

IN THE CASE OF: [REDACTED]

BOARD DATE: 21 December 2023

DOCKET NUMBER: AR20230003252

APPLICANT REQUESTS: in effect,

- his Orders 098-0007, dated 8 April 2013, be corrected to show his disability is based on injury or disease received in the line of duty (LOD) as a direct result of armed conflict or caused by an instrumentality of war and incurred in the LOD during a war period as defined by law
- his DA Form 199 (Informal Physical Evaluation Board (PEB) Proceedings) be corrected to show his disability is based on injury or disease received in the line of duty (LOD) as a direct result of armed conflict or caused by an instrumentality of war and incurred in the LOD during a war period as defined by law

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

- ARBA online application in lieu of DD Form 149 (Application for Correction of Military Record)
- Defense Finance and Accounting Service (DFAS) Online Customer Service printout
- Form 1099-R (Department of the Treasury – Internal Revenue Service)
- Department of Veterans Affairs (VA) summary of benefits letter
- Orders 098-0007
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- Combat Related Special Compensation (CRSC) decision letter (Claim # 315334)
- CRSC decision letter (Claim # 309629)
- excerpt 26 US Code 104
- DA Form 199

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.

2. The applicant states:

a. Medical Retirement Disability Order # 098-0007, dated 08 April 2013 says Not Combat Related and Not in the Line of Duty. This is incorrect and should read Combat Related - Instrumentality of War and in the Line of Duty.

b. PEB DA Form 199 states Not Combat Related and Not in the Line of Duty under Section III and Section V. This is incorrect and should read Combat Related and in the Line of Duty per the attached Human Resource Command (HRC) Combat Related Special Compensation (CRSC) letter dated 27 February 2014.

c. A DFAS email states they cannot code him for Tax Exemption for his retired disability pay because his retirement letter states Not in the Line of Duty and Not Combat Related. Currently most of his Disability Retired Pay is tax exempt, however, a small portion is not because of the above error on his retirement Orders 098-0007, dated 8 April 2013.

d. HRC - Combat Related Special Compensation (CRSC) Branch verified and granted his injuries are combat related and in the Line of Duty, therefore, an error occurred during the PEB because they had the same information and all the same signed medical documents, certified Line of Duties statements, witness statements, and commanders letters, for his injuries but somehow must have missed it entirely and created a DA Form 199 and retirement orders stating Not Combat Related and Not in the Line of Duty. HRC CRSC verified and granted approval of everything that was missed by the PEB; however, it needs to be fixed on the retirement orders and DA Form 199 so DFAS can properly code his retired disability pay for the full 100 percent tax exemption.

e. He was not aware that this was causing his tax exempt problem until he inquired why he was not getting the full 100 percent tax exemption for being a medically disabled retiree 100 percent permanent and total. He talked to DFAS back in 2016 or something and they said that is just how it is, and they could not code his distribution box on his 1099-R with a 3 which means disability. Currently and since he has been retired, he has been coded 7 (normal distribution) or normal tax on a portion of his military disability retired pay. He became aware of it in January 2023 when he met a friend who was also 100 percent disabled medically retiree and he said he need to look into it again and do not take no for an answer when DFAS says that is just how the system is coding. He got an email from someone who knows something at DFAS (see attached) and they said he can be coded tax exempt 100 percent if his retirement orders stated his injuries were combat related and in the line of duty. This got him to looking at his DA Form 199 and retirement order where he saw the connection on how the DA Form 199 and his retirement order was given to DFAS with incorrect information on them, therefore, DFAS cannot help him until the above correction is made on both DA Form 199 orders. Why the PEB stated Not Combat Related and Not in the Line of Duty is beyond him when the

same medical injuries and Line of Duty Statements and testimonies were given to the HRC-CRSC Division. It was clear to them so they verified and granted CRSC compensation, however no department or agency corrected this with retired disability pay at DFAS because they can only do this with the retirement orders as stated in the response they sent.

3. The applicant served in the Regular Army from 14 August 1984 to 13 June 1987. He also served in the [REDACTED] Army National Guard ([REDACTED] ARNG) from an unknown date to 31 December 1994. His record also contains Orders D-01-610690 and honorable discharge certificate showing he was discharged from the Army Reserve on 16 January 1996.

4. A DA Form 4836 (Oath of Extension of Enlistment) showing the applicant extended his enlistment of 14 August 1999 for a period of 3 years. A DD Form 214 shows he served on active duty as a member of the Army National Guard from 1 February 2000 to 15 December 2000.

