ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [redacted]

BOARD DATE: 18 February 2025

DOCKET NUMBER: AR20240006097

APPLICANT REQUESTS: This case comes before the Army Board for Correction of Military Records (ABCMR) on a remand from the United States District Court for the District of Columbia (hereinafter referred to as the Court).

a. The Court remands this case to the ABCMR so that it may reconsider claims for relief asserted by Plaintiff (hereinafter referred to as the applicant) related to his request for a medical retirement based on service-incurred medical disabilities and promotion to the rank and grade of sergeant (SGT)/E-5 (new issue).

b. The Court further orders the ABCMR to consider, along with information previously submitted, all allegations and evidence raised in the applicant's Complaint as well as any additional information or documentation submitted by the applicant.

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

- Court Remand Order
- Applicant's Complaint, filed in the Unites States District Court for the District of Columbia
- Memorandum in Support of Application for Correction of Records
- Exhibit 1 – applicant’s affidavit
- Exhibit 2 – enlistment/reenlistment documents
- Exhibit 3 – DD Form 214 (Certificate of Release or Discharge from Active Duty)
- Exhibit 4 – Department of Veterans Affairs (VA) Rating Decision, dated 17 February 2021
- Exhibit 5 – Standard Form (SF) 600 (Chronological Record of Medical Care), dated 14 October 2008
- Exhibit 6 – excerpt of Army Regulation (AR) 40-501 (Standards of Medical Fitness), dated 14 December 2007, revised 23 August 2010
- Exhibit 7 – SF 600, dated 8 October 2008
- Exhibit 8 – SF 600, dated 24 August 2009
- Exhibit 9 – SF 600, dated 9 November 2009
- Exhibit 10 – SF 600, dated 9 February 2010
- Exhibit 11 – SF 600, dated 28 June 2010
- Exhibit 12 – SF 600, dated 29 November 2010

- Exhibit 13 – VA Rating Decision, dated 29 April 2010
- Exhibit 14 – VA/Department of Defense *e*Benefits applicant's information
- Exhibit 15 – DA Form 3349 (Physical Profile) (blank form)
- Exhibit 16 – AR 600-8-19 (Enlisted Promotions and Demotions), effective 26 October 2023
- Exhibit 17 – VA Decision Review Officer Decision, dated 26 March 2024 and VA Board of Veterans' Appeals decision letter, date 1 April 2024
- email from the applicant's attorney, dated 1 January 2025
- Applicant/counsel's rebuttal to the advisory opinion, 1 January 2025
- expert medical opinion and CV of Dr. D_____ N_____, DO
- expert witness report and CV of Dr. V_____ B_____, MD

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the ABCMR in Docket Number AR20220004580 on 21 November 2022.

2. In a Memorandum in Support of Application for Correction of Records, the applicant's counsel states the applicant previously applied to the ABCMR. On or about 21 November 2022, the ABCMR denied his application and declined to grant any relief. On or about 26 June 2023, the ABCMR notified the applicant of its decision. On 11 December 2023, he filed suit in the United States District Court for the District of Columbia, arguing that the ABCMR's denial of his application was arbitrary and capricious and unsupported by substantial evidence, in violation of 5 U.S.C. § 706 (2)(A) and (2)(E). On 29 May 2024, the Court ordered that his application be remanded to the ABCMR pursuant to a joint remand motion between the Secretary of the Army and the applicant, so that the ABCMR could consider his application and the exhibits submitted in support of his application.

3. In a 24-page Complaint, dated 11 December 2023, filed in the United States District Court for the District of Columbia, the counsel states:

a. The applicant was born in Scotland to two servicemembers stationed there while enlisted in the United States Navy. For as long as he can remember, the desire to serve his country in the military has been a motivating principle of his life. As a young boy, he often went with his father to Bear Mountain, New York, which overlooks the United States Military Academy at West Point, New York. He would watch the students training at West Point from afar, transfixed by what he saw. Those outings with his father are among his most cherished memories and have served as an abiding source of inspiration for him.

b. As the applicant grew up, he remained steadfast in his determination to serve his country in the armed forces, earn his way through college, and learn valuable and transferable life skills along the way. At 16, he attended Lincoln's Challenge Academy, a military academy, and earned his G.E.D. in December 2001, six months after starting there. Just before he attained his G.E.D., the United States was savagely and unprovokedly attacked on 11 September 2001. Like many Americans, the 9/11 attacks were highly traumatic for him. But unlike many Americans, the attacks also carried a personal element for him: his father was blocks from the World Trade Center in New York City when the attacks occurred. He was unable to reach his father for days after the terrorist attack. Later, he learned that his father's building was evacuated because it was in such proximity to the World Trade Center.

c. Although the applicant had initially been planning to work toward his college degree, the events of 11 September 2001 galvanized him to fast-track his dream of serving his country and becoming a part of something bigger than himself. Eager to the point of impatience to serve, he did not want to wait to become an officer or take on the student loans that would be required to pay for college tuition. With his parents' consent, he enlisted in United States Army at the age of 17 in May 2002. After his enlistment, he was sent to Fort Moore (formerly Fort Benning), Georgia, and then Fort Eisenhower (formerly Fort Gordon), Georgia, for advanced individual training. His first station was in Hawaii, far from his friends and family in the eastern continental United States.

d. During the Christmas season in 2002, the applicant returned home to see his father while on leave. While he was there, he learned that his father had lung cancer. The applicant was devastated by this news. The emotional strain of being away from his ailing father, with whom he enjoyed an extremely close relationship, first in Hawaii and then while deployed to Thailand, took a heavy toll on him. In late May 2003, the applicant received a DUI (driving under the influence) and a general officer memorandum of reprimand (GOMOR). This was a serious wake-up call for him, who at 18 was still young, immature, and overwhelmed by the impending loss of a parent. Despite these difficulties, he immediately understood that he needed to take accountability for his actions and improve, and he did.

e. On 29 June 2003, the applicant's father tragically lost his battle with lung cancer. In January 2004, he deployed to Kuwait enroute to Iraq. He convoyed to Kirkuk that same month. He served with great distinction. He was awarded a certificate of achievement for assisting in the emergency medical treatment and evacuation of soldiers wounded after an enemy mortar strike landed on their infantry barracks. His unit was transferred back to the United States in January 2005. While back in the United States, he was highly productive. He began working on his bachelor's degree and dreamed of becoming an attorney. He has since attained both his bachelor's degree, Master's of Business Administration, and J.D. In his personal life, he married a fellow

Soldier he met on deployment, and his first child was born in June 2005. His daughter was born just prior to his second deployment in 2007.

f. By August 2007, the applicant was training for another deployment. In November 2007, just prior to deployment, he was laterally promoted to corporal (E-4) to lead a squad and electronic shop section. In late December 2007, he arrived in Taji, Iraq, just outside an active warzone. He worked in an electronic shop until he volunteered to act as a truck commander on convoys. In this role, he was given the exceedingly dangerous task of running supply missions outside the wire to forward operating bases. He supervised two other Soldiers, a driver and a gunner, but also acted as a communications specialist and on-site electronics technician. He did not worry about the dangers, as he remained zealous and steadfast in his desire to serve his country.

g. In March 2008, the applicant's unit was tasked with providing support for a quick reaction force in the Sadr City area of Baghdad. Sadr City was experiencing unrelenting waves of extreme violence at this time. He, however, was once more undaunted by this danger and volunteered for the support mission. Yet he was also realistic. He understood that to succeed in such a ruthless and challenging environment, the Soldiers in his unit would need to be in top form. He and the Soldiers under his command spent hours training together, including a weeklong training session. At the conclusion of this training session, one of his superior noncommissioned officers (NCO), an E-7, sergeant first class (SFC), went from Taji to Baghdad to familiarize himself with both the support mission and the area in which the unit would be operating.

h. The SFC instructed the applicant and the unit’s other NCOs that the unit was to go on convoy while he was away. The applicant and the other NCOs faithfully performed this task. However, once the convoy was complete, the applicant and the other NCOs decided to give their Soldiers the rest of the weekend off. He continued to appreciate just how challenging operating in Sadr City would be. He wanted the Soldiers to rest and prepare for the demands of constant and continuous convoys. He knew the unit would be performing daily operations once they went to Sadr City. He appreciated that this would be the last opportunity he and his men would have to recharge for quite some time. He felt rest would help the unit be prepared for the obstacles ahead. However, the SFC did not see it that way. Upon his return from Baghdad, the SFC was apoplectic with the applicant for allowing the Soldiers to rest, notwithstanding that he had not actually disobeyed a single order the SFC had given him.

i. The SFC ordered the applicant to serve as the gunner in the commander’s truck the very next day. Supposedly, this was due to his experience. In reality, it was a punishment. On 13 April 2008, he served as the gunner in the commander’s truck in the convoy. During the convoy, the truck driver, exhorted by the commander to “stop being a [derogatory term],” began to drive in a reckless and irresponsible manner. Predictably,

the driver soon lost control of the truck. The truck flipped over twice. The applicant was in the elevated gunner's position when the truck crashed. He suffered serious injuries in the crash. He was immediately medically evacuated back to Taji. However, his injuries were too serious to be treated at Taji. He was placed in a medically induced coma so that he could be flown to Walter Reed Medical Center in Bethesda, Maryland.

j. While in transit through Germany, the applicant's brain functions nearly went into a permanent decline. Fortunately, he reemerged from his coma on 21 April 2008, eight full days after the accident. It was immediately apparent to him when he awoke just how seriously he had been injured. He had a feeding tube, a breathing tube, and a catheter. Atrophy made it impossible for him to move his body. He had sustained an exhausting list of maladies in the crash: moderate traumatic brain injury (TBI), three broken ribs, two collapsed lungs, a broken nose, a broken left thumb, a broken left index finger, a broken left ring finger, a broken left elbow, a broken left collar bone, a broken neck, a separated right shoulder, a blood clot, a right elbow contusion, a left knee contusion, a right knee contusion, and damage to his tailbone and the L4/L5 disks in his back.

