

IN THE CASE OF: [REDACTED]

BOARD DATE: 22 November 2023

DOCKET NUMBER: AR20230003585

APPLICANT REQUESTS:

- personal appearance before the Board
- correction of his DA Form 199 (Informal Physical Evaluation Board (PEB) Proceedings) to reflect the following:
 - his left glenohumeral (shoulder) joint dislocation/recurrent dislocation with rotator cuff tear, be found to have been the result of a combat-related injury
 - his right degenerative arthritis with right patellofemoral pain syndrome and right knee tendonitis/tendinosis (non-compensable) be found to have been incurred or aggravated in the line of duty (LOD) in an authorized duty status
 - his left degenerative arthritis with left patellofemoral pain syndrome and left knee tendonitis/tendinosis (non-compensable) be found to have been incurred or aggravated in the LOD in an authorized duty status

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

- DD Form 149 (Application for Correction of Military Record)
- self-authored statement
 - three DD Forms 214 (Certificate of Release or Discharge from Active Duty), covering the periods of service ending 15 December 1990, 5 April 1998, and 16 September 2004
- eight sets of assignment/reassignment orders, dated between October 1991 – August 1995
- six Standard Forms 600 (Chronological Record of Medical Care), dated between January 1993 - February 2004
- Standard Form 513 (Consultation Sheet), dated 25 January 1993
- Standard Form 558 (Emergency Care and Treatment Record), dated 8 August 1997
- three sets of mobilization, temporary change of station, and demobilization orders, dated between December 2002 – September 2004
- Standard Form 513 (Consult Report), dated 12 November 2003
- Department of Veterans Affairs (VA) letter, dated 23 September 2021
- Advice of Right to Counsel, dated 25 January 2022

- DA Form 199, dated 24 March 2022
- partial DA Form 5893 (Soldier's Medical Evaluation Board (MEB)/PEB Counseling Checklist), dated 30 March 2022
- U.S. Army Human Resources Command (AHRC) Combat-Related Special Compensation (CRSC) Decision Letter, dated 29 September 2022
- two witness statements
- 13 photographs
- Army Review Boards Agency (ARBA) letter, dated 18 May 2023
- ARBA email correspondence, dated 7 June 2023

FACTS:

1. The applicant states:

a. He would like to appeal the determination and rating decision of the PEB approved on 1 May 2022. He feels the PEB was in error in determining that he was not in an active-duty status or that the conditions that were incurred were not aggravated by military service or simulated combat training.

b. His left shoulder condition, although found unfitting with a 20 percent rating and found to be duty-related by the MEB/PEB, was not found to have been caused or aggravated by combat simulated training which occurred in 1993. Additionally, the PEB often referred to LOD investigations, but while in an active duty status in the Regular Army, LODs were not conducted for simple accidents. Instead, injuries and medical conditions are annotated in a Standard Form 600 by the local Troop Medical Center (TMC) or Army Hospital.

c. A Standard Form 600, dated 15 January 1993, states, "Injured shoulder while downhill skiing." But that annotation does not state that the downhill skiing was part of Unit Cold Weather Combat Training. As this information was omitted from the board report, this disqualified him from receiving CRSC. He has attached letters from his platoon sergeant and squad leader at the time the injury occurred in support of his claim. He has also added medical documentation and pictures for visual confirmation of the cold weather ruck march, snowshoe hikes, downhill skiing event, and a picture of himself in the back of the ambulance after he injured his left shoulder.

d. As a specialist (SPC)/E-4 at the time he was asked by the medical professional what happened, he did not consider that he should have specifically said it happened while he was participating in simulated combat training, he fell and dislocated his shoulder and tore his rotator cuff during the downhill ski portion of the training. He also did not have access to his medical records at the time to review them nor did he know how important correcting the record to have it show the injury occurred during a unit training event would be.

e. The PEB determined that neither of his knee conditions were caused or aggravated by military service. They also state that he sought treatment in April 2009, without considering additional Standard Forms 600 that were provided. For this reason, he has attached those additional Standard Forms 600 for the Board to review as well as his supporting active duty orders, permanent change of station (PCS) orders, expiration term of service (ETS) orders, mobilization orders and extended mobilization orders while serving as a U.S. Army Reserve (USAR) Soldier. He has additionally attached DD Forms 214 show the start and end dates of all of his active military service. He has several Standard Forms 600 showing the date and time as well as the condition for which he was seen.

f. Although the PEB granted him a 20 percent rating, they also stated, "The clear and unmistakable evidence indicates this condition existed prior to service (EPTS) as the Soldier first sought treatment for this condition on 23 October 2007, at Army Health Center, Grafenwoehr, Germany." This is incorrect information, as he initially sought treatment on 5 January 1993, after an automotive vehicle accident and on 22 April 1997, while lifting a transmission from an Army truck, while performing his duties as a mechanic. See the attached Standard Form 600, and additional treatment documentation from 21 February 2003, 5 September 2003, and 3 November 2003, which were either while he was in the Regular Army or as a mobilized Reservist on active duty. These conditions were not present prior to his military service; they were prior to his USAR service, but not his Regular Army service. His initial military service in the Regular Army began directly out of high school when he was initially stationed in Italy.

