

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2024-01792

XXXXXXXXXXXXXX

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

His official military personnel record amended to reflect award of Combat-Related Special Compensation (CRSC) for Intervertebral Disc Syndrome with Degenerative Arthritis of the Spine and Degenerative Arthritis, Left Shoulder.

APPLICANT'S CONTENTIONS

He suffered from service-connected disabilities to his back and shoulder, each directly caused by an in-service accident that occurred in Aug 77, when the applicant was severely injured commanding an M551 Sheridan Tank during live-fire exercises. As established in his application to the Air Force CRSC board, these disabilities qualify for CRSC because they were sustained in the performance of duty under conditions simulating war and through an instrumentality of war in accordance with Title 10, United States Code § 1413a (10 USC § 1413a). The applicant applied to the CRSC board three times seeking to have his back and shoulder disabilities approved for CRSC. In each instance, the CRSC board denied those claims. The applicant has exhausted his administrative options and is now appealing to the Air Force Board for Correction of Military Records (AFBCMR).

In its 1 Nov 18 ruling, the CRSC board denied CRSC for his back and shoulder because the documentation he provided “does not confirm an injury from the scenario [I] described” and “does not confirm [my] duties as a Tank Commander.” In that same ruling, the CRSC board invited the applicant to gather new documentation addressing those issues and resubmit his claim for reconsideration. The applicant spent the following years searching for and obtaining documentation addressing the board’s concerns, including undertaking the time-consuming process of locating members of his unit to corroborate the accident and his injuries. After successfully obtaining additional supporting documentation, including a sworn statement, the applicant submitted a second request for reconsideration on 28 Mar 24. On 19 Apr 24, only 16 business days after submission, the CRSC board denied his claim again. The denial, however, consisted only of a photocopy of the first page of the CRSC board’s 1 Nov 18 order and an outdated copy of the DD Form 149¹ [Application for Correction of Military Record]. This cursory and rushed review did not comply with the CRSC Program Guidance, which required the CRSC board to review his newly submitted material and “inform [me] of the results of the review.” Adding insult to injury, the CRSC board did not even extend the courtesy of addressing the applicant by rank in its correspondence. Most frustrating, however, is the applicant’s newly submitted evidence, as well as the evidence he submitted in his previous applications, establishes by a “preponderance of available documentary information” that his back and shoulder disabilities qualify for CRSC. The applicant provides a detailed accounting of the documentary information he provided to the CRSC board.

Unfortunately, the applicant is not able to submit record evidence contemporary to the accident to further confirm his claim because no such record exists. The absence of contemporary

¹ The DD Form 149 is used to apply to the AFBCMR. The DD Form 2860 is used to apply for CRSC.

evidence does not justify the denial of his claim. In Docket Number BC-2017-02964, the AFBCMR found the applicant was a victim of error or injustice and ordered the applicant's disabilities be deemed combat-related. In reaching that conclusion, the AFBCMR ruled "while there is no contemporaneous evidence" supporting the applicant's claim for CRSC, "the medical records provided with the appeal and the signed affidavit of the detachment commander provided sufficient evidence." Similarly, in Docket Number [REDACTED] *Work-Product*, the AFBCMR corrected the CRSC board's ruling and awarded CRSC after crediting the applicant's argument that the CRSC board erred in denying the applicant's claim due to the absence of contemporaneous evidence. As the AFBCMR recognized, no statute, CRSC Program Guidance, or financial management regulation requires an applicant "provide contemporaneous medical evidence for an injury to be approved for CRSC." Based on these prior AFBCMR rulings, the evidence the applicant provided in his application to the CRSC board is sufficient to establish his claim for CRSC for his back and shoulder disabilities.

He met the standard set forth in Attachment 1 of the Amended Revised Program Guidance to 10 USC § 1413a, and proved by a preponderance of available information that his back and shoulder disabilities qualify for CRSC. The CRSC board's decision to deny his claim constitutes a legal error and is fundamentally unfair.

