

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 24 January 2025

DOCKET NUMBER: AR20240007349

APPLICANT REQUESTS: This case comes before the Army Board for Correction of Military Records (ABCMR) on remand from the United States Court of Federal Claims (hereinafter refer to as The Court). The Court directs the ABCMR to determine:

- if the applicant's post-traumatic stress disorder (PTSD) was incurred in the line of duty (LOD)
- whether, at the time of the applicant's discharge, his disability rating for PTSD was at least 30 percent (%) and if so, that he be given a medical retirement

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

- Court Remand Order
- Court Remand Motion
- Court Remand Complaint
- Letter to Director ABCMR
- Excerpt Rule 52.2 (Remanding a Case)
- Personal Documents (Birth Certificate, High School Transcript, High School Equivalent Diploma)
- U.S. Marine Corps Documents
- DA Form 1059 (Service School Academic Evaluation Report) Army Crewmember, 11 February 2001
- Memorandum Notice of Release from Armor Crewman Course, 11 February 2001
- DD Form 368 (Request for Conditional Release) 22 May 2001
- DA Form 4187 (Personnel Action) Request Enlistment in the Regular Army, 22 May 2001
- DD Form 1966 (Record of Military Processing Armed Forces of the United States), 5 June 2001
- DD Form 4 (Enlistment/Reenlistment Document Armed Forces of the United States) Regular Army, 18 June 2001
- Montgomery GI Bill Act of 1984, 18 June 2001
- Army Policy Documents, 18 June 2001
- DA Form 2-1 (Personal Qualification Record), 14 September 2001

- Orders 332-601, Discharge from the Army National Guard (ARNG), 28 November 2001
- Recruiter Eligibility Data Display Response
- Servicemembers' Group Life Insurance Election and Certificates
- DD Forms 2648 (Preseparation Counseling Checklist
- Orders 059-004 Discharge from the Regular Army 28 February 2004
- Personal Medical History for Cardiovascular Risk Assessment, 4 March 2004
- DA Form 2166-8 (Noncommissioned Officer Evaluation Report (NCOER)), May 2004
- DD Form 214 (Certificate of Release or Discharge from Active Duty) Regular Army, 17 June 2004
- DD Form 4 (Enlistment/Reenlistment Document Armed Forces of the United States), and ARNG enlistment documents, 4 March 2006
- DD Forms 93 (Record of Emergency Data)
- Orders 083-606 Reassignment Orders, 24 March 2006
- DA Form 4836 (Oath of Extension of Enlistment or Reenlistment), 9 April 2006
- Orders 241-66 Reassignment Orders, 29 August 2006
- Orders 238-606 Transfer Orders, 10 October 2006
- Letter from Department of Veterans Affairs (VA) Debt Management Center, 27 January 2007
- DA Form 1059 (Service School Academic Evaluation Report) Cavalry Scout, 31 July 2007
- Memorandum Request for ARNG Military Occupational Specialty (MOS) Conversion Bonus/Agreement, 10 August 2007
- Orders 241-600 MOS Orders, 29 August 2007
- DA Form 2166-8 (NCOER), 30 November 2007
- Orders 004-079 Temporary Duty (TDY) Orders, 4 January 2008
- Orders 098-610 Reassignment Orders, 8 April 2009
- Orders 099-107 Annual Training (AT) Orders, 8 April 2008
- Orders 099-348 AT Orders, 8 April 2008
- Letter from VA Debt Management Center, 10 May 2008
- DA Form 2166-8 (NCOER), 30 November 2008
- Certificate of Completion Combat Lifesaver Training, 14 December 2008
- Veteran's Application for Compensation and/or Pension, 1 August 2009
- VA Report of Contact, 4 August 2009
- DD Form 214, 3 March 2010
- Veteran's Application for Compensation and/or Pension, 11 March 2010
- Orders 074-117 Amendment Order, 15 March 2010
- Letter from VA, 22 March 2010
- Fee Agreement for Work Performed Before the VA, 31 March 2010
- Letter from VA, 26 April 2010

- Orders 117-113 TDY Orders, 27 April 2010
- Letter from VA, 20 May 2010
- Orders 147-099 TDY Orders, 27 May 2010
- Report of General Information, 19 August 2010
- Letter from VA, 1 September 2010
- VA Fiscal Transaction, 14 October 2010
- Orders 255-697 Reassignment Orders 12 September 2010
- VA Rating Decision, 12 October 2010
- Letter from VA, 14 October 2010
- Statement in Support of Claim, 15 October 2010
- DA Form 3349 (Physical Profile), 19 November 2010
- DA Form 2166-8 (NCOER), 30 November 2010
- Letter to VA New Claim, 7 December 2010
- Notice of Waiver of VA Compensation or Pension to Receive Military Pay and Allowances, 2011
- Report of General Information, 24 January 2011
- Station of Jurisdiction, 2 February 2011
- Letter from VA, 3 February 2011
- DA Form 3349 (Physical Profile), 3 March 2011
- Letter from VA, 4 March 2011
- DA Form 4836 (Oath of Extension of Enlistment or Reenlistment), 20 March 2011
- Orders 087-022 AT Orders, 28 March 2011
- NGB Form 23A (ARNG Current Annual Statement), 11 April 2011
- Orders 122-024 Revocation Orders, 2 May 2011
- Orders 122-055 Order to Active Duty for Training (ADT), 2 May 2011
- Orders 158-086 Order for ADT, 7 June 2011
- Memorandum Medically Unfit for Retention, 10 June 2011
- DA Forms 1059 Health Care Specialist phases 1 through 3 (3 July 2011, 21 July 2011, and 6 August 2011)
- Orders 242-615 MOS Orders, 30 August 2011
- Orders 242-616 Transfer Orders, 30 August 2011
- Letter from VA, 2 November 2011
- VA Fiscal Transaction, 2 November 2011
- Memorandum Commander's Statement, 18 November 2011
- DA Form 3349, 2 December 2011
- VA Notice of Waiver of VA Compensation or Pension to receive Military Pay and Allowances, 2012
- National Guard Bureau (NGB) Form 23B (ARNG Retirement Points History Statement), 1 March 2012
- Memorandum Separation, 1 March 2012
- Acknowledgement of Notification of Separation, 2 March 2012

- NGB Form 23B, 14 May 2012
- Memorandum for Record Counseled on Retention, 15 May 2012
- Statement, 18 May 2012
- Orders 143-617 Discharge from the ARNG, 22 May 2012
- NGB Form 55 (Honorable Discharge Certificate), 22 May 2012
- NGB Form 22 (Report of Separation and Record of Service) and NGB Form 22A (Correction to NGB Form 22), 22 May 2012
- NGB Form 23B (ARNG Retirement Points History Statement), 23 May 2012
- NGB Form 23A (ARNG Current Annual Statement) 1 June 2012
- NGB Form 23B, 6 June 2012
- Fee Agreement for Work Performed Before the VA, 23 July 2012
- Appeal to Board of Veterans' Appeals, 29 July 213
- VA Rating Decision, 19 November 2013
- Report of General Information, 19 November 2013
- Letter from VA, 19 November 2013
- Letter from VA Notice of Disagreement, 19 November 2013
- Appeal Certification to VA Worksheet, 19 November 2013
- Letter from VA to Attorney, 19 November 2013
- Letter from VA, 19 November 2013
- Board of Veterans' Appeals Transcripts of Hearing, 27 January 2014
- Letter from VA to Attorney, 5 February 2014
- Letter from VA, 5 February 2014
- Letter from VA to Attorney, 11 February 2014
- Letter from VA Board of Veterans' Appeals, 14 July 2014
- Board of Veterans' Appeals, 14 July 2014
- Statement in Support of Claim, 27 December 2014
- Letter from VA, 20 March 2015
- Application for Disability Compensation and Related Compensation Benefits, 12 April 2015
- Request Pertaining to Military Records, 14 April 2015
- Applications for Disability Compensation and Related Compensation Benefits, 16 April 2015, 30 April 2015, 2 June 2015, and 12 June 2015
- Letter from National Veterans Legal Services Program, 15 June 2015
- ABCMR Docket Number AR20150005157 – Letter to Applicant and Self-Authorized Letter to the Board, (Administrative Closure Letter), 14 July 2015
- Letter to Senator, 12 August 2015
- Station of Jurisdiction, 9 September 2015
- Letter from VA, 11 September 2015
- Applications for Disability Compensation and Related Compensation Benefits, 16 September 2015 and 18 September 2015
- Letter from VA, 19 September 2015

- Station of Jurisdiction, 9 October 2015
- Letter from the West Virginia ARNG, 12 November 2015
- Station of Jurisdiction, 20 December 2015
- Report of General Information, 9 March 2016
- Calculation of Attorney Fees Withheld, 31 March 2016
- VA Deduction-Attorney Fees, 31 March 2016
- VA Fiscal Transaction, 31 March 2016
- Letter from VA, 21 April 2016
- Letter from VA Privacy Act Request, 23 April 2016
- Letter from U.S. Army Human Resources Command (AHRC), 8 July 2016
- ABCMR Docket Number AR20170013644 – Record of Proceedings and Letter to Applicant, 4 January 2018 and 22 June 2018
- Purchase Orders, 10 November 2021
- ETP [sic] Program Guideline Detail
- Medical Documents

FACTS:

1. On 12 July 2024, the applicant filed an unopposed motion to voluntarily remand his military pay case to the ABCMR and, concomitantly, stay further proceedings before the Court pending further action by the Board. The ABCMR shall complete its review within 120 days of receiving the applicant's supplemental submission addressing, inter alia, whether his diagnosed PTSD was incurred in the LOD and, if so, whether at the time of discharge, his disability rating for PTSD was at least 30%.

