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**UNITED STATES AIR FORCE
BOARD FOR CORRECTION OF MILITARY RECORDS**

RECORD OF PROCEEDINGS

IN THE MATTER OF:

Work-Product

DOCKET NUMBER: BC-2021-02502

COUNSEL: *Work-Product*

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His disapproved claim for Combat-Related Special Compensation (CRSC) be reconsidered and approved for; 1) post-traumatic stress disorder (PTSD), 2) right upper extremity radiculopathy second to right shoulder, 3) arthritis and rotator cuff tendinitis to right shoulder, and 4) internal derangement to left knee.

APPLICANT'S CONTENTIONS

He was erroneously denied CRSC in Nov 20 by the Air Force CRSC Board. As a result of several direct enemy attacks, he sustained injuries that forced his retirement from the Air Force which continue to prevent him from reintegrating into civilian life. He was honorably medically retired by the Physical Evaluation Board (PEB) on 28 Sep 12 for PTSD (50 percent) and determined to be combat-related as a direct result of armed conflict. Evidence and documentation overwhelmingly show his disabilities were caused by at least two specific combat-related events. His PTSD was caused by the friendly fire incident which occurred on 27 Feb 91 in Iraq and his neck, right shoulder, and left knee injuries were caused while running during a mortar attack in Iraq in 2005.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

On 17 May 12, an Informal PEB (IPEB) found the applicant's PTSD (combat-related) Category I - Unfitting Conditions with 50 percent compensable disability rating and incurred in a combat zone or incurred during the performance of duty in combat-related operations. The applicant's conditions of radiculopathy of the right upper extremity, chronic sinusitis, and arthritis and rotator cuff tendinitis of the right shoulder were found as Category II - Conditions That Can Be Unfitting But Are Not Currently Unfitting. The IPEB recommended temporary retirement with reevaluation in six months.

Per Special Order *Work-Product*, dated 10 Aug 12, the applicant was relieved from active duty and placed on the temporary disability retired list (TDRL), effective 29 Sep 12, with compensable percentage of 50 percent for physical disability.

On 24 Apr 14, the applicant received a TDRL re-evaluation indicating his unfitting medical condition of PTSD (combat-related) was unchanged since being placed on the TDRL and would

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likely not change over the next several years. The IPEB found his PTSD was combat-related and incurred in a combat zone or incurred during the performance of duty in combat-related operations and recommended permanent retirement with compensable percentage for physical disability of 50 percent.

Per Special Order **Work-Product**, dated 27 Jun 14, the applicant was removed from the TDRL, effective 17 Jul 14, and retired with compensable percentage of 50 percent for physical disability.

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

APPLICABLE AUTHORITY/GUIDANCE

The primary authority for the CRSC program is 10 U.S.C. 1413a, which provides additional compensation, above and beyond that for normal service related injuries, to veterans with a "combat-related disability." The term "combat-related disability" is defined, in relevant parts, to include injuries that were "incurred (A) as a direct result of armed conflict, [or]... (D) through an instrumentality of war." DoDI 1332.18, *Disability Evaluation System*, enclosure. 3, appx. 5, paras. 1.b.(2) and 2.b., further elaborates that "direct result of an armed conflict" requires a definite causal relationship between armed conflict and the disability. Moreover, "that the injury was incurred during a period of war, in an area of armed conflict, or while participating in combat operations is not sufficient to support this finding" (emphasis added). For an instrumentality of war, again, there must exist a direct causal relationship between the instrumentality and the injury – just because an instrumentality of war was involved in the events leading to the injury is not enough, that instrumentality must have caused the injury. DoDR 7000.14-R, *Financial Management Regulation*, vol. 7B, ch. 63, para. 630502 elaborates that "[a]n uncorroborated statement in a record that a disability is combat-related will not, by itself, be considered determinative for purposes of meeting the combat-related standards for CRSC prescribed herein." DoDR 7000.14-R, vol. 7B, ch. 63, para. 630601 & 630604 and a 2004 Directive Type Memorandum (DTM) on CRSC both mirror the above definition language. In addition, the 2004 DTM also charges the Military Departments with independently determining the relationship between a member's injury and the qualifying CRSC criteria. A preponderance of evidence standard is used in making these determinations. Further, the burden of proof rests with the CRSC applicant.

