

IN THE CASE OF: ██████████

BOARD DATE: 27 February 2023

DOCKET NUMBER: AR20220007433

APPLICANT REQUESTS: Reconsideration of his previous request for:

- approval of the portion of his Combat Related Special Compensation (CRSC) claim that was denied
- correction of his records to show the authority for his placement in the Retired Reserve as Title 10, U.S. Code (USC), section 12731 (Age and service requirements) in lieu of section 12731b (Special rule for members with physical disabilities not incurred in the line of duty)
- approval of fume inhalation while on duty in 1997 as a Line of Duty (LOD) injury
- referral to the Disability Evaluation System (DES) and receipt of permanent medical retirement with at least 30 percent disability
- back pay dating back to effective date of medical retirement
- personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- supplemental statement through counsel
- U. S. Army Human Resources Command (HRC) Orders Number C12-591-749
- National Guard Bureau (NGB) Form 22 (Report of Separation and Record of Service)
- DD Form 214 (Certificate of Release or Discharge from Active Duty) service ending 16 October 1991
- DD Form 214 (Report of Separation from Active Duty) service ending 25 July 1977
- ██████████ Memorandum, Subject: Formal LOD Determination ██████████ (the applicant)
- Record of Proceedings (ROP) Docket Number AR20080014667
- 15-Year Letter
- ██████████ National Guard (██████ NG) Orders Number 365-010
- Department of Veterans Affairs (VA) Rating Decision
- NGB Form 23 (Army National Guard (ARNG) Retirement Points History Statement)

- Leave and Earnings Statement (LES) for period 1 through 30 November 1992
- LES for period 1 through 31 December 1992
- LES for 31 July 1998
- U. S. Army HRC CRSC decision, 22 September 2016
- U. S. Army HRC CRSC decision, 19 December 2016
- Defense Finance and Accounting Service (DFAS) letter
- ROP Docket Number AR20170009166
- Applicant's declaration statement
- CRSC document

FACTS:

1. Incorporated herein by reference are military records 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 AR20170009166 on 8 May 2020. The Board determined that the evidence presented did not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of the case were insufficient as a basis to amend the decision in ABCMR Docket Number AR20080014667 on 20 November 2008.

In Docket Number AR20080014667 on 20 November 2008 the Board determined he was found medically unfit for retention and he completed 17-years of creditable service for retired pay. Therefore, it was equitable to issue him a 15-year letter and to amend his discharge order and his NGB Form 22 to reflect he was transferred to the Retired Reserve due to being medically unfit for retention. The applicant contended he was medically unfit for retention because he was injured on active duty on 7 June 1997 and the injury was aggravated on 7 June 1997 by working conditions. Therefore, there was insufficient evidence to show the condition arose or was aggravated solely by performing military duty on 7 June 1997. There was no basis for referral to a Physical Evaluation Board (PEB) or placement on the Temporary Disability Retired List (TDRL).

2. The applicant states, through counsel,

a. He served in the ARNG on active duty during the Gulf War from 1991 through 1992, upon his redeployment he developed many disabilities.

b. His LOD determination dated 6 January 1991 is central to his case. The applicant believes the Board and Office of the Surgeon General determination that his unfitting medical conditions were not incurred in the LOD was incorrect. The Board in fact concluded he was indeed medically unfit for retention when he was granted the issuance of the 15-year letter. However, the Board concluded he was not entitled to a medical retirement based on the erroneous belief that his unfitting conditions were not incurred in the LOD. The applicant did not have a personal injury, but rather

exacerbated condition while in the LOD. Since his medical condition was exacerbated in the LOD, he should have been entered into the DES for a Medical Evaluation Board (MEB) and PEB.

c. In 2008, the applicant petitioned the Board for relief in issuing him a 15-year Reserve component retirement letter, his LOD and medical records be amended and his service record reflect 21-years for the purpose of pay. The Board granted the applicant partial relief and issued him a 15-year letter which was published on 30 December 2008 and annotated such in his service record.

d. The applicant's VA rating decision reflect the rating was based on various medical conditions which is relevant to his case for sinusitis, anemia, and Gastroesophageal Reflux Disease (GERD). On 19 December 2016, the applicant's CRSC claim was denied for these conditions. The CRSC board stated it was unable to verify these conditions were combat related disabilities.

e. The applicant petitioned the ABCMR and granted partial relief; and he was referred to the Office of the Surgeon General for review. The decision to grant a partial relief was a clear indication there was something wrong with the status quo in his case. The Office of the Surgeon General stated a MEB was not warranted at the time of the applicant's separation. The ABCMR made a final decision that incorporated the Office of the Surgeon General's decision. The applicant requests reconsideration for relief based on new evidence and arguments.