2. The applicant's attorney states, on behalf of the applicant, in pertinent part:

a. “The United States has long held a special cognizance for military servicemembers whose service is cut short by injuries sustained in the LOD. Congress has, therefore, statutorily mandated that these servicemembers receive all the benefits of a medical disability retirement.

b. “The applicant is a decorated [V]eteran who was in uniform for over 14 years - first in the USMC, later in the United States Army, and finally, in the West Virginia ARNG. He deployed twice to Iraq between 2003 through 2004 and 2009 through 2010, where he saw active combat.

c. “Following him home after each deployment were the battlefield traumas he experienced and witnessed - such as children wounded by explosives and civilians and fellow servicemembers killed on the battlefield. Based on his records and physician examinations, the VA concluded in 2010, after he demobilized following his second Iraq deployment, that he suffered from PTSD associated with his combat service.

d. “Unfortunately, his PTSD symptoms worsened in severity. In December 2011, the West Virginia (WV) ARNG State Surgeon found he was no longer medically fit for retention. But despite overwhelming proof to the contrary - including a mountain of evidence relating to the VA's determination that his PTSD was caused by military service - the ARNG failed to classify his PTSD as incurred in the LOD.

e. “Consequently, in May 2012, he was honorably discharged for supposedly non-duty-incurred PTSD, but his PTSD was clearly incurred in the LOD such that he should have received disability evaluation system (DES) processing that would have resulted in his medical disability retirement and the attendant retirement benefits.

f. “At the time of his discharge, the ARNG failed to apprise him of his procedural and substantive legal right - e.g., the opportunity to establish that the medical condition for which he was found unfit for retention was incurred in the LOD. Nor was he provided with DES processing, which would have included evaluations by the Medical Evaluation Board (MEB) and Physical Evaluation Board (PEB). Had that occurred, he could have presented (even more) evidence that his PTSD was incurred in the LOD, and he would have been awarded a medical disability retirement.

g. “After discharge, he has sought to correct his military discharge records to reflect a medical disability retirement for injury incurred in the LOD. He sought help from the Office of the Adjutant General for the WVARNG - which admitted he was not properly notified of his rights, at the time of discharge, but took no additional action.

h. “He further sought a medical disability retirement from the ABCMR, which, in a convoluted series of events, ultimately sent his application to the Office of the Surgeon General (OTSG) for adjudication. On 7 September 2018, the OTSG denied his application in a letter riddled with errors, overlooking indisputable evidence such as the VA's 2010 diagnosis that he suffered from service-connected PTSD.

i. “The Board's denial of his application of medical disability retirement was arbitrary, capricious, contrary to law, and not supported by substantial evidence. It flew in the face of undisputed facts and was also an improper delegation of decision-making authority to the OTSG, Department of the Army established: ‘the Deputy Assistant Secretary of the Army (DASA) (Review Boards) found there is sufficient evidence to grant relief.’

j. “The applicant, therefore, brings this action against Defendant, the United States of America, for medical disability retirement pay and benefits to which he is entitled, and collaterally, for the correction of his military record to reflect that he was medically retired on the date of his discharge.

k. “This is an action under Title 10 U.S. Code (USC) section 1201 for pay and benefits of medical retirement due to his PTSD incurred in the LOD, which at the time of

his discharge was rated at least 30% under VA's disability-rating schedule. Correspondingly, this action also seeks the correction of his military retirement record to reflect a medical retirement, on the date of his discharge.

l. "The statutory basis for this action is Title 10 USC section 1201, which requires the payment of disability retirement compensation once a disability is found qualifying and, therefore, constitutes a money-mandating provision.

m. "The applicant was not afforded DES processing, while in the service. Instead, he first sought relief from the ABCMR post discharge. With that ABCMR application, he exhausted his administrative remedies prior to commencing this action [before the Court].

n. "Chapter 61 of Title 10 USC establishes the process by which the Armed Forces discharge medically disabled servicemembers. It authorizes the secretaries within the Department of Defense (DoD) to separate members of the Armed Forces once the member is found 'unfit' to perform the duties of his or her office, grade, rank, or rating due to disability. The secretaries of each service branch are also authorized to promulgate regulations establishing the procedures for determining fitness.

o. "This statutory scheme is implemented thorough each service branch's DES. Various DoD rules establish policies and procedures for disability processing and medical separation that uniformly apply across all service branches. In turn, each branch's DES process is established via the branch's regulations 'to ensure physical disability evaluation is accomplished in a timely manner with uniform application of the governing laws and DoD policy.' The Army's DES process is set forth in Army Regulation 635-40 (Medical Disability Separations) and accompanying regulations, which also apply to ARNG Soldiers, like the applicant.

p. "Both DoD Instruction (DoDI) 1332.38 (Physical Disability Evaluation) and Army Regulation 635-40 set forth the process by which DES processing is to occur. A servicemember must be referred by a treating physician or by their commander into the DES process. Upon referral, officials make a critical choice: whether to send a member to a duty-related pathway of the DES or the non-duty related pathway. Members sent to the duty-related pathway first go before the MEB for medical evaluation and, when appropriate, proceed to the PEB for a determination of fitness and eligibility for benefits. Those referred into the non-duty related path, by contrast, will be referred 'solely for determination of fitness for duty' and have no prospect of receiving retirement or separation benefits.

q. "Whether a servicemember goes through the duty or non-duty related DES pathways hinges on whether they have a LOD determination - i.e., a determination that indicates a Soldier was 'injured, diseased, or deceased' in the LOD - as set forth in

Army Regulation 600-8-4 (LOD Policy, Procedures, and Investigations) The critical nature of a LOD determination is made clear by the Army's own regulation, which provides that '[l]ine of duty determinations are essential for protecting the interest of both the individual concerned and the U.S. Government...' Soldier stands to 'lose substantial benefits' if the determination is erroneous, so 'it is critical that the decision to categorize injury, disease, or death as not in the LOD only be made after following the deliberate, ordered procedures' enshrined in the regulations.

r. "The Army' policies and procedures regarding LOD determinations are a separate process from DES, and primarily involve a Soldier's commander and military treatment facility.

s. "There are two LOD determinations: in the LOD, and not in the LOD. As described, if a Soldier's disabling condition is classified as 'in the LOD,' the Soldier qualifies for duty-related DES processing and possible award of retirement or separation pay and medical benefits. By contrast, if a Soldier's disabling condition is classified as 'not in the LOD,' the Soldier is eligible only for non-duty related DES processing without any possible award of retirement or separation pay and medical benefits.

t. "However, LOD determinations does not always require a LOD investigation, of which there are two types: informal and formal.

u. "No LOD investigation is needed where a presumptive LOD determination can be made. Per DoDI 1332.28 and Army Regulation 600-8-4 paragraph 2-3(a), the Secretaries of Military Departments will presume that diseases or injuries incurred by servicemembers on continuous orders to active duty specifying a period of more than 30 days were incurred or aggravated in the LOD unless the disease or injury was noted at the time of entry into service or the presumption is rebutted by 'clear and unmistakable evidence. By contrast, [t]here is no presumption of incurrence or aggravation in the LOD of Reserve Component servicemembers serving on orders of 30 days or less.'

v. "But in 'all other cases....an [informal or formal] LOD investigation must be conducted' for which detailed procedures and evidentiary requirements are set forth in the regulatory text. An informal LOD investigation is conducted when 'no misconduct or negligence' is suspected. An informal LOD investigation's determination can only be in 'LOD'. That is, an informal LOD investigation cannot render a Soldier ineligible for disability benefits. A formal LOD investigation is required before a Soldier's condition is found 'not in LOD' and for injuries incurred 'under strange or doubtful circumstance,' 'self-inflicted', or 'involving the abuse of alcohol or other drugs.' Furthermore, counseling must be provided to all Soldiers with disabling conditions classified as non-duty related as to the Soldiers' right to (i) demonstrate that their records already contain an approved

'in LOD' determination; or (ii) request a LOD investigation, if they lack a LOD determination or an approved 'in LOD' determination.

w. "If a Soldier does have a LOD determination, presumptive or otherwise, confirming that his injuries were incurred in the LOD, he is eligible for duty-related DES processing. Soldiers cannot self-refer for DES process. Rather, they are referred to a MEB - phase one of DES processing - when their duty-related wound, illness, or injury results in a permanent condition or has long lasting effects. The purpose of the MEB is to evaluate whether referred Soldiers satisfy retention standards set forth in Army Regulation 40-501 (Standards of Medical Fitness). That is, to confirm the existence of one or more medical condition that might render them unfit for service. If any medical condition fails retention standards, then the Soldier is referred into the second phase of DES processing, the PEB. The PEB makes the final decisions on whether a Soldier is fit to serve and entitled to disability benefits.

x. "The MEB documents a Soldier's medical conditions and duty limitations and assesses whether any of the Soldier's mental or physical conditions fail Army retention standards. 'A decision is made as the Soldier's medical qualification for rection based on the criteria in Army Regulation 40-501, chapter 3.' The MEB must review all available medical evidence - including prior VA disability examinations - to document and '[c]onfirm the medical diagnosis(es)' for any 'conditions or defects, individually or in combination' that fail to meet retention standards. The MEB must consider a document past medical history, including '[p]rior ratings (e.g. given by the DES or VA).' Notably, the regulations provide that PTSD is one such medical condition describing 'anxiety, somatoform, or dissociative disorders.' If the MEB determines that the Soldier 'does not meet retention standards,' then the MEB refers the Soldier to a PEB.

y. "Once a case has been referred to the PEB, an 'informal' PEB is convened to conduct a record review and render preliminary findings as to the Soldier's fitness and degree of disability. If the Soldier is unsatisfied with the outcome of the informal process, then a 'formal' PEB is convened. The overarching goal of the PEB phase is to determine whether the Soldier 'is physically fit or unfit to perform the duties of the Soldier's office, grade, rank, or rating.' The PEB evaluates the Soldier's disability and makes findings and recommendations as to the Soldier's fitness and eligibility for benefits based on the preponderance of the evidence. If the PEB determines that a Soldier is unfit, one of the findings the PEB must make is whether the Soldier's disabling condition 'meets the criteria established by law for compensation.' The PEB assigns a rating based on the VA's disability-rating schedule for each disability found to be unfitting. The combined disability ratings assigned by the PEB controls the amount of military benefits and services to which the Soldier is entitled upon discharge. The combined disability rating, when at least 30 percent, requires that a soldier be 'medically retired' with monthly disability retirement pay and other benefits, such as lifetime healthcare coverage and military commissary and exchange privileges.

z. "The ABCMR provides administrative review within the Department of the Army to allow servicemembers and veterans to seek the correction of 'any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice.' For claims for review of a discharge or dismissal based on matters related to PTSD, the ABCMR must 'review the claim with liberal consideration to the claimant that PTSD...potentially contributed to the circumstances resulting in the discharge or dismissal or to the original characterization of the claimant's discharge or dismissal'. Liberal consideration requires that a 'service-connection determination by the VA is 'persuasive evidence' that PTSD existed during military service and binding guidance on the ABCMR provides that 'a diagnosis made by a licensed psychiatrist or psychologist that the condition existed, during military service, will receive liberal consideration'.

aa. "The applicant, the son of a former Navy servicemember, was born in Parkersburg, West Virginia. After a chance meeting with a military recruiter, he made the life-changing decision to serve his country, enlisting in the U.S. Marine Corps on 23 April 1996. In the Marine Corps he served as an assault amphibious vehicle crewman and rose to the rank of lance corporal. Starting in 2000, he became a Marine Corps Reservist and later an Army National Guardsman until 18 June 2001, when he enlisted in the U.S. Army.

bb. "He was a sergeant in the 327th Regiment of the 101st Airborne Division, renowned for its rapid deployment capabilities into combat zones as a vanguard force. Soldiers in the 101st Airborne have participated in many significant American military campaigns since the Division's first combat mission: dropping into occupied France at around midnight on D-Day to secure Utah Beach, hours before the amphibious assault began.

