

IN THE CASE OF: [REDACTED]

BOARD DATE: 28 April 2025

DOCKET NUMBER: AR20240007866

APPLICANT REQUESTS:

- Permanent disability retirement or
- Transfer into the Retired Reserves
- Medical retirement
- Correction of his date of birth

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

- DD Form 149 (Application for Correction of Military Record)
- Self-authored letter in support of application
- Original birth certificate
- Corrected birth certificate
- DD Form 214 (Certificate of Release or Discharge from Active Duty), for the period ending 23 April 2005
- Memorandum Subject: Request for Determination of Physical and Medical Suitability, 2 June 2007
- Waiver of MEB/PEB Evaluation, 11 July 2007
- Memorandum Subject: Results of Profile Board, 23 July 2007
- DA Form 3349 (Physical Profile), 26 July 2007
- Memorandum Subject: Notification of Medical Disqualification, 1 August 2007
- AG ARK Form 4187E (Personnel Action), 11 August 2007
- Memorandum Subject: Notification of Intent, 11 August 2007
- Permanent Order 211-04, 30 July 2015
- A letter issued by the Department of Veterans Affairs (VA), 19 August 2020
- A letter issued by [REDACTED] Army National Guard ([REDACTED] ARNG), 15 May 2022
- Patient Inquiry, 18 September 2023
- A letter issued by the Human Resources Command (HRC), 19 March 2024

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, section 1552(b); however, the Army Board for Correction of Military Records

(ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.

2. The applicant states, in effect, he is requesting that his date of birth reflects the correct date as shown on his corrected birth certificate. His date of birth was entered incorrectly at the time of entry and has been incorrect the entire time. In addition, he requests, in effect, that his honorable discharge be changed to a permanent disability retirement or that be transferred into the Retired Reserves. He sustained injuries while serving in Iraq in support of Operation Iraqi Freedom (OIF), for which he has been awarded the Purple Heart. At the time of discharge, he was simply informed he is being discharged, he was coerced into signing the MEB/PEB waiver, he didn't have the proper guidance, and knowledge to make an informed decision in regard to a medical retirement vice his honorable discharge. He requested a medical retirement from the [REDACTED] ARNG Adjutant General (AG), and despite his honorable service and awards for valor, his request was denied.

3. The applicant's request for correction to his date of birth was due to his application to HRC, in which his request was denied on 19 March 2024. HRC recommended he applies to the Army Review Boards Agency (ARBA) for correction. This correction will be addressed in the Administrative Notes section of this document without the need for Board action.

4. The applicant provides, and the service record shows:

- On 21 September 1999, he enlisted in the [REDACTED] ARNG
- On 12 October 2003, he was ordered to active duty in support of OIF
- On 5 March 2004, he arrived in Iraq
- On 4 December 2004, he sustained an injury to his face and both thighs due to a blast from a grenade fuse, which dropped on his lap. He was treated and subsequently returned to full duty
- On 18 February 2004, he sustained an injury to his left middle finger, while conducting Army duties
- On 4 March 2006, he reported low back pain with occasional tingling in both hands, and concerns of exposures
- On 8 March 2005, he departed Iraq. He completed 1 year, and 4 days of foreign service in support of OIF
- On 23 April 2005, he was honorably discharged for completion of required active service and transferred back to his unit. He completed 1 year, 6 months, and 23 days of active duty service
- On 2 June 2007, a physical and medical suitability determination was requested by [REDACTED] ARNG, because the applicant did not meet retention standards. A physical profile would follow this determination
- On 11 July 2007, the applicant waived his MEB and PEB evaluations

- On 23 July 2007, pursuant the results of a medical review board, he was found to be unfit for retention in the [REDACTED] ARNG due to post traumatic stress disorder (PTSD)
- On 26 July 2007, the applicant was issued a permanent profile with a psychiatric designation of "4", which signifies one or more medical conditions of such a severity that performance of military duties must be drastically limited
- On 1 August 2007, the applicant elected to be discharged from the ARNG and as a Reserve of the Army
- On 11 August 2007, the approving authority directed the applicant be discharged with an honorable discharge, due to being medically unfit for retention
- On 1 September 2007, he was honorably discharged from the [REDACTED] ARNG after seven years of service, due to being medically unfit for retention
- On 30 July 2015, the applicant was awarded the Purple Heart for wounds received as a result of enemy actions on 4 January 2005
- In a letter issued by the VA on 12 August 2020 shows in pertinent part, the applicant has been awarded a disability rating of 70 percent (%) for PTSD
- On 15 May 2022, in response to the applicant's request for placement on the permanent disability retired list, it was denied by the AG, [REDACTED] ARNG, due to having waived his rights for an MEB/PEB evaluation on 11 July 2007

5. Medical forms attached to the supporting documents will be reviewed and discussed by Behavioral Health, and Medical staff at ARBA.

6. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. Documentation reviewed included the applicant's ABCMR application and accompanying documentation, the military electronic medical record (EMR – AHLTA and/or MHS Genesis), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant is applying to the ABCMR in essence requesting a referral to the Disability Evaluation System.

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. His Report of Separation and Record of Service (NGB Form 22) shows he entered the Army National Guard on 21 September 1999 and received an honorable discharge from [REDACTED] Army National Guard ([REDACTED] ARNG) 16 May 2005 under authority provided in paragraph 8-26j(1) of NGR 600-200, Enlisted Personnel

Management (1 March 1997): Medically unfit for retention per AR 40-501 (Standards of Medical Fitness).

d. The behavioral health aspects of this case will be addressed by a behavioral health advisor in a separated advisory opinion.

e. Paragraph 8-26j(1) of NGR 600-200:

"Medically unfit for retention per AR 40-501, chapter 3. 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 AR 40-501 and NGR 40-501. If the soldier refuses to report as directed, see paragraph 8-27i of this regulation.

Commanders who do not recommend retention will request the soldier's discharge. When medical condition was incurred in line of duty, the procedures of NGR 40-3 will apply. Discharge will not be ordered while the case is pending final disposition."

f. The █ ARNG placed the applicant on a permanent duty limiting physical profile for PTSD effective 26 July 2007. No other medical conditions were listed. The applicant mentions injuries in his self-authored letter but does not identify them. There are no entries in the EMR. JLV shows he has been awarded more than 30 VA service-connected disability ratings.

g. The applicant subsequently waived his right to the DES. While this is allowed for Reserve Component Soldiers, it is highly discouraged. His PTSD may have affected his judgement in this case.

h. There is insufficient probative medical evidence to identify a medical condition(s) which would have failed the medical retention standards of chapter 3 of AR 40-501, Standards of Medical Fitness, thus warranting a referral to the DES for other than his PTSD.

i. It is the opinion of the Agency Medical Advisor that a referral of his case for a physical condition to the Disability Evaluation System is not warranted.

BEHAVIORAL HEALTH REVIEW:

a. Background: The applicant is requesting to be medically retired due to disability. In the alternative, to have his medical conditions referred to the Integrated Disability Evaluation System (IDES) for proper disposition. He contends PTSD, TBI, and OMH as related to his request.

b. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Pertinent to this advisory are the following:

- Applicant enlisted in the [REDACTED] ARNG on 21 September 1999.
- On 12 October 2003, he was ordered to active duty in support of OIF.
- On 5 March 2004, he arrived in Iraq and departed on 8 March 2005, completing 1 year, and 4 days of foreign service in support of OIF.
- On 4 December 2004, he sustained an injury to his face and both thighs due to a blast from a grenade fuse, which dropped on his lap. He was treated and subsequently returned to full duty.
- On 23 April 2005, he was honorably discharged for completion of required active service and transferred back to his unit. He completed 1 year, 6 months, and 23 days of active-duty service.
- On 2 June 2007, a physical and medical suitability determination was requested by [REDACTED] ARNG, because the applicant did not meet retention standards. A physical profile would follow this determination.
- On 11 July 2007, the applicant waived his MEB and PEB evaluations.
- On 23 July 2007, pursuant the results of a medical review board, he was found to be unfit for retention in the [REDACTED] ARNG due to post traumatic stress disorder (PTSD).
- On 1 September 2007, he was honorably discharged from the [REDACTED] ARNG after seven years of service, due to being medically unfit for retention.
- On 30 July 2015, the applicant was awarded the Purple Heart for wounds received as a result of enemy actions on 4 January 2005.

