

ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2019-01896

COUNSEL: YES

HEARING REQUESTED: NO

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 major (O-4).

On 20 Nov 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 clearly indicate the applicant's disabilities (chronic lumbar back pain, right lower extremity lumbar radiculopathy and left lower extremity lumbar radiculopathy) were the direct result of armed conflict, hazardous service, instrumentality of war, or simulating; 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 F.

On 16 Sep 22, the United States Court of Federal Claims remanded the case, instructing the AFBCMR to reconsider the applicant's entitlement to CRSC, including an explanation of the applicable evidentiary standard and its application to the factual circumstances of the applicant's case, in accordance with AFI 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraphs 2.3 and 4.1. The Order further instructed the Board to provide the applicant an opportunity to provide additional evidence and supplemental legal argument in support of his claim within 60 days of the remand order; 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; and allow the applicant to respond to the advisory opinion within 30 days of receipt.

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

On 15 Nov 22, the applicant's counsel submitted a supplemental legal argument requesting reconsideration for CRSC approval for injuries sustained during Combat Airman Skills Training (CAST) in 2013 in preparation for his deployment to Afghanistan. As a result, he is 40 percent disabled due to injuries sustained in the performance of duty under conditions simulating war and through an instrumentality of war. On 22 Apr 13, the applicant participated in a simulated Humvee rollover training exercise that made him unfit for military service, including (1) chronic lumbar back pain, Department of Veterans Affairs (DVA) rated as lumbar intervertebral disc syndrome (IVDS) status post fusion under Veterans Affairs Schedule for Rating Disabilities (VASRD) code 5243; (2) right lower extremity lumbar radiculopathy under VASRD code 8720; and (3) left lower extremity lumbar radiculopathy under VASRD code 8720. After the rollover exercise, the

applicant experienced back pain which made it hard for him to walk or run while wearing heavy gear. Two days later, he received x-rays due to his lower back pain, which he described as “shooting pain” and associated numbness and tingling that radiated to his feet. On 25 Apr 13, he was seen at an urgent care clinic due to increased back pain. The doctor instructed him to follow up with the clinic the next day and told the applicant he would be sent home if he could not finish pre-deployment training due to the pain. On 26 Apr 13, the applicant was participating in a small unit tactical exercise that required him to run through an urban combat course while wearing a large rucksack and other heavy gear, including a bulletproof vest and ¹Kevlar. While running from building to building his back disc herniated at T12/L1 causing him to collapse on the training field. He was unable to walk on his own and had to be rushed to the emergency room where he received a Magnetic Resonance Imaging (MRI) showing he had bulging discs compressing his spinal cord. The following morning the applicant received emergency surgery to repair his back.

Counsel contends the applicant meets the preliminary and final CRSC eligibility criteria established by CRSC statute. First, there is a direct causal relationship between the applicant’s injuries and his “performance of duty under conditions simulating war.” Participating in the simulated Humvee rollover and small unit tactical exercises directly resulted in the applicant’s injuries. Second, his injuries were directly caused by an instrumentality of war: a Humvee. Under the proper evidentiary standard, “the preponderance of available documentary information,” it is more likely than not the applicant was injured in conditions simulating war and through an instrumentality of war; thus entitled to a 40 percent CRSC rating.

Counsel further contends the Board applied the wrong evidentiary standard when considering the applicant’s application. The Secretary of Defense CRSC Program Guidance states that determinations must be made “based on the preponderance of available documentary information where quality and information is more important than quantity.” The Program Guidance does not require a definite causal relationship, only that a qualifying injury was more likely than not caused by qualifying conditions. Injuries occurring from conditions simulating war and through an instrumentality of war do not require a definite causal relationship. Furthermore, there is no requirement in either the statute or the Program Guidance that the causal relationship between the injury and the qualifying condition be explicitly documented. Moreover, the Board and AFPC/DPFDC further erred by rejecting all supporting evidence because they were not in-service medical records from the time of the injuries. There is no requirement in statute, the Program Guidance, or the financial management regulation that limits the consideration of evidence to in-service medical records from the time of the injuries. CRSC determinations are based on the preponderance of available documentary information. The Board’s requirement that an applicant must provide contemporaneous medical evidence for an injury to be approved for CRSC is unlawful and has no basis in statute, the Program Guidance or financial management regulation.

Finally, the Board must accept as supporting evidence the fact that the Physical Evaluation Board (PEB) determined the applicant’s injuries were combat-related under 26 United States Code Section 104 (26 U.S.C. § 104). The standards and definitions for a combat-related injury contained in 26 U.S.C. § 104 are the same for the CRSC statute, 10 U.S.C. § 1413a. While the purpose of § 104 may be different than § 1413a, a plain reading of the language in both statutes establishes that the definitions for conditions simulating war and instrumentalities of war are the same. In properly considering the preponderance of available evidence in deciding this matter, the PEB’s finding that the applicant’s injuries are combat-related along with the medical evidence confirming his injuries were caused by conditions simulating war or instrumentalities of war must lead to award of CRSC. There is no available documentation that contradicts the PEB’s combat-related finding that the applicant’s injuries were incurred under conditions simulating war and through an

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instrumentality of war. Because it is more likely than not the applicant was injured in the performance of duty under conditions simulating war and through an instrumentality of war, he is thus entitled to a 40 percent CRSC rating.

