

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 5 August 2025

DOCKET NUMBER: AR20240011483

APPLICANT REQUESTS: in effect, with counsel, reconsideration of his previous request to the Board to have his disability separation changed to a medical retirement via the Army Physical Disability Evaluation System (PDES).

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

- DD Form 149 (Application for Correction of Military Record)
- Counsel's 8-page Brief in Support of Application with Exhibits 1-19

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20160013503 on 22 May 2019.

2. The applicant, with counsel state, in effect:

a. Having prior training in the Air Force Junior Reserve Officers' Training Corps the applicant enlisted in the U.S. Marine Corps (USMC) on 16 August 2004. He trained as a Field Wireman and deployed to Iraq. He was honorably discharged from the USMC on 15 August 2008, and he enlisted in the Regular Army (RA) on 13 January 2009. He served in military occupational specialty (MOS) 92G (Food Service Specialist). During his service, he received many awards and accolades. On 16 September 2013, he was honorably discharged for disability with severance pay. Specifically, he was discharged for high levels of depression, for which he received treatment. However, the applicant suffers from post-traumatic stress disorder (PTSD) directly related to his military service. The applicant seeks to correct his records by having this Board direct a Physical Evaluation Board (PEB)/Medical Evaluation Board (MEB).

b. The Army made a material error of fact by not diagnosing his PTSD at separation. The applicant received a medical evaluation which diagnosed him with depression and labeling him with a 20% disabled status. See Exhibit 7. However, this was a misdiagnosis on behalf of the Army and constituted a material error of fact. See Exhibits 4 & 8. The applicant has PTSD because of his two combat tours in Iraq while

serving in the USMC. See Exhibits 4 & 9. The applicant completed two combat tours to Iraq: the first from 1 March 2006 to 30 September 2006, and second from 1 July 2007 to 29 February 2008. See Exhibit 10. This condition left the applicant with a 20% disability rating at the time of his discharge. See Exhibit 11. If the Army diagnosed the applicant properly during his separation, he would have received a medical retirement. See Exhibit 12. Unfortunately, he could have been medically retired, but instead was only given a 20% disability rating, despite receiving 100% service connection from a later appointment and diagnosis by the Department of Veteran Affairs (VA). See Exhibit 11.

c. The applicant has numerous medical documentations from VA physicians that confirm that he suffers from PTSD. See Exhibit 9. The VA even recommended a proposed rating of 60% at the time of his discharge. See Exhibit 11. Furthermore, his screenings for depression indicate either low or no depression at all. See Exhibit 8. The Army made a material error of fact in labeling his condition as only depression. The Army then made a discretionary error by directing him to attend classes that did little to assist him with the mental health condition he did have. See Exhibit 13. As a result, the applicant has effectively gone untreated for his mental condition. By convening a PEB/MEB to evaluate his injuries and correcting his records in accordance with the PEB/MEB findings, this Board could remove the error and enable him to obtain treatment for his PTSD.

d. The applicant has not been treated for his PTSD for the past decade. He received treatment for depression and anxiety from the Army, but that treatment did not properly address his condition. See Exhibit 4. He also went to anger management classes to try and mitigate his condition. See Exhibit 11. However, this treatment did not assist him either. His family members report his struggles impacting his family and social life as well. See Exhibits 14, 15, & 16. Letters written by family and friends all show that he still carries these mental scars.

e. Friends of the applicant see his struggles and know that fixing this error would go a long way to helping treat his PTSD: "Having [the applicant's] medical discharge upgraded would only further ensure more financial stability not only for him but his family." See Exhibit 16. While the above factors should have been considered at the time, the 2017 Kurta memo expands on these considerations and how they should be construed upon review. On 25 August 2017, under Secretary of Defense Anthony M. Kurta issued a memorandum (hereinafter "the Kurta Memo") that clarified and expanded guidance on whether a veteran's mental health condition(s) might mitigate the circumstances that led to the veteran's discharge; this memo serves to address the "invisible wounds" suffered by veterans. See Exhibit 17.