The applicant did not make his CRSC claim for his 9/11 or M551 accident for the severe physical ailments (three neurosurgeries due to the M551 accident) until a decade after his medical retirement because he did not know about CRSC. The applicant found out about it when he first went to the Department of Veterans Affairs (DVA). If the applicant had known CRSC existed in 2006 when retiring, he would have called his former commander right then. The applicant's former commander was right behind him in an armored vehicle when the applicant was almost killed in the M551 accident, but the applicant's former commander had passed away by the time the applicant found out about CRSC. All the other witnesses have died or have been impossible to find four decades after the accident. The applicant recently found his S-1/Adjutant at the time of the M551 accident, and he vouched for him, but the CRSC board still said, "no." It doesn't seem fair. Since he convalesced over one and a half years after his last surgery due to the M551 accident, he received no retirement benefits briefing. Surely, they would have told the applicant about CRSC. It is not easy finding witnesses to an M551 accident four decades after it occurred.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a retired Air Force Reserve colonel (O-6).

On 25 May 06, according to AF Form 356, *Findings and Recommended Disposition of USAF Physical Evaluation Board (Informal)*, provided by the applicant, he was found unfit because of physical disability and diagnosed with:

- Category I – Unfitting Conditions Which Are Compensable and Ratable:
 - Chronic Back and Low Extremity Pain; Incurred while entitled to basic pay: Yes; Line of Duty: Yes; Disability Rating: 40 percent; Veterans Administration Schedule for Rating Disabilities Code: 5238; Disability was the direct result of a combat-related injury: Yes.

The IPEB recommended permanent retirement with a compensable percentage of 40 percent.

On 1 Jul 06, according to Special Order Number XXXX, dated 8 Jun 06, the applicant was relieved from organization and base of assignment. Effective 2 Jul 06, the applicant was

permanently disability retired with a compensable percentage for physical disability of 40 percent. Disability was the direct result of a combat-related injury as defined by 26 USC § 104.

On 14 Mar 16, according to an excerpt from a DD Form 2860, *Application for Combat-Related Special Compensation (CRSC)*, the applicant submitted a claim for CRSC for:

- Intervertebral disc syndrome with degenerative arthritis of spine
- Post-Traumatic Stress Disorder (PTSD)
- Radiculopathy, Left Lower Extremity
- Radiculopathy, Right Lower Extremity
- Right Shoulder, Arthritis
- Degenerative Arthritis, Left Shoulder
- Diabetes Mellitus

On 25 May 16, according to an AFPC/DPFDC letter, the applicant's request for CRSC was denied for:

- PTSD, insufficient documentation
- Degenerative Arthritis (Left Shoulder); insufficient documentation
- Traumatic Arthritis (Intervertebral Disc Syndrome); insufficient documentation
- Paralysis of Sciatic Nerve (Left Lower); insufficient documentation
- Paralysis of Sciatic Nerve (Right Lower); insufficient documentation
- Degenerative Arthritis (Right Shoulder); Non-Combat Related
- Diabetes Mellitus; Non-Combat Related
- Limited Motion of Wrist (Carpal Tunnel, Right); Non-Combat Related
- Limited Motion of Wrist (Carpal Tunnel, Left); Non-Combat Related
- Tinnitus; Non-Combat Related
- Collar Bone; Not Rated
- Head; Not Rated
- Neck; Not Rated

On 20 Jul 18, according to applicant's letter, Subject: Request for Reconsideration of 25 May 16 USAF CRSC Decision, provided by the applicant, he requested reconsideration for the following five diagnosed conditions:

- PTSD
- Degenerative Arthritis (Left Shoulder)
- Traumatic Arthritis (Intervertebral Disc Syndrome)
- Paralysis of Sciatic Nerve (Left Lower)
- Paralysis of Sciatic Nerve (Right Lower)

On 1 Nov 18, according to an AFPC/DPFDC letter, Subject: Partial Approval of CRSC in the Case of [applicant], the applicant's request for CRSC for PTSD was approved; however, the following conditions were denied:

- Intervertebral Disc Syndrome with Degenerative Arthritis of Spine
- Degenerative Arthritis, Left Shoulder
- Radiculopathy, Right Lower Extremity
- Radiculopathy, Left Lower Extremity
- Tinnitus

On 28 Mar 24, according to an applicant letter, Subject: Request for Reconsideration of 1 Nov 18 USAF CRSC Decision for the Injuries Sustained in My M551 Tank Live-Fire Accident, provided by the applicant, he requested reconsideration for award of CRSC for his back

(Intervertebral Disc Syndrome with Degenerative Arthritis of Spine) and shoulder (Degenerative Arthritis, Left Shoulder).

For more information, see the excerpt of the applicant's record at Exhibit B and the advisory at Exhibit C.

