

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: ██████████

BOARD DATE: 14 May 2024

DOCKET NUMBER: AR20230004558

APPLICANT REQUESTS: reconsideration of his earlier requests to award him Combat-Related Special Compensation (CRSC), and as new requests:

- Correction of his military records to reflect that the Army medically retired him with a combined 60 percent disability rating, on 9 December 2002, so that he can properly calculate his benefits, verify he received his entire disability severance pay, and receive disability retired pay
- In effect, change item 10c (If Retired Because of Disability, The Board Makes the Recommended Finding That:) of his DA Form 199 (Physical Evaluation Board (PEB) Proceedings), dated 16 July 2002, to state the applicant's disabilities were combat-related
- Any other relief necessary to ensure his due process rights are protected and confirm he receives a just, fair, and equitable result

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

1. Exhibits provided by counsel:

- DD Form 149 (Application for Correction of Military Record)
- Exhibit 1 – "Army Physical Disability Agency Letter, April 26, 2013" (U.S. Army Physical Disability Agency (USAPDA) letter with Installation Management Command – Europe Orders)
- Exhibit 2 – "War Game Field Exercise Injury, November 25, 2000" (MEDCOM (Medical Command) Form 691-R (Medical Record – Patient Release/Discharge Instructions))
- Exhibit 3 – "War Game Exercise Injury, April 26, 2000" (DA Form 3349 (Physical Profile))
- Exhibit 4 – "Line of Duty Injury, June 7, 2000" (DA Form 2173 (Statement of Medical Examination and Duty Status) for injury occurring in 1997)
- Exhibit 5 – "Article 138 Complaint" (Memorandum, dated 6 July 2000 with subject: Request for Redress Under Article 138 (Complaints of Wrongs), UCMJ (Uniform Code of Military Justice) (AR (Army Regulation) 27-10 (Military Justice)), [Applicant])
- Exhibit 6 – "Reprisal" (Statement, dated 24 June 2000 with subject: Reprisal)

- Exhibit 7 – "Physical Disability Board of Review Opinion" (Department of Defense Physical Disability Board of Review (PDBR) Record of Proceedings, dated 30 November 2012)
- Exhibit 8 – DD Form 214 (Certificate of Release or Discharge from Active Duty)
- Exhibit 9 – "DFAS Letter" (Defense Finance and Accounting Service (DFAS) Verification of Pay Letter with Annual or Changed RAS (Retiree Account Statement))
- Exhibit 10 – Additional Medical Records

2. Additional evidence provided by applicant:

- U.S. District Court Order, filed 30 September 2020
- Handwritten Summons, filed 9 October 2020
- Extract from Army Board for Correction of Military Records (ABCMR) Record of Proceedings (ROP) for Docket Number AR20160017386, with applicant's commentary
- DD Form 149, dated 30 September 2020 (and 28 March 2004)
- Photo with added comment
- Two Army Review Boards Agency (ARBA) letters
- U.S. Army Human Resources Command (HRC) letter
- Military Times Article
- DA Form 3349
- Standard Form (SF) 600 (Health Record – Chronological Record of Medical Care), with entries dated in July 1994
- Medical Procedure Report for operation performed on 18 November 2000
- Medical Admission Record, dated 28 November 2000
- Four DA Forms 2166-7 (NCO (Noncommissioned Officer) Evaluation Report
- Two Permanent Orders
- Operation Desert Storm Certificate of Commendation
- Extract from H.R. (House of Representatives) 303 – 116th Congress (2019-2020) Retired Pay Restoration Act
- Document titled, Disabilities Presumptively Service-Connected by the VA (Department of Veterans Affairs)
- VA Rating Decision, dated 15 December 2014
- Two DD Forms 2860 (Claim for CRSC) (undated and first page only)
- DD Form 215 (Correction to DD Form 214)
- Freedom Team Salute Certificate of Appreciation, with associated letter
- U.S. District Court Notice of Electronic Filing; Summons issued to U.S. Department of the Army (HRC and CRSC Compensation Branch)
- DFAS Leave and Earnings Statement
- Extract from ABCMR ROP for Docket Number AR20050008787, with applicant's commentary