AIR FORCE EVALUATION

AFPC/DPFDC recommends denying the application. The fact that a member incurred a 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 IAW 10 U.S. C. Section 1413a and DoD Financial Management Regulation, Vol 7B Chapter 6. When making combat-related determinations, with regard to Armed Conflict, Hazardous Service, Simulation of War or an Instrument of War, the Board looks for definite, documented, causal relationship between the armed conflict and the resulting disability.

The applicant submitted a claim for CRSC on 23 Oct 20. His claim was disapproved on 30 Nov 20 as non-combat-related. In this claim, the applicant does not state what caused his PTSD but believes that his false memory of a friendly fire incident contributed to his disability. His BCMR application contends that it occurred during a rocket propelled grenade explosion in Iraq and that his physical injuries were caused due to running during a mortar attack while in Iraq. Documentation submitted by the applicant in his claim and his BCMR application have been reviewed and there was no evidence provided, such as in-service medical records (for physical injuries) from the time of the injuries and evaluations and/or decoration citation (for PTSD), that

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confirms that his injuries were direct result of Armed Conflict, Hazardous Service, Simulation of War or an Instrument of War.

The findings and recommended disposition of the USAF PEB found the applicant's PTSD to be combat-related or occurred in the combat zone in accordance with AFI 36-3212, *Physical Evaluation for Retention, Retirement, and Separation*. Their process and standards for determinations are governed under a guidance which determines a member's ability to remain fit for active duty. However, the PEB's decision does not automatically qualify a disability as combat-related under the CRSC program. 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.

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 16 Feb 22 for comment (Exhibit D), but has received no response.

ADDITIONAL EVALUATION

ODUSD MPP-Compensation recommends denying the application. Determinations of whether a disability is combat-related will be based on the preponderance of available documentary information where the quality of information is more important than quantity. All relevant documentary information is to be weighed in relation to known facts and circumstances, and determinations will be made on the basis of credible, objective documentary information in the records as distinguished from personal opinion, speculation, or conjecture.

Specific to the determination of CRSC in the applicant's case, the definitions for disabilities incurred as a direct result of armed conflict and via an instrumentality of war are included below:

As a Direct Result of Armed Conflict: 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 relationship between the armed conflict and the resulting disability.

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.

Armed conflict may also include incidents involving a member while interred 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.

Instrumentality of War: 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.

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

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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 conditions in civilian pursuits.

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 explosions of military ordnance, vehicles, or materiel.

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.

Regarding the applicant's PTSD, throughout his separation process, two incidents are mentioned as the potential primary causes of his PTSD: the incident involving the Iraqi Republican Guard and the Umm Hajul friendly fire incident. In his CRSC application, the applicant admits the incident involving the Iraqi Republican Guard did not actually happen, which leaves the Umm Hajul friendly fire incident remaining as the sole reason for the PTSD claim. The records provided do not indicate any level of participation in armed conflict during this event. His commander's non-medical assessment states the commander did not believe the applicant was directly involved in the incident, rather he was one of the first to arrive on the scene after the events. There is no evidence in the applicant's record indicating he was directly involved. Finally, PTSD stressors attributed to the death of individuals where the member was not directly involved in the event do not qualify for CRSC. As a result, the applicant has not met his burden of proof to show his PTSD is combat-related.

Regarding the applicant's upper body injuries, he claims these disabilities were caused by an RPG attack in 2005 where he was slammed into a concrete barrier. The first mention of these injuries in his records comes five years later in 2010. The applicant did not provide any medical records from around the time of the injury and his record does not include any awards or citations indicating he was injured in combat during this deployment. Absent some objective evidence from closer to the time of injury, the applicant's record does not contain sufficient documentary evidence to prove his right upper extremity radiculopathy, arthritis and rotator cuff tendinitis to right shoulder, and degenerative arthritis C5-C6 with S/P anterior cervical disc fusion C5-C6 are combat-related.

