IN THE CASE OF: [redacted]

BOARD DATE: 21 December 2023

DOCKET NUMBER: AR20230004525

APPLICANT REQUESTS: reconsideration of his prior request for amendment of his DA Form 199 (Informal Physical Evaluation Board (PEB) Proceedings) to reflect the following in Section V (Administrative Determinations):

- the disability disposition is based on disease or injury incurred in the line of duty (LOD) in combat with an enemy of the U.S. 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
- the disability did 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

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

- self-authored statement
- two Radiologic Examination Reports, dated 9 September 2010
- Front Range Spine and Neurosurgery letter, dated 3 February 2011
- Radiology Report, dated 15 and 28 November 2011
- Radiology Report, dated 16 May 2016
- email correspondence, dated 7 June 2016
- Radiology Report, dated 11 August 2016
- U.S. Army Physical Disability Agency (USAPDA) memorandum, dated 23 March 2020
- Army Review Boards Agency (ARBA) letter, dated 15 April 2020

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20170013499 on 5 May 2022.

2. The applicant states:

a. He is requesting reconsideration of his case or reinstatement of the USAPDA Legal Advisor’s recommendation to grant the change to his records to show his

disabling injuries are combat-related. On or around 31 August 2022, he received notice that his application to the ABCMR to change the combat coding for his medical retirement, as reflected on his DA Form 199 (Informal Physical Evaluation Board (PEB) Proceedings), had been denied. The denial response stated he did not file the application for change within the 3-year time frame and there was no mention or consideration of the USAPDA legal advisory recommendation stating the evidence supported changing the codes to combat-related.

b. He has had neck and back problems ever since the incident in Iraq when the helicopter he was riding in quickly dropped in elevation and his spine was compressed between the overhead metal and his seat. Initially, most of the pain was in the lower back with shooting pains going down his legs and his legs going numb from time to time. At the time, the neck pains were comparatively minor. His back pains would be so profound that he could not move some days.

c. When he was initially medically evacuated (MEDEVACd) out of Iraq to Germany, he was given the option to either have surgery, which would have put him out for a while, or get steroid shots and go back to his unit. He was a commander at the time and wanted to get back to finishing up what he was working on downrange, which was developing the Central Receiving and Shipping Point (CRSP) at Camp Taji, and the first PAX terminal at Camp Taji. He decided to get the steroid shots to the spine and wound up finishing the tour in Iraq, completing both projects and bringing all his Soldiers home safely.

d. When he got back to Germany, he had to close his post due to the draw down. He eventually went to two more duty stations in the following 4 years, having to get reevaluated and go through repeated process to get seen for his injuries. Before he knew it, he had to deploy to Afghanistan. While in Afghanistan, he aggravated the back and neck pain while doing reconnaissance missions looking for better logistical hubs in the Sangin Valley. He was getting treatment for both his back and neck while in theater; however, he was told his back was becoming too unstable and he was MEDEVACd again.

e. This time after being MEDEVACd he had to get back surgery. After receiving the spinal fusion, his back felt a lot better after the recovery period. However, he was told at the time he would also need to address his neck pain at some point. Additional duty stations and moving every 2 years hindered the process of getting his neck fully evaluated. Over the years, his neck has deteriorated and the pain has gotten worse. While he was in Korea, a neurosurgeon told him that his spinal fusion did not take properly and that he would need five out of seven C-spine elements fused. He would then lose a significant amount of mobility. As his neck progressively got worse, the pain grew and his arms started to go numb as his head was positioned differently. Today he has constant pain in his neck.

f. As a result of the neck pain and still some back pain, along with other medical issues (feet, ankles, shoulder, hand, etc.), he decided to take the advice of doctors and medically retire in 2017. When his final paperwork came back, he noticed the coding stated non-combat related injuries. When he asked about it, he was told he would have to have been shot at in combat to have the code reflect combat-related. He was also told that if he did not sign the DA Form 199 at the time that he would have to restart the whole process and it would take several months, or he could appeal it with the ABCMR. Additionally, he was told that going through the ABCMR would be a lengthy process; however, it would be the best route to take in his circumstances.