f. The applicant's condition is PTSD. See Exhibit 9. The applicant has this condition because of his experience in the Iraq War during his deployments. See Exhibits 9 & 10. He experienced dangerous moments and life-threatening situations, which left

psychological wounds that he can never heal from. See Exhibits 4 & 17. He lives with this condition every day. See Exhibits 14, 15, & 17. He wakes up shuttering in the night from nightmares. See Exhibit 14. He is so sensitive to sounds when he hears as little as a balloon pop, he shuts down, fearing an attack. See Exhibits 15 & 18. The people who have known him the longest see that he is a different person after his time in the military. See Exhibits 14 & 16. His PTSD was not present prior to his service. See *Id.* According to the memo, there is "Liberal consideration will be given to veterans petitioning for discharge relief when the application for relief is based in whole or in part on months relating to mental health conditions, including PTSD; Traumatic Brain Injuries (TBI), sexual assault, or sexual harassment." See Exhibit 17. The purpose of this memo is to give Board's, such as this one, the ability to consider the "invisible wounds" suffered by servicemembers to correct their records considering conditions or disabilities. If the applicant's PTSD was recorded correctly, he would have crossed the 30% threshold required for a medical retirement by the Department of Defense. See Exhibit 19. The VA recommended a 60% rating for his disability status. This was incorrectly denied to the applicant. The applicant has a confirmed diagnosis of PTSD and therefore falls under the memo's jurisdiction. Therefore, this Board should apply this memo to the applicant and allow him to correct his discharge to stop this injustice and allow the invisible scars of the applicant to finally be properly addressed and treated.

g. The applicant's condition did occur during his military service. Specifically, during his time with the USMC. See Exhibits 4, 9, 10. Specifically, his two combat tours to Iraq. See Exhibit 10. His family describes his circumstances and the contrast between before and after his service. See Exhibits 14, 15, & 16. He is quick to anger, and fears being attacked. See *Id.* His wife in particular witnesses his condition daily, helping care for him during his panic attacks. See Exhibit 14. Per the Kurta memo, "This clarifying guidance ensures fair and consistent standards of review for veterans with mental health conditions, or who experienced sexual assault harassment regardless of when they served or in which Military Department they served." See Exhibit 19. There is a stark contrast between what the applicant was like before and after he entered the military. See Exhibits 4 & 16. His condition would not have occurred but for his military service. See *Id.* Furthermore, medical evaluations from VA medical professionals confirm his PTSD is service related. See Exhibit 9.

h. Given the facts and arguments presented herein, the applicant respectfully submits this application to correct his military records to change his type of separation from an honorable discharge to a medical retirement; specifically, that he be granted a medical retirement after a PEB/MEB is convened to fully determine the extent of his injuries. He has served honorably throughout his service without any misconduct violations, he does not deserve to be punished for his condition. Rather he should receive the retirement that he is entitled to for his service to this nation.

3. The evidence of record shows while serving in the USMC, the applicant served in Iraq from 1 March to 30 September 2006 and 1 July 2007 to 29 February 2008.

4. He enlisted in the RA on 13 January 2009. He served in MOS 92G. On 16 September 2013, the applicant was honorably discharged due to disability with severance pay, (\$52,083) combat related. His DD Form 214 (Certificate of Release or Discharge from Active Duty) confirms he was discharged under the provisions of Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation), chapter 4. The form shows he was awarded or authorized the:

- Army Commendation Medal (4th Award)
- Army Achievement Medal (4th Award)
- Army Good Conduct Medal
- USMC Good Conduct Medal
- National Defense Service Medal
- Global War on Terrorism Service Medal
- Iraq Campaign Medal with Campaign Star (2nd Award)
- Noncommissioned Officer Professional Development Ribbon
- Army Service Ribbon
- Overseas Service Ribbon (4th Award)
- U.S. Navy Sea Service Deployment Ribbon (2nd Award)

5. The applicant subsequently applied to this Board to change his separation to a medical retirement. In Docket Number AR20160013503, 22 May 2019, the applicant stated he wanted his discharge changed to a medical retirement due to damage to his knees and his diagnosis of PTSD.

a. On 3 April 2013, a MEB convened and after consideration of clinical records, laboratory findings, and physical examinations, found he was diagnosed with the conditions listed below and recommended for a referral to a PEB.