c. Review of Available Records: The Army Review Board Agency (ARBA) Behavioral Health Advisor reviewed the supporting documents contained in the applicant's file. The applicant is requesting his honorable discharge be changed to a permanent disability retirement or to be transferred into the Retired Reserves. He sustained injuries while serving in Iraq in support of Operation Iraqi Freedom (OIF), for which he has been awarded the Purple Heart. At the time of discharge, he was simply informed he was being discharged and was coerced into signing the MEB/PEB waiver. He did not have proper guidance nor knowledge to make an informed decision in regard to a medical retirement versus an honorable discharge. He requested a medical retirement from the [REDACTED] ARNG Adjutant General (AG), and despite his honorable service and awards for valor, his request was denied.

d. The electronic medical record available for review shows the applicant participated in a Polytrauma/Traumatic Brain Injury (TBI) evaluation on 7 August 2007 that diagnosed him with a TBI and indicates he was enrolled in behavioral health services for treatment of his PTSD. A memorandum for command, dated 23 July 2007, indicates the applicant was found unfit for retention in the [REDACTED] ARNG due to Post Traumatic Stress Disorder (PTSD) and states he waived his right to the MEB process. A Physical Profile,

dated 26 July 2007, assigned the applicant the PULHES "111114" and indicates "Soldier does not meet retention standards per AR 40-501 3-32c".

e. The VA's Joint Legacy Viewer (JLV) was reviewed and indicates the applicant is 100% service connected, including 70% for PTSD. The record further shows the applicant has participated in treatment for his symptoms of PTSD.

f. Based on the information available, it is the opinion of the Agency Behavioral Health Advisor that there is sufficient evidence to support a referral to the IDES process. The applicant is 100% service connected, including 70% for PTSD, and he was honorably discharged from military service due to being medically unfit for retention as a result of his PTSD. There is evidence the applicant waived his right to undergo a MEB/PEB evaluation. However, given the medical documentation indicating the applicant had a TBI and was also struggling with symptoms of PTSD, it is more likely than not his decision-making capacity was severely impacted when he opted to waive his right for a MEB/PEB. In addition, Paragraph 7-1 of AR 40-400, Patient Administration (8 July 2014), states, in part: "If the Soldier does not meet retention standards, an MEB is mandatory and will be initiated by the physical evaluation board liaison officer (PEBLO)." Of note there is no mention of component or duty status, thus this would apply to the applicant. In addition, Paragraph 7-5b (5) more directly addresses this case, stating that one of the situations requiring MEB consideration is "an RC member not on AD who requires evaluation because of a condition that may render him or her unfit for further duty." In addition, Paragraph 2-9c of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (8 February 2006), which would have been in effect when the applicant was discharged, identifies "The unit commander will – c. Refer a soldier to the servicing MTF for medical evaluation when the soldier is believed to be unable to perform the duties of his or her office, grade, rank, or rating." Overall, based on the documentation available for review, and in the interest of fairness and justice, the applicant warrants a referral to the IDES process.

g. Kurta Questions:

- (1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Not applicable.
- (2) Did the condition exist or experience occur during military service? Not applicable.
- (3) Does the condition or experience actually excuse or mitigate the discharge? Not applicable.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board majority found that Partial relief was warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered.
2. The Board minority voted to refer the applicant's records to the referral Disability Evaluation System for behavioral health and medical issues.
3. The Board Majority agreed with the opinion of the Medical Advisor, that a referral of his case for a physical condition to the Disability Evaluation System is not warranted, but that referral of his case for a behavioral health, specifically, PTSD, to the Disability Evaluation System is warranted by the evidence of record.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

BOARD DETERMINATION/RECOMMENDATION:

1. The Board concurs with the corrections addressed in Administrative Note(s) below and the Board determined that the evidence presented was sufficient to warrant a recommendation for partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by directing the applicant be entered into the Disability Evaluation System (DES) and a Medical Evaluation Board (MEB) convened to determine whether the applicant's condition(s), to include PTSD, met medical retention standards at the time of service separation.
 - a. In the event that a formal physical evaluation board (PEB) becomes necessary, the individual concerned will be issued invitational travel orders to prepare for and participate in consideration of their case by a formal PEB. All required reviews and approvals will be made subsequent to completion of the formal PEB.
 - b. Should a determination be made that the applicant should have been separated or retired under the DES, these proceedings will serve as the authority to void their administrative separation and to issue them the appropriate separation retroactive to their original separation date, with entitlement to all back pay and allowances and/or retired pay, less any entitlements already received
2. The Board further determined the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to any additional relief.

5/6/2025

X

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.