APPLICABLE AUTHORITY/GUIDANCE

10 USC § 1413a. *Combat-related special compensation.*

(a) *Authority.* The Secretary concerned shall pay to each eligible combat-related disabled uniformed services retiree who elects benefits under this section a monthly amount for the combat-related disability of the retiree determined under subsection (b).

(e) *Combat-Related Disability.* In this section, the term "combat-related disability" means a disability that is compensable under the laws administered by the Secretary of Veterans Affairs and that:

- (1) is attributable to an injury for which the member was awarded the Purple Heart; or,
- (2) was incurred (as determined under criteria prescribed by the Secretary of Defense)
 - (A) as a direct result of armed conflict;
 - (B) while engaged in hazardous service;
 - (C) in the performance of duty under conditions simulating war; or
 - (D) through an instrumentality of war.

Department of Defense (DoD) 7000.14-R, *Financial Management Regulation*, Volume 7B, Chapter 63, dated Jun 24:

6.0 *Determinations of Combat-Relatedness.* The following criteria, terms, definitions, and explanations will apply to making combat-related determinations in the CRSC Program.

6.1 Direct Result of Armed Conflict.

6.1.1. The disability is a disease or injury incurred in the line of duty as a direct result of armed conflict. To support a combat-related determination, it is not sufficient to only state the fact that a member incurred the disability during a period of war, in an area of armed conflict, or while participating in combat operations. There must be a definite causal relationship between the armed conflict and the resulting disability.

6.1.2. Armed conflict includes a war, expedition, occupation of an area or territory, battle, skirmish, raid, invasion, rebellion, insurrection, guerilla action, riot, or any other action in which Service members are engaged with a hostile or belligerent nation, faction, force, or with terrorists.

6.1.3. Armed conflict may also include incidents involving a member while interned as a prisoner of war, while detained against his or her will in the custody of a hostile or belligerent force, or while escaping or attempting to escape from such confinement, prisoner of war, or detained status.

6.2 *While Engaged in Hazardous Service.* Hazardous service is service that includes, but is not limited to, aerial flight, parachute duty, demolition duty, experimental stress duty, and diving duty. A finding that a disability is the result of hazardous service requires that the injury or disease be the direct result of actions taken in the performance of such service. Travel to and from such service, or actions incidental to a normal duty status not considered hazardous, are not included.

6.3 *In the Performance of Duty Under Conditions Simulating War.* In general, performance of duty under conditions simulating war covers disabilities resulting from military training, such as war games, practice alerts, tactical exercises, airborne operations, leadership reaction courses, grenade and live fire weapon practice, bayonet training, hand-to-hand combat training, repelling, and negotiation of combat confidence and obstacle courses. It does not include physical training activities such as calisthenics, jogging, formation running, or supervised sport activities.

6.4 *Instrumentality of War.*

6.4.1. There must be a direct causal relationship between the instrumentality of war and the disability. It is not required that a member's disability be incurred during an actual period of war. The disability must be incurred incident to a hazard or risk of the service.

6.4.2. An instrumentality of war is a vehicle, vessel, or device designed primarily for Military Service and intended for use in such Service at the time of the occurrence or injury. It may also include such instrumentality not designed primarily for Military Service if use of or occurrence involving such instrumentality subjects the individual to a hazard peculiar to Military Service. Such use or occurrence differs from the use or occurrence under similar circumstances in civilian pursuits.

6.4.3. A determination that a disability is the result of an instrumentality of war may be made if the disability was incurred in any period of service as a result of such diverse causes as wounds caused by a military weapon, accidents involving a military combat vehicle, injury or sickness caused by fumes, gases, or explosion of military ordnance, vehicles, or materiel.

6.4.4. For example, if a member is engaging in a sporting activity while on a field exercise and falls and strikes an armored vehicle, the injury would not be considered the result of an instrumentality of war (armored vehicle) because it was the sporting activity that was the cause of the injury, not the vehicle. On the other hand, if the individual was engaged in the same sporting activity and the armored vehicle struck the member, then the injury would be considered the result of an instrumentality of war.

AIR FORCE EVALUATION

AFPC/DPFDC recommends denying the application based on the documentation provided by the applicant and analysis of the facts.

The applicant submitted three claims for CRSC. His PTSD was approved with an overall CRSC rating of 70 percent. His remaining disabilities were disapproved as non-combat related. The applicant contends his disabilities were caused while conducting live-fire exercises in a United States Army M551 Sheridan tank which he was violently ejected from and pushing cargo off an aircraft.