5. The applicant underwent a medical examination on 4 June 2001 for the purpose of commissioning in the Army National Guard. His DD Form 2807-1 (Report of Medical History) shows he reported he was currently in good health with a history of any knee or foot surgery including arthroscopy or the use of a scope to any bone or joint. He explains in 1989 he had septic hip infection and underwent surgery to drain. The corresponding DD Form 2808 (Report of Medical Examination) shows after clearance from an orthopedic, he was found qualified for service and assigned a physical profile of 111111.

A physical profile, as reflected on a DA Form 3349 (Physical Profile) or DD Form 2808, is derived using six body systems: "P" = physical capacity or stamina; "U" = upper extremities; "L" = lower extremities; "H" = hearing; "E" = eyes; and "S" = psychiatric (abbreviated as PULHES). Each body system has a numerical designation: 1 meaning a high level of fitness; 2 indicates some activity limitations are warranted, 3 reflects significant limitations, and 4 reflects one or more medical conditions of such a severity that performance of military duties must be drastically limited. Physical profile ratings can be either permanent or temporary.

6. The applicant was discharged from the [REDACTED] ARNG and as a Reserve of the Army effective 11 July 2001, to accept a commission. He was commissioned as a Second Lieutenant in the [REDACTED] ARNG on 12 July 2001.

7. The applicant served on active duty from 4 February 2002 to 23 May 2002 for active duty for training.

8. The applicant underwent a medical examination on 8 September 2003, for the purpose of entering active service. His DD Form 2807-1 shows he reported he was currently in good health with a history of a septic hip infection and underwent surgery to drain in 1989. The corresponding DD Form 2808 shows he was found qualified for service and assigned a physical profile of 111111.
9. The applicant was ordered to active duty in support of Operation Noble Eagle from 15 September 2003 to 29 September 2004.
10. A DA Form 3349 shows the applicant was assigned a permanent profile of 112111 for right hip pain (osteoarthritis) and was restricted from participating in the 2-mile run and lower body weight training, effective 4 November 2004.
11. The applicant was ordered to active duty in support of Operation Enduring Freedom effective 15 November 2004.
12. A DA Form 2173 (Statement of Medical Examination and Duty Status) dated 19 September 2005 shows the applicant was treated on 14 August 2005 at Fort Irwin, CA for quadriceps and hamstring contusion worsening existing ... conditions. He was struck by a 5-ton truck bumper during training. This injury was found to have occurred in the line of duty and a memorandum shows such.
13. He served in Djibouti from 18 April 2006 – 5 September 2006.
14. The applicant was released from active duty on 13 September 2006. He again served on active duty from 5 December 2006 to 19 April 2007. He was honorably discharged from the [REDACTED] ARNG on 20 May 2007. He entered active service on 21 May 2007 as a member of the Army Reserve.
15. He received his 20-year letter (Notification of Eligibility for Retired Pay at age 60) on 14 July 2011.
16. A DA Form 199 shows:
 - a. An Informal PEB convened on 21 February 2013, wherein the applicant was found physically unfit with a recommended rating of 100 percent and that his disposition be permanent disability retirement.
 - b. The applicant was found unfit for the following conditions:
 - (1) Posttraumatic stress disorder (PTSD) (MEB Dx 6) rated at 100%. Onset 2007. Soldier's first Behavioral Health visit was in 2008 for symptoms consisting of nightmares, recurrent thoughts of deployment to Africa in 2006, paranoia, anxiety and

sleep difficulty. Upon exam, Soldier reports no engagement of his weapon in combat. He did not see any anyone wounded or killed and did not feel that he was in any great danger. He did not feel that he was going to be killed, nor did he experience any associated trauma during his deployment. (v/4-Yes). This condition renders the Soldier unfit because his physical profile limitations prevent him from carrying and firing his individually assigned weapon (IAW DoDI 1332.38, E3.P3.4.1.1), which is a required common Soldier's task. Soldier is competent to participate in the MEB/PEB process. (NARSUM, C&P Exam, DA Form 3947, DVA Proposed Rating Decision)

(2) Chronic lumbar strain status post lumbar laminectomy and revision surgery with lumbar degenerative joint disease, lumbar stenosis, and intervertebral disc syndrome PEB referred as failed back/post laminectomy syndrome with bilateral LE radiculopathy. (MEB Dx 1) rated at 40%. Onset 2005 when he was struck by the open door of a truck during a vehicle recovery operation. Condition is not combat related. This condition renders the Soldier unfit (IAW DoDI 1332.38, E3.P3.4.1.1), because LBP prevents him from wearing the usual IBA gear, which is a required common Soldier's task (NARSUM, C&P Exam, DA Form 3947, DVA Proposed Rating Decision Date).