ADMINISTRATIVE NOTE(S):

A review of the applicant's records shows his date of birth should reflect as shown on his corrected birth certificate. As a result, correct his DD Forms 214 for the periods ending on 5 April 2000, and 23 April 2005 by amending item 5 (Date of Birth) to show: 14 February 1977.

REFERENCES:

1. Title 10 (Armed Forces), United States Code (USC), section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the Army Board for Correction of Military Records (ABCMR) to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.
2. Army Regulation 15-185 (ABCMR), currently in effect, prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR. The ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.
3. Title 10 (Armed Forces), United States Code (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 (DOD) Directive 1332.18 and Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation).
 - a. Soldiers are referred to the disability system when they no longer meet medical retention standards in accordance with Army Regulation 40-501 (Standards of Medical Fitness), chapter 3, as evidenced in a Medical Evaluation Board (MEB); when they receive a permanent medical profile rating of 3 or 4 in any factor and are referred by an MOS 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 the Informal Physical Evaluation Board (PEB) Proceedings. The purpose of

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

- c. The mere presence of a medical impairment does not in and of itself justify a finding of unfitness. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier may reasonably be expected to perform because of his or her office, grade, rank, or rating. Reasonable performance of the preponderance of duties will invariably result in a finding of fitness for continued duty. A Soldier is physically unfit when a medical impairment prevents reasonable performance of the duties required of the Soldier's office, grade, rank, or rating.
4. National Guard Regulation 600-200 (Enlisted Personnel Management) establishes standards, policies, and procedures for the management of the Army National Guard (ARNG) and the Army National Guard of the United States (ARNGUS) enlisted Soldiers. Separation/Discharge from State ARNG and/or Reserve of the Army. 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. When medical condition was incurred in line of duty, the procedures of Army Regulation 600-8-4 will apply.
5. Army Regulation 40-501 (Standards of Medical Fitness), provides information on medical fitness standards for induction, enlistment, appointment, retention, and related policies and procedures. Soldiers with conditions listed in chapter 3 who do not meet the required medical standards will be evaluated by an MEB and will be referred to a PEB as defined in Army Regulation 635-40 with the following caveats:
 - a. U. S. Army National Guard (ARNG) Soldiers not on active duty, whose medical condition was not incurred or aggravated during an active-duty period, will be processed as follows. National Guard Soldiers with nonduty related medical conditions who are pending separation for failing to meet the medical retention standards of chapter 3 are eligible to request referral to a PEB for a determination of fitness.

- b. Physicians who identify Soldiers with medical conditions listed in this chapter should initiate an MEB at the time of identification. Physicians should not defer initiating the MEB until the Soldier is being processed for non-disability retirement. Many of the conditions listed in this chapter (for example, arthritis in para 3-14b) fall below retention standards only if the condition has precluded or prevented successful performance of duty.
- c. A permanent profile may only be awarded or changed by the authority designated by Commanders of Army Military Treatment Facilities. If the profile is permanent, the profiling officer must assess if the Soldier meets the medical retention standards of this regulation, those Soldiers on active duty who do not meet the medical retention standards must be referred to an MEB. Permanent profiles may be amended at any time if clinically indicated and will automatically be reviewed at the time of a soldier's periodic examination. The Soldier's commander may also request a review of a permanent profile.
- d. A physical profile, as reflected on a DA Form 3349 (Physical Profile) or DD Form 2808, is derived using six body systems: "P" = physical capacity or stamina; "U" = upper extremities; "L" = lower extremities; "H" = hearing; "E" = eyes; and "S" = psychiatric (abbreviated as PULHES). Each body system has a numerical designation: 1 meaning a high level of fitness; 2 indicates some activity limitations are warranted, 3 reflects significant limitations, and 4 reflects one or more medical conditions of such a severity that performance of military duties must be drastically limited. Physical profile ratings can be either permanent or temporary.

6. Army Regulation 600-8-4 (Line of Duty (LOD) Policy, Procedures, and Investigations) prescribes policies and procedures for investigating the circumstances of disease, injury, or death of a Soldier providing standards and considerations used in determining LOD status.