g. The MEB and PEB failed to take into consideration that he was on active duty in the Regular Army prior to joining the USAR and that his prior active service records must be considered as having been in an authorized duty status. When he requested the additional supporting documentation in the form of pictures, statements from witnesses and medical records from when he was in the Regular Army, he was told there would be no further review of that information without an LOD. When he explained that the Regular Army only completes the Standard Form 600 and does not do an LOD, he was told that he was in the USAR and not the Regular Army or in an active-duty status, so this information was not considered during the board process.

h. The rules for CRSC state, "In the Performance of Duty Simulating War – In general, this covers disabilities resulting from military training, such as war games, practice alerts, tactical exercises, airborne operations, leadership reaction courses, grenade and live fire weapons practice, bayonet training, hand-to-hand combat training, repelling, and negotiation of combat confidence and obstacle courses. It does not include physical training activities such as calisthenics and jogging or formation running

and supervised sport activities.” In his case the training was part of war games, tactical exercises, and negotiation of combat confidence and obstacle courses.

i. He is requesting a review of the documents he provided and if you agree with his supporting information, that an adjustment be made to the record to show that his listed knee conditions be considered as having been incurred while in an active duty status.

j. He is also requesting that his shoulder condition be corrected based on the evidence provided to show it was caused or aggravated by the combat-simulated training event. This is also an injury that has continued to be aggravated over time by military service and is a primary reason for his medical retirement. The PEB considered his cold weather injury as combat-related, but not his shoulder injury, although they occurred at the same time. The cold weather injury was incurred during cold weather combat simulated training and the shoulder injury happened at the same time.

2. The applicant enlisted in the USAR on 16 December 1989.

3. A DD Form 214 shows the applicant entered active duty training on 12 July 1990 and was awarded the Military Occupational Specialty (MOS) 63W (Wheel Vehicle Repairer). He was honorably released from active-duty training after 5 months and 4 days on 15 December 1990, as a Reserve Component personnel upon completion of MOS training.

4. While a drilling member of his USAR unit, the applicant enlisted in the Regular Army on 1 October 1991.

5. The applicant provided multiple sets of orders reflecting his various assignments and reassignments throughout his Regular Army career, which have all been provided in full to the Board for review.

6. The applicant provided multiple medical records emanating from his Regular Army service, dated between January 1993 and November 1997, all of which have been provided to the Board for review and in pertinent part show the following:

a. A Standard Form 600, dated 15 January 1993, shows, the applicant was seen on the date of the form for complaints of left shoulder pain after injuring it while downhill skiing. He landed with his shoulder hyperextended and his entire shoulder was in pain. He stated he had a history of shoulder injury (dislocation 4 months ago). He was assessed with subluxation rotator cuff injury with contusion to deltoid, prescribed Tylenol with codeine, given a sling and swathe and put on a physical profile to not use his left arm, no rucking, pushups, pullups, or lifting.

b. A Standard Form 600, dated 25 January 1993, shows he was again seen on the date of the form for his left shoulder injury incurred in a skiing injury that was treated 10 days prior. He had limited range of motion (ROM) and some improvement, but still in pain and needed his physical profile renewed.

c. A Standard Form 513, dated 25 January 1993, shows after medical consult, a request for physical therapy was made for the applicant's pertaining to his left shoulder pain/dislocation resulting from a fall onto his left shoulder. The Consultation Report on the bottom of the form, dated 2 February 1993, shows suspected left shoulder dislocation/subluxation for which he should continue strengthening exercises, icing, physical profile, no physical training for 4 weeks, follow up in 1 month.

d. A Standard Form 600, dated 22 October 1993, shows the applicant was seen on the date of the form for complaints of lower back pain for 2 weeks and no prior history of lower back pain.

e. A Standard Form 600, dated 22 April 1997, shows the applicant was again seen on the date of the form with complaints of lower back pain for 1 day after lifting a transmission.

f. A Standard Form 600, the date of which is unclear, shows the applicant was seen with complaints of a headache, sore throat, and lower back pain, which he stated felt like he was getting a spinal tap.

g. A Standard Form 558, dated 8 August 1997, shows the applicant received emergency care and treatment on the date of the form after injuring himself in a motorcycle accident, hitting the back of his head on the ground and scraping his right elbow. He was assessed with benign headache, probably concussion vs. sinusitis.

h. A Standard Form 600, dated 7 November 1997, shows the applicant was seen for complaints of right knee pain for the past 2 months. He denied swelling, locking or giving out, and no significant injury. He was assessed with patellofemoral pain syndrome (PFPS) and was given a physical therapy consult. X-rays were within normal limits.

i. A Standard Form 600, dated 17 November 1997 provided a physical therapy note regarding the applicant's right knee pain.

7. A second DD Form 214 shows the applicant was honorably discharged on 5 April 1998, after 6 years, 6 months, and 5 days of net active service this period due to completion of required active service.

8. After a break in service, the applicant again enlisted in the USAR on 3 February 2000.

9. Headquarters, 7th Army Reserve Command Orders M-361-0010, dated 27 December 2002, ordered the applicant to active duty in support of Operation Enduring Freedom, effective 21 January 2003, with service in Schwetzingen, Germany.