g. Within 3 months of his retirement, he submitted his request to the ABCMR on 17 August 2017, and followed up with emails every few months. After almost 3 years, he received a letter from the ARBA, Director, Case Management Division, dated 15 April 2020 and a letter from the USAPDA Legal Advisor, dated 23 March 2020. The letters indicate that the USAPDA Legal Advisor reviewed his case and found the evidence substantial enough to change his codes and recommended the change be made to reflect his injuries were combat-related. He then sent emails every 90 days to check on the status and received the same response that they were awaiting final approval. Then, after 2 years, he received a letter denying his claim in July 2022.

h. In accordance with Title 10, U.S. Code, section 1556, the ABCMR is required to given applicant's copies of all correspondence or communications to or from the Board pertaining to or having a material effect on the applicant's case. This includes advisory opinions. To comply with the basic principles of due process, it is also well established that applicants to the ABCMR are given the opportunity to rebut or respond to advisory opinions. See ABCMR advisory opinions in cases AR20070012890, AR201900103095, and AR20150018420 as examples of other applicants receiving advisory opinions and being given the opportunity to rebut.

i. In his case, the ABCMR considered his appeal and the USAPDA legal team found his appeal justified, recommending the code be changed to show combat-related. Then, years later, he gets a response stating his request to change the coding to combat-related has been denied. In the July 2022 letter, there was no mention of the previous legal recommendation and the provided Record of Proceedings stated he did not submit his application for the change within the 3-year period, which is clearly not a correct statement.

j. Additionally, looking at the argument to deny his claim, it was based on him not complaining enough about his neck from the beginning. He did not complain about his neck because he was consistently told he could only address one problem at a time and the back was giving him the most pain in the beginning. This should not be the deciding factor for a denial. There are a lot of Soldiers out there who do not complain about injuries or pain that they deal with until it gets to a breaking point. With this type of

thought process while evaluating cases, we are setting a precedent to deny proper consideration to those who try their best to give everything they have to serve. Evidence in his case clearly states that he started having spinal problems during a deployment in Iraq in 2005/2006 (low back and neck are all part of the spine, regardless of what section was focused on first). The incident and aggravating incidents were in combat zones in Iraq and Afghanistan and happened while in an instrument of war, a helicopter and a Mine-Resistant Ambush Protected (MRAP) vehicle.

k. He requests that the ABCMR reevaluate his case, looking at the evidence closely, realizing that spinal injuries are all connected. Once one part of your spine goes bad, it tends to lead to problems in other areas as well. Just because one area might need the attention first does not mean that the other areas of the spine are not being affected. It is his hope that the Board will reconsider and change the codes to reflect his injuries are combat-related.

l. Additionally, to start the denial Record of Proceedings stating he submitted his application outside the 3-year allowable time frame and not mention anything about the legal advice clearly shows the denial was not handled properly and seems to look for excuses to not grant the requested change.

3. After 7 years and 4 months of prior honorable enlisted service in the Regular Army, the applicant was appointed as a second lieutenant (2LT) in the Regular Army on 3 August 2000.

4. The applicant deployed to the following locations during the following timeframes:

- Iraq, from 15 September 2005 through 14 September 2006
- Afghanistan, from 13 March 2010 through 12 July 2010

5. Two Radiologic Examination Reports, dated 9 September 2010, show the following:

a. An MRI of the cervical spine (C-spine) was done due to acquired deformity of the neck. The impression shows acquired C5-C6 spinal canal narrowing.

b. C-spine series was completed due to neck pain that radiates down the right arm. The impression shows degenerative change; moderate disk space narrowing C5-6 with mild bilateral foraminal narrowing C4 through C6.

6. A letter from Front Range Spine and Neurosurgery, dated 3 February 2011, shows the following:

a. The applicant was seen on the date of the letter for a follow up visit. He underwent an L5-S1 Anterior Lumbar Interbody Fusion (ALIF) at the Medical Center of

Aurora on 13 October 2010. On examination, he has a well-healed anterior incision. Review of the plain films shows a stable anterior L5-S1 intervertebral fusion.

b. At this point the applicant has no restrictions. He can continue to progress in his activities as tolerated. He can start trying to run again slowly, only 5 to 10 minutes at a time to see how he feels and slowly progress with this. Additionally, one of his previous magnetic resonance imaging (MRI) notes he has some cervical stenosis, but they do not have the MRI available to review. The applicant should be seen again in a couple weeks to review his MRI with him.