k. For nearly three years, from April 2008 through January 2011, the applicant remained in the Warrior Transition Unit (WTU), with months spent at Walter Reed and later in Richmond, Virginia, at a brain trauma clinic before moving back to Honolulu, Hawaii, to recover from his serious injuries. While in the WTU, he had treatment for subdural hematoma, two surgeries on his left shoulder, two on his left thumb, two on his left elbow, one on his right shoulder, and back surgery. Because of his frail health, he was constantly getting infections. This necessitated tonsil removal surgery.

l. PULHES is an acronym for a system used by the branches of the United States military to evaluate physical fitness and stamina for each enlisted member. PULHES stands for P (physical capacity/stamina), U (Upper extremities), L (Lower extremities) H (Hearing and ears), E (Eyes), and S (Psychiatric). Each letter in the acronym is paired with a number from 1 to 4, which designates the service member's physical capacity in each given area. A 1 rating indicates the highest possible level of physical capacity in a given area, while a 4 is the lowest possible level of physical capacity. On 22 July 2008, the applicant was on a temporary profile for his PULHES of 2-1-3-3-1-3 due to the health issues he had sustained because of the crash. This meant that he had a temporary profile of a 3 for 1) his lower extremities, 2) hearing and ears, and 3) psychiatric, respectively.

m. Under AR 40-501, dated 14 December 2007, revised 23 August 2010, effective at all relevant times in this action), paragraph 7-4c(3), temporary profiles are not permitted to last more than a year. Once a servicemember has been in a temporary profile longer than a year, absent specific approval by the commander of the medical treatment facility, or their designated senior physician approval authority, the profile is to become permanent. AR 40-501, 7-4(c)(3). A permanent profile of 3 (P3) leads to

screening by a Medical Evaluation Board (MEB) qualified doctor for referral to the Disability Evaluation System (DES). AR 40-501, 7-4b.

n. The applicant repeatedly requested that his command grant him a P3 profile for his temporary 3 ratings for his lower extremities, hearing and ears, and psychiatric, respectively. He also requested that his command refer him to the DES. However, his requests were repeatedly rebuffed. While his doctor issued him a P3 in January 2009, this was cancelled in April 2009. Instead of receiving a P3, his temporary profile was repeatedly extended through the remainder of his nearly three years of service. This practice directly contradicted AR 40-501, 7-4c(3).

o. In May 2010, the applicant underwent another back surgery. At this point, he had been on a temporary profile for nearly two years. Following his surgery, he again requested a referral to the DES. However, he was instructed to wait another six months, and then have another back surgery. He was also informed that he would not be referred to the DES. He was concerned about the impact another invasive surgery would have on his health and declined the surgery. At this point, he was informed that because his separation date was approaching, he would be processed out of the Army without a DES. This course of action directly contradicted AR 40-501, paragraph 3-3, which provides that Soldiers should not be denied a DES simply because their separation date is approaching.

p. On 31 January 2011, the applicant was discharged from active duty service under honorable conditions. After his separation from the Army, he was forced to undergo a long and drawn-out application process to get his disabilities rated by the VA. On or about 10 June 2013, his service-connected disabilities were rated at 90% by the VA as of 1 February 2011. On or about 29 April 2020, he was rated 100% disabled for service-connected disabilities by the VA as of 1 February 2011. On 17 February 2021, he was finally granted permanent and total disability status. Unfortunately, his disabilities have only gotten worse since that time. He has suffered multiple blood clots, and the impaction of his L4/L5 disks in his back continues to cause him grave pain. He has been referred for two more surgeries on his toes and will likely need further surgery for other issues in the future. His mobility has been greatly constrained by service-connected problems with his big toes, including bone spurs and early arthritis. He had surgery on the left big toe at the VA but was referred for a second surgery on the same toe and was referred for another surgery on the right toe.

q. On or about 6 January 2022, the applicant filed an application with the ABCMR. In his application, he argued that 1) because his temporary profiles were wrongfully extended for more than 12 months in violation of Army regulations; 2) the Army's refusal to refer him to the DES violated of Army regulations; 3) and that because the Army is legally mandated to follow Army regulations regarding referral to the DES, or screening regarding referral to the DES, and failure to follow these regulations can be fixed

through post-facto DES referral for a determination of whether the service member was fit for duty at the time they should have been referred; 4) that therefore he was due a screening for potential DES referral in April and October of 2009, and he was also due a mandatory MEB (part of the DES) evaluation; 5) and that therefore the ABCMR should refer him to the DES for a determination of whether he was fit for duty at the two individual points of April and July of 2009; 6) should the DES find that he was unfit for duty in either April or July of 2009, the ABCMR should grant him a medical retirement; or, 7) in the alternative, the ABCMR should themselves find that he was unfit for service in either April or July of 2009 and grant him a medical retirement.

r. The applicant requested that 1) his discharge be upgraded to a medical retirement; 2) that he be granted all attendant backpay; 3) that his DD Form 214 be changed to reflect a separation for disability; 4) that the ABCMR do so by referring him to the DES for an evaluation of whether he was fit for service in 2009 and 2010, when he was legally due a screening for referral to the DES; or 4) in the alternative, that the ABCMR itself find that he was unfit for service during that time period. As part of the ABCMR's review, the Army Review Boards Agency (ARBA) Medical Advisor reviewed his application and submitted their findings and recommendations. The ARBA Medical Advisor reviewed his medical history and concluded that "referral of the case to the DES is not warranted". The ARBA Medical Advisor stated in support of this conclusion, "The applicant was on a temporary duty limiting physical profile at the time of his voluntary separation. While it is certainly possible the applicant would have at some point been referred into the DES, he chose to separate from the Army prior to this decision being made."

s. The ARBA Medical Advisor did not address the applicant's argument that under AR 40-501, 7-4c(3), because he had been on a temporary profile for over 12 months from 22 July 2008 through 8 February 2011, and because his temporary profile had not been extended on specific approval by the commander of the medical treatment facility, or their designated senior physician approval authority, his temporary profile was required to become permanent. Nor did the ARBA Medical Advisor address his argument that AR 40-501, 3-3, provides that Soldiers should not be denied a DES simply because their separation date is approaching, and that therefore his separation from the Army is irrelevant to his ABCMR application.

t. On or about 21 November the ABCMR reached a decision on the applicant's application. In its decision, the ABCMR addressed his arguments in a single paragraph. The ABCMR stated, "The applicant's contentions, the military record, an advisory opinion, counsel's petition, and regulatory guidance were carefully considered. Evidence of the record shows the applicant was on a temporary duty limiting physical profile at the time of his voluntary separation. The governing regulation provides that all permanent "3" and "4" profiles, for Soldiers on active duty, will be reviewed by an MEB physician or physician approval authority. If the profile is permanent, the profiling officer

must assess if the Soldier meets the medical retention standards of AR 40-501, chapter 3. Based upon a preponderance of the evidence, the Board determined there is insufficient evidence that shows a referral of his medical records to the Army Disability Evaluation System (DES) was warranted during his period of active service." On this basis, the ABCMR determined that relief "was not warranted."

u. The ABCMR, like the ARBA Medical Advisor's advisory opinion, failed to consider the applicant's argument that under AR 40-501, 7-4c(3), because he had been on a temporary profile for over 12 months from 22 July 2008, through 8 February 2011, and because his temporary profile had not been extended on specific approval by the commander of the medical treatment facility, or their designated senior physician approval authority, his temporary profile was required to become permanent. As a result, the ABCMR's decision ignored a non-frivolous argument advanced by the applicant in violation of 5 U.S.C. § 706(2)(A). Failing to consider this argument led to the ABCMR reaching a decision contrary to agency regulation, again in violation of 5 U.S.C. § 706(2)(A). The ABCMR's decision therefore disregarded injustice clearly present in the record, again in violation of 5 U.S.C. § 706(2)(A).

v. The allegations of the preceding paragraphs are incorporated by reference as if fully stated herein. Federal courts have the obligation to "hold unlawful and set aside" any agency action which is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law". 5 U.S.C. § 706(2)(A). Boards for the correction of military records are not permitted to ignore non-frivolous arguments advanced by applicants. *See Rudo v. Geren*, 818 F. Supp. 2d 17, 26-27 (D.D.C. 2011). "If the ABCMR chooses to disregard a non-frivolous argument, it must expressly indicate that it has done so. Otherwise, neither the plaintiff nor [the] court would be able to discern whether the ABCMR considered and was unpersuaded by those factors or whether the ABCMR simply excluded them from its decision-making process. Moreover, if the ABCMR excludes those factors from consideration it must explain its rationale for doing so." *Rudo,* 818 F.Supp.2d at 26, *citing Puerto Rico Higher Educ. Assistance Corp. v. Riley*, 10 F.3d 847, 853 (D.C.Cir.1993).

w. Here, the ABCMR ignored a non-frivolous argument advanced by the applicant. Specifically, he argued that under AR 40-501, ¶7-4c(3), because he had been on a temporary profile for over 12 months from 22 July 2008 through 8 February 2011, and because his temporary profile had not been extended on specific approval by the commander of the medical treatment facility, or their designated senior physician approval authority, his temporary profile was required to become permanent. However, the ABCMR failed to either address his argument or explain its rationale for failing to consider his argument. *See Rudo, 818 F.Supp.2d at 26*. Instead, the ABCMR wrote, "Evidence of the record shows the applicant was on a temporary duty limiting physical profile at the time of his voluntary separation. The governing regulation provides that all permanent "3" and "4" profiles, for Soldiers on active duty, will be reviewed by an MEB

physician or physician approval authority. If the profile is permanent, the profiling officer must assess if the Soldier meets the medical retention standards of Chapter 3."

x. The language of the ABCMR's decision makes it clear that the ABCMR did not consider the applicant's non-frivolous argument that under AR 40-501, 7- 4c(3), because he had been on a temporary profile for over 12 months, and because his temporary profile had not been extended on specific approval by the commander of the medical treatment facility, or their designated senior physician approval authority, his temporary profile was required to become permanent. *See Rudo,* 818 F.Supp.2d at 26. Nor did the ABCMR explain its rationale for not considering his non-frivolous argument. *See Rudo,* 818 F.Supp.2d at 26. All in violation of 5 U.S.C. § 706(2)(A).