10. The applicant provided multiple medical records emanating from his mobilized USAR service, dated between February 2003 and February 2004, all of which have been provided to the Board for review and in pertinent part show the following:

a. A Standard Form 600, dated 21 February 2003, shows the applicant was seen on the date of the form for lower back pain after falling on ice on 12 February 2003 and twisting his back. It hurt to sit, with pain sometimes radiating down the legs. He also complained of migraine headaches for the past week, with a history of migraines over 12 years. He was assessed with lower back pain and tension vs. cluster headaches.

b. A Standard Form 600, dated 5 September 2003, shows the applicant was seen on the date of the form for right lower back pain that radiated to his right hip and upper leg, causing him problems walking and numbness in his right foot. See notes from February 2003.

c. A Standard Form 513, dated 2 November 2003, shows a physical therapy consult was ordered for the applicant. The reason for the consult was the applicant had a motorbike accident 3 weeks ago with no fracture, but still pain in heel with walking and standing painful. The bottom of the form contains the Consult Result, dated 12 November 2003. It shows the applicant's chief complaint was chronic lower back pain and also foot pain. The chronic lower back pain has increased after a motorcycle accident 4 weeks ago and the pain radiates to his glutes and posterior thighs.

d. A Standard Form 600, dated 2 December 2003, provides physical therapy progress notes pertaining to his left knee pain, which was assessed as left patellar tendinitis.

e. A Standard Form 600, dated 3 February 2004, provides physical therapy progress notes pertaining to the applicant's left patella tendonitis and right shoulder pain. He stated his right knee pain had increased insidiously and had left shoulder pain when laying on left side. Had left shoulder Bankart and labral repair about 4 years ago.

f. A Standard Form 600, dated 18 February 2004, shows the applicant was seen on the date of the form for his left shoulder and left knee pain.

g. A Standard Form 600, dated 23 February 2004, provides physical therapy notes related to the applicant's left shoulder and left knee pain and treatment.

11. A third DD Form 214, covering his mobilized service in support of Operation Enduring Freedom beginning on 21 January 2003, shows the applicant was honorably released from active duty on 16 September 2004, due to completion of required active service and transferred back to his USAR unit. He was credited with 1 year, 7 months, and 26 days of net active service this period.

12. A VA letter, dated 23 September 2021, shows the applicant's periods of honorable active service were as follows:

- 1 October 1991 through 5 April 1998
- 21 January 2003 through 16 September 2004

13. The applicant's DA Form 3349 (Physical Profile), DA Form 7652 (Disability Evaluation System (DES) Commander's Performance and Functional Statement), Medical Evaluation Board (MEB) Narrative Summary (NARSUM), DA Form 3947 (MEB Proceedings), VA Compensation and Pension (C&P) Exam, and VA Rating Decision are not in his available records for review and have not been provided by the applicant.

x. A U.S. Army Physical Disability Agency (USAPDA) memorandum, dated 30 September 2021, shows the USAPDA administratively terminated the non-duty related case pertaining to the applicant based on the PEB findings and those PEB Proceedings are void.

14. An Advice of Right to Counsel document shows the applicant signed and initialed the form on 25 January 2022, indicating he received his initial counseling upon referral to the MEB and understood his right to consult with legal counsel, he received his mandatory telephonic legal briefing, and he received his DA Form 3947 and his DA Form 199.

15. A DA Form 199 shows the following:

a. An informal PEB convened on 24 March 2022, wherein the PEB found the applicant physically unfit, recommended a rating of 50 percent, and that his disposition be permanent disability retirement.

b. Among the documents used in the adjudication of this case were the applicant's NARSUM; DA Form 7652; DA Form 3349; DA Form 3947; VA C&P Exam, VA Rating Decision; LOD memorandum, dated 22 September 2021; DD Form 214(s), covering the periods ending 5 April 1998 and 16 September 2004; Clinical Notes, dated 7 January

2002, 29 March 2005, 23 October 2007, 9 April 2009; LOD dated 25 March 2013; Retirement Points Accounting System (RPAS), dated 8 November 2021.

c. The medical conditions determined to be unfitting are as follows:

(1) Left glenohumeral joint dislocation/recurrent dislocation with rotator cuff tear (MEB diagnosis (Dx) 2); VA Schedule for Rating Disabilities (VASRD) code 5201; incurred or aggravated in the LOD in a duty status authorized by Title 10 U.S. Code: Yes; EPTS/and was not aggravated by active military service: not applicable (N/A); rating: 20 percent. The applicant first sought treatment for this condition in September 1992 following a left shoulder dislocation. He underwent surgery in 1993 and in 1999. The LOD memorandum, dated 22 September 2021 [not in his available record for review by the Board], indicated the applicant underwent surgery in 2004, following a left rotator cuff injury while working under a truck in Bosnia. He is unfit because his DA Form 3349 functional activity limitations associated with this condition make him unable to reasonably perform required duties.