(3) Right hip total replacement with degenerative disease PEB referred as residuals of total right hip arthroplasty with chronic pain and decreased range of motion (MEB Dx 4) rated at 30%. Onset 1990 when Soldier developed sudden pain with no etiology or history of trauma. This not a combat related injury. Limited ROM prevents the Soldier from pushing or pulling more than 10 pounds, as per his physical profile. This condition is unfitting because he cannot evade direct and indirect fire or move 40 pounds while wearing usual protective gear at least 100 yards (IAW DoDI 1332.38, E3.P3.4.1.1), which is a required common Soldier's task. (NARSUM, C&P Exam, DA Form 3947, DVA Proposed Rating Decision).

(4) Left knee degradative disease PEB referred as mild to moderate osteoarthritis of the left knee with decreased range of motion (MEB Dx 3) rated at 30%. Onset August 2008 with no known etiology or history of trauma. This is not a combat related injury. Limited ROM and pain limits the Soldier's ability to move 40 pounds at least 100 yards, which is a required functional activity of the common Soldier's tasks. This condition renders the Soldier unfit (IAW DoDI 1332.38, E3.P3.4.1.1). (NARSUM, C&P Exam, DA Form 3947, DVA Proposed Rating Decision).

(5) Right knee medial meniscectomy, with residuals and degenerative disease PEB referred as Severe osteoarthritis of the right knee joints s/p meniscus repair with chronic pain and decreased range of motion. (MEB Dx 2) rated at 30%. Onset August 2008 with no known etiology or history of trauma. This is not a combat related injury. Limited ROM and pain limits the Soldier's ability to move 40 pounds at least 100 yards, which is a required functional activity of the common Soldier's tasks. This condition

renders the Soldier unfit (IAW DoDI 1332.38, E3.P3.4.1.1). (NARSUM, C&P Exam, DA Form 3947, DVA Proposed Rating Decision).

(6) Left hip degenerative disease PEB referred as mild to moderate osteoarthritis of the left hip joint with decreased range of motions (MEB Dx 5) rated at 10%. Onset 1990 when Soldier developed sudden pain with no etiology or history of trauma. This not a combat related injury. Limited ROM prevents the Soldier from pushing or pulling more than 10 pounds, as per his physical profile. This condition is unfitting because he cannot evade direct and indirect fire or move 40 pounds while wearing usual protective gear at least 100 yards (IAW DoDI 1332.38, E3.P3.4.1.1), which is a required common Soldier's task. (NARSUM, C&P Exam, DA Form 3947 DVA Proposed Rating Decision).

c. The applicant was found fit for the following conditions:

- Benign right distal femur enchondroma; (MEB Dx 7)
- Severe Obstructive sleep apnea OSA requiring continuous positive airway pressure (CPAP) (MEB Dx 8)
- Moderate to loud non-position snoring (MEB Dx 9)
- Bilateral subjective constant tinnitus (MEB Dx 10)
- Refractive error, myopia, presbyopia, and astigmatism s/p LASIK (MEB x 11)
- Photosensitivity (MEB Dx 12)
- Common migraine headaches (MEB Dx 13)
- Isolated systolic hypertension; (MEB Dx 14)
- Gastroesophageal reflux disease (GERD) (MEB Dx 15)
- Non-debilitating surgical scars (MEB Dx 16)
- Condyloma acuminatum resolved (MEB Dx 17)
- Seasonal allergic rhinitis (MEB Dx 18)
- Bilateral pingecula (MEB Dx 19)
- Latent tuberculosis infection (LTBI) (MEB Dx 20)
- Traumatic arthritis of the left elbow (MEB Dx 21)
- Atypical chest pain (MEB Dx 22)
- History of elective sterilization (vasectomy) (MEB Dx 23)
- Hypertriglyceridemia (MEB Dx 24)

d. The PEB made the following administrative determinations:

(1) The disability disposition is not based on disease or injury incurred in the line of duty in combat with an enemy of the United States and as a direct result of armed conflict or caused by an instrumentality of war and incurred in the line of duty during a period of war (5 USC 8332, 3502, and 6303). (This determination is made for all compensable cases but pertains to potential benefits for disability retirees employed under Federal Civil Service.)

(2) Evidence of record reflects the Soldier was not a member or obligated to become a member of an armed force or Reserve thereof, or the NOAA or the USPHS on 24 September 1975.

(3) The disability did not result from a combat-related injury under the provisions of 26 USC 104 or 10 USC 10216.

e. This case was adjudicated as part of the Integrated Disability Evaluation System (IDES).

f. The applicant concurred and waived a formal hearing of his case on 11 March 2013.

g. The applicant did not request reconsideration of his VA ratings.

h. The proceedings were finalized on 13 March 2013.