cc. "His first combat deployment started in March 2003 as part of Operation Iraqi Freedom. In his role as unit supply specialist, he was an integral part of his company and was on the front lines in cities like Mosul and Baghdad. Unfortunately, he saw children injured in a hospital from explosives, civilians shot, and a fragging incident (i.e. deliberate friendly fire). In January 2004, he completed his combat deployment and returned to the United States. He then demobilized and was honorably discharged from the U.S. Army on 17 March 2004. In recognition of his military service up to 2004, among his awards are the Army and Marine Corps Good Conduct Medals, Global War on Terrorism Expeditionary Medal, and Global War on Terrorism Service Medal.

dd. "On 4 March 2005, he reenlisted in the West Virginia ARNG. He held the rank of sergeant. According to the medical examination performed on the day of his reenlistment, he was in good health. The examining military medical provider did not document any preexisting medical conditions or clinical abnormalities with respect to any aspect of his health (whether physical, mental, dental, etc.). He was therefore

declared fully fit for service and without any preexisting medical conditions, at the time of his reenlistment in 2006.

ee. "He was a member of the 1st Squadron (an armored reconnaissance squadron), 15th Cavalry Regiment of the West Virginia ARNG. The Regiment traces its lineage back to a colonial militia in the American Revolution, and its Soldiers have fought in nearly every conflict since.

ff. "In 2007, he received formal training as a cavalry scout. Cavalry scouts specialize in forward reconnaissance and intelligence-gathering and are among the first Soldiers who advance into combat areas. His annual performance evaluations were often outstanding. For example, in 2009, his superiors evaluated his overall performance and potential to be 'among the best' (the highest possible grade), and he was given 'excellent' ratings (the highest possible rating) under the 'competence' and 'responsibility and accountability' skillsets. The review's narrative comments were also glowing - for instance, he 'does not take shortcuts,' 'bases all decisions on the Army Values', goes 'the extra step to learn and perform the jobs of those around him, 'displays a genuine concern for Soldiers, enforces teamwork and a positive training environment," and "ensures the safety and well-being of each Soldier assigned at all times'.

gg. "On 11 February 2009, he mobilized for active duty. A few months later, in April 2009, he started his second combat deployment to Iraq. Once again, he served with distinction on the front lines. Among his awards is the Combat Action Badge, which gives special recognition to Soldiers who directly engage, or are engaged by, enemy forces. Notably, he was recommended for a Bronze Star Medal - the military's fourth highest award - which recognizes meritorious or heroic acts in a combat zone.

hh. "However, his time in Iraq had started to take its toll and he began experiencing symptoms of PTSD. Two weeks before he returned to the United States on 25 January 2010, he completed the required Post-Deployment Health Assessment (PDHA) in which he noted that he had encountered dead bodies and saw people killed, felt 'in great danger of being killed,' and had engaged in direct combat. In addition, he flagged that for 'few or several days' in the past month, he had '[l]ittle interest or pleasure in doing things,' and that his health was 'somewhat worse than before he deployed'. He also reported that he had difficulty hearing, ringing in the ears, and back pain. He remained on active duty orders until 3 March 2010, when his duty was reverted to non-mobilized service in the West Virginia ARNG.

ii. "However, his health continued to deteriorate. His combat experiences over the last year stayed with him, and he continued to experience worsening PTSD. In March 2010, he began seeking a psychologist to cope with his PTSD. On 4 March 2010, he filed a claim for VA benefits for PTSD and linked its cause to his military service -

explaining that his PTSD stemmed from the stressors he was exposed to, during his tours in Iraq.

jj. "On 22 July 2010, he underwent a VA Compensation and Pension exam for his PTSD, which found his mood 'anxious and depressed' and his affect 'constricted'. He also reported trouble sleeping and that he generally preferred to "stay behind the crowd." The examiner diagnosed him with PTSD and assigned a global assessment of functioning score of 50. According to the *Diagnostic and Statistical Manual of Mental Disorders*, a core of 50 indicates 'serious symptoms' or 'any serious impairment in social, occupational, or school functioning.' On 12 October 2010, the VA issued its initial rating decision, assigning him a combined rating of 40 percent and finding service connection for PTSD with a disability rating of 30 percent.

kk. "The next month, he underwent his annual post-deployment physical, where he disclosed his medical condition. He was told that his condition could be problematic and result in discharge and that he should await further guidance from his unit. On 19 November 2010, he received his first permanent profile with a P-U-L-H-E-S (physical capacity/stamina (P), upper extremities (U), lower extremities (L), hearing and ears (H), eyes (E), and psychiatric (S)) score of 1-1-1-1-2. The comments section attributed the S (psychiatric) rating of 2 to PTSD, noting 'Servicemember with PTSD stable to perform MOS. Reevaluate as necessary.' On 3 March 2011, he received another physical profile, this time with a P-U-L-H-E-S score of 3-1-1-1-2. The comments attributed to the S rating of 2 to PTSD. Under item 7, which asked 'Does the Soldier meet retention standards in accordance with Chapter 3 Army Regulation 40-501?', the box 'No; Needs MEB' was checked.

ll. "On 5 October 2011, he had a follow-up Compensation and Pension exam regarding his PTSD. He satisfied a number of PTSD criteria, including '[f]eeling of detachment or estrangement,' '[r]estricted range in affect,' '[d]ifficulty falling or staying asleep,' '[i]rritability or outbursts of anger,' and '[d]ifficulty concentrating.' The exam again found he had PTSD and determined his PTSD symptoms were severe enough to 'cause clinically significant distress or impairment in social, occupational, or other important areas of functioning.' As a result his PTSD rating remained at 30 percent disabling. On 1 November 2011, the VA issued its rating decision for his second set of claims, assigning a combined disability rating of 60 percent.

mm. "On 18 November 2011, his commander, Captain (CPT) J- L-, requested that the West Virginia ARNG State Surgeon review his medical records to evaluate whether he could be retained in his current MOS. CPT L- 'agree[d]...with [the applicant's] permanent profile as written' and expressed concern that '[the applicant's] medical condition/limitation may adversely affect my unit.'

nn. "On 2 December 2011, after a review of the applicant's medical records, the State Surgeon found he failed Army retention standards due to his PTSD and recommended he be discharged. However, despite clear evidence to the contrary, the State Surgeon failed to recognize his PTSD and other physical ailments were incurred in the LOD. That same day, the applicant received a third physical profile, this time with a P-U-L-H-E-S score of 3-1-1-1-1-3. The comments attributed the S rating of 3 to PTSD. Item 7 was again checked 'No; Needs MEB.'

oo. "On 1 March 2012, after a review of his medical records by the State Surgeon, the Military Personnel Office (MILPO) sent his unit commander a 'Separation Memo' recommending he be discharged for failure to meet Army medical retention standards due to his PTSD. The memo advised that he had the right to appeal his separation, but contrary to Policy Memorandum NGWV-PER [Number] 11-004, it failed to mention he had the right to indicate that his medical conditions had been incurred in the LOD. Nor did the memo inform him he had the right to request a LOD investigation. Instead, it assumed his conditions were not incurred in the LOD and advised only on the procedures for '[S]oldiers with non-duty related impairments.' This was contrary to Army regulations, which state if no LOD determination is conducted and the record is silent, the LOD determination is presumed to be 'in the LOD.'

pp. "The next day, he signed an 'acknowledgement of notice of separation' acknowledging that he had received the separation memo and stating he understood he would be separated from the West Virginia ARNG. The form provided him with an option to appeal the decision that he was medically unfit for retention, as well as the option to submit additional medical documentation. However, this form, too, did not provide him with any option(s) to indicate that his conditions had been incurred in the LOD, or to request a LOD investigation. As a result, he never informed the West Virginia ARNG that his conditions were incurred in the LOD or requested an investigation of the same. He chose not to appeal the separation decision because he did not dispute the underlying fitness determination and he was given no opportunity to challenge the LOD findings. He was actively coping with PTSD, as well as other physical ailments listed on his permanent physical profile, and by that time, the VA had already determined he was 30 percent disabled from service-connected PTSD.

qq. "For the next few months, he had no contact with the West Virginia ARNG. On 15 May 2012, he signed a letter stating he had been counseled about his separation from the West Virginia ARNG. The next week, on 22 May 2012, he was honorably discharged and placed on the Permanent Disability Retired List (PDRL). Because his records reflected he was administratively separated - as opposed to medically separated or retired - he was not entitled to disability retirement pay or medical benefits.

rr. "After discharge, he continued to pursue his claims for medical benefits at the VA. Before his discharge, he filed Notices of Disagreement challenging aspects of the

VA's 2010 and 2011 rating decisions. Examination and testimony developed as part of this appeals process continued to confirm the debilitating nature of his PTSD. Indeed, after additional proceedings, the VA ultimately increased his PTSD disability rating to 70 percent in January 2014.

ss. "Following a 16 January 2014 exam, a psychologist reported that his 'attitude was restless, guarded, and uneasy,' he had 'feelings of agitation and psychomotor pressure,' and he experienced 'irritability as easily angered.' At a 27 January 2014 hearing before the Board of Veterans' Appeals, he testified that 'a lot of things about [his PTSD] had gotten worse' since 2011, and that he also had difficulty being around a lot of people, difficulty paying attention or remembering certain things, and that he had to miss work because of his PTSD symptoms. Following a 4 March 2015 exam, another psychologist reported that he 'presented with moderate anxiety' and his affect was 'nervous.' In a 2015 letter, he provided an excel sheet listing 104 different instances between March 2010 and March 2015 where he had to take leave from work because of his PTSD, he 'could no longer handle the situations or became uncomfortable to the point where [he] needed to remove [him]self.'

tt. "In addition in increasing his PTSD disability rating from 30 percent to 70 percent in January 2014, the VA also rated his combined disability as progressively increasing: 70 percent from 4 March 2010; 70 percent from 17 May 2013; 80 percent from 20 May 2013; 90 percent from 27 January 2014; 90 percent from 11 July 2014; 100 percent from 16 April 2015; and 90 percent from 18 June 2015.

uu. "On 25 March 2015, he applied to the ABCMR, requesting his 2012 honorable discharge be corrected to reflect a medical retirement for PTSD incurred in the LOD. The ABCMR did not process his application and instead referred him to the Adjutant General of the West Virginia ARNG to seek relief in the first instance. He then petitioned the Adjutant General of the West Virginia ARNG for relief. The Adjutant General responded in a letter dated 12 August 2015 that it believed that Army Regulations had been followed in his discharge process but that he could apply to the ABCMR, but then on 12 November 2015, the West Virginia ARNG Assistant Inspector (IG) General, A- L-, sent him a letter where she concluded his 'separation from the West Virginia ARNG was procedurally incorrect.' The letter identified a host of procedural errors including that his discharge notification 'did not have the mandatory notification letter, counseling, rights, or election options as required in Policy Memorandum NGWV-PER [Number] 11-004" and that he 'was not afforded the right to present whether his permanent medical condition was incurred in the LOD or not incurred in the LOD.'

