

IN THE CASE OF: [REDACTED]

BOARD DATE: 6 February 2025

DOCKET NUMBER: AR20240009883

APPLICANT REQUESTS: through Counsel, reconsideration of his prior request for physical disability retirement in lieu of honorable administrative discharge due to a condition, not a disability.

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

- U.S. Court of Federal Claims Order, 15 May 2024
- U.S. Court of Federal Claims Order, 5 June 2024
- U.S. Court of Federal Claims Order, 6 September 2024
- Rules of Court of Federal Claim excerpt
- U.S. Court of Federal Claims letter to the Director, Army Board for Correction of Military Records (ABCMR), 10 September 2024
- DD Form 149 (Application for Correction of Military Record)
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- Exhibits List
- Counsel's Brief
- applicant's self-authored statement
- partial DD Form 2807-2 (Medical Prescreen), 22 May 2002
- Office of Personnel Management Security Clearance Application, 22 May 2002
- DD Form 2808 (Report of Medical Examination), 23 May 2002
- DD Form 2795 (Pre-Deployment Health Assessment), 30 May 2003
- DD Form 2795, 27 June 2003
- Army Commendation Medal Certificate, 30 November 2003
- DA Form 638 (Recommendation for Award), 17 December 2003
- Army Commendation Medal Certificate, 22 December 2003
- DD Form 2796 (Post-Deployment Health Assessment), 3 April 2004
- Certificate of Achievement, 31 August 2004
- Army Achievement Medal Certificate, 1 September 2004
- DA Form 638, 7 September 2004
- Pioneer Services Raytheon Award Nomination, 8 March 2005
- 4th Brigade, 4th Infantry Division Permanent Orders 224-02, 12 August 2005
- Headquarters, 4th Infantry Division (Mechanized) Permanent Orders 269-04, 26 September 2005

- Fort Hood Medical Department Activity (FH MDA) Form 975 (Carl R. Darnall Army Community Hospital (DACH) Emergency Medical Services (EMS) Patient Report), 11 October 2005
- DA Form 4700 (Intake Questionnaire – Fort Hood Mental Health), 13 October 2005
- Medical Command (MEDCOM) Form 691-R (Medical Record – Patient Release/discharge Instructions), 13 October 2005
- DA Form 4856 (Developmental Counseling Form), 13 October 2005
- Standard Form 600 (Chronological Record of Medical Care) 13, 20, 25 October 2005
- Standard Form 600, 25 October 2005
- MEDCOM Form 699-R (Mental Status Evaluation), 26 October 2005
- DA Form 268 (Report to Suspend Favorable Personnel Actions (FLAG), 27 October 2005
- Standard Form 504 (Medical Record – History – Part 1), undated
- Standard Form 505 (Medical Record – History – Parts 2 and 3), undated
- Headquarters and Headquarters Company 4th Brigade Memorandum for Record, 27 October 2005
- DD Form 2807-1 (Report of Medical History), 21 November 2005
- DD Form 2808, 29 November 2005
- Standard Form 600, 6 December 2005
- DD Form 2569 (Third Party Collection Program – Record of Other Health Insurance), 12 December 2005
- 4th Brigade Combat Team (Rear)(Provisional) memorandum, 13 December 2005
- MEDCOM Form 699-R, 27 December 2005
- DA Form 3822-R (Report of Mental Status Evaluation), 3 January 2006
- partial 4th Brigade Combat Team (Rear)(Provisional) memorandum, 4 January 2006
- 4th Infantry Division (Rear)(Provisional) memorandum, 5 January 2006
- DD Form 214 (Certificate of Release or Discharge from Active Duty) covering the period ending 27 January 2006
- Department of Veterans Affairs (VA) Compensation and Pension (C&P) Exam Report for Initial Post-Traumatic Stress Disorder (PTSD) Exam, 3 July 2006
- VA C&P Exam Report for General Medical Examination, 7 July 2006
- VA Rating Decision, 13 October 2006
- VA Rating Decision, 27 December 2007
- VA Rating Decision, 7 January 2008
- VA Rating Decision, 19 June 2008
- VA Rating Decision, 30 July 2014
- VA Rating Decision, 22 January 2019

FACTS:

1. A U.S. Court of Federal Claims Order, 5 June 2024, shows on 15 May 2024, the Court denied the Government's Motion to Dismiss. On 3 June 2024, the Government filed a Consent Motion for Voluntary Remand. The Court granted the Government's Consent Motion for Voluntary Remand in part. The Court stayed all proceedings in this case until further order from the Court. The applicant shall submit any additional evidence, comments, and argument to the ABCMR on or before 6 September 2024. The applicant shall file a status report with the Court on or before 6 September 2024, confirming his submission of all additional evidence, comments, and argument to the ABCMR. The Court will issue a remand order upon receiving the applicant's 6 September 2024 status report.

2. A U.S. Court of Federal Claims Order, 6 September 2024, shows the Court adopts the parties' proposed procedure for remand outlined in the Government's Motion and remands the case to the ABCMR. The ABCMR shall reconsider in full all claims asserted by the applicant based on the existing record and any further evidence, comments, and argument he may submit during the remand. The remand period shall terminate on 5 March 2025, and all proceedings remain stayed until that date. The Government shall file a joint status report every 90 days, apprising the Court of the status of the remand proceedings. Within 30 days of the ABCMR's decision, the parties shall file a joint status report advising the Court whether the remand affords a satisfactory basis for disposition of the case or if further proceedings are required.

3. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the ABCMR in Docket Number AR20210005659 on 10 November 2021.

4. Counsel states:

a. The applicant was a physically and mentally fit young man when he enlisted in the U.S. Army on 18 September 2002, where he served with bravery and honor. When he left the Army 4 years later, his combat experience had left him with not only medals, but also serious, unfitting mental disorders, including PTSD, major depressive disorder (MDD), and a traumatic brain injury (TBI), all of which he continues to struggle with more than 2 decades later. Despite his brave and honorable service to this country and his serious, ongoing health problems stemming from his combat experience, the applicant is not the recipient of a military disability retirement.

b. The applicant served in the Army effectively and proudly until 27 January 2006, at which time the Army discharged him under Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), paragraph 5-17, for an alleged "Condition Not A Disability." Prior to the Army commencing his separation, he had sought treatment for

what was clearly PTSD, stemming from his combat experience in Iraq. Instead of receiving treatment, the applicant was administratively separated from the Army on the basis of an alleged adjustment disorder. This basis for separation was in conflict with his medical records, which demonstrate clearly that he suffered from service-related PTSD, MDD, and TBI, and was otherwise in violation of numerous Army and Department of Defense regulations. The applicant should have been medically retired instead because of his compensable and unfitting disabilities of PTSD, MDD, and, TBI, under the provisions of Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation) and section 1201 of Title 10, Chapter 61 of the U.S. Code. The ABCMR should correct this injustice.

c. This memorandum presents the facts of the applicant's case and demonstrates how the Army failed to follow its own regulations in discharging him. The Army's departure from its regulatory mandates resulted in the applicant's improper discharge under Army Regulation 635-200, paragraph 5-17. This memorandum shows that: (i) the applicant suffered from unfitting PTSD, MDD, and TBI as a result of his military service; (ii) He did not have an adjustment or personality disorder before, during, or after his time in the Army; (iii) had he been evaluated properly by the Army's Disability Evaluation System (DES) (as he should have been), the Army would have determined that his PTSD, MDD, and TBI rendered him unfit for continued service; and (iv) had he been discharged as unfit due to PTSD, MDD, and TBI, he would have received a disability rating of at least thirty percent (30 percent), thereby entitling him to a military disability retirement.

d. Section 1552 of Title 10, Chapter 79 of the U.S. Code authorizes the Secretary of the Army to correct errors or injustices in military records. The Secretary of the Army may make such corrections through a board of civilians from the executive branch of the Army. The applicant requests that the Board correct his records by changing the narrative reason for his separation from an incorrect administrative separation under Army Regulation 635-200, paragraph 5-17 to a medical retirement under section 1201 of Title 10, Chapter 61 of the U.S. Code and Army Regulation 635-40 based on his physical disabilities of PTSD, MDD, and TBI.

e. The applicant first became aware that the Army erred in administratively discharging him in July 2020, after the National Veterans Legal Services Program advised him to request his medical records and he reviewed those records with counsel. After discovering that he had unfitting in-service diagnoses of PTSD and MDD, the applicant applied to the Board in January 2021 for correction of his military records (Docket Number AR20210005659). Specifically, he requested that his medical records be corrected to change the Separation Authority, Separation Code, and Narrative Reason for Separation from the incorrect administrative separation under Army Regulation 635-200, paragraph 5-17 for a Condition, Not a Disability to reflect a medical retirement under 10 U.S. Code section 1201 and Army Regulation 635-40 for being unfit

because of a physical disability of PTSD and MDD. The Board denied his application in September 2022.

f. Following the Board's denial of his application, the applicant filed suit against the United States, acting by and through the Army, in the Court of Federal Claims (the Court) seeking correction of his medical records and a military disability retirement. The United States sought unsuccessfully to have the applicant's suit dismissed on the basis of the statute of limitations. The Court denied the United States' motion to dismiss the applicant's claim in May 2024, and ordered that he submit additional evidence, comments, and arguments in support of his claim to the Board on or before 6 September 2024. Following his submission of such additional evidence, comments, and arguments to the Board, the applicant is to file a status report with the Court. The applicant and the United States expect that, following the filing of such status report, the Court will issue a further order remanding his claim to the Board.

g. The applicant joined the Army out of a sense of service and duty to his new county. The applicant, who is originally from Ecuador, emigrated to the United States as a teenager. He enlisted in the Army on 18 September 2002, following his graduation from a vocational high school. He had no mental health or emotional infirmities prior to his enlistment. He was an avid soccer player and played on amateur championship teams in Ecuador before coming to the United States. The applicant sought opportunities in the Army to challenge himself, learn new skills, and earn money so he could continue his education.

