to support a referral to the IDES process. The opine noted there is evidence in the record that at least three separate medical providers considered the applicant as eligible for a Medical Board based on his diagnosed mental health condition. The Board determined based on the medical review and evidence found in the applicant record, there is sufficient evidence to support referral to DES. As such, the Board granted partial relief.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

: : : GRANT FULL RELIEF

   GRANT PARTIAL RELIEF

: : : GRANT FORMAL HEARING

: : : DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined the evidence presented is sufficient to warrant 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 directing the applicant be entered into the Disability Evaluation System (DES) and a Medical Evaluation Board concerned to determine whether the applicant's condition(s), met medical retention standard at the time-of-service separation.
 - a. 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.
 - b. 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 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 being retired due to disability with a disability rating of 100%, effective 20 October 2008 and back pay and allowances resulting from this correction.

[REDACTED]

[REDACTED]

[REDACTED]

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

REFERENCES:

1. Title 10, U.S. Code, section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or

injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.

2. Army Regulation (AR) 635-200, Personnel Separations-Active Duty Enlisted Administrative Separations, sets forth the basic authority for the separation of enlisted personnel.

a. Chapter 5 prescribed policy for separation for convenience of the Government.

(1) Unless the reason for separation requires a specific characterization, a Soldier being separated for the convenience of the Government will be awarded a character of service of honorable, under honorable conditions, or an uncharacterized description of service if in entry-level status. (2) No Soldier will be awarded a character of service under honorable conditions under this chapter unless the Soldier is notified of the specific factors in his/her service record that warrant such a characterization, using the notification procedure. Such characterization is normally inappropriate for Soldiers separated under the provisions of paragraphs 5-4, 5-11, 5-12, 5-15, 5-16, or 5-17.

b. Paragraph 5-17 states commanders may approve separation under this paragraph on the basis of other physical or mental conditions not amounting to disability and excluding conditions appropriate for separation processing under paragraph 5-11 (Separation of Personnel Who Did Not Meet Procurement Medical Fitness Standards) or 5-13 (Separation Because of Personality Disorder) that potentially interfere with assignment to or performance of duty. Such conditions may include, but are not limited to:

- chronic airsickness
- chronic seasickness
- enuresis
- sleepwalking
- dyslexia
- severe nightmares
- claustrophobia
- other disorders manifesting disturbances of perception, thinking, emotional control or behavior sufficiently severe that the Soldier's ability to effectively perform military duties is significantly impaired

c. Paragraph 5-17b states when a commander determines that a Soldier has a physical or mental condition that potentially interferes with assignment to or performance of duty, the commander will refer the Soldier for a medical examination and/or mental status evaluation per AR 40-501, Medical Services-Standards of Medical Fitness. A recommendation for separation must be supported by documentation confirming the existence of the physical or mental condition.

d. Paragraph 5-17c states separation processing may not be initiated under paragraph 5-17 until the Soldier has been counseled formally concerning deficiencies and has been afforded ample opportunity to overcome those deficiencies as reflected in appropriate counseling or personnel records.

e. Paragraph 5-17e states prior to involuntary separation under paragraph 5-17, the notification procedure in chapter 2, section I; or the administrative board procedure will be utilized. The notification procedure in chapter 2 states that when the reason for separation requires notification procedure, the commander will notify the Soldier in writing that his/her separation has been recommended.

(1) The commander will cite specific allegations on which the proposed action is based and will also include the specific provisions of this regulation authorizing separation.

(2) The soldier will be advised of –

(a) Whether the proposed separation could result in discharge, release from active duty to a Reserve Component, or release from custody and control of the Army.

(b) The least favorable characterization of service or description of separation he/she could receive.

(c) The type of discharge and character of service recommended by the initiating commander and that the intermediate commander(s) may recommend a less favorable type of discharge and characterization of service than that recommended by the initiating commander.

3. AR 635-40, Physical Evaluation for Retention, Retirement, or Separation, in effect at the time, established the PDES and set forth the policies, responsibilities, and procedures that apply in determining whether a Soldier is unfit because of physical disability to reasonably perform the duties of his or her office, grade, rank, or rating. It stated that after establishing the fact that a Solider is unfit because of a physical disability, and that the Soldier is entitled to benefits, the PEB must decide the

percentage rating for each unfitting disability. The VASRD, as modified in the regulation, is used to establish this rating. This regulation states:

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 service.

b. 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 member reasonably may be expected to perform because of his or her office, rank, grade, or rating.

c. When a commander believes that a Soldier of their command is unable to perform the duties of their office, grade, rank, or rating because of physical disability, the commander will refer the Soldier to the responsible Medical Treatment Facility for evaluation.

d. 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.

