ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [redacted]

BOARD DATE: 1 August 2025

DOCKET NUMBER: AR20250002264

APPLICANT REQUESTS: through Counsel, reconsideration of his prior request for physical disability retirement in lieu of physical disability separation with severance pay through the inclusion of disability ratings for additional unfitting foot conditions

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

- DD Form 149 (Application for Correction of Military Record)
- U.S. Court of Federal Claims Class Action Complaint, 31 January 2024
- U.S. Court of Federal Claims Opinion and Order, 25 February 2025

FACTS:

1. A Complaint in the U.S. Court of Federal Claims, 31 January 2024, shows the applicant and the proposed class members he seeks to represent are former U.S. Army Soldiers who were evaluated by a Medical Evaluation Board (MEB) and Physical Evaluation Board (PEB) and were denied proper compensation by the failures of the Army to properly evaluate their disabilities, determine their fitness for duty, use the Department of Veterans Affairs Schedule for Rating Disabilities (VASRD) in making disability determinations, and to apply ratings supplied to the Army by the VA, in their Integrated Disability Evaluation System (IDES) cases, as required by statute and regulations. The applicant and those proposed class members he seeks to represent, bring this action against the defendant, the United States, acting through the Department of the Army and its sub-agencies.

2. The U.S. Court of Federal Claims 20-page Opinion and Order, 25 February 2025, has been provided in full to the Board for review. It grants in part and denies in part the applicant's motion.

a. The applicant's motion is granted with respect to his challenge that the Army Board for Correction of Military Records' (ABCMR) fitness determination is unsupported by substantial evidence, failed to consider the VA exams as relevant evidence, and did not consider the collective impact of applicant's foot conditions. This was arbitrary and capricious. Remand is appropriate on the fitness determination. The discussion section of the opinion further elaborates on the applicant's granted motion:

(1) The Board's fitness determination is not supported by substantial evidence.

(2) The Army does not explain why it did not consider the VA's exam.

(3) The Board's fitness determination finding is otherwise unsupported by substantial evidence and is arbitrary and capricious.

(4) The Board's failure to consider relevant October and November 2017 medical records is unexplained.

(5) By relying on perceived inconsistencies regarding the applicant's medical history, the Board misstated the record and relied on documents unavailable for the Court to review.

(6) The Board failed to sufficiently address whether the applicant was able to perform the common duties of his rank.

(7) The Board's focus on ankle pain is unexplained.

(8) The Army relied on much the same evidence to find the applicant fitting for flat feet and plantar fasciitis but unfitting for bunions.

(9) The applicant does not establish a systemic "collective impact" issue, but the Army did not consider collective impact in his case.

b. The applicant's motion is denied with respect to his other challenges. The discussion section of the opinion further elaborates on the applicant's denied other challenges:

(1) The applicant does not establish a systematic failure to apply the VA ratings, but the Board should re-examine the Army's practice on remand.

(2) The applicant does not establish a full and fair hearing violation.

(3) The applicant's mental health claims are waived; he did not previously raise issues related to his mental health before the Board.

(4) The applicant's motion for class action is denied because he has not alleged sufficient facts; accordingly, the Court declines to address class issues.

c. The Government's motion for judgment on the administrative record is granted in part and denied in part. It is granted with respect to the Government's arguments that the applicant does not establish systemic violations of the IDES process, that the

applicant was not denied a full and fair hearing, and that his mental health claims are waived here. It is denied in all other respects, as detailed above.

d. The case shall be remanded to the ABCMR with instructions to re-examine whether the applicant's flat feet and plantar fasciitis are unfitting consistent with this opinion and to apply the proper percentage rating from the VA in compliance with the IDES regulations and statute. The applicant may submit additional arguments and evidence on remand. The ABCMR is directed to take any corrective action deemed appropriate based on its review and to advise the court of the same. The Board must complete its remand within 120 days.

3. Incorporated herein by reference are military records and all documents previously provided by Counsel, 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 AR20210015809 on 19 April 2022.

4. Counsel states:

a. This is an action to recover military disability retirement compensation and associated benefits of monetary value that are owed to the plaintiff, and those similarly situated, due to the failures of the Army to properly adjudicate their IDES cases.

b. The initial establishment of what would later be re-named as the IDES was accomplished by the Department of Defense (DoD) as the Pilot Program in 2007. See DoD "Policy and Procedural Directive-Type Memorandum (DTM) for the Disability Evaluation System (DES) Pilot Program," dated 21 November 2007. The key features of the Pilot Program, and later the IDES, are the provision by the VA of a single set of disability exams and ratings for all conditions claimed by service members, with the direct application of the ratings by the military departments to all conditions that are individually or collectively unfitting.

c. Title 10 U.S. Code, chapter 61, DoD regulations, and Army regulations have required for many years – and the National Defense Authorization Act for Fiscal Year 2008 later re-codified – that the Army must apply the VASRD when making a disability determination of Soldiers.

d. In addition, 10 U.S. Code, section 1216a(b), DoD regulations, and Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation) requires the Army to consider the collective impact of disabilities in making fitness determinations and, under applicable regulations, to use the VA conducted medical examination as the exam of record in making this determination. See DoD Manual (DODM) 1332.18 (Disability Evaluation System Manual: Processes) (2014); and Army Regulation 635-40, paragraph.4-22.

e. The VASRD has a provision mandating the award of a 100 percent rating to those with less than that combined rating under the schedular criteria based on their having certain qualifying disabilities meeting certain rating criteria or based on unemployability. See 38 Code of Federal Regulations (CFR), section 4.16.

f. Despite these legal obligations to consider the collective impact of disabilities, to apply the VASRD and rating determinations made by the VA, and to use the VA exam as the exam of record in determining fitness, the Army has systematically ignored DoD regulations, its own rules, the 2008 NDAA, Title 10 U.S. Code, section1216a, and the VASRD in adjudicating Soldiers' disabilities in the IDES. The Army's systemic practice of failing to properly evaluate disabilities and underrating Soldiers, as alleged in this complaint, is arbitrary, capricious, contrary to law, and not based on substantial evidence, and has deprived disabled Soldiers of the much-needed compensation and medical care that they are lawfully entitled to receive under Title 10 U.S. Code, chapter 61.

g. In 2007, after 6 years of continuous warfare, the American military's Disability Evaluation System (DES) was under unprecedented strain, characterized by long wait times for case processing, substandard treatment and evaluation of wounded warriors, and notable discrepancies between military disability ratings and those of the VA for identical conditions. The DoD established the DES Pilot Program, and later the IDES, to address these issues. The reforms in these programs aimed to provide a unified process with a single disability exam conducted by the VA and the application of a single rating, determined by the VA using the VASRD, applied by the military to conditions rendering members unfit for duty. In addition, Congress mandated that the military Service Secretaries, "[i]n making a determination of disability…shall to the extent feasible, utilize the schedule for rating disabilities [VASRD] in use by the Department of Veterans Affairs, including any applicable interpretation of the schedule by the United States Court of Appeals for Veterans Claims," and that they "shall take into account all medical conditions, whether individually or collectively, that render the member unfit to perform the duties of the member's office, grade, rank, or rating." Title 10 U.S.C., section 1216a.

h. The DES, including the IDES, is composed of two parts:

(1) Medical evaluation to include the MEB, impartial medical reviews, and rebuttal.

(2) Disability evaluation to include the PEB and appellate review, counseling, Case management, and final disposition." DoDI 1332.18, dated 5 August 2014 (Incorporating Change 1, Effective 17 May 2018).

i. The MEB's purpose is "to document a Soldier's medical status and duty limitations insofar as duty is affected by the member's medical status." Army Regulation 40-400 (Patient Administration), paragraph 7-1, dated 8 July 2014. As part of the MEB, a physician writes a Narrative Summary (NARSUM) which documents the members disabilities and explains the MEB's findings which are recorded on the DA Form 3947 (MEB Proceedings).

j. The PEB's purpose, according to Army Regulation 635-40, paragraph 4-19, is to "determine fitness for purposes of Soldiers' retention, separation, or retirement for disability under Title 10 U.S. Code, chapter 61, or separation for disability without entitlement to disability benefits under other than Title 10 U.S. Code, chapter 61."

k. The PEB stage of the IDES has four possible outcomes. A service member can be:

(1) Found *fit for duty*;

(2) Found *unfit for duty but ineligible for disability benefits* because, among other reasons, the disabling condition was not incurred in the line of duty, existed prior to service, was the result of intentional misconduct or willful neglect, or was incurred during an unauthorized absence;

(3) Found *unfit for duty and eligible for medical retirement* with monthly disability retirement pay and other benefits; or

(4) Found *unfit for duty and eligible for medical separation* with disability severance pay.

l. In the IDES, once a PEB finds that a member has one or more unfitting conditions, the Army requests that the VA supply proposed disability ratings, which the Army is required to apply to the conditions that the PEB has found unfitting. Army Regulation 635-40, paragraph 4-1(d) and Title 10 U.S. Code, chapter 61, *inter alia,* provides for the disability retirement and payment of monies for those members with at least a 30 percent combined disability rating for their unfitting conditions.

m. From Fiscal Years (FY) 2018 through 2022, the Army has separated or retired more than 89,00 [sic] Soldiers for disability. See 2023 Disability Evaluation System Analytics and Research (DESAR) Annual Report, Table 5A.2 On average, Soldiers had at least two conditions found unfitting by the PEB and the Army separated or retired more than 93 percent of Soldiers with less than a 100 percent rating.

n. According to the VA, for first time compensation awards in FY 2022, the average number of service-connected disabilities awarded to Global War on Terrorism era

Veterans, which includes plaintiffs, is 6.27. See VBA Annual Benefits Report, Compensation at 74.3. Based on information or belief, this is likely well above the average number of unfitting VA rated disabilities for those Soldiers processed through the IDES. The second highest most common VA award for disability percentage for first time compensation recipients is 100 percent.

o. The DoD issued a regulation, via a Directive-Type Memo (DTM) applicable to the Army, which mandated that the VA conduct a single set of exams and provide the ratings to the military which will use them to determine fitness and award disability ratings: determines whether wounded, ill, or injured service members are fit for continued military service and by which DoD and VA determine appropriate benefits for service members who are separated or retired for a service-connected disability. The IDES features a single set of disability medical examinations appropriate for fitness determination by the Military Departments and a single set of disability ratings provided by VA for appropriate use by both departments." DTM 11-015 (IDES), dated 19 December 2011 (Incorporating Change 2, 4 December 2012).

p. DoDM 1332.18-V2 (5 August 2014) confirmed the VA disability exam as the exam of record to be used by the military departments in making fitness determinations. DoDM 1332.18-V2, Enclosure 2, paragraphs 3(a)(5) and (12).

q. Army Regulation 635-40, paragraph 4-12, d, states: "The NARSUM preparer conducts an administrative review of records, to include the VA medical examination. With reference to the VA medical examination, the NARSUM preparer may seek clarification or correction from the VA. The NARSUM preparer will resolve any inconsistencies regarding diagnosis, onset, severity, and impact on duty."

r. Department of the Army Pamphlet (DA PAM) 635-40, Paragraph 3-6j (1), provides that: "Apparent inconsistencies. If a diagnosis listed by the VA Compensation and Pension (C&P) examiner has insufficient evidence to support that diagnosis or is clearly erroneous, then it should be listed in this section. It must still be listed as a diagnosis in section four with the statement, ‘no medical basis.**’ Every attempt should be made to clarify this with the VA C&P examiner, but if no resolution can be reached, then list the diagnosis in this section. The MEB provider does not write diagnostic variance memorandums**." (Emphasis added).

s. Army Regulation 40-501 (Standards of Medical Fitness), paragraph 7-3, dated 17 June2017, describes the Army’s physical profiles, which is a document used to describe a Soldier’s physical and mental functional limitation due to disability. The individual anatomical and functional systems are divided into six categories (termed "serials"), with a numerical descriptor of 1-4 used to describe the level of impairment for each serial. A serial numerical descriptor of 1 indicates a high level of medical readiness and the sequentially higher numbers indicate increasing levels of functional limitations.

The regulation describes the system as follows: The factors to be considered are as follows:

(1) P—Physical capacity or stamina. This factor, general physical capacity, normally includes conditions of the heart; respiratory system; gastrointestinal system, genitourinary system; nervous system; allergic, endocrine, metabolic, and nutritional diseases; diseases of the blood and blood forming tissues; dental conditions; diseases of the breast, and other organic defects and diseases that do not fall under other specific factors of the system.

(2) U—Upper extremities. This factor concerns the hands, arms, shoulder girdle, and upper spine (cervical, thoracic, and upper lumbar) in regard to strength, range of motion, and general efficiency.

(3) L—Lower extremities. This factor concerns the feet, legs, pelvic girdle, lower back musculature and lower spine (lower lumbar and sacral) in regard to strength, range of motion, and general efficiency.

(4) H—Hearing and ears. This factor concerns auditory acuity and disease and defects of the ear.

(5) E—Eyes. This factor concerns visual acuity and diseases and defects of the eye.

(6) S—Psychiatric. This factor concerns personality, emotional stability, and psychiatric diseases.

t. Four numerical designations are assigned for evaluating the individual's functional capacity in each of the six factors. Guidance for assigning numerical designators is contained in Table 7–1. The numerical designator is not an automatic indicator of deployability or assignment restrictions, or referral to an MEB. The conditions listed in chapter 3 and the Soldier's functional limitations, rather than the numerical designator of the profile, will be the determining factors for MEB processing.

(1) An individual having a numerical designation of '1' under all factors is considered to possess a high level of medical fitness.

(2) A physical profile designator of '2' under any or all factors indicates that an individual possesses some medical condition or physical defect that may require some activity limitations.

(3) A profile containing one or more numerical designators of '3' signifies that the individual has one or more medical conditions or physical defects that may require

significant limitations. The individual should receive assignments commensurate with their physical capability for military duty.