h. After attending Basic Combat Training (BCT) and Advanced Individual Training (AIT) at Fort Knox, KY, the applicant joined 1st Battalion, 66th Armor Regiment, 1st Brigade, 4th Infantry Division at Fort Hood, TX. BCT was difficult for him, given his limited English proficiency. He worked hard to improve his English speaking and comprehension, including by completing language classes at Lackland Airforce Base.

i. The applicant became qualified to serve as a Tanker on an M1A1 Abrams tank. His duties included driving armored equipment (including tanks) and loading and firing weapons to destroy enemy positions. He deployed to the Middle East between 2003 and 2004, and served in Iraq during this time in support of Operation Iraqi Freedom. Notably, the applicant had no mental health issues reported or noted as part of his pre-deployment health assessment conducted on 27 June 2003 (see the pre-deployment health assessment performed prior to his combat experience in Iraq).

j. The applicant's deployment to Iraq was physically and mentally stressful, and ultimately traumatizing. He participated in numerous patrols and missions as part of the 1-66th "Iron Knights" Armor Battalion, often taking enemy fire, including mortar rounds. He sustained physical injuries during the course of his deployment, including an injured

knee after falling from a tank and a head injury sustained when jumping into a tank to take cover from enemy fire.

k. In October 2003, while stationed at a forward operating base (FOB) just north of Samarra, Iraq, a militant group loyal to Saddam Hussein attacked the base with mortar fire. Specialist (SPC) [REDACTED], the applicant's friend, was killed during the attack. The FOB became known as camp [REDACTED], in honor of SPC [REDACTED] and SPC [REDACTED] who was killed during a separate mortar attack.

l. On two separate occasions in early and mid-November 2003, the applicant had first-hand experience with roadside bomb explosions. The aftermath of these explosions was gruesome and terrifying. Following the first incident, which involved a bomb detonating while being loaded into a vehicle by militants, the applicant saw a half-destroyed car surrounded by body parts. During the second incident, an exploding roadside bomb disabled one of the tanks in his platoon, stranding the platoon for several fraught hours until reinforcements could arrive. Soldiers in the applicant's platoon suffered a number of impacts from the explosion, including dizziness, shortness of breath, and headaches. His platoon lieutenant received a Purple Heart due to his injuries.

m. In late November 2003, the applicant's tank company took part in an operation in Samarra, which stands on the east bank of Tigris River about 80 miles north of Baghdad. The operation involved supporting forces delivering new paper money (Iraqi Dinars) to local banks. The Iraqi Dinars had been redesigned to remove the image of Saddam Hussein. Although U.S. forces did not expect to encounter enemy resistance during the operation, an enemy contingent attempted an ambush as U.S. forces entered the city. A roadside bomb destroyed a Humvee traveling in front of the applicant's tank. The pressure wave from the explosion caused him to fall into the tank. A battle ensued, and the applicant's tank came under heavy fire, including from rocket-propelled grenades. During the battle, the applicant loaded the main gun of his tank. He also fired the tank's M240 machine gun at numerous enemy targets, including a militant who was preparing to fire a rocket-propelled grenade at his tank.

n. The applicant was awarded both an Army Commendation Medal and Combat Action Badge for his actions during this operation. As justification for the awards, he was described as playing a key role in helping to repel the enemy attack through his skillful use of the M240 machine gun and quick loading of the tank's main gun, all while under enemy fire, to defeat multiple enemy elements.

o. Although the applicant was not wounded during this battle, he did not emerge from his combat experience unscathed. He recalls seeing numerous horrific sights, including dead bodies, a boy's body burning, severed body parts, and destroyed buildings and vehicles. As detailed in his Post-Deployment Health Assessment dated 4

March 2004 (attached hereto as Exhibit 8), the applicant reported that he had discharged his weapon in direct combat; that he saw enemies and civilians wounded, killed, or dead; that he believed he would die; and that, as a result of his combat experiences, he sometimes felt down, depressed, and hopeless.

p. The applicant's combat experience continued to haunt him following this return from deployment. In October 2004, while driving from San Antonio to Fort Hood, he experienced a combat-related flashback. He thought he saw something burning in front of him, causing him to lose control of his car. His car struck a concrete barrier, and was then struck by another vehicle. The applicant's car was totaled, and he suffered a head injury. His car insurance payment from the crash was not sufficient to enable him to pay off his car loan, leaving him in debt and with no car.

q. The applicant's mental health also continued to decline dramatically. On 11 October 2005, he was rushed to Darnall Army Hospital following an overdose of Motrin and Naproxen and a "stated intent to hurt himself," as he told a fellow Soldier that he was planning to end his life. He was admitted and, following a medical evaluation, diagnosed with an adjustment disorder with mixed disturbance of emotions and conduct and occupational stress. Following his discharge from the hospital on 13 October 2005, he was counseled by his command, and warned that he was at risk of being separated from the Army on multiple grounds, including for a personality disorder, if his "behavior" continued (presumably meaning the applicant missing work as a result of his hospitalization and/or overdosing on medication). That same day, the applicant sought counseling at Fort Hood Mental Health, noting on his intake questionnaire that he had tried to hurt himself and had experienced feelings of self-harm for 2 weeks.

r. The applicant again sought help on 25 October 2005, due to ongoing mental health-related issues and difficulties with his command. He was diagnosed with chronic PTSD. The next day, he underwent a mental status evaluation because he was being considered for discharge. The examiner found that he met retention requirements and deemed him fit for full duty, but concluded that he was non-deployable. The examiner recommended him for discharge under Army Regulation 635-200, paragraph 5-17 "[d]ue to his continuous problems with adjustment in his current position as well as his ambivalence for military retention and rehabilitation..." During a follow up medical appointment on 27 October 2005, the applicant reported experiencing homicidal ideations toward his squad leader and experiencing additional stressors, including occupational difficulties, a need to support his mother financially, and recently learning that his first cousin, who lived in Ecuador, had been killed. He was diagnosed with MDD, moderate. That same day, his commanding officer requested that the applicant be administered a pre-separation physical and that he be assigned to an action, non-commissioned officer (NCO), presumably to ensure complete and strict compliance with separation procedures. But, because the applicant's brigade was preparing to deploy to

Iraq in support of Operating Enduring Freedom and needed to fill his position prior to deployment, his separation was rushed.

s. The applicant underwent a medical examination in preparation for his separation on 29 November 2005. As part of the examination, he reported that he had attempted suicide, was taking Prozac, and experienced numerous mental health symptoms, including frequent trouble sleeping, depression, and excess worry. Although the medical examination report states that the applicant's psychiatric profile was not evaluated as part of the medical examination, the examiner determined that his psychiatric profile rating was a 3, which indicated a psychiatric condition that may require significant limitation on his activities. The report further concluded that he was not qualified for service.

t. On 13 December 2005, the applicant was notified that his commanding officer was initiating action to administratively separate him from the Army because he had been diagnosed with an adjustment disorder. Yet, the applicant had been diagnosed with various mental health conditions while in service, including PTSD and MDD, which should have triggered his referral to the DES. Further complicating the rationale for his discharge, he had received conflicting diagnoses of adjustment disorder (a condition that arises in response to a specific stressor occurring within 3 months of symptom onset, which would have postdated his enlistment) and personality disorder (which would have predated his enlistment). In a follow up mental health evaluations conducted on 27 December 2005, and 3 January 2006, the examiners determined that the applicant met the criteria for separation under Army Regulation 635-200, paragraph 5-17 for adjustment disorder and depression.

u. On 4 January 2006, the applicant's commanding officer recommended that he be separated with an honorable discharge under Army Regulation 635-200, paragraph 5-17 because he had been diagnosed with an adjustment disorder. In making this recommendation, his commanding officer noted that, while the applicant had received counseling on 11 October 2005, the Army had made no rehabilitation attempts. The recommended separation was approved on 5 January 2006, following a determination that any further rehabilitation efforts would be futile and would not be in the best interests of either the applicant or the Army.

v. In connection with a claim to the VA for service-connected disability benefits, the applicant underwent a C&P Exam on 3 July 2006. He was diagnosed with PTSD and MDD. During a follow up C&P Exam on 7 July 2006, the applicant stated that he began experiencing mental health symptoms while deployed to Iraq, and that those symptoms continued following his return from deployment. Those symptoms included having flashbacks, hearing voices, anxiousness, depression, and a suicide attempt.

w. On 13 October 2006, the VA granted the applicant service-connected disability benefits for PTSD with MDD, rated at a 30 percent disability rating, effective as of 28 January 2006. On 27 December 2007, the VA revised his disability rating from 30 percent to 50 percent, effective 17 October 2007. On 7 January 2008, the VA again revised his disability rating from 50 percent to 70 percent, effective as of 1 August 2006, and granted him individual unemployability benefits (effective as of 1 August 2006), finding that his PTSD, MDD, and other conditions precluded him from obtaining or retaining substantially gainful employment. On 30 July 2014, the VA revised his disability rating stemming from PTSD with MDD from 70 percent to 100 percent, effective as of 5 June 2014. On 22 January 2019, the VA determined that the applicant's 100 percent disability rating included TBI.

x. The applicant requests that his records be corrected to change the Separation Authority, Separation Code, and Narrative Reason for Separation from the incorrect administrative separation under Army Regulation 635-200, paragraph 5-17 for a Condition, Not a Disability to reflect a medical retirement under Title 10 U.S. Code, section 1201 and Army Regulation 635-40 for being unfit because of his disabilities of PTSD, MDD, and TBI, effective as of the date of his discharge.

y. The Army erred in administratively separating the applicant for a "Condition, Not a Disability," given his unfitting PTSD, MDD, and TBI. The Army instead should have processed him through the DES and granted him a medical retirement. As a result of this error, the Army denied him a meaningful evaluation of his correct discharge status and eligibility for future benefits.