7. A Radiology Report, dated 15 and 28 November 2011, shows a cervical MRI was performed, which shows the following:

- right foraminal stenosis in C5-6 level due to bulging disc and uncovertebral hypertrophy
- bulging disc in C4-5
- loss of cervical lordosis and mild kyphotic curvature in C5-6 level
- status post (s/p) posterolateral fixation in L5-S1 level
- isthmic spondylolisthesis of L5 on S1
- bilateral foraminal stenosis in L5-S1 due to bulging disc

8. The applicant again deployed to Afghanistan from 3 March 2014 through 2 June 2014.

9. A Radiology Report, dated 16 May 2016, shows the applicant underwent MRI of the C-spine without contrast on the date of the report. The findings show vertebral body heights and vertebral alignment are normal. There is straightening of cervical lordosis, which may be postural or positional. The visualized spinal cord is normal in size and signal. Prominence cervical chain lymph nodes and paratonsillar pillars are noted bilaterally. The impression shows moderate cervical spondylosis within the mid cervical spine.

10. Email correspondence between the applicant and Dr. [redacted], dated 7 June 2016, shows Dr. [redacted] advised the applicant that his most recent MRI of his C-spine showed degenerative changes that cause some tightening of his spinal cord and neural foramina. These are chronic processes that may worsen in time, but do not necessarily do so. Based on his symptoms, he was having some degree of nerve root compression resulting in numbness of his arms that was intermittent. While the narrowing of his spinal column put him at slightly increased risk of spinal cord injury, especially if he forcefully extends his neck, it was not reason alone to undergo the risk of surgery. They would continue to monitor his symptoms and if he worsened, they would readdress his cervical spine and intervene if necessary.

11. A Radiology Report, dated 11 August 2016, shows Computed Tomography (CT) scan of the C-spine without contrast was obtained on the date of the report. The impression shows no acute osseous abnormality and C5-C6 spondylosis.

12. The applicant's DA Form 3349 (Physical Profile), DA Form 7652 (Disability Evaluation System (DES) Commander's Performance and Functional Statement), DA Form 3947 (MEB Proceedings), Department of Veterans Affairs (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.

13. A Medical Evaluation Board (MEB) Narrative Summary (NARSUM), dated 19 December 2016, has been provided in full to the Board for review, and in pertinent part shows the following:

a. The applicant was being referred to the Integrated Disability Evaluation System (IDES) for neck pain with radiculopathy.

b. The following conditions were found to fail retention standards in accordance with Army Regulation 40-501 (Standards of Medical Fitness):

- cervical degenerative disc disease with spondylosis and myofascial pain syndrome (diagnosis (Dx 1))
- right cervical neuritis/radiculopathy (Dx 2)
- left cervical neuritis/radiculopathy (Dx 3)

c. The following conditions were found to meet retention standards:

- obstructive sleep apnea (Dx 4)
- choanal atresia (Dx 5)
- rhinitis (Dx 6)
- right sensorineural hearing loss (Dx 7)
- left sensorineural hearing loss (Dx 8)
- tinnitus (Dx 9)
- tension headaches (Dx 10)
- gastroesophageal reflux disease (GERD) (Dx 11)
- right rotator cuff tendonitis (Dx 12)
- left rotator cuff tendonitis (Dx 13)
- right lateral epicondylitis (Dx 14)
- right 5th metacarpal boxer's fracture (Dx 15)
- left 4th and 5th metacarpal boxer's fracture (Dx 16)
- s/p lumbar fusion surgery with postsurgical L5-S1 spondylolisthesis (Dx 17)
- right knee tendonitis/tendinosis (Dx 18)

