

## ADDENDUM TO RECORD OF PROCEEDINGS

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2017-02964

**COUNSEL:** YES

INDICATED

**HEARING REQUESTED:** NOT

---

---

### APPLICANT'S REQUEST

The Board reconsider his request for Combat-Related Special Compensation (CRSC).

### RESUME OF THE CASE

The applicant is a permanently disability retired Air Force technical sergeant (E-6).

On 20 Sep 19, the Board considered and denied the applicant's request for CRSC; finding he was not the victim of an error or injustice. The Board determined the available evidence of record did not support a finding the applicant's service-connected medical condition of left hip and knee pain were incurred as the direct result of armed conflict, while engaged in hazardous service, in the performance of duty under conditions simulating war, or through an instrumentality of war; and, therefore, did not qualify for compensation under the CRSC Act.

For an accounting of the applicant's original request and the rationale of the earlier decision, see the AFBCMR Letter and Record of Proceedings at Exhibit E.

On 3 Jun 21, the United States Court of Federal Claims remanded the case, stating the applicant shall provide the AFBCMR with any additional evidence and supplemental legal argument in support of his claim within 60 days of the remand order, and instructed the AFBCMR to request and obtain an advisory opinion regarding the applicant's claim from the Director of Compensation, Office of the Deputy Under Secretary of Defense (Military Personnel Policy) within 60 days of the date the applicant submits any additional evidence and supplemental legal argument.

The United States Court of Federal Claims remand order is at Exhibit F.

On 2 Aug 21, the applicant's counsel submitted a supplemental legal argument requesting reconsideration for CRSC approval for left hip disability and traumatic brain injury (TBI). Counsel contends the Air Force erred by applying legal standards and evidentiary requirements much more rigorous than those prescribed by the DoD Guidance; accordingly, it must now "reevaluate all the evidence" in the record because its application of its heightened standard "affected how all the evidence was evaluated." The DoD Guidance provides that a CRSC applicant need only to show that a disability is combat-related, and thus eligible for compensation by a "preponderance of available documentary information." Preponderance only requires an applicant to show that his disabilities were "more likely than not" caused by a combat-related injury. Accordingly, there is no basis for the Air Force's requirement that the applicant provide "medical records from the time of the injur[y]." Although the applicant does not have contemporaneous medical records, because he was not analyzed at the medic station

that day, the record is replete with evidence, including a Purple Heart, that shows his disabilities are more likely than not the direct result of two improvised explosive device (IED) blasts as well as expert testimony from his orthopedic surgeon, eyewitness testimony from the detachment commander, applicant's sworn testimony, statement by the officer in charge, and a slew of medical records. On the other side of the scale, there are no medical records or any other indication of a different potential cause of his TBI or the degenerative changes to his left hip. Put together, the evidence in the record, in the absence of any contrary evidence, weighs strongly in favor of the conclusion the applicant's disabilities were caused by the injuries he sustained in combat (two IEDs) while serving in Iraq. That evidence need not be "definitive" nor "confirm" that causal link; it merely must show that it is more likely true than not. The applicant has met that burden.

The applicant's complete submission is at Exhibit G.

## **EVALUATION**

The Director of Military Compensation Policy, Office of the Deputy Under Secretary of Defense recommends granting CRSC for the applicant's hip disability. After careful review of the applicant's records in this case, and by a preponderance of the evidence, the Director finds the applicant and his high mobility multipurpose wheeled vehicle (HMMWV) team were subjected to a hostile fire event, i.e., the blast from a roadside IED, on 15 Mar 07; he was awarded a Purple Heart for injuries sustained on 15 Mar 07 (the date of the IED blast); an Air Force orthopedic surgeon confirmed the applicant's hip replacement surgery in 2013 was the result of the blunt force injury he sustained from the IED blast in 2007; the Department of Veterans Affairs (DVA) assigned a service-connected compensable disability rating (including a Veterans Affairs Schedule for Rating Disabilities (VASRD) medical diagnosis code) for his left hip replacement; and, his retired pay is subject to offset in accordance with the provisions of 38 U.S.C. §§ 5304 and 5305. According to the Air Force Central Command (AFCENT) Personnel Division, the Surgeon General's office also determined that the applicant's left hip replacement was a result of the injuries he sustained from the IED blast. It appears a similar conclusion/determination was not reached with respect to his TBI. The Director opines that a sufficient causal relationship exists between the applicant's hip replacement disability (for which he receives compensation from the DVA) and the injuries for which he was awarded the Purple Heart to conclude the DVA compensated disability is *attributable* to the Purple Heart injuries. It is the Director's further opinion; the applicant's hip replacement meets the definition of a "combat-related disability", and he qualifies for payment of CRSC.

The complete advisory opinion is at Exhibit H.

## **APPLICANT'S REVIEW OF EVALUATION**

The Board sent a copy of the advisory opinion to the applicant on 6 Dec 21 for comment (Exhibit I), and the applicant replied on 5 Jan 22. On behalf of the applicant, counsel agrees with the advisory in finding the applicant is entitled to CRSC based on his hip disability. Although the advisory opinion does not address it, the applicant's TBI also qualifies for CRSC. The preponderance of available evidence shows that this injury is also a direct result of armed conflict, the same IED blast that caused his Purple Heart injuries. The shock wave that injured his hip also drove his head into the turret of his HMMWV, causing the TBI he experiences today. There is no question that explosion was part of an armed conflict (indeed, had it not been, the applicant could not have been awarded a Purple Heart), and no reason to conclude that anything else injured the applicant's brain. Put another way, the record establishes that the applicant's TBI has the same combat-related cause as his hip disability, and there is no basis for awarding CRSC for one but not the other. While the applicant's TBI may not have been the

source of his Purple Heart, this disabling injury still qualifies for CRSC because it was caused as a direct result of armed conflict and/or through instrumentalities of war.