Diagnosis	Met Retention Standards	Did Not Meet Retention Standards
1. Left knee ACL tear		X
2. Right knee medical meniscal tear		X
3. Degenerative arthritis of left shoulder joint		X
4. Cervical strain		X
5. Tension headaches		X
6. Alopecia	X	

7. Unilateral tinnitus left ear	X	
8. Bruxism	X	
9. Depression, NOS	X	
10. Stuttering	X	
11. Pseudofolliculitis barbae	X	

b. On 19 April 2013, after having been counseled, the applicant indicated he reviewed the contents of the MEB, agreed with the findings and recommendations, and authenticated the DA Form 3947 (MEB Proceedings) with his signature. He acknowledged:

- he reviewed the contents of the MEB, physical profile, and narrative summary; he understood the PEB would only consider the conditions listed on the DA Form 3947
- the DA Form 3947 included all his conditions and whether or not they meet retention standards, the conditions that did not meet retention standards were properly listed
- he provide all medical documents in his possession to be included in the MEB; he agreed that the MEB accurately covered his medical conditions at the time

c. On 6 June 2013, an informal PEB convened to determine the applicant’s fitness for retention in the Army.

(1) The PEB found him physically unfit for his degenerative arthritis of the left shoulder, cervical strain, left knee injury anterior cruciate ligament (ACL) tear repair, right knee medial meniscal tear, and tension headaches. The PEB recommended a rating of 20% and that his disposition be separation with severance pay.

(2) He was counseled, concurred with the PEB findings and recommendations on 17 June 2013, waived his right to a formal hearing, and did not request reconsideration of his VA ratings.

6. On 17 January 2019, the Army Review Boards Agency senior medical advisor rendered an advisory opinion in the processing of this case. He opined:

a. The applicant’s medical conditions were duly considered during the medical separation processing. The applicant did not meet medical retention standards for right knee, left knee, left shoulder, cervical strain, and tension headaches in accordance with Army Regulation 635-40.

b. The applicant met medical retention standards for depression with stuttering and sleep disturbance, bruxism, tinnitus, scar right knee, burn scar right arm,

psuedofolliculitis barbae, alopecia, and other physical, medical, dental and/or behavioral conditions.

c. A review of the available documentation found no evidence of a medical disability or condition that would support a change to the character, reason, rated condition(s), disability determination(s), disability rating(s), and/or combat-relatedness for the discharge in this case.

d. After comprehensive review of the medical and other records, the medical advisor concluded there is no cause to recommend a change in the PEB fitness determination for any of the contended conditions and so no additional disability rating(s) recommended.

e. The Army has neither the role nor the authority to compensate for progression or complications of service-connected conditions after separation, Congress grants that role and authority to the VA, operating under a different set of laws.

7. After reviewing the application and all supporting documents, the Board determined that relief was not warranted. Based upon the findings of the medical advisory stating it found no evidence of a medical disability or condition that would support a change to the character or reason for discharge, the Board concluded that there was insufficient evidence to warrant changing the reason for separation in the applicant's discharge.

8. The applicant provides, in part, Counsel's 8-page Brief in Support of Application with Exhibits 1-19, and a/an:

a. Applicant Memorandum in Support of Military Records, 9 July 2024, which states, in effect:

(1) He highly recommends that his case be thoroughly reevaluated, taking into account the effects of undiagnosed PTSD on his everyday functioning and general well-being. Even though he was diagnosed with depression when he was first released from the Army, further medical evaluations have accurately shown that PTSD plays a major role in his mental health issues. The misdiagnosis had severe repercussions, including increased sensitivity to loud noises, involuntary flinching during slumber, and ongoing anger management problems. Considering that he has been accurately diagnosed with PTSD and that it has had a significant impact on his life, he supports a review of his discharge. In his opinion, a medical retirement that acknowledges the service-connectedness of his illness would be a more appropriate outcome, guaranteeing that he receives the assistance and attention he needs to continue recovering and adjusting to life as a civilian.

(2) One unexpected obstacle he faced while serving in the military was that he developed chronic knee problems that he could clearly attribute to his military experience. At the same time, he saw signs of untreated PTSD, which provoked him to go to the doctor. Sadly, the harshness of his mental illness was not recognized, and his medical condition was the main reason for his exit rather than the mental health problems that were there. Looking back, he understands how critical it is to spread knowledge about mental health issues in the armed forces; he truly regrets if anything he did during that period was misunderstood, as his objective has always been to take care of the emotional and physical issues that are harming his overall health.