FACTS:

1. Incorporated herein by reference are military records, as were summarized in the previous considerations of the applicant's case by the ABCMR in Docket Numbers:

- AR20050008787, on 13 April 2006
- AR20070004909, on 30 October 2007
- AR20150009937, on 30 August 2016
- AR20160017386, on 27 June 2019
- AR20210006799, on 5 November 2021

2. Through counsel, the applicant states his requested corrections should be granted because the evidence reveals he was injured during hand-to-hand combat training and a live-fire exercise; as a result, he should be entitled to CRSC.

a. Counsel argues the applicant incurred post-traumatic stress disorder (PTSD)-like symptoms while deployed in support of Operations Desert Shield/Desert Storm, and he additionally suffered discrimination during a live-fire exercise; the discrimination and PTSD-like symptoms further corroborate that the applicant's claims.

b. Counsel points out that the applicant's GAF (Global Assessment of Functioning) score was "50." (GAF assessments are intended to reflect the impact of a person's disability on his/her social, occupational, and psychological functioning; scores range from 0 (total impairment) to 100 (normal functioning)).

c. Counsel also notes the applicant did not learn that USAPDA corrected his disability rating until 2020; in 2013, USAPDA changed those ratings from "0" to "60" percent, with an effective date of 9 December 2002. Had the applicant received the 60 percent rating in 2002, he would never have applied to the VA for benefits; because of USAPDA's correction, the applicant has not received any disability retired pay.

3. Counsel provides the following additional information and arguments:

a. Executive Summary. The applicant faithfully served in the Army from 1 November 1988 to 9 December 2002; he deployed during the Gulf War, and he sustained injuries as a result of hand-to-hand combat training and live-fire war games.

(1) The applicant's leadership recognized him with multiple awards and gave him favorable NCO Evaluation Reports. Despite his honorable and selfless service, the applicant's last unit discriminated against him, and the Army wrongfully separated him, giving him disability severance pay and a 0 percent disability rating; to make matters worse, DFAS never paid the applicant the full amount of his severance pay.

(2) After the applicant's separation, the VA granted him benefits; thereafter the applicant repeatedly asked the Army to correct his service records to show he was medically retired. The Army finally made this correction in 2013, but it was not until 2020 that he learned of the change. At present, DFAS is refusing to process the applicant's requests for retired pay because of a "VA waiver"; had the Army properly retired him in 2002, he would not be having this issue.

b. Procedural History. After explaining why the Board should waive the 3-year statute of limitations and requesting the Board expedite the applicant's case, counsel addresses procedural history. Citing exhibits 5 (Article 138 Complaint) and 6 (Reprisal), counsel states the applicant has consistently filed petitions for relief, to include requests for military records corrections and the approval of CRSC. As a member of a minority, the applicant has historically been denied military benefits, and as a result, the Board should thoroughly and comprehensively consider his current requests.

c. Statement of Facts. Counsel details the dates of the applicant's deployments, lists his awards and decorations, and identifies the rating periods during which the applicant's leadership rated him favorably. Counsel then summarizes the basis for the applicant's disability separation.

(1) Facts Related to the CRSP (sic) Pay. While on active duty, the applicant participated in numerous hand-to-hand and live-fire war game exercises, and during these exercises he sustained injuries.

(a) "First, in 1997, [applicant] and his unit deployed to Tazar, Hungary to conduct (a) hand-to-hand combat training exercise. During the exercise, he was injured. The supporting documentation indicates that his injury was incurred in the line of duty. The details of the accident state that [applicant] was in a combat training – hand-to-hand training – and while conducting the training, he tripped and hurt his ankle over large rocks. He went to the aid station on the same day. This document is signed by PEBLO (PEB Liaison Officer) USAMEDDAC (U.S. Army Medical Command) – B__ W. C__. On June 7, 2002, LTC (lieutenant colonel) L__ signed off on the document indicating that the injury was considered in the line of duty. (Exhibit 4 – Line of Duty Injury)."