(4) A profile serial containing one or more numerical designators of ‘4’ indicates that the individual has one or more medical conditions or physical defects of such severity that performance of military duty must be drastically limited."

u. Army Regulation 40-501, paragraph 7-8, dated 17 June 2017, provides: "MEB physicians must ensure that all physical profile and assignment limitations are fully recorded on one DA Form 3349 (Physical Profile). When the Soldier is referred to a PEB, a copy of the consolidated DA Form 3349 will be forwarded to the PEB with the MEB proceedings, with distribution of the form as indicated in paragraph 7–11b, below. On the consolidated DA Form 3349, the MEB physician may be the profiling officer (1st signature). Cooperation between the MEB physician, PEB liaison officers, and the PEB is essential when additional medical information or profile reconsideration is requested from the Military Treatment Facility (MTF) by the PEB. The limitations described on the profile form may affect the decision of fitness by the PEB."

v. Congress has mandated that the Army consider *all* medical conditions, individually or collectively, that render a member unfit. See Title 10 U.S. Code, section 1216a.(b). The Army routinely and systemically fails to comply with this requirement and imposes an illegal heightened level of functional impact of a condition as a prerequisite to finding a condition collectively unfitting.

w. *Sissel v. Wormuth* highlighted this issue, noting that the Army's approach to determining disability ratings was inconsistent with the standards set forth in 1990 Army Regulation 635-40, paragraph 4–19(f)(6)(b), which defines a compensable disability as one that either renders the Soldier unfit or contributes to the unfitting condition. *See Sissel v. Wormuth*, 77 F.4th 941, 942 (D.C. Cir. 2023). A 2014 update to Army Regulation 635-40 incorporated the statutory requirements of Title 10 U.S. Code, section 1216a(b) for the Service Secretaries to consider all conditions, individually or collectively, that render a military member unfit, but the Army has failed to properly implement this requirement.

x. The applicant, and those he seeks to represent, have been processed by the Army through the IDES and have been found to have at least one unfitting condition and have either been separated or retired from the Army with an inappropriately low rating, denying them the compensation and benefits to which they are entitled under Title 10 U.S. Code, section 1201, *et seq.*

y. The Army, in the case of the applicant and those he seeks to represent, has failed to properly evaluate their disabilities, including in some or all cases, by failing to properly conduct the MEB, to apply the VA assigned ratings to unfitting conditions, to

consider all conditions, individually or collectively that render a member unfit for continued military service, and to apply the VASRD in making disability determinations. This has resulted in the denial of compensation and benefits to which they are lawfully entitled to receive and to which they are owed as a result of their selfless sacrifice in service to the Army and our nation.

z. The applicant enlisted in the Army on 13 June 2007, and after basic training he attended Airborne school and served as a Psychological Operations Specialist and as a Cannon Crewmember. During his almost 10 years of enlisted service, he rose to the rank of Sergeant First Class (SFC). His enlisted Army service ended on May 12, 2017, when he accepted a commission as a Second Lieutenant (2LT) in the Infantry and continued to serve in the U.S. Army as an officer.

aa. While enlisted, the applicant had three combat deployments to Iraq, Afghanistan, and Uganda, earning award of a Combat Action Badge, and over the course of his service, he was injured and experienced traumatic brain injuries (TBI), including from training in combatives, hard parachute landings, and being near a Soldier who was killed by an Improvised Explosive Device (IED). The enemy attacked his unit, and he survived several firefights and sniper attacks during his deployments. As a result of these attacks, he witnessed injured and dead American and enemy Soldiers, as well as civilian casualties (including children), which caused him to develop post-traumatic stress disorder (PTSD) and depression. During his Army service, the applicant also suffered from bilateral foot disabilities, as well as a left shoulder disability, bilateral ankle sprains, bilateral hip, bilateral knee, right elbow, and back disabilities, among other disabilities.

bb. As part of the military professional education for new Infantry Officers, the applicant attended the Infantry Basic Officer Leadership Course (IBOLC), a physically demanding Army school that emphasizes small unit tactics and field training. He began to have serious problems with his health, and he suffered a worsening of his bilateral foot disabilities which limited his ability to perform his duties. He also suffered from headaches because of his TBI and developed severe mental health symptoms from his PTSD, and many other disabilities which limited his functional ability to perform his duties as an Infantry Officer.

cc. On 29 January 2018, he applicant’s military medical provider referred him to the MEB due to his MEB diagnosis (Dx) 1 Right Foot Pain with Pes Planus and Hallux Valgus[L-3], Dx 2; left foot pain with pes planus and hallux valgus [L-3]." Notable was the assignment of a L3 profile for his bilateral foot conditions.

dd. On 12 April 2018, an MEB convened to evaluate the applicant’s disabilities. The MEB found that he had 37 disabilities, with only his bilateral hallux valgus (commonly called bunions) being found to fail retention standards under Army Regulation 40 501,

chapter 3. The MEB failed to properly consider the collective impact of his referred conditions of bilateral foot pain by only finding the hallux valgus condition to fail retention standards.

ee. The VA exam of record for the IDES stated that the applicant suffered from "L foot pain with pes planus and hallux valgus. R foot pain with pes planus and hallux valgus." The examiner described the history as follows: "SM was diagnosed with flat feet on 7/23/09. SM complained of pain in the L big toe on 9/11/2009 while stationed in Hawaii; x rays showed hallux valgus, was treated with inserts with no relief. X rays of the ankles on 6/9/14 confirmed bilateral flat foot. Was given orthotics with no improvement on 8/6/14. Complained of pain in the plantar arches on 10/20/17 at Ft. Benning that had been present for 3 months. Was seen by podiatrist on 11/2/17 and there was severe bilateral arch tenderness and pain at bilateral 1st MPJ at hallux valgus site. X rays showed flat feet. Was given a permanent profile for running, rucking, jumping. The pain in the L foot and hallux valgus is moderate and constant, the pain in the R foot and hallux valgus is constant and mild."

ff. The VA examiner, in addressing the pes planus, stated that there was pain present due to this condition in both feet, noted bilateral presence of pain on manipulation, and noted that treatment with orthotics was "tried but remains symptomatic." The examiner later noted that the pes planus caused incoordination, pain on movement, pain with non-weight bearing, foot deformity, loss of arch, interference with locomotion, interference with standing, and lack of endurance."

gg. Despite the IDES exam of record showing a severe level of disability for pes planus, the NARSUM noted about his profile, "DA 3349 reviewed and updated on: 12 April 2018, and confirmed to be accurate. P2 U1 L3 H1 E1 S1." The L3 was only for the hallux valgus, with a later finding that the pes planus warranted an L2. This finding was inconsistent with the profiling rules explained in Army Regulation 40-501, DA PAM 40-502, and the opinion of the MEB referring provider.

hh. Though finding the applicant's bilateral hallux valgus, which it characterized as moderate, failed retention standards, the NARSUM dismissed the severe bilateral pes planus, plantar fasciitis, writing: "Medical Basis for Diagnosis: SM's progressive Left Foot Pain due to Hallux Valgus has limited his function and ability to perform his required military training and MOS duties. X-rays Weight Bearing Bilateral Feet on 2 Nov 2017 noted **severe Pes Planus**, moderate Hallux Valgus in the Left> Right Foot. Treatment Summary and Current Status: He was referred to Podiatry and weight bearing films noted **Severe Pes Planus and Moderate Hallux Valgus**. SM was not found to have any symptoms of Plantar Fasciitis **and no diagnosis prior to his VA Exam**. Permanent profile limitations including running, rucking, and jumping were recommended as well as consideration for a MAR2 [Military Occupational Specialty (MOS) Administrative Retention Review] with a transfer to a less physically demanding

MOS. SM reports that he continues to have constant moderate Left Foot Pain and mild Right Foot Pain." (Emphasis added).

ii. In a separate section addressing the applicant's bilateral pes planus and plantar fasciitis, the NARSUM, while noting an L2 profile for these conditions, stated: "SM was noted to have Moderate Asymptomatic Pes Planus and Hallux Valgus on his entrance exam in 2007. Although Pes Planus increases his risk of Plantar Fasciitis, he has had no evaluation or treatment for symptoms associated with the condition and **was initially diagnosed with this condition on his VA Exam**. He denied any symptoms of Foot Pain or any other musculoskeletal complaints when he completed his Pre Commissioning Review of Symptoms and Physical Exam in July 2016. SM did not report any change in these symptoms prior to his commissioning in May 2017. SM was diagnosed with Pes Planus by Podiatry in 2017 and was counseled that his Pes Planus increased his risk of developing symptoms of Plantar Fasciitis with the physical demands of combat arms training. However, the symptoms he reported to Podiatry were not consistent with Plantar Fasciitis and he was **asymptomatic on exam**. Permanent profile limitations including running, rucking, and jumping were recommended as well as consideration for a MAR2 with a transfer to a less physically demanding MOS both due to his symptomatic Hallux Valgus and **his asymptomatic Pes Planus**. There is **no evidence to suggest that his Pes Planus** or Plantar Fasciitis has interfered with the performance of his duties. However, he would benefit from an L2 profile to limit the aggravating factors that could cause symptoms." (Emphasis added).

jj. The IDES exam of record notes severe functional limitations due to the applicant's bilateral pes planus, including incoordination, pain on movement, pain with non-weight bearing, foot deformity, loss of arch, interference with locomotion, interference with standing, and lack of endurance. The functional limitations described by the VA examiner for the applicant's bilateral pes planus met, at a minimum, the standards for an L3 profile, in that it was a medical conditions or physical defects that "may require significant limitations." Army Regulation 40-501, Para. 7-3. The NARSUM failed to credit the IDES exam of record and its findings for pes planus and dismissed the plantar fasciitis condition because it was diagnosed by the VA examiner. The MEB and NARSUM failed to properly document the applicant's conditions as required by the law and regulations.

kk. The MEB failed to credit the VA exam of record in the IDES and failed to address the findings of the examiner showing severe pain and duty limiting functional impairment due to the applicant's bilateral pes planus.

ll. The MEB stated S1 profile (the psychiatric serial) denoted that the applicant suffered minimal to no functional impact from his mental health disability. This is contradicted by the VA examiner's finding in the IDES exam of record that his mental health condition caused social and occupational impairment. The NARSUM stated

about his mental health condition that: "Although he is noted by the VA Examiner to have occupational and social impairment due to the symptoms, **this is not consistent with the SM's medical or military records**. There is **no information** to either render a diagnosis or to support that any behavioral health symptoms he might have would interfere with the SM's ability to perform required Soldier functions or live in an austere environment. SM meets retention standards for this diagnosis per Army Regulation 40- 501, paragraph 3-41.e (1, 2)." (Emphasis added).

mm. In addressing the applicant's TBI, the NARSUM stated: "SM is noted by the VA Examiner to have occupational and social impairment due to the symptoms with a Montreal Cognitive Assessment (MOCA) score of 22/30. **It should be noted that the MOCA is a quick screening, his reported injuries are remote, and that any residual symptom have clearly not limited his performance of duties or his ability to obtain his bachelor's** degree **and be commissioned through Reserve Officers' Training Corps (ROTC) in 2017.** SM also denied any history of Head Injury or BH Symptoms when his Pre-Commissioning Physical was completed at Ft Knox, KY, in July 2016. Given that he is reporting these symptoms years after when he states that the injuries have occurred and residuals of TBI tend to stabilize or improve rather than deteriorate over time there is **no objective evidence to support that his reported residuals cause any significant functional impairment**. The condition is not duty limiting, and meets retention standards per Army Regulation 40-501, paragraph 3-41.e (1,2)." (Emphasis added). The MEB's conclusion that the applicant's mental health condition was not significant and warranted only an S1 profile violated Army Regulation 40-501, paragraph 7-3.

nn. The applicant appealed the findings of the MEB to the approving authority requesting a finding that his bilateral pes planus fail retention standards. The approving authority rejected his appeal, which contained more than 25 pages of supporting documents, including copies of medical treatment notes for his bilateral pes planus describing severe pain due to this condition and noting duty limitations. The MEB approving authority found no change warranted in the MEB NARSUM. The approving authority wrote in response to the appeal: "Pes Planus is a congenital deformity which can contribute to the development of Plantar Fasciitis and Hallux VaIgus, however the condition itself is **generally asymptomatic** and treatment with orthotics is focused on preventing the development of these other conditions, **not for any symptoms of Pes Planus** itself. Findings support a determination that this condition in fact meets retention standards. In summary, the SM's appeal has been considered and the original findings and recommendations are confirmed. No changes are recommended **as no additional evidence was found in the records review or the SM's appeal to support any changes to the NARSUM**." (Emphasis added).

oo. The MEB failed to credit the IDES exam of record conducted by the VA in violation of DoD and Army regulations. It also failed to adequately weigh the evidence of

record, ignoring favorable evidence, and cited irrelevant factors that did not bear on the applicant's condition at the time of the MEB in support of its arbitrary and capricious findings. It also failed to properly consider the collective impact of his conditions on his duty performance, resulting in erroneous findings as to what conditions he had that failed to meet retention standards.

pp. The MEB forwarded his case to the PEB, which determined that his only unfitting condition was bilateral hallux valgus. The PEB then requested ratings from the VA for all of his conditions. The VA awarded the applicant a 100 percent combined rating and found him to be permanently and totally disabled due to his service-connected disabilities.

qq. The VA assigned the applicant a 70 percent rating for his PTSD and TBI. The VA decision letter stated: "We have assigned a 70 percent evaluation for your posttraumatic stress disorder [PTSD] and depression (also claimed as anger anxiety); traumatic brain inju1y [TBI] (claimed as concussion) based on:

- Suspiciousness
- Depressed mood
- Disturbances of motivation and mood
- Spatial disorientation
- Impaired judgment
- Mild memory loss
- Impaired impulse control
- Chronic sleep impairment
- Difficulty in understanding complex commands
- Panic attacks more than once a week
- Obsessional rituals which interfere with routine activities
- Difficulty in adapting to stressful circumstances
- Difficulty in adapting to work
- Grossly inappropriate behavior
- Flattened affect
- Difficulty in adapting to a work like setting
- Anxiety
- Difficulty in establishing and maintaining effective work and social relationships
- Occupational and social impairment with reduced reliability and productivity

rr. The overall evidentiary record shows that the severity of your disability most closely approximates the criteria for a 70 percent disability evaluation."

ss. The VA assigned the applicant's bilateral foot conditions a 50 percent rating. The rating decision stated: "We have assigned a 50 percent evaluation for your bilateral

pes planus with plantar fasciitis, and bilateral hallux valgus (claimed as left foot pain with pes planus and hallux valgus, right foot pain with pes planus and hallux valgus, B/L foot condition, and B/L toes condition, arthritis) is proposed as directly related to military service. We have assigned a 50 percent evaluation for your bilateral pes planus with plantar fasciitis, and bilateral hallux valgus (claimed as left foot pain with pes planus and hallux valgus, right foot pain with pes planus and hallux valgus, B/L foot condition, and B/L toes condition, arthritis based on:

- Extreme tenderness of plantar surfaces of the feet
- Marked Pronation
- Symptoms NOT improved by orthopedic shoe or appliance
- Additional symptom(s) include - Objective evidence of marked deformity (pronation, abduction, etc.)
- Pain on manipulation of the feet, accentuated
- Pain on use of the feet, accentuated
- Weight-bearing line over or medial to great toe

tt. When evaluating conditions, we do not assign more than one evaluation based on the same symptoms. If the symptoms of two or more conditions cannot be clearly separated, we assign a single evaluation under whichever set of diagnostic criteria allows the better assessment of overall impaired functioning due to both conditions. In your case, the examiner noted that the bilateral pes planus with plantar fasciitis, and the bilateral hallux valgus all affect lower extremity deformity and pain to the feet. The conditions are evaluated together because the symptoms overlap. MEB NOTE: The referred conditions of hallux valgus left foot and hallux valgus; right foot would have warranted 10 percent each absent the non-referred conditions of pes planus with plantar fasciitis. The evaluations arc shown below for your review. We would have assigned a 10 percent evaluation based on: Painful motion due to hallux valgus, left. We would have assigned a 10 percent evaluation based on: Painful motion due to hallux valgus, right."

uu. The Informal PEB (IPEB) issued findings on a DA Form 199 (PEB Proceedings) which found the applicant unfit due to his bilateral hallux valgus, with a 10 percent disability rating awarded for each foot (resulting in a combined rating of 20 percent) and recommending that he be separated with severance pay. The applicant disagreed with these findings and demanded a Formal PEB (FPEB) hearing. He also submitted an appeal to the IPEB, and he submitted approximately 50 pages of supporting documentation, including statements from classmates in IBOLC who personally witnessed the applicant’s functional limitations due to his pes planus and plantar fasciitis.

vv. On 13 July 13, 2018, the FPEB hearing convened, the applicant appeared, and testified that he suffered severe pain and limitations due to his pes planus. He

requested an unfit finding for all of his bilateral foot conditions based on the combined effect of his disabilities. As a result of his testimony, the FPEB recessed and returned his case to the MEB for clarification regarding the applicant's foot disabilities and his profile. The MEB responded that no change to his MEB Proceedings, DA Form 3947, was recommended, but it did add an update to his profile noting that he was unable to perform any alternate aerobic events for the Army Physical Fitness Test (APFT) due to his foot conditions. The MEB, in discussing his bilateral pes planus, stated that despite his treating podiatrist having recommended surgical reconstruction of his feet for this condition, his podiatrist did not know that the conditions "pre-existed" his entrance into the military (more than 10 years earlier), that he had not been issued replacement orthotics for this condition, and he did not need any profile or duty limitations due to this condition before October 2017, a year prior to his reconvened FPEB hearing. These reasons for not changing the profile or DA Form 3947 were factually incorrect or irrelevant to the issue of his functional limitations at the time the PEB requested clarification.

ww. In his contention memo for the reconvened FPEB, the applicant again requested that he be found unfit due to his bilateral pes planus, plantar fasciitis, and hallux valgus. He also rebutted, with supporting documentation, several errors in the MEB response to the PEB's request for clarification: "In support of his Official Contention, [the applicant] notes the following discrepancies in the Response to the 'RTH' Memo:

(1) SM reported to Podiatry on 2 July 2018 that he had failed multiple treatment Options including insoles, injections, and profiling. However, the only treatment documented in the SM's medical record was a prescription for Custom Orthotics. (NARSUM Addendum, pg. 2).