17. Orders 086-0006, dated 27 March 2013 and Orders 098-0007, dated 8 April 2013 show the applicant was released from assignment because of physical disability incurred while entitled to basic pay and under conditions that permit his retirement for permanent physical disability. Both sets of orders show:

- Disability is based on injury or disease received in the line of duty as a direct result of armed conflict or caused by an instrumentality of war and incurred in the line of duty during a period of war as defined by law: NO
- Disability resulted from a combat related injury as defined in 26 USC 104: NO

18. The applicant was honorably retired on 29 June 2013 for disability, permanent (enhanced). His DD Form 214 shows the separation code SEJ.

19. The applicant applied for CRSC on 25 February 2014. He was awarded 40 percent CRSC for lumbar strain status post laminectomy and revision surgery with lumbar degenerative joint disease effective July 2013 as combat-related due to an Instrumentality of War.

20. The applicant applied for reconsideration of his original CRSC application on 7 July 2014. He was awarded the following as combat-related due to an Instrumentality of War for a total award of 80 percent effective July 2013:

- 30 percent -bilateral, right hip total replacement with osteoarthritis/degenerative disease
- 30 percent - bilateral, left knee osteoarthritis/degenerative disease

- 30 percent - bilateral, right knee osteoarthritis/degenerative disease, status post medical meniscectomy
- 10 percent - bilateral, left hip osteoarthritis/degenerative disease with limited flexion
- 10 percent - bilateral, left lower extremity radiculopathy due to failed back/post laminectomy syndrome
- 0 percent - right lower extremity radiculopathy due to failed back/post laminectomy syndrome
- 0 percent - surgical scars of the right knee (x3), right hip, and low back
- 0 percent - left hip osteoarthritis/degenerative disease thigh impairment

21. The applicant provided the following:

a. DFAS Online Customer Service printout, showing the following emphasized statement:

The only way your retired pay would be tax exempt is if you were medical retired by your Branch of Service with a medical disability rating and your orders indicated that your injuries/disabilities were incurred in the line of duty or by instrumentality of war...

b. Form 1099-R showing a distribution code of 7.

c. A VA summary of benefits letter dated 17 February 2023 stating he has a 100 percent combined service-connected evaluation effective 30 June 2013.

22. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. Documentation reviewed included the applicant's ABCMR application and accompanying documentation, the military electronic medical record (AHLTA), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and/or the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant is applying to the ABCMR requesting reversal of the United States Army Physical Disability Agency's administrative determination that none of his five military disabilities was not related to combat as defined by law:

"Medical Retirement Disability Order # 098-0007, dated 08 April 2013 says 'Not Combat Related and Not in the Line of Duty.' This is incorrect and should read

'Combat Related - Instrumentality of War and in the Line of Duty (2).' PEB DA 199 states 'Not Combat Related and Not in the Line of Duty' under Section III and Section V. This is incorrect and should read 'Combat Related and in the Line of Duty' per the attached HRC - Combat Related Special Compensation (CRSC) Letter dated February 27, 2014."

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. Orders published 15 May 2015 by the United States Army Garrison, Fort Belvoir show he was permanently retired for physical disability with an 100% military disability rating effective 30 June 2015 under provisions provided in chapter 4 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (20 March 2012). It shows none of his disabilities had been determined combat related.

d. A Soldier is referred to the IDES when they have one or more conditions which appear to fail medical retention standards as documented on a duty liming permanent physical profile. At the start of their IDES processing, a physician lists the Soldier's referred medical conditions in section I the VA/DOD Joint Disability Evaluation Board Claim (VA Form 21-0819). The Soldier, with the assistance of the VA military service coordinator, lists all conditions they believe to be service-connected disabilities in block 8 of section II or a separate Statement in Support of Claim (VA form 21-4138).

e. Soldiers then receive one set of VA C&P examinations called Disability Benefits Questionnaires (DBQs) covering all their referred and claimed conditions. These examinations, which are the examinations of record for the IDES, serve as the basis for both their military and VA disability processing. All conditions are then rated by the VA prior to the Soldier's discharge. The physical evaluation board (PEB), after adjudicating the case sent them by the medical evaluation board (MEB), applies the applicable VA derived ratings to the Soldier's unfitting condition(s), thereby determining their final combined rating and disposition. Upon discharge, the Veteran immediately begins receiving the full disability benefits to which they are entitled from both their Service and the VA.

f. On 10 April 2012, the applicant was referred to IDES for "1. Lumbar Degenerative Disc Disease status post Surgery x 2. 2. Right Hip Osteoarthritis, status post Total Hip Arthroplasty 3. Right Knee Osteoarthritis." He claimed an additional 20 conditions on his VA 21-809. The MEB determined the applicant had six conditions which failed medical retention standards:

1. Failed back / post laminectomy syndrome with bilateral lower extremity radiculopathy.
2. Severe osteoarthritis of the right knee joints.
3. Mild to moderate osteoarthritis of the left knee.

