

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 24 June 2025

DOCKET NUMBER: AR20240012123

APPLICANT REQUESTS:

a. This case comes before the Army Board for Correction of Military Records (ABCMR) on remand from the U.S. District Court for the District of Columbia. The Court directs the ABCMR to set aside the previous ABCMR decision as promulgated in Docket Number AR20210013946 on 16 March 2022. The Court further directs the ABCMR to review and reconsider the plaintiff's (hereinafter referred to as the "applicant") application for retroactive disability retirement, i.e., placement on the Permanent Disability Retired List (PDRL) through the correction of her military records.

b. Through counsel, the applicant requests:

- increase of her Department of Defense (DOD) Disability Rating from 20 percent (%) to at least 30% and placement on the PDRL pursuant to Title 10 U.S. Code (USC) § 1201
- payment of all retroactive and prospective pay and allowances due based on the Board's correction of her disability rating
- referral to a Physical Evaluation Board (PEB) for re-evaluation in consideration of the new medical evidence provided
- payment of attorney's fees

c. Additionally, the applicant requests correction of her DD Form 214 (Certificate of Release or Discharge from Active Duty) to reflect the aforementioned changes.

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

- Legal brief, 35 pages
- Docket Number AR20210013946, 16 March 2022
- Civil Action No. 1:24-2963 (Summons in a Civil Action), filed 21 October 2024
- Civil Action No. 24-2963 (Consent Motion for Voluntary Remand and Stay of Proceedings), filed 22 January 2025

FACTS:

1. The applicant filed her original application on 25 March 2021, wherein she requested an increased physical disability rating to at least 30%, placement on the PDRL, retroactive pay and allowances, and referral to the PEB for reevaluation. The ABCMR denied her request for relief on 16 March 2022.

2. Counsel states:

a. In 2003, the applicant suffered a neck injury during a training exercise in preparation for a combat deployment to Iraq for Operation Iraqi Freedom II. As a result, she underwent military-performed surgery for her neck injury. Unfortunately, the military surgical team improperly inserted a screw into her cervical spine, which necessitated a follow-up military performed surgery to correct the problem. The two surgeries resulted in multiple disabling conditions including vocal cord dysfunction due to the surgeon nicking the applicant's vocal cord and a disfiguring, painful scar. The combination of these conditions, combined with the applicant's then-pending military medical separation, produced a depressive disorder prior to her separation.

b. In 2004, as part of the medical separation process, the applicant received an informal PEB review. The PEB evaluated several of her disabling medical conditions, but failed to evaluate the painful and disfiguring scar that resulted from her two military surgeries, and failed to evaluate her then-existent depressive disorder. As a result of the PEB overlooking the applicant's painful and disfiguring surgical scar and depressive disorder, the PEB assigned her a DOD Disability Rating of only 20%. Upon the applicant's medical separation from the Army – a disability rating too low to place her on the PDRL, which requires a 30% disability rating. Had the PEB evaluated the two conditions related to the applicant's painful and disfiguring scar, she would have received a 50% Rating – a rating high enough to place her on the PDRL. Placement on the PDRL would have opened up a "host" of non-monetary benefits to the applicant "to which no monetary value can be attached" because she would have been entitled to all the rights and privileges of a military retiree.

c. In 2021, given the PEB 's errors, the applicant requested that the ABCMR correct her military records. The applicant detailed the existence of her painful and disfiguring scar throughout her request – pointing to indisputable evidence in her medical record at the time of her separation of the two scar-related conditions that warranted separate disability ratings. The applicant also pointed to her medical history subsequent to her separation that revealed that she had a depressive disorder at the time of her separation.

d. In 2023, the ABCMR completely denied the applicant's request. Remarkably, despite acknowledging that she had the two scar-related conditions at the time of her

separation in recounting the facts, the Board's discussion of the applicant's request makes no mention of her two scar-related conditions – and the Board failed to make a determination on those two conditions. Additionally, the ABCMR determined that the applicant's depressive disorder did not warrant military medical retirement – providing an incoherent, illogical explanation for its determination. Further compounding the Board's egregious oversight failure is the Board's haphazard grasp of the administrative and procedural foundation for the applicant's request. The Board's decision provides that the "Board determined that a reconsideration of his previous request for physical disability retirement in lieu of physical disability separation with severance pay is not warranted." That's a problem twice over. First, the applicant's request to the ABCMR was her first – there was no "reconsideration" involved. Second, the applicant is a "her"-since birth and in every medical record since then – not a "his."

e. Claims for Relief:

(1) Count I: The Board's failure to make a determination on the applicant's two scar-related conditions renders its decision arbitrary and capricious.