- SM received physical therapy from July to Aug 2014. These records are available in AHLTA [Armed Forces Health Longitudinal Technology Application]
- SM received physical therapy by an athletic trainer in OCT 2017 while a holdover at IBOLC. These records are available in AHLTA

(2) SM was prescribed custom orthotics in October 2009 for his Great Toe Pain, Left Foot; however, to be effective these need to be replaced every 1 to 2 years and he received a single pair in 2009 and another in 2018.' (NARSUM Addendum, pg.2).

- 6 August 2014. SM was prescribed a brace (arch support - removable) for complaints of ankle joint pain
- 3 November 2017. SM's feet were digitally scanned for custom arch supports; he received the supports on 3 January 2018

- 20 June 2018. SM's feet were digitally scanned for custom arch supports; he received the supports on 26 June 2018

(3) At the PEB Proceedings on 13 July 2018, the applicant reported experiencing pain over the entirety of each foot with the greatest pain where the foot and ankle join. This is the area that Dr. N____ sought to perform injections; where orthotics were provided to reinforce and stabilize; and the area of attention for physical therapy with massage."

xx. On or about 20 August 2018, the FPEB reconvened and later issued findings confirming the recommendations of the IPEB that the applicant was only unfit due to his bilateral hallux valgus. In the new DA Form 199-1 (Formal PEB Proceedings), the FPEB stated that, "In full consideration of DoDl 1332.18, Enc. 3, App, 2, to include combined, overall effect" his 35 other disabilities were not unfitting, including his other foot and ankle conditions, surgically repaired right knee, bilateral hip disability, neck and back disabilities, bilateral shoulder disabilities, "history of concussive events" and idiopathic exertional dyspnea." There was no mention of his mental health condition. The FPEB stated that these conditions were not unfitting "because the MEB indicates these conditions meet Army Regulation 40- 501, Chapter 3. medical fitness standards; none are listed on the DA Form 3349, physical profile as preventing the Soldier from performing one or more section 24 (a-f) functional activities and, there is no evidence to indicate that performance issues, if any, are due to these conditions." The FPEB failed to properly consider the collective impact of the applicant's disabilities on his fitness, to properly weigh the evidence, to apply the VASRD to his case, and to base its decision on substantial evidence. It also failed to respond in an orderly and itemized fashion to the issues that the applicant raised in violation of Title 10 U.S. Code, section 1222.

yy. The FPEB, in awarding only 10 percent for each foot's hallux valgus, listed the applicable VASRD diagnostic code (DC) as 5276. That condition is listed in the VASRD as "Flatfoot, acquired," which is the common term for pes planus. This failure to apply the VASRD to the applicant violated Title 10 U.S. Code, section1201.

zz. The FPEB is the fact-finding body that provides the "Full and Fair Hearing" mandated by statute. Title 10 U.S. code, section1214. By relying on a legally deficient MEB and failing to make its own determinations based on a balanced consideration of the evidence, by failing to consider the collective impact of his disabilities on his fitness, by failing to apply the VASRD, by failing to apply the VA supplied ratings to the unfitting conditions, the PEB failed to provide the applicant a full and fair hearing. On 30 October 2018, the Army separated the applicant with disability severance pay due to his bilateral hallux valgus rated at 20 percent.

aaa. On 13 April 2021, the applicant requested that the ABCMR review his case and grant him a 50 percent disability retirement for the foot conditions that were rated at

that level by the VA during the IDES process. Through Counsel, he argued that the Army incorrectly concluded that his foot conditions met retention standards, the PEB should have found his pes planus and plantar fasciitis unfitting, that the PEB should have applied the VA rating of 50 percent and that the PEB should have considered the combined impact of his disabilities in making its fitness findings.

bbb. In a conclusory one paragraph discussion of the applicant's application, dated 19 April 2022, the ABCMR declined to grant relief, stating: "While he has since received multiple service-connected disability ratings, including one for pes planus, it is important to note that the disability evaluation system compensates an individual only for service incurred condition(s) which have been determined to disqualify him or her from further military service. The VA on the other hand compensates service members for anticipated future severity or potential complications of conditions which were incurred during or permanently aggravated by their military service. Board members agreed with the thorough medical review that determined no evidence of error or injustice." The ABCMR's decision was arbitrary, capricious, contrary to law, and unsupported by substantial evidence. The Army failed to properly process the applicant's IDES case as alleged above and has denied him the compensation that he is due under Title 10 U.S. Code, section1201.

ccc. Counsel further argues class allegations and class action relief over multiple pages, which have been provided in full to the Board are available for review in the complaint but will not be further discussed here as the U.S. Court of Federal Claims has denied the request for class action.

5. A DD Form 2807 -1 (Report of Medical History) shows the applicant provided his medical history on 7 May 2007, for the purpose of enlisting in the Regular Army. He reported no significant defects and indicated he was in good health.

6. The acronym "PUHLES" 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.

7. A corresponding DD Form 2808 (Report of Medical Examination) shows the applicant underwent medical examination on 7 May 2007, for the purpose of Regular Army enlistment. Hallux valgus and pes planus (moderate, asymptomatic) are both

annotated on the form, and he was found qualified for service with a PULHES of 111111.

8. The applicant enlisted in the Regular Army 13 June 2007.

9. The applicant deployed to the following locations during the following time periods:

- Iraq, from 10 December 2007 through 1 March 2009
- Afghanistan, from 16 July 2011 through 20 January 2012
- Uganda, from 3 December 2013 through 29 May 2014

10. The applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was honorably administratively discharged on 12 May 2017, to accept commission or warrant in the Army. He was credited with 9 years and 11 months of net active service this period.

11. On 12 May 2017, the applicant was discharged from the U.S. Army Reserve (USAR) Control Group (ROTC), appointed as a Commissioned Officer in the USAR on 13 May 2017, and appointed as a Commissioned Officer in the Regular Army on 21 May 2017.

12. Counsel previously provided 48 pages of medical records, dated between 11 September 2009 – 12 December 2018, all of which have been provided in full to this Board for review and reflect the applicant's diagnoses of and treatment for foot, joint, back, neck, and ankle pain.

13. Counsel previously provided page 2 of the applicant's MEB NARSUM, 12 April 2018, which has been provided in full to the Board for review, and in pertinent part shows VA DX: symptomatic hallux valgus:

a. Medical Basis for Diagnosis: SM's progressive left foot pain due to hallux valgus has limited his function and ability to perform his required military training and MOS duties. X-rays weight bearing bilateral feet on 2 November 2017 noted severe pes planus, moderate hallux valgus in the left> right foot.

b. Onset: SM was noted to have moderate asymptomatic pes planus and hallux valgus on his entrance exam in 2007. He was not complaining of any foot pain but was noted on to have an incidental finding of asymptomatic pes planus on his physical on 23 July 2009. SM reported that he was exercising intensely on a regular basis and ran track during high school and denied any foot pain associated with activity. He was referred to Podiatry following an injury to his left toe when a weight was dropped on it in 2009. SM was noted to have symptomatic hallux valgus of the left foot, which was likely exacerbated by the traumatic injury, and he was prescribed custom orthotics. SM had

no additional follow up evaluation for foot pain for 9 years. He completed additional combat deployments to Afghanistan and Africa and was commissioned through ROTC in May 2017 without any need for treatment. However. he reported in October 2017 that he was having increased foot pain associated with all the ruck marching during IBOLC at Ft. Benning, GA.

c. Treatment Summary and Current Status: He was referred to Podiatry and weight bearing films noted severe pes planus and moderate hallux valgus. SM was not found to have any symptoms of plantar fasciitis and no diagnosis prior to his VA exam. Permanent profile limitations including running, rucking, and jumping were recommended as well as consideration for a MAR2 with a transfer to a less physically demanding MOS. SM reports that he continues to have constant moderate left foot pain and mild right foot pain.

d. Noncompliance, when applicable: NA

e. Prognosis Statement: It is unlikely that there will be significant improvement or worsening of the condition during the next 3 years. The rigors of soldiering would most likely worsen SM 's condition.

f. Impact on Duty Performance: SM should wear extra wide boots and orthotics as prescribed. No guerilla drills, MOUT or buddy carries. No Airborne Operations or other high risk activities. No climbing to include in and out of tanks or deer stand. No lifting or carrying > 40 pounds (lbs.). No Ruck Marching. No Running in formation. SM may run at his own pace and tolerance. SM should perform low impact activities to include walking, elliptical. Stairmaster, Nordic track, stationary bike, or swimming.

14. The applicant's DA Form 3349 (Physical Profile), DA Form 7652 (Disability Evaluation System (DES) Commander's Performance and Functional Statement), DA Form 3947 (MEB Proceedings), and DA Form 199 (Informal PEB Proceedings) are not in the applicant's available records for review, and they have not been provided by Counsel.

15. A 27 page VA C&P Exam has been provided in full to the Board for review and reflects the applicant's medical evaluations of his feet, knee, ankle, lower leg, and heart conditions, conducted by the VA on 27 March 2018.

16. Counsel previously provided pages 1 and 10 of the applicant's 31 paged VA DES Proposed Rating, dated 7 June 2018, and they have been provided in full to this Board for review. These pages show:

a. Page 1 shows the applicant's proposed DES disabilities:

- PTSD and depression; TBI, 70 percent
- bilateral pes planus with plantar fasciitis and bilateral hallux valgus (claimed as left foot pain with pes planus and hallux valgus, right foot pain with pes planus and hallus valgus, B/L foot condition, and B/L toes condition, arthritis) [IDES/PEB referred] 50 percent
- chronic left shoulder sprain, 20 percent
- sensory deficit, post laceration of the right thumb, percentage not included

b. Page 10 shows proposed entitlement to service-connection of bilateral pes planus with plantar fasciitis , and bilateral hallux valgus (claimed as left foot pain with pe planus and hallux valgus, right foot pain with pes planus and hallux valgus, B /L foot condition, and BIL toe condition, arthritis) for VA benefits.

(1) Service connection for bilateral pes planus with plantar fasciitis, and bilateral hallux valgus (claimed as left foot pain with pes planus and hallux valgus, right foot pain with pes planus and hallux valgus , B/L foot condition. and B/L toe condition, arthritis is proposed as directly related to military service.

(2) We have assigned a 50 percent evaluation for your bilateral pes planus with plantar fasciitis and bilateral hallux valgus (claimed a left foot pain with pes planus and hallux valgus, right foot pain with pe planus and hallux valgus, B/L foot condition, and B/L toe condition, arthritis) based on:

- extreme tenderness of plantar surfaces of the feet
- marked pronation
- symptoms NOT improved by orthopedic shoe or appliance

(3) Additional symptoms include:

- objective evidence of marked deformity (pronation, abduction, etc.)
- pain on manipulation of the feet, accentuated
- pain on use of the feet, accentuated
- weight-bearing line over or medial to great toe

(4) This is the highest schedular evaluation allowed under the law for acquired flat foot.

(5) When evaluating conditions, we do not assign more than one evaluation based on the same symptoms. If the symptom of two or more condition cannot be clearly separated, we assign a single valuation under whichever set of diagnostic criteria allows the better assessment of overall impaired functioning due to both conditions. In your case, the examiner noted that the bilateral pes planus with plantar

fasciitis and the bilateral hallux valgus all affect lower extremity deformity and pain to the feet. The conditions are evaluated together because the symptoms overlap.

(6) MEB NOTE: The referred condition of hallux valgus, left foot and hallux valgus, right foot would have warranted 10 percent each absent the non-referred condition of pes planus with plantar fasciitis . The evaluation is shown for your review: we would have assigned a 10 percent evaluation based on painful motion due to hallux valgus, left.

(7) 38 Code of Federal Regulation, section 4.59, allows consideration of functional due to painful motion to be rated to the minimum compensable rating for the affected disability. Since you demonstrate painful motion, a minimum compensable evaluation of 10 percent is assigned.