z. The DES, established under Chapter 61 of Title 10 of the U.S. Code, authorizes the Secretaries within the Department of Defense, including the Secretary of the Army, to separate a member of the armed forces when it is determined that such member is "unfit" to perform the duties of his or her office, grade, rank, or rating due to physical or mental disability. Pursuant to this statutory authority, the Department of Defense issued DoDI 1332.38 (DES), which created the DES process and sets forth standards and procedures for conducting physical and mental disability evaluation claims.

aa. A service member's disability must be compensable (e.g., incurred or aggravated in the line of duty) in order for the service member to be eligible for DES processing. Unsuiting "non-disability mental conditions," which are non-compensable, include disorders manifesting "disturbances of perception, thinking, emotional control, or behavior" that are not incurred or aggravated in the line of duty. While PTSD, MDD, and TBI are considered compensable conditions when incurred or aggravated in the line of duty, adjustment disorders and personality disorders are viewed as non-compensable conditions. Where a non-compensable condition requires discharge from the military, it may be referred to as an "unsuiting" diagnosis or condition. By contrast, compensable conditions that result in discharge are referred to as "unfitting."

bb. Prior to separating a Soldier administratively for any condition not constituting a disability that “potentially interfere[s] with assignment or performance of a duty” (including those conditions that manifest “disturbances of perceptions, thinking, emotional control, or behavior”) pursuant to Army Regulation 635-200, paragraph 5-17, the Army must satisfy certain requirements. The relevant requirements set out in the version of Army 635-200, paragraph 5-17 in effect at the time of Mr. Benitez’s separation from the Army include the following:

(1) the recommendation for separation must be supported by medical and/or mental status evaluation confirming the existence of the physical or mental condition that is basis for separation;

(2) the Soldier must be formally counseled concerning deficiencies in performance;

(3) the Soldier must be given ample opportunity to overcome such deficiencies; and

(4) the Soldier must be properly notified of the impending separation using the proper procedure.

cc. The Army erred by relying upon Army Regulation 635-200 paragraph 5-17 as the discharge authority for the applicant, and compounded this error by applying the requirements of paragraph 5-17 incorrectly. The Army’s reliance on a diagnosis of “adjustment disorder” as the basis on which to initiate separation proceedings under Army Regulation 635-200, paragraph 5-17, was error. The applicant’s medical records show clearly that he was suffering from unfitting chronic PTSD and MDD, as well as unfitting TBI, at and before the time of his discharge.

dd. Under the governing regulations at the time of the applicant’s discharge, the Army was required to follow the Diagnostic and Statistical Manual of Mental Disorders, 4th Edition (DSM-4). The DSM-4 provides that an adjustment disorder can only be diagnosed properly when the resulting mental health symptoms: (i) occur within three months of onset of the underlying stressor; (ii) generally are in excess of what would be expected from exposure to the underlying stressor; and (iii) do not persist for more than six months after resolution of the underlying stressor or the consequences of the underlying stressor. Common stressors include marriage, divorce or separation, family crisis, illness, birth of a child, financial problems, and job loss. The DSM-4 further provides that the stress-related disturbance cannot meet the criteria for another specific so called AXIS I disorder (such as PTSD or MDD) or be an exacerbation of a preexisting AXIS I disorder. Also relevant is the fact that the DSM-4 provides that an

adjustment disorder cannot be based on the same stressor underlying a PTSD diagnosis.

ee. The Army, whether diagnosing PTSD, MDD, TBI, or adjustment disorder, was required by regulation to follow the DSM-4. In making a diagnosis, the Army was required by regulation to make “every effort...to distinguish symptoms and impairment resulting from these disorders from impairment based on other psychiatric conditions.” Moreover, AXIS I and II diagnoses, such as PTSD and MDD, were required to “be assessed as to the Impairment for Military Duty as well as the Impairment for Social and Industrial functioning.”

ff. The applicant’s medical records show that his condition did not meet the definition of an adjustment disorder as described in the DSM-4, which the Army was required to follow pursuant to the Army’s own regulations. His condition, which remains serious today, was even at the time of discharge obviously not temporary, as his symptoms persisted long past the 6-month timeframe described in the DSM-4. He first reported being depressed in March 2004 as a result of his combat experience in Iraq. His symptoms continued for the next several months, culminating in a suicide attempt in October 2005, nearly 2 years following his combat experience and nearly a year and half following his first report of symptoms. The medical evaluation containing the adjustment disorder diagnosis also did not follow other requirements of the DSM-IV. For example, it did not identify an underlying stressor as a purported alternative to the applicant’s reported traumatic combat experiences. An adjustment disorder is defined by the presence of symptoms which are out of proportion to a common life stressor, such as relationship and family problems. The applicant’s symptoms were very much in proportion to the horrific combat traumas he experienced in Iraq and thus properly diagnosed as PTSD. Worse, the diagnosis made no reference to his self-reporting that he felt depressed and hopeless following his combat experience, apparently ignoring these relevant self-reports. Moreover, as part of assessments in late October 2005 in follow-up to his suicide attempt, the applicant was diagnosed with chronic PTSD and MDD, conflicting AXIS I diagnoses which fully account for the symptoms and impairment that he was experiencing.

gg. The Army committed a clear error in basing his separation on an adjustment disorder diagnosis, a flawed diagnosis based on the DSM-4, given that the psychiatric symptoms that culminated in his suicide attempt had not abated within 6 months of his return from Iraq, while ignoring his AXIS I diagnoses of chronic PTSD and MDD and the impact those conditions were having on his fitness for continued service. Following evaluations by the VA between 2006 and 2019, the VA determined that the applicant’s PTSD, MDD, and TBI precluded him from obtaining or retaining substantially gainful employment and assigned him a disability rating of 100 percent.

hh. The Army further erred in its handling of the applicant's separation because the Army failed to follow the procedures set forth in Army Regulation 635-200, paragraph 5-17. As shown in the relevant excerpt of paragraph 5-17 summarized above, the Army was required to afford the applicant ample opportunity to overcome the alleged deficiency prior to his separation. There is no evidence in his records to support the notion that the Army provided him with any such opportunities. Had the Army provided such opportunities, the Army would have recognized that its diagnosis of an adjustment disorder was wrong.

ii. The applicant was notified by his commanding officer on 13 December 2005, that he was initiating action to separate him on the basis of "other designated physical or mental conditions" because he had been diagnosed with an adjustment disorder. The Army approved the applicant's separation on 5 January 2006, less than 1 month later. Although the records setting forth the recommendation for separation by the applicant's commanding officer state that he had received counseling, those records also state that the Army had made no rehabilitation attempts. The Army's failure to make rehabilitation attempts runs counter to the requirement in Army Regulation 635-200, paragraph 5-17 that a Soldier be given "ample opportunity" to correct a deficiency prior to separation.

jj. Even without this admission, it would be unreasonable to conclude that the applicant was given "ample opportunity" to overcome the alleged deficiency, as required by paragraph 5-17, given that his separation was processed and approved less than 1 month after his commanding officer gave notice of the Army's intent to initiate a separation action. Although Army regulations do not describe what constitutes "ample opportunity" for purposes of applying paragraph 5-17, courts have clarified that, for separations based on a diagnosis of an adjustment disorder, a Soldier must be given up to 6 months to overcome any deficiencies prior to his or her separation on the basis of an adjustment disorder.

kk. This 6-month period is crucial in the applicant's case because, as explained above, an adjustment disorder is considered to be a temporary condition for which symptoms cease within 6 months after termination of the underlying stressor(s). The applicant's medical records make clear that, had the Army proceeded with rehabilitation attempts for at least 6 months, the Army would have recognized that his symptoms were not resolving, thereby demonstrating that the initial diagnosis of an adjustment disorder likely was wrong and could not serve as a proper basis on which to discharge him.

ll. Instead of pursuing separation pursuant to Army Regulation 635-200, paragraph 5-17, the Army should have processed the applicant's discharge through the DES because he was suffering from unfitting PTSD and MDD, not an adjustment disorder. Had the Army done so, the record demonstrates that he would have fallen below Army retention standards due to his unfitting PTSD and MDD.

mm. A service member is entitled to a medical retirement (including retirement disability benefits and TRICARE health insurance) if he or she sustains one or more service-connected disabilities, with a combined disability rating of 30 percent or greater, that directly prevents the Soldier from further military service. Once a Soldier is referred to the DES, the Soldier's disability is evaluated by both a Medical Evaluation Board (MEB) and a Physical Evaluation Board (PEB). First, the MEB evaluates whether the Soldier has one or more medical conditions which prevents the Soldier from satisfying the medical retention standards set forth in Army Regulation 40-501 (Standards of Medical Fitness). If the MEB determines that a Soldier has one or more such medical conditions, the Soldier's case is referred to a PEB.

nn. At the time of the applicant's discharge, the Army's regulations (then in effect) required medical examinations for service members being administratively processed for separation under Army Regulation 635- 200, paragraph 5-17. In the context of such medical examinations, service members who did "not meet the medical fitness standards for retention," such of those with unfitting diagnoses of PTSD or MDD, were required to be referred into the DES. Pursuant to Army medical retention standards, mood disorders (such as MDD) anxiety disorders (such as PTSD), and physical disorders (such as TBI) cause a Soldier to fall below medical retention standards if the "persistence or recurrence of symptoms result[s] in interference with effective military performance."

oo. As detailed above, the applicant's mental health deteriorated dramatically following his return from Iraq and throughout 2004 and 2005. He attempted suicide and exhibited other mental-health related issues, including difficulties with his command and other interpersonal issues, ongoing homicidal and suicidal ideations, anxiety, and depression, and was ultimately diagnosed as suffering from both PTSD and MDD.⁹⁰ In light of these diagnoses of unfitting conditions, the Army should have referred him into the DES pursuant to the Army's own regulations.