(2) Left glenohumeral joint dislocation/recurrent dislocation with rotator cuff tear (VA rated as impairment of the humerus due to left shoulder glenohumeral joint dislocation with rotator cuff tear (non-dominant) (MEB Dx 2); VASRD code 5202; incurred or aggravated in the LOD in a duty status authorized by Title 10 U.S. Code: Yes; EPTS/and was not aggravated by active military service: N/A; rating: 20 percent. The applicant first sought treatment for this condition in September 1992 following a left shoulder dislocation. He underwent surgery in 1993 and in 1999. The LOD memorandum, dated 22 September 2021 [not in his available record for review by the Board], indicated the applicant underwent surgery in 2004, following a left rotator cuff injury while working under a truck in Bosnia. He is unfit because his DA Form 3349 functional activity limitations associated with this condition make him unable to reasonably perform required duties.

(3) Chronic lumbar pain secondary to minimal degenerative changes (VA rated as degenerative arthritis, thoracolumbar spine) (MEB Dx 3); VASRD code 5242; incurred or aggravated in the LOD in a duty status authorized by Title 10 U.S. Code: Yes; EPTS/and was not aggravated by active military service: N/A; rating: 20 percent. The clear and unmistakable evidence that indicates this condition was EPTS is the applicant sought treatment for this condition on 23 October 1997 at Army Health Center, Grafenwoehr, Germany. At the time the applicant was diagnosed with this condition, he was not in an active duty status for more than 30 days or entitled to base pay. The condition was aggravated on 5 May 2012, when the applicant was performing an Army Physical Fitness Test (APFT). The presumption of service aggravation is not overcome; therefore the condition is compensable. He is unfit because his DA Form 3349 functional activity limitations associated with this condition make him unable to reasonably perform required duties.

(4) Major depressive disorder, moderate, recurrent with anxious distress (non-compensable) (MEB Dx 1); VASRD code 9400; incurred or aggravated in the LOD in a duty status authorized by Title 10 U.S. Code: No; EPTS/and was not aggravated by active military service: No; rating: N/A. Although the MEB indicated this condition might have been EPTS, there was no clear and unmistakable evidence in the case file to support his assertion. The applicant first sought treatment for this condition on 7 January 2002 in Germany. This condition was caused by no specific mechanism of injury or trauma. At the time the applicant was diagnosed with these conditions, he was not in an active-duty status for more than 30 days or entitled to base pay and there is no LOD investigation for this condition. Additionally, there is no evidence within the applicant's available case file that indicates that military service has aggravated the condition. Therefore, the condition is not compensable because the evidence overcomes both the presumption of soundness and the presumption of permanent service aggravation. The applicant is unfit because his DA Form 3349 functional activity limitations associated with this condition make him unable to reasonably perform required duties.

(5) Right degenerative arthritis with right patellofemoral pain syndrome and right knee tendonitis/tendinosis (non-compensable) (MEB Dx 4); VASRD code 5003-5260; incurred or aggravated in the LOD in a duty status authorized by Title 10 U.S. Code: No; EPTS/and was not aggravated by active military service: No; rating: N/A. The applicant first sought treatment for this condition on 9 April 2009, in Heidelberg, Germany. The applicant indicated he was suffering from bilateral knee pain for several years. There is no specific injury or trauma indicated. At the time the applicant was diagnosed with this condition he was not in an active-duty status for more than 30 days or entitled to base pay, and there is no LOD investigation for this condition. Additionally, there is no evidence within the applicant's available case file that indicates that military service has aggravated this condition. Therefore, the condition is not compensable because the evidence overcomes both the presumption of soundness and the presumption of permanent service aggravation. The applicant is unfit because his DA Form 3349 functional activity limitations associated with this condition make him unable to reasonably perform required duties.

(6) Left degenerative arthritis with left patellofemoral pain syndrome and left knee tendonitis/tendinosis (non-compensable) (MEB Dx 5); VASRD code 5024-5261; incurred or aggravated in the LOD in a duty status authorized by Title 10 U.S. Code: No; EPTS/and was not aggravated by active military service: No; rating: N/A. The applicant first sought treatment for this condition on 9 April 2009, in Heidelberg, Germany. The applicant indicated he was suffering from bilateral knee pain for several years. There is no specific injury or trauma indicated. At the time the applicant was diagnosed with this condition he was not in an active-duty status for more than 30 days or entitled to base pay, and there is no LOD investigation for this condition. Additionally, there is no evidence within the applicant's available case file that indicates that military service has

aggravated this condition. Therefore, the condition is not compensable because the evidence overcomes both the presumption of soundness and the presumption of permanent service aggravation. The applicant is unfit because his DA Form 3349 functional activity limitations associated with this condition make him unable to reasonably perform required duties.

d. The PEB determined the applicant was fit for conditions listed as MEB Dx 6-7.

e. Section V: Administrative Determinations includes the following:

(1) The disability disposition is not based on disease or injury incurred in the LOD 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 LOD during a period of war

(2) The disability did not result from a combat-related injury under the provisions of Title 26 U.S. Code, section 104 or Title 10 U.S. Code, section 10216

f. On 1 April 2022, the applicant signed the form indicating he was advised of the findings and recommendations of the informal PEB and concurred and waived a formal hearing of his case. He also indicated he did not request reconsideration of his VA ratings.