17. A DA Form 199-1 shows:

a. A Formal PEB convened on 3 October 2018, where the applicant was found physically unfit with a recommended rating of 20 percent and that his disposition be separation with severance pay for the following conditions:

- right hallux valgus (MEB Dx 2), 10 percent
- left hallux valgus (MEB Dx 1), 10 percent

b. The PEB noted the clear and unmistakable evidence that indicated these conditions existed prior to military service was the [applicant's] entrance exam in 2007 and the presumption of service aggravation was not overcome. The [applicant] reported onset of this condition in October 2017 from a ruck march while stationed in Fort Benning, Georgia.

c. He was found unfit for these conditions because they were medically unacceptable and prevented worldwide deployment in a field or austere environment. The PEB further noted although the VA code on the Rating Decision was 5276, 10 percent was awarded based on the VA Rating Decision which cited that the Hallux Valgus alone would be rated at 10 percent. The documentation considered in this determination were DA Form 3947, NARSUM, DA Form 7652, DA Form 3349, VA C&P Exam, and VA Rating Decision.

d. The applicant was found fit for MEB diagnoses 3-37 (plantar fasciitis, left foot; plantar fasciitis, right foot; pes planus, left foot; pes planus, right foot; pseudofolliculitis barbae; strain, right hip; strain, left hip; strain, right hamstring; leg length discrepancy; MCL tear status post arthroscopic repair right knee; sprain, left knee; strain, cervical; strain, lumbar; strain, right shoulder; strain, left shoulder; strain, right elbow; strain, left elbow; laceration of right thumb with residual scarring and sensory deficit; strain, right

wrist; strain, right ankle; strain, left ankle; personal history of military deployment; personal history of concussive events; diarrhea; acid reflux; nephrolithiasis; gynecomastia status post excision with residual scar; 3rd degree burn status post ostectomy, left side of chest with residual hypertrophic scar; allergic rhinitis; meibomian gland dysfunction, dry eyes; tinnitus; erectile dysfunction; vitamin D deficiency; early repolarization; and idiopathic exertional dyspnea). The conditions were not unfitting in full consideration of DoDI 1332.18, Enc. 3, App. 2, to include combined, overall effect, because the MEB indicated these conditions met medical fitness standards of Army Regulation 40-501, chapter 3; none were listed on the DA Form 3349, physical profile as preventing the applicant from performing one or more section 24 (a - f) functional activities; and there was no evidence to indicate that performance issues, if any, were due to these conditions.

e. The case was adjudicated as part of the IDES. As documented in the VA memorandum dated 1 September 2017, the VA determined the specific VASRD code(s) to describe the applicant's condition(s). The PEB determined the disposition recommendation based on the proposed VA disability rating(s) and in accord with applicable statutes and regulations.

g. The formal hearing notes state the applicant contended he was unfit for bilateral plantar fasciitis and bilateral pes planus. Based upon a review of the objective evidence of record, including the applicant's testimony and exhibits provided during the Formal Board proceedings; in full consideration of DoDl 1332.18, Enc. 3, App. 2; and considering the requirements for reasonable performance of duties required by rank and military specialty (11A, Infantry Officer), the PEB found the applicant was fit for bilateral plantar fasciitis and bilateral pes planus. The applicant did not provide testimony or new evidence that would support his contention that these conditions affected his ability to perform his duties. The applicant received a permanent L2 profile on 17 April 2018, after referral to the MEB. This profile was for bilateral foot pain exclusive of bilateral hallux valgus, which is the only condition that fails retention standards. The applicant submitted a MEB appeal on 18 April 2018 contending his bilateral pes planus should fail retention standards. On 19 April 2018, the MEB determined that the only foot condition that failed retention standards was the applicant's bilateral hallux valgus. The PEB returned the case to the MEB during a recess of the Formal Board proceedings on 13 July 2018 to obtain more information regarding the applicant's bilateral plantar fasciitis and bilateral pes planus. The MEB response, dated 18 July 2018, indicated there was no new medical evidence to change the original findings of the MEB. The return response indicated the following: the applicant reported to the Podiatrist on 2 July 2018 that he failed multiple treatment options including insoles, injections, and profiling for pes planus. The only treatment documented in the applicant's medical record was a prescription for custom orthotics. However, to be effective these need to be replaced every one to two years and he received a single pair in 2009 and did not request a second pair in 2018. The applicant received physical therapy for his bilateral ankle pain

in 2014 and an emergency room (ER) note dated 17 October 2017, showed bilateral ankle pain after jumping into a ditch during IBOLC. The medical record does not reflect the applicant received physical therapy for any type of foot pain. Based on their review following the return by the PEB, the MEB determined the conditions, bilateral plantar fasciitis, and bilateral pes planus, do NOT fail retention standards and there was no change to the applicant's permanent L2 profile. Therefore, the PEB found insufficient medical evidence to reverse the findings of the Informal Board regarding this condition.

h. On 11 October 2018, the applicant signed the form indicating he concurred with the findings and recommendations of the Formal PEB and did not request reconsideration of his VA ratings.

18. A second DD Form 214 shows the applicant was honorably discharged on 30 October 2018, under the provisions of Army Regulation 635-40, for disability, severance pay, non-combat related (enhanced), with corresponding Separation Code JEB. He was credited with 1 year, 5 months, and 18 days of net active service this period and 9 years, 11 months of total prior active service.

19. The applicant previously applied to the ABCMR in April 2021, requesting records correction to reflect a 50 percent physical disability rating for his combined foot conditions of bilateral hallux valgus, pes planus, and plantar fasciitis, effectively granting a physical disability retirement in lieu of physical disability separation with severance pay.

20. In the adjudication of that case, a medical advisory opinion was provided by the Army Review Boards Agency (ARBA) medical advisor, which was incorporated into the prior Record of Proceedings for Docket Number AR20210015809, and shows in full:

a. Documentation reviewed included the applicant’s ABCMR application and accompanying documentation, the military electronic medical record (AHLTA), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and/or the Interactive Personnel Electronic Records Management System (iPERMS).

b. The applicant is applying to the ABCMR requesting an increase in his military disability rating and that his disability discharge disposition be changed from separated with disability severance pay to permanent retirement for physical disability. He states through counsel: "Mr. [Applicant] requests that his records be amended to reflect a 50 percent disability for his combined food [sic] conditions: bilateral hallux valgus, pes planus, and plantar fasciitis."

c. The Record of Proceedings details the applicant's service and the circumstances of the case. His DD 214 for the period of service under consideration shows he entered the regular Army on 13 May 2017 and was discharged with $98,729.40 of disability severance pay on 25 February 2018 under provisions provided in chapter 4 of Army Regulation 635-40 (19 January 2017).

d. A Soldier is referred to the IDES when they have one or more conditions which appear to fail medical retention standards reflected on a duty liming permanent physical profile. At the start of their IDES processing, a physician lists the Soldier's referred medical conditions in section I the VA/DOD Joint Disability Evaluation Board Claim (VA Form 21-0819). The Soldier, with the assistance of the VA military service coordinator, lists all other conditions they believe to be service connected disabilities in block 8 of section II of this form, or on a separate Application for Disability Compensation and Related Compensation Benefits (VA Form 21-526EZ).

e. Soldiers then receive one set of VA C&P examinations covering all their referred and claimed conditions. These examinations, which are the examinations of record for the IDES, serve as the basis for both their military and VA disability processing. The MEB uses these exams along with AHLTA encounters and other information to evaluate all conditions which could potentially fail retention standards and/or be unfitting for continued military service. Their findings are then sent to the PEB for adjudication.

f. All conditions, both claimed and referred, are rated by the VA using the VASRD. The PEB, after adjudicating the case, applies the applicable ratings to the Soldier's unfitting condition(s), thereby determining their final combined rating and disposition. Upon discharge, the veteran immediately begins receiving the full disability benefits to which they are entitled from both their service and the VA.

g. On 31 January 2018, the applicant was referred to the IDES for "Left foot pain with pes planus and hallux valgus" and "Right foot pain with pes planus and hallux valgus." The applicant claimed 36 additional conditions on a separate Statement in Support of Claim (VA Form 21-4138). An MEB determined the applicant's "Hallux Valgus, Left Foot" and "Hallux Valgus, Right Foot" failed the medical retention standards of Army Regulation 40-501. They determined 35 other medical conditions met medical retention standards. These included "Plantar Fasciitis, Left Foot;" "Plantar Fasciitis, Right Foot;" "Pes Planus, Left Foot;" and "Pes Planus, Right Foot."

h. On 18 April 2018, the applicant non-concurred with the MEB's findings, contending that his left and right foot pes planus were conditions which also failed medical retention standards.

i. The physician who completed the review of his appeal determined the MEB was correct in determining these two conditions did not fail medical retention standards:

(1) "SM contends that his bilateral pes planus should also fail retention standards as he's been treated with orthotics by Podiatry. Pes planus is a congenital deformity which can contribute to the development of plantar fasciitis and hallux valgus, however the condition itself is generally asymptomatic and treatment with orthotics is focused on preventing the development of these other conditions, not for any symptoms of Pes Planus itself. Findings support a determination that this condition in fact meets retention standards."

(2) "In summary, the SM's appeal has been considered and the original findings and recommendations are confirmed. No changes are recommended as no additional evidence was found in the records review or the SM's appeal to support any changes to the NARSUM."

j. The writer correctly points out that while the applicant's pes planus was the congenital structural cause in the development of his bilateral hallux valgus, the condition per se is not typically symptomatic. The case, including the applicant's appeal, was forwarded to a PEB for adjudication.

k. On 11 June 2018, the applicant's informal PEB found his "Right hallux valgus" and "Left hallux valgus" to be the two unfitting condition for continued military service. They found the 35 remaining medical conditions not unfitting for continued service. In particular, they noted that these conditions were not unfitting in combination, also known as combined effect: "In full consideration of DoDI 1332.18, Enc. 3, App. 2, to include combined, overall effect, the following listed conditions are not unfitting."

l. Paragraph 4d in appendix 2 to enclosure 3 of Department of Defense Instruction 1332.18 SUBJECT: Disability Evaluation System (DES), 5 August 2014 (Change 1, 05/17/2018) addresses combined effect: "Combined Effect. A Service member may be determined unfit as a result of the combined effect of two or more impairments even though each of them, standing alone, would not cause the Service member to be referred into the DES or be found unfit because of disability. The PEB will include in its official findings, in cases where two or more medical conditions (referred or claimed) are present in the service treatment record, that the combined effect was considered in the fitness determination as referred by the MEB. Combined effect includes the pairing of a singularly unfitting condition with a condition that standing alone would not be unfitting."

m. The PEB applied the Veterans Benefits Administration (VBA) derived ratings of 10 percent and 10 percent respectively, and recommended the applicant be separated with disability severance pay. After being counseled by his PEB Liaison Officer (PEBLO) on the PEB's findings and recommendations, he appealed the PEB's findings and declined to request a VA reconsideration of his ratings.

n. The applicant contended that his bilateral plantar fasciitis and pes planus should also be unfitting conditions for continued service. The PEB's evaluation of the appeal included a request for clarification from the MEB. In their three-page narrative summary addendum written to answer the PEB's questions, the MEB again affirmed their previous findings. In part:

(1) Podiatry notes by Dr. DG. dated 2 July 2018, noted that the SM reported a history of trying medication, shoe gear, insoles, imaging, injections, and profiling in the past without relief. PEB request that addendum address inconsistency of the note and the SM's statements to the PEB during his formal board.

(2) SM reported to Podiatry on 2 July 2018, that he failed multiple treatment options including insoles, injections, and profiling. However, the only treatment documented in the SM's medical record was a prescription for custom orthotics.

(3) SM reported to the PEB in July 2018, that he had not had any previous treatment except for Orthotics and Physical Therapy.

(4) SM was prescribed custom orthotics in October 2009 for his great toe pain, left foot. However, to be effective these need to be replaced every one to two years and he received a single pair in 2009 and another in 2018.

(5) SM did receive physical therapy for his bilateral ankle pain in 2014. However, he has never had any physical therapy for any type of foot pain.

(6) Dr D.G., Podiatry, noted on 2 July 2018, that the SM reported previous treatments, however these are unsupported by a review of the AHLTA records.

(7) This provider has no medical explanation for these reported inconsistencies other than possible personal issues that may be motivating the SM's behavior. SM reported during his formal board that he is able to bike and use the elliptical. PEB requests that the SM's profile be reviewed and updated as his current profile does not allow an alternate APFT.

(8) SM's profile has been updated.

o. The profile utilized during the initial boards and the updated profile both showed his only foot condition as "Hallux Valgus (Bilateral)," and that this was the only condition which failed medical retention standards.

p. The VBA's Disability Activities Rating site (DRAS) derived separate ratings for the applicant's right and left hallux valgus as provided for as part of IDES. From the 7 June 2018 VA Ratings Decision obtained during the applicant's IDES processing:

(1) MEB NOTE: The referred conditions of hallux valgus, left foot and hallux valgus, right foot would have warranted 10 percent each absent the non-referred conditions of pes planus with plantar fasciitis. The evaluations are shown below for your review.

(2) We would have assigned a 10 percent evaluation based on painful motion due to hallux valgus, left.

(3) 38 CFR, section 4.59 allows consideration of functional loss due to painful motion to be rated to the minimum compensable rating for the affected disability. Since you demonstrate painful motion, a minimum compensable evaluation of 10 percent is assigned.

(4) A separate 10 percent evaluation for your hallux valgus, left would be warranted for: Operated with resection of metatarsal head. We would have assigned a 10 percent evaluation based on painful motion due to hallux valgus, right.

(5) 38 CFR, section 4.59 allows consideration of functional loss due to painful motion to be rated to the minimum compensable rating for the affected disability. Since you demonstrate painful motion, a minimum compensable evaluation of 10 percent is assigned.

(6) A separate 10 percent evaluation for your hallux valgus, right would be warranted for operated with resection of metatarsal head.

(7) Your statement of pain on use of the joint is found credible, warranting the minimum compensable evaluation.

(8) If hallux valgus of either foot requires bunion surgery and you wish to file a claim for increased benefits, please submit a new claim form.

q. The applicant's formal PEB reconvened on 3 October 2018. The applicant was present and represented by regularly appointed counsel. Following the hearing, the formal PEB affirmed the finding of the informal PEB: In part:

(1) "The Officer did not provide testimony or new evidence that would support his contention that these conditions affected his ability to perform his duties. The officer received a permanent L2 profile on 17 April 2018, after referral to the MEB. This profile was for bilateral foot pain exclusive of bilateral hallux valgus, which is the only condition that fails retention standards…"

(2) "The PEB returned the case to the MEB during a recess of the Formal Board proceedings on 13 July 2018 to obtain more information regarding the officer's bilateral plantar fasciitis and bilateral pes planus. Based on their review following the return by the PEB, the MEB determined the conditions, bilateral plantar fasciitis, and bilateral pes planus, do NOT fail retention standards and there was no change to the officer's permanent L2 profile. Therefore, the PEB finds insufficient medical evidence to reverse the findings of the Informal Board regarding this condition."

r. On 11 October 2018, after being counseled by his PEB Liaison Officer (PEBLO) on the formal PEB's findings and recommendations, he concurred with the formal PEB's findings and declined to request a VA reconsideration of his ratings.

s. Review of his PEB case file in ePEB along with his encounters in AHLTA revealed no substantial inaccuracies or discrepancies.

t. His records in JLV show he has been awarded multiple service-connected disability ratings, including one for pes planus. However, the DES compensates an individual only for service incurred condition(s) which have been determined to disqualify them from further military service. 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 during or permanently aggravated by their military service. These roles and authority are granted by Congress to the VA and executed under a different set of laws.

u. Given no evidence of error or injustice, it is the opinion of the ARBA medical advisor that neither an increase in his military disability rating nor a referral of his case back to the IDES is warranted.

21. On 19 April 2022, the Board denied the applicant's request, determining the evidence presented does not demonstrate the existence of a probable error or injustice and the overall merits of his case are insufficient as a basis for correction of his records.

22. 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.

23. In the adjudication of this case, a medical advisory opinion was obtained from the ARBA medical advisor (see the Medical Review section below). The medical advisory opinion was provided to Counsel on 10 June 2025, and he was given an opportunity to provide comments.