4. Residual of total right hip arthroplasty with chronic pain.

5. Mild osteoarthritis of the left hip joint.

6. PTSD

g. The MEB determined eighteen additional conditions met retention standards. On 23 August 2012, the applicant agreed with the MEB's findings and recommendation and his case was forwarded to a physical evaluation board (PEB) for adjudication.

h. The applicant's Informal Physical Evaluation Board (PEB) Proceedings (DA Form 199) dated 21 February 2013 shows the board determined all the conditions which had failed medical retention standards were also unfitting conditions for continued military service. The PEB made the administrative determination that none of the disabilities was not combat related: They found no evidence that one of these disabilities was the direct result of armed combat; was related to the use of combat devices (instrumentalities of war); the result of combat training; incurred while performing extra hazardous service though not engaged in combat; incurred while performing activities or training in preparation for armed conflict in conditions simulating war; or that he was a member of the military on or before 24 September 1975.

i. The onset of these conditions as noted in the MEB narrative summary and written in the disability rationales on his DA 199:

Posttraumatic stress disorder (PTSD):

"Onset 2007. Soldier's first BH visit was in 2008 for symptoms consisting of nightmares, recurrent thoughts of deployment to Africa in 2006, paranoia, anxiety, and sleep difficulty. Upon exam, Soldier reports no engagement of his weapon in combat. He did not see any anyone wounded or killed and did not feel that he was in any great danger. He did not feel that he was going to be killed, nor did he experience any associated trauma during his deployment..."

Chronic lumbar strain status post lumbar laminectomy and revision surgery:

"Onset 2005 when he was struck by the open door of a truck during a vehicle recovery operation. Condition is not combat related."

Right hip total replacement:

"Onset 1990 when Soldier developed sudden pain with no etiology or history of trauma. This not a combat related injury."

Left knee degenerative disease:

"Onset August 2008 with no known etiology or history of trauma. This is not a combat related injury."

Right knee medial meniscectomy, with residuals and degenerative disease:
 “Onset August 2008 with no known etiology or history of trauma. This is not a combat related injury.”

Left hip degenerative disease:
 “Onset 1990 when Soldier developed sudden pain with no etiology or history of trauma.”

j. These are the same onsets of injury as noted in the applicant’s DBQ’s and associated documents.

k. Combat related is defined in Section b(3) of 26 U.S. Code § 104, and requires there be a direct cause and effect relationship:

(3) Special rules for combat-related injuries: For purposes of this subsection, the term “combat-related injury” means personal injury or sickness—

(A) which is incurred—

- (i) as a direct result of armed conflict,
- (ii) while engaged in extra-hazardous service, or
- (iii) under conditions simulating war; or

(B) which is caused by an instrumentality of war.

l. The applicant’s Initial PTSD DBQ and earlier clinical documents note the stress he was under while in Africa and a passing reference to traumatic events. From his PTSD DBQ:

3. Stressors

The stressful event can be due to combat, personal trauma, other life-threatening situations (non-combat related stressors) .

a . Stressor #1 : special forces operations experiences .

m. While these types of stressors may lead to the development of PTSD, they are not necessarily combat related.

n. The applicant believes his lumbar spine condition should be found combat related because he was working with military vehicles at the time. As these are instruments of war, his lumbar condition should be combat related. However, because a Soldier was injured while in, on, around, or working on/with an instrumentality of war doesn’t

automatically make it a disability caused by an instrumentality of war. The disability must be because the use or circumstances surrounding the injury is uniquely military and different from the use or occurrences in similar circumstances in civilian pursuits. Thus, an injury due to a moving vehicle door / vehicle maintenance is not uniquely military or combat related.

o. The PEB determined the remaining eighteen conditions were not unfitting for continued service. They then applied the VA derived ratings for combined military disability rating of 100% and recommended the applicant be permanently retired for physical disability. On 11 March 2013, after being counseled on the PEB's findings and recommendation by his PEB liaison officer, he concurred with the board's findings, waived his right to a formal hearing, and declined to request a VA reconsideration of his disability ratings.