16. The applicant provided a partial DA Form 5893, pages 4 – 7, which shows he signed and initialed the form on 30 March 2022, indicating he was advised of 30 itemized entries on the MEB/PEB Checklist, among them being the course of the PEB process, the findings and recommendations of the PEB, his right to seek legal counsel, information regarding CRSC, and his right to apply to the Army Board for Correction of Military Records (ABCMR) for relief if he believes his case was incorrectly decided.

17. USAPDA Order D 096-18, dated 6 April 2022, released the applicant from assignment and duty because of physical disability incurred while entitled to basic pay and under conditions that permit his retirement for permanent physical disability effective 6 May 2002, with disability rating of 50 percent. The orders further show the disability is not based on injury or disease received in LOD during a war period as defined by law and disability did not result from a combat-related injury as defined in Title 26 U.S. Code.

18. A review of the AHRC, Soldier Management System (SMS) confirms a transaction was completed to discharge the applicant from USAR Troop Unit (TPU) service (current and transfer him to the Permanent Disability Retired List (PDRL) effective 6 May 2002.

19. On 2 August 2022, the applicant applied to AHRC for CRSC. An AHRC CRSC Branch letter to the applicant, dated 29 September 2022, shows the following:

a. Their office reviewed the applicant's claim for CRSC and were able to verify the following conditions as combat-related:

(1) tinnitus; 10 percent; combat-related due to an instrumentality of war

(2) Raynaud's disease; 0 percent; combat-related due to an instrumentality of war

b. They were unable to verify the following conditions as combat-related:

(1) unspecified mood disorder; 70 percent; no documentation in claim that establishes disability is combat related in accordance with CRSC guidelines

(2) residuals, restabilization of left shoulder by Bankart repair, status post left shoulder rotator cuff reconstruction; 20 percent; his PEB states this disability is not combat-related

(3) degenerative arthritis, thoracolumbar spine, 20 percent; his PEB states this disability is not combat-related

(4) radiculopathy with sciatic nerve involvement, left lower extremity; 20 percent; this condition is secondary to a condition which is not combat-related

(5) radiculopathy with sciatic nerve involvement, right lower extremity; 20 percent; this condition is secondary to a condition which is not combat-related

20. The applicant provided numerous photos and two witness statements, all of which have been provided in full to the Board for review. The witness statements show, in pertinent part, the following:

a. Sergeant First Class (SFC) (Retired) ■■■■■ provided a statement indicating he served as the applicant's platoon sergeant while they were assigned to the U.S National Support Element (USNSE), Allied Mobile Forces Land (AMF) (L), at Camp Darby, in Livorno, Italy. It was part of the unit's mission to operate and train in austere environments, to include extreme cold weather training events. In January 1993, while performing cold weather training in Pontebba, Italy the unit participated in simulated war/combat training by "Shoot, Move, and Communicate" using downhill and cross-country skis as well as emergency removal of patients using rescue toboggans. The unit occupied the training area for up to 30 days, living in tents, igloos, and other developed shelters. During this training exercise in January 1993, he was present when the

applicant fell and injured his shoulder while performing the down-hill ski training event. This training was the primary unit mission and all Soldiers were required to perform these actions. As the unit was away from the TMC at Camp Darby, the unit medics placed the applicant's arm in a sling, and he was put on light duty restriction for the rest of the training exercise. No LOD investigation was initiated as this was not a customary action for active duty Regular Army. Upon return to home station, the applicant reported to the 3rd Dispensary, was placed on additional light duty, and continued the use of the sling pending an evaluation of his shoulder. After months of physical therapy, surgery was eventually required to repair the injury and in July 1994, the applicant underwent Open Bankart Reconstructive Surgery at the U.S. Army Hospital in Heidelberg, Germany.

b. Staff Sergeant (SSG) ■■■■■ provided a statement indicating he was the applicant's squad leader at the time of the injury, responsible for his first line counseling, training, and assignment of daily duties. While conducting cold weather training in Italy, the applicant fell while performing the downhill ski training and dislocated his shoulder. He later had surgery on his shoulder when physical therapy failed. He can confirm the applicant was performing military combat simulated training as part of the commander's training objectives and had firsthand knowledge of when and how this injury was incurred.

21. 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 his unfitting left shoulder condition be determined combat related; and his right and left knee conditions be determined to be duty related with a corresponding an increase in his current military disability rating.

c. The Record of Proceedings details the applicant's service and the circumstances of the case. Orders published by the United States Army Physical Disability Agency (USAPDA) on 6 April 2022 show the former USAR drilling Soldier was permanently retired for physical disability with a 50% military disability rating effective 6 May 2022 under provisions provided in chapter 4 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (19 January 2017).

d. A Soldier is referred to the Integrated Disability Evaluation System (IDES) when they have one or more conditions which appear to fail medical retention standards reflected on a duty limiting permanent physical profile. At the start of their IDES processing, a physician lists the Soldiers 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 other conditions they believe to be service-connected disabilities in block 8 of section II of this form, or on a separate Application for Disability Compensation and Related Compensation Benefits (VA Form 21-526EZ).

e. Soldiers then receive one set of VA C&P examinations 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. The medical evaluation board (MEB) uses these exams along with AHLTA encounters and other information to evaluate all conditions which could potentially fail retention standards and/or be unfitting for continued military service. Their findings are then sent to the physical evaluation board for adjudication.