f. The service and the Board have ignored what the law requires in his case. The evidence demonstrates the applicant is entitled to CRSC for sinusitis, anemia, and GERD which was demonstrated by the assigned VA rating of 30 percent for GERD, 30 percent for sinusitis, and zero percent for anemia. The CRSC board acted in direct violation of the law in denying the applicant's claim for CRSC for these conditions. The CRSC board claimed he did not provide evidence these disabilities were combat related was in error. The VA specifically rated these conditions as service connected, Gulf War incurred were binding on the CRSC. The CRSC program guidance requires the presumption that the conditions were combat related as the VA rated disabilities were based on the applicant's Persian Gulf service and deemed to be service related. Absent any evidence to the contrary, the CRSC cannot ignore these findings without providing any evidence or explanation to disprove the combat relationship of these conditions. The Board must find these conditions were combat related and direct the applicant received CRSC for these conditions.

3. A review of the applicant's service record shows:

a. On 26 July 1974, the applicant enlisted in the Regular Army (RA).

b. On 25 July 1977, the applicant was honorably released from active duty and assigned to the U.S. Army Reserve (USAR) Control Group (Reinforcement). DD Form 214 shows the applicant completed 3-years of active service.

c. NGB Form 23B (ARNG Retirement Points History Statement) shows the applicant enlisted in the USAR on 18 January 1978.

d. On 12 June 1991, the applicant was ordered to active duty in support of Operation Desert Shield/Desert Storm. He was released from active duty on 16 October 1991. DD Form 214 shows the applicant completed 4-months and 5-days of active service. It also shows in item 18 (Remarks) that he served in Southwest Asia during the period of 21 July through 28 September 1991.

e. NGB Form 23B shows the applicant was released from the USAR on 12 December 1993

f. On 13 December 1993, the applicant enlisted in the [REDACTED] ARNG.

g. On 6 January 1999, the [REDACTED], the Adjutant General's Office, the applicant's formal LOD investigation determined after review from the NGB Chief Surgeon's Office was to be returned without action as it was determined he did not sustain an injury of illness related to military training during the period of 7 through 8 June 1997. The applicant should be referred to the VA for any Desert Storm related medical treatment and he should be processed through the State Medical Duty Review Board for retention determination.

h. On 23 June 2000, the applicant was honorably discharged from the ARNG and placed on the permanent disability retired list. NGB Form 22 shows the applicant completed 6-years, 6-months, and 11-days of service.

i. On 30 December 2008, the [REDACTED] ARNG notified the applicant of his eligibility for retired pay at age 60 with 15-years of service because he was found to no longer have met the qualification for membership solely because he was found to be unfit because of a physical disability, and his disability was not the result of your intentional misconduct, willful neglect, or willful failure to comply with standards and qualifications for retention established by the Secretary of the Army or was incurred during a period of unauthorized absence.

j. On 30 December 2008, Orders Number 365-010, issued by the [REDACTED] ARNG, the applicant was assigned to the USAR Control Group (Retired Reserve), effective 23 June 2000.

k. On 29 December 2015, Orders Number C12-591-749, issued by HRC, the applicant was placed on the retired list, effective 11 February 2016, under the provisions of Title 10 United States Code (USC), section 12731.

4. The applicant provides:

a. VA rating decision dated 2 July 2009, shows disabilities for compensation:

- organic personality disorder – 70 percent, service connected, Gulf War incurred
- chronic fatigue syndrome – 40 percent, service connected, Gulf War incurred
- GERD – 40 percent, service connected, Gulf War incurred
- chronic ethmoid and maxillary sinusitis with maxillary retention cyst and nasopharyngeal hyperplasia – 30 percent, service connected, Gulf War incurred
- chronic headaches, probably migraine types – 10 percent, service connected, Gulf War incurred
- dermatitis or scalp and groin areas, subsided – zero percent, service connected, Vietnam Era incurred
- anemia – zero percent, service connected, Gulf War incurred

b. LES showing his pay and entitlements.

c. HRC letter dated 22 September 2016, the applicant was notified his CRSC claim was approved for chronic fatigue syndrome – 40 percent, Gulf War presumptive. The CRSC board was unable to verify the following as a combat related disability:

- anemia – no connection between combat and anemia
- dermatitis of scalp and groin area, subsided – chloracne on skin disorder recognized as related to Agent Orange by the VA, condition must clearly be awarded by VA as secondary to, related to, or aggravated by exposure to Agent Orange
- GERD – does not meet Department of Defense (DOD) defined definition of combat related, GERD is a chronic condition, there was no direct connection between combat related events or activities and GERD
- Chronic headaches, probably migraines – documentation did not show accident or incident to connect disability to combat related event
- Organic personality disorder – documentation did not show causal relationship between combat related event and resulting disability
- chronic ethmoid and maxillary sinusitis with maxillary retention cyst and nasopharyngeal hyperplasia – condition did not meet the criteria for CRSC, currently the only direct connection between combat related events and

allergic rhinitis/sinusitis was exposure from ordnance disposal and smoke inhalation from the oil fires during the first Gulf War

d. HRC letter dated 19 December 2016, the applicant was notified his CRSC claim was approved for

- chronic fatigue syndrome – 40 percent, previously awarded
- chronic headaches, probably migraine – 10 percent
- organic personality disorder – 70 percent

The CRSC board was unable to verify the following as a combat related disability:

- anemia – no new evidence to show combat related event caused condition
- GERD - no new evidence to show combat related event caused condition
- dermatitis of scalp and groin areas, subsided - no new evidence to show combat related event caused condition
- chronic ethmoid and maxillary sinusitis with maxillary retention cyst and nasopharyngeal hyperplasia - no new evidence to show combat related event caused condition

e. DFAS letter dated 8 February 2017, regarding the applicant's request for Concurrent Retirement and Disability Pay (CRDP) and CRSC which stated the applicant was not entitled to CRSC because his records reflect, he was retired under Title 10 USC, section 12731 retirement law under section b with a personal injury.

f. Applicant's declaration stated he was submitting additional or new evidence to remove b and apply the original age and service under Title 10 USC, section 12731. This new evidence of changing the law to remove b would entitle the applicant to received CRSC. Effective 12 March 2009, new guidance was issued a new interpretation of the law that indicates that although the title infers applicability, it is only for member with disabilities not incurred in the LOD, it did not make this distinction. Therefore, the early qualification retired pay at age 60 provision applicant to all Selected Reserve Soldiers whether or not the physical disability was incurred or aggravated in the LOD.

His sinusitis was directly related to his combat service and was awarded 30 percent from the VA. How can HRC and DOD deny combat related injuries when it was a presumption of the law and VA disability, they were not reading the cases properly and just pushing them through the system.

His LOD was processed with numerous errors and typographical errors, one area states in the LOD and one area "No" was marked which contradict one another. For the LOD to be correct, it should reflect it was in the LOD and the disability should be permanent

and total. He had been totally disabled by the VA since 13 February 1998 from an accidently carbon monoxide exposure being aggravated while on duty on 7 June 1997. His condition was aggravated when he was exposed to carbon monoxide while directing traffic near a rest area. The LOD process made a prejudgment of his medical condition and he should have been sent to the MEB. He sustained brain damage and softening of the brain from carbon monoxide poisoning. He is totally disabled as he has not been able to work since the injury in 1997. The VA and Walter Reed Army Medical Center connect his condition with the LOD as an aggravated injury from 7 June 1997. HRC CRSC section stated his condition was a personal injury when in fact it was an aggravated injury. He feels his cases are not being read, but just being pushed through the process.

g. CRSC document states the preliminary criteria is:

- have 20 or more years of service for purposes of retired pay under Title 10 USC, section 12731 unless retired under section 12731b
- in retired status
- entitled to retired pay
- has qualifying disability rating
- qualifying combat related disability compensated by the VA

BOARD DISCUSSION:

1. The applicant's request for a personal appearance hearing was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

2. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The applicant's contentions, counsel's petition, the military record, and regulatory guidance were carefully considered. The governing regulation provides that order for a condition to be considered combat-related, there must be evidence of the condition having a direct, causal relationship to war or the simulation of war or caused by an instrumentality of war. After thorough review of all evidence presented and his service record, the Board determined the applicant provided insufficient documentation to show the OTSG LOD findings were in error. The applicant provided only argument without documentary evidence to show an injustice or error occurred. Based upon a preponderance of the evidence, the Board determined there is insufficient evidence to overturn the CRSC claim that was denied.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
█	█	█	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

Except for the correction addressed in Administrative Note(s) below, the Board found the evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis to amend the decisions of the ABCMR set forth in Docket Numbers AR20080014667 on 20 November 2008 and AR20170009166 on 8 May 2020.

6/7/2023

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CHAIRPERSON

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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.