pp. Ultimately, the Army concluded that the applicant was not fit for service due to the severity of his ongoing symptoms and the impact of his condition on his ability to perform his military duties, even though the Army incorrectly characterized such unfitness as unsuitability. Given the Army's own conclusion, it should have referred him to the DES. If the Army had done so, an MEB would have determined that the applicant's PTSD and MDD would cause him to fall below the medical retention standards set forth in Army Regulation 40-501.

qq. Following a determination by an MEB that a Soldier has a medical condition that prevents him or her from satisfying medical retention standards, a PEB must then determine whether such medical condition makes a Soldier unfit for continued military service. A Soldier is unfit for continued military service if the relevant medical condition interferes with the performance of his or her duties, appropriate to office, grade, rank, or

rating. The record establishes clearly that the applicant met this standard at the time of his discharge.

rr. As a result of separate medical examinations performed in October and November 2005, the Army determined that: (i) the applicant was not fit for deployment due to the impacts of his PTSD and MDD; (ii) his psychiatric profile merited a rating of 3, which indicates a psychiatric condition that may require significant limitations on his activities; and (iii) he was not qualified for service. He served as a Tanker, whose duties included operating armored equipment, including tanks, and loading and firing weapons to destroy enemy positions. A PEB would have concluded that the applicant could no longer carry out his duties as a Tanker given the Army's determinations regarding his fitness for service following multiple medical examinations, including the fact that he was not deployable, and the fact that the Army sought to discharge him on the basis of his mental health.

ss. Following a finding by a PEB that the applicant was unfit to perform his duties, the PEB would next determine the disability rating, if any, to which he was entitled. The PEB would make this determination using the VA's disability rating schedule. Under Title 38 C.F.R., section 4.129, a disability rating of 50 percent is assigned automatically when a mental condition that results from a highly stressful event brings an end to a Soldier's military service: "[w]hen a mental disorder that develops in service as a result of a highly stressful event is severe enough to bring about the veteran's release from active military service, the rating agency shall assign an evaluation of not less than 50 percent and schedule an examination within the six month period following the veteran's discharge to determine whether a change in evaluation is warranted."

tt. The application of the relevant regulations means the applicant would have merited a disability rating for PTSD and MDD of at least 50 percent. This is because, the mental health conditions that served as the basis for his separation from the Army developed during his military service as a result of a highly stressful event, namely his combat experience in Iraq. The applicant had no mental health issues prior to enlisting in the Army, and began experiencing mental health symptoms only following his return from his traumatic deployment to Iraq in early 2004.

uu. If a PEB determines a Soldier is unfit for continued military service, but also determines that the Soldier's condition has not sufficiently stabilized to accurately assess the permanent degree of disability, the Soldier is placed on the Temporary Disability Retirement List (TDRL). While on the TDRL, the Soldier undergoes periodic evaluations to determine if his or her disability stabilizes. If (i) the Soldier's disability stabilizes or (ii) more than five years pass (for Soldiers placed on the TDRL on or before December 31, 2016), the PEB will proceed with determining the Soldier's permanent disability rating.

vv. The Army's error in separating the applicant pursuant to Army Regulation 635-200, paragraph 5-17, rather than proceeding through the DES, deprived him of the rights and protections afforded to Soldiers under, inter alia, Title 38 C.F.R., section 4.129. Had the Army placed the applicant on the TDRL at the time of his separation, his medical condition at the end of the applicable 5-year statutory period would have resulted in the assignment of a permanent disability rating of at least 30 percent or higher when assessed pursuant to Title 38 C.F.R., section 4.130.101 This is because, as the record shows, during such 5-year period, the VA had assigned him a disability rating of at least 30 percent or higher in accordance with Title 38 C.F.R. section 4.130.

ww. The applicant would not be shut out of the DES if he were undergoing separation from the Army today due to PTSD. Under the applicable regulations currently in effect, he could not be separated for an adjustment disorder diagnosis because his evaluators would be required to "record the specific diagnostic criteria for the condition use" in order for such diagnosis to serve as grounds for separation from the Army. The record shows that this standard would not have been met in the applicant's case as the adjustment disorder diagnosis in his medical records does not explain whether his condition is chronic or acute, does not identify his underlying "stress-related disturbance," and does not explain how such "stress-related disturbance" does not meet the relevant diagnostic criteria for PTSD or MDD, much less examine the impact of his TBI.

xx. Even if we assume that the applicant's adjustment disorder diagnosis was supported adequately, the current version of Army Regulation 635-200 would require that he be referred to the DES because of his in-service PTSD and MDD diagnoses, which clearly contributed to his proposed processing for administrative separation. Finally, because he deployed to Iraq, the diagnosis for adjustment disorder would have to be corroborated by an installation Director of Psychological Health and forwarded to the Office of the Surgeon General for final review. Of course, none of these opportunities were given to him prior to his administrative separation under Army Regulation 635, paragraph 5-17. If they had been, he would have been placed on the TDRL, given at least a 50 percent disability rating, and would currently enjoy the benefits of a military retirement.

yy. The Board must review the applicant's application using liberal consideration, pursuant to Title 10 U.S. Code, section 1552(h)(2)(B). The statute requires that a former service member's claim for review of discharge or dismissal be reviewed with liberal consideration when such claim is based in whole or in part on matters relating to combat-related PTSD or TBI as supporting rationale. As detailed in this Memorandum, the record shows clearly that his combat-related PTSD is central to his discharge. As such, Title 10 U.S. Code, section 1552(h)(2)(B) requires the Board to consider how the impacts of PTSD led to his discharge and also may have led to the improper

characterization of his discharge as being due to an unsuiting condition, rather than an unfitting condition.

zz. The liberal consideration standard, now codified, stems from Department of Defense memoranda issued following a February 2015 report to Congress by the Government Accountability Office that called for policy changes and oversight processes to ensure that service members separated for non-disability mental conditions were afforded appropriated protections. Such policy changes and oversight processes were needed to, among other things, address ongoing concerns that service members with PTSD were continuing to be diagnosed improperly with non-disability mental conditions, the exact error that the applicant seeks to correct.

aaa. Last year, in *Doyon v. United States*, 58 F.4th 1235 (Fed. Cir. 2023), the Federal Circuit held that the Boards for Correction of Military Records (BCMRs) were bound by Title 10 U.S. Code, section 1552(h) and the so-called Kurta Memorandum to apply liberal consideration to claims for medical retirement.

bbb. Recently, the Department of Defense issued a new liberal consideration memorandum, the Vazirani Memorandum, which asserts the government's narrow interpretation of the Doyon decision. The Vazirani Memo purports to affect medical retirement claims in two ways: (1) limiting the application of liberal consideration to medical retirement claims to the minimum required by section 1552(h) and Doyon, which apply only to claims based on combat-related or military sexual trauma-induced PTSD or TBI; and (2) creating a bifurcated review process where liberal consideration is applied only to challenging the existing discharge, but not to proving unfitness.

ccc. Even if the Vazirani Memorandum applies, the applicant is entitled to have his claims heard with liberal consideration given his in-service diagnoses of combat-related PTSD and MDD. But the Vazirani Memorandum should be disregarded in this case, because the bifurcated review process it proposes is in direct conflict with section 1552(h) and Doyon.

ddd. Congress has instructed the Board via section 1552(h) to apply liberal consideration to "the circumstances resulting in the discharge or the original characterization of the claimant's discharge or dismissal." In Doyon, the Federal Circuit held that "discharge" in section 1552(h)(1) plainly refers to "severance from military service," such that section 1552(h) requires the BCMRs to apply liberal consideration to servicemember requests seeking to correct records related their "severance from military service" (e.g., their DD Form 214 discharge record) to reflect medical retirement, and therefore necessarily unfitness based on PTSD or TBI.

eee. While the Vazirani Memorandum purports to be "promulgated in light of" and to be "consistent with" Doyon, in fact, the Vazirani Memo directly conflicts with Doyon

when it asserts that section 1552(h) “cannot be read to require the application of liberal consideration to assess whether a qualifying PTSD or TBI condition potentially contributed to the circumstances resulting in a medical discharge which never occurred.” To the contrary, the Federal Circuit stated in Doyon: “[w]hether Mr. Doyon’s discharge was misattributed to unsuitability based on a personality disorder instead of unfitness based on PTSD-related disability plainly falls within Title 10 U.S.C. section 1552(h)’s requirement that the BCMR shall apply liberal consideration when reviewing whether PTSD “potentially contributed to the circumstances resulting in the discharge.”

fff. Thus, the Federal Circuit found that liberal consideration under section 1552(h) of the circumstances resulting in discharge applies to the determination of unfitness. Applying liberal consideration, the Board must “consider and weigh medical evidence submitted by [the applicant],” including the opinions of the VA examiners following his discharge. Where those medical professionals have found that the applicant’s mental health symptoms at the time of discharge were attributable, not to adjustment disorder, but to PTSD, MDD, and TBI which “predated and contributed to the circumstances of [his] discharge,” the Board must “wrestle with or seek to explain why these medical opinions should not be followed.” The Board must liberally consider the applicant’s own statements in his affidavit as to the state of his condition at the time of discharge. Applying liberal consideration, it is clear that the mental health symptoms which the Army erroneously attributed to adjustment disorder and concluded made him unsuitable were, in fact, symptoms of unfitting PTSD, MDD, and TBI.

ggg. The applicant served his county honorably as part of Operation Iraqi Freedom and has suffered debilitating mental health issues as a direct result of his combat experience. Had the Army followed its own regulations, the Army would have evaluated his PTSD and MDD through the formal processes set out as part of the DES, including review by an MEB and PEB. He would have been found medically unfit for continued military service as a result of this process, and granted the medical retirement he deserves. The applicant’s medical records show that the Army’s conclusion that he should be separated due to an adjustment disorder was wrong, and otherwise contrary to the overwhelming evidence that he was suffering from service-related PTSD, MDD, and TBI.

hhh. Unfortunately, when the applicant sought help, he was treated unfairly and discharged under AR 635-200, paragraph 5-17 for a “Condition Not a Disability.” The Army’s actions were contrary to the evidence available at the time and in violation of the Army’s own regulations. As a result of the Army’s error, the applicant has been deprived of critical benefits to which he is rightfully entitled. The Board has the authority and opportunity to correct this injustice and should do so now.

iii. Should the Board not see fit to grant the applicant the relief sought, he requests a clear record of the Board's findings and reasoning so that an immediate appeal can be taken to the Court of Federal Claims.