- a. Formal LOD investigation is a detailed investigation that normally begins with DA Form 2173 (Statement of Medical Examination and Duty Status) completed by the medical treatment facility and annotated by the unit commander as requiring a formal LOD investigation. The appointing authority, on receipt of the DA Form 2173, appoints an investigating officer who completes the DD Form 261 (Report of Investigation LOD and Misconduct Status) and appends appropriate statements and other documentation to support the determination, which is submitted to the General Court Martial Convening Authority for approval.
- b. The worsening of a pre-existing medical condition over and above the natural progression of the condition as a direct result of military duty is considered an aggravated condition. Commanders must initiate and complete LOD investigations,

despite a presumption of Not In the Line of Duty, which can only be determined with a formal LOD investigation.

c. An injury, disease, or death is presumed to be in LOD unless refuted by substantial evidence contained in the investigation. LOD determinations must be supported by substantial evidence and by a greater weight of evidence than supports any different conclusion. The evidence contained in the investigation must establish a degree of certainty so that a reasonable person is convinced of the truth or falseness of a fact.

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

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

9. Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation), establishes the Army Physical Disability Evaluation System according to the provisions of Title 10, United States Code (USC), Chapter 61, (10 USC 61) and Department of Defense Directive (DODD) 1332.18. It sets forth policies, responsibilities, and procedures that apply in determining whether a Soldier is unfit because of physical disability to reasonably perform the duties of his or her office, grade, rank, or rating. If a Soldier is found unfit because of physical disability, this regulation provides for disposition of the Soldier according to applicable laws and regulations. The objectives of this regulation are to maintain an effective and fit military organization with maximum use of available manpower, provide benefits for eligible Soldiers whose military service is terminated because of a service-connected disability, provide prompt disability processing while ensuring that the rights and interests of the Government and the

Soldier are protected.

a. Soldiers are referred to the disability system when they no longer meet medical retention standards in accordance with Army Regulation 40-501 (Standards of Medical Fitness), chapter 3, as evidenced in 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 or directed by medical providers.

b. The disability evaluation assessment process involves two distinct stages: the MEB and 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 whose medical condition did not exist prior to service who are determined to be unfit for duty due to disability are either separated from the military or are permanently retired, depending on the severity of the disability. Individuals who are "separated" receive a one-time severance payment, while veterans who retire based upon disability receive monthly military retired pay and have access to all other benefits afforded to military retirees.

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

d. Physical disability evaluation will include a determination and supporting documentation on whether the Soldiers disability compensation is excluded from Federal gross income under the provisions of Title 26, United States Code (USC), section 104. The entitlement to this exclusion is based on the Soldier having a certain status on 24 September 1975 or being retired or separated for a disability determined to

be combat related as set forth in this paragraph. The determination will be recorded on the record of proceedings of the Soldier's adjudication.

10. Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation) prescribes Army policy and responsibilities for the disability evaluation and disposition of Soldiers who may be unfit to perform their military duties due to physical disability. As such, this regulation implements the requirements of Title 10 (Armed Forces), United States Code, Chapter 61; DODI 1332.18, DODM 1332.18 (Volumes 1 through 3), and DOD policy memorandums to these issuances; and Army Directive 2012-22 as modified by DODI 1332.18.

a. Chapter 4 provides, Public Law 110-181 defines the term, physical DES, in part, as a system or process of the DOD for evaluating the nature and extent of disabilities affecting members of the Armed Forces that is operated by the Secretaries of the military departments and is comprised of MEBs, PEBs, counseling of Soldiers, and mechanisms for the final disposition of disability evaluations by appropriate personnel.

b. A Soldier may not be discharged or released from active duty because of a disability until they have made a claim for compensation, pension, or hospitalization with the Department of Veterans Affairs (VA) or have signed a statement that their right to make such a claim has been explained or have refused to sign such a statement.

c. The objectives of the Disability Evaluation System (DES) are to:

(1) Maintain an effective and fit military organization with maximum use of available manpower.

(2) Provide benefits for eligible Soldiers whose military Service is terminated because of a disability incurred in the line of duty (LOD).