- left knee tendonitis/tendinosis (Dx 19)
- right ankle lateral collateral ligament strain (Dx 20)
- left ankle lateral collateral ligament strain (Dx 21)
- right ankle osteoarthritis and osteochondral defect (posterior talar dome) (Dx 22)
- right acquired pes cavus (claw foot) (Dx 23)
- left acquired pes cavus (Dx 24)
- right hammer toes (all toes) (Dx 25)
- left hammer toes (all toes) (Dx 26)
- enlarged prostate gland (Dx 27)
- scar, left upper back, left hand, and abdomen (Dx 28)

d. The applicant's three unfitting conditions of cervical degenerative disc disease with spondylosis and myofascial pain syndrome, right cervical neuritis/radiculopathy and left cervical neuritis/radiculopathy are interrelated and fail retention standards in combination.

e. The onset of these unfitting conditions occurred in Iraq in January 2006. As described in a 26 April 2016 Pain Management note and confirmed by telephone conversation with the applicant on 17 December 2016, his neck was initially injured while flying as a passenger in a military helicopter. After a sudden drop in altitude, which was then followed by a sudden rebound, his body was forced into a prohibitively small space on the aircraft. This force caused an immediately audible crack in his neck and low back. This was then followed by severe pain in both. Since his back was worse, his neck pain was not mentioned on initial and subsequent progress notes. This omission occurred for 5 1/2 years, leaving a paucity of clinical neck pain documentation in his medical records. There is no available evidence indicating these conditions existed prior to service (EPTS).

f. Initial medical records discussion of neck pain in his service treatment records is a clinical encounter following a motor vehicle accident. On 11 October 2008, he was seen at the Fort Carson, CO, emergency department for neck pain after he was rear-ended by another driver. With his post-helicopter incident low back and neck pain persisting on, the applicant deployed to Afghanistan in early 2010. After he returned, and after his low back pain was addressed mid-year 2010 with surgery, he requested a C-spine MRI. The resultant 9 September 2020 C-spine MRI reported broad based annular C5-C6 disc bulging with consequent spinal cord narrowing. No treatment recommendation were made at the time.

g. The applicant's chronic neck pain with right and left neuritis/radiculopathy conditions were not expected to significantly improve or resolve over the next 5 years to allow his return to full duty and were stable.

14. A DA Form 199 shows the following:

a. An informal PEB convened on 3 February 2017, where the applicant was found physically unfit with a recommended rating of 70 percent, and that his recommended disposition be permanent disability retirement.

b. His unfitting conditions were as follows:

- right cervical neuritis/radiculopathy (MEB Dx 2); 40 percent; onset in 2006 while deployed to Iraq due to sudden movement during a helicopter flight
- cervical degenerative disc disease with spondylosis and myofascial pain syndrome (MEB Dx 1); 30 percent; onset in 2006 while deployed to Iraq due to a sudden movement during a helicopter flight
- left cervical neuritis/radiculopathy (MEB Dx 3); 20 percent; onset in 2006 while deployed to Iraq due to sudden movement during a helicopter flight

c. MEB Dxs 4 – 28 were found to be not unfitting.

d. Section V shows the following administrative determinations:

(1) The disability disposition is not based on disease or injury incurred in the LOD in combat with an enemy of the U.S. 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.

e. On 6 February 2017, the applicant signed the form indicating he concurred with the findings and recommendations of the PEB and waived a formal hearing of his case. He additionally indicated he did not request reconsideration of his VA ratings.

15. The applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was retired under the provisions of Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation) due to disability, permanent (enhanced) effective 24 May 2017. He was credited with 16 years, 9 months, and 17 days of net active service this period and 7 years, 4 months of total prior active service.

16. The applicant previously applied to the ABCMR on 25 August 2017, requesting correction to his DA Form 199 to reflect his medically unfitting neck injuries and radiculopathy are combat-related.

17. The prior Record of Proceedings for Docket Number AR20170013499 states the applicant did not file within the 3 year time frame provided in Title 10, U.S. Code; however the ABCMR determined it was in the interest of justice to excuse the applicant's failure to timely file. While it is accurate that the ABCMR found it in the interest of justice to disregard any time frame limitations and thus examined his record and boarded his application, the prior reference to not filing his application within the 3-year time frame is incorrect, as records indicate his application to the ABCMR was well within the 3-year timeframe.