The fact that a member incurred the disability during a period of war; while serving in an area of armed conflict; and/or while participating in combat operations is not sufficient by itself to support a combat-related determination. When making combat-related determinations, with regard to Armed Conflict, Hazardous Service, Simulation of War, or an Instrument of War, the [CRSC] board looks for definite, documented, causal relationship between the combat-related event and the resulting disability.

Documentation submitted by the applicant in his claims and AFBCMR application have been reviewed and there was no evidence provided, such as in-service medical records from the time of the injuries, that confirms his injuries were the direct result of a combat-related event. The burden of proof that a disability is combat-related rests with the applicant. Applicants will be required to provide copies of documents in their possession and otherwise substantiate claims to the best of their ability. A record submitted by a member may be used in support of their

application if that record appears regular on its face and is consistent with military service documents and procedures in use at the time issued, based on the best information available.

Civilian medical provider letters (after service) and third-party witness testimonials of the event are accepted and taken into consideration regardless of the rank of the individual providing the testimonial but are not sufficient proof to establish clear and convincing evidence unless corroborated by objective documentation (in-service medical documentation from the time of the event). Third-party witness statements cannot confirm a medical diagnosis. The CRSC board acknowledges the applicant is 100 percent service-connected with the DVA, and he incurred his disabilities during his military career; however, that is not sufficient by itself to support a combat-related determination.

The complete advisory opinion is at Exhibit C.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 15 Oct 24 for comment (Exhibit D) but has received no response.

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, the Board concludes the applicant is not the victim of an error or injustice. The Board concurs with the rationale and recommendation of AFPC/DPFDC and finds a preponderance of the evidence does not substantiate the applicant's contentions.

The third-party witness statements only reiterate the circumstances surrounding the injuries as provided by the applicant. As these statements are not first-hand accounts, they can only speculate on the cause of the applicant's disabilities. Further, these statements are not corroborated by objective evidence, such as medical records, or accident/investigative reports, which could produce a definite, documented, causal relationship between the combat-related event and the resulting disability. The limited medical documentation dated on or about the time of his claimed injury, provided by the applicant, is insufficient to create this nexus. The Board does not dispute the potential for the M551 tank to cause injury; however, the documentation provided by the applicant does not substantiate the M551 tank was the cause of his injuries and subsequent diagnoses.

It is noted the PEB determined the applicant's unfitting condition to be the direct result of a combat-related injury as defined by 26 USC § 104; however, as explained in the AFPC/DPFDC letter to the applicant, dated 25 May 16, the PEB decision does not automatically qualify the applicant's disability as combat-related under the CRSC program. They are two separate, distinct programs. This is evidenced by the approval for CRSC for the applicant's PTSD, which was not considered by the PEB as a potentially disqualifying condition. The PEB, operating in accordance with Air Force Instruction 36-3212, *Physical Evaluation for Retention, Retirement, and Separation*, determines a member's ability to remain fit for active duty, while the CRSC program is designed to provide compensation for combat-related injuries. Consequently, CRSC standards are much more rigorous when determining disabilities under current criteria. Furthermore, although the DVA granted service-connection for the applicant's disabilities, this is not sufficient by itself to support a combat-related determination.

Finally, the Board acknowledges the applicant's reference to previously adjudicated AFBCMR cases; however, while the Board considers similarly situated applicant's similarly, each case is adjudicated on its own specific, individual merits. Although award of CRSC is addressed in each case, there are significant differences in circumstances, timing, and evidence provided which do not contribute to a like outcome in the applicant's case. Therefore, the Board recommends against correcting the applicant's records.

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 Board recommends informing the applicant the evidence did not demonstrate material error or injustice, and the Board will reconsider the application only upon receipt of relevant evidence not already presented.

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-2024-01792 in Executive Session on 19 Feb 25:

, Panel Chair
, Panel Member
, Panel Member

All members voted against correcting the record. The panel considered the following:

Exhibit A: Application, DD Form 149, w/atchs, dated 15 May 24.
Exhibit B: Documentary evidence, including relevant excerpts from official records.
Exhibit C: Advisory Opinion, AFPC/DPFDC, dated 30 May 24.
Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 15 Oct 24.

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.

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Board Operations Manager, AFBCMR