p. No substantiating medical documentation or command endorsements were submitted, nor are there any AHLTA encounters identified to support an affirmative combat related.

q. Review of his Combat Related Special Compensation (CRSC) applications and findings from the CRSC Section at the United States Army Human Resources Command (USA HRC) show he has been awarded CRSC for several of these Army and VA service-connected disabilities. It is noted that in block 13j of these request – "In your own words, describe the events surrounding the disability and how it meets the guidelines of combat related" – the reasons are different than they were during the IDES process.

r. For example, the DA 199 notes for the Right hip total replacement: "Onset 1990 when Soldier developed sudden pain with no etiology or history of trauma."

s. The VA's Proposed Ratings dated 13 February 2014 states:

"Evaluation of right hip total replacement with osteoarthritis/degenerative disease (previously evaluated as right hip osteoarthritis; previously claimed as bacteremia septic hip infection resulting from dental cleaning and hip injury) ..."

t. A 21 August 2005 "To Whom It May Concern" Memorandum from his treating surgeon shows a hip infection and not combat related trauma was the cause of his right hip injury:

"I was asked to see the above patient in consultation (9/13/90) because of a monoarticular, septic arthritis of the right hip joint ... Although, his history states that he had dental examination 3 weeks prior to admission, actual records

indicate that dental examination occurred 8/29/90 just 12 days prior to admission and 10 days prior to the onset of symptoms.

There was no history of injury to the hip, systemic disease, rheumatic disorder or autoimmune dysfunction to predispose him to this infection ...

Surgical examination by Dr. ■, necessitated by failure of this patient to respond to antibiotic therapy, was consistent with infection.”

u. The actual operative note dictated by Dr. ■ is also in the supporting documents. The surgeon stated:

“Using long right-angle retractors, the muscle splitting incision was developed to expose the anterior hip joint capsule at the base of the femoral neck. The anterior hip capsule was then incised with electrocautery with the release of a large amount of purulent material under pressure.”

v. However, the applicant wrote in block 13-j of his CRSC application for his right hip arthroplasty:

“I was deployed and was conducting vehicle recovery in the desert Simulating War like conditions when I was struck by a moving S&P Trailer. I was hit by an open utility door that struck my hip and spun me around to the ground which caused my "Hip" and "Back" to become injured.”

w. It is the opinion of the ARBA Medical Advisor there is insufficient probative documentary evidence upon which to reverse the United States Army Physical Disability previous non-combat related determinations for his unfitting disabilities.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found relief is not warranted.
2. The Board concurred with the conclusion of the ARBA Medical Advisor that the PEB's determination that the applicant's unfitting conditions were not combat related was correct. Based on a preponderance of the evidence, the Board determined there is no basis for changing the combat-related determinations shown on the applicant's DA Form 199 or his retirement orders.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
█	█	█	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

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 for correction of the records of the individual concerned.

2/27/2024

X

CHAIRPERSON

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.

REFERENCES:

1. Army Regulation (AR) 600-8-4 (Line of Duty (LOD) Policy, Procedures, and Investigations) prescribes policies and procedures for investigating the circumstances of disease, injury, or death of a Soldier providing standards and considerations used in determining LOD status.

a. A formal LOD investigation is a detailed investigation that normally begins with DA Form 2173 (Statement of Medical Examination and Duty Status) completed by the medical treatment facility and annotated by the unit commander as requiring a formal LOD investigation. The appointing authority, on receipt of the DA Form 2173, appoints an investigating officer who completes the DD Form 261 (Report of Investigation LOD and Misconduct Status) and appends appropriate statements and other documentation

to support the determination, which is submitted to the General Court Martial Convening Authority for approval.

b. The worsening of a pre-existing medical condition over and above the natural progression of the condition as a direct result of military duty is considered an aggravated condition. Commanders must initiate and complete LOD investigations, despite a presumption of Not in the Line of Duty, which can only be determined with a formal LOD investigation.

c. An injury, disease, or death is presumed to be in LOD unless refuted by substantial evidence contained in the investigation. LOD determinations must be supported by substantial evidence and by a greater weight of evidence than supports any different conclusion. The evidence contained in the investigation must establish a degree of certainty so that a reasonable person is convinced of the truth or falseness of a fact.