(b) "Next, in Aril (sic) 25, 2000, [applicant] was deployed on a field exercise with (a field artillery battalion). During his deployment, he was participating in a war game exercise. "Counsel then quotes an entry taken from Exhibit 3 – War Game Exercise Injury, which states the applicant fell and injured his right arm while involved in a war game exercise.

(c) "Also, on November 25, 2000, [applicant] was injured again during another war game exercise. During the live-fire weapons drill exercise, he fell and injured himself." Counsel cites Exhibit 2 – War Game Exercise Injury.

(d) "In addition, during his deployment to Iraq, [applicant] was exposed to Scud missile attacks that caused him extreme stress and fear for his life. During his deployment, one Scud missile attack killed 28 National Guardsmen in Saudi Arabia. Following his deployment to Iraq, [applicant] experienced nightmares, was easily irritated, feared crowds, and became very suspicious. (Exhibit 7 – Physical Disability Board of Review Opinion)."

(e) "Finally, in January 2000, [applicant] was subject to discrimination and he filed an EO (equal opportunity) complaint to protect his due process rights. He also requested to transfer to another unit. Subsequently, his command reprimed against him, and, on May 3, 2000, [applicant] filed an IG (inspector general) complaint. On June 13, 2000, [applicant] was assigned to range number 55 to conduct training simulating wartime exercises, but he was not given proper equipment to maintain the range. However, once a Commanding General decided to visit the range, [applicant] was replaced with a Caucasian NCO, who received all the necessary equipment. The stress and anxiety caused by the perceived discrimination caused [applicant] to be psychologically injured during the training exercise simulating wartime conditions. (Exhibit 5 – Article 138 Complaint) (Exhibit 6 – Reprisal)."

(2) Facts Related to his Medical Retirement. On 9 December 2002, the Army medically retired (sic) (he was discharged, not retired) the applicant with a zero percent disability rating; he was to receive disability severance pay, but DFAS never paid him the amount he was due. The applicant subsequently applied for VA benefits while still petitioning to correct his military records. On 26 April 2013, the USAPDA decided to correct the applicant's records, changing his disability rating to a combined 60 percent and placing him on the Permanent Disability Retired List (PDRL).

(a) "Had [applicant] been correctly retired in 2002 – with a sixty percent disability rating – he would not have applied for the VA benefits. Based on this, [applicant] respectfully requests to correct his records to indicate that he should be receiving military retired benefits. [Applicant] repeatedly requested to receive his military medical retired pay, but DFAS refuses to pay him anything because of the VA waiver (Exhibit 9 – DFAS Letter). Based on this, his military records should be corrected. Before any correction, it should be confirmed that his military medical retirement pay and benefits are greater in value than his current VA pay."

d. Statement of Law.

(1) Counsel quotes the U.S. Constitution, 5th Amendment and specifically highlights, "nor be deprived of life, liberty, or property, without due process of law."

(2) Additionally, counsel references Title 10 (Armed Forces), United States Code (USC), section 1552(a)(1) (Correction of Military Records: Claims Incident Thereto), where the law states, "The Secretary of a military department may correct any military

record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice." "The Secretary concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant...."

(3) Title 5 (Government Organization and Employees), USC, section 706 (Judicial Review – Scope of Review) states, "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall – "

- (a) "Compel agency action unlawfully withheld or unreasonably delayed; and"
- (b) "hold unlawful and set aside agency action, findings, and conclusions found to be –
 - "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;"
 - "contrary to constitutional right, power, privilege, or immunity;"
 - "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;"
 - "without observance of procedure required by law" (emphasis added by counsel)
 - "unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute" (emphasis added by counsel)
 - (section 556 (Hearings; Presiding Employees; Powers and Duties; Burden of Proof; Evidence; Record as Basis of Decision); section 557 (Initial Decisions; Conclusiveness; Review by Agency; Submissions by Parties; Contents of Decisions; Record)
 - "unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court" (emphasis added by counsel)

(4) Title 10, USC, section 1413a(e) (CRSC) states, "Combat-Related Disability. 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:"