(3) Ever since he left the military, the effects of PTSD have been continuous with him, making it hard for him to learn how to live with increased sensitivity to loud noises and his requirement for attentiveness before approaching people. His wife, particularly, has been a huge help to him throughout these difficult times, even helping to handle circumstances where he has breath-holding fits or periods of hyper vigilance at night. As far as successes after discharge go, he has focused on family and career development. Notwithstanding the difficulties brought on by PTSD, he has continued to learn and develop his skill set to make a valuable contribution to the civilian workforce. One of his main motivations in life after service has been his devotion to personal and professional development. With his extensive background and direct knowledge of the difficulties experienced by PTSD-affected veterans, he thinks he can help those in the military by raising awareness of, promoting understanding of, and providing support for mental health issues. His commitment to continuous personal development and a strong sense of responsibility enables him to make major contributions that advance the community.

b. Partial service and post-service medical records in addition to character reference/letters of support from various family members.

9. Army Regulation 635-40 establishes the Army PDES 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.

10. 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.

11. 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

12. 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.

13. 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.

14. Title 38, CFR, Part IV is the VA's schedule for rating disabilities. The VA awards disability ratings to veterans for service-connected conditions, including those conditions detected after discharge. As a result, the VA, operating under different policies, may award a disability rating where the Army did not find the member to be unfit to perform his duties. Unlike the Army, the VA can evaluate a veteran throughout his or her lifetime, adjusting the percentage of disability based upon that agency's examinations and findings.

15. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting, through counsel, a reconsideration of his previous request to the Board to have his disability separation changed to a medical retirement via the Army Physical Disability Evaluation System (PDES). On his DD Form 149, the applicant indicated Posttraumatic Stress Disorder (PTSD) is related to his request. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Pertinent to this advisory are the following: 1) while serving in the USMC, the applicant served in Iraq from 01 March to 30 September 2006 and 01 July 2007 to 29 February 2008, 2) he enlisted in the Regular Army on 13 January 2009 as a 92G, 3) the applicant was honorably discharged on 16 September 2013, under the provisions of AR 635-40, Chapter 4, due to disability with severance pay, combat related. His DD Form 214 shows he received numerous awards throughout his career, 4) the applicant previously petitioned the Board, as summarized in Docket Number AR20160013503 dated 22 May 2019, to change his separation to a medical retirement due to damage to his knees and PTSD. On 17 January 2019, ARBA senior medical advisor rendered an opinion in the processing of the case and opined that the applicant's medical conditions were duly considered during medical separation processing and a review of the available documentation found no evidence of a medical disability or condition that would support a change to the character, reason, rated condition(s), disability determination(s), disability rating(s), and/or combat-relatedness for the discharge in this case. As such, the Board determined that relief was not warranted.

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the ROP and casefiles, supporting documents and the applicant's military service and available medical records. The VA's Joint Legacy Viewer (JLV) was also examined. Lack of citation or discussion in this section should not be interpreted as lack of consideration.

c. Military medical records included as part of his application and available via JLV were reviewed. Review of his service treatment records (STR) were void of any behavioral health diagnoses or treatment history with the exception of his VA examination that was completed in conjunction with his MEB processing. On 15 March 2013, the applicant underwent a VA examination as part of the MEB process and was diagnosed with Stuttering and Depression Not Otherwise Specified (NOS). The evaluating provider documented that his symptoms started in 2012 as a result of him being transferred to Ft. Polk and although he had a history of stuttering in childhood, it had since been exacerbated. His symptoms at the time of the evaluation were documented as depression, sleep problems, and stuttering, though denied any impact on daily functioning. It was also documented that he had not received any behavioral health treatment in the military, had no history of suicidal ideation, and had no history of hospitalizations or emergency room visits for psychiatric reasons. His military and deployment history were documented, and it was noted that he denied experiencing any adjustment problems and had not engaged in combat activities. It was noted that since developing behavioral health symptoms he had started withdrawing from people and was embarrassed by his stuttering. His work relationships were described as 'good' and he reported no time lost at work due to behavioral health issues. The evaluating provider documented that he did not report or demonstrate any signs or symptoms of PTSD. Regarding functional impairment, it was noted that his psychiatric symptoms were mild or transient and cause occupational or social impairment with a decrease in work efficiency and occupational tasks only during periods of significant stress and some interference in leisure activity because of withdrawing due to stuttering.