24. Counsel provided a rebuttal statement on 10 July 2025, which shows:

a. This is in response to the medical advisory opinion dated 20 May 2025, regarding the applicant's case on remand to the ABCMR from the United States Court of Federal Claims. The medical advisor recommends that the ABCMR make no changes to the applicant's records. They respectfully disagree with the advisory opinion. For the reasons detailed below, they ask the ABCMR to find that in addition to his hallux valgus (bunions), the applicant's bilateral pes planus and plantar fasciitis rendered him unfit for military service as an Infantry Officer at the time of his discharge. Additionally, they request that at a minimum the Board adopt the combined 50 percent disability rating assigned by the VA as the Army's final rating under VASRD code 5276.

b. It is unclear if the medical advisor reviewed the reported opinion before reaching his conclusions. Unfortunately, the advisory opinion does not adequately address the Honorable Judge Lerner's opinion in this case. It repeats numerous errors that Judge Lerner found were made in the original ABCMR decision that necessitated the remand. It also ignores several issues that Judge Lerner found wanting in the original ABCMR findings and that she directed the ABCMR to address. Most notably, the advisory opinion does not address the key issue in the standard for fitness determinations — the duties required of Infantry Officers. Due to the errors identified in this letter, any reliance by the ABCMR on the Advisory Opinion's recommendation will be unlikely to survive further judicial review. The following quote from Judge Lerner's decision bears repeating due to the Medical Advisor's primary error in failing to make a rational connection between the facts found and his recommendations:

c. "The Board's decision is arbitrary and capricious if it 'entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the [Board], or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.' Adams v. United States, 117 Fed. Cl. 628, 653 (2014) (quoting Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)). 'The agency must articulate a rational connection between the facts found and the choice made.' Gregory v. United States, 151 Fed. Cl. 209, 237 (2020) (quoting Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285–86, 95

S.Ct. 438, 42 L.Ed.2d 447 (1974)) (internal quotation marks omitted). 'When ... the agency has not fully explained its decision ... the Court generally remands' for a fuller explanation. Ford v. United States, 172 Fed. Cl. 300, 303 (2024).

d. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' Strand v. United States, 951 F.3d 1347, 1351 (Fed. Cir. 2020) (internal quotations and citation omitted). '[A]ll of the competent evidence must be considered ... whether or not it supports the challenged conclusion.' Valles-Prieto, 159 Fed. Cl. at 617 (quoting Heisig, 719 F.2d at 1157). '[The Board] ... fail[s] to consider the entire record [when] it cherry-pick[s] which evidence to consider.' Id. at 618. The Board must offer more than a 'naked conclusion and mere recitation' that it has analyzed all the evidence in writing. Robbins v. United States, 29 Fed. Cl. 717, 728 (1993) (quoting Beckham v. United States, 183 Ct. Cl. 628, 636, 392 F.2d 619 (1968)).".

e. The medical advisor's conclusions are conclusory and based on an incorrect standard. The medical advisor did conduct a fairly comprehensive review of the applicant's medical records and the procedural history of the case up to the time of the ABCMR's first decision. The main fault with his conclusions is that they are conclusory and do not rationally connect the findings with the evidence reviewed. The summary and opinion of the advisory opinion is contained in paragraph 9, and the ultimate conclusion is stated in subparagraph j.: "Based on careful review of documentation in available records, in the undersigned's opinion, evidence was insufficient to support that the claimant's Bilateral Pes Planus and/or Bilateral Plantar Fasciitis condition failed medical retention standards of AR 40-501 chapter 3. Both conditions had permanent, protective level 2 profiles. No change is recommended to the claimant's October 2018 Formal PEB findings."

f. The question before the board is not whether the applicant's conditions failed to meet retention standards. Instead, it is whether he was unfit: "The Board must 'sufficiently address whether [a plaintiff] was able to perform the common duties' of his 'office, grade, rank, or rating.' Kelly v. United States, 69 F.4th 887, 895–96 (Fed. Cir. 2023). '[T]he relevant time for a determination of whether [a] [p]laintiff is entitled to military disability benefits is when [he] was separated from the service.' Ward, 133 Fed. Cl. at 418. Thus, the Board acts arbitrarily when 'it fail[s] to address whether [a] plaintiff's medical condition previously found to be fitting for service had become unfitting, and to what degree, by the date of [the] plaintiff's discharge.' Gregory, 151 Fed. Cl. at 238."

g. Judge Lerner found that the ABCMR, in its first decision, failed to address the correct standard. "'The question of which duties are the proper focus of the fitness inquiry'—in this case, Plaintiff's ability to serve as an infantry officer—is 'a critical and potentially outcome-determinative one.' Henrikson, 162 Fed. Cl. at 607–08. The Board

has not provided enough evidence that it conducted this analysis." The medical advisor repeats this error by focusing on retention standards instead of the applicant's ability to perform the expected duties of an Infantry Officer at the time of his discharge. The use of an incorrect standard and the failure to discuss his expected duties renders the advisory opinion arbitrary, capricious, and unsupported by substantial evidence.

h. The advisory opinion failed to adequately address the applicant's foot and ankle pain. In paragraph 9, a., the medical advisor wrote: "The claimant had a longstanding history of intermittent foot and ankle pain (left worse than the right). He sustained 3 separate ankle injury/exacerbations (2011, 2014 and 2017). The podiatrist considered a PTTD diagnosis in 2017; however, MRI of the ankles were not diagnostic. The claimant endorsed substantial improvement of his left ankle pain with use of the CAM boot."

i. Judge Lerner specifically questioned the MEB, PEB, and previous ABCMR decisions focus on the time period predating Mr. McCadney's discharge. "But the relevant time for the fitness assessment is when Plaintiff was 'found unfit for duty and separated from the service.' Barnick, 591 F.3d at 1381. Thus, even if the applicant's conditions were not debilitating from 2009 to 2017, the required analysis was whether in 2018 his condition made him unfit." The advisory opinion repeats the error made at every previous step of this case by focusing on remote time periods. For example, in paragraph 9,f., the medical advisor claims that "At least through 2017, there was insufficient evidence for support that the claimant's lower extremity conditions substantially impacted performance despite multiple foot diagnoses." This conclusion does not address the actual relevant time period.

j. The advisory opinion also fails to relate the applicant's noted need for a CAM boot (described at https://www.thefootandankleclinic.com.au/treatment/cam-fracture-walkers-aka-moon-boots/, last accessed on 9 July 2025) and the impact of the need for this device on his ability to perform the duties on an Infantry Officer. Additionally, though they disagree with the medical advisor's use of retention standards in lieu of fitness standards, throughout Army Regulation 40-501, chapter 3-13, which contains the standards for lower extremities, there is pervasive mention of conditions failing retention standards when they "prevents the wearing of military footwear." The need for a CAM boot to alleviate pain qualifies for the very standards that the Medical Advisor has found wanting in this case.

k. The medical advisor also wrote several non-sequiturs, inconsistent, and unexplained comments in his recounting of the applicant's history and foot pain. (As the advisor explained, "For explanation or clarification purposes, the undersigned's [the medical advisor's] comments (italicized) are located throughout the review.") For example, in paragraph 3, k., he wrote: "03Oct2018 Formal PEB…The claimant was found physically unfit for Right Hallux Valgus and Left Hallux Valgus with each rated at

10% under code 5276. The recommended disposition was separation with severance pay at 20% total. The narrative indicated the following: the Officer reported to the podiatrist on 02Jul2018, that he had failed multiple treatment options including insoles, injections and profiling for pes planus. The only treatment documented in the Officer's medical record was a prescription for custom orthotics. However, to be effective these needed to be replaced every one to two years and he had received a single pair in 2009 and did not request a second pair until 2018. The Officer received physical therapy for his bilateral ankle pain in 2014. The medical record does not reflect the Officer received physical therapy for any type of foot pain. The record did show that the claimant received 4 sessions of medical massage physical therapy 30August through 25Sep2018 (Comprehensive Pain Management Martin-Benning ACH). The visit diagnoses included Pain in Unspecified Foot; however, there was no specific comment(s) concerning foot massage (in contrast to the comments noted concerning massage to the neck and back regions. These visits took place after the PEB recessed but before it reconvened."

l. The above, apart from the comments, is essentially a quote from the PEB Formal Findings. This is a curious choice because Judge Lerner found that the Formal PEB's use of this referenced evidence was inconsistent: "The Army's focus on pre-2017 evidence is also puzzling because Plaintiff's treatment record beginning in October 2017 is teeming with references to functional limitations due to foot pain and flat feet that the Army failed to discuss. The MEB acknowledged that plaintiff '[w]as diagnosed with [flat feet] by Podiatry in 2017.' But it left out the fact that doctors diagnosed him with 'acquired' flat feet that was 'severe' and 'extreme.' The MEB acknowledged Plaintiff's 'severe [flat feet]' only in its section analyzing bunions. Its description of his flat feet a page later as "asymptomatic" is thus inconsistent with the record. The PEB similarly erred. It referred to evidence from October 2017 showing ankle pain after Plaintiff jumped into a ditch as proof he did not have flat feet. But it did not discuss medical records from the same visits that showed extensive foot pain and recommended duty limitations. Id. The IDES regulations state that 'relevant evidence in assessing Service member fitness' includes 'the circumstances of referral.' DoDI 1332.18, Encl. 3, App'x 2, section 3. The Board appears to have ignored this critical evidence."

m. "While the Board was not required to discuss each of Plaintiff's medical records, it did need to 'provide a reason for ... [its] failure to consider certain' relevant evidence. Hatmaker, 127 Fed. Cl. at 235–36. Other than to summarize Plaintiff's evidence at the start of its decision, the Board makes no mention of the October and November 2017 medical records. By focusing on his pre-2017 records, the Board arbitrarily 'evaluated only certain of plaintiff's medical records during his service.' Fuentes, 157 Fed. Cl. Because the Board failed to assess whether Plaintiff's flat feet 'previously found to be fitting for service ... had become unfitting' by his discharge in 2018, it acted arbitrarily. Gregory, 151 Fed. Cl. If the Board chose to discount Plaintiff's October and November 2017 records, the Court is 'unable to discern why.' Hatmaker,

127 Fed. Cl. at 237. Instead, the Board 'cherry-pick[ed] which evidence to consider.' Valles-Prieto, 159 Fed. Cl. at 618."

n. Essentially, the medical advisor repeats the same error that Judge Lerner found in the Army's earlier review of the evidence that he cited. He focused on earlier records at the expense of more recent records and failed to explain why he credited some evidence over other evidence favorable to the applicant. There was no analysis of the use of the CAM boot and its impact on the performance of Infantry duties. The medical advisor also questions whether the applicant ever had medical massage therapy for his feet and suggests that his massages may have been for his neck and back. Exacerbating this error is the comment regarding the timing of the medical massages occurring after the formal board recessed but before it reconvened. The lack of explanation of the reasoning for the comments is facially problematic but given the previous errors in focusing on the relevant time period, it also appears that the medical advisor suggests that this evidence is not probative because the massage appointments occurred while the applicant was undergoing IDES processing. If that is the case, then the medical advisor again misapprehends that the proper time for unfit findings is the date of discharge and any other date of evidence, pre or post discharge, is less probative than more recent dates in relation to the discharge.

o. The medical advisor reviewed the same evidence cited in the above quote in paragraph 5, j.: "j. 02Jul2018 Podiatry Martin Benning ACH. He presented for bilateral foot pain. He stated that his feet had been bothering him since 2009 and hurt at the bunions, plantar fascia, Achilles tendon, inside of foot and ankle joint. He stated that he had tried medication, shoe gear, insoles, imaging, injections, profiling without relief in the past. The only thing that had helped was rest and massage therapy. Exam: There was bilateral pes planus (flat feet). There was pain in the bilateral bunions…Bilateral equinus (restricted ankle joint flexibility) was present. Pain with ROM of Achilles tendon and pain with palpation of Achilles tendon was present. There was pain in the medial plantar arch bilaterally. There was relaxed calcaneal stance position (RCSP) in valgus deformity. RCSP is an important index used to assess the severity of the foot valgus deformity. Based on the reported history, exam and imaging, the specialist endorsed the claimant had Severe Pes Planus, Bilateral; Moderate Bunion Deformity, Bilateral; and Posterior Tibial Tendonitis, Bilateral. The podiatrist opinioned that the claimant would need surgical flat foot reconstruction after the MEB process. It should be noted that at the time of this note, the MEB and Informal PEB were already completed. The undersigned could not locate documentation of any foot injections. Medical records did not indicate that the claimant had completed any physical therapy for the foot at this point. Records indicated that he did participate in medical massage therapy for the foot after this note."

p. In this section, the medical advisor cites evidence that on 2 July 2018, the applicant had reported numerous failed treatments for his bilateral foot pain, bunions,

plantar fasciitis, Achilles tendon, and inside of his foot and ankle joint. The examining Army podiatrist found that he had bilateral flat feet, pain in his bilateral bunions, pain and limitations of range of motion in his toe joint, restricted range of motion of the Achilles tendon with pain, pain in the bottom of the foot and a need for eventual surgical flat foot reconstruction. However, his main comments were that the note was written during the IDES process, that the medical advisor did not locate physical therapy records for the foot as of that date, but did have medical massage therapy for "the foot" after this note was written. Once again, the medical advisor focuses on the timing of the note and later medical massage dates prior to the actual relevant date — 30 October 2018, the date that the Army discharged the applicant. The medical advisor also fails, again, to address the applicant's fitness to perform his Infantry Officer duties and erroneously substitutes specific treatment modalities as a proxy for the actual standards for fitness. The advisory opinion fails to explain or discuss how the absence or presence of physical therapy, foot injections, or massage therapy relates to his opinion as to the applicant's fitness.

q. The medical advisor failed to properly consider the collective impact of the applicant's disabilities on his fitness. The medical advisor found that the applicant's "Bilateral Pes Planus with Plantar Fasciitis, and Bilateral Hallux Valgus all affect lower extremity deformity and pain to the feet," and that due to symptoms overlap between these conditions they were rated together in accordance with VASRD principles. See the advisory opinion, paragraph 3,e. Despite acknowledging this overlap, the medical advisor concluded that these conditions collectively did not render the applicant unfit.

r. In paragraphs 9,b. and h., the medical advisor discussed the overlap of symptoms between conditions, such as the shared symptoms and common treatments (e.g., footwear modifications, orthotics, and physical therapy). He further noted that bunions, plantar fasciitis, and hammertoes frequently coincide with flat feet. See the advisory opinion, paragraph 9,b. However, the advisor downplayed pes planus as "frequently asymptomatic," concluding that it had minimal impact on functional impairment or performance. See advisory opinion, paragraph 9,h. This conclusion directly contradicts evidence previously considered by Judge Lerner, who explicitly highlighted that the Army failed to adequately address how flat feet and plantar fasciitis may have contributed collectively to the applicant's unfitness: "Despite reciting the correct standard, the Army did not comply with it. Cf. Fuentes, 157 Fed. Cl. at 459. The MEB and PEB relied on records of foot pain and ankle pain, but only considered Plaintiff's bunions—instead of the possibility that his flat feet and plantar fasciitis contributed to his foot pain, and thus his unfitness. [...] The Board addressed whether Plaintiff's 'foot conditions, in isolation, were unfitting.' Meidl, 108 Fed. Cl. at 577. But it did not explain whether Plaintiff's flat feet—which also required orthotics and produced pain—contributed to unfitness along with his bunions."