2. Title 10, USC, chapter 61, provides the Secretaries of the Military Departments with authority to retire or discharge a member if they find the member unfit to perform military duties because of physical disability. The U.S. Army Physical Disability Agency is responsible for administering the Army physical disability evaluation system and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with DOD Directive 1332.18 and AR 635-40 (Physical Evaluation for Retention, Retirement, or Separation).

a. Soldiers are referred to the disability system when they no longer meet medical retention standards in accordance with Army Regulation 40-501 (Standards of Medical Fitness), chapter 3, as evidenced in an MEB; when they receive a permanent medical profile rating of 3 or 4 in any factor and are referred by an MOS Medical Retention Board; and/or they are command-referred for a fitness-for-duty medical examination.

b. The disability evaluation assessment process involves two distinct stages: the MEB and PEB. The purpose of the MEB is to determine whether the service member's injury or illness is severe enough to compromise his/her ability to return to full duty based on the job specialty designation of the branch of service. A PEB is an administrative body possessing the authority to determine whether or not a service member is fit for duty. A designation of "unfit for duty" is required before an individual can be separated from the military because of an injury or medical condition. Service members who are determined to be unfit for duty due to disability either are separated from the military or are permanently retired, depending on the severity of the disability and length of military service. Individuals who are "separated" receive a one-time severance payment, while veterans who retire based upon disability receive monthly military retired pay and have access to all other benefits afforded to military retirees.

c. The mere presence of a medical impairment does not in and of itself justify a finding of unfitness. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier may reasonably be expected to perform because of his or her office, grade, rank, or rating. Reasonable performance of the preponderance of duties will invariably result in a finding of fitness for continued duty. A Soldier is physically unfit when a medical impairment prevents reasonable performance of the duties required of the Soldier's office, grade, rank, or rating.

3. Title 38 USC, section 1110 (General - Basic Entitlement) states for disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

4. Title 38 USC, section 1131 (Peacetime Disability Compensation - Basic Entitlement) states for disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during other than a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

5. AR 635-40 (Personnel Separations-Disability Evaluation for Retention, Retirement, or Separation) establishes the Army Disability Evaluation System and sets forth policies, responsibilities, and procedures that apply in determining whether a Soldier is unfit because of physical disability to reasonably perform the duties of his office, grade, rank, or rating. Only the unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability.

a. Disability compensation is not an entitlement acquired by reason of service-incurred illness or injury; rather, it is provided to Soldiers whose service is interrupted and who can no longer continue to reasonably perform because of a physical disability incurred or aggravated in military service.

b. Soldiers who sustain or aggravate physically unfitting disabilities must meet the following line-of-duty criteria to be eligible to receive retirement and severance pay benefits:

(1) The disability must have been incurred or aggravated while the Soldier was entitled to basic pay or as the proximate cause of performing active duty or inactive duty training.

(2) The disability must not have resulted from the Soldier's intentional misconduct or willful neglect and must not have been incurred during a period of unauthorized absence.

c. The percentage assigned to a medical defect or condition is the disability rating. A rating is not assigned until the PEB determines the Soldier is physically unfit for duty. Ratings are assigned from the Department of Veterans Affairs (VA) Schedule for Rating Disabilities (VASRD). The fact that a Soldier has a condition listed in the VASRD does not equate to a finding of physical unfitness. An unfitting, or ratable condition, is one which renders the Soldier unable to perform the duties of their office, grade, rank, or rating in such a way as to reasonably fulfill the purpose of their employment on active duty. There is no legal requirement in arriving at the rated degree of incapacity to rate a physical condition which is not in itself considered disqualifying for military service when a Soldier is found unfit because of another condition that is disqualifying. Only the unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability.

6. AR 40-501 (Standards of Medical Fitness) governs medical fitness standards for enlistment, induction, appointment (including officer procurement programs), retention, and separation (including retirement). The Department of Veterans Affairs Schedule for Rating Disabilities (VASRD). VASRD is used by the Army and the VA as part of the process of adjudicating disability claims. It is a guide for evaluating the severity of disabilities resulting from all types of diseases and injuries encountered as a result of or incident to military service. This degree of severity is expressed as a percentage rating which determines the amount of monthly compensation.

7. Section 1556 of Title 10, USC, requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA

Medical Office recommendations, opinions (including advisory opinions), and reviews to Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

8. Department of Defense Financial Management Regulation (DoD FMR) provides in chapter 63, paragraph 630101 the CRSC was effective on 31 May 2003 to provide special compensation to members of the uniformed service who may have retired pay reduced by reason of receiving VA disability compensation where a portion of such VA compensation is the result of disabilities that are combat-related. Eligibility requirements have changed since its inception. CRSC is not military retired pay. It is payable from funds appropriated for pay and allowance payable by the Secretary of the Military Department concerned.