f. All conditions, both claimed and referred, are rated by the VA using the VA Schedule for Rating Disabilities (VASRD). The physical evaluation board (PEB), after adjudicating the case, applies the applicable ratings to the Soldier's unfitting condition(s), thereby determining his or her 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.

g. On 17 November 2021, the applicant was referred to the IDES for anxiety disorder, left shoulder pain, lumbosacral strain, bilateral knee pain, and bilateral lower extremity radiculopathy. The applicant did not claim any additional conditions on his Application for Disability Compensation and Related Compensation Benefits (VA Form 21-526EZ).

h. The medical evaluation board determined the applicant had five conditions which failed the medical retention standards of AR 40-501, Standards of Medical Fitness: "Major Depressive Disorder, moderate, recurrent with anxious distress;" "Left Glenohumeral joint dislocation/recurrent Dislocation w/rotator cuff tear;" "Chronic lumbar pain secondary to minimal degenerative changes;" "Right degenerative arthritis w/right patellofemoral pain syndrome and Right Knee tendonitis/tendinosis;" and "Left degenerative arthritis w/right patellofemoral pain syndrome and Left Knee tendonitis/tendinosis."

i. The onset of his left shoulder condition, right knee condition, and left knee condition as stated in the MEB narrative summary:

Left shoulder: "Onset: 19920901: Per signed ILOD memo dated 20210922, the date of onset for this condition is 19920901. While SM was Regular Army, he

incurred a Left dislocated shoulder, then reinjured the same shoulder x 2 in 1993, and underwent left shoulder surgery x 2.”

Right knee: “Onset: 20090409. Per AHLTA note dated 20090409, this will be the date of onset for this condition. SM was seen in Landstuhl RMC, GA for this condition, however, he does not endorse any specific incident or injury.”

Left knee: “Onset: 20090409. Per AHLTA note dated 20090409, this will be the date of onset for this condition. SM was seen in Landstuhl RMC, GA for this condition, however, he does not endorse any specific incident or injury.”

j. On 25 January 2022, he concurred with the MEB decision, declined to submit a written appeal, declined the opportunity to request an independent medical review, and his case was forwarded to the physical evaluation board (PEB) for adjudication.

k. On 24 March 2022, the applicant’s informal PEB determined the five conditions previously determined to fail medical retention standards were also unfitting conditions for continued military service. They determined his left shoulder and lumbar conditions to be duty related and compensable while his depression and bilateral knee conditions were not duty related and therefore non-compensable:

“Major depressive disorder, moderate, recurrent with anxious distress (non-compensable). Although the Medical Evaluation Board indicated this condition might have existed prior to service, there was no clear and unmistakable evidence available in the case file to support this assertion. The Soldier first sought treatment for this condition on 7 January 2002 in Germany. This condition was caused by no specific mechanism of injury or trauma.

At the time the Soldier was diagnosed with these conditions he was not in an Active-Duty status for more than 30 days or entitled to base pay, and there is no Line of Duty investigation for this condition. Additionally, there is no evidence within the Soldier’s available case file that indicates that military service has aggravated the condition. Therefore, the condition is not compensable because the evidence overcomes both the presumption of soundness and the presumption of permanent service aggravation.

“Right degenerative arthritis with right patellofemoral pain syndrome and right knee tendonitis/tendinosis (non-compensable). The Soldier first sought treatment for this condition on 9 April 2009 in Heidelberg, Germany. The Soldier indicated he was suffering from bilateral knee pain for several years. There is no specific injury or trauma indicated.

At the time the Soldier was diagnosed with this condition he was not in an Active-Duty status for more than 30 days or entitled to base pay, and there is no Line of

Duty investigation for this condition. Additionally, there is no evidence within the Soldier's available case file that indicates that military service has aggravated the condition. Therefore, the condition is not compensable because the evidence overcomes both the presumption of soundness and the presumption of permanent service aggravation."

"Left degenerative arthritis with left patellofemoral pain syndrome and left knee tendonitis/tendinosis (non-compensable). The Soldier first sought treatment for this condition on 9 April 2009 in Heidelberg, Germany. The Soldier indicated he was suffering from bilateral knee pain for several years. There is no specific injury or trauma indicated.

At the time the Soldier was diagnosed with this condition he was not in an Active-Duty status for more than 30 days or entitled to base pay, and there is no Line of Duty investigation for this condition. Additionally, there is no evidence within the Soldier's available case file that indicates that military service has aggravated the condition. Therefore, the condition is not compensable because the evidence overcomes both the presumption of soundness and the presumption of permanent service aggravation."

l. The PEB made the administrative determinations that neither of the duty related conditions was 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.

m. The PEB applied the Veterans Benefits Administration (VBA) derived ratings for a combined military disability rating of 50% and recommended the applicant be permanently retired for physical disability. On 1 April 2022, 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.

n. The applicant's description of his left shoulder injury in 1992:

"On 15 January 1993, the SF 600 states "Injured shoulder while downhill skiing." But does not state that the downhill skiing was part of Unit Cold Weather Combat training. As this information is omitted from the board report, this disqualified me from receiving Combat Related Special Compensation (CRSC) ...