vv. "The applicant then, on 1 December 2015, directly applied to the ABCMR to fix his discharge records. On 31 August 2017, the Chief of the Special Actions Branch of the National Guard Bureau (NGB) issued an advisory opinion, which stated he did not receive proper counseling prior to being discharged, and that, had that occurred, he

would have been provided with the documents he needed to show he was injured in the LOD. The opinion recommended he be provided with invitational travel orders to the nearest Medical Treatment Facility to undergo an MEB/PEB, and that, if he was found unfit for duty, he be medically separated or retired, with an effective date of 22 May 2012, and entitled to any medical severance pay he is owed. However the West Virginia ARNG did not concur with the NGB's recommendation (or that of the West Virginia ARNG Assistant IG, for that matter), so his case was forwarded to the Senior Medical Advisor of the Army Review Boards Agency (ARBA). On 17 November 2017, ARBA issued an advisory opinion which concluded, after a review of the 'available evidence,' that the applicant was not entitled to medical separation. But ARBA's analysis focused only on medical records for a short period of his time on active duty - August to October 2009 - and did not consider the full record of his developing PTSD that existed, at the time the West Virginia ARNG State Surgeon determined he was unfit for retention, including his 25 January 2010 PDHA and 22 July 2010 and 5 October 2011 Compensation and Pension exams.

ww. "On 4 January 2018, a three-member panel of the ABCMR issued a determination there was an insufficient basis to directly correct his military records, relying heavily on the ARBA opinion, but others at the ABCMR disagreed with the panel's determination and on 22 June 2018 D- D-, Director of the ABCMR sent the applicant a letter stating that '[a]fter reviewing the findings, conclusions, and Board member recommendations, the DASA (Review Boards) found there is sufficient evidence to grant relief.' The ABCMR then punted its obligations and forwarded the Record of Proceedings to the OTSG, Falls Church to 'take action to correct [the applicant's] records.' But then on 7 September 2018, in a letter riddled with legal and factual errors that wholly ignored that a servicemember can be eligible for a medical retirement when a duty-related condition prevents reasonable performance of duties, while in either active or guard status, the OTSG refused to take any action to correct the applicant's discharge record.

xx. "In large part, the OTSG denied the applicant a medical retirement by erroneously concluding he did not actually suffer from PTSD in service. This conclusion was wrongful because it was based on erroneous facts, including that:

(1) The servicemember provided a copy of his VA rating decision from 19 November 2013 (18 months post discharge) and he was not found to have a service connected disability for the diagnosis of PTSD.' Error: The 19 November 2013 decision was silent on PTSD. The VA had already determined in its 12 October 2010 decision that his PTSD was service-connected with a 30 percent disability rating.

(2) 'A review of the VA medical record outlines that the servicemember did not seek treatment for behavioral health (BH) symptoms through the VA until 4 March 2015. There is reference made to the servicemember receiving counseling through services

close to his home in West Virginia, but there are not notes outlining a diagnosis or treatment recommendations.' Error: The VA evaluated and diagnosed him with PTSD as early as March 2010, when he began seeing a local psychologist.

(3) There was no evidence of duty impairment secondary to a BH condition, at the time of discharge in May 2012. It is clear he met Army Regulation 40-501, chapter 3 retention standards in May 2012.' Error: There was ample evidence of impairment in May 2012, which multiple members of the military concurred with. This included:

- His repeated placement on permanent physical profiles with a psychiatric rating of 3 due to his PTSD including in 19 November 2010, 3 March 2010, and 2 December 2011
- His commander expressing concern that the applicant's PTSD 'may adversely affect my unit' on 18 November 2011
- His separation due to PTSD interfering with his performance of duties
- His documentation in his 25 January 2010 PDHA that for a 'few or several days in the past month, he had 'little interest or pleasure in doing things,' and that his health was 'somewhat worse than before he deployed'
- The VA's determination on 12 October 210 that he had service-connected PTSD with a 30 percent disability rating

(4) 'It is unclear why three profiles were generated in November 2010, March 2010 or December 2011, since the servicemember did not have a diagnosis of PTSD documented in any available medical record. There is no evidence that the diagnosis of PTSD, not established until 2015, hindered him while he was on active duty.' Error: The fact that he was placed on permanent physical profiles three separate times was itself evidence of his PTSD - he would not have received that placement if he had not been diagnosed with symptoms of PTSD. Furthermore, his 25 January 2010 PDHA (conducted before he was released from active duty) documented multiple PTSD stressors and symptoms, including that he felt 'in greater danger of being killed;' that for 'few or several days' in the past month, he had 'little interest or pleasure in doing things;' and that his health was 'somewhat worse than before he deployed.' Critically he was separated as unable to perform his duties because of his PTSD. There was, thus, ample evidence that his PTSD hindered him, as outlined.

yy. "The ABCMR took no further action following the OTSG's letter - effectively delegating its decision-making authority on records correct to the OTSG -- and to date, the applicant's military records have not been corrected. Thus, several errors in his records remain uncorrected.

zz. "First, despite the fact that his PTSD was clearly incurred in the LOD as supported by (1) documented PTSD stressors and symptoms in his 25 January 2010

PDHA, (2) the fact that he sought counseling for PTSD immediately upon his release from active duty in March 2010, (3) a VA evaluation and diagnosis of PTSD on 22 July 2010 and again on 5 October 2011, and (4) a VA finding that his PTSD was service-connected with a disability rating of 30 percent on 12 October 2010, his PTSD continues to be treated as a non-duty related condition. In fact, the Board's continued insistence that his PTSD was not incurred in the LOD, not only runs afoul of the facts, but also violates mandates that the ABCMR review all claims 'that PTSD or traumatic brain injury potentially contributed to...the original characterization of discharge or dismissal' with liberal consideration. Had liberal consideration been applied as required, the OTSG, or the ABCMR would have had to find the applicant's PTSD to be incurred in the LOD since his PTSD was diagnosed and service-connected by the VA, and liberal consideration requires that a post-discharge diagnosis be considered as 'persuasive evidence that PTSD existed, during military service.'

aaa. "Second, the ABCMR erred in failing to find his PTSD as not incurred in the LOD despite the significant evidence that it prevented him from performing the duties of his office, grade, rank, or rating as evidenced by his commander expressing concern that his PTSD 'may adversely affect my unit,' a 2 December 2011 finding by the State Surgeon that he was not medically fit for retention, and him being discharged because his PTSD rendered him medically unfit.

bbb. "Third, despite (1) a 12 November 2015 letter from the West Virginia ARNG Assistant IG, (2) a 31 August 2017 opinion from the Chief of the Special Actions Branch of the NGB, and (3) a 22 June 2018 letter from the Director of the ABCMR all concluding he was not discharged under proper procedures and/or should have been medically separated, the ABCMR has refused to find that a 'probable error or injustice' occurred and take corrective action, or even, at a minimum, provide the processing to which he was entitled. The ABCMR's deference to the OTSG, failure to apply liberal consideration, and resulting failure to correct his discharge records to reflect a medical disability retirement, was arbitrary, capricious, contrary to law, and unsupported by substantial evidence.

ccc. "Title 10 USC section 155, which governs the correction of military records, provides that all 'corrections shall be made by the Secretary acting through boards of civilians of the executive part of that military department. 'By delegating its decision-making authority to the OTSG as to whether the applicant's military records should be corrected, the ABCMR acted through the OTSG, a non-civilian entity. The ABCMR therefore did not 'act through boards of civilians of the executive part of the Army,' (i.e. the ABCMR itself), which was arbitrary, capricious, and contrary to the law set forth in Title 10 USC section 1552.'

ddd. "Title 10 USC section 1201 confers a substantive right to monetary benefits against the United States by specifying the disability retirement pay and benefits to be

provided to a qualified discharged Soldier, when they are medically retired. Before the ABCMR delegated its decision-making authority to the OTSG, it had determined that there was "sufficient evidence to grant relief" and promised the applicant there would be "action to correct his records." This action would have corrected the applicant's military record to reflect that he was medically retired, due to disabilities incurred in the LOD. This would have entitled him to disability retirement pay and medical benefits under Title 10 USC section 1201. Accordingly, as a direct result of this unlawful action of the ABCMR, the applicant has been, and continues to be, deprived of the disability retirement pay and medical benefits to which he is entitled under Title 10 USC section 1201.

eee. "32 Code of Federal Regulations (C.F.R) section 581.3(e) requires that applications to the ABCMR be reviewed to determine whether "the preponderance of the evidence shows that an error or injustice exists." At the time the ABCMR reviewed his application, a preponderance of the evidence supported that he should have been medically retired for his PTSD in 2012 rather than separated as if his condition was non-duty related. Specifically, before the ABCMR was evidence sufficient to satisfy the award of a medical retirement; there was evidence that his condition was incurred in the LOD, was unfitting, and required a rating of 30 percent. The ABCMR cherry-picked his record and failed to grapple with contrary evidence. Had the ABCMR addressed the entirety of the record, it would have found that his PTSD was incurred in the LOD, as demonstrated by the fact that:

(1) His service treatment records document PTSD symptoms in service. His 25 January 2010 PDHA documenting multiple PTSD stressors and symptoms.

(2) The VA diagnosed service-connected PTSD based on his in-service treatment records and a VA exam conducted less than six months post-discharge. He sought counseling for PTSD immediately upon his release from active duty (in March 2010), and less than six months later, on 22 July 2010, he was diagnosed by the VA with service-connected PTSD.

(3) The VA continues to find the applicant's PTSD to be service-connected, serving as persuasive evidence that his PTSD existed, and was thus incurred, on active duty. Two exams resulted in him being diagnosed with service-connected PTSD.