5. The applicant states:

a. He is originally from Ecuador and came to the United States as a teenager. He joined the Army out of a sense of service and duty to his new country after graduating from a vocational high school. He wanted to challenge himself, learn new skills, and earn money to attend college. He enlisted in the Army in 2002 and attended BCT at Fort Knox, KY. He is not a native English speaker, so he had difficulty speaking and understanding English during BCT. He worked hard to improve his English, including by taking language classes at Lackland Airforce Base from November 2002 to January 2003.

b. After completing BCT and Advanced Individual Training (AIT) at Fort Knox, he was stationed at Fort Hood, TX, and joined 1st Battalion, 66th Armor Regiment, 1st Brigade, 4th Infantry Division. He served as a Tanker on an M1A1 Abrams tank. As an Armor Crewman (19K), his duties included operating armored equipment, driving, and loading and firing weapons to destroy enemy positions. He was deployed to the Middle East, and served in Iraq from August 2003 to April 2004 in support of Operation Iraqi Freedom. From August to October 2003, his platoon oversaw two FOBs in Samarra, Iraq. The first forward operating base was located outside of the city, along a river bank.

c. In November 2003, they were forced to move to a forward operating base located within the city after suffering repeated attacks from militants firing rocket-propelled grenades (RPGs) and mortar rounds. His deployment to Iraq was stressful, both physically and mentally. He worked around the clock, participating in numerous patrols and other missions as part of Alpha Company, 1st Battalion, 66th Armor Regiment, 1st Brigade, 4th Infantry Division. They often took enemy fire, including mortar rounds, and members of his post were killed. They also took friendly fire.

d. His company had missions 6 days a week including guarding, protecting, securing, and fighting militants. Part of their duty each night was patrolling the streets of Samarra. His platoon had four tanks, and one tank had four crew members. Each tank had two crew members shifting every 2 hours, working guard duty, and sleeping on top of the tank between 10:00 p.m. and 6:00 a.m. One day, he injured his back falling from a tank. During one morning shift, he suffered a head injury after jumping into a tank to take cover from enemy fire. One day per week, they were part of a Quick Reaction Force, meaning they were on call to respond to incidents in the vicinity of their base.

e. In early November 2003, while on duty as part of a Quick Reaction Force, his platoon responded to a loud explosion near their FOB. As part of this response, they

were tasked with checking a traffic circle near the Great Mosque of Samarra. Upon their arrival, they found that a bomb had detonated while being loaded into a car by militants. The explosion had a devastating impact. He saw a half-destroyed car surrounded by body parts. His platoon secured the perimeter until the car and body parts could be removed from the area.

f. In a separate incident in November 2003, their platoon was returning to their FOB following a mission when a roadside bomb detonated. The explosion severely damaged one of their tanks. They suffered a number of physical impacts from the explosion, including dizziness, shortness of breath, and headaches. Their platoon lieutenant later received a Purple Heart due to his injuries. Their platoon was stranded for over an hour while they waited for tank mechanics and a recovery vehicle to arrive to assist with the damaged tank.

g. On 30 November 2003, his tank company was part of Operation Dinar Exchange in Samarra. Their mission was to support forces delivering new paper money to local banks. The new paper money was redesigned to remove the image of Saddam Hussein. For this particular mission, he was assigned as the loader for a tank under the command of Captain (CPT) [REDACTED]. Their convoy included tanks, Bradley Fighting Vehicles, and Humvees. They did not expect to encounter enemy resistance during the operation. However, at approximately 11:00 a.m., while approaching a traffic circle in the city, a roadside bomb exploded. The Humvee traveling in front of his tank was destroyed completely. He felt a strong pressure wave from the blast hit his face, which caused him to fall into the tank. He felt dizzy, had a rapid heart rate, heard whistling sounds in his ears, and had difficulty hearing and processing sounds. He was terrified and thought he was going to die. He saw a fellow Soldier on the street with half of his face badly damaged. They were surrounded by panicked Iraqi civilians trying to flee the area. They worked to secure the perimeter and helped with evacuating injured soldiers before continuing their mission.

h. A large enemy contingent attacked their forces and a battle ensued. They came under heavy fire, including from RPGs. He recalls vividly a man wearing black, the signature color of Saddam Hussein's Fedayeen militants, emerging from a taxi with a rocket-propelled grenade aimed at their tank. His commander ordered them to open fire, and they killed the militant. The ensuing battle was fierce, with over a hundred militants attacking them with grenades, mortars, and RPGs. He operated the M240 machine gun and loaded the main gun of their tank, firing multiple rounds at militants while under heavy fire. The sound of grenades exploding and bullets hitting the tank was deafening, and the intensity of the crossfire left him fearful for his life. Eventually, they were able to repel enemy forces and secure the eastern bank of the Tigris River. He received an Army Commendation Medal and a Combat Action Badge for his efforts during the battle.

i. The battle was very traumatic for him. He saw numerous horrific sights, including dead bodies, a boy's body burning, severed body parts, and destroyed buildings and vehicles. The overwhelming fear, exhaustion, and the smell of gunpowder inside the tank lingered with him long after the battle. This experience left him emotionally shattered, and the memories of that day continue to haunt him. The media reported that there were approximately 54 Iraqi casualties following the battle.

j. He reported on my Post-Deployment Health Assessment dated 4 March 2004, that he was feeling down, depressed, or hopeless. He began experiencing flashbacks to the battle, including hearing gun fire, voices, and screams. He also began having trouble sleeping and feeling depressed. He was not depressed when he joined the Army. He did not receive any follow-up evaluation or care in response to what he reported on his Post-Deployment Health Assessment.

k. In 2004, he also began experiencing problems with his right knee and lower back. He reenlisted in the Army on 28 October 2004, and was transferred to a battalion in 4th Brigade Combat Team, 4th Infantry Division. By 2005, he was moved to the Headquarters and Headquarters Company (HHC) as the driver for 4th Brigade Command Sergeant Major (CSM) [REDACTED]. He then became part of the Personal Security Detachment Team responsible for ensuring the safety of the Commander and the CSM during deployment.

l. He continued to experience mental health issues following his reenlistment. On 29 October 2004, while driving from San Antonio to Fort Hood, he experienced a flashback to his combat experience. He thought he saw something burning in front of him, causing him to lose control of his car. His car struck a concrete barrier and then was struck by another vehicle. His car was totaled and he suffered a TBI. His car insurance payout was not sufficient to pay off his car loan, leaving him in debt and with no car.

m. His depression worsened throughout 2005. He was hospitalized in October 2005 after overdosing on medication and telling a fellow Soldier he intended to hurt himself. He tried speaking with the company first sergeant (1SG) about his feelings, but he told him no one would take his concerns seriously and that he was just trying to "use the system." He had mental health outpatient appointments and was prescribed medication, including Prozac, for depression and difficulty sleeping.

n. Following his suicide attempt, his company commander rushed his papers for administrative separation. His brigade was deploying to Iraq in support of Operation Enduring Freedom, and his commander needed to fill his position as soon as possible because he had been deemed not deployable. Although he sought further counseling during this period and tried to take efforts to improve his own mental health, the Army made no attempts to rehabilitate him or otherwise make him deployable. He understood

that they wanted to discharge him as soon as possible, but he mistakenly thought that he would have an opportunity to reenlist later if he was able to find help on his own.

o. He was discharged from the Army on 27 January 2006. Although he began experiencing service-connected knee problems and lower back pain in 2004, he did not have the opportunity for an MEB to consider either of those ailments or my mental health issues while on active duty. His DD Form 214 shows his name as [REDACTED] [REDACTED]. He changed his name to [REDACTED] in September 2005, after becoming a U.S. citizen. Almost immediately following his discharge from the Army, he began seeking treatment for his mental health at [REDACTED] VA Medical Center in [REDACTED]. The VA confirmed his preexisting diagnoses of PTSD and MDD. In 2019, he was diagnosed with service-connected TBI, as a result of his exposure to the roadside bomb blast in November 2003 and injuries sustained in his October 2004 car crash. He is currently rated by the VA as 100 percent disabled due to service-connected PTSD, MDD, and TBI. He has also received disability ratings due to a service-connected chronic right knee condition, with a 10 percent disability rating, and lower back arthritis, also with a 10 percent disability rating.

6. A partial DD Form 2807-2 shows on 22 May 2002, the applicant provided his medical history as part of a medical prescreen for enlistment and marked "no" on all of the entries.

7. The acronym "PULHES" describes the following six physical factors used in the profiling system to classify medical readiness: "P" (Physical capacity or stamina), "U" (Upper extremities), "L" (Lower extremities), "H" (Hearing), "E" (Eyes), and "S" (Psychiatric). Physical profile ratings are permanent (P) or temporary (T). A service member's level of functioning under each factor is represented by the following numerical designations: 1 indicates a high-level of fitness, 2 indicates some activity limitations are warranted, 3 reflects significant limitations, and 4 reflects one or more medical conditions of such a severity that performance of military duties must be drastically limited.