18. In the adjudication of the applicant's prior case for Docket Number AR20170013499, an advisory opinion was provided by the USAPDA legal advisor on 23 March 2020, which shows the following.

a. The applicant is requesting an instrumentality of war and a combat-related determination for his conditions (V1/V3). For the below reasons, his request is found to be legally sufficient.

b. The PEB findings state his conditions were caused by sudden movement during a helicopter flight while deployed in Iraq and further state he is unfit due to his inability to reasonably perform the duties of his occupation and his functional Soldier activities.

c. Department of Defense Instruction (DODI) 1332.18 states that if the disability was incurred "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 or military ordnance, vehicles, or material, the criteria are met" for determination of combat related. There must be a direct causal relationship between the instrumentality of war and the disability. According to the IDES MEB NARSUM, the onset of the applicant's unfitting conditions was incurred while flying as a passenger in a military helicopter when the helicopter experienced a drop in altitude followed by a sudden rebound. This occurrence was the direct cause of the injuries. Therefore, the unfitting conditions are the result of an instrumentality of war during a period of war and qualify for V1/V3 designation.

19. The applicant was provided a copy of the USAPDA legal advisory opinion on 15 April 2020 and given an opportunity to submit comments. He was also advised the Board may adopt the advisory opinion recommendation in whole, in part, or reject the recommendation, based on the Board's analysis of the facts and circumstances of his case. The applicant did not provide a response.

20. The applicant's case for Docket Number AR20170013499 was also reviewed by the ARBA medical advisor, whose written review is documented in the Record of Proceedings, under the section titled "Medical Review", which has been provided in full to the Board for review. The medical review shows in pertinent part the following:

a. The applicant's DA Form 199 shows on 3 February 2017, the PEB determined his right cervical neuritis/radiculopathy, cervical degenerative disc disease with spondylosis and myofascial pain syndrome, and left cervical neuritis/radiculopathy were unfitting conditions for continued service. They noted the onset of all three conditions as "Onset in 2006 while deployed to Iraq due to sudden movement during a helicopter flight."

b. The PEB made the administrative determination that none of his disabilities were 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.

c. This finding is also seen in the PEB's request for disability ratings from the US Department of Veterans Affairs, SeaTac Processing Center, in the annotations "V1-No; V3-No." V1 denotes the disability was incurred in the line of duty as a direct result of armed conflict and includes instrumentally of war related disabilities; and V3 signifies the disability was incurred while performing extra hazardous service (special dangers) even if not directly engaged in combat.

d. The onset of his disabilities, as stated in the MEB NARSUM summary, shows: "…the Soldier's neck was initially injured while flying as a passenger in a military helicopter. After a sudden drop in altitude, which was then followed by a sudden rebound, his body was forced into a prohibitively small space on the aircraft. This force caused an immediately audible crack in his neck and low back. This was then followed by severe pain in both."

e. Review of the applicant's records in AHLTA (military electronic medical record) show he was medically evacuated from theater to Landstuhl Regional Medical Center in February 2006 for a herniated lumbar disc. While in Landstuhl, he made no mention of cervical pain or injury, "an audible crack in his neck" or "severe pain in his neck." This includes no mention of cervical pain or injury during his spine/low back pain evaluation by neurosurgery on 11 April 2006.

f. The applicant's first clinical encounter for neck pain was on 9 September 2011: "Pt comes in with stabbing pain between the shoulder blades since yesterday. It started while pt was running, but it has been persistent since then." From a follow-up visit on 3 October 2011: "Complaining of Neck pain after PT (physical training) for 2 months. Pain is not radiating to arm or numbness and tingling. Med (Mobic and Percocet) is helping. Pt is doing PT exercise."

g. The applicant was diagnosed with a cervical radiculopathy in November 2011. The clinical records do not support the onset of this injury as reported in the MEB NARSUM.

h. The applicant also maintains his disabilities should have been determined to have been incurred in the line of duty because in addition to having been a passenger in a rotary wing aircraft, he had been a passenger in an MRAP, both of which are instrumentalities of war. An instrumentality of war is defined as a vehicle, vessel, or device designed primarily for military service and intended for use in such Service at the time of the occurrence or injury. They may also include such instrumentalities not designed primarily for military service if use of or occurrence involving such instrumentality subjects the individual to a hazard peculiar to military service.