y. The allegations of the preceding paragraphs are incorporated by reference as if fully stated herein. Federal courts have the obligation to "hold unlawful and set aside" any agency action which is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law". 5 U.S.C. § 706(2)(A). Like all federal agencies, the ABCMR is not permitted to make decisions which are contrary to law or regulation. *Walker v. Shannon,* 848 F. Supp. 250, 255 (D.D.C., 1994); *see also Accardi v. Shaughnessy,* 347 U.S. 260, 267 (1954). Rules for screening and DES referral under AR 40- 501 are legally binding on the Army, and therefore must be enforced by the ABCMR. *Watson v. United States*, 113 Fed. Cl. 615, 632-5 (2013). Under AR 40-501, 7-4c(3), temporary profiles may not last more than a year. Once a servicemember has been in a temporary profile longer than a year, without specific approval by the commander of the medical treatment facility, or their designated senior physician approval authority, they are to become permanent.

z. Moreover, if the MEB qualified doctor determines the Soldier potentially does not meet retention standards, the Soldier must be referred to the DES after attaining the Medical Retention Determination Point (MRDP). The MRDP must be within one year of the diagnosis of the Soldier's injuries, though it may be earlier if the screening authority determines that the Soldier would not be capable of returning to duty within one year. AR 40-501, 7-4(b)(2). In addition, AR 40-501, 3-41(e)(1), states that Soldiers with conditions and defects that prevent the soldier from performing the functional activities listed under item number five of DA Form 3349 (Physical Profile), published September 2010) are to be evaluated by an MEB. Item number five of DA Form 3349 listed these activities as: 1) carrying and firing individual assigned weapons; 2) evading direct and indirect fire; 3) riding in a military vehicle for at least 12 hours per day; 4) wearing a helmet for at least 12 hours per day; 5) wearing body armor for at least 12 hours per day; 6) wearing load bearing equipment (LBE) for at least 12 hours per day; 7) wearing military boots and uniform for at least 12 hours per day; 8) wearing protective mask and Mission-Oriented Protective Posture (MOPP) 4 for at least 2 continuous hours per day; 9) moving 40 lbs. while wearing usual protective gear (helmet, weapon, body armor and

LBE) for at least 100 yards; and 10) living in an austere environment without worsening the medical condition.

aa. Moreover, AR 40-501, 7-4 also states that a temporary profile exceeding six months in duration will be referred to a condition specialist who will consider whether to a) continue the temporary profile for a maximum of 12 months from the initial profile start date; b) change the temporary profile to a permanent profile; or c) determine Soldier to an MEB. Finally, to receive a medical retirement, active-duty personnel must 1) be found unfit for service by the DES; and 2) have service-connected disabilities with a combined rating at or more than 30% based on the VA's standard schedule ratings of disabilities. *See* 10 U.S.C. § 1201(b).

bb. On 22 July 2008, the applicant had a temporary profile of a 3 for his lower extremities, hearing and ears, and psychiatric, respectively, due to the health issues he had sustained from a car crash while on active duty. He repeatedly requested that his command grant him a P3 for his injuries, as well as refer him to the DES. However, he was repeatedly rebuffed. Although in January 2009 his doctor issued him a P3, this was cancelled in April 2009. Instead of granting him a P3, his temporary profile was instead repeatedly extended through the remainder of his nearly three years of service. This course of events directly contradicted AR 40-501, 7-4(c)(3): "In no case will Soldiers carry a temporary profile that has been extended for more than 12 months" (emphasis added).

cc. The applicant's profiles should have become permanent in July of 2009. Additionally, he achieved his MRDP in April of 2009, one year after the diagnosis of his injuries from the crash in April of 2008. As he spent more than two and a half years in the WTU before being separated from active service, he was demonstrably not capable of returning to active duty within one year. Therefore, in April of 2009, he should have been immediately referred to the DES. In addition, he clearly exhibited conditions and defects preventing him from performing the functional activities listed under item number five of DA Form 3349. For this reason as well, he was required to be evaluated by an MEB. Furthermore, because he had been on a temporary profile exceeding six months in duration, he should have been referred to a condition specialist who would have considered whether to a) continue the temporary profile for a maximum of 12 months from the initial profile start date; b) change the temporary profile to a permanent profile; or c) determine whether the Soldier meets the medical retention standards of chapter 3 and, if not, refer the Soldier to an MEB. However, this additional review for whether he met retention standards never occurred, although his temporary profile being repeatedly extended for far more than six months.

dd. On 10 June 2013, the applicant's service-connected disabilities were rated by the VA at 90% as of 1 February 2011. By 20 April 2020, his service-connected disabilities were rated at 100% by the VA, backdated to 1 February 2011. By

17 February 2021, his service-connected disabilities were rated as total and permanent by the VA. His 10 June 2013 90% disability rating was based on his medical records as of 1 February 2011. As this rating was based on his state after years of surgery and recovery in the WTU, it is obvious that he more than met the 30% threshold for a medical retirement in 2009 and 2010. Therefore, if he had been found unfit for service by the DES, as he would have been, he would also have been granted a medical retirement, as he more than exceeded the statutory conditions.

ee. The applicant dedicated his entire life to serving his country beginning at the age of 17. He was injured during a deployment for which he had volunteered. His injuries occurred because the driver of his vehicle was operating the vehicle in a reckless and unsafe manner, after his commanding officer unbecomingly goaded him to "stop being a [derogatory term]." This disgusting and unfitting disregard of proper safe operational standards cost him dearly: a near-death experience, harrowing surgeries, constant pain and suffering, strained relationships, years of his life spent in physical therapy and rehabilitation centers, and physical and mental debilitation which continues to haunt him to this very day. Most distressing of all for him, he lost his calling: the opportunity to serve his country in the United States Army, a vocation which had given his life meaning for as long as he can remember.

ff. During the applicant's nearly three-year medical odyssey in the Army, the care he experienced violated numerous Army regulations. In recognition of the incredible harms that he suffered as a result of one commanding officer's ridiculous and un-soldierly behavior, and the numerous violations of several Army regulations regarding his care, he requested that the ABCMR order that 1) his discharge be upgraded to a medical retirement; 2) that he be granted all attendant backpay; 3) that his DD Form 214 be changed to reflect a separation for disability; 4) that the ABCMR do so by referring him to the DES for an evaluation of whether he was fit for service in 2009 and 2010, when he was legally due a screening for referral to the DES; or 4) in the alternative, that the ABCMR itself find that he was unfit for service during that time period. However, the ABCMR denied him any relief. This decision was made in defiance of the ABCMR's obligation to correct injustice when it is clearly present in the record. 10 U.S.C. § 1552(a)(1); *McCarthy*, 959 F.3d at 415. All in violation of 5 U.S.C. § 706(2)(A).

gg. Prayer for Relief: Wherefore, the applicant prays that judgment be entered finding that he was unfit for active duty service in 2009 and 2010; and, ordering the Department of the Army to order the ABCMR to upgrade his discharge to a medical retirement; and, ordering the Department of the Army to reimburse the applicant's reasonable attorney's fees and costs borne by him arising out of this action; and, any other and further relief as the Court may deem, in the circumstances, be just and proper.

4. In a 21-page Introduction Statement, counsel again argues the applicant should have been referred to the DES and adds that the applicant should be promoted to SGT/E-5. While he was undergoing counseling and medical care for his injuries, he gained weight, which resulted in him failing a tape test and being denied a promotion to E-5. He had the points and made the promotion list. He would have been promoted to E-5 had he not failed to make weight. The only reason why he failed to make weight was because of his injuries. *See* Army Regulation 600-8-19 (6-4(u) (A Soldier is in a non-promotable status and will not be selected, promoted, advanced, appointed to a higher rank…when one of the following conditions exist…Semi-annual weigh-in that is more than 8 months old.). For these reasons, he should be promoted to E-5. *The complete 21-page Introduction Statement was provided to the Board for their review and consideration.*

5. The applicant's affidavit states:

> I was born in Scotland to two servicemembers stationed serve there while enlisted in the United States Navy. For as long as I can remember, the desire to serve my country in the military has been a motivating principle of my life. As a young boy, I often went with my father to Bear Mountain, New York, which overlooks the United States Military Academy at West Point, New York. We would watch the students training at West Point from far. I was transfixed by what I saw. Those outings with my father are among my most cherished memories and have served as an abiding source of inspiration for me.
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> As I grew up, I remained steadfast in my determination to serve my country in the armed forces, earn my way through college, and learn valuable and transferable life skills along the way. At 16, I attended Lincoln's Challenge Academy, a military academy, and earned my G.E.D. in December 2001, six months after starting there.
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> Just before. I attained my G.E.D., the United States was savagely and unprovokedly attacked on 11 September 2001. Like many Americans, the 9/11 attacks were highly traumatic for me. But unlike many Americans, the attacks also carried a personal element: my father was blocks from the World Trade Center in New York City when the attacks occurred. I was unable to reach my father for days after the terrorist attack. Later, I learned that my father's building was evacuated because it was in such proximity to the World Trade Center.
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> Although I had initially been planning to work toward my college degree, the events of 11 September 2001 galvanized me to fast-track my dream of serving my country and becoming a part of something bigger than myself. Eager to the point of impatience to serve, I did not want to wait to become an officer or take on the student loans that would be required to pay for college tution. With my parents' consent. I enlisted in United States Army at the age of 17 in May 2002.

After my enlistment, I was sent to Fort Moore (formerly Fort Benning), Georgia, and then Fort Eisenhower (formerly Fort Gordon), Georgia, for Advanced Individual Training. My first station was in Hawaii, far from my friends and family in the eastern continental United States. During the Christmas season in 2002, I returned home to see my father while on leave. While I was there, I learned that my father had lung cancer. I was devastated by this news.