(4) NGB indicated that duty related DES processing was necessary. NGB determined he did not receive proper discharge counseling, which resulted in a failure to classify his PTSD and had recommended that he undergo an MEB/PEB.

fff. "In addition, had the ABCMR meaningfully addressed the entirety of the record, it would have also found that a preponderance of the evidence supported his PTSD being unfitting. He was separated for PTSD in 2012. The West Virginia State Surgeon found,

on 2 December 2011, that he was not medically fit for retention due to his PTSD and recommended that he be discharged. He was continually placed on P3 profiles for his PTSD. He was placed on three different permanent physical profiles, demonstrating that his PTSD caused duty limitations. On 18 November 2011, his commander expressed concern that his PTSD 'may adversely affect my unit' supporting that his continued service posed a risk to him and others and a burden to the military generally. Finally, had the ABCMR meaningfully addressed the entirety of his record, it would have found that pursuant to Title 10 USC section 1216(a) his PTSD required a 30 percent rating requiring his medical retirement, his PTSD was rated 30 percent disabling by the VA.

ggg. "By ignoring the cited evidence and instead relying heavily on ARBA's factually inaccurate advisory opinion and deferring to the OTSG, the ABCMR acted arbitrarily, capriciously, and contrarily to the law set forth in 32 C.F.R. section 581.3(e), by failing to meaningfully consider the entire record to determine whether "the preponderance of the evidence shows that an error or injustice exists" and therefore acted contrary to law set forth in 32. C.F.R. section 581.3(e).

hhh. "In addition, ABCMR's effective decision to not correct the applicant's military records to reflect his medical retirement for PTSD was arbitrary, capricious, and unsupported by substantial evidence because it runs counter to considerable evidence before the agency. The OTSG's September 2018 letter cherry-picked the record and based its decision on false assumptions that were clearly contrary to it including:

(1) That there was no diagnosis of PTSD - when in fact, his PTSD had been examined and diagnosed in two VA compensation and pension exams, dated 22 July 2010, while he was still in service, and 5 October 2011.

(2) That he had not been found to have service-connected PTSD - when in fact, the VA had found on 12 October 2010 that his PTSD was service-connected.

(3) That there was no evidence of impairment due to PTSD - when in fact, he was separated in 2012 because his PTSD failed retention standards, his 25 January 2010 PDHA documented impairing PTSD symptoms, and his commander's expressed concern over his PTSD.

iii. "The OTSG's failure to address any of the contrary evidence in the record (and erroneous assumptions in light of it) and entry of a conclusion that is completely contradicted by this evidence, render the decision unsupported by substantial evidence, arbitrary, capricious, and contrary to law. As a direct result of this unlawful action, he has been, and continues to be, deprived of the disability retirement pay and medical benefits to which he is entitled under Title 10 USC section 1201.

3. The applicant provides the following documents:

a. Veteran's Application for Compensation and/or Pension, 1 August 2009, states in pertinent part, the applicant was applying for compensation. He was a member of the ARNG. He was claiming PTSD for Operation Iraqi Freedom (OIF) I from 2003 through 2004. The disability occurred on 4 March 2005. The following were Gulf Hazard Exposures:

- Air pollution
- Bites, flea, sand flea
- Bacteria
- Bites fly, sand fly
- Burning animals
- Burning feces
- Dead animals
- Gulf war service
- Heat
- Human waste
- Medication, anthrax
- Mold
- Scud missile

He has had emotional issues and behavior problems since his time in Iraq from 2003 through 2004. He shows numerous signs of PTSD and has been advised by several friends and family that they believe he should see if he may have it. His back issues stem directly from OIF I and VIII where the body armor he was forced to wear resulted in serious back pain. The armor has been known to have physical effects on even a young man's back.

b. Veteran's Application for Compensation and/or Pension, 11 March 2010, states in pertinent part, the applicant was applying for compensation. He was stationed in the Gulf after 1 August 1990. He was a member of the ARNG. His first disability occurred during guard duty service. His treatment information was as follows:

- temporomandibular joint disorders (TMJ)
- tinnitus
- chronic back pain from bulging disc
- PTSD

The following were Gulf Hazard Exposures:

- Air pollution
- Bacteria
- Bites fly, sand fly

- Burning animals
- Burning garbage
- Burning feces
- Dead animals
- Sand
- Medication, malaria
- Diesel fuel
- Dust
- Gulf war service
- Human waste
- Medication, anthrax
- Mold
- Native food
- Sun

The TMJ was caused by the constant use of the Kevlar helmet mashing his jaw along with the stress of the environment. The PTSD was from his deployment, during the invasion with the 101st Airborne Division from 2003 through 2004. The tinnitus is caused from the TMJ along with pressure in his ears from TMJ. His bulging disc is from the over exertion of his back and spine from the constant wear of the armor vest. While on midtour leave, he went to a private chiropractor.

c. Letter from the VA, 22 March 2010 states they were working on his claim for chronic acquired psychiatric disorder to include PTSD, TMJ, ear condition to include tinnitus and pressure, chronic back pain from bulging disc, and gulf war hazards.

d. VA Rating Decision, 12 October 2010 shows the following service-connected disabilities:

- PTSD, 30 percent effective 4 March 2010
- TMJ, 10 percent effective 4 March 2010
- Thoracolumbar strain, 10 percent effective 4 March 2010
- Service connection for ear condition to include tinnitus and pressure was denied

e. DA Form 3349 (Physical Profile), 19 November 2010, shows the medical condition as PTSD and a permanent profile P-U-L-H-E-S of 1-1-1-1-1-2. His PTSD was stable to perform his MOS and he would be reevaluated as necessary.

f. Letter to the VA, from the applicant's attorney, 7 December 2010 stating they had a new claim for bilateral pes planus and bilateral knee condition.

g. DA Form 3349 (Physical Profile), 3 March 2011, shows the medical conditions as jaw pain and PTSD and a permanent profile P-U-L-H-E-S of 3-1-1-1-1-2. It indicates he needs an MEB.

h. Memorandum from the Chief of Staff, State of West Virginia, Office of the Adjutant General, 10 June 2011, a policy memorandum states in pertinent part, Soldiers/officers who have been found to be medically unfit for a medical condition not in the LOD have the following options:

- Transfer to the Retired Reserve, if eligible
- Request discharge from the West Virginia ARNG
- Request a non-duty related PEB review of their case

In all cases the unit commander (or approved representative) must notify the Soldier/officer that they have been found medically unfit and counsel the Soldier as soon as possible to advise them of their options, counsel them on their rights, and allow them to make an election.

i. Letter from the VA, 2 November 2011, shows he had an increase in compensation. The following service connected disabilities had been added:

- Patellofemoral pain syndrome, left knee, 10 percent effective 4 March 2010
- Patellofemoral pain syndrome, right knee, 10 percent effective 4 March 2010
- Pes planus, left foot (flat foot), 10 percent effective 4 March 2010
- Pes planus, right foot (flat foot), 10 percent effective 4 March 2010
- TMJ, 10 percent, no change

j. Memorandum Commander's statement to the State Surgeon, 18 November 2011, states:

(1) The applicant is performing his duties in his MOS and is in an appropriate position for his grade and MOS. He has requested that his medical documents be reviewed. At the time, he is receiving a VA percentage and this information is being forwarded to the State Surgeon's office as supporting documentation. The unit is starting new equipment training in preparation for a future deployment. The applicant's medical condition/limitations may adversely affect the unit.

(2) The commander reviewed the applicant's permanent profile and agreed with his permanent profile as written. The commander had not observed the applicant performing tasks, on or off duty, which are restricted by the profile. The commander was requesting the applicant be evaluated to determine if he can be retained in his MOS.

k. DA Form 3349 (Physical Profile), 2 December 2011, shows the medical conditions as jaw pain and PTSD and a permanent profile P-U-L-H-E-S of 3-1-1-1-3. It indicates he needs an MEB.

l. Memorandum Separation, 1 March 2012 states the West Virginia ARNG State Surgeon evaluated and determined the applicant was not retainable. He would undergo separation procedures. He had the right to appeal the action. Soldier with non-duty related impairments are eligible to be referred to the PEB solely for a fitness determination, but not a determination for eligibility for disability benefits. He had 13 years of service and was not eligible for retirement benefits as a result of the separation. The applicant acknowledged he would be separated from the ARNG, he did not desire to appeal his separation, and would not submit additional medical documentation on his behalf.

m. VA Rating Decision, 19 November 2013, shows he had the following service-connected disabilities:

- Bilateral pes planus, 30 percent effective 17 May 2013
- TMJ, increased to 20 percent effective 20 May 2013
- Tinnitus, 10 percent effective 4 Mar 2010

n. Appeal from the VA, 14 July 2014, shows the issues were entitlement to an initial rating in excess of 30 percent for PTSD, entitlement to an initial rating in excess of 10 percent for right patellofemoral pain syndrome, and entitlement to an initial rating in excess of 10 percent for left patellofemoral pain syndrome. The board found a rating in excess of 10 percent is not warranted for either knee disability based on limitation of motion. The board found that a higher or separate rating is not warranted for either knee because the evidence does not show slight recurrent lateral instability or subluxation. The board found that a rating in excess of 10 percent is not warranted for patellofemoral pain syndrome of either knee. Further development is needed for a higher initial rating for PTSD.

o. Application for Disability Compensation and Related Compensation Benefits, 12 April 2015 shows new claimed disabilities of shoulder condition, left; sinusitis (related to environment hazard in Gulf War); and arthritis. He was seeking increased disabilities for TMJ and bilateral pes planus.

p. Application for Disability Compensation and Related Compensation Benefits, 16 April 2015 shows he was seeking increased disabilities for patellofemoral pain syndrome, right knee; patellofemoral pain syndrome, left knee; and thoracolumbar strain.

q. Application for Disability Compensation and Related Compensation Benefits, 30 April 2015 shows he was seeking disability compensation for the secondary disabilities of anxiety condition (secondary to PTSD) and depression (secondary to PTSD).

r. Application for Disability Compensation and Related Compensation Benefits, 2 June 2015 shows he was seeking disability compensation for the secondary disabilities of headaches (secondary to TMJ), neck condition (secondary to TMJ), muscle pain in the face including swelling (secondary to TMJ), and leg pain (secondary to bilateral pes planus).

s. Application for Disability Compensation and Related Compensation Benefits, 12 June 2015 shows he was seeking disability compensation for a newly claimed disability of vertigo.

t. Letter from ARBA, 14 July 2015, in reference to AR20150005157, states in pertinent part, there was no evidence he had appealed his discharge to his state Adjutant General before he applied to the ABCMR; therefore, his application was administrative closed.

u. Letter from the West Virginia Office of the Adjutant General to a Senator, 12 August 2015, states:

(1) The applicant sent a letter to the Senator requesting assistance with his appeal to correct his service record. In the letter, he stated early in 2015 it came to his attention that the process used to discharge him was not in accordance with Army Regulations resulting in his loss of benefits including retirement and Tricare. He stated he was processed under administrative separation regulations, when he should have been discharged in accordance with medical regulations. He requested that if the West Virginia ARNG believes everything was done within regulation that they inform him in writing to justify the denial.

(2) The Adjutant General's staff reviewed his supporting information regarding his appeal to correct his service record. His commander requested a review of his medical records on 18 November 2011, to be conducted by the West Virginia ARNG State Surgeon to determine if he met current retention standards of Army Regulation 40-501. The West Virginia ARNG State Surgeon reviewed his medical records on 2 December 2011, and determined he did not meet the Army medical retention standards due to his medical condition. The Health Service Office reviewed his medical records to determine if he had medical records relevant to a LOD investigation for the condition he was considered unfit for. A thorough review of his medical records indicated he did not have any documents available to support an LOD investigation.