The Rules for Combat Related Special Compensation (CRSC) are states that "In the Performance of Duty Under Conditions Simulating War - In general this covers disabilities resulting from military training, such as war games, practice alerts, tactical exercises, airborne operations, leadership reaction courses, grenade and live fire weapons practice, bayonet training, hand-to-hand combat training, repelling, and negotiation of combat confidence and obstacle courses. It does not include physical training activities such as calisthenics and jogging or formation running and supervised sport activities."

o. The referenced document is in the supporting documentation and is as the applicant states. Though the applicant injured his shoulder during downhill skiing training, this appears to have been an individual task and does not equate to an injury incurred in the performance of duty under condition simulating war. Enclosed photographs reported to have been taken during the training show a "cross country ski march prior to the injury." The pictured Soldiers are not equipped as if they were participating in an exercise under conditions simulating combat. While the downhill skiing was part of his unit's cold weather combat training, it was not part of a larger exercise such as a field training exercise (FTX), assault, combat, or similar course, a live fire exercise, a situational training exercise (STX), or other qualifying military training under situations simulating war.

p. Military medical documentation shows he was seen and treated for right knee patellofemoral pain syndrome (PFPS) in 1997 while on active duty. However, there is no evidence this condition persisted during this period of active-duty service (1991-1998) or after leaving active duty in a manner which would link it to the unfitting knee condition in 2022.

q. While serving in Germany in support of Operation Enduring Freedom from 21 January 2003 thru 16 May 2005, the then USAR Soldier was seen for left knee PFPS in February 2004. Again, there is no evidence this condition persisted during this period of service or after leaving active duty in a manner which would link it to the unfitting knee condition in 2022.

r. Review of his PEB case file in ePEB along with his encounters in AHLTA revealed no substantial inaccuracies or discrepancies.

s. It is the opinion of the Agency Medical Advisor there is insufficient evidence to support the reversing of USAPDA's determinations that neither of his knee conditions was duty related, or to support the reversing of the United States Army Human Resources Command's or USAPDA's decision that his left shoulder injury was not combat related.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that partial relief was warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation. One potential outcome was to concur with the advising official finding insufficient evidence to support the reversing of USAPDA's determinations that neither of his knee conditions was duty related. However, upon review of the applicant's petition, available military records and medical review, the Board notwithstanding the advising official finding insufficient evidence to support the reversing of USAPDA's determinations that neither of his knee conditions was duty related, or to support the reversing of the United States Army Human Resources Command's or USAPDA's decision that his left shoulder injury was not combat related.

2. The Board majority determined there is sufficient evidence applicant's injury occurred while conducting downhill skiing during part of his unit's cold weather combat training. Although the opine noted it was not part of a larger exercise such as a field training exercise (FTX), assault, combat, or similar course, a live fire exercise, a situational training exercise (STX), or other qualifying military training under situations simulating war. The Board found the applicant did not have the option to say no to the required training which led to his injury. The Board noted evidence in the records on the applicant's Standard Form 600, and additional treatment documentation from 21 February 2003, 5 September 2003, and 3 November 2003, which were either while he was in the Regular Army or as a mobilized Reservist on active duty. These conditions were not present prior to his military service; they were prior to his USAR service, but not his Regular Army service. The Board found sufficient evidence that supports the applicant's left glenohumeral (shoulder) joint dislocation/recurrent dislocation with rotator cuff tear, be found to have been the result of a combat-related injury and his right degenerative arthritis with right patellofemoral pain syndrome and right and left knee tendonitis/tendinosis (non-compensable) be found to have been incurred or aggravated in the line of duty (LOD) in an authorized duty status. Therefore, the Board granted partial relief.

3. 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.

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:

1. The Board determined the evidence presented is sufficient to warrant are commendation for partial relief. As a result, the Board recommends that all Department of Army records of the individual concerned be corrected to show reversal of the of the United States Army Human Resources Command's or USAPDA's decision that his left shoulder injury was combat related.

2. The Board further determined the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to

- his right degenerative arthritis with right patellofemoral pain syndrome and right knee tendonitis/tendinosis (non-compensable) be found to have been incurred or aggravated in the line of duty (LOD) in an authorized duty status
- his left degenerative arthritis with left patellofemoral pain syndrome and left knee tendonitis/tendinosis (non-compensable) be found to have been incurred or aggravated in the LOD in an authorized duty status

12/21/202

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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. Title 10, U.S. Code, 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 (DES) 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 Army Regulation 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 a Medical Evaluation Board (MEB); when they receive a permanent medical profile rating of 3 or 4 in any factor and are referred by an Military Occupational Specialty (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 Physical Evaluation Board (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.

2. Army Regulation 635-40 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

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.

d. Paragraph 5-11 (Presumption of sound condition for Soldiers on orders to active duty specifying a period of more than 30 days), states the PEB will presume Soldiers, including Reserve Component Soldiers and recalled retirees on continuous orders to active duty specifying a period of more than 30 days, entered their current period of military service in sound condition when the disability was not noted at the time of the Soldier's entrance to the current period of active duty.