The emotional strain of being away from my ailing father, with whom I enjoyed an extremely close relationship, first in Hawaii and then while deployed to Thailand, took a heavy toll on me. In late May 2003, I received a DUI and letter of reprimand from [25th Infantry Division commanding general]. This was a serious wake-up call for me. I immediately understood that I needed to take accountability for my actions and improve, and I did.

On 29 June 2003, my father tragically lost his battle ling lung cancer. In January 2004, I deployed to Kuwait enroute to Iraq. I convoyed to Kirkuk the same month. While in Iraq, I served with great distinction. I was awarded a certificate of achievement for assisting in the emergency medical treatment and evacuation of Soldiers wounded after an enemy mortar strike landed on their infantry barracks.

My unit was transferred back to the United States in January 2005. While back in the United States, I was highly productive. I began working on my bachelor's degree an dreamed of becoming an attorney. I have since attained both my bachelor's degree, Master's of Business Administration, and Juris Doctor. I was also awarded for my efforts in standing up the FBCB2 Blue Force tracking system portion of the Stryker systems before the first deployment of Strykers from Hawaii.

In my personal life I married, and my first child, a boy, was born in June 2005. My second child, a girl, was born just prior to my second deployment in 2007. By August 2007, I was training for another deployment. In November 2007, just prior to deployment. I was laterally promoted to corporal to lead a squad and electronic shop section.

In late December 2007, I arrived in Taji, Iraq, just outside an active warzone. I worked in an electronic shop until I volunteered to act as a truck commander on convoys. In this role, I was given the exceedingly dangerous task of running supply missions outside the wire to forward operating bases. I supervised two other Soldiers, a driver and a gunner, but also acted as a communications specialist and on-site electronics technician. In March 2008, my unit was tasked with providing support for a Quick Reaction Force in the Sadr City area of Baghdad. Sadr City was experiencing unrelenting waves of extreme violence at this time. I was undaunted by this danger and volunteered for the support mission. Yet I was also realistic. I understood that to succeed in such a ruthless and challenging environment, the

Soldiers in my unit would need to be in top form. I and the Soldiers under my command spent hours training together, including a weeklong training session.

At the conclusion of this training session, one of my superior officers, an E-7, [SFC R], went from Taji to Baghdad to familiarize himself with both the support mission and the area in which the unit would be operating. SFC R instructed myself and the unit's other NCOs that the unit was to go on convoy while he was away. I and the other officers faithfully performed this task.

Once the convoy was complete, however, I and the other NCOs decided to give the Soldiers the rest of the weekend off. I continued to appreciate just how challenging operating in Sadr City would be. I wanted the Soldiers to rest and prepare for the demands of constant and continuous convoys. I knew the unit would be performing daily operations once they went to Sadr City. I appreciated that this would be the last opportunity my men and I would have to recharge for quite some time. I felt rest would help the unit be prepared for the obstacles ahead.

SFC R did not see it that way. Upon his return from Baghdad, he was apoplectic with me and the other NCO's for allowing the Soldiers to rest, notwithstanding that I had not actually disobeyed a single order SFC R had given me. SFC R ordered me to serve as the gunner in the commanders Humvee the very next day. Supposedly, this was due to my experience. In reality, it was a punishment.

On 13 April 2008, I served as the gunner in the commander's Humvee in the convoy. During the convoy, the truck driver, exhorted by the commander to "stop being a [derogatory term]" began to drive in a reckless and irresponsible manner. Predictably, the driver soon lost control of the Humvee. The Humvee flipped over twice. I was in the elevated gunner's position when the Humvee crashed. I suffered serious injuries in the crash. I was immediately medevacked [medical evacuation] back to Taji. However, my injuries were too serious to be treated at Taji. I was placed in a medically induced coma so that I could be flown to Walter Reed Medical Center in Bethesda, Maryland. While in transit through Germany, my brain functions nearly went into a permanent decline. Fortunately, I reemerged from this coma on 21 April 2008, eight full days after the accident.

It was immediately apparent to me when I awoke just how seriously I had been injured. I had a feeding tube, a breathing tube, and a catheter. Atrophy made it impossible for me to move my body. I had sustained an exhausting list of maladies in the crash: moderate traumatic brain injury, three broken ribs, two collapsed lungs, a broken nose, a broken left thumb, a broken left index finger, a broken left ring finger, a broken left elbow, a broken left collar bone, a broken neck, a separated right shoulder, a blood clot, a right elbow contusion, a left knee contusion, a right knee contusion, and damage to my tailbone and the L4/L5 disks in my back.

For nearly three years, from April 2008 through January 2011, I remained in the Warrior Transition Unit (WTU), with months spent at Walter Reed and later in Richmond, Virginia, at a brain trauma clinic before moving back to Honolulu, Hawaii, to recover from my serious injuries. My expiration of term of service date was supposed to be in January of 2009, but I was still receiving intensive amounts of medical care at the time in the WTU. While in the WTU, I had treatment for subdural hematoma, two surgeries on my left shoulder, two on my left thumb, two on my left elbow, one on my right shoulder, and back surgery. Because of my frail health, I was constantly getting infections. This necessitated tonsil removal surgery.

I underwent constant counseling and medical care. Unsurprisingly, during this period, I gained weight, which resulted in my failing a tape test and being denied a promotion to E-5, despite having the points and making the promotion list. My command at the Warrior Transition Unit did not conduct a weight or tape test until I was named on a promotion list and had made points.

On 22 July 2008, I was on a temporary profile for my PULHES of 2-1-3-3-1-3 due to the health issues I had sustained because of the crash. This meant that I had a temporary profile of a 3 for 1) my lower extremities, 2) hearing and ears, and 3) psychiatric, respectively. He repeatedly requested that my command grant me a P3 for my temporary 3 ratings for my lower extremities, hearing and ears, and psychiatric, respectively. I also requested that my command refer me to the DES. However, my requests were repeatedly rebuffed. While my doctor issued me a P3 in January 2009, this was cancelled in April 2009. Instead of receiving a P3, my temporary profile was repeatedly extended through the remainder of my nearly three years of service.

In May 2010, I underwent another back surgery. At this point, I had been on a temporary profile for nearly two years. Following my surgery, I again requested a referral to the DES. However, I was instructed to wait another six months, and then have another back surgery. I was also informed that I would not be referred to the DES. I was concerned about the impact another invasive surgery would have on my health and declined the surgery. At this point, I was informed that because my separation date had arrived, I would be processed out of the Army without referral to the DES. On 31 January 2011, I was discharged from active duty service under honorable conditions.

After my separation from the Army, I had my disabilities rated by the VA. My initial application would not be finally decided until 2023. In its first decision, the VA determined that I was 90 percent disabled as of 1 February 2011, the date of my discharge from the Army, exceeding the 30 percent threshold for permanent disability retirement for active duty servicemembers under 10 USC § 1201(b)(3)(B)(ii). I timely appealed the VA's first decision, dated 2013, in 2014, and

in 2020 I was found to have been 100% disabled as of 1 February 2011. A further appeal was necessary because not all of my injuries sustained while in service were rated or backdated to 2011. That appeal was remanded by the Board of Veterans Appeals in 2023 and decisions after remand came in April 2024. In 2023, I was granted permanent and total disability status by the VA.

Unfortunately, my disabilities have continued to cause me serious problems. I have suffered multiple blood clots, and the impaction of my L4/L5 disks in my back continues to cause me grave pain. I have seen deterioration in the back and have since been rated for neuropathy and other issues stemming from the back injury. My broken neck has also caused consistent issues. I have been referred for two more surgeries on my toes and will likely need further surgery for other issues in the future. My mobility has been greatly constrained by service-connected problems with my big toes, including bone spurs and early arthritis. I had surgery on the left big toe at the VA but was referred for a second surgery on the same toe and was referred for another surgery on the right toe.

6. The applicant's records show he enlisted in the Regular Army on 2 May 2002 for a period of 4 years. He held military occupational specialty 94E, Radio and Communication Operator/Repairer.

- He arrived in Iraq on 17 January 2004 and reenlisted on 20 January 2005 for a period of four years; he departed Iraq on 26 January 2005
- He served a second tour of duty in Iraq from 6 December 2007 to 13 April 2008.

7. The applicant provided several SFs 600, with dates ranging from 8 October 2008 through 29 November 2010, showing he was undergoing treatment/therapy at the WTU, Tripler Army Medical Center, Hawaii, due to multiple injuries he sustained in a military vehicle rollover on 13 April 2008. The SFs 600 also show he was issued a series of temporary profiles.

8. The applicant's DD Form 214 shows he was discharged from the Army on 31 January 2011, in the rank and grade of specialist/E-4, under the authority of AR 635-200 (Active Duty Enlisted Administrative Separations), chapter 4, by reason of completion of required active service. The DD Form 214 also shows he completed 8 years, 8 months, and 29 days of active service and he was assigned Separation Code KBK and Reentry Code 1 (fully eligible for reenlistment).

9. During the processing of this case, an advisory opinion was obtained regarding the applicant's request for promotion to SGT/E-5 from the U.S. Army Human Resources Command, Enlisted Promotion Branch. It states:

a. In accordance with AR 600-8-19, dated 11 July 2007, the regulation in effect for the time of the request, paragraph 1-20, Soldiers who are pending referral to a Military Occupational Specialty/Medical Retention Board under AR 600-60 (Physical Performance Evaluation System) or referral to a medical evaluation board under AR 40-400 (Patient Administration) or physical evaluation board under AR 635-40 (Disability Evaluation for Retention, Retirement, or Separation) will not be denied promotion (if already promotable) on the basis of medical disqualification if they are otherwise qualified for promotion.

b. A review of the applicant's Army Military Human Resource Record in the Interactive Personnel Electronic Records Management System (Army's authorized personnel records repository), there is no record to show that he was recommended for promotion prior to being injured or after he was injured. Therefore, he would not be promoted under AR 600-8-19, dated 11 July 2007, paragraph 1-20.

10. Counsel provided the following rebuttal in response to the advisory opinion provided by the Department of the Army, U.S. Army Human Resources Command, Fort Knox, KY, and three additional attachments:

a. An email/letter from the applicant's attorney, dated 18 December 2024, which reads.