i. In order for a disability to be incurred as a result of an "instrumentality of war" under the Department of Defense's 2004 Program Guidance, (1) the "disability must be incurred incident to a hazard or risk of the service" and (2) there "must be a direct causal relationship between the instrumentality of war and the disability." Thus, just 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 have been directly caused in the use of the military equipment, or the circumstances surrounding the injury is uniquely military and different from the use or occurrences in similar circumstances in civilian pursuits.

j. There is no evidence the applicant sustained an injury while simply being transported as a passenger in either a rotary wing aircraft or MRAP. It is therefore the opinion of the ARBA medical advisor that none of the applicant's unfitting disabilities were caused by an instrumentality of war or incurred in the LOD during a war period as defined by law.

21. After reviewing the application and all supporting documents, the Board denied the applicant's request on 5 May 2022, determining the evidence presented does not demonstrate the existence of a probable error or injustice and the overall merits of his case are insufficient as a basis for correction of his records.

22. An ABCMR letter to the applicant, dated 8 July 2022, informed the applicant that the ABCMR denied his application and enclosed a copy of the Board's Record of Proceedings for his review. He was advised he may request reconsideration of this decision if he could present new evidence or argument that was not considered by the Board in its original denial.

23. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor reviewed the supporting documents, the Record of Proceedings (ROP), and the applicant's available records in the Interactive Personnel Electronic Records Management System (iPERMS), the Health Artifacts Image Management Solutions (HAIMS) and the VA's Joint Legacy Viewer (JLV). The applicant requests combat designation for his neck condition. He states that while a passenger in a helicopter in Iraq, there was sudden drop in elevation and his spine became compressed between the overhead metal and his seat. He further states he has experienced back as well as neck pain as a result. This is a request for a reconsideration of the decision from ABCMR Board date 05May2022.

b. The applicant’s record was summarized in the ABCMR ROP. Of note, the applicant served as an officer in the Regular Army from 20000803 to 20170524. His MOS was 90A Logistics Officer. He served in Iraq from 20050915 to 20060914. He also served in Afghanistan from 20100313 to 20100712 and from 20140303 to 20140602. He was discharged from the Army due to permanent disability retirement. Prior to this, he served as an enlisted member of the Army starting in 1997. And prior to that, he served in the U.S. Marine Corp from March 1992 to July 1996. In addition to the deployments noted above, he had 2 six-month deployments (ending in 1994 and 1997). And finally, medical records indicate he was in S. Korea September 2011 to July 2013.

c. Medical records and related

- 07Feb2006 Theatre Facility. This was a follow up visit for severe back pain. He had already consulted with physical therapy.
- 16Feb2006 LSL Neurosurgery. The applicant complained of low back pain with radiation down the right leg. He reported the symptoms begin approximately six months prior with no history of trauma or inciting event. He also reported the right leg symptoms started after a session of physical therapy on 28Jan2006.
- 21Feb2006 LSL Neurosurgery. In this note it was reported that he had low back pain since jump school, but it had been manageable. The symptoms had worsened down range due to standing around all day with LBE etc., then further worsened with PT.
- 11Apr2006 LSL Neurosurgery. The note read that he complained of back pain and right leg pain beginning in August 2005 but worsened in January 2006.
- 11Oct2008 Emergency Care & Treatment Evans ACH. The applicant was seen for neck and low back pain after sustaining injury during a car accident. While a restrained front seat passenger, he was rear-ended at approximately 45 mph while stopped at a light. He sustained facial lacerations across the nasal bridge and forehead abrasions. A cervical spine film showed normal vertebral height

and no fracture. There was straightening of the usual lordosis of the cervical spine, and possible very early degenerative disc change at C5-6 and C6-7 discs. The physical exam showed no tenderness to palpation over the spine. Diagnosis: Acute Cervical and Lumbar Strain.