(1) The PEB may overcome this presumption if clear and unmistakable evidence demonstrates the disability existed before the Soldier's entrance on their current period of active duty and was not aggravated by their current period of military service. Absent such clear and unmistakable evidence, the PEB will conclude that the disability was incurred or aggravated during their current period of military service.

(2) The PEB must base a finding that the Soldier's condition was not incurred in or aggravated by their current period of military service on objective evidence in the record, as distinguished from personal opinion, speculation, or conjecture. When the evidence is unclear concerning whether the condition existed prior to their current

period of military service or if the evidence is equivocal, the presumption of sound condition at entry to the current period of military service has not been rebutted, and the PEB will find the Soldier's condition was incurred in or aggravated by military service.

e. Paragraph 5-14 (Impairments incurred during prior service) states any medical condition incurred or aggravated during one period of active service or authorized training in any of the Armed Forces that recures, is aggravated, or otherwise causes the Soldier to be unfit, should be considered incurred in the LOD, provided the origin or such impairment or its current state is not due to the Soldier's misconduct or willful negligence, or progressed to unfitness as the result of intervening events when the Soldier was not in a duty status.

f. Paragraph 5-15 (Title 10, U.S. Code 1207a and pre-existing conditions) states under the provisions of Title 10, U. S. Code 1207a, a pre-existing condition is deemed to have been incurred while entitled to basic pay and will be considered for purpose of determining whether the disability was incurred in the LOD when:

(1) The Soldier is called to duty for more than 30 days (other than for training under Title 10 U.S. Code 10148(a)) when the PEB determines that the Soldier is unfit.

(2) A Reserve Component Soldier was not released within 30 days of their orders to active duty in accordance with Title 10 U.S. Code 1206a due to the identification of a pre-existing condition not aggravated by the current call to active duty.

(3) The Soldier will have at least 8 years of active Service. The 8 years of service does not require a continuous 8-year period.

3. Title 10, U.S. Code, section 1201, provides for the physical disability retirement of a member who has at least 20 years of service or a disability rating of at least 30 percent. Title 10, U.S. Code, section 1203, provides for the physical disability separation of a member who has less than 20 years of service and a disability rating of less than 30 percent.

4. Title 10, U.S. Code, 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 a physical disability retirement with less than 20 years' service for injuries 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.)

5. Department of Defense Instruction (DODI) 1332.38 (Physical Disability Evaluation), paragraph E3.P5.2.2 (Combat-Related), covers those injuries and diseases attributable to the special dangers associated with armed conflict or the preparation or training for armed conflict. A physical disability shall be considered combat related if it makes the member unfit or contributes to unfitness and was incurred under any of the following circumstances:

- as a direct result of armed conflict
- while engaged in hazardous service
- under conditions simulating war
- caused by an instrumentality of war

6. DODI 1332.38, paragraph E3.P5.2.2.3 (Under Conditions Simulating War), in general, covers disabilities resulting from military training, such as war games, practice alerts, tactical exercises, airborne operations, leadership reaction courses, grenade and live-fire weapons practice, bayonet training, hand-to-hand combat training, rappelling, and negotiation of combat confidence and obstacle courses. It does not include physical training activities, such as calisthenics and jogging or formation running and supervised sports.

7. Appendix 5 (Administrative Determinations) to enclosure 3 of DODI 1332.18 (Disability Evaluation System) (DES) currently in effect, defines armed conflict and instrumentality of war as follows:

a. Incurred in Combat with an Enemy of the United States: The disease or injury was incurred in the LOD in combat with an enemy of the United States.

b. Armed Conflict: The disease or injury was incurred in the LOD as a direct result of armed conflict (see Glossary) in accordance with sections 3501 and 6303 of Reference (d). The fact that a Service member may have incurred a disability during a period of war, in an area of armed conflict, or while participating in combat operations is not sufficient to support this finding. There must be a definite causal relationship between the armed conflict and the resulting unfitting disability.

c. Engaged in Hazardous Service: Such service includes, but is not limited to, aerial flight duty, parachute duty, demolition duty, experimental stress duty, and diving duty.

d. Under Conditions Simulating War: In general, this covers disabilities resulting from military training, such as war games, practice alerts, tactical exercises, airborne operations, and leadership reaction courses; grenade and live fire weapons practice; bayonet training; hand-to-hand combat training; rappelling; and negotiation of combat confidence and obstacle courses. It does not include physical training activities, such as calisthenics and jogging or formation running and supervised sports.

e. Caused by an Instrumentality of War: Occurrence during a period of war is not a requirement to qualify. If the disability was incurred during any period of service as a result of wounds caused by a military weapon, accidents involving a military combat vehicle, injury or sickness caused by fumes, gases, or explosion of military ordnance, vehicles, or material, the criteria are met. However, there must be a direct causal relationship between the instrumentality of war and the disability. For example, an injury resulting from a Service member falling on the deck of a ship while participating in a sports activity would not normally be considered an injury caused by an instrumentality of war (the ship) since the sports activity and not the ship caused the fall. The exception occurs if the operation of the ship caused the fall.

8. Title 10, U.S. Code, section 1556 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.

9. Army Regulation 15-185 (Army Board for Correction of Military Records (ABCMR)) prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR. 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//