- (a) "Is attributable to an injury for which the member was awarded the Purple Heart; or"

(b) "Was incurred (as determined under criteria prescribed by the Secretary of Defense):"

- "as a direct result of armed conflict"
- "while engaged in hazardous service"
- "in the performance of duty under conditions simulating war; or"
- "through an instrumentality of war"

(5) Counsel further offers three opinions extracted from case law (Smith v. Resor, Brezler v. Mills, and Porter v. United States), two ABCMR cases (AR20050004810 and AR20120022347), and the Department of Defense Financial Management Regulation (DODFMR), Volume 7B (Military Pay Policy – Retired Pay) to make the following arguments:

- Administrative agencies cannot ignore their own regulations, even where discretionary decisions are involved; it is axiomatic that an agency's decisions are "arbitrary and capricious" if those decisions are contrary to the agency's own mandatory rules
- In Porter v. United States, the Navy's CRSC Board granted CRSC based on the petitioner's incurred injuries resulting from a fall from a ladder during combat-related training
- The ABCMR stated the retiree must show he/she incurred the disability while engaged in combat, while performing duties simulating combat, or while performing hazardous duty; it is not enough that the injury occurred during a period of war or while participating in combat operations
- The DODFMR defines "Performance of Duty under Conditions Simulating War"; included are injuries sustained during war games, tactical exercises, live-fire weapons practice, and hand-to-hand combat training

e. Legal Arguments.

(1) Consistent with Title 10, USC, section 1413a and the DODFMR, the applicant's service records must be corrected concerning CRSC pay.

(2) Consistent with USAPDA's April 26, 2013 decision, the applicant's service records should be corrected to show he was medically retired with pay.

f. Conclusion. "Persuasive and compelling evidence that consists of [applicant's] personnel and medical records strongly suggests that he should be receiving CRSP (sic) pay. Additionally, evidence strongly suggests that [applicant] has (been) wrongfully denied (the) correct disability rating and (was) discriminated (against). Based on this, the requested relief in section I should be granted to this discriminated and injured combat Veteran."

4. With the exception of the following, all evidence provided by counsel and the applicant are already part of the applicant's previous ABCMR considerations:

a. DFAS Verification of Pay Letter, which states the applicant is in retired status and paid at a rate of \$2,066. An attached RAS indicates the applicant formerly received no retired pay but was now being paid \$2,066; after the VA waiver deduction, the applicant has no pay due.

b. DA Form 3349, dated in February 2000, which shows a temporary level "3" (one or more medical conditions requiring significant limitations) physical profile for the "U" (upper extremity) physical factor; the condition is listed as "Arm Pain – Ulnar Nerve (not legible)." Item 9 (Other) states, "SM (service member) was running to fire his weapon at (an) enemy target when he slipped and fell on his ® arm."

5. A review of the applicant's service record reveals the following:

a. On 1 November 1988, the applicant enlisted into the Regular Army for 4 years; upon completion of initial entry training and the award of military occupational specialty (MOS) 94B (Food Service Specialist), orders assigned the applicant to Germany, and he arrived at his new unit, on 27 January 1989. Through extensions and reenlistments, the applicant continued his Regular Army service and completed assignment within and outside the continental United States.

b. On 10 December 1990, the applicant deployed to Southwest Asia; he redeployed, on 6 May 1991. On 1 August 1993, the applicant immediately reenlisted for 3 years and, as his reenlistment option, he elected to undergo training in MOS 54B (Chemical Operations Specialist). On 24 August 1994, the applicant successfully completed 54B MOS training, and, effective 1 September 1994, his leadership promoted him to sergeant (SGT)/E-5 in MOS 54B.

c. On 6 August 1996, reassignment orders transferred the applicant to a signal unit in Germany; on 5 March 1997, he deployed to Hungary and redeployed, on 27 April 1997. Effective 1 November 1998, the applicant's chain of command promoted him to staff sergeant (SSG)/E-6. On 3 August 1999, the applicant completed his tour in Germany, and orders reassigned him to a field artillery battalion at Fort Campbell, KY; he arrived at his new unit, on 1 October 1999.