s. Further, the Board failed to consider collective impact because it ignored—without explanation—evidence that indicated an overlap of symptoms, including the October and November 2017 records and the VA exam. [...] This also violated IDES regulations that instruct the VA exam should be used to determine collective impact. DoDM 1332.18, Vol 2., Encl. 2 section 3(a)(12). The Board must provide a thorough review and written analysis of potentially overlapping conditions and may not summarily disregard combined impact."

t. Here, the medical advisor repeats the same error identified by the court: He explicitly acknowledges an overlap of symptoms yet dismisses their collective impact without explanation. Indeed, in paragraph 3,e., the medical advisor affirmed the VA's combined rating precisely because of symptom overlap involving "lower extremity deformity and pain." Given this acknowledgment, the advisor's subsequent conclusion in paragraph 9,h., is internally inconsistent and legally unsupportable.

u. Because the evidence clearly demonstrates overlapping symptoms between flat feet, plantar fasciitis, and bunions and that these conditions that collectively impaired the applicant's functional capacity as an Infantry Officer, the Board should find these conditions collectively unfitting.

v. The medical advisor failed to properly address the evidence regarding the applicant's flat feet. The medical advisor wrote in paragraph 9,c.: "The claimant's flat feet were frequently noted in the context of an exam for acute injury. Documentation of complaints that could be attributable to pes planus during those visits were minimal; despite the condition being technically assessed as severe. The podiatrist did offer surgical corrective treatment for the pes planus deformity. The claimant declined, which was reasonable given that conservative treatment had not been maximized (please see summary of pes planus treatment below). Symptoms of flat feet include pain or stiffness in the midfoot (medial plantar arch), heel or in the ankle due to over pronation. Although the claimant's Foot Condition DBQ exam revealed marked pronation, episodes of distinct ankle trauma/injury were documented in the record."

w. It is unclear what the medical advisor is suggesting about the applicant's "marked pronation." If he is suggesting that this was not a feature of his flat feet or to support a conclusion that they were "asymptomatic" this is not supported by evidence and is close to the same problem that Judge Lerner identified: "The same issue infects the Medical Advisor's finding that Plaintiff's flat feet were 'asymptomatic.' Both the Board and the MEB merely stated that congenital flat feet are not usually symptomatic. But the VASRD, which the military must use as a guide, specifically instructs that '[i]t is essential to make an initial distinction between bilateral flat foot as a congenital or as an acquired condition.' 38 C.F.R. 4.57. The Board did not address whether Plaintiff's flat feet had become symptomatic by October 2017 or by his separation. In failing to do so, it 'did not discuss relevant evidence that may contradict the conclusions of the [MEB]

and [PEB].' Henrikson v. United States, 162 Fed. Cl. 594, 608 (2022). This failure is grounds for remand."

x. A related issue is present in paragraph 9,f.: "At least through 2017, there was insufficient evidence for support that the claimant's lower extremity conditions substantially impacted performance despite multiple foot diagnoses. For example, he was deemed qualified to enter Infantry in 2017, he passed the 17Feb2015 APFT with score 294 (NCOER covering 20150211 thru 20150815) and earned the Army Physical Fitness Award for Excellence (NCOER covering 20140415 thru 20150210) and passed the 28Jun2013 with score 297 (NCOER covering 20120627 thru 20140414). The record showed episodic, largely prophylactic treatment for the Pes Planus condition with custom orthotics from 2009 to January 2018, twice. "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 their office, grade, rank, or rating" (Paragraph 3-1 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (20 March 2012))."

y. Leaving aside the repeated error in focusing on remote time periods, the advisory opinion does not address the applicant's pain, treatment, and functional limitations due to flat feet exacerbated by IBOLC that Judge Lerner identified: "Plaintiff again needed medical care at a hospital on October 11, 2017 for pain in his left foot and right ankle. Id. He explained that he had 'developed gradually increasing pain in both lateral ankles and feet' during the Leadership Course training. Id. The provider, Dr. R____ S____, found that '[the applicant] has [flat foot] [in] both feet.' Id. Dr. S____ noted Plaintiff's 'long-standing history of flat feet' and stated that he had 'previously be[en] seen by orthopedics or podiatry and...has been given orthotics.' Id. Records from this visit reported 'pain in both lateral ankles,' 'ankle joint stiffness[,]' '[s]tiffness of the foot, foot pain occurring with exercise, and [that] the arch of [his] foot is lost.' Plaintiff reported he had been experiencing sharp pain for the previous five days that was 'constant and more every [ ] time he takes a step.' Id. The provider determined factors correlating with onset were 'flat feet and training for IBOLC.'"

z. "On 13 October 2017, Plaintiff reported to a clinic with 'bilateral ankle and foot pain.' He experienced 'significant pain when stepping down on the left foot.' The clinician observed the applicant 'has significant [flat feet].' Later that day, Plaintiff was fitted for an orthotic boot to treat 'left ankle/foot pain.' On 20 October 2017, Dr. S____ diagnosed Plaintiff with "Flat Foot [pes planus] (acquired), unspecified foot." He wrote: Patient does have extreme flatfeet. I agree that it is unlikely he would do well as an infantry officer long-term."

aa. The advisory opinion paints a very different picture of the applicant's flat feet than the severe condition which numerous military medical providers found made his ability to perform duties in the Infantry unlikely. "The results of a November 2, 2017 podiatry exam and MRI identified "severe bilateral [flat foot] with mid foot sag imaging" as well as "[m]oderate bilateral hallux valgus deformity/bunions." On 8 November 2017, after receiving the referral for "severe [flat foot] and chronic bilateral ankle and foot pain," a radiologist concurred with the acquired flat foot diagnosis. The radiologist recommended the applicant for "an Army occu[p]ation other than infantry." On 3 November Dr. S____ again affirmed his diagnosis of acquired flat feet, writing: [e]ven with orthotics, it is unlikely the Soldier would be able to continue with extended road marching as required in infantry branch. The podiatrist, the patient, and I are all in agreement that a permanent profile to limit extended road marching would be warranted. This would result in a recommendation for a branch transfer."

bb. The advisory opinion does not address the evidence showing that the applicant's flat feet and related pain prevented him from "extended road marching," a requirement for Infantry Officers. This finding was also made by the VA Examiner on the Disability Benefits Questionnaire who stated that due to his diagnoses, which included the bilateral flat feet, plantar fasciitis, and bunions, the applicant "Can not run, ruck or jump." Not only did the advisory opinion fail to account for the treating doctor's conclusions, it also did not properly weigh the VA exam in its findings. "So while a board may discount a VA exam, it must rely on countervailing 'objective evidence,' including medical records and witness testimony, and non-contemporaneous exams may be less probative. Mazarji, 164 Fed. Cl. at 310. Still, 'a mere mention' of the VA ratings 'does not remotely cut the mustard' because claiming to have examined evidence 'without an analysis...in writing' is inadequate. Keltner, 165 Fed. Cl. at 515 (quoting Beckham, 183 Ct. Cl. at 637, 392 F.2d 619)."

cc. In the opinion, there is no substantive discussion of the duties of an Infantry Officer. However, with the records before the board and the court, there is a clear evidentiary basis that extended ruck marching is expected of Infantry Officers and that the applicant was unable to ruck because of the effect, individually or collectively, of his bilateral foot disabilities. The advisory opinion errs by not properly considering the evidence and by failing to discuss the relevant military duties that are the foundation of any fitness determination. Because the advisory opinion failed to properly weigh the evidence and to consider the VA examination's findings, the ABCMR should reject its recommendations and grant the applicant full relief.

dd. The advisory opinion makes speculative and unsupported findings regarding the applicant's treatment. The medical advisor wrote in paragraph 9,i.: "Of note, there were no records submitted regarding immediate or ongoing treatment for foot conditions after discharge from service. The undersigned did not find post military treatment records in the VA's JLV (Joint Legacy Viewer) for any of the foot conditions in the first

24 months following discharge. Also noted, imaging did not show degenerative changes in the ankle or foot joints, which could support a predictable future progression of symptoms."

ee. The medical advisor makes several errors in this section. First, there is no basis or explanation of the significance of the applicant having not submitted post-discharge records. While such records, close in time to discharge, may be probative evidence of his condition at discharge, there is no reason to expect that he would submit such records in this remanded case. Second, the reference to VA records and the lack of treatment records in the 24-month post discharge assumes, without basis, that the applicant was only seen by VA providers. It is just as plausible that, like many veterans, the applicant sought care from non-VA providers or was referred through VA community care to a civilian provider. There is simply no foundation for the expectation that there would be records in the VA's JLV. Additionally, the medical advisor references unidentified "imaging" which has not been provided to the applicant or his counsel, but regardless, there is no explanation of the significance of "a predictable future progression of symptoms." It appears that, again, the medical advisor is using another standard to judge the applicant's fitness instead of the correct standard. For these reasons, the ABCMR should reject the recommendations in the advisory opinion and find the applicant unfit for his flat feet, plantar fasciitis, and related foot and ankle conditions.

ff. The advisory opinion failed to adequately address the applicant's profiles In paragraph 9,j., the medical advisor claimed that the applicant had "permanent, protective level 2 profiles." Before the court, he argued that it was improper to assign different Numerical Designators to different conditions affecting the same anatomical system. Judge Lerner addressed this in her opinion: "Plaintiff argues that the assignment of separate PULHES ratings for different parts of his feet rather than a single rating systematically violates Army regulations. The Army profiling regulations are silent on whether this kind of sub-profiling of systems is inappropriate. On this record, it is unclear a systemic violation occurred. But because the Army's decision to rate the profiles differently is unexplained, the Board should also explain this practice on remand.

gg. The Board should reject the medical advisor's analysis of the applicant's L Serial profiles. First, the medical advisor does not explain the basis or significance of "protective profiles." He appears to discount their significance on this classification without explanation. All profiles can be viewed as "protective," and there is no distinction or category of protective versus non-protective contained in Army Regulation 40-501. A designator of "2" "indicates that an individual possesses some medical condition or physical defect that may require some activity limitations." Army Regulation 40-501, paragraph 7-3, d. (Note the permissive "may" is also used to describe limitation in the "3" designation). Even though they believe that there is no basis for "sub-profiling," the

finding that the applicant's flat feet and plantar fasciitis "may" require activity limitations shows that these conditions were, in combination with his bunions, unfitting. The medical advisor did not address the issue of sub-profiling and they respectfully request that his and the ABCMR's position on this issue be explained in order to understand the basis for the advisory opinion and the board's decision.

hh. The advisory opinion did not address several issues in the reported opinion In addition to the errors identified earlier in this response, the advisory opinion failed to address several other issues highlighted by Judge Lerner. Although the medical advisor's limited role may explain some of these omissions, the resolution of these issues may impact the Board's decision and provide additional bases to reject the advisory opinion.

ii. The advisory opinion does not address the issue of missing medical records that the Court found problematic. Specifically, Judge Lerner noted that the ABCMR previously relied upon a three-page MEB Addendum that was absent from the Administrative Record, concluding that "[w]ithout these records, the Court cannot determine whether the Board's decision is supported by substantial evidence or is arbitrary and capricious." Similarly, in the current advisory opinion, the medical advisor references unidentified imaging and treatment records without providing them or even clarifying their source or content. Any decision by the ABCMR that does not grant full relief and relies on these absent or unidentified records would be insufficient and unsupported by substantial evidence.

jj. Judge Lerner addressed Mr. McCadney's position that the PEB and ABCMR improperly deviated from the VA-assigned combined rating of 50 percent for the applicant's overlapping foot conditions, instead adopting an informal 20 percent sub-rating based solely on a note in the IDES proposed rating. As Judge Lerner explained, "[T]he Army erred in evaluating the overlap of symptoms and separability of his conditions… The Army's decision to deviate from the VA's combined rating for Plaintiff's overlapping foot conditions also appears to cut against Section 4.14 of the VASRD, which instructs agencies to avoid 'pyramiding' or 'the evaluation of the same disability under various diagnoses.'"

kk. In a similar recent case, Culpepper v. United States, the Navy BCNR, upon remand from the US Court of Federal Claims, found that the Navy "had no statutory or regulatory authority to modify the rating provided by the VA in Integrated DES cases, except under limited circumstances not applicable in this case." Decision on Remand of BCNR, Culpepper v. United States, No. 22-420 (Fed. Cl. May 19, 2023) (Dietz, J.) at 8, Dkt. No. 20. Furthermore, the court in Culpepper subsequently found that the Government's original defense of using the sub-rating "lacked substantial justification." See Culpepper v. United States, No. 22-420 (Fed. Cl. Nov. 21, 2024).

ll. Although Judge [redacted] did not find this issue dispositive, she directed that if the ABCMR again adopts such a sub-rating on remand, it must fully explain and justify its basis for doing so. The advisory opinion entirely ignores this issue and offers no justification whatsoever for deviating from the official VA rating assigned to the applicant. The ABCMR should reject the advisory opinion's application of the improper sub-rating and adopt the official combined VA rating of 50 percent for his flat feet under VASRD code 5276.

mm. They respectfully ask the ABCMR to reject the recommendations of the advisory opinion. Consistent with Judge [redacted] opinion and order, they request that the ABCMR explicitly address each argument and issue identified in our response, including those neglected by the medical advisor. The advisory opinion is conclusory, inconsistent, fails to apply the proper legal standard for fitness determinations, and is unsupported by substantial evidence. Most importantly, it does not adequately consider the duties required of an Infantry Officer, nor does it properly analyze the collective impact of the applicant's documented conditions at the relevant time of discharge.

nn. Accordingly, the ABCMR should grant the applicant full relief by finding him unfit due to his bilateral pes planus, plantar fasciitis, and hallux valgus, and adopt the combined 50 percent VA disability rating under VASRD code 5276.

MEDICAL REVIEW:

1. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case which has been sent to ABCMR under court remand. The review included the accompanying supporting documents and the applicant's available electronic medical records. The claimant through counsel contends that the PEB should have found his Pes Planus and Plantar Fasciitis bilateral foot conditions unfitting for continued service and that the VA rating of 50% should be his Army disability rating. It was further contended that his foot conditions in combination are unfitting. For explanation or clarification purposes, the undersigned's comments (italicized) are located throughout the review.

2. The claimant enlisted in the Regular Army 13Jun2007. His MOS was Psychological Operations Specialist for almost 6 years and Cannon Crewmember for approximately 3.5 years. He was deployed to Iraq (20071210-20090301), Afghanistan (20110716-20120120), and Uganda (20131203-20140529). He was commissioned 12May2017, and his MOS was 11A Infantry Officer subsequently. He was discharged 30Oct2018 under provisions of AR 635-40 chapter 4-24 for disability. His service was characterized as honorable. He received severance pay of $98729.