Regarding the applicant's internal derangement to the left knee, he claims he injured his knee while running from a mortar in full combat gear in 2005. Much like his upper body injuries, the first mention of this injury comes five years later in 2010. He has not produced any medical records from around the time of the injury, nor any awards or citations indicating he was injured in combat during this deployment. Absent some objective record near the time of the injury, the applicant's record lacks sufficient documentary evidence to show his internal derangement to the left knee is combat-related.

Based on the applicable provisions of law, regulation, and policy governing entitlement to, and administration of, CRSC, it is opined, the applicant's service-connected DVA compensable CRSC disabilities do not meet the qualifying criteria required to establish they are combat-related for purposes of entitlement to CRSC as incurred as a direct result of armed conflict or via an instrumentality of war and do not qualify for payment of CRSC

The complete advisory opinion is at Exhibit E.

APPLICANT'S REVIEW OF ADDITIONAL EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 2 Jan 24 for comment (Exhibit F), but has received no response.

FINDINGS AND CONCLUSION

1. The application was not 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. After a thorough review of the available evidence of record, it is the Board's opinion the applicant's DVA service-connected disabilities, he believes to be combat-related, were not incurred as a direct result of armed conflict nor through an instrumentality of war, and therefore, do not qualify for compensation under the CRSC program. Specifically, the Board does not find sufficient evidence between the incident involving the Umm Hajul friendly fire incident in 1991 nor the attack in 2005, and his service-connected disabilities, such as in-service medical records, evaluations and/or decoration citation that confirms his injuries were combat-related. Although medical documentation may confirm mental health disease it does not identify a specific combat-related event (nexus) that attributed to the claimed disability. Medical documentation for such disabilities are often related from a patient's account of what happened and not objective documentary evidence the claimed combat-related stressors occurred. Consequently, the Board agrees with the opinion and recommendations of AFPC/DPFDC and ODUSD MPP-Compensation and adopt their rationale as the basis for our conclusion the applicant has not been the victim of an error or injustice. Therefore, the board recommends against correcting the applicant's records.

Although we find the application untimely, that conclusion does not end our consideration of the request. The governing statute provides that the Correction Board "may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice." (10 U.S.C., § 1552b). We believe the intent of this provision of the statute is to provide the Board with the flexibility to consider all the facts and circumstances of a case regardless of the time that has passed since the incident-giving rise to the appeal. The statute permits us to consider the reasons for the delay provided by the applicant and, if those reasons are plausible, excuse the failure to file in a timely manner and consider the case on its merits. Even if the reasons for the delay in filing are insufficient to excuse the delay, we may examine the facts and circumstances of the case and, if substantial evidence of an error or injustice exists, waive the three-year time limit and correct the error or injustice. Thus, we normally assert the statute and reject an application for timeliness only when we find no plausible reason for the delay and no substantial evidence of an error or injustice. Paragraph b of 10 U.S.C., § 1552 permits us, in our discretion, to excuse untimely filing in the interest of justice. We have carefully reviewed the applicant's submission and the entire record, and we do not find a sufficient basis to excuse the untimely filing of this application. The applicant has not shown a plausible reason for delay in filing, and we are not persuaded that the record raises issues of an error or injustice that require resolution on its merits. Accordingly, we conclude that it would not be in the interest of justice to excuse the untimely filing of the application.

RECOMMENDATION

The Board recommends informing the applicant the application was not timely filed; it would not be in the interest of justice to excuse the delay; 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, paragraph 2.1, considered Docket Number BC-2021-02502 in Executive Session on 27 Apr 22 and 17 Jul 24:

Work-Product [Redacted], Panel Chair
[Redacted], Panel Member
[Redacted], Panel Member

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

- Exhibit A: Application, DD Form 149, w/atchs, dated 16 Apr 21.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AFPC/DPFDC, dated 9 Aug 21.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 16 Feb 22.
- Exhibit E: Advisory Opinion, ODUSD MPP-Compensation, dated 29 Dec 23.
- Exhibit F: Notification of Advisory, SAF/MRBC to Applicant, dated 2 Jan 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.

7/22/2024

X

Work-Product [Redacted]

Work-Product [Redacted]

Board Operations Manager, AFBCMR
Signed by: USAF