(2) Count II: The Board's incoherent explanation regarding its denial of the applicant's depressive disorder renders the Board's decision arbitrary and capricious.

(3) Count III: The Board's circular "Reasoning" in its denial of the applicant's depressive disorder condition renders the Board's decision arbitrary and capricious.

(4) Count IV: The Board's blatant errors of misgendering the applicant and failing to correctly identify the relief sought renders its decision arbitrary and capricious.

f. Given the foregoing, the Board's decision lacks "reasoned decision-making" and fails to "reasonably reflect upon the information contained in the record." Therefore, the decision must be held unlawful and set aside.

3. A review of the applicant's available service records reflect the following:

a. The applicant was appointed as a Reserve Commissioned Officer in the Quartermaster Corps, on 27 May 2000.

b. She served in Kosovo from 5 May 2002 to 3 November 2002.

c. She was promoted to captain, effective 1 October 2003.

d. A Physical Disability Board of Review, Record of Proceedings shows the applicant was first seen for neck pain on 1 August 2003. She had noted a painful snap at the right side of the neck after putting on training gear during a field exercise. She

underwent surgery on 12 December 2003. The applicant's vocal cord dysfunction began after the February 2004 revision of her cervical spine surgery.

e. An Informal PEB convened on 22 November 2004, and found the applicant physically unfit and recommended a combined rating of 20% for neck pain with cervical spine fusion and "radiculopathy" and vocal cord dysfunction. The disposition was separation from service with severance pay.

f. Orders 344-001, dated 9 December 2004, show the applicant was reassigned to the Schweinfurt Transition Center, Germany, for transition processing. The orders note the applicant was entitled to disability severance pay.

g. The applicant was honorably discharged on 20 January 2005. She completed 4 years, 7 months, and 24 days of net active service. Her DD Form 214 contains the following entries in:

- item 25 (Separation Authority) – AR [Army Regulation] 635-40, paragraph 4-24B(3)
- item 26 (Separation Code) – JFL
- item 27 (Reenlistment Code) – NA
- item 28 (Narrative Reason for Separation) – Disability, Severance Pay

h. A Physical Disability Board of Review Record, dated 18 February 2018, shows a panel reviewed the disability ratings assigned to the conditions determined by the PEB to be unfitting for continued military service. The panel majority recommended no change in the PEB adjudication. The single voter for dissent submitted an appended minority opinion. The panel recommended no modification or re-characterization of the applicant's disability and separation determination.

MEDICAL REVIEW:

1. References

- a. Army Regulation (AR) 40-501 (Standards of Medical Fitness)
- b. AR 635-40 (Physical Evaluation for Retention, Retirement, or Separation)
- c. Department of Defense Instruction 1332.38 (Physical Disability Evaluation) dated 14 November 1996

2. The applicant was separated from the Army on 20 January 2005 with \$40,272.00 of disability severance pay effective 20 January 2005 for a 20% disability rating. She is requesting that a disfiguring/painful scar on her neck and her depression be added as additional unfitting conditions and that her disability disposition be changed accordingly from separated with disability severance pay to permanent retirement for physical

disability. The applicant's behavioral health condition will be addressed in a separate Army Review Board Agency (ARBA) behavioral health advisory opinion.

3. The ARBA medical advisor was asked to review this request. Documentation reviewed included the applicant's application and accompanying documentation, the supporting documentation and application from the prior case (AR20210013946), the military electronic medical record (AHLTA), and the Veterans Affairs (VA) electronic medical record (JLV).