a. Paragraph 6302 (Determinations of Combat-Relatedness) The following criteria, terms, definitions, and explanations will apply to making combat related determinations in the CRSC Program. 630201 (Direct Result of Armed Conflict) subparagraph 630201(A) states the disability is a disease or injury incurred in the line of duty as a direct result of armed conflict. The fact that a member incurred the disability during a period of war, or in an area of armed conflict or while participating in combat operations is not sufficient to support a combat-related determination. There must be a definite causal relationship between the armed conflict and the resulting disability.

b. Paragraph 6303 (Entitlement) states CRSC is a monthly entitlement. A member must file an application with the Military Department from which the member retired to determine entitlement. A retiree is entitled to CRSC for each month during which, for the entire month, the member: 630301 (A) has applied for and elected CRSC under these provisions (section 6304). 630301 (B) meeting the preliminary CRSC criteria (Section 6305) and 630301 (C) meets the final criteria (section 6306) that is, has a combat-related disability or disabilities.

c. Paragraph 630602 (Other Combat-Related Disabilities) states a combat-related disability is a disability with an assigned medical diagnosis code from VASRD that was incurred. The Military Departments will determine whether a disability is combat-related based on the following criteria:

- (1) As a direct result of armed conflict,
- (2) While engaged in hazardous service,
- (3) In the performance of duty under conditions simulating war, or
- (4) Through an instrumentality of war.

d. The Department shall record for each disability determined to be combat-related which of the circumstances provided above qualifies the disability as combat-related. A determination of combat-relatedness (see section 6302) will be made with respect to each separate disability with an assigned medical diagnosis code from the VASRD. A retiree may have disabilities that are not combat-related. Such disabilities will not be considered in determining eligibility for CRSC or the amount of CRSC payable. An 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. CRSC determinations must be made on the basis of the program criteria.

e. Paragraph 631001 (Basis for Determination) states determinations of whether a disability is combat-related will be based on the preponderance of available documentary information where 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 and conjecture. The burden of proof that a disability is combat-related rests with the applicant and the member is required to provide copies of documents in his or her possession to the best of his or her ability. Military Departments may compile a list of typical documents used for CRSC verification.

9. Title 10, U.S. Code, section 1413a, as amended, established 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. Payments under this section are not retired pay. Payment is made by the Military Department, not the VA, and is tax free. Eligible retirees are those who have combat related disabilities and are entitled to retired pay. The Secretary of Defense shall prescribe procedures and criteria under which a disabled uniformed services retiree may apply to the Secretary of a military department to be considered to be an eligible combat-related disabled uniformed services retiree. Such procedures shall apply uniformly throughout the Department of Defense. A combat-related disability means a disability that is compensable under the laws administered by the Secretary of Veterans Affairs and that –

a. is attributable to an injury for which the member was awarded the Purple Heart;
or

b. was incurred (as determined under criteria prescribed by the Secretary of Defense) as a direct result of armed conflict, engaged in hazardous service, in the performance of duty under conditions simulating war or through an instrumentality of war.

10. On 3 September 2014 the Secretary of Defense directed the Service Discharge Review Boards (DRBs) and Service Boards for Correction of Military/Naval Records (BCM/NRs) to carefully consider the revised PTSD criteria, detailed medical considerations and mitigating factors when taking action on applications from former service members administratively discharged UOTHC and who have been diagnosed with PTSD by a competent mental health professional representing a civilian healthcare provider in order to determine if it would be appropriate to upgrade the characterization of the applicant's service.

11. On 25 August 2017, the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to DRBs and BCM/NRs when considering requests by veterans for modification of their discharges due in whole or in part to: mental health conditions, including PTSD, traumatic brain injury, sexual assault, or sexual harassment. Boards are to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based, in whole or in part, on those conditions or experiences.

12. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records (BCM/NRs) regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. BCM/NRs may grant clemency regardless of the court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds. This guidance does not mandate relief, but rather provides standards and principles to guide BCM/NRs in application of their equitable relief authority. In determining whether to grant relief on the basis of equity, injustice, or clemency grounds, BCM/NRs shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment.

13. Army Regulation (AR) 635-5-1 (Personnel Separations - Separation Program Designator (SPD) Codes) prescribes the specific authorities (statutory or other directives), reasons for separating Soldiers from active duty, and the separation program designator (SPD) codes to be entered on DD Form 214 (Certificate of Release or Discharge from Active Duty). Table 2–2 (Separation program designator codes applicable to officer personnel) shows the following codes for permanent disability retirement:

- SEJ - Disability, permanent (enhanced)
- SFJ - Disability, permanent

- VEJ Disability, permanent (enhanced)
- WEJ Disability, permanent (enhanced)
- WFJ Disability, permanent

//NOTHING FOLLOWS//