8. A DD Form 2808 shows the applicant underwent medical examination on 23 May 2002 for the purpose of enlistment in the Regular Army and was found qualified for service with a PULHES of 111111.

9. A DD form 4 (Enlistment/Reenlistment Document) shows the applicant enlisted in the Regular Army on 18 September 2002.

10. The applicant's DD Form 214 incongruously shows he deployed to Iraq on 2 May 2003, which predates his two pre-deployment medical assessments.

11. A DD Form 2795, 30 May 2003, provides the applicant's pre-deployment assessment of his health, and shows he indicated his health was very good with no concerns about his health.

12. A second DD Form 2795, 27 June 2003, again provides the applicant's pre-deployment assessment of his health. It shows he indicated his health was excellent with no concerns about his health and a medical provider signed the form indicating no referrals were indicated.

13. An Army Commendation Medal Certificate shows the applicant was awarded the Army Commendation Medal for meritorious achievement on 30 November 2003, while serving as the tank loader during Operation Dinar Exchange, which helped defeat an enemy attack in the city of Samarra. A corresponding DA Form 638, 17 December 2003, shows the Army Commendation Medal award recommendation and ultimate approval through the chain of command for the applicant's combat actions on 30 November 2003.

14. A second Army Commendation Medal Certificate shows the applicant was awarded an Army Commendation Medal for meritorious achievement from 2 May 2003 through 22 December 2003, while assigned to Task Force 1-66 Armor during Operation Iraqi Freedom.

15. The applicant's DD Form 214 shows he returned from Iraq on 22 December 2003.

16. A DD Form 2796, 3 April 2004, provides the applicant's post-deployment assessment of his health. It shows he indicated:

- the date of his arrival in theater (Kuwait and Iraq) was 23 August 2003
- his health stayed about the same or got better
- he did see enemy and civilian wounded, killed or dead during his deployment
- he was engaged in direct combat where he discharged his weapon
- he did feel during this deployment he was in great danger of being killed
- in the last 2 weeks, he felt "some" down, depressed, or hopeless (out of the possible form options "none," "some," and "a lot")
- he indicated his health was very good and he had no concerns about his health
- a medical provider signed the form indicating no referrals were indicated

17. A Certificate of Achievement was awarded to the applicant on 31 August 2004, for displaying the proper skill and cunning required to contribute to his crew qualifying their tank during Tank Table VIII.

18. An Army Achievement Medal Certificate shows the applicant was awarded an Army Achievement Medal for conspicuous achievement from 18 August 2004 through

1 September 2004, during the 1-66 AR Level II Gunnery as a tank driver, where he demonstrated the highest level of proficiency. A corresponding DA Form 638, 7 September 2004, shows the Army Achievement Medal award recommendation and ultimate approval through the chain of command for the applicant's participation in the battalion's Level II Gunnery proficiency test from 18 August 2004 through 1 September 2004.

19. A DA Form 3340-R (Request for Reenlistment or Extension in the Regular Army) shows on 4 October 2004, the applicant requested reenlistment in the Regular Army and his immediate commander signed the form on 14 October 2004, indicating the applicant was fully qualified for reenlistment and approving the request.

20. A second DD Form 4 shows the applicant reenlisted in the Regular Army on 28 October 2004.

21. A Pioneer Services Raytheon Award Nomination shows on 8 March 2005, the applicant's 1SG submitted a nomination for the applicant's commendation from Raytheon, listing his accolades as including serving as the driver for the CSM, conducting countless patrols with his Tank Company while in Iraq, and helping his company defeat an enemy attack in the city of Sammara by employing his machine gun with precision and deadly effect.

22. 4th Brigade, 4th Infantry Division Permanent Orders 224-02, 12 August 2005, awarded the applicant the Army Good Conduct Medal (1st Award) for the period of service from 18 September 2002 through 17 September 2005.

23. Headquarters, 4th Infantry Division (Mechanized) Permanent Orders 269-04, 26 September 2005, awarded the applicant the Combat Action Badge for actively engaging or being engaged by the enemy from 18 May 2003 through 12 June 2004.

24. A FH MDA Form 975 provides a Darnall Army Community Hospital (DACH) EMS Report and shows:

a. On 11 October 2005, EMS were dispatched to the applicant's barracks building at approximately 10 pm, with the applicant's possible overdose. The applicant states he took about 28 Motrin, 800 milligrams, and about 10 Naproxen at about 6 PM with the intent to hurt himself.

b. He was transported to the DACH Emergency Department, where an examination was conducted, reflecting he was acting a little drowsy at times, otherwise a normal exam. He was walked to a unit and secured to a bench seat with a safety belt, then transported to his room and bed.

25. A MEDCOM Form 691-R, 13 October 2005, provides the applicant's discharge instructions from DACH and shows his final diagnosis was adjustment disorder due to occupational stress and he was released to duty with no medication and with instructions to follow-up with a case manager for counseling.

26. A DA Form 4700, 13 October 2005, provides a Fort Hood Mental Health Clinic intake form and shows the applicant indicated:

a. He was referred to the Fort Hood Mental Health Clinic by medical professionals because he tried to hurt himself on 11 October 2005.

b. He had been experiencing these problems for 2 weeks and did not have difficulties or trouble like this before.

c. The result he desired from the clinic today was counseling.

d. In the section of the form titled Stressors, the applicant indicated marital separation, occupational supervisor conflict, and military permanent change of station (PCS). He did not mark the box for deployment.

e. In the section of the form titled Psychological Assessment, the applicant indicated the behavior that was a problem for him was self-injury; his current feelings were anxiety; current danger to self or others is not checked nor is problems that run in the family; he indicated as a child he was raised by a single parent and was physically abused.

27. A DA Form 4856 shows the applicant was counseled on 13 October 2005 by his squad leader regarding his suicidal gesture on 11 October 2005, when he was reported out of ranks for the first formation and told another Soldier he was trying to kill himself, after which he was located in his barracks room and an ambulance was called. He was advised his chain of command was there to help him and he must keep them informed of any problems he was having.

28. Multiple Standard Forms 600 from October 2005, show:

a. On 13 October 2005, the applicant was seen at the Mental Health Clinic after previously trying to hurt himself and requested consultation with a Spanish speaking provider.

b. On 20 October 2005, the applicant was seen at the Mental Health Clinic after referral by in-patient after overdose. He did not have current suicidal thoughts. He relayed he had stress related to his mother's and sister's heart health, poor concentration, poor relationships at work, other relationship stressors, monetary

stressors, and feels he was punished because he was in-patient in the hospital. He described his mood as depressed with low energy, and 4-5 hours of sleep per night. He was diagnosed with occupational stressors; rule out depression.

c. Multiple forms on 25 October 2005, show he was seen at the Mental Health Clinic. He was not currently thinking of hurting himself, but was thinking about hurting his 1SG, platoon sergeant, and squad leader. He indicated he would kill them if he had a weapon. He was there because his chain of command "pisses him off" and related that since his return from being an inpatient on the 5th floor, things were very different and he felt he was being harassed. He also indicated having nightmares from Iraq, was irritable and had intrusive thoughts and flashbacks three times per week. He had much anger and felt withdrawn from others. He further stated he was separated from the rest of his co-workers and that his sister and grandfather died in Ecuador. He was full of range since he left the hospital. He was diagnosed with occupational hazards, PTSD (chronic), and on the second Standard Form 600 from that date, also with MDD (moderate).

29. A MEDCOM Form 699-R, signed by a Staff Psychiatrist, shows:

a. The applicant underwent a mental status evaluation on 26 October 2005, where he was found to have the mental capacity to understand and participate in proceedings, was mentally responsible, and met the retention requirements of Army Regulation 40-501.

b. He was without safety concerns at that time. He should continue follow-up at the R&R Building (where he received mental health counseling). Due to his continuous problems with adjustment in his current position as well as his ambivalence for military retention and rehabilitation, he was recommended for expeditious administrative discharge under Army Regulation 635-200, paragraph 5-17, with a ban on reenlistment. He is non-deployable until the time of his separation, but otherwise fit for duty.

30. DA Form 268 shows a flag was initiated on the applicant's records on 27 October 2005, for the purpose of field initiated elimination.

31. An undated Standard Form 504 and undated Standard Form 505, provide parts 1, 2, and 3 of the applicant's medical history, and they show:

a. The applicant presented for homicidal ideation related to his 1SG, platoon sergeant, and squad leader and reported that if he had a weapon he would kill them all now. He had no suicidal ideation. He had confirmed kills in Iraq and his risk factor was high.

b. He was released from Ward 5E on 13 October 2005 with a diagnosis of adjustment disorder with mixed disturbance of emotions and conduct. He reported he was positive for auditory hallucinations at the time of his suicide attempt. He was decompensating due to occupational problems, stress of the financial support for his mother, and his brother was robbed and shot in the head in Ecuador.

c. His mood and affect were depressed and congruent. His thought content was positive for homicidal ideation. He was diagnosed with moderate MDD.

33. Headquarters and Headquarters Company 4th Brigade Memorandum for Record, 27 October 2005, shows the applicant was to be administered a pre-separation physical in order to facilitate his discharge under the provisions of (Army Regulation 635-200) chapter [sic paragraph] 14-12c (Commission of a serious offense). It is presumed this reference to paragraph 14-12c is a typographical error intended to read paragraph 5-17. The applicant was to be assigned an action NCO from the unit to ensure his complete and strict compliance with separation procedures.

34. A DD Form 2807-1 shows the applicant provided his medical history on 21 November 2005, for the purpose of his Army separation. The applicant indicated he had:

- a prescription for Prozac
- left foot trouble since October 2005
- a right knee injury with chronic pain since February 2005
- fractured both tibias (stress fractures) in December 2002 and January 2005
- untreated intestinal trouble since October 2005
- recent weight gain of 15 pounds in the past 2 weeks
- he abused a prescription in October 2005 and was hospitalized at DACH at that time

35. A DD Form 2808 shows the applicant underwent medical examination on 29 November 2005, for the purpose of Regular Army separation. He was found not qualified for service with a PULHES of 111111. It was recommended he see dental and ophthalmology for consultations.