4. The applicant's submitted documentation and AHLTA Medical Record are notable for the following entries:

- a. The applicant was diagnosed by an examination by neurologist and with cervical MRI with a two-month history of C-6-7 herniated disc with bilateral upper arm radiculopathy on 14 October 2003. It was treated conservatively, and nerve conduction studies were ordered.
- b. The results of this set of the nerve conduction studies were not identified.
- c. The applicant underwent an anterior cervical discectomy and fusion at C6-7 on 12 December 2003
- d. The applicant underwent hardware removal (a screw) of her anterior cervical discectomy and fusion site on 5 February 2004.
- e. Post-operative physical therapy was ordered but the consult was administratively closed on 5 May 2005 after the applicant did not attend her 2 March 2004 appointment or arrange any further appointments with physical therapy."
- f. Post-operatively, the applicant complained of radicular symptoms in her right arm.
- g. Nerve conduction study results dated 7 April 2004 were completely normal and "There is no electrophysiological evidence of neuropathy, myopathy, or radiculopathy in the right upper extremity at this time."
- h. A consult with neurosurgery was administratively closed on 17 June 2004 after the applicant did not attend her 7 May 2004 appointment or arrange any further appointments with neurosurgery.
- i. A consult with orthopedics was administratively closed on 12 May 2005 after the applicant did not attend her 7 April 2004 appointment or arrange any further appointments with neurosurgery.
- j. There are no additional relevant encounters in AHLTA.

5. The applicant was entered into the Disability Evaluation System (DES) on 13 May 2004 when she was placed on a permanent duty limiting physical profile for "Chronic Neck Pain." No other conditions were listed on the physical profile.

6. On 11 August 2004, the medical evaluation board (MEB) determined her "Neck pain with radiculopathy secondary to cervical fusion" failed the medical retention standards of

AR 40-501. They found no other medical conditions to fail medical retention standards. On 16 August 2004, the applicant agreed with the board's findings and recommendation and her case was forwarded to a PEB for adjudication.

7. On 22 November 2004, the PEB determined that her "Neck Pain with Cervical Spine Fusion and 'Radiculopathy'" and "Vocal Cord Dysfunction Secondary to Recurrent Laryngeal Nerve Injury" were unfitting conditions for continued service.

8. The VA Schedule for Rating Disabilities (VASRD) is the document used to rate unfitting military disabilities. Paragraph B-1a and B1b of Appendix B to AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (1 September 1990):

"a. Congress established the VASRD as the standard under which percentage rating decisions are to be made for disabled military personnel. Such decisions are to be made according to Title IV of the Career Compensation Act of 1949 (Title IV is now mainly codified in chap 61 of Title 10, U.S. Code).

b. Percentage ratings in the VASRD represent the average loss in earning capacity resulting from these diseases and injuries. The ratings also represent the residual effects of these health impairments on civil occupations."

9. Using the VASRD, the PEB derived and applied a 10% rating for each disability for a combined military disability rating of 20%. They recommended she be separated with disability severance pay as her rating was below the 30% required for a permanent retirement for physical disability. On 1 December 2004, after being counseled on the Board's findings and recommendation by her PEB liaison officer, she concurred with the PEB and waived her right to a formal hearing.

10. The applicant applied for, and her case was reviewed by the Physical Disability Board of Review. The Board determined on 18 February 2018 that her "Neck Pain with Cervical Fusion and 'Radiculopathy'" rated at 10% and her "Vocal Cord Dysfunction" rated at 10% were the correct ratings for the applicant's 20% combined disability rating. Their findings were approved by the Deputy Assistant Secretary of the Army (Review Boards) for the Secretary of the Army on 6 March 2018. Confirmed PDBR decisions are not reviewable by the ABCMR.

11. Counsel asserts:

"b. The PEB evaluated several of the Plaintiffs disabling medical conditions.

c. However, the PEB failed to evaluate Plaintiffs painful scar and disfiguring scar conditions that resulted from the two military-performed surgeries in connection with her neck injury.”