(3) On 1 March 2012, his unit was notified that he did not meet medical retention standards. On 2 March 2012, he signed his counseling statement that he did not desire to appeal his separation. He declined remaining in the military to obtain 15 years of service to be eligible for a pro-rated retirement at age 60. His medical records that he provided along with all other medical records on file were reviewed and the proper disposition was made. He did not have any supporting medical documentation to support his claim and he did not appeal his separation.

v. Application for Disability Compensation and Related Compensation Benefits, 16 September 2015 shows he was seeking disability compensation for new disabilities of liver condition (related to environmental hazard in Gulf War) and scars. He was requesting increased disabilities for patellofemoral pain syndrome, left knee and right knee.

w. Application for Disability Compensation and Related Compensation Benefits, 18 September 2015 shows he was seeking new disability compensation for hearing loss, sensorineural.

x. Letter from the West Virginia National Guard, Office of the IG, 12 November 2015, states:

(1) He was found medically unfit for retention in the West Virginia ARNG in accordance with Army Regulation 40-501, Chapter 3. His rights available to him depended on whether his condition was incurred in the LOD. It has been determined that he was not given the opportunity to indicate his LOD status in accordance with Policy Memorandum NGWV-PER Number 11-1004, West Virginia ARNG Soldiers/Officers Found Medically Unfit for Retention, Non-Duty related (30 Day Memo). The following is the information that was considered in determining his separation from the West Virginia ARNG, which was procedurally incorrect.

(2) He was enlisted in the Marine Corps from 18 March 1996 to 31 August 2000, and the Army from 1 September 2000 to 17 June 2004, and from 4 March 2006 to 22 May 2012. His service includes two tours to Iraq from 3 March 2003 to 31 January 2004 and 21 April 2009 to 27 January 2010. He has seven active federal service years and 14 years, and 3 months total service for retired pay.

(3) On 12 October 2010, the VA awarded him an overall 40 percent total disability compensation. On 19 November 2010, he was awarded a permanent medical profile. He was able to do all of the functional activities and the Army Physical Fitness Test. The West Virginia ARNG State Surgeon reports "Servicemember's PTSD stable to perform MOS. Reevaluate as necessary." On 27 February 2010, SF Form 600 (Chronological Record of Medical Care) provider D- B- did not indicate the time,

signature, hospital, or medical facility as required by Army Regulation 40-66 (Medical Record Administration and Healthcare Documentation) paragraph 5-18.

(4) On 3 March 2011, he was awarded a permanent medical profile with serial codes P-3, U-1, L-1, H-1, E-1, S-2. Item 7 reads, "Soldier does not meet retention standards and needs MEB." This profile has only one signature, two are required. This incomplete profile was required to be reviewed and signed by an approving authority before it became a valid permanent profile. A permanent level 3 profile that has not been signed by the appropriate number of physicians is not valid. The physical profile was included in his separation packet. In accordance with Army Regulation 40-501, paragraph 7-8a, permanent 3 or 4 profile requires the signatures of two profiling officers.

(5) On 20 March 2011, he signed a DA Form 4836 (Oath of Extension of Enlistment or Reenlistment). A mistake was made regarding his basic pay entry date, 3 January 1998 was marked through and 4 December 1997 was hand written. Also, his physical profile, 3 March 2011, reports he did not meet retention standards and needed an MEB. In accordance with NGB-ARH policy memorandum number 09-026, 13 August 2009:

Section II Extension of Enlistment, states correction of errors on extension/reenlistment forms. To correct errors, which are found after the Soldier has extended or reenlisted and forms have been distributed, the following procedures apply: Extensions: Commander or designee may correct minor administrative and typographical errors found after distribution of form, by completing DA Form 4187 (Request for Personnel Action) to correct the DA Form 4836. The Soldier must sign the DA Form 4187.

Table 3 Instructions for completing the DA Form 4836: The extension cannot be issued if the Soldier does not meet physical, mental, or moral qualification for continued service under the provisions of the Enlistment Criteria Memorandum and this policy. Waiver of disqualification must be approved in advance. This form will contain no errors. Pen and ink corrections, strikeouts, etc. are not permitted.

(6) On 22 July 2011, Service School Academic Evaluation Report, reporting he started phase three of Health Care Specialist Course graduating on 6 August 2011, achieving course standards. In accordance with Army Regulation 350-1 (Army Training and Leader Development), paragraph 3-14 (Physical Profile) states:

Soldiers with a permanent designator of 2 in the physical profile must include a copy of DA Form 3349 (Physical Profile) as part of the course application. They will be eligible to attend courses and train within the

limits of their profile provided they can meet course graduation requirements. Soldiers with a permanent designator of 3 or 4 in their physical profile must include a copy of the DA Form 3349 (Physical Profile) and the results of their MOS Administrative Retentions Review as part of the course application. For training purposes physical profiles are required to be maintained in the Digital Training Management System

(7) On 18 November 2011, a memorandum from CPT J- L- to the State Surgeon requested a medical records review for the applicant's retention. CPT L-'s request states, "Soldier's medical conditions/limitations may adversely affect my unit." CPT L- writes, "I have reviewed the Soldier's DA Form 3349 (Physical Profile) and I do agree with Soldier's permanent profile as written." CPT L- is referring to the physical profile, 3 March 2011, this not signed by an approving authority, which is required for validation. This physical profile is not a valid profile. Also, this physical profile was included in the applicant's administrative separation packet.

(8) On 2 December 2011, a Chronological Record of Medical Care by Lieutenant Colonel S- E- states, "servicemember is not medically fit for retention based upon Army Regulation 40-501 (Standards of Medical Fitness) Chapter 3. The member should be processed for separation as not being medically fit for retention." On 2 December 2011, he was awarded a permanent medical profile with serial codes P-3, U-1, L-1, H-1, E-1, S-3. Item 7 states, "Soldier does not meet retention standards and needs MEB." Item 8, Functional Limitation and Capabilities and Other, "TMJ disorder (P3) 3-8. PTSD (S2) SM with PTSD stable to perform MOS. Reevaluate as necessary. Per profile dated 19 November 2010." Item 3 of this profile reporting permanent profile S3 is not compatible with item 8 reporting S2. This profile has only one signature, two are required. This incomplete profile needed to be reviewed and signed by an approving authority before it became a valid permanent profile. A permanent level 3 profile that has not been signed by the appropriate number of physicians is not valid. This physical profile was included in his separation packet.

(9) On 1 March 2012, the military personnel office (MILPO) sent a separation memorandum to his commander informing him that the applicant was not retainable in accordance with Army Regulation chapter 3-33 and would undergo administrative separation procedures in accordance with National Guard Regulation 600-200 (Enlisted Personnel Management) paragraph 6-32e. The reasons used for "not medically fit for retention" on the Chronological Record of Medical Care, 2 December 2011, and the physical profile, 2 December 2011 do not coincide. The separation memorandum informed the commander that the applicant had the right to appeal the separation or be referred to the PEB if the impairments were non-duty related. In accordance with National Guard Regulation 600-200 paragraph 6-32e, "notify Soldiers who do not meet medical retention standards of the intent to separate and afford them the opportunity to

request a waiver for retention per Army Regulation 40-501 or to provide additional information from civilian doctors at their own expense."

(10) On 2 March 2012, the applicant acknowledged receipt of notification of administrative separation where he elected not to appeal his separation and would not submit additional medical documentation. He claims he did not want to contest the reason for his separation, therefore, he elected not to submit additional medical documents. After confirming with the applicant, the unit, and MILPO the Health System Specialist counseled him from/using the MILPO memorandum that was addressed to his commander. He never received a notification letter with election options specifically written to him. He was never afforded the option/right to select report an LOD status, did or did not have an LOD but believed his conditions were incurred in the LOD. He was not advised that he could initiate a LOD investigation, waive his right to a non-duty PEB or request a non-duty PEB. The rights available to him were dictated on whether his conditions were or were not incurred in the LOD. In accordance with Policy Memorandum NGWV-PER Number 11-004, 10 June 2011, it states:

When a unit receives the memorandum notifying them they have a Soldier/officer that does not meet medical retention standards of Army Regulation 40-501 Chapter 3, they must prepare a Notification Letter with Elections and personally deliver the option letter. If unable to personally deliver the letter, mail it certified with return receipt to the Soldier's home of record.

Read the counseling form to the Soldier to ensure complete understanding of all options, and then the Soldier and commander must sign at the bottom of the counseling form

When complete, email the notification letter with election and counseling form to the State Health Systems Specialist

The policy memorandum had examples of a medically unfit for retention notification, counseling for Soldiers, and checklist of items needed.

(11) On 15 May 2012, the applicant wrote a memorandum for record stating he had been counseled by Staff Sergeant (SSG) B-, Medical Readiness Noncommissioned Officer (NCO). He wrote he had been counseled and understood if he stayed in the ARNG an additional year he would receive medical retirement at age 60. SSG B- was referring to an administrative separation and potential approval for a 15 year retirement for an unfitting but non-service connected condition meaning medically retire but unable to collect until the age of 60.

(12) On 18 May 2012, a note from Ms. M- N- claimed she spoke with the applicant concerning his discharge and that if he stayed in the ARNG until December 2012 he would reach his 15 years and could medically retire. Ms. N- is referring to an administrative separation and potential approval of a 15 year retirement for an unfitting but non-service connected condition meaning medically retire but unable to collect until the age of 60.

(13) On 22 May 2012, Order 143-617 shows the applicant was honorably discharged. His NGB Form 22 (Report of Separation and Record of Service) reentry eligibility code is RE 3 meaning not fully qualified for reentry or continuous service, at the time of separation, but this disqualification is waivable. In accordance with National Guard Regulation 600-200 Section III (Orders and Certifications) 6-12 Orders d. "if determined that a Soldier has been separated in error and there has been no fraud, the individual may reenlist if qualified. If a waiver is required, submit the case with all supporting documents and recommendations of the chain of command to the Adjutant General or Chief NGB as appropriate for a determination. After all other means have been exhausted, a Soldier may appeal to the ABCMR under Army Regulation 15-185 (ABCMR) for benefits, which might have been earned during the periods between discharge and reenlistment."

(14) On 22 May 2022, NGB Form 22 (Report of Separation and Record of Service) item number 23 (Authority and Reason) reported him medically unfit for retention, placed him on the PDRL, and stated failure to obtain required physical. Placement on the PDRL occurs if the servicemember has fewer than 20 years of service, is found unfit, the disability is determined permanent, and is rated 30 percent by a U. S. Army Physical Disability Agency PEB. His case was never forwarded to a PEB, therefore, placement on the PDRL was not possible. Also pointing this out to the West Virginia ARNG Health System Specialist, this error was corrected on 29 October 2015 by completion of NGB Form 22A (Correction to NGB Form 22).