36. An additional Standard Form 600, 6 December 2005, is largely blank, and shows the applicant was not currently thinking of hurting himself or others and was not distressed because he was hearing voices telling him what to do. He was seeking help because of questions that he had.

37. On 13 December 2005, the applicant was notified by his immediate commander of his initiation of action to honorably separate him under the provisions of Army Regulation 635-200, paragraph 5-17 for other physical or mental conditions due to his

diagnosis of adjustment disorder. He was advised of his right to consult with counsel and submit statements in his own behalf.

38. On 13 December 2005, the applicant acknowledged receipt of notification from his commander of his initiation of his honorable separation under the provisions of Army Regulation 635-200, paragraph 5-17.

39. A MEDCOM Form 699-R, signed by an Advanced Nurse Practitioner, shows:

a. The applicant underwent a second mental status evaluation on 27 December 2005, where he was found to have the mental capacity to understand and participate in the proceedings.

b. In accordance with Army Regulation 635-200, the applicant met the criteria for administrative separation under the provisions of paragraph 5-17, based on his adjustment disorder with depression, indicated by the following behavioral manifestations defined by DSM-IV:

- homicidal ideation in the past with repeated hospitalization
- poor coping skills with stress
- some non-compliance with medication as ordered
- poor insight
- poor relationship skills with few friends, isolating behaviors

c. Retention of such emotionally and behaviorally disabled Soldiers puts them at high risk to continue to engage in behaviors (substance abuse, suicide attempts, assault, absence without leave (AWOL), etc.) for which psychiatric hospitalization or Uniform Code of Military Justice (UCMJ) action may become necessary. Further, a personality-disordered Soldier represents a command liability and impairs overall unit readiness and functioning. While intensive effort may result in transient improvement in behavior, such efforts are predictably short-lived in their efficacy and ultimately result in no improvement of the Soldier's retention potential.

40. A DA Form 3822-R, signed by a Clinical Psychologist, shows:

a. The applicant underwent a third mental status evaluation on 3 January 2006, where he was found to have the mental capacity to understand and participate in proceedings, was mentally responsible, and met the retention requirements of Army Regulation 40-501.

b. He was seen and provided a mental health evaluation on 3 January 2006, the results of which reflect a mental disorder characterized by depressed mood and personality disorder. Both of these disorders are long standing and have not responded

to treatment. The personality disorder is not normally viewed as a treatable condition within a military setting and is characterized by chronic adjustment problems.

c. His continuing to drink alcohol against medical advice and his failure to comply with the medication regiment directed has complicated his problems with depression and resulted in no progress in that treatment.

d. It was recommended he be considered for administrative discharge under the provisions of Army Regulation 635-200, paragraph 5-17, for the good of the service. He was fully responsible for his actions and was cleared for any administrative or legal actions deemed appropriate by his command.

41 On 4 January 2006, the applicant acknowledged having been advised by his consulting counsel of the basis for the contemplated action to separate him for other designated physical or mental conditions under the provisions of Army Regulation 635-200, paragraph 5-17, and its effects and the rights available to him. The applicant signed the form indicating he was not submitting statements in his own behalf and he did request consulting counsel representation.

42. The applicant's immediate commander recommended his honorable discharge under the provisions of Army Regulation 635-200, paragraph 5-17 due to his diagnosis of adjustment disorder. He had been counseled on 11 October 2005 and no rehabilitations attempts were made. It was recommended that he not be transferred to the Individual Ready Reserve (IRR as he clearly had no potential for useful service under conditions of full mobilization.

43 On 5 January 2006, the approval authority directed the applicant's honorable discharge under the provisions of Army Regulation 635-200, paragraph 5-17, for other designated physical or mental conditions. The applicant would not be transferred to the IRR as he had no potential for useful service under conditions of full mobilization. The approval authority considered further rehabilitation efforts and concluded they would be futile, due to his feeling that a rehabilitative transfer would not produce the desired results for continued service and would not be in the best interest of the applicant or the Army.

44. The applicant's DD Form 214 shows:

a. He was honorably discharged on 27 January 2006, under the provisions of Army Regulation 635-200, paragraph 5-17, due to a condition, not a disability, with corresponding separation code JFV.

b. He was credited with 3 years, 4 months, and 10 days of net active service.

c. He was awarded or authorized the Combat Action Badge, Global War on Terrorism Expeditionary Medal, Army Commendation Medal (2nd Award), Army Achievement Medal, and Army Good Conduct Medal, among other decorations, medals, badges and citations.

45. A VA C&P Exam Report for Initial PTSD Exam, has been provided in full to the Board for review, and shows the applicant underwent examination on 3 July 2006, where he was diagnosed with PTSD and MDD, recurrent, moderate to severe. It was the examiner's opinion that he met the criteria for PTSD and that it is more likely than not associated with his exposure to combat-related trauma while serving in Iraq. It is also the examiner's opinion that his recurrent MDD is more likely than not associated with his deployment to Iraq..

46. A VA C&P Exam Report for General Medical Examination has been provided in full to the Board for review and shows the applicant underwent examination on 7 July 2006, where the applicant was diagnosed with PTSD/adjustment disorder (deferred to scheduled psychiatric exam); right knee condition (deferred to orthopedic exam); low back condition (deferred to scheduled orthopedic exam) and eye condition (deferred to scheduled optometry exam).

47. A VA Rating Decision, 13 October 2006, shows the applicant was granted the following service-connected disability ratings effective 28 January 2006:

- PTSD with MDD, 30 percent
- arthritis, lumbosacral spine, 10 percent
- chronic right knee pain with probable meniscal pathology, 10 percent

48. A VA Rating Decision, 27 December 2007, shows evaluation of the applicant's PTSD with MDD, which was currently 30 percent disabling, was increased to 50 percent effective 17 October 2007.

49. A VA Rating Decision, 7 January 2008, shows evaluation of the applicant's PTSD with MDD, which was currently 50 percent disabling, was increased to 70 percent effective 1 August 2006.

50. A VA Rating Decision, 19 June 2008, shows entitlement to individual unemployability was granted for the applicant effective 1 August 2006.

51. A VA Rating Decision, 30 July 2014, shows evaluation of PTSD with MDD, which was currently 70 percent disabling, was increased to 100 percent effective 5 June 2014.

52. A VA Rating Decision, 22 January 2019, shows the applicant was granted the following service-connected disability ratings effective 14 September 2018:

- tension headaches, 0 percent
- TB, combined with the existing evaluation of PTSD with MDD, which is currently 100 percent disabling; the evaluation of PTSD with MDD and TBI is continued as 100 percent disabling

53. The applicant previously applied to the Board through Counsel, requesting physical disability retirement and personal appearance before the Board. The complete Record of Proceedings for that case, contained in Docket Number AR20210005659, has been provided in full to the Board for review. The medical advisory opinion found insufficient evidence to warrant a referral of the applicant's record to the DES for consideration of military disability retirement. On 10 November 2021, the Board denied the applicant's request, determining the evidence presented did not demonstrate the existence of a probable error or injustice and the overall merits of his case were insufficient as a basis for correction of his records.

54. On 17 January 2025, an advisory opinion was provided by the Army Review Boards Agency (ARBA) medical advisor (see Medical Review). A copy of the advisory opinion was provided to the applicant and his representing Counsel and they were given an opportunity to submit comments in response. Counsel responded on 29 January 2025, stating:

a. On behalf of the applicant, they write in response to the letter from the ARBA dated 17 January 2025, and the medical advisory opinion enclosed with such letter. The applicant was given 15 days in which to review and provide comments in response to the opinion and the comments set forth herein, are provided on his behalf.

b. The applicant thanks for the Board for its ongoing review of his application for correction of his military records dated 5 September 2024. He generally agrees with the findings of the agency medical advisor, set forth in the opinion, that: (i) there is sufficient evidence that he did not meet medical retention standards due to this symptoms of PTSD related to his combat experience while deployed; (ii) the disability rating of 30 percent provided by the VA was an appropriate rating for his level of disability at the time of his discharge; and (iii) this rating would qualify him for a medical retirement.

c. The applicant respectfully requests that the Board consider his disability rating in light of the regulations the Army should have applied had the Army followed proper procedures with respect to his discharge. As detailed in the memorandum provided in support of his application, pursuant to Title 38 C.F.R., section 4.129, a disability rating of 50 percent is assigned *automatically* when a mental condition that results from a highly stressful event brings an end to a Soldier's military service. As detailed in the applicant's application, and as supported by the findings set forth in the opinion, the mental health conditions that served as the basis for his separation from the Army resulted from his

combat experience in Iraq. The application of the relevant regulations means that the applicant would have merited a disability rating for PTSD of at least 50 percent had the Army followed proper procedures.

d. The applicant disagrees that there is insufficient evidence that he did not meet medical retention standards as a result of a TBI. As shown in his medical records, in 2019 the VA determined that his 100 percent disability rating included impacts relating to a service-connected TBI (which resulted from his exposure to a bomb blast during his combat experience in Iraq and injuries sustained in a car crash caused by a combat-related flashback). The opinion notes that there is insufficient evidence he was diagnosed with a TBI while on active service. In weighing the conclusion of the agency medical advisor on this point, though, the Board should bear in mind that the Army was focused on pursuing administration separation based on the incorrect and unsupported adjustment diagnosis disorder and did not afford the applicant the opportunity to be referred to a MEB or PEB. The Army's numerous errors in handling the applicant's separation clearly impacted the evaluation of his mental health conditions while on active service. Accordingly, the applicant respectfully requests that the Board consider the VA's findings with respect to his service-connected TBI.

e. Thank you again for the opportunity to submit comments on the applicant's behalf.