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

4. Current AR 635-40 establishes the Disability Evaluation System (DES) and sets forth policies, responsibilities, and procedures that apply in determining whether a Soldier is unfit because of physical disability to reasonably perform the duties of his or her office, grade, rank, or rating. It states there is no legal requirement in arriving at the rated degree of incapacity to rate a physical condition which is not in itself considered disqualifying for military service when a Soldier is found unfit because of another condition that is disqualifying. Only the unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability.

a. The DES assessment process involves two distinct evaluations, the Medical Evaluation Board (MEB) and the 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 or her ability to return to full duty based on the job specialty designation of the branch of service.

b. A PEB is an administrative body possessing the authority to determine whether a service member is fit for duty. A designation of "unfit for duty" is required before an individual can be separated from the military because of an injury or medical condition. Service members who are determined to be unfit for duty due to disability are either separated from the military or permanently retired, depending on the severity of the disability and length of military service. The overall effect of all disabilities present in an

individual whose physical fitness is under evaluation must be considered both from the standpoint of how the disabilities affect the individual's performance, and requirements which may be imposed on the Army to maintain and protect him or her during future duty assignments. The mere presence of impairment does not, of itself, justify a finding of unfitness because of physical disability.

5. Directive-type Memorandum (DTM) 11-015 explains the Integrated Disability Evaluation System (IDES). It states:

- a. The IDES is the joint Department of Defense (DOD)-Department of Veterans Affairs (VA) process by which DOD determines whether wounded, ill, or injured Service members are fit for continued military service and by which DOD and the VA determine appropriate benefits for Service members who are separated or retired for a service-connected disability. The IDES features a single set of disability medical examinations appropriate for fitness determination by the Military Departments and a single set of disability ratings provided by the VA for appropriate use by both departments. Although the IDES includes medical examinations, IDES processes are administrative in nature and are independent of clinical care and treatment.
- b. Unless otherwise stated in this DTM, DOD will follow the existing policies and procedures promulgated in DOD Directive 1332.18 and the Under Secretary of Defense for Personnel and Readiness Memoranda. All newly-initiated, duty-related physical disability cases from the Departments of the Army, Air Force, and Navy at operating IDES sites will be processed in accordance with this DTM and follow the process described in this DTM unless the Military Department concerned approves the exclusion of the Service member due to special circumstances. Service members whose cases were initiated under the legacy DES process will not enter the IDES.
- c. IDES medical examinations will include a general medical examination and any other applicable medical examinations performed to VA C&P standards. Collectively, the examinations will be sufficient to assess the member's referred and claimed condition(s) and assist the VA in ratings determinations and assist military departments with unfit determinations.
- d. Upon separation from military service for medical disability and consistent with Board for Corrections of Military Records (BCMR) procedures of the Military Department concerned, the former Service member (or his or her designated representative) may request correction of his or her military records through his or her respective Military Department BCMR if new information regarding his or her service or condition during service is made available that may result in a different disposition. For example, a veteran appeals the VA's disability rating of an unfitting condition based on a portion of his or her service treatment record that was missing during the IDES process. If the VA changes the disability rating for the unfitting condition based on a portion of his or her

service treatment record that was missing during the IDES process and the change to the disability rating may result in a different disposition, the Service member may request correction of his or her military records through his or her respective Military Department BCMR.

e. If, after separation from service and attaining veteran status, the former Service member (or his or her designated representative) desires to appeal a determination from the rating decision, the veteran (or his or her designated representative) has 1 year from the date of mailing of notice of the VA decision to submit a written notice of disagreement with the decision to the VA regional office of jurisdiction.

6. Title 38, U.S. Code, permits the Department of Veterans Affairs (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.

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

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

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

Correction of Military/Naval Records may grant clemency regardless of the court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds.

a. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. In determining whether to grant relief on the basis of equity, injustice, or clemency grounds, Boards shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment.

b. Changes to the narrative reason for discharge and/or an upgraded character of service granted solely on equity, injustice, or clemency grounds normally should not result in separation pay, retroactive promotions, and payment of past medical expenses or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded service characterization.

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

11. Title 10, U.S. Code, section 1552, the law which provides for the Board, states that The Secretary may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due to the claimant on account of his or another's service in the Army, Navy, Air Force, Marine Corps or Coast Guard, as the case may be.

12. AR 15-185, Boards, Commissions, and Committees-ABCMR, prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR will decide cases on the evidence of record. It is not an investigative body. 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.

//NOTHING FOLLOWS//