12. No mention of a painful or disfiguring scar was found in AHLTA or the supporting documentation for either case. In her MEB narrative summary, it is simply addressed: “She has a 3 cm scar at the right side of the neck just above the clavicle.”

13. Paragraph 3-38y of AR 40-501 (29 August 2003) states that for a scar or keloid to fail medical retention standards and be a cause for referral to a PEB, it must be “So extensive or adherent that they seriously interfere with the function of an extremity or interfere with the performance of duty.”

14. Paragraph E3.P3.5.1 of Department of Defense Instruction 1332.38 Subject: Physical Disability Evaluation (14 November 1996) states: “The DES compensates disabilities when they cause or contribute to career termination.”

15. This concept from the DES’s governing document is incorporated into paragraph 3-2b(1) of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (1 September 1990) states:

“(1) 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 they can no longer continue to reasonably perform because of a physical disability incurred or aggravated in service.”

16. Paragraph 3-1 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (1 September 1990) states:

“The mere presence of an 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 soldier reasonably may be expected to perform because of his or her office, grade, rank, or rating.”

17. That the applicant had the cervical incisional scar is without question. In her MEB narrative summary, it is simply addressed “She has a 3 cm scar at the right side of the neck just above the clavicle.” There was no additional contemporaneous documentation submitted or identified addressing the nature of the scar. Thus, insufficient probative medical evidence was presented/identified that it met the criteria to both fail medical retention standards and be unfitting for continued service for this then Quartermaster Officer.

18. Review of the applicant's electronic VA medical record (JLV) shows the applicant was awarded a 10% rating for "Superficial Scars" on 16 April 2018 under the VASRD diagnostic code 7804 Scar(s), unstable or painful.

19. The DES only compensates an individual for permanent service incurred medical condition(s) which have been determined to disqualify him or her from further military service and consequently prematurely ends their career. The DES has neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions which were incurred or permanently aggravated during their military service; or which did not cause or contribute to the termination of their military career. These roles and authorities were granted by Congress to the VA and executed under a different set of laws.

20. Based on the information currently available, it is the opinion of the ARBA medical advisor that there is insufficient contemporaneous probative medical evidence that her scar failed medical retention standards prior to her separation. Thus, neither the awarding of a permanent retirement for physical disability nor a referral of the applicant's record to the DES for consideration of a military medical retirement is not indicated at this time.

BEHAVIORAL HEALTH REVIEW:

1. The ARBA Medical Advisor reviewed the supporting documents, the Record of Proceedings (ROP), the applicant's available electronic medical record in AHLTA, the Health Artifacts Image Solutions (HAIMS), and the VA electronic medical record (JLV). The applicant has applied to the ABCMR requesting a medical disability retirement in part for Depressive Disorder at a 30% or higher disability compared to her previous medical discharge rating, which did not include a mental health condition.

2. The applicant's available military records were summarized in the ABCMR ROP. There is sufficient evidence the applicant suffered a physical injury during a training exercise in 2003. The applicant reports experiencing depressive symptoms secondary to her physical injuries and resultant surgeries from this injury. There is insufficient evidence the applicant was diagnosed with depression or received behavioral health treatment for depressive symptoms. There is also insufficient evidence the applicant underwent behavioral health treatment for six or more months without improvement, required inpatient psychiatric treatment, or was placed on a permanent psychiatric profile. In November 2004, a PEB determined the applicant was experiencing physical conditions which were unfit for continued service. There was insufficient evidence the applicant reported or met criteria for a mental health condition including Depressive Disorder which was found to not meet medical retention standards, at that time.

3. The applicant underwent a Compensation and Pension Evaluation for the VA in 2013 for mental health conditions. She was found to be 30% disabled with service-connected Depressive Disorder likely caused by her service-connected physical injuries.