(15) On 19 November 2013, the VA awarded a service-connected combined evaluation of 80 percent. The packet that was used to discharge him for not meeting retention standards did not have the mandatory notification letter, counseling, rights or election options as required by Policy Memorandum NGWV-PER Number 11-004. His separation packet included two invalid permanent profiles and a MILPO letter to the commander, which was used to counsel him. He should have received a written counseling specifically addressed to him. He was not provided an opportunity to present his case, i.e. LOD status, did or did not have an approved LOD but believed his conditions were incurred in the LOD that would initiate an LOD investigation; waive his right to a non-duty related PED; or a request a non-duty PEB review. Furthermore, one of the non-valid permanent physical profiles reports two different psychiatric serial codes and the medical fitness standards for retention and separation. The unit MILPO and Health System Specialist were given an opportunity to provide documentation to

support regulatory separation notification and counseling. To date current documentation shows he was not afforded the right to present whether his permanent medical condition was incurred in the LOD or not incurred in the LOD.

(16) The ABCMR is the highest administrative Board in the Army. If he decides to appeal to the ABCMR, include with his application any evidence, to include a letter, that will help support his application request.

y. Record of Proceedings AR20170013644, 4 January 2018, states the evidence presented does not demonstrate the existence of a probable error or injustice. Therefore the Board determined the overall merits of the case are insufficient as a basis for correction of the applicant's record. The entire Record of Proceedings is available for the Board's review.

z. Letter from the Director, ABCMR reference AR20170013644 to the applicant, 22 June 2018, states in pertinent part, the ABCMR Board members unanimously recommended denial of the applicant's request. However, after reviewing the findings, conclusions, and Board Member's recommendations, the DASA (Review Boards) found there was sufficient evidence to grant relief. The Record of Proceedings had been forwarded to the OTSG. They would take action to correct the applicant's records and would provide him with official notification as soon as the directed correction has been made. The letter from the OTSG is not available for the Board's review.

aa. Medical documentation which show the applicant's diagnoses and medical/mental conditions. They are available for the Board's review and will be reviewed by the ARBA mental health and medical staff who will provide a medical review for the Board's consideration.

4. The applicant's service record contains the following documents:

a. DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was in the U.S. Marine Corps from 23 April 1996 through 22 April 2000. He had completed 4 years of active duty service. He was honorably transferred to Marine Corps Reserve Support Command. He was discharged for completion of required active service.

b. DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was in the Regular Army from 18 June 2001 through 17 June 2004. He had completed 3 years of active duty service, with 4 years total prior active duty service, and 1 year and 3 months of prior inactive duty service. He had service in Kuwait/Iraq from 3 March 2003 through 31 January 2004. He was honorably discharged for completion of his required active service.

- c. DD Form 4 (Enlistment/Reenlistment Document Armed Forces of the United States) shows he enlisted in the West Virginia ARNG on 4 March 2006. He remained in the West Virginia ARNG through oaths of extension of enlistment or reenlistment.
- d. DD Form 2807 (Report of Medical History), 4 March 2006, shows he was in good health and does not indicate he had any mental health/medical conditions. DD Form 2808 (Report of Medical Examination), 4 March 2006, shows his P-U-L-H-E-S was 1-1-1-1-1-1 and he was qualified for enlistment in the ARNG.
- e. DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was ordered to active duty, as a member of the ARNG, on 11 February 2009 and was honorably released on 3 March 2010 for completion of his required active service. He had service in Iraq from 21 April 2009 to 27 January 2010.
- f. Memorandum from MILPO, 1 March 2012, states the West Virginia National Guard State Surgeon evaluated and determined the applicant is not retainable. He would undergo separation procedures in accordance with National Guard Regulation 600-200 paragraph 6-32e. He had the right to appeal the action. Soldiers with non-duty related impairments are eligible to be referred to the PEB solely for a fitness determination, but not a determination of eligibility for disability benefits. He has 13 years of service. He is not eligible for any retirement benefits as a result of separation.
- g. Self-authored memorandum for record, 15 May 2012, states he has been briefed thoroughly about his separation from the West Virginia ARNG. During his Periodic Health Assessment in 2011, it was found he has a medical condition that prevents him from continuing his service with the ARNG. SSG B- his Medical Readiness NCO, explained if he stayed in an additional year he would receive medical retirement at age 60. He politely declined and appreciated the information.
- h. Statement from M- N- states she spoke with the applicant on 18 May 2012, concerning that he fully understood his discharge, that if he stayed until December 2012, he would reach his 15 years and he could have a medical retirement. He understood completely and said he just wanted to get out and start a new chapter in his life.
- i. Orders 143-617, published by Joint Forces Headquarters - West Virginia, Adjutant General's Department, 22 May 2012, honorably discharged him from the ARNG effective 22 May 2012 for medical physical or mental condition retention. The authority for discharge was National Guard Regulation 600-200 paragraphs 6-35l(8), 6-36u, and 6-36s. The orders were amended on 29 October 2015, changing the authority to National Guard Regulation 600-200 paragraph 6-35l(8).

j. NGB Form 22 (Report of Separation and Record of Service) shows he was honorably discharged from the ARNG on 22 May 2012. He had completed 6 years, 2 months, and 19 days of net service this period with 1 year and 3 months of prior Reserve Component service and 7 years of prior active federal service. He had 14 years, 5 months, and 19 days of total service for pay and 14 years and 3 months of total service for retired pay. The authority and reason for separation was National Guard Regulation 600-200, 6-35I(8) Medically unfit for retention, 6-36s Placement on the PDRL, and 636u failure to obtain required physical. An NGB Form 22a (Correction to NGB Form 22) shows the NGB Form 22 was corrected to show the authority for separation as National Guard Regulation 600-200, paragraph 6-35I medically unfit for retention.

k. NGB Form 23B (ARNG Retirement Points History Statement), 6 June 2012, shows he has 14 years and 3 months creditable service for retired pay.

l. His service record is void of:

- Documentation showing DES processing
- DA Forms 3349 (Physical Profile)
- Medical documentation other than his Report of Medical History and Report of Medical Examination for enlistment in the ARNG
- A letter from the IG
- An administrative separation packet
- An LOD investigation

5. Based on the applicant's VA documentation provided showing he had medical/behavioral health conditions, the Army Review Boards Agency Medical Staff will review and provide a medical review for the Board's consideration.

MEDICAL REVIEW:

1. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents, the Record of Proceedings (ROP), the applicant's available electronic medical record in The Armed Forces Health Longitudinal Technology Application (AHLTA), the Health Artifacts Image Solutions (HAIMS), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART), the electronic Physical Evaluation Board (ePEB), and the VA electronic medical record (JLV). In addition, the hard-copy military and VA medical documentation provided by the applicant were also examined. The applicant has applied to the ABCMR requesting his diagnosis of PTSD be determined as incurred in the line of duty (LOD). In addition, the applicant is requesting at the time of his discharge, his disability rating for PTSD be determine at least 30 percent (%), and if so he be given a medical retirement.

2. The applicant's available military records were summarized in the ABCMR ROP. There is sufficient evidence the applicant completed two combat tours in Iraq (2003-2004 and 2009-2010). While deployed in 2009, he reported and was treated for insomnia by military medical providers on one occasion. Later during his Post Deployment Health Assessment (PDHA), on 25 January 2010, the applicant discussed being exposed to potentially traumatic events and experiencing some depressive symptoms. He was seen at the VA for a Compensation and Pension evaluation for mental health symptoms on 22 July 2010. He was diagnosed with service-connected PTSD (30% disability rating) related his deployment experiences in Iraq. The applicant was attending treatment with a civilian behavioral health provider at that time, but he began to attend behavioral health treatment more regularly in 2015 at the VA. He continues to be consistently diagnosed with and treated for service-connected PTSD by various VA behavioral health providers till present.

3. After the applicant's PDHA, in November 2010, the applicant's military medical providers were made aware of his diagnosis of service-connected PTSD. The applicant was issued a temporary psychiatric profile for this condition. He was also identified as stable to perform his military occupational specialty (MOS) and to re-evaluated as necessary. On 03 March 2011, the applicant again received a temporary psychiatric profile for PTSD, determined to be stable to perform his MOS, and to re-evaluate as necessary. On 18 November 2011, the applicant's commander requested a review of his medical records. The unit was initiating training in preparation for a future deployment, and there was concern applicant's medical condition/limitations could adversely affect the unit. On December 02, 2011, a review of the applicant's medical records was conducted. The applicant was determined to be not medically fit for retention based on Army Regulation 40-501 (Standards of Medical Fitness) Chapter 3. The applicant was recommended to be processed for separation as not being medically fit for retention. As a result of this determination, the applicant received a third physical profile with permanent psychiatric profile for PTSD. It also noted the applicant required an MEB. However, there was conflicting information provided on this profile, and it was not signed by two physicians.

4. There is sufficient evidence the applicant was diagnosed with service-connected PTSD as a result of his combat experiences during his deployment to Iraq. This diagnosis was provided within a reasonable amount of time following his deployment to consider his condition LOD. The applicant has consistently been diagnosed with PTSD by multiple providers, and the information regarding his diagnosis was provided to his leadership and military providers shortly after returning from deployment. There is also sufficient evidence the applicant was performing his military duties adequately for over a year in his MOS, as noted by his temporary psychiatric profiles. Yet later, there was documented concern from his leadership, in regard to the applicant's continued ability to meet mission requirements due to changes with training and potential upcoming deployment. Thus, there was a request to review the applicant's potential retention

based on Army Regulation 40-501 in late 2011. As a result of this evaluation, the applicant's diagnosis of PTSD was found to be an unfitting condition for continued military service. There have been noted procedural errors that occurred with the medical documentation necessary to separate the applicant for not meeting the medical physical or mental condition standards for retention. In summary, there is sufficient evidence the applicant's PTSD meets the requirements to be determined LOD. He was found to not meet medical retention standards, in part as a result of PTSD, at the time of his discharge. Earlier, the applicant was found to be 30% disabled for PTSD, which is an appropriate rating for his level of disability at the time of his discharge. Lastly, this rating would qualify him for a medical retirement from the West Virginia National Guard, if all other procedural requirements for this type of discharge are met, outside of procedural errors made in the processing of his separation.