> On November 21, 2024, our office received a letter from you, containing an advisory opinion provided by the Department of the Army, U.S. Army Human Resources Command, Fort Knox, KY, in [the applicant's] court-remanded application to the Army Board for the Correction of Military Records (AR20240006097). The letter informed us that we had 30 days, that is, until December 21, 2024, to file a rebuttal to the advisory opinion. This letter is [the applicant's] rebuttal to the advisory opinion.
>
> The Advisory Opinion stated, in pertinent part: “In accordance with Army Regulation (AR) 600-8-19, dated 11 July 2007, the regulation in effect for the time of the request, paragraph 1-20, Soldiers who are pending referral to a Military Occupational Specialty (MOS)/Medical Retention Board (MMRB) under AR 600-60 or referral to a medical evaluation board under AR 40-400 or physical evaluation board under AR 635-40 will not be denied promotion (if already promotable) on the basis of medical disqualification if they are otherwise qualified for promotion. A review of [the applicant's] Army Military Human Resource Record (AMHRR) in IPERMS (Army's authorized personnel records repository). There is no record to show that [the applicant] was recommend [sic] for promotion prior to being injured or after he was injured. Therefore, he would not be promoted under AR 600-8-19 dated 11 July 2007, paragraph 1-20. under AR 600-8-19 dated 11 July 2007, paragraph 1-20.”

> But in fact, and contrary to the advisory opinion, [the applicant] was otherwise qualified for promotion and had been for approximately four years when he met his points requirement in January of 2010. [The applicant] had accumulated 707 points for promotion purposes as of August 26, 2009. See Enclosure 1, "Enlisted Record Brief".1 Under Army regulations, [the applicant] met the 705-point cutoff for his desired promotion to the grade of E-5 in January of 2010. See https://www.armystudyguide.com/content/Promotion_point_cutoff_scores/promotion_points_2010/january-2010-promotion-po.shtml.
>
> [The applicant] also completed the required Warrior Leadership Course in February of 2006, his command promoted him to Corporal in 2007, and he deployed as a "SR Comsec/Radio RPR" (94E20 instead of 94E10) as a squad leader in the 2007-2008 combat deployment where he was injured. See Enclosure 1; see Enclosure 2, "Service School Academic Evaluation Report"; see Enclosure 3, "Promotion to Corporal." For these reasons, [the applicant] was otherwise qualified for promotion to E-5 and should have been promoted to E-5.

b. Enclosure 1, the applicant's Enlisted Record Brief, 26 August 2009, provided for the Board to review.

c. Enclosure 2, a DA Form 1059 (Service School Academic Evaluation Report), dated 8 February 2006, provided for the Board to review.

d. Enclosure 3, Certificate of promotion to corporal, dated 20 July 2007, provided for the Board to review.

11. The applicant provided several VA Rating Decisions showing he was granted service-connected disability compensation, effective 1 February 2011, for several medical condition that include TBI and PTSD.

12. The Army rates only conditions determined to be physically unfitting at the time of discharge, which disqualify the Soldier from further military service. The Army disability rating is to compensate the individual for the loss of a military career. The VA does not have authority or responsibility for determining physical fitness for military service. The VA may compensate the individual for loss of civilian employability.

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 purpose of this medical advisory is to assist the ABCMR in

addressing the specifics of this case sent by court remand. The claimant underwent a previous ABCMR proceedings on 21Nov2022 without relief.

a. In this current application the claimant made three claims:

(1) ABCMR's prior decision ignored the claimant's nonfrivolous argument: Under AR 40-501, 7-4(c)(3), the temporary profile that he had been on for over 12 months (from 22Jul2008 through 08Feb2011), was required to be made permanent; or should have been extended on specific approval by the command of the medical treatment facility, or their designated senior physician approval authority. They also noted that ABCMR failed to address this and also failed to explain the rationale for not addressing it.

(2) ABCMR failed to observe their statutory obligation to only make decisions which were not contrary to law or regulation, and to follow binding Army regulations for screening and DES referral under AR 40-501: AR 40-501, 7-4. They argued that the claimant had been on a temporary profile for longer than 12 months and a temporary profile exceeding 6 months required consideration by a relevant specialist; a temporary profile exceeding 12 months which should have been made permanent P3, would have resulted in screening by a MEB qualified doctor for referral to the DES; and finally, with the claimant's profile limitations, it should be determined that he was unfit for service by the DES and based on his VA ratings (totaling greater than 30%) should be considered for retirement.

(3) ABCMR's prior Board decision blatantly disregarded injustice clearly present in the record: The claimant sustained "a near death experience, harrowing surgeries, constant pain and suffering, strained relationships, years of life spent in physical therapy and rehabilitation centers, and physical and mental debilitation…" The injuries occurred because the driver of the vehicle was operating the vehicle in an "unsafe manner". And finally, "during his nearly three-year medical odyssey…there were numerous violations of Army regulations: AR 40-501, 3-1; 3-3; 3-3(d); 3-41(e)(1); 7-4(b); 7-4(b)(2); 7-4(c)(1); 7-4(c)(3)".

b. The ABCMR ROP summarized the applicant's record and circumstances surrounding the case. The applicant reenlisted in the Army 20Jan2005 for 4 years. He entered the period of active service 02May2005. His MOS was 94E, Radio & Communication Security Repairer. He was deployed in Iraq from 20040117 to 20050126; and from 20071206 to 20080413. He was discharged 31Jan2011 under provisions of AR 635-200, chapter 4 due to completion of required active service. His reentry code was 1 and his service was characterized as honorable.

c. While in theatre, the claimant was a restrained passenger in a HUMVEE that rolled over twice during an accident. He was initially treated in Bagdad, then he was

medically evacuated to Landstuhl Regional Medical Center (LRMC) where he was hospitalized from 13Apr2008 to 15Apr2008. And finally, he was air evacuated and admitted to the surgical intensive care unit at Walter Reed Army Medical Center (WRAMC) on 15Apr2008 while intubated and sedated. His initial Glasgow Coma Scale score was 15/15 (normal). He initially had bilateral pneumothoraces and pulmonary contusion which resolved with treatment. He also sustained moderate traumatic brain injury (TBI), left first rib fracture, left clavicle fracture, open left elbow dislocation, open left ulnar fracture, left hand digit fractures (thumb, middle, index), nasal septal fracture, ear laceration, large scalp laceration and stable spinous fractures of C7, T1, and T2. He underwent surgical repair of the left-hand digit fractures by orthopedics on 16Apr2008 and when he was medically stable, he was transferred to PM&R (physical medicine and rehab) at WRMC on 25Apr2008. He was transferred to Richmond VAMC for TBI Rehab on 28Apr2008. He entered WTB (Warrior Transition Battalion) at Schofield Barracks AHC (SB AHC) starting 21Aug2008.

d. The more significant or enduring medical conditions are reviewed below in paragraphs 5 through 12.

e. TBI with PTSD

(1) 28Apr2008, he was admitted to Polytrauma Rehabilitation Center, VAMC for acute inpatient interdisciplinary rehabilitation. The head CT was normal except there was a large soft tissue injury over the high left posterior parietal region. There was no involvement of the brain parenchyma (the functional tissue of the brain). The 26Apr2008 brain MRI was normal.

(2) 29Apr2008 Speech Pathology, VAMC. He was assessed by speech language pathology service and no cognitive-linguistic deficits were observed during evaluation.

(3) 29Apr2008 MH Psychiatry Consult VAMC. The claimant reported experiencing anxiety. He had sustained a moderate TBI based on length of LOC (loss of consciousness) and PTA (post traumatic amnesia). During early recovery he developed hallucinations, disorientation and confusion that occurred in the context of receiving morphine. The hallucinations were treated with Seroquel 50mg which stabilized the symptoms. The Mini Mental Status Score was 28/28 (normal). Diagnosis: Delirium due to a general medical condition (TBI, medications). He currently had no mental health symptoms except for anxiety about wanting to recover and be discharged. This anxiety was considered normal and not clinically diagnostic of any disorder at the time. Seroquel was gradually discontinued.

(4) 21May2008 Neuropsychology Consult VAMC. This evaluation was requested for current cognitive and emotional status after recently diagnosed TBI,

moderate to severe. He articulated an ambitious plan to complete a bachelor's degree in business at Arizona State, complete a master's degree in public administration, and then to become a lawyer. PTSD symptom checklist test score fell in the normal, non-clinically significant range. Score on a self-report measure of depression suggested mild depressive symptomatology. The neuropsychologist assessed that the current 'moderate to severe' severity rating for his TBI appeared inflated based on the claimant's relatively brief LOC, and his cogent narrative of events soon after regaining consciousness which included remembering the helicopter ride to the field hospital. They recommended he continue follow-up with inpatient rehabilitation and outpatient psychiatry and psychology for purposes of mood management. Future neuropsychology assessments were not indicated. They assessed that the claimant was making a strong cognitive recovery.

(5) 03Jun2008 Occupational Therapy WRAMC. Per his report, his memory and attention skills had returned to baseline. He stated that he was able to manage his own schedule, medications and navigate the WRAMC campus without difficulty. Cognitive testing not performed that day as previous neuropsychology testing was within normal limits, and he was not reporting deficits.

(6) 17Nov2010 TBI Neuropsychology SB AHC. Diagnoses: Anxiety Disorder due to general medical condition with generalized anxiety; and History of TBI.

(7) 06Apr2011 TBI Compensation and Pension (C&P) Examination. The claimant had a history of a moderate TBI with LOC duration one to twenty-four hours and post-concussion syndrome. He reported that since his injury, he had headaches and left side weakness. He was able to perform normal activity while he had the headache. There was no history of use of headache preventive medication. He was ambidextrous. The exam showed no autonomic nervous system impairment; gait abnormalities; imbalance or tremors; muscle atrophy or loss of muscle tone. For TBI Exam Facets: He complained of mild memory loss, attention, concentration, or executive functions, but without objective evidence on testing; social interaction was occasionally inappropriate; judgement was normal; he was occasionally disoriented; he experienced three or more subjective symptoms that mildly interfered with work; he had one or more neurobehavioral effects that occasionally interfered with workplace interaction, social interaction, or both but did not preclude them; comprehension or expression, or both, or either spoken language or written language was only occasionally impaired. He was able to communicate complex ideas. MMSE (Mini Mental Status Exam) score was 30/30, consistent with there being no cognitive impairment.