3. Summary of IDES.

a. 26Jan2018 CTMC Benning. The visit was to update the profile. He had been referred to change his military branch (MAR 2 reclass); however, it was determined that he could not physically perform in the basic role as a Soldier. The claimant endorsed that he was unable to run without pain. The foot conditions included Left and Right Foot Hallux Valgus (bunion); and Acquired Left and Right Pes Planus (flat feet). He had been evaluated by podiatry and offered surgery, but he had declined. The primary care provider concluded that the claimant had met MRDP (medical retention determination point) for bilateral feet pain due to these conditions. *MRDP is the point at which a condition appears to have sufficiently medically stabilized so that the course of further recovery is relatively predictable*. *A retention decision can be made after this point.*

b. 27Mar2018 Foot Conditions DBQ (Disability Benefits Questionnaire). The VA listed the following bilateral diagnoses with dates of onset of diagnoses in parentheses as follows: Right and Left Plantar Fasciitis (27Feb2018); Right and Left Flat Foot (09Jun2014); Right Symptomatic Hallux Valgus (02Nov2017); and Left Symptomatic Hallux Valgus (11Sep2009). *It should be noted that the date of onset listed for the Left and Right Pes Planus conditions, is not consistent with the military entrance physical which noted the bilateral condition at the time in 2007*. The claimant reported to the VA examiner that he had tried arch supports and orthotics but remained symptomatic. The pain in the left foot and hallux valgus was moderate and constant. The pain in the right foot and hallux valgus was constant and mild. Exam: He was tender in the plantar surface of both feet. There was decreased longitudinal arch height of both feet with weightbearing; there was marked pronation of both feet; and the weight-bearing line fell over or medial to the great toe. The examiner assessed that bilateral pes planus, bilateral plantar fasciitis and bilateral painful hallux valgus deformities all contributed to alteration of the weight-bearing line. There was moderate tenderness to palpation of the bilateral 1st metatarsophalangeal joints (due to bunion formation). There was no use of assistive devices as a normal mode of locomotion. There was evidence of pain with passive range of motion (ROM), and with weightbearing and non-weightbearing.

c. 12Apr2018 MEB Proceedings (DA Form 3947). The MEB determined that only foot conditions Left and Right Foot Hallux Valgus were medically unacceptable IAW AR 40-501 chapter 3-13b(1). The MEB NARSUM (narrative summary) notes indicated that the bilateral foot condition existed prior to service and that it had been permanently worsened by service. The VA diagnosis for this condition was Symptomatic Hallux Valgus. The MEB determined that foot conditions Left and Right Foot Plantar Fasciitis and Left and Right Foot Pes Planus, were medically acceptable. Both Plantar Fasciitis and Pes Planus bilateral conditions had permanent L2 physical profiles. The claimant non-concurred with the MEB findings contending in his 18Apr2018 appeal that the Bilateral Pes Planus condition failed retention standards in combination with the Bilateral Hallux Valgus condition.

d. 7Apr2018 Physical Profile Record (DA Form 3349). The document showed a

permanent L3 physical profile for Hallux Valgus (Bilateral) with two associated functional activity limitations and also included instruction to run at own pace and tolerance.

e. 07Jun2018 DES Proposed Rating. The VA combined the rating for Pes Planus with Plantar Fasciitis, and Bilateral Hallux Valgus (claimed as Left Foot Pain with Pes Planus and Hallux Valgus, Right Foot Pain with Pes Planus and Hallux Valgus, Bilateral Foot condition and Bilateral Toes condition, Arthritis) at 50% total under code 5276. The narrative indicated that the VA Foot Conditions DBQ examiner endorsed that the Bilateral Pes Planus with Plantar Fasciitis, and Bilateral Hallux Valgus all affect lower extremity deformity and pain to the feet. Therefore, the foot conditions were evaluated together due to symptoms overlap in accordance with specified VASRD (VA Schedule for Rating Disabilities) principles.

f. 11June2018 Informal PEB (DA Form 199). The PEB found that Right Hallux Valgus and Left Hallux Valgus existed prior to service and that the presumption of service aggravation was not overcome. The bilateral condition was found unfitting for continued service with right and left sides both receiving 10% ratings under code 5276. The combined rating was 20%. The case was adjudicated as part of the IDES; therefore, the ratings were supplied by the VA. The PEB recommended disposition was separation with severance pay. The claimant concurred and waived a formal hearing of his case on 12Sep2018. He did not request reconsideration of the VA ratings.

g. 18Jun2018, the claimant appealed the decision of the Informal PEB requesting for Pes Planus and Plantar Fasciitis to be found unfitting in combination with the Bilateral Hallux Valgus condition.

h. 18Jun2018 memo from the MEB to the PEB with SUBJECT: Return of PEB Proceedings. The memo noted the claimant's contention that the combined effect of all of his foot issues including Pes Planus and Plantar Fasciitis, in combination with his Hallux Valgus, caused the severe functional limitations that prevented performance of duties. The MEB responded as follows (in brief): The claimant was first diagnosed with Plantar Fasciitis by the VA in March 2018. There was no medical evidence of chronicity, and the claimant had been on a protective profile for Foot Pain that would have prevented its development. Concerning the flat foot condition, Moderate Asymptomatic Pes Planus (a congenital deformity) was noted during the entrance Army physical. Although the condition could contribute to the development of Hallux Valgus, the flat foot condition itself was generally asymptomatic and therefore would not cause functional impairment and did meet retention standards.

i. 13Jul2018 Formal PEB (DA Form 199). The FPEB convened, then recessed to obtain further information about the claimant's plantar fasciitis and pes planus.

j. 31Jul2018 DA Form 3349. The permanent L3 physical profile for Hallux Valgus

(Bilateral) was updated. The profile prohibited the claimant from moving greater than 40 lbs while wearing usual protective gear and prohibited the APFT 2-mile run event. In addition, the profile directed him to wear extra wide boots and orthotics as prescribed; run at own pace and distance; and perform self-directed low impact activities.

k. 03Oct2018 Formal PEB. The FPEB reconvened and found that there was clear and unmistakable evidence that the Right and Left Hallux Valgus condition had existed prior to service. They also found that the presumption of service aggravation was not overcome— *the bilateral condition was compensable*. The claimant was found physically unfit for Right Hallux Valgus and Left Hallux Valgus with each rated at 10% under code 5276. The recommended disposition was separation with severance pay at 20% total. The narrative indicated the following: the Officer reported to the podiatrist on 02Jul2018, that he had failed multiple treatment options including insoles, injections and profiling for pes planus. The only treatment documented in the Officer's medical record was a prescription for custom orthotics. However, to be effective these needed to be replaced every one to two years and he had received a single pair in 2009 and did not request a second pair until 2018. The Officer received physical therapy for his bilateral ankle pain in 2014. The medical record does not reflect the Officer received physical therapy for any type of foot pain. *The record did show that the claimant received 4 sessions of medical massage physical therapy 30August through 25Sep2018 (Comprehensive Pain Management Martin-Benning ACH). The visit diagnoses included Pain in Unspecified Foot; however, there was no specific comment(s) concerning foot massage (in contrast to the comments noted concerning massage to the neck and back regions. These visits took place after the PEB recessed but before it reconvened*.

4. In the paragraphs 5 through 7 below, the medical records for each foot condition were reviewed.

5. Hallux Valgus

a. 07May2007 Report of Medical Examination (DD Form 2808). Hallux Valgus (and Pes Planus) was noted during the enlistment physical examination.

b. 11Sep2009 TMC Trophic Lightening Clinic. The claimant reported left foot pain for the prior 2.5 months which started after he dropped a weight on the left great toe. Diagnosis: Acquired Deformity of Toe— Left Toe Valgus. *The pre-existing hallux valgus condition was aggravated by the crush injury*.

c. 21Oct2009 Schofield Base Podiatry Clinic. He complained of pain in left great toe joint with walking or running. He pointed specifically to the first metatarsophalangeal (1st MTP or “toe knuckle”) joint as the area of maximum pain. The pain was through-and-through but mostly on the top. Dorsiflexion was decreased. Also noted was that the first ray of the left foot was hypermobile. *The first ray is a*

functional unit of bones that include the 1st metatarsal and is important for gait. *Metatarsals are the long bones in the foot*. He was prescribed custom orthotics to "decrease his hypermobile first ray which will in turn increase first metatarsophalangeal joint range of motion". He was also prescribed ibuprofen 800mg. *With the exception of report of foot pain during post deployment health assessment (for the Uganda deployment), the treatment record was then silent for foot pain until October 2017*. *This coincided with increased training in conjunction with his new commission and MOS and ankle injury*.

d. 13Oct2017 Brace Shop Consult Martin-Benning ACH. He was issued a cam boot for Provisional Diagnosis: Pain in Left Ankle and Joints of Left Foot.

e. 17Oct and 20Oct2017 Soldier Athlete Program. The claimant was seeking a permanent profile or branch transfer due to his reports of increased foot and ankle pain associated with road marching during IBOLC (Infantry Basic Officer Leadership Course) training. The exact location of foot pain was not specified.

f. 02Nov2017 Podiatry Martin-Benning ACH. There was gradual onset of foot pain, right 1st MTP pain, and pain in the left foot in the MTP joint. Exam: Hallux valgus of both feet was observed. Pain was elicited in the 1st MTP joint by motion during the exam of the right and left foot. Diagnoses included Flat Foot, (Acquired), Unspecified Foot; Hallux Valgus (Acquired), Unspecified Foot. Arch supports (non-custom) were dispensed. The podiatrist recommended that the claimant should be in a less demanding Army branch than Infantry. *It should be noted that pes planus can be congenital or acquired. The note did not discuss when the condition was acquired; however, as previously stated, the condition was noted upon entry into service*.

g. 02Nov2017 foot films revealed severe bilateral pes planus, bilateral hallux valgus (left greater then right), and possible chronic small fracture fragment.

h. 03Jan2018 Orthopedic Appliance Martin-Benning ACH. The claimant was fitted for custom AMFIT arch supports with training for proper use and instructions including length of use and to return if any modifications or adjustments needed to be made.

i. 17Apr2018 Physical Profile Record (DA Form 3349). The document showed a permanent L2 physical profile for Ankle/Foot Injury/Pain (Bilateral) with no associated specific duty limitations.

j. 02Jul2018 Podiatry Martin Benning ACH. He presented for bilateral foot pain. He stated that his feet had been bothering him since 2009 and hurt at the bunions, plantar fascia, Achilles tendon, inside of foot and ankle joint. He stated that he had tried medication, shoe gear, insoles, imaging, injections, profiling without relief in the past. The only thing that had helped was rest and massage therapy. Exam: There was bilateral pes planus (flat feet). There was pain in the bilateral bunions. There was pain

on range of motion (ROM) of the 1st metatarsophalangeal joint (MTPJ) bilaterally. Normal ROM of 1st MTPJ up to 65 degrees dorsiflexion. Bilateral equinus (restricted ankle joint flexibility) was present. Pain with ROM of Achilles tendon and pain with palpation of Achilles tendon was present. There was pain in the medial plantar arch bilaterally. There was relaxed calcaneal stance position (RCSP) in valgus deformity. *RCSP is an important index used to assess the severity of the foot valgus deformity*. Based on the reported history, exam and imaging, the specialist endorsed the claimant had Severe Pes Planus, Bilateral; Moderate Bunion Deformity, Bilateral; and Posterior Tibial Tendonitis, Bilateral. The podiatrist opinioned that the claimant would need surgical flat foot reconstruction after the MEB process. *It should be noted that at the time of this note, the MEB and Informal PEB were already completed*. *The undersigned could not locate documentation of any foot injections*. *Medical records did not indicate that the claimant had completed any physical therapy for the foot at this point. Records indicated that he did participate in medical massage therapy for the foot after this note.*

k. Comprehensive Pain Management/Physical Therapy Martin-Benning ACH. The claimant completed 4 medical massage therapy sessions for diagnosis Pain in Unspecified Foot on 10Aug2018, 30Aug2018, 07Sep201 and 26Sep2018. *This was after the FPEB recessed but before the FPEB reconvened for the final disposition*. *The foot condition(s) being treated was(were) not specified*.

6. Pes Planus

a. 07May2007 Report of Medical history and Report of Medical Examination (DD Forms 2807-1 and 2808). Pes Planus, Moderate, Asymptomatic (and Hallux Valgus) was noted during the enlistment physical.

b. 23Jul2009 TMC Trophic Lightening Clinic. The claimant presented for a physical exam for psychological operations school. He denied any pain. Flat feet (pes planus) were noted bilaterally with medial displacement of the medial malleolus (a bone in the ankle). He had no complaints; he shared that he ran track in high school and currently exercised intensely.

c. 21Oct2009 Schofield Base Podiatry. The claimant had pain in the left great toe and was prescribed custom orthotics to “decrease his hypermobile first ray” and to increase the ROM (of the joints in that ray). Essentially, this was to treat the 1st metatarsal Hallux Valgus condition; however, his Pes Planus condition would also benefit from the custom orthotics. *The record was silent for foot pain until October 2017*. *This coincided with increased training in conjunction with his new commission and MOS and ankle injury*.

d. 24Jul2014 Physical Therapy Womack AMC. The bilateral flat foot condition was

incidentally noted during physical examination when he presented for treatment for the ankle injury (see below). Documentation indicated that he received physical therapy for right hamstring, left hip strain, bilateral ankle strain and low back strain.

e. 06Aug2014 Orthopedics Womack AMC and 07Aug2014 Brace Shop Consult. The claimant was issued a pair of medium density orthotics for Pes Planus (in the setting of a recent exacerbation of chronic intermittent ankle pain). The Provisional Diagnosis was Ankle Joint Pain. *It should be noted it was specified that the orthotics were dispensed for pes planus; however, there was no indication that the flat feet condition was symptomatic during this visit. He received instruction on orthotic use.*

f. 20Oct2017 CTMC-Benning. The claimant was seeking a permanent profile or branch transfer. He had a long-standing history of flat feet and had experienced foot and ankle pain intermittently throughout his military career. He was completing his IBOLC and had experienced an exacerbation of his foot and ankle pain due to road marching. *This was the first documentation of any foot issues since the visit for left great toe pain in October 2009*. The claimant reported left ankle pain during the visit. The primary care provider noted the claimant's extremely flat feet and endorsed that it was unlikely that the claimant would do well as an infantry officer long-term. The provider considered a permanent L2 physical profile to limit road marching distance.

g. 02Nov2017 bilateral weight bearing foot films showed severe pes planus, moderate hallux valgus deformity/bunions (left greater than right) and fifth digit hammertoe deformity bilaterally. He was dispensed non-custom fit (temporary) inserts.

h. 15Nov2017 Martin-Benning ACH. The visit was for profile review for left foot pain with duration 3 months. Pain was rated 5/10. Mobility was not limited. Gait and stance were normal. Diagnosis: Pes Planus, Acquired, Unspecified Foot.

j. 03Jan2018 and 26Jun2018 Orthopedic Appliance Martin-Benning ACH. The claimant was fitted for custom arch supports with instructions on how to wear them, how long to wear them and proper fitting in other footwear besides boots.

k. 26Jan2018 Martin-Benning ACH. The visit was to update the profile. He had been referred for MAR 2 reclass; however, it was determined that he could not perform as a Soldier. The claimant endorsed that he was unable to run without pain. He had already been evaluated by Podiatry. Diagnoses included Acquired Left and Right Pes Planus. The provider concluded the claimant "met MRDP for bilateral feet pain due to severe bilateral Pes Planus and Bilateral Hallux Valgus". *The flat foot and hallux valgus conditions were noted during the entrance exam.*

l. 17Apr2018 Physical Profile Record (DA Form 3349). The document showed a

permanent L2 physical profile for Ankle/Foot Injury/Pain (Bilateral) with no associated specific duty limitations.

m. 02Jul2018 Podiatry Martin Benning ACH. He presented for bilateral foot pain. This note was previously summarized above. The exam showed bilateral pes planus (flat feet), pain in bilateral posterior tibial tendon and pain in the medial plantar arch bilateral. The podiatrist stated, "based off history, exam and imaging, patient has severe pes planus foot deformity to bilateral feet." The podiatrist also believed that the claimant had posterior tibial tendon dysfunction (PTTD). The podiatrist opined that the claimant would need surgical flat foot reconstruction after the MEB process. *The posterior tibial tendon is one of the main supports for the medial arch of the foot. Of note, flat foot reconstruction frequently involves posterior tibial tendon repair/reconstruction*.

n. 09Aug2018 MRI of both left and right ankles showed no significant abnormality

7. Plantar Fasciitis -

a. 27Mar2018 Foot Conditions DBQ. The VA examiner listed diagnoses Right and Left Plantar Fasciitis. *The undersigned did not find this diagnosis in the record prior to this evaluation for the IDES process*.

b. 30Apr2018 CTMC Benning. The claimant was seen reporting a 3-week history of constant foot pain that started suddenly in both feet in the plantar aspect that was worse with weight bearing. There was no known injury. *He was in the MEB process at the time, and he was already on a protective profile*. He was referred to pain clinic.

c. 02Jul2018 Podiatry Martin Benning ACH. This note was previously summarized above. Of pertinence concerning the Bilateral Plantar Fasciitis condition, the claimant reported experiencing foot pain in the plantar fascia area of both feet.