For these reasons, and those set out at greater length in the brief, filed 2 Aug 21, the applicant and his counsel ask that the Board: 1) adopt the advisor's finding that the applicant is entitled to CRSC based on his hip disability, 2) find in the first instance that the applicant is entitled to CRSC based on his TBI, and 3) retroactively grant his claim for those benefits.

The applicant's complete response is at Exhibit J.

### **ADDITIONAL EVALUATION**

The Director of Military Compensation Policy, Office of the Deputy Under Secretary of Defense provided a supplementary advisory opinion in response to the applicant and his counsel's argument. The Director recommends granting CRSC for the applicant's TBI disability. After careful review of the applicant's records, the Director finds the applicant's CRSC application meets the burden of proof to establish that his TBI is combat-related. Based on the preponderance of available documentary evidence, the Director opines the applicant and his counsel have shown that his TBI was incurred as a direct result of the 2007 IED strikes on his HMMWV. While there is no contemporaneous evidence tying the IED blast to his TBI, the medical records provided with this appeal and the signed affidavit of the detachment commander provided sufficient evidence to tie the applicant's TBI, to these IED blasts.

While contemporaneous medical records could provide additional probative value, their absence should not be dispositive for CRSC awards and the realities of life while deployed might not make them available in all cases. We are often tasked with making decisions in the absence of perfect information; in this case the Director believes the available information favors the applicant's claim for CRSC.

As noted in the memorandum filed in support of the applicant's appeal, he is the type of Service member Congress intended to receive benefits under the CRSC program. Consequently, based on applicable provisions of law, regulation, and policy governing entitlement to, and administration of, CRSC, it is the Director's opinion that the applicant's service-connected DVA-compensable disability of TBI meets the qualifying criteria required to establish it is combat-related for purposes of entitlement to CRSC as either incurred as a direct result of armed conflict or through an instrumentality of war. The applicant should qualify for payment of CRSC for his TBI disability, and his petition to the AFBCMR should be approved.

The complete advisory opinion is at Exhibit K.

### **APPLICANT'S REVIEW OF ADDITIONAL EVALUATION**

The Board sent a copy of the advisory opinion to the applicant on 5 May 23 for comment (Exhibit L), and the applicant replied on 9 May 23. On behalf of the applicant, counsel states the Director of Military Compensation Policy, Office of the Deputy Under Secretary of Defense got it exactly right. There is no need for further delay. Counsel urges the Board to correct expeditiously its original decision by granting the applicant's request for CRSC for each of his combat-related injuries, his hip injury and his TBI, retroactive to 29 Mar 16, which is the date of his first eligibility for such payments and continuing prospectively.

The applicant's complete response is at Exhibit M.

### **FINDINGS AND CONCLUSION**

1. The application was timely filed.
2. The applicant exhausted all available non-judicial relief before applying to the Board.
3. After reviewing all Exhibits, to include the applicant's supplement legal argument and responses to the advisory opinions, the Board concludes the applicant is the victim of an error or injustice. The Board concurs with the rationale and recommendation of the Director of Military Compensation Policy and finds a preponderance of the evidence substantiates the applicant's contentions. Specifically, as noted by the Director, the applicant has provided evidence sufficient to justify his hip disability and TBI meet the definition of a "combat-related disability" making him qualified for payment of CRSC. Therefore, the Board recommends correcting the applicant's records to the extent indicated below.
4. The applicant has not shown a personal appearance, with or without counsel, would materially add to the Board's understanding of the issues involved.

### **RECOMMENDATION**

The pertinent military records of the Department of the Air Force relating to APPLICANT be corrected to show the following disabilities were found to be combat-related and deemed qualified for Combat-Related Special Compensation: Hip Prosthesis (left) under VASRD code 5054 and Traumatic Brain Disease (traumatic brain injury) under VASRD code 8045.

### **CERTIFICATION**

The following quorum of the Board, as defined in Department of the Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2017-02964-2 in Executive Session on 18 May 23:

Panel Chair  
Panel Member  
Panel Member

All members voted to correct the record. The panel considered the following:

- Exhibit E: Record of Proceedings, w/ Exhibits A-D, dated 22 Oct 21.
- Exhibit F: Remand Order, w/atchs, dated 3 Jun 21.
- Exhibit G: Applicant's additional submission, w/atchs, received 2 Aug 21.
- Exhibit H: Advisory Opinion, Director of Military Compensation Policy, dated 3 Dec 21.
- Exhibit I: Notification of Advisory, SAF/MRBC to Counsel, dated 6 Dec 21.
- Exhibit J: Applicant's Response, dated 5 Jan 21.
- Exhibit K: Supplemental Advisory Opinion, Director of Military Compensation Policy, dated 3 May 23.
- Exhibit L: Notification of Advisory, SAF/MRBC to Counsel, dated 5 May 23.
- Exhibit M: Applicant's Response, dated 9 May 23.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings, as required by DAFI 36-2603, paragraph 4.12.9.

**X**