(8) 10May2011 Psychiatry Consult. The applicant endorsed characteristic PTSD symptoms stemming from the rollover vehicle accident in 2008. The PCL-C score of 41 suggested PTSD symptoms were occurring at a subclinical level. Although test results

suggested mild depression, the claimant reported that his mood was “pretty good”. For past mental health, treatment included some therapy as a youth and also following the car accident. He denied inpatient psychiatric hospitalizations, acts of self-harm and suicide ideation. There was no family history of mental illness. Diagnosis: Subclinical PTSD; and Depression Not Otherwise Specified, Mild. Intensive trauma focused treatment was not warranted at the present time. He was offered the option of psychoeducation classes (e.g., Trauma 101) or in vivo exposure exercises focused on some of the situations he had anxiety about; however, he declined.

(9) 12Dec2012 Mental Health Evaluation Note. The claimant’s main concern was an increase in headaches. He acknowledged being under quite a bit of stress due to finals (he was in law school). He continued to experience PTSD symptoms (nightmares, hypervigilance, and intrusive thoughts). At the time he was not interested in any counseling services due to his schedule.

(10). 08Feb2013 Initial PTSD DBQ. Diagnosis: PTSD. Stressors: He was under multiple motor attacks during the first Iraq deployment; and the 2008 motor vehicle rollover accident during the second Iraq deployment. There was no history of psychiatric hospitalization, suicide ideation, violence, mania, or psychosis. He was not on any psychotropic medication. The BH examiner opined that the PTSD condition caused occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks, although generally functioning satisfactorily, with normal routine behavior, self-care, and conversation (the 30% level level). He completed an MBA degree in May 2011 and was currently in law school with grades reported to be in the top 20%.

f. Neck strain/Cervical spinous process fracture, C7.

(1) 23Apr2008 Neck MRI. There were fractures of spinous processes C7, T1, and T2 with soft tissue edema. The spinal cord signal was normal. The VA TBI examiner noted the “spinous processes “are the solid point people can palpate down the spine and do not usually impair the cord or the nerve roots.”

(2) 31Mar2011 Spine C&P Exam. Diagnosis: Neck strain/fracture treatment included pain medication (Vicodin), and muscle relaxant. Response to treatment was ‘good’. He reported mild weekly pain flare-ups lasting hours. The exam revealed there was no muscle spasm. There was neck forward flexion 0 to 45 degrees (normal); and extension 0 to 45 degrees (normal). Painful motion was present.

(3) The most recent visit with principal diagnosis/complaint of neck pain, neck strain or cervicalgia in JLV, was 09Nov2009, over a year prior to discharge.

g. Back strain/Herniated L4-L5/Spinous process fractures at T1, T2 and T6 and associated Lumbar Radiculopathy (Sciatic and Crural Nerves)

(1) 23Apr2008 lumbar MRI. There was broad left parasagittal L4-L5 disc herniation with mass effect on traversing left-sided nerve roots. No lumbar, sacral, or other pelvic region fracture identified.

(2) The claimant participated in individual and group physical therapy for lumbar stabilization in June and July 2008 and he received instruction in home exercise program (HEP).

(3) 12May2010 Orthopedic Clinic Tripler AMC. He had one injection recently which dulled his pain slightly, but he was still requiring narcotic pain relief (OxyContin and Roxicet). He agreed to undergo back surgery but not until November because he wanted to wait until after his thumb reconstruction surgery was completed at the end of June.

(4) 26Aug2010 lumbar microdiscectomy levels L4 and L5 for left lumbar paracentric\disc herniation. The surgery was performed due to the claimant's report of left lower extremity radicular symptoms and the exam showed a positive straight leg raise on the left and right. After inadequate or temporary response to pain medication (narcotic and anti-inflammatory), physical therapy, and an injection; the claimant underwent back surgery.

(5) 22Nov2010 WTU Primary Care Clinic Schofield Barracks AHC. He was doing well status post microdiscectomy. Low back pain was rated 1/10 (mild). He was planning to ETS 07Dec2010.

(6) 31Mar2011 Spine Compensation and Pension (C&P) Exam. Diagnosis: Back strain; Herniated Discs, L4-L5. Treatment included pain medication (Vicodin); muscle relaxant; and exercises learned in physical therapy until eventual surgery in September 2010. Response to treatment was 'fair'. He reported moderate weekly pain flare-ups lasting hours. He had constant "zinging" in right buttocks and occasional sharp electric sensation down back of left leg to calf, but not as bad since surgery. He used stretching, resting, and occasionally used pain medication for self-care. He was able to walk 1-3 miles. The exam showed no muscle spasm. Back ROM (range of motion) was full. Painful motion was present. Lower extremity muscle strength and reflex testing were normal. He had not been able to do his usual job of fixing radios since his accident in 2008. He was working part time and attending law school full time.

h. Right upper extremity pain/Right shoulder acromioclavicular joint arthrosis

(1) 27May2008 Physical Therapy WRAMC. There was atrophy and depression of the right shoulder scapular muscles with increased tone to right rhomboids.

(2) 23Mar2010, the claimant underwent right distal clavicle excision surgery for right shoulder acromioclavicular joint arthrosis.

(3) 05Aug2010 Orthopedic Clinic Tripler AMC. He was about 5 months out from his surgery. He stated that his pain was much better, but he still had some grinding with motion. He had full ROM. He stated the joint was mildly painful except when he used his arm quite a bit.

(4) 31Mar2011 Joints, Shoulder C&P Exam. There was no deformity. Giving way, instability, stiffness, and weakness were present. Flexion was 0 to 170 degrees (normal is 180 degrees); abduction was 0 to 170 degrees (normal is 180 degrees). Internal rotation was 0 to 85 degrees (normal is 90 degrees); and external rotation was 0 to 90 degrees (normal).

i. Left shoulder pain/Status post left clavicle fracture repair.

(1) 11Mar2009 the claimant underwent ORIF (open reduction and internal fixation) for left clavicle non-union fracture.

(2) 10Sep2009, the left clavicle intramedullary fixation screw was removed due to pain, then he had 30 days of convalescent leave, followed by rehab.

(3) 05Aug2010 Orthopedic Clinic Tripler AMC. The examination revealed left side scapular winging. He had no specific impingement signs. He had otherwise reasonable objective strength. The orthopedist felt the claimant had scapular dyskinesis secondary to his clavicle fracture and that he had been under rehabilitated—he had never engaged in official physical therapy. If symptoms persisted, he should return for repeat CT scan. The specialist stated: “I do not see any reason that this patient should not be able to return to all forms [of] activity including full duty with this particular injury”.

(4) 31Mar2011 Joints, Shoulder C&P Exam. There was no deformity, giving way, or instability of the left shoulder joint. Stiffness and weakness were present. Flexion was 0 to 180 degrees (normal); abduction was 0 to 180 degrees (normal). Both internal and external rotation were 0 to 90 degrees (normal).

j. Left arm condition/Elbow mildly displaced fracture of the proximal ulnar shaft.

(1) 16Apr2008, the claimant underwent ORIF for the elbow fracture (left proximal ulna fracture with radial head dislocation).

(2) 10Dec2009 left olecranon hardware was removed due to pain.

(3) 31Mar2011 Joints, Elbow C&P Exam. There was pain with active motion of the left elbow. Ranges of motion were normal. The 31Mar2011 left elbow x-ray showed no abnormalities.

k. Left Hand Digit Fractures/Lacerations

(1) April 2008, the left thumb metacarpal intraarticular fracture underwent open reduction/internal fixation (ORIF).

(2) April 2008, the fracture of the second metacarpal neck underwent open left index metacarpal fracture repair and repair of the left index laceration, volar surface without tendon involvement.

(3) April 2008, the left long finger extensor tendon laceration was repaired.

(4) 30Apr2008 Orthopedic Surgery Resident Note. Hand management/occupational therapy was consulted for range of motion.

(5) 03May2010 Hand Surgery Clinic Tripler AMC. He was status post ORIF left thumb April 2008. The fracture healed but he continued to have pain along the CMC (carpometacarpal) joint and subjective weakness. The exam showed good range of motion without instability.

(6) 29Jun2010, he had placement of Artelon spacer and removal of hardware left thumb and carpometacarpal joint resurfacing. He had developed arthritis at the carpometacarpal joint. He underwent occupational therapy rehab after surgery.

(7) 25Aug2010 Hand Surgery Clinic Tripler AMC. The surgical incision was well healed. Strength testing revealed 5/5 extensor and flexor tendon function. He was minimally tender about the CMC joint. There was some joint stiffness. He had already started occupational on therapy 20Aug2010.

(8) 07Sep2010 and 28Sep2010 Occupational Therapy. He was approximately 10 weeks from date of surgery, with no complaints of pain and normal ROM of LEFT thumb. He had decreased grip/lateral pinch strength in LEFT hand when compared to RIGHT; however, his strength was more than adequate to perform everyday tasks. He had met maximum functional potential at the time and was placed on home strengthening program. Rehab potential was good, and he had currently met all goals.

(9) 31Mar2011 Hand Thumb and Fingers C&P Exam. The Left index finger had a deformity at the PIP joint; however, ROM was normal and there was no objective

evidence of pain. The left long finger showed normal ROM and no objective evidence of pain. The left thumb showed normal ROM and there was no objective evidence of pain. The claimant reported that he was left hand dominant during this exam. He was working for a local newspaper in San Tan Valley. The claimant reported weakness, decreased dexterity in all fingers including the thumb. He stated it was very difficult and painful to hold a pen.

l. Right Knee and Left Knee Conditions

(1) 24Nov2008 bilateral knee films were essentially negative.