The MEB proceedings dated 03 April 2013 show that the applicant was considered for 11 conditions overall. As it pertains to BH conditions, he was found to meet retention standards for Depression NOS (stuttering does not constitute physical disability). The Informal PEB Proceedings dated 06 June 2013 shows that he was found medically unfit due to degenerative arthritis of left shoulder, cervical strain, left knee injury anterior cruciate ligament (ACL tear repair), right knee medial meniscal tear, and tension headaches) and recommended a rating of 20%, and a disposition of separation with severance pay. It was also noted that the MEB considered diagnoses 6-9 (alopecia, unilateral tinnitus left ear, bruxism, and depression) and that these conditions were not associated with profile limitations and did not impact his ability to perform any of the ten functional activities. As such, it was determined that those conditions met medical retention standards.

d. A review of JLV shows the applicant has a 100% service-connected disability rating through the VA for several physical and behavioral health conditions, to include 100% for PTSD (initial effective date 15 November 2015, updated 04 January 2017), and 30% for Major Depressive Disorder (MDD) (effective: 17 September 2013). A VA C&P examination conducted on 02 February 2016 documented the applicant's diagnosis as PTSD. The stressor associated with the diagnosis was documented as combat-related events that occurred while he was deployed to Iraq (small arms fire, mortar attacks, and witnessing people with shrapnel and gunshot trauma). The applicant included select VA behavioral health treatment records as part of his application from 2015 through 2022. Review of the records shows that the applicant has received PTSD-specific treatment through the VA since being diagnosed with the condition. A screening note dated 03 November 2022 shows he screened negative for depressive symptoms, alcohol misuse, and suicidal ideation.

e. The applicant provided several letters from family members as part of his application describing the changes they noticed in him following his deployments to Iraq. His wife indicated changes in mood (ups and downs), and anger. His mother-in-law noted an exaggerated startle response, hypervigilance, shut down at times, and did not like to be in crowded closed-in areas.

f. Based on the available information, it is the opinion of the Agency Medical Advisor that there is insufficient evidence that the applicant failed medical retention standards due to a behavioral health condition IAW AR 40-501, Chapter 3 while in the military. Thus, a referral to the Disability Evaluation System (DES) is not warranted.

The applicant contends that his in-service diagnosis of Depression was inaccurate and cites his VA disability rating as evidence of error in discharge and requests records amendment to show he was discharged due to disability. It is of note that VA examinations are based on different standards and parameters, they do not address whether a medical condition met or failed Army retention criteria or if was a ratable condition during the period of service. Therefore, a VA disability rating does not imply failure to meet Army retention standards at the time of service or that a different diagnosis rendered on active duty is inaccurate. A subsequent diagnosis of PTSD through the VA is not indicative of a misdiagnosis or other injustice at the time of service. Furthermore, even an in-service diagnosis of PTSD is not automatically unfitting per AR 40-501 and would not automatically result in medical separation processing. Per AR 40-501, Chapter 3-33, a referral to the DES is required when the condition results in: 1) Persistence or recurrence of symptoms sufficient to require extended or recurrent hospitalization, and/or 2) Persistence or recurrence of symptoms that interfere with duty performance and necessitate limitation of duty or duty in a protected environment. The applicant was diagnosed with Depression NOS in-service during a VA examination as part of his MEB proceedings. There was no documentation

in his STR's showing that he reported any symptoms or concerns consistent with PTSD while in the military. His military records are otherwise void of any BH diagnosis or treatment history and there is no documentation showing that his condition ever necessitated duty limitations or recurrent/extended hospitalization for behavioral health reasons. Moreover, Depression NOS was considered as part of his MEB proceedings and determined that he met medical retention standards for this condition. As such, there is insufficient medical evidence that the applicant failed medical retention standards while in the military due to PTSD, or any other behavioral health condition, IAW AR 40-501, Chapter 3.

g. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? N/A, the applicant is requesting medical retirement.

(2) Did the condition exist or experience occur during military service? N/A, the applicant is requesting medical retirement.

(3) Does the condition or experience actually excuse or mitigate the discharge? N/A, the applicant is requesting medical retirement.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition, and executed a comprehensive review based on law, policy, and regulation. Upon review of the applicant's petition, available military records, and the medical review, the Board concurred with the advising official. Based on this, the Board determined the applicant's PEB decision at the time of separation was appropriate and a change in his retired status or change to a physical disability retirement is not warranted.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
XXX	XXX	XXX	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.