(3) Provide prompt disability processing while ensuring that the rights and interests of the Government and the Soldier are protected.

d. The DES begins for a Soldier when the Soldier is issued a permanent profile approved in accordance with the provisions of Army Regulation 40-501 and the profile contains a numerical designator of P3/P4 in any of the serial profile factors for a condition that appears not to meet medical retention standards in accordance with Army Regulation 40-501 (see glossary). Within (but not later than) one year of diagnosis, the Soldier must be assigned a P3/P4 profile to refer the Soldier to the DES. Any DA Form 3349 generated for a USAR Soldier in a drilling Troop Program Unit or AGR status must be validated by the U.S. Army Reserve Command's Medical Management Center before their referral into the DES.

e. The DES concludes for Soldiers as set forth below:

(1) For Soldiers determined by the MEB to meet medical retention standards and MAR2 did not refer the Soldier to the DES, the DES concludes the date the MEB returned the Soldier to duty. (If referral to MEB resulted from MAR2 evaluation, referral to the PEB may be mandatory).

(2) For Soldiers referred to the PEB and determined fit, the DES concludes as of the date of USAPDA's memorandum approving the finding of fit.

(3) For Soldiers referred to the DES under a Legacy Disability Evaluation System (LDES) process and determined unfit, the DES concludes on the date of the Soldier's separation or retirement for disability.

(4) For Soldiers referred to the DES under the Integrated Disability Evaluation System (IDES) process and determined unfit, the DES concludes on the date of the Soldier's notification of the VA's benefits decision. However, the Soldier's military status as a member of the Regular Army (RA) or Reserve Component (RC), as applicable, ends on the date of the Soldier's disability separation or retirement.

f. A Soldier will be considered unfit when the preponderance of evidence establishes that the Soldier, due to disability, is unable to reasonably perform the duties of their office, grade, rank, or rating (hereafter call duties) to include duties during a remaining period of Reserve obligation.

g. Any medical condition incurred or aggravated during one period of active Service or authorized training in any of the Armed Forces that recurs, is aggravated, or otherwise causes the Soldier to be unfit, should be considered incurred in the LOD, provided the origin of such impairment or its current state is not due to the Soldier's misconduct or willful negligence, or progressed to unfitness as the result of intervening events when the Soldier was not in a duty status.

h. Combat related injuries are those injuries and diseases attributable to the special dangers associated with armed conflict or the preparation or training for armed conflict. A physical disability will be considered combat related if it causes the Soldier to be unfit or contributes to unfitness and was incurred under any of the following circumstances:

(1) Armed conflict. A SM may have incurred a medical impairment during a period of war, in an area of armed conflict, or while participating in combat operations is not sufficient to support a finding that the disability resulted from armed conflict. There must be a definite causal relationship between the armed conflict and the resulting unfitting disability. Armed conflict includes a war, expedition, occupation of an area or territory, battle, skirmish, raid, invasion, rebellion, insurrection, guerrilla action, riot, or any other action in which Soldiers are engaged with a hostile or belligerent nation, faction, force, or terrorists. Armed conflict may also include such situations as incidents

involving a Soldier while interned as a prisoner-of-war or while detained against their will in custody of a hostile or belligerent force or while escaping or attempting to escape from such confinement, prisoner of war, or detained status.

(2) While engaged in hazardous service. Such service includes, but is not limited to, aerial flight duty, parachute duty, demolition duty, experimental stress duty, and diving duty.

(3) Under conditions simulating war. In general, this covers disabilities resulting from military training, such as war games, practice alerts, tactical exercises, airborne operations, leadership reaction courses, grenade and live fire weapons practice, bayonet training, hand-to-hand combat training (combatives training), rappelling, and negotiation of combat confidence and obstacle courses. It does not include physical training activities, such as calisthenics and jogging or formation running and supervised sports.

(4) Caused by an instrumentality of war. Occurrence during a period of war is not required. A favorable determination is made if the disability was incurred during any period of service as a result of such diverse causes as wounds caused by a military weapon, accidents involving a military combat vehicle, injury, or sickness caused by fumes, gases, or explosion of military ordnance, vehicles, or material. However, there must be a direct causal relationship between the instrumentality of war and the disability. For example, if a Soldier is on a field exercise and is engaged in a sporting activity and falls and strikes an armored vehicle, the injury will not be considered to result from the instrumentality of war (the armored vehicle), because it was the sporting activity that was the cause of the injury, not the vehicle. On the other hand, if the individual was engaged in the same sporting activity and the armored vehicle struck the Soldier, the injury would be considered the result of an instrumentality of war (the armored vehicle).

11. Title 10 (Armed Forces), United States Code (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%. Title 10, United States Code (USC) (Armed Forces), 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%.

12. Title 10 (Armed Forces), United States Code (USC), section 1556 (Ex Parte Communications Prohibited) 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 applicant's (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//