(2) 23Dec2008 left knee MRI. The study revealed no meniscal injury or ACL (anterior cruciate ligament) tear. There was mild thickening of the iliotibial band without focal tear or surrounding edema consistent with old injury vs chronic inflammation.

(3) 12Jan2009 Orthopedic Clinic. The claimant reported bilateral anterior knee pain that was significant with prolonged standing, prolonged walking, climbing up and down stairs and prolonged sitting. He denied instability, effusions, or other major complaints. He stated that he had anterior knee pain. Left knee pain was worse than the right. The exam revealed full active and passive range of motion of both knees without limitations. He had very minimal patellofemoral crepitus in both knees. Bilateral knee joint stability tests did not show abnormality.

(4) 31Mar2011 bilateral weightbearing knee series revealed some mild decrease in the medial compartment joint space but no significant evidence of arthritic changes.

(5) 31Mar2011 Joints, Knee C&P Exam. There was no knee deformity, giving way or instability in either knee. Pain and stiffness were present. Weakness was endorsed but strength testing showed knee flexion and extension strength was 5/5 (normal).

m. Opinion/Summary

(1) In mid-2008, the claimant did inquire about undergoing a MEB (27May2008 Physical Therapy WRAMC and 14Oct2008 WTU Primary Care Clinic SB AHC); however, at that time, he was still recovering from multiple injuries. The claimant was admitted to the WTB (also called WTU) in August 2008 where he remained until discharge. Being in the WTU allows wounded Soldiers to focus almost exclusively on recovery. While in the WTU, the applicant recovered from multiple injuries and underwent multiple surgeries. He was also able to pursue his MBA through Chaminade University (19Feb2010 Social Work Outpatient Schofield Barracks AHC).

(2) The claimant was also approved to extend his time on active duty to complete his medical care while on active duty. Although he expressed frustration with the long healing process, he regretted not being able to take care of all of his medical issues while on active duty (17Nov2010 TBI Neuropsychology SB AHC). During his time in the WTU, he did undergo several surgeries involving multiple joints and some joints underwent multiple procedures. Surgeries require a temporary profile, a convalescent period and time for rehab afterward.

(3) The claimant had several conditions that required significant follow-up and frequently required follow-up with multiple services. With the number of conditions that needed addressing, it is not unreasonable that one year in the WTU would not be sufficient. In fact, the claimant was undergoing surgery right up until the final few months in active service with just enough time to complete adequate post-surgery monitoring. It should also be noted that medical records documented that the claimant requested for at least one surgery to be delayed due to another pending surgery, which was a reasonable request. It is not unreasonable that the claimant's recovery and stay in the WTU took longer than 12 months to address all needs adequately. It is also not unreasonable that there would be different timelines for recovery/rehab for different conditions.

(4) In his application to ABCMR, the claimant endorsed that he was on temporary profile from 22Jul2008 through Feb2011; this contention is not rebutted by the undersigned, nor could it be verified in the available record. A blank Physical Profile (DA Form 3349) was submitted with the claimant's supporting documentation. A search in HAIMS, which frequently contains archived profiles, only yielded two Physical Profiles: The 07Apr2009 physical profile and the 23Jan2009 Physical Profile for Right Clavicle Fracture, Right AC (acromioclavicular) Separation and LBP (Low Back Pain) that it superseded. The 07Apr2009 Physical Profile indicated that the claimant's MEB (for shoulder, knee and back) had been cancelled to allow for him to undergo surgery and rehab. Afterward, he was to be cleared by orthopedics. It was further indicated that temporary profiles would be issued to cover his rehab time. The 07Apr2009 profile was initiated by the military medical treatment facility Orthopedics Surgery Service and was approved by the profiling Delegated Authority.

(5) It should be noted that during the 17Nov2010 TBI Neuropsychology SB AHC note, the claimant reported that he had decided that he would ETS rather than wait for another few months of rehab for a determination for a potential MEB. The psychologist wrote "We discussed how he weighed out his options and how he discussed them with his wife and how he came to the conclusion".

(6) At the time of discharge, the claimant was on a temporary profile 5 months into recovery from his back surgery. He was doing well, there had been no complications, his pain control was good, his temporary profile for Lower Back Pain

Status Post Surgery would expire 08Feb2011. He received a phone call from WTU Primary Care Clinic SB AHC on 03Jan2011 during which he shared that he was driving from Illinois to Arizona. The undersigned notes that prolonged sitting can provoke back pain. The claimant stated that everything was good, and he verbalized no concerns.

(7) It was also noted that orthopedics had not recommended a permanent level 3 profile for any of the orthopedic conditions within a year of discharge. There was no indication in the record, that at the time of discharge, there was a poor prognosis for continued recovery for his orthopedic conditions, with this review especially noting the shoulder, knee, and back conditions (previously identified for a potential MEB in the 23Jan2009 Physical Profile). And finally, none of the applicant's orthopedic conditions for which there are minimal ROM requirements under AR 40-501 chapter 3, failed minimum standards based on ROM examinations documented closest to the discharge process. Based on records currently available for review, there was insufficient evidence to support that the claimant had a medical condition, including a mental health condition, which failed medical retention standards of AR 40-501 chapter 3 at the time of separation from service.

2. Counsel provided the following rebuttal to the advisory opinion provided by the Department of the Army, Army Review Boards Agency Medical Advisor (see attachments):

a. An email from the applicant's attorney, dated 1 January 2025, wherein he notes the applicant's rebuttal, and 4 enclosures were included.

b. A letter from the applicant's attorney, dated 1 January 2025, reads:

> On December 2, 2024, our office received a letter from you, containing an advisory opinion provided by the Department of the Army, Army Review Boards Medical Advisor, in [the applicant's] court-remanded application to the Army Board for the Correction of Military Records (AR20240006097). The letter informed us that we had 30 days, that is, until January 1, 2025, to file a rebuttal to the advisory opinion. This letter is [the applicant's] rebuttal to the advisory opinion.
>
> The Advisory Opinion stated, in pertinent part: "Based on records currently available for review, there was insufficient evidence to support that the claimant had a medical condition, including a mental health condition, which failed medical retention standards of AR 40-501 chapter 3 at the time of separation from service." The Medical Advisor's name and CV were not provided.
>
> At our request and on behalf of [the applicant], Dr. D[_____] N[_____], an expert in physical medicine and rehabilitation as well as brain injury medicine,

and Dr. V[_____] B[_____], an expert neurologist, reviewed [the applicant's] medical records and the opinion provided by the unidentified expert. Their expert reports are attached to this letter. See Enclosure 1 (“Medical Expert Opinion of Dr. D[_____] N[_____]”), Enclosure 2 (“Medical Expert Opinion of Dr. [V____ B____]”). We also attach Dr. N[_____] and Dr. B[_____]’s CVs to this letter. See Enclosure 3 (“Dr. D[_____] N[_____] CV”); Enclosure 4 (“Dr. V[_____] B[_____] CV”).

The expert opinions, which are evidence which this Board is bound to consider in its assessment of [the applicant's] application, speak for themselves and will not be belabored here. In his opinion, Dr. N[_____] determined that [the applicant's lumbar spine, recurrent venous thromboembolic disease, right shoulder, left shoulder, left hand/elbow, and TBI (traumatic brain injury)/ PTSD (post-traumatic stress disorder), all were sufficient for MEB referral under Army Regulation 40-501. Enclosure 1, at 18-24. Dr. B[_____] also determined, to a reasonable degree of medical certainty, that “[The applicant] was unfit for further military service as these persistent complex neurocognitive deficits significantly limited his mental function to such a degree as to significantly interfere with his performance of duties as per AR 40-501 (3-1 (a) and 3-30 (j)).” Enclosure 2, at 3. The opinions of Dr. N[_____] and Dr. B[_____] together thoroughly rebut the Medical Advisor’s inaccurate opinion there was “insufficient evidence” to support that [the applicant] “had a medical condition, including a mental health condition, which failed medical retention standards of AR 40-501 chapter 3 at the time of separation from service.” [The applicant] has shown that he in fact suffered from several conditions which failed medical retention standards of AR 40-501 chapter 3 at the time of his separation from service. As a final note, the Medical Advisory opinion also did not address, let alone rebut, [the applicant's] argument that his temporary profiles were wrongly extended for more than 12 months in violation of Army Regulation 40-501. See [the applicant's] Memorandum in Support of Application for Correction of Records, at 15-16. Nor did the Medical Advisory opinion address [the applicant's] argument that his referral to an MEB was required under Army Regulation 40-501. Id. at 16-21.

For all these reasons, [the applicant] renews his request that this Board determine that as of April 2008, [the applicant] was unfit to perform the duties of his office, grade, rank, or rating because of physical disabilities which are at least 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs, and these disabilities were incurred while [the applicant] was entitled to basic pay, under 10 U.S.C. § 1201(a) and (b)(3)(B). [The applicant] also requests that this Board determine that [the applicant's] injuries occurred in a combat zone because of an armed conflict, hazardous duty, or an instrumentality of war. [The applicant] requests that considering the foregoing, [the applicant's] discharge be upgraded to a medical retirement, and

that he be granted all attendant backpay and allowances, including any health care reimbursement, under 10 U.S.C. § 1201 (b)(3)(B). [The applicant] also requests that his DD21 Counsel provided the following rebuttal to the advisory opinion provided by the Department of the Army, Army Review Boards Medical Advisor:

c. The expert medical opinion of Dr. D_____ N_____, DO, provided to the Board to review in full.

d. The expert witness report of Dr. V_____ B_____, MD, provided to the Board to review in full.

e. The CV of Dr. D_____ N_____, DO, provided to the Board to review in full.

f. The CV of Dr. V_____ B_____, MD, provided to the Board to review in full.