ADMINISTRATIVE NOTE(S):

1. Reference the enclosed request for correction of military records from the subject individual to correct his DD Form 214 (Certificate of Release or Discharge from Active Duty) for the period ending October 16, 1991, by adding the Kuwait Liberation Medal – Government of Kuwait.

2. A review of the records listed below (enclosed) is sufficient to substantiate correction of the DD Form 214 without action by the Board.

- DD Form 214 service ending October 16, 1991
- NGB Form 22 service ending June 23, 2000

3. Please correct the applicant's DD Form 214 by amending it as shown in paragraph 1 above. Provide the applicant a copy of the corrections, and as applicable the medals. Please ensure that the corrections are recorded in the applicant's official military personnel record.

REFERENCES:

1. Title 10, USC, section 1413a, as amended, established Combat Related Special Compensation (CRSC). CRSC provides for the payment of the amount of money a military retiree would receive from the VA for combat-related disabilities if it were not for the statutory prohibition for a military retiree to receive a VA disability pension. Payment is made by the Military Department, not the VA, and is tax free. Eligible members are those retirees who have 20 years of service for retired pay computation (or 20 years of service creditable for Reserve retirement at age 60) and who have disabilities that are the direct result of armed conflict, especially hazardous military duty, training exercises that simulate war, or caused by an instrumentality of war. CRSC eligibility includes disabilities incurred as a direct result of:

- armed conflict (gunshot wounds, Purple Heart, etc.)
- training that simulates war (exercises, field training, etc.)
- hazardous duty (flight, diving, parachute duty)
- an instrumentality of war (combat vehicles, weapons, Agent Orange, etc.)

2. The Office of the Under Secretary of Defense for Military Personnel Policy provided guidance for processing CRSC appeals. This guidance stipulated that in order for a condition to be considered combat-related, there must be evidence of the condition having a direct, causal relationship to war or the simulation of war or caused by an instrumentality of war.

3. Title 10, USC, section 12731 (Age and service requirements) provides the legal age and service requirements for age and service for Reserve non-regular retirement. It states that, upon application, a person is entitled to retired pay if the person has attained the applicable eligibility age, has performed at least 20 years of service computed under section 12732 of this Title; and is not entitled, under any other provision of law, to retired pay from an armed force or retainer pay as a member of the Fleet Reserve or the Fleet Marine Corps Reserve.

4. Title 10, USC, section 12731a (Temporary special retirement qualification authority) provides for retirement with at least 15 years of service. The Secretary concerned may, during the period described in the subsection below, determine to treat a member of the Selected Reserve of a RC of the armed force under the

jurisdiction of that Secretary as having met the service requirements of 10 USC 12731, subsection (a)(2), and provide the member with the notification required by subsection (d) of that section if the member:

a. as of 1 October 1991, has completed at least 15, and less than 20, years of service computed under section 12732 of this title; or

b. after that date and before the end of the period described in subsection (b), completes 15 years of service computed under that section; and

c. upon the request of the member submitted to the Secretary, transfer the member to the Retired Reserve.

d. The period referred to above is the period beginning 23 October 1992 and ending 31 December 2001.

5. Title 10, USC, section 12731b (Special rule for members with physical disabilities not incurred in the line of duty), enacted 23 October 1992, provides in pertinent part that in the case of a member of the Selected Reserve of a RC who no longer meets the qualifications for membership in the Selected Reserve solely because the member is unfit because of physical disability, the Secretary concerned may, for the purpose of Section 12731 of this title, determine to treat the member as having met the service requirement and provide the member notification required if the member completed at least 15 years, but less than 20 years of qualifying service for retirement purposes as of 1 October 1991. This special provision of the law is applicable only to members who are medically disqualified for continued service in an RC.

6. Title 38, USC, sections 1110 and 1131, permit the VA to award compensation for disabilities that were incurred in or aggravated by active military service. However, the award of a VA rating or a comparatively higher VA rating does not establish error or injustice on the part of the Army. The Army only rates conditions determined to be physically unfitting at the time of discharge that disqualify the Soldier from further military service. The VA does not have the authority or responsibility for determining physical fitness for military service. The VA awards disability ratings to veterans for service-connected conditions, including those conditions detected after discharge, to compensate the individual for loss of civilian employability. These two government agencies operate under different policies. Unlike the Army, the VA can evaluate a veteran throughout his or her lifetime, adjusting the percentage of disability based upon that agency's examinations and findings.

7. Army Regulation 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR.

a. The ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

b. Paragraph 2-11 states applicants do not have a right to a formal hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

//NOTHING FOLLOWS//