- 26Mar2010 Chronological Record of Medical Care Theatre Facility (Iraq). He was seen for a complaint of neck pain for 4 days. The neck pain was described as stabbing/throbbing behind the neck and into the shoulder. At the follow up visit on 03Apr2010 for both neck and back pain, he provided more history. Of note, he reported being in treatment by pain services for 2 months prior to deployment for his back condition which had included a steroid injection in February. He also stated that he had previously been medevacked out of Iraq to Germany for back pain and then resumed the deployment. The provider indicated there was no prior documented neck pain; however, the applicant stated he had experienced neck pain in the past. He denied traumatic injury of the neck and back. Diagnosis: Cervical Neck Pian, Subacute.
- 25May2010 and 10Jun2010 43rd Clinic. The applicant was seen for lower, mid, and upper back pain. The upper back pain was located between the shoulder blades and was called cervicalgia. *Cervicalgia is also referred to as 'neck pain'.*
- 15Jul2010 LSL Neurosurgery, Landstuhl RMC. The visit focus was primarily on his lower back pain. He had had intermittent low back pain and difficulty for greater than 10 years. This started initially in Iraq between 1995 and 1996 when he was riding in the helicopter, struck his head on the bulkhead with immediate onset of low back pain.
- 09Sep2010 cervical spine MRI. Impression: Acquired C5-C6 spinal canal narrowing due to bulging disc. The film was obtained for a pending neurosurgery appointment on 31Aug2010.
- 13Dec2010 Physical Therapy Post Deployment Exam Evans ACH. He was seen for back pain. There was no mention of neck pain.
- 09Sep2011 Family Practice Clinic, Allgood ACH (S. Korea). The applicant complained of pain of the lower cervical region which started the day prior while running. He was referred for physical therapy. Diagnosis: Cervicalgia and Lumbago.
- 03Oct2011 Physical Medicine Clinic Allgood ACH. He reported neck pain of 2 months duration which started after physical training.
- 21Aug2013 Post Deployment Health Reassessment. Of note, the applicant reported back pain issues status post spinal fusion. No report of neck pain.
- 06Oct2014 Post deployment Health Assessment. The applicant did not report an injury during this deployment
- 04Feb2015 Physical Therapy Clinic Evans ACH. He reported neck pain began when he was riding in a helicopter with helmet touching the ceiling due to his height and they hit an air pocket with his head compressing into the ceiling.
- 19Dec2016 MEB NARSUM (narrative summary). The MEB NARSUM preparer listed three conditions as failing medical retention standards: Cervical

Degenerative Disc Disease with Spondylosis and Myofascial Pain; Right Cervical Neuritis/Radiculopathy; and Left Cervical Neuritis/Radiculopathy. They annotated that the neck condition began due to an incident while flying as a passenger in a military helicopter: A sudden drop and rebound in altitude resulted in his body being forced into a "prohibitively small space in the aircraft". The applicant reported hearing an immediate audible crack in the neck and an audible crack in the back and experiencing severe pain in the same.

- 03Feb2017 Informal PEB Proceedings (on DA Form 199) found that the three conditions listed by the MEB as failing retention standards, were unfitting for continued service. The PEB listed 2006 as the year of onset of all three conditions, while the applicant was deployed to Iraq, due to sudden movement during the helicopter flight. The PEB's recommended disposition for the applicant was permanent disability retirement. The PEB found that the applicant's disabling conditions were not incurred in the line of duty as a direct result of armed conflict or caused by an instrumentality of war incurred in the line of duty during a period of war. The applicant concurred with the PEB findings at the time.

d. Summary. The applicant seeks combat designation for his unfitting neck condition (which includes Cervical Degenerative Disc Disease with Spondylosis and Myofascial Pain; Right Cervical Neuritis/Radiculopathy; and Left Cervical Neuritis/Radiculopathy) due to instrumentality of war. In his memorandum for record for ARBA dated 31Oct2022, he contends that his neck condition started while deployed in 2006 in Iraq due to an incident involving a military helicopter. While back pain is well documented in Theatre notes in February 2006; no neck symptoms were documented during these visits. Neurosurgery medical records at the time of Iraq deployment documented the following in February 2006: Back pain began approximately six months prior with no history of trauma or inciting event. Neurosurgery also indicated low back pain was present since jump school. In April 2006, neurosurgery annotated the back pain began in August 2005. *This is prior to the Iraq 2006 deployment.* In July 2010, it was first documented in medical records that the applicant reported his back pain was due to riding in a military helicopter as described above. In 2015, it was first documented in medical records that the applicant reported his neck condition was due to riding in a military helicopter as described above.