BOARD DISCUSSION:

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

a. The evidence shows the applicant was medically evacuated from Iraq after a vehicle accident and was hospitalized in Landstuhl from 13 April 2008 to 15 April 2008. He was subsequently returned to Tripler Army Medical Center where he was assigned to the Warrior Transition Unit to undergo continued treatment and therapy for his injuries sustained; including traumatic brain injury (TBI), left rib fracture, left clavicle fracture, left elbow dislocation, left ulnar fracture, left hand digital fractures, nasal septal fracture, ear laceration, scalp laceration, and spinous fractures.

b. The Board noted that at the time of the applicant's treatment, he inquired about undergoing a Medical Evaluation Board (MEB); however, found no evidence to support his chain of command, providers, or other professionals referred him to the Disability Evaluation System (DES) for further processing.

c. The Board noted the two medical advisors' reviews finding:

(1) At the time of discharge, he was doing well, there had been no complications, his pan control was good, and his temporary profile for lower back pain status post-surgery would expire 8 February 2011;

(2) Insufficient evidence to support the applicant had a medical condition, including a mental health condition, which failed medical retention standards of Army Regulation 40-501, Chapter 3 at the time of his separation from service.

d. The Board further considered the medical opinions of the neurologist and doctor of osteopathic medicine retained by the applicant, opining the applicant should have been referred to the DES.

e. The Board found the applicant has demonstrated by a preponderance of evidence an error or injustice warranted referral to the DES. The Board found underlying procedural inequities, which failed to meet the regulatory standards. Specifically, the Board found the applicant met his burden of proof that:

(1) He incurred service-related injuries that warrant consideration through the DES;

(2) He was honorably discharged on 31 January 2011 due to completion of required active service prior to being referred to DES as a specialist (SPC)/E-4 without the opportunity for promotion based on the circumstances.

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

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

(2) Amending his DD Form 214 to reflect the grade, rate or rank of sergeant (SGT) and pay grade of E-5;

(3) Denying of so much of the applicant’s request that pertains to a medical retirement without evaluation under the DES. The DES is equipped to determine if wounded, ill, or injured servicemembers are fit for continued service and provide disability benefits to servicemembers and veterans, if appropriate.

BOARD VOTE:

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

BOARD DETERMINATION/RECOMMENDATION:

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

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

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

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

d. Amending his DD Form 214, for the period ending 31 January 2011 to show in:

- item 4a (Grade, Rate, or Rank): SGT
- item 4b (Pay Grade): E05
- item 12i (Effective Date of Pay Grade): 30 January 2011

2. The Board further determined that the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to changing his type of discharge without evaluation under the DES.

X

CHAIRPERSON

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

REFERENCES:

1. Title 10, U.S. Code, 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 Disability Evaluation System (DES) and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with Department of Defense Directive 1332.18 and AR 635-40 (Disability Evaluation for Retention, Retirement, or Separation).

2. AR 635-40 establishes the Army 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 office, grade, rank, or rating.

a. The disability evaluation assessment process involves two distinct stages: the Medical Evaluation Board (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 or 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 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.

b. Service members whose medical condition did not exist prior to service who are determined to be unfit for duty due to disability are either separated from the military or are permanently retired, depending on the severity of the disability. 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. Paragraph 3-6 (Length of hospitalization), in effect at the time, states providing definitive medical care to active duty Soldiers requiring prolonged hospitalization who are unlikely to return to active duty is not within the Department of the Army mission. The time at which a Soldier should be processed for disability retirement or separation must be decided on an individual basis. The interest of both the Army and the Soldier must be considered. A Soldier may not be retained or separated solely to increase retirement or separation benefits. Soldiers who are medically unfit and not likely to return to duty should be processed for disability retirement or separation when it is decided that they have attained optimum hospital improvement.

d. Paragraph 3-7 (Retaining Soldiers on active duty after scheduled non-disability retirement or discharge date), in effect at the time, states a Soldier whose normal scheduled date of non-disability retirement or separation occurs during the course of

hospitalization or disability evaluation may, with his or her consent, be retained in the service until he or she has attained maximum hospital benefits and completion of disability evaluation if otherwise eligible for referral into the disability system.

3. AR 40-501 (Standards of Medical Fitness) provides information on medical fitness standards for induction, enlistment, appointment, retention, and related policies and procedures. Chapter 7 (Physical Profiling), paragraph 7-4 (Temporary vs Permanent Profiles) of the regulation in effect at the time states:

a. Permanent Profile: A permanent profile may only be awarded or changed by the proper authority. All permanent "3" and "4" profiles, for Soldiers on active duty, will be reviewed by an MEB physician or physician approval authority. If the profile is permanent, the profiling officer must assess if the Soldier meets the medical retention standards of chapter 3. Those Soldiers on active duty who do not meet the medical retention standards must be referred to an MEB.

b. Soldiers who have one or more condition(s) that do not meet medical retention standards are referred to a MEB/PEB after attaining the Medical Retention Determination Point MRDP. The MRDP is when the Soldier's progress appears to have medically stabilized; the course of further recovery is relatively predictable; and where it can be reasonably determined that the Soldier is most likely not capable of performing the duties required of his military occupational specialty (MOS), grade, or rank. This MRDP and referral to a MEB/PEB will be made within 1 year of being diagnosed with a medical condition(s) that does not appear to meet medical retention standards, but the referral may be earlier if the medical provider determines that the Soldier will not be capable of returning to duty within 1 year.

c. The MEB physician or physician approval authority will review all MEB referrals to ensure that MRDP has been achieved prior to initiating an MEB: coordinate inappropriate MEB referrals back through the profiling officer for appropriate disposition; and assist physician approving authorities in reconciling profiling officer's questions and concerns about MRDP timing and Medical MOS Retention Board (MMRB) versus MEB referrals. The MEB physician or physician approval authority will review all profiles to confirm that the MRDP has been reached before obtaining the approving authority signature.

d. Those Soldiers who meet retention standards but have at least a 3 or 4 PULHES serial will be referred to an MMRB, unless waived by the MMRB convening authority. Permanent profiles may be amended (following the correct procedure) at any time if clinically indicated and will automatically be reviewed and verified by the privileged provider at the time of a Soldier's periodic health assessment or other medical examination.

e. Temporary Profiles: Soldiers receiving medical or surgical care or recovering from illness, injury, or surgery, will be managed with temporary physical profiles until they reach the point in their evaluation, recovery, or rehabilitation where the profiling officer determines that MRDP has been achieved but no longer than 12 months. A temporary profile is given if the condition is considered temporary, the correction or treatment of the condition is medically advisable, and correction usually will result in a higher physical capacity. Soldiers on active duty and Reserve Components Soldiers not on active duty with a temporary profile will be medically evaluated at least once every 3 months at which time the profile may be extended for a maximum of 6 months from the initial profile start date by the profiling officer.

f. Temporary profiles exceeding 6 months duration, for the same medical condition, will be referred to a specialist (for that medical condition) for management and consideration for one of the following actions:

(1) Continuation of a temporary profile for a maximum of 12 months from the initial profile start date;

(2) Change the temporary profile to a permanent profile;

(3) Determination of whether the Soldier meets the medical retention standards of chapter 3 and, if not, referral to an MEB.

f. The profiling officer must review previous profiles before making a decision to extend a temporary profile and refer the Soldier to a medical specialist for management if the temporary profile has been in effect for 6 months. Any extension of a temporary profile must be recorded on DA Form 3349 (Physical Profile), and if renewed, item 8 on the DA Form 3349 will contain the following statement: "This temporary profile is an extension of a temporary profile first issued on (date)." In no case will Soldiers carry a temporary profile that has been extended for more than 12 months. If a profile is needed beyond the 12 months, the temporary profile will be changed to a permanent profile. Exceptions to the 12-month temporary physical profile restriction must be approved by the medical treatment facility commander or their designated senior physician approval authority.

4. The Army Recovery Care Program (previously known as the Warrior Care and Transition Program) transitions Soldiers back to the force and/or to Veteran status through a comprehensive program of medical care/rehabilitation management, professional development, and achievement of personal goals. The Army Recovery Care Program provides policy oversight to the 14 Soldier Recovery Units (previously known as Warrior Transition Units) located on military installations across the country. Soldier Recovery Units manage the recovery of wounded, ill, and injured Soldiers requiring complex care. The Soldier Recovery Unit is designed to provide complex case

management for Soldiers who meet the Army Recovery Care Program single entry criteria. Soldier Recovery Units single entry criteria:

> Soldier has, or is anticipated to receive, a profile of more than six months duration, with duty limitations that preclude the Soldier from training or contributing to unit mission accomplishment; the complexity of the Soldier's condition requires clinical case management.

5. Title 38, U.S. Code, 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.

6. Title 38, Code of Federal Regulations, Part IV is the VA Schedule for Rating Disabilities (VASRD). 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.

7. AR 600-8-19 (Enlisted Promotions and Reductions) states in:

a. Paragraph 1-10 (Nonpromotable status) Soldiers in the ranks of specialist through master sergeant are nonpromotable to a higher grade when, among other reasons, the Soldier has incurred a flag under the provisions of AR 600-8-2 (Suspension of Favorable Personnel Actions (Flags)).

b. Paragraph 1–20, Soldiers pending referral to an MMRB, MEB, or PEB will not be denied promotion (if already promotable) on the basis of medical disqualification if they are otherwise qualified for promotion.

c. Paragraph 3–7 (Soldiers hospitalized because of service-incurred disease, wound, or injury and Soldiers assigned to a warrior transition battalion):

(1) Provided otherwise eligible, Soldiers on a recommended list for promotion prior to hospitalization or assignment to a Warrior Transition Battalion (WTB), may be promoted if their point scores are the same or higher than those announced by Headquarters, Department of the Army. Provided otherwise eligible, Soldiers who are not on a recommended list at the time of hospitalization or assignment to a WTB may be recommended for and considered for promotion by the local medical holding facility selection board.

(2) The Soldier must be recommended for promotion by the hospital facility or WTB commander. Patients will appear before a promotion board for consideration, unless the hospital or WTB commander waives the board appearance requirement. Waivers are appropriate when it is determined that a Soldier is physically unable to appear before a promotion board.

8. AR 600-8-2, paragraph 1-13, provides that entry into the Army Body Composition Program (formerly the Army Weight Control Program) requires the imposition of a transferable flag. The flag will be removed on the day the commander decides that the Soldier is in compliance with the program.

//NOTHING FOLLOWS//