4. There is sufficient evidence the applicant did experience a physical injury during her active service that resulted in a medical discharge. However, there is insufficient medical evidence the applicant reported or was diagnosed with a mental health condition including a Depressive Disorder during her active service. In addition, there is insufficient evidence the applicant underwent six or more months of behavioral health treatment, required inpatient psychiatric treatment, or was ever placed on a psychiatric profile. While she was determined to meet criteria for a Depressive Disorder secondary to her service-connected physical condition in 2013 by the VA, that diagnosis does not determine if the applicant met medical retention standards for a condition at the time of her discharge. Therefore, based on the available information, it is the opinion of the Agency Medical Advisor there is insufficient evidence the applicant did not meet medical retention standards from a behavioral health perspective due to her reported symptoms of a Depressive Disorder in accordance with AR 40-501. Thus, there is insufficient evidence at this time to recommend a change to the applicant's rating of military disability in regard to a Depressive Disorder.

5. On 8 April 2025, the applicant's counsel was provided a copy of the medical advisory opinion and afforded 30 days to provide comments. On 2 May 2025, counsel stated the Board should reject the recommendations because:

a. The scar opinion recommendation of no rating change is based on its erroneous belief that the contemporaneous record does not include evidence that the applicant's scar was painful and overlooks that a disfiguring scar warrants a separate ratable disability from a painful scar.

b. The depressive order opinion fares no better than the scar opinion. It concludes that there is "insufficient evidence [the applicant] reported or was diagnosed with a mental health condition including a depressive disorder during her active service." But this conclusion is irrational and illogical for at least two reasons.

(1) First, the depressive disorder opinion concludes there is an absence of contemporaneous evidence to support the applicant's contention that the PEB failed to identify and evaluate her then existing depressive disorder-such a conclusion on its face is irrational and illogical. The depressive disorder opinion ignores the obvious and necessary corollary to the applicant's contention, which is that there necessarily will be an absence of contemporaneous evidence indicating that she suffered from a depressive disorder while on active duty because the PEB failed to identify and evaluate her condition.

(2) Second, the depressive disorder opinion fails to consider why the applicant might not have actively sought out mental health treatment in the first instance. Between 2001 and 2014, "[a]pproximately 60% of military personnel who experience[d] mental health problems [did] not seek help[.]" Marie-Louise Sharp et al. Stigma as a Barrier to Seeking Health Care Among Military Personnel with Mental Health Problems, *Epidemiologic Revs.* 144 (Jan. 16, 2015). This was due in large part to the stigma associated with military personnel who sought treatment, including being treated differently by unit leadership, being seen as weak, and unit members having less confidence in them.

c. In summary, the ABCMR should reject the scar opinion, the depressive disorder opinion, and their recommendations in their entirety. All suffer from the same infirmities as the ABCMR's initial assessment of the applicant's claims, which form the basis of the applicant's complaint. Given the rejection of the recommendations, and as detailed above, the Board should correct the overall DOD Disability Rating to 60%.

BOARD DISCUSSION:

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

a. The evidence shows an Informal PEB convened on 22 November 2004, and found the applicant physically unfit and recommended a combined rating of 20% for neck pain with cervical spine fusion and "radiculopathy" and vocal cord dysfunction. The disposition was separation from service with severance pay after her injury suffered on a pre-deployment field training exercise with two subsequent surgeries.

b. The Board noted that at the time of the applicant's treatment, prior to discharge, a medical examination dated 17 May 2004 identified an "abnormal...3.5 cm neck surgical scar," a 30 August 2004 examination revealed she suffered "pain with palpitation...over the scar reflecting her anterior cervical disc fusion," and a 12 October 2004 MEB addendum describes an "anterior neck scar noted well healed." However, this evidence relating to her scar was apparently not considered in her Disability Evaluation System (DES) processing.

c. The Board noted the medical advisor's review finding the applicant's electronic VA medical record (JLV) shows the applicant was awarded a 10% rating for "Superficial Scars" on 16 April 2018 under the VASRD diagnostic code 7804 Scar(s), unstable or painful. The Board noted a VA rating decision dated 31 May 2018 shows evaluation of a

surgical scar, anterior, cervical disc fusion, which was 0 percent disabling, was increased to 30 percent effective 16 April 2018.

d. The Board also noted the behavioral health advisor's review finding insufficient medical evidence the applicant reported or was diagnosed with a mental health condition including a depressive disorder during her active service. It also noted the applicant's position there will not be any contemporaneous evidence she suffered from any depressive disorder because the PEB "failed to identify and treat her depressive disorder in the first instance." It also considered her post-discharge VA C&P statements with concurrent medical evidence.