e. Regulation. The ARBA Medical Reviewer noted the MEB NARSUM preparer endorsed the neck pain onset in 2006 in Iraq due to the helicopter incident as described above. The U.S. Army Physical Disability Agency memorandum for record for ARBA dated 23Mar2020 by the Legal Advisor recommending that the applicant's claim is legally sufficient, was also noted. Regarding instrumentality of war and a qualifying injury, DoDI 1332.18, 05Aug2014, 46 Appendix 5 to Enclosure 3 provides: "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". The disability must be incurred incident to a hazard or risk of military service. Further guidance instructs that the use or occurrence regarding the military device must differ from the use or occurrence under similar circumstances in civilian pursuits.

f. Opinion. Medical documentation, especially if near the time of the event helps to provide a nexus to support a direct cause and effect relationship between an incident or injury and the development of a disabling condition. Cervical MRIs and cervical spine films revealed that the applicant had cervical degenerative disc changes which were manifested by chronic neck pain and later upper extremity radicular symptoms. The record did not show that these existed prior to service. Therefore, the available evidence affirms a chronic neck injury was incurred during service. The evidence showed that the condition failed medical retention standards and was unfitting for continued service. Medical records also revealed specific dates and method of injury of the neck: A car accident on 11Oct2008 while CONUS, and exacerbation of the neck condition during physical training near 09Sep2011. The medical records showed progression in neck symptoms over time, not always associated with specific injury (26Mar2010). Although starting in 2015, it was endorsed in medical records that the applicant's neck condition had onset due to a helicopter incident in Iraq in 2006; there was no medical documentation of a specific date or incident (more than one scenario and time frame was presented in the record). In addition, the medical documentation endorsing that back pain and later neck pain had onset while the applicant was deployed in Iraq in 2006 due to a helicopter incident, was not consistent with the medical records that were prepared in 2006 while the applicant was deployed in Iraq. Based on medical documentation in 2006, onset of the neck condition does not appear to have been directly caused by a combat or combat related injury, or injury caused by instrumentality of war.

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 sequence of events documented in the applicant's medical records do not support a finding that his unfitting conditions were incurred under circumstances that would warrant a favorable combat-related finding. Based on a preponderance of the evidence, the Board determined the PEB's conclusion that his unfitting conditions were not combat related is not in error or unjust.

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 that the overall merits of this case are insufficient as a basis to amend the decision of the ABCMR set forth in Docket Number AR20170013499 on 5 May 2022.

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. 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

2. 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.

3. 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.

4. 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.

5. Army Regulation (AR) 635-40 (Disability Evaluation for Retention, Retirement, or Separation) establishes the Army disability system 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 or her office, grade, rank, or rating.

6. AR 40-501 (Standards of Medical Fitness) governs medical fitness standards for enlistment, induction, appointment, retention, and separation (including retirement). Once a determination of physical unfitness is made, disabilities are rated using the VA schedule of disability rating.

7. Title 26, U.S. Code, section 104, authorizes special rules for combat-related injuries for compensation for injuries or sickness. 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.

8. Title 10, U.S. Code, section 1413a, states the Secretary concerned shall pay to each eligible combat-related disabled uniformed services retiree who elects benefits under this section a monthly amount for the combat-related disability of the retiree determined under subsection (b). In this section, the term "combat-related disability" means a disability that is compensable under the laws administered by the Secretary of Veterans Affairs and that (1) is attributable to an injury for which the member was awarded the Purple Heart; or (2) was incurred (as determined under criteria prescribed by the Secretary of Defense) (A) as a direct result of armed conflict; (B) while engaged in hazardous service; (C) in the performance of duty under conditions simulating war; or (D) through an instrumentality of war.

//NOTHING FOLLOWS//