8. Ankles

a. 23Jul2009 TMC Trophic Lightening Clinic. The claimant presented for a physical exam for psychological operations school. He denied any pain. The physical exam showed pes planus bilaterally with medial displacement of the medial malleolus (ankle bone).

b. 23Jun2011 Clark Clinic. The claimant injured his left ankle when he fell in a well at Camp McCall 2 weeks prior (09Jun2011). He was diagnosed with a sprain at the time and placed on a temporary profile.

c. 10Feb2012 Report of Medical Assessment (DD Form 2697). He experienced

some improvement in the left ankle symptoms while deployed in Afghanistan.

d. 05Jun2014 Post Deployment Health Assessment (DD Form 2796) and Report of Medical Assessment (DD Form 2697). After his return from Uganda deployment, the claimant reported having experienced left ankle pain and pain in his feet while deployed. He endorsed pain in the arms, legs, or joints also.

e. July and August 2014 Physical Therapy Womack AMC. He attended 8-9 sessions which included treatment for bilateral ankle pain (right hamstring, left hip strain, and low back strain as well). Diagnosis: Ankle Immobility. The record was silent for ankle issues again until October 2017.

f. 07Oct2017 the claimant was seen in the emergency room for bilateral ankle pain (left greater than right) after a fall/jump into a trench in IBOLC training 6 weeks prior. The emergency room doctor noted the bilateral flat feet and history of left foot injury. The claimant specifically pointed "to the area around the lateral malleolus (ankle bone) as the location of the pain" (11Oct2017). The ER doctor thought the flat feet may be contributory to the claimant's continued bilateral ankle pain.

g. 13Oct2017 CTMC-Benning. The claimant reported having significant pain when stepping down on the left foot. The left ankle bone scan result was nonspecific (nondiagnostic). He was placed in a CAM walker for a few weeks to take the pressure off the foot. He was also given profile restrictions.

h. 17Oct2017 Soldier Athlete Program-Benning. His ankle felt better for the most part. He reported feeling random pain along the lateral foot with prolonged activity. The exam showed tenderness to palpation along the lateral ankle. He was able to complete various maneuvers with only minor pain.

i. 30Oct2017 Soldier Athlete Program-Benning. Two weeks later, he endorsed having received tremendous benefit from the ankle mobilization devices/treatment.

j. 27Mar2018 Ankle Conditions DBQ. ROM: Right ankle dorsiflexion was 0 to 15 degrees; and plantar flexion 0 to 45 degrees. Left ankle dorsiflexion was 0 to 10 degrees; and plantar flexion was 0 to 45 degrees. *The ROMs for both ankles met retention standards of AR 40-501 chapter 3*. There was pain with motion; however, there was no evidence of pain with weight bearing. Muscle strength was 5/5 (normal). There was no ankle instability or dislocation suspected.

k. 02Jul2018 Podiatry Martin Benning ACH. In addition to Severe Pes Planus Bilateral, the podiatrist opined that the claimant had posterior tibial tendon dysfunction (PTTD) as well. *The main function of the posterior tibial tendon, which is located in the ankle, is to hold up the arch and support the foot when walking (American Academy of*

Orthopedic Surgeons). *PTTD can be a progressive condition and may ultimately require surgery.*

l. 09Aug2018 MRI of both left and right ankles showed no significant abnormality.

9. Summary/Opinion

a. The claimant had a longstanding history of intermittent foot and ankle pain (left worse than the right). He sustained 3 separate ankle injury/exacerbations (2011, 2014 and 2017). The podiatrist considered a PTTD diagnosis in 2017; however, MRI of the ankles were not diagnostic. The claimant endorsed substantial improvement of his left ankle pain with use of the CAM boot.

b. In addition to the bilateral ankle condition, the claimant had multiple foot conditions which shared some symptoms in common as well as some common treatment modalities. For example, change in footwear, modifications in activity, stretching, regular use and update of custom inserts/orthotics, anti-inflammatories (NSAIDs and steroids) and physical therapy could benefit all of the claimant's bilateral foot conditions (bunions, flat feet, plantar fasciitis and 5th digit hammertoe deformity). It should be noted that the incidence of bunions, plantar fasciitis and hammertoes is increased in individuals with flat feet. It should also be stated that not all of the claimant's foot conditions were symptomatic.

c. The claimant's flat feet were frequently noted in the context of an exam for acute injury. Documentation of complaints that could be attributable to pes planus during those visits were minimal; despite the condition being technically assessed as severe. The podiatrist did offer surgical corrective treatment for the pes planus deformity. The claimant declined, which was reasonable given that conservative treatment had not been maximized (please see summary of pes planus treatment below). Symptoms of flat feet include pain or stiffness in the midfoot (medial plantar arch), heel or in the ankle due to over pronation. *Although the claimant's Foot Condition DBQ exam revealed marked pronation, episodes of distinct ankle trauma/injury were documented in the record*.

d. In January 2018, the claimant's primary care provider specifically referred both the Bilateral Hallux Valgus and Bilateral Pes Planus conditions to be reviewed by the MEB. The MEB reviewed all of the claimant's medical conditions and determined that only the Bilateral Hallux Valgus failed retention standards. At the time of the MEB in April 2018, the claimant had very few visits with symptomatic flat feet as the primary focus. The recent focus was symptoms associated with bilateral hallux valgus (and bilateral ankle pain). This seems congruent with the VA diagnoses for foot conditions during the Foot Conditions DBQ: Bilateral Plantar Fasciitis; Bilateral Flat Foot; and Bilateral Symptomatic Hallux Valgus.

e. Summary of diagnosis/treatment for the Pes Planus condition was as follows: Pes Planus diagnosis (asymptomatic) was noted 07May2007 during the military entrance physical. On 23Jul2009 during the physical exam for psychological operations school, flat feet were noted; however, no symptoms were documented. The claimant was subsequently fitted for custom orthotics on 21Oct2009. Pes Planus was again noted 24Jul2014 in the context of bilateral ankle injury (fell into a well in June 2011, exacerbation during Uganda deployment) without flat foot symptoms being documented. In November 2017 Pes Planus was noted again in the context of bilateral ankle pain for which he had been seen recently in the emergency room after a fall/jump into a trench (07Oct2017 BMACH). He was dispensed non-custom inserts (02Nov2017) while awaiting to be fitted for custom orthotics a second time (03Jan2018). And finally, while in the IDES process, he was fitted for custom orthotics on 26Jun2018. He deferred surgery but did complete 4 sessions for of medical message in August and September 2018 (Comprehensive Pain Management Martin-Benning ACH for Unspecified Foot Pain from which he endorsed some benefit.

f. At least through 2017, there was insufficient evidence for support that the claimant's lower extremity conditions substantially impacted performance despite multiple foot diagnoses. For example, he was deemed qualified to enter Infantry in 2017, he passed the 17Feb2015 APFT with score 294 (NCOER covering 20150211 thru 20150815) and earned the Army Physical Fitness Award for Excellence (NCOER covering 20140415 thru 20150210) and passed the 28Jun2013 with score 297 (NCOER covering 20120627 thru 20140414). The record showed episodic, largely prophylactic treatment for the Pes Planus condition with custom orthotics from 2009 to January 2018, twice. "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 their office, grade, rank, or rating" (Paragraph 3-1 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (20 March 2012)).

g. The claimant had episodic symptomatic Pes Planus condition that had not failed conservative measures. Failing conservative treatment is an indirect measure of a condition's functional impairment and impact on performance. Generally, Pes Planus and Plantar fasciitis are manageable conditions with temporary relative rest, regular use of not outdated or worn inserts/orthotics and use of accommodating footwear. In contrast, the claimant had onset of more persistent pain from his Bilateral Hallux condition which was not adequately managed by conservative treatment efforts with the 1st MTP repeatedly identified as a source of pain. The record showed minimal standard maintenance/care for the Pes Planus and Plantar Fasciitis conditions; therefore, the conditions had not failed medical retention standards.

h. The VA rated the foot conditions together as one evaluation in accordance with the VARSD principles; however, the VA rating rules have no bearing on the PEB mission of fitness determination. The PEB operating under different statutes, may find condition(s) unfitting due to combined effect: A service member may be determined to be unfit as a result of the combined effect of two or more impairments even though each of them, standing alone, would not cause the service member to be referred into the DES or be found unfit because of disability (DoDI 1332.18 Enc.3. App. 2). However, before a condition can be determined to be unfitting in combination with another, the condition itself should have demonstrated functional impairment and impact on performance. Based on documentation in available records, pes planus was frequently noted incidentally during examinations for physical injury (usually the ankle); however, the condition itself was frequently asymptomatic. Therefore, it would be estimated to have little impact on functional impairment and by extension, little impact on performance.

i. Of note, there were no records submitted regarding immediate or ongoing treatment for foot conditions after discharge from service. The undersigned did not find post military treatment records in the VA's JLV (Joint Legacy Viewer) for any of the foot conditions in the first 24 months following discharge. Also noted, imaging did not show degenerative changes in the ankle or foot joints, which could support a predictable future progression of symptoms.

j. Based on careful review of documentation in available records, in the undersigned's opinion, evidence was insufficient to support that the claimant's Bilateral Pes Planus and/or Bilateral Plantar Fasciitis condition failed medical retention standards of AR 40-501 chapter 3. Both conditions had permanent, protective level 2 profiles. No change is recommended to the claimant's October 2018 Formal PEB findings.

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. The Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation. Upon review of the applicant's petition, available military records and medical review, the Board considered the ARBA Medical Advisor's opinion, determined that relief is warranted. The Board notwithstanding the opine finding evidence does not support a finding that either Bilateral Pes Planus or Bilateral Plantar Fasciitis failed to meet medical retention standards under AR 40-501, Chapter 3. Both conditions were managed under permanent Level 2 protective profiles, and contemporaneous documentation indicated medical providers anticipated continued service in a non-

infantry capacity. Accordingly, no change is recommended to the October 2018 Formal Physical Evaluation Board (PEB) findings with respect to retention standards.

2. However, upon consideration of the totality of evidence including service records, clinical assessments, and IDES documentation the Board finds that Bilateral Pes Planus rendered the applicant unfit for continued military service specifically in the Infantry branch at the time of separation. Medical providers explicitly noted that his permanent profile limitations including restrictions on road marching were incompatible with the physical demands of his designated branch. The VA's proposed 50% rating under VASRD code 5276 accounted for overlapping symptoms from pes planus and plantar fasciitis. Nonetheless, the Board finds that the limitations and medical restrictions primarily stemmed from pes planus, based on provider notes, clinical history, and absence of a plantar fasciitis diagnosis in military records.

3. The Board noted, the record reflects the applicant potentially should have been considered for reclassification into a branch compatible with his medical profile. The Board finds that the applicant's service should have been evaluated in light of his physical inability to perform duties associated with his assigned branch. As such, with respect to the plantar fasciitis, both the MEB and PEB declined to identify it as unfitting, and the ARBA Medical Advisor found no evidence to support a contrary conclusion. The condition was not diagnosed separately in service treatment records, and the available evidence does not support a finding of unfitness based on plantar fasciitis. The Board recommends correcting the applicant's military records to reflect Bilateral Pes Planus as an unfitting condition. A disability rating of 50% is applied, consistent with the VA's evaluation under VASRD guidance. No change is recommended with respect to plantar fasciitis. The applicant's request is therefore granted in part and denied in part. Relief is appropriate to recognize the impact of Bilateral Pes Planus on branch-specific duties and to adjust his record accordingly.

BOARD VOTE:

Mbr 1	Mbr 2	Mbr 3	
[redacted]	[redacted]	[redacted]	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 relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by:

- changing the applicant's PEB proceedings (DA Form 199-1), dated 3 October 2018 to reflect a Bilateral Pes Planus as an unfitting condition with a disability rating of 50%
- voiding the applicant's separation order (Order 290-2209), dated 17 October 2018 and issuing new separation orders reflecting his medical separation
- voiding the applicant's DD Form 214 for the period ending 30 October 2018 and reissuing a DD Form 214 reflecting his medical separation.

X _____

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 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 their 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 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 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.

3. DOD Instruction 1332.18 (Disability Evaluation System) provides policy guidance on the DES. In determining a service member's disability rating, the Secretary of the Military Department concerned will consider all medical conditions, whether singularly, collectively, or through combined effect, which render the service member unfit to perform the duties of their office, grade, rank, or rating. Appendix 2, enclosure 3, Paragraph 4d (Combined Effect), addresses combined effect:

a. A Service member may be determined unfit as a result of the combined effect of two or more impairments even though each of them, standing alone, would not cause the Service member to be referred into the DES or be found unfit because of disability.

b. The PEB will include in its official findings, in cases where two or more medical conditions (referred or claimed) are present in the service treatment record, that the combined effect was considered in the fitness determination as referred by the MEB.

c. Combined effect includes the pairing of a singularly unfitting condition with a condition that standing alone would not be unfitting."

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, 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.

6. 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.

7. 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//