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

(1) Directing the applicant be entered into the DES and a MEB convened to determine whether her reported painful and/or disfiguring scar, depressive disorder, and any other relevant previously unrated conditions (if existing) met medical retention standards at the time of service separation;

(2) Denying of so much of the applicant's request that pertains to a medical retirement without evaluation under the DES.

(3) Denying so much of the applicant's request that pertains to payment of all retroactive and prospective pay and allowances.

2. The applicant's request that pertains to payment of attorney's fees is not within the Board's purview. The Board's jurisdiction under Title 10, U.S. Code, section 1552 extends to any military record of the Department of the Army.

3. As it relates to the applicant's request for correction of her DD Form 214 (Certificate of Release or Discharge from Active Duty) to reflect the requested changes, the Board made no decision that impacts the applicant's DD Form 214. However, if the applicant's record, after being reviewed through DES process, requires amendments, those will be completed at a later date.

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

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

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

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

2. The Board further determined that the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to any relief in excess of the above.



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

REFERENCES:

1. Title 10, USC, Section 1203, provides for the physical disability separation of a member who has less than 20 years of service and a disability rating at less than 30%.
2. Title 10, USC, Section 1556, requires the Secretary of the Army to ensure that an applicant seeking corrective action by 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.
3. Title 10, USC, Chapter 61, provides the Secretaries of the Military Departments with authority to retire or discharge a member if they find the member unfit to perform military duties because of physical disability. The U.S. Army Physical Disability Agency is responsible for administering the Army Physical Disability Evaluation System (PDES) and executes Secretary of the Army decision-making authority as directed by Congress in Chapter 61 and in accordance with DOD Directive 1332.18 and Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation).
 - a. Soldiers are referred to the disability system when they no longer meet medical retention standards in accordance with Army Regulation 40-501 (Standards of Medical Fitness), chapter 3, as evidenced in a MEB; when they receive a permanent medical profile rating of 3 or 4 in any factor and are referred by a Military Occupational Specialty Medical Retention Board; and/or they are command-referred for a fitness-for-duty medical examination.
 - b. The disability evaluation assessment process involves two distinct stages: the MEB and 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 (Physical Evaluation for Retention, Retirement, or Separation) 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 his or her office, grade, rank, or rating. It provides for a MEB that 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, Chapter 3. 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 his or her office, rank, grade, or rating. The Army must find that a service member is physically unfit to reasonably perform his or her duties and assign an appropriate disability rating before he or she can be medically retired or separated.

b. Paragraph 4-24b(3) provides that based upon the final decision of U.S. Army Physical Disability Agency, or Army Physical Disability Appeal Board, Personnel Command will issue retirement orders or separation for physical disability with severance pay.

5. Army Regulation 635-5-1 (Separation Program Designator (SPD) Codes) provides the specific authorities (regulatory or directive), reasons for separating Soldiers from active duty, and the separation codes to be entered on the DD Form 214. At the time, this regulation prescribed the separation code "JFL" as the appropriate code to assign to Soldiers separated under the provisions of Army Regulation 635-40, paragraph 4-24b(3) for disability, severance pay.

6. Department of Defense Instruction (DODI) 6040.44 (Physical Disability Board of Review (PDBR)) designates the Secretary of the Air Force as the lead agent for the establishment, operation and management of the PDBR for the DOD.

a. The PDBR reassesses the accuracy and fairness of the combined disability

ratings assigned former service members who were separated, with a combined disability rating of 20% or less during the period beginning on 11 September 2001 and ending on 31 December 2009, due to unfitness for continued military service, resulting from a physical disability.

b. The PDBR may, at the request of an eligible member, review conditions identified but not determined to be unfitting by the PEB of the Military Department concerned.

c. As a result of a request for PDBR review, the covered individual may not seek relief from the Board for Correction of Military Records operated by the Secretary of the Military Department concerned.

//NOTHING FOLLOWS//