X //SIGNED//

CHAIRPERSON

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

REFERENCES:

1. Title 10, U.S. Code, chapter 61, provides the Secretaries of the Military Departments with authority to retire or discharge a member if they find the member unfit to perform military duties because of physical disability. The U.S. Army Physical Disability Agency, under the operational control of the Commander, U.S. Army Human Resources Command (AHRC), is responsible for administering the Army PDES and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with Department of Defense Directive 1332.18 and Army Regulation 635-40.

a. Soldiers are referred to the PDES 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, when they receive a permanent medical profile, P3 or P4, and are referred by an MOS Medical Retention Board, when they are command-referred for a fitness-for-duty medical examination, and when they are referred by the Commander, AHRC.

b. The PDES assessment process involves two distinct stages: the MEB and the 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 are either separated from the military or are permanently retired, depending on the severity of the disability and length of military service. Individuals who are "separated" receive a one-time severance payment, while veterans who retire based upon disability receive monthly military retirement payments 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 their 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.

2. Army Regulation 40-501 provides that for an individual to be found unfit by reason of physical disability, he or she must be unable to perform the duties of his or her office,

grade, rank or rating. Performance of duty despite impairment would be considered presumptive evidence of physical fitness.

3. Army Regulation 635-40 establishes the PDES 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 their office, grade, rank, or rating. It provides that an MEB is convened to document a Soldier's medical status and duty limitations insofar as duty is affected by the Soldier's status. A decision is made as to the Soldier's medical qualifications for retention based on the criteria in Army Regulation 40-501. Disability compensation is not an entitlement acquired by reason of service-incurred illness or injury; rather, it is provided to Soldiers whose service is interrupted and who can no longer continue to reasonably perform because of a physical disability incurred or aggravated in service.

a. Paragraph 2-1 provides that the mere presence of impairment does not of itself justify a finding of unfitness because of physical disability. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the member reasonably may be expected to perform because of their office, rank, grade, or rating. The Army must find that a service member is physically unfit to reasonably perform their duties and assign an appropriate disability rating before they can be medically retired or separated.

b. Paragraph 2-2b(1) provides that when a member is being processed for separation for reasons other than physical disability (e.g., retirement, resignation, reduction in force, relief from active duty, administrative separation, discharge, etc.), his or her continued performance of duty (until he or she is referred to the PDES for evaluation for separation for reasons indicated above) creates a presumption that the member is fit for duty. Except for a member who was previously found unfit and retained in a limited assignment duty status in accordance with chapter 6 of this regulation, such a member should not be referred to the PDES unless his or her physical defects raise substantial doubt that he or she is fit to continue to perform the duties of his or her office, grade, rank, or rating.

c. Paragraph 2-2b(2) provides that when a member is being processed for separation for reasons other than physical disability, the presumption of fitness may be overcome if the evidence establishes that the member, in fact, was physically unable to adequately perform the duties of his or her office, grade, rank, or rating even though he or she was improperly retained in that office, grade, rank, or rating for a period of time and/or acute, grave illness or injury or other deterioration of physical condition that occurred immediately prior to or coincidentally with the member's separation for reasons other than physical disability rendered him or her unfit for further duty.

d. Paragraph 4-10 provides that MEBs are convened to document a Soldier's medical status and duty limitations insofar as duty is affected by the Soldier's status. A decision is made as to the Soldier's medical qualification for retention based on criteria in Army Regulation 40-501, chapter 3. If the MEB determines the Soldier does not meet retention standards, the board will recommend referral of the Soldier to a PEB.

e. Paragraph 4-12 provides that each case is first considered by an informal PEB. Informal procedures reduce the overall time required to process a case through the disability evaluation system. An informal board must ensure that each case considered is complete and correct. All evidence in the case file must be closely examined and additional evidence obtained, if required.

4. 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.

5. Title 38, U.S. Code, sections 1110 and 1131, permits the VA to award compensation for medical conditions incurred in or aggravated by active military service. The VA, however, is not empowered by law to determine medical unfitness for further military service. The VA, in accordance with its own policies and regulations, awards compensation solely on the basis that a medical condition exists and that said medical condition reduces or impairs the social or industrial adaptability of the individual concerned. Consequently, due to the two concepts involved, an individual may have a medical condition that is not considered medically unfitting for military service at the time of processing for separation, discharge, or retirement, but that same condition may be sufficient to qualify the individual for VA benefits based on an evaluation by that agency.

6. Section 1556 of Title 10, United States Code, 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.

7. Army Regulation 15-185 prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR considers individual applications that are properly brought before it. The ABCMR will decide cases on the evidence of record. It is not an investigative body. The ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

//NOTHING FOLLOWS//