5. On 21 November 2024, the Army Review Boards Agency, Case Management Division provided the applicant the medical review to the applicant/counsel for an opportunity to respond. On December 19, 2024, the applicant, through counsel, responded.

a. The applicant agrees, in general, with the overall conclusion of the review – that he is entitled to medical retirement as a result of his PTSD, which was incurred in the line of duty, rendered him unfit for service, is permanent, and was at least 30 percent disabling at the time of discharge.

b. The applicant notes he was unfit to perform the duties of his MOS because of his PTSD as detailed in his original application, the record evidence supports the conclusion that the applicant's PTSD rendered him unfit for service. Specifically, the applicant's PTSD rendered him unable to perform the duties of a combat medic, his position at the time of discharge. Not only did his PTSD make him unfit to perform the required duties of the combat medic position, but the applicant's PTSD prevented him from being deployable and from continuing to service without placing others or himself at risk. In addition, it also meant he would be unable to maintain the necessary profile.

c. Any procedural error noted in the advisory opinion are not related to the applicant's unfitness and thus should not affect the applicant's entitlement to medical retirement. The applicant satisfies all the necessary procedural requirements for a permanent medical retirement despite procedural errors made by the military in processing the applicant's separation.

d. The applicant respectfully requests the Board update his military records to reflect his permanent medical retirement at the time of discharge due to his combat-related PTSD.

BOARD DISCUSSION:

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

- a. The Board found the applicant has demonstrated by a preponderance of evidence his post-traumatic stress disorder (PTSD) was incurred in the line of duty (LOD) and at the time of his discharge, his disability rating for PTSD was 30 percent and determined his disability rating of 30 percent warranted a medical retirement.
- b. The Board reviewed and concurred with the medical advisor's review finding the applicant was determined to be not medically fit for retention based on Army Regulation 40-501 (Standards of Medical Fitness) Chapter 3. The applicant was recommended to be processed for separation as not being medically fit for retention. As a result of this determination, the applicant received a third physical profile with permanent psychiatric profile for PTSD. There is sufficient evidence the applicant was diagnosed with service-connected PTSD as a result of his combat experiences during his deployment to Iraq.
- c. The Board found the applicant met his burden of proof that the PTSD was in the LOD and unfitting for continued service and should have been considered through the Disability Evaluation System process. As a result, the Board unanimously agreed his disability rating for PTSD was 30 percent and warranted a medical retirement from the Army National Guard.
- d. Based on the preponderance of evidence available for review, the Board determined the evidence presented was sufficient to warrant a recommendation for relief.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

■	■	■	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board determined the evidence presented is sufficient to warrant amendment of the Army Board for Correction of Military Record's decision in Docket Number AR20170013644 on 4 January 2018. As a result, the Board recommends that all Department of the Army and Army National Guard records of the individual concerned be corrected by

- a. Amending Orders 143-617, issued by Joint Forces Headquarters – West Virginia, Adjutant General's Department on 22 May 2012, to show he was medically retired (vice discharged) at a combined disability rate of 30% on 22 May 2012;
- b. Amending the applicant's NGB Form 22 to show he was honorably retired on 22 May 2012, in accordance with NGR 600-200 PARA 6-36S, placement on the permanent disability retired list;
- c. If married, affording the applicant the opportunity to enroll in (or decline enrollment) in the Survivor Benefit Plan (SBP) by timely submitting the appropriate SBP form.

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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, USC, chapter 61, provides the Secretaries of the Military Departments with authority to retire or discharge a member if they find the member unfit to perform military duties because of physical disability. The U.S. Army Physical Disability Agency is responsible for administering the Army physical disability evaluation system and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with Department of Defense Directive 1332.18 and Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation).
2. Army Regulation 40-501, chapter 3, provides that for the separation of an individual found to be unfit by reason of physical disability, he/she must be unable to perform the duties of his/her office, grade, rank or rating. Members with conditions listed in this chapter are considered medically unfit for retention on active duty and are referred for disability processing.
3. Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation) establishes the Army Disability Evaluation System and sets forth policies, responsibilities, and procedures that apply in determining whether a Soldier is unfit because of physical disability to reasonably perform the duties of his office, grade, rank, or rating. Only the unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability.
 - a. Soldiers are referred to the disability system when they no longer meet medical retention standards in accordance with AR 40-501, chapter 3, as evidenced in an MEB; when they receive a permanent physical profile rating of "3" or "4" in any functional capacity factor and are referred by a Military Occupational Specialty Medical Retention Board; and/or they are command referred for a fitness for duty medical examination.
 - b. The disability evaluation assessment process involves two distinct stages: the MEB and physical evaluation board (PEB). The purpose of the MEB is to determine whether the service member's injury or illness is severe enough to compromise his 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. Service members 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 and length of military service. Individuals who are "separated" receive a onetime severance payment, while veterans who retire based upon disability receive monthly military retired pay and have access to all other benefits afforded to military retirees.

c. The mere presence of medical impairment does not in and of itself justify a finding of unfitness. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier may reasonably be expected to perform because of his or her office, grade, rank, or rating. Reasonable performance of the preponderance of duties will invariably result in a finding of fitness for continued duty. A Soldier is physically unfit when medical impairment prevents reasonable performance of the duties required of the Soldier's office, grade, rank, or rating.

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

5. Title 38, USC, sections 1110 and 1131, permits the VA to award compensation for disabilities that were incurred in or aggravated by active military service. However, an award of a higher VA rating does not establish error or injustice on the part of the Army. The Army rates only conditions determined to be physically unfitting at the time of discharge which disqualify the Soldier from further military service. The VA does not have the authority or responsibility for determining physical fitness for military service. The VA awards disability ratings to veterans for service-connected conditions, including those conditions detected after discharge, to compensate the individual for loss of civilian employability. These two government agencies operate under different policies. 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.

6. Army Regulation 600-8-4 (Line of Duty Policy, Procedures, and Investigations) prescribes policies and procedures for investigating the circumstances of disease, injury, or death of a Soldier. It provides standards and considerations used in determining line of duty (LD) status. The Commanding General, U.S. Army Human Resources Command has functional responsibility for LD determinations and acts for the Secretary of the Army (SA) on all LD determinations and appeals referred to Headquarters, Department of the Army (HQDA) and all exceptions to procedures prescribed in this regulation. Major continental U.S. Army commander will supervise the LD investigation process under their jurisdiction. The general court-martial convening authority (GCMCA) acts as the final approving authority for formal LD determinations on behalf of the SA and may delegate this authority in writing to a field grade officer on the staff of the GCMCA.

a. Line of duty determinations are essential for protecting the interest of both the individual concerned and the U.S. Government where service is interrupted by injury, disease, or death. A Soldier of the Army National Guard of the United States or USAR is entitled to hospital benefits, pensions, and other compensation, similar to that for

Soldiers of the Active Army for injury, illness, or disease incurred in LD, under the following conditions as prescribed by law (Title 10, U.S. Code, section 1074a):

- while performing active duty for a period of 30 days or less while performing inactive duty training
- while traveling directly to or from the place at which that soldier is to perform or has performed active duty for a period of 30 days or less; inactive duty training; or service on funeral honors duty
- while remaining overnight immediately before the commencement of inactive duty training, or while remaining overnight, between successive periods of inactive duty training, at or in the vicinity of the site of the inactive duty training

b. The attending physician or patient administrator will initiate and complete Section 1 of DA Form 2173. The medical troop medical clinic will forward the DA Form 2173 to the unit commander will ensure the DA Form 2173 is promptly completed and forwarded through channels to the appointing authority. Investigations can be conducted informally by the chain of command where no misconduct or negligence is indicated.

Documentation for an informal LD investigation typically consists of DA Form 2173. The military treatment facility commander or an authorized representative (attending physician or patient administrator) will ensure Section I of DA Form 2173 is completed. The unit commander will complete Section II and forward it to the appointing authority or higher authority. The final determination of an informal LD investigation can result in a determination of "in LD" only. The unit commander should complete their regulatory requirements within 30 calendar days of the incident. (For member of the USAR and Army National Guard, the unit administrator or unit commander initiates the DA Form 2173 and coordinates directly with civilian medical providers to complete Section 1.)

c. Line of duty determinations must be supported by substantial evidence and by a greater weight of evidence than support any different conclusion. The evidence contained in the investigation must establish a degree of certainty so a reasonable person is convinced of the truth or falseness of a fact.

d. The final approving authority will review the LD for completeness and required documents. Upon approval, the approving authority should retain a copy and forward a copy to the Soldier's official military personnel file for filing in their record. The standard completion time is normally 40 calendar days after the incident.

e. Paragraph 4-4 (Time limitations for processing LD actions) states LD should be completed with the prescribed time limits defined in this regulation. When a report is late, comments should be included in the remarks section of the DA Form 2173 for informal reports. It states, "The mere failure to complete an action within the prescribed time or the failure to provide reasons the report is late is not a basis to disapprove, reverse, or change an otherwise proper determination."

7. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records (BCM/NRs) regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. BCM/NRs may grant clemency regardless of the type of court-martial. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to other corrections, including changes in a discharge, which may be warranted based on equity or relief from injustice. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. In determining whether to grant relief based on equity, injustice, or clemency grounds, BCM/NRs shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment. Changes to the narrative reason for discharge and/or an upgraded character of service granted solely on equity, injustice, or clemency grounds normally should not result in separation pay, retroactive promotions, and payment of past medical expenses or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded service characterization.

8. National Guard Regulation 600-200 (Enlisted Personnel Management) establishes standards, policies, and procedures for the management of the ARNG enlisted Soldiers in the functional areas of classification and reclassification, personnel management, assignment and transfer including interstate transfer, special duty assignment pay, enlisted separations, and command sergeant major program.

a. Paragraph 6-32 (Notification and Administrative Board Procedures) e, states notify Soldiers who do not meet medical retention standards of the intent to separate and afford them the opportunity to request a waiver for retention per Army Regulation 40-501, or to provide additional information from civilian doctors at their own expense.

b. Paragraph 35 (Separation/Discharge from State ARNG and/or Reserve of the Army, I(8) states medically unfit for retention per Army Regulation 40-501. Commanders, who suspect that a Soldier may not be medically qualified for retention, will direct the Soldier to report for a complete medical examination per Army Regulation 40-501. If the Soldier refuses to report as directed, see paragraph 6-36u. Commander who do not recommend retention will request the Soldier's discharge. When medical condition was incurred in LOD, the procedures of Army Regulation 600-8-4 (LOD Policy, Procedures, and Investigations) will apply. Discharge will not be ordered while the case is pending final disposition. This paragraph also includes those Soldiers who refuse or are ineligible to reclassify into a new MOS.

c. Paragraph 36 (State ARNG Separations), states placement on the PDRL.

d. Paragraph 36u, states failure to obtain required physical per Army Regulation 40-501. Soldier will be notified in writing of the requirement to obtain a physical, and given 90 days after the letter is mailed to comply with this requirement. Commander can authorize an extension of up to 60 days for extenuating circumstances.

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

//NOTHING FOLLOWS//