The applicant's complete submission is at Exhibit H.

EVALUATION

The Director of Military Compensation Policy, Office of the Deputy Under Secretary of Defense recommends granting the application. Based on a preponderance of the available documentary evidence, the applicant has shown his disabilities were caused by injuries sustained at CAST in Camp Bullis and that CAST is a form of military training contemplated in the definition of "performance of duty under conditions simulating war."

The applicant's medical records from around the time of his back surgery and throughout the remainder of his military career tie his CRSC disabilities to injuries sustained during CAST. While the applicant may have arrived at Camp Bullis complaining of back pain, his 24 Apr 13 doctor's note indicates that combat training had aggravated the existing back pain. Additionally, the radiograph he received on 24 Apr 13 did not indicate any fractures or any of the issues that eventually resulted in his spinal surgery. These injuries did not present themselves until 26 Apr 13, where an MRI showed a bulging disc that was compressing his spinal cord. This lends credence to the claim, supported by contemporaneous records, that a permanent worsening of the underlying back problems occurred at CAST between 24 and 26 Apr 13 and caused his CRSC disabilities. Medical records created along with his stay at Brooke Army Medical Center for his surgery specifically tie his CRSC disabilities to this combat training. The applicant's records provide no contradictory evidence that would indicate his CRSC disabilities were incurred through anything other than CAST training, and these disabilities fall within the category of disabilities incurred in the performance of duty under conditions simulating war.

Regarding the applicant's scar, if the Department of Veterans Affairs adjusts the rating to greater than zero percent in the future, he could then apply for CRSC for the scar using similar documentation. However, with a rating of zero percent, this injury does not currently meet the preliminary requirements for CRSC.

Based on the applicable provisions of law, regulation, and policy governing entitlement to, and administration of, CRSC, it is the Director's opinion the applicant's service-connected DVA compensable CRSC disabilities (IVDS status post fusion, right lower extremity lumbar radiculopathy, and left lower extremity lumbar radiculopathy) meet the qualifying criteria required to establish that they are combat-related for purposes of entitlement to CRSC as incurred in the performance of duty under conditions simulating war. The applicant should qualify for payment of CRSC for his CRSC disabilities and his petition to the AFBCMR should be approved.

The complete advisory opinion is at Exhibit I.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 25 May 23 for comment (Exhibit J), and the applicant replied on 7 Jun 23. On behalf of the applicant, counsel encourages the Board to vote in favor of approving the applicant's CRSC claim, based on several combat-related injuries incurred in the performance of duty under conditions simulating war, as outlined in the advisory opinion. Alternatively, the Board should vote expeditiously in favor of approving the applicant's CRSC claim on the basis of injuries incurred through an instrumentality of war, which the advisory opinion does not directly address but which is a sufficient independent basis for the award of CRSC benefits, for all of the evidentiary reasons set forth in the advisory opinion.

The applicant's complete response is at Exhibit K.

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 report provided by the Court remand order, the applicant's supplement legal argument with attachments, and response to the advisory opinion, the Board concludes the applicant is the victim of an error or injustice. In their review, the Board explicitly followed the Court remand instructions to obtain an advisory opinion from the Director of Compensation, Office of the Deputy Under Secretary of Defense (Military Personnel Policy) and reconsider the applicant's claim on the basis of the existing record, the additional evidence and supplemental legal argument provided by the applicant, and the advisory opinion from the office of primary responsibility. In view of the forgoing, 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 lumbar IVDS status post fusion and right and left lower extremity lumbar radiculopathy meet the definition of a "combat-related disability" making him qualified for CRSC payment. Therefore, the Board recommends correcting the applicant's records to the extent indicated below.

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:

- A. Lumbar IVDS status post fusion under VASRD code 5243;
- b. Right lower extremity lumbar radiculopathy under VASRD code 8720; and
- c. Left lower extremity lumbar radiculopathy under VASRD code 8720.

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-2019-01896 in Executive Session on 6 Jul 23:

Chair, AFBCMR
Panel Member
Panel Member

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

Exhibit F: Record of Proceedings, w/ Exhibits A-E, dated 20 Nov 19.
Exhibit G: United States Court of Federal Claims Order, dated 16 Sep 22
Exhibit H: Application, DD Form 149, w/atchs, dated 14 Nov 22.
Exhibit I: Advisory Opinion, Director of Military Compensation Policy, ODUSD,

dated 25 May 23.

Exhibit J: Notification of Advisory, SAF/MRBC to Applicant, dated 25 May 23.

Exhibit K: Applicant's Response, dated 7 Jun 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

Board Operations Manager, AFBCMR