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

56. Title 38, USC, Sections 1110 and 1131, permit the VA to award compensation for disabilities which were incurred in or aggravated by active military service. However, an award of a VA rating does not establish an error or injustice on the part of the Army.

MEDICAL REVIEW:

1. The 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), 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 contending he was unfit for continued military service, and he is requesting a medical retirement for PTSD and TBI at a 30 percent or higher disability rating compared to his honorable administrative separation for a "condition, not a disability."

2. The applicant's available military records were summarized in the ABCMR ROP. There is sufficient evidence the applicant completed a deployment to Iraq (2003-2004) where he engaged in significant combat and was exposed to traumatic events. The applicant reports being exposed to TBIs during this deployment, but there is insufficient evidence the applicant was treated for a TBI during his deployment or sought behavioral health treatment. After returning from deployment, the applicant reported experiencing personal, financial, and eventually occupational stressors. In addition, it was noted the applicant had transferred to a different unit after returning from his deployment and was preparing to deploy again to Iraq. Along with experiencing increased stressors, the applicant was reporting symptoms consistent with PTSD related to his recent combat deployment. The applicant was describing flashbacks, nightmares, hypervigilance, increased irritability, low mood, and insomnia. He was brought to the Emergency Department on 11 October 2005 after an overdose of over-the-counter medication with the intent to harm himself. He was released back to his unit after a short hospital stay with the diagnosis of an occupational problem and an adjustment disorder, and there is insufficient evidence he was provided a psychiatric profile despite a recent suicide attempt. He was seen by outpatient behavioral health services on 13 October 2005 following his discharge. There are inconsistent medical records available for the applicant likely due to the early utilization of a military electronic medical record system (AHLTA) and discontinuing hardcopy medical records. There is evidence the applicant was admitted into inpatient psychiatric treatment twice for reporting homicidal ideation and depression. There is also evidence he underwent three Mental Status Evaluations (MSEs) with, at times, contradictory or inconsistent reports of his treatment history, risk of harm to self or others, report of symptoms, and his fitness for duty. There is also evidence the applicant engaged in some individual behavioral health treatment, and he was prescribed psychiatric medication for assistance with depression and insomnia. There is consistent evidence the applicant was reporting anxiety, depression, and PTSD symptoms while on active service, but there is insufficient evidence he was diagnosed with a TBI. He was found unable to deploy, not placed on a psychiatric profile despite his repeated homicidal ideation and suicide attempt, and was, at times, found fit for duty. Yet, it was recommended the applicant be administratively separated for his diagnosis of an adjustment disorder, but the situation or conditions for which he was not adequately adjusting to were never clearly identified in the available medical records.

3. Shortly after his discharge, the applicant underwent a C&P Evaluation at the VA in February 2006. He was found to be 30 percent disabled with service-connected PTSD. The applicant has been actively engaged in treatment for PTSD, and in 2018, he underwent another C&P Evaluation. He was diagnosed with service-connected migraines. The applicant has also been evaluated and treated for service-connected

TBI by the VA. He is currently determined to be 100 percent disabled for a combination of service-connected mental health and physical conditions.

4. There is sufficient evidence the applicant was deployed to an active combat environment, and he was experiencing PTSD at the time of his active service. It is likely the applicant's PTSD was an underlying mental health condition, which negatively impacted his ability to manage an increase in stressful events. The applicant was reporting suicidal and homicidal ideations, which required at least two inpatient psychiatric hospital stays. Despite the applicant's risk of harm to self or others, there is insufficient evidence he was placed on psychiatric profile. Yet, he was determined, at times, to be unable to deploy or fulfill his military duties. He underwent some individual therapy and was prescribed psychiatric medication. There is insufficient evidence the applicant demonstrated improvement on this treatment plan. While the applicant was reporting symptoms consistent with depression, anxiety, and PTSD, he was intermittently diagnosed with an adjustment disorder, particularly during MSEs. However, these MSEs, at times, presented contradictory or inconsistent reports of his treatment history, risk of harm to self or others, report of symptoms, and his fitness for duty. In addition, when the applicant was diagnosed with an adjustment disorder, the situation or conditions to which he was not adjusting were never clearly identified. Thus, while the applicant was recommended for an administrative separation due to his diagnosis of an adjustment disorder, there is sufficient evidence the applicant was experiencing PTSD related to his recent combat deployment while on active service. The severity of his PTSD symptoms resulted in at least two inpatient psychiatric treatment hospitalizations, and he did not demonstrate improvement with individual therapy and psychiatric medication. The applicant was not provided 6 months of behavioral health treatment before his administrative discharge to be afforded the opportunity to be referred to a MEB or PEB. However, he was determined to not be suitable for continued military service and nondeployable as a result of mental health symptoms. Shortly after his discharge, the applicant was found to be 30 percent disabled as a result of PTSD. Therefore, based on the available information, it is the opinion of the agency medical advisor there is sufficient evidence the applicant did not meet medical retention standards due to his symptoms of PTSD in accordance with Army Regulation 40-501, but there is insufficient evidence that he did not meet medical retention standards as a result of a TBI. The applicant was provided a disability rating of 30 percent by the VA, which is an appropriate rating for his level of disability at the time of his discharge. This rating would qualify him for a medical retirement.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the applicant's military records, the Board found relief was warranted. Counsel's

contentions for combat related PTSD rated at 50%, the applicant's military records, and regulatory guidance were carefully considered. The Board found the applicant has demonstrated by a preponderance of evidence an error or injustice warranted amending the DD214 and all relevant records to reflect an honorable discharge under AR 635-40 for combat related PTSD at 30% entitling him to permanent disability retirement.

2. The Board found substantial underlying incongruities and procedural inequities, which independently and cumulatively failed to meet legal standards of review resulting in the grievous injustice and harm complained of. Specifically, the Board found the applicant met his burden of proof, with clear and convincing evidence, that the PTSD with major depressive disorder rated by the Department of Veteran Affairs following his initial Compensation and Pension examination at 30% would have received an equivalent rating had he been appropriately processed through the Disability Evaluation System as regulatorily required.

3. Consequently, the Board unanimously agreed to amend the applicant's DD Form 214 and all relevant records to reflect the 2006 separation was a result of receiving a 30% permanent disability retirement in accordance with Army Regulation 635-40.

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

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

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

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined the evidence presented is sufficient to warrant a recommendation for partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by showing he was retired for permanent disability effective 27 January 2006 with a 30% disability rating.
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 relief in excess of that described above.


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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. On 25 August 2017, the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to Discharge Review Boards (DRBs) and Boards for Correction of Military/Naval Records (BCM/NRs) when considering requests by veterans for modification of their discharges due in whole or in part to: mental health conditions, including post-traumatic stress disorder (PTSD), traumatic brain injury (TBI), sexual assault, or sexual harassment. Boards are to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based, in whole or in part, on those conditions or experiences.
2. On 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 court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds. This guidance does not mandate relief, but rather provides standards and principles to guide BCM/NRs in

application of their equitable relief authority. In determining whether to grant relief on the basis of 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.

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

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

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

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

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

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

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

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

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

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

unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability.

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

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

a. Paragraph 1-16 (Counseling and rehabilitative requirements) states Army leaders at all levels must be continually aware of their obligation to provide purpose, direction, and motivation to soldiers. It is essential that Soldiers who falter, but have the potential to serve honorably and well, be given every opportunity to succeed. Effective leadership is particularly important in the case of Soldiers serving their initial enlistments. Except as otherwise indicated in this regulation, commanders must make maximum use of counseling and rehabilitation before determining that a Soldier has no potential for further useful service and, therefore, should be separated. In this regard, commanders will ensure that adequate counseling and rehabilitative measures are taken before initiating separation proceedings for multiple reasons, to include for other designated physical or mental conditions in paragraph 5-17.

b. Rehabilitative measures are required prior to initiating separation proceedings for entry-level performance and conduct (chapter 11), unsatisfactory performance (chapter 13), and minor disciplinary infractions/patterns of misconduct (chapter 14). The rehabilitative transfer requirements in chapters 11, 13, and 14 may be waived by the separation authority in circumstances where commonsense and sound judgment indicate that such transfer will serve no useful purpose or produce a quality Soldier. Note separations under paragraph 5-17 are not included in the required rehabilitative measures.

c. Paragraph 5-17 states a service member may be separated for other designated physical or mental conditions that potentially interfere with assignment to or performance of duty. not amounting to disability under Army Regulation 635-40 and excluding conditions appropriate for separation processing under paragraphs 5-11 (Separation of personnel who did not meet procurement medical fitness standards) or 5-13 (Separation because of personality disorder) Such conditions may include, but are not limited to, the following:

- chronic airsickness

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

b. When a commander determines a Soldier has a physical or mental condition that potentially interferes with assignment to or performance of duty, the commander will refer the Soldier for a medical examination and/or a mental status evaluation in accordance with Army Regulation 40-501. A recommendation for separation must be supported by documentation confirming the existence of the physical or mental condition. Members may be separated for physical or mental conditions not amounting to disability sufficiently severe that the Soldier's ability to effectively perform military duties is significantly impaired.

c. Separation processing may not be initiated under this paragraph until the Soldier has been counseled formally concerning deficiencies and has been afforded ample opportunity to overcome those deficiencies as reflected in appropriate counseling or personnel records. A Soldier being separated under this section will be awarded a character of service of honorable, under honorable conditions, or uncharacterized if in an entry-level separation. An under honorable conditions characterization of service which is terminated under this paragraph is normally inappropriate.

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

8. Title 38, U.S. Code, section 1131 (Peacetime Disability Compensation – Basic Entitlement) states for disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during other than a period of war, the United States will pay to any veteran thus disabled and who was

discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

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

//NOTHING FOLLOWS//