d. The applicant provides an SF 513, dated 5 November 1999, which shows that the Physical Therapy department at Fort Campbell evaluated the applicant for pain in his Achilles tendon; the applicant told the physical therapist that, while deployed to Bosnia in April 1997, he had torn his left Achilles tendon and initially received treatment in Germany. The physical therapist did not mention the cause of the injury, nor did he state the applicant had been participating in hand-to-hand combat training.

e. Based on a document provided by the applicant, on or about 26 January 2000, medical authority issued the applicant a temporary level "3" physical profile for the "U" (upper extremity) physical factor due to "Right Cubital Tunnel Syndrome." Item 9 (Other) states, "SM deployed to a field exercise with (field artillery battalion). He was participating in a war game exercise when he fell on his (R) arm and got a pinched nerve in his (R) arm."

f. On 28 January 2000, the applicant filed an EO complaint with his higher headquarters (Division Artillery (DIVARTY)); he stated Captain (CPT) B__ and Master Sergeant (MSG) B__ were treating him differently because of his race, and he asked for a reassignment to another battalion. The applicant additionally noted he had already passed on his concerns to the battalion executive officer (XO), the battalion command sergeant major (CSM), and the battalion commander; the battalion commander was conducting an investigation and had referred the applicant to DIVARTY EO.

g. On 3 May 2000, after transferring to an infantry battalion, the applicant submitted an IG action request based on his belief that members of his new unit were retaliating against him. The applicant had previously filed a complaint against a CPT and MSG in his last unit, and a field artillery battalion investigating officer (IO) determined the applicant's racial bias complaints were unfounded; however, due to concerns about the potential for retaliation, the IO recommended the applicant's reassignment. Division Chemical directed the applicant's placement in the infantry battalion, but the NCO leadership there (i.e., first sergeant (1SG) and battalion CSM) did not want the applicant.

h. On 24 June 2000, the applicant prepared a memorandum with the subject: "Reprisal." He stated that, on 13 June 2000, the applicant, CPT C__, and Specialist (SPC) H__ deployed to Range 55; the applicant was to be the range NCO and CPT D__ the range officer (both were minorities).

(1) The applicant had never performed these duties before, so he had to figure out what he was supposed to do. In addition, they did not give him enough time to prepare and he did not have all of the equipment he required; he had only one operational tent and three radios that only worked occasionally. When he contacted the S-3, they told him to use what he had.

(2) On 15 June 2000, the battalion commander came to inspect the range, and, when he saw what was going on, he did not seem very pleased; he saw there was no place to put the ammunition, and communication systems were poor.

(3) The next day, the battalion XO came out, and "it all started" when the XO told the applicant in a nasty way to put on his gear; it was clear to the applicant that the XO

was "reprising against me because he (knew) I was going to file the Article 138." Later, around 1900, the battalion commander came out and found more deficiencies.

(4) On 19 June 2000, the applicant ran out of ammunition; the battalion commander was not pleased. On 20 June 2000, after more communications issues, the applicant's supervisor told him he wanted the applicant to take some time off, and that he would come back to the range on the 22nd to supervise the policing of the range. In the meantime, a white NCO took the applicant's place, and, in the applicant's view, the reason for that change was because the Commanding General was expected to visit. On 20 June 2000, the applicant overheard his supervisor tell the battalion commander, XO, and others that "in a few hours [applicant] would be back in the rear and now we will have someone to take over the tent that can make this work."

(5) The applicant concluded his chain of command thought it was funny that he had been removed as Range NCO in charge, and the applicant felt his leadership had set him up for failure; he perceived their actions were based on racial bias, and he stated his intent to prepare a complaint under Article 138, UCMJ.

i. On 6 July 2000, an Army Legal Assistance Officer prepared the applicant's Article 138 complaint and, after spelling out the applicant's concerns, requested the applicant's rehabilitative transfer to another unit completely that had no association with either the infantry brigade or DIVARTY. On 14 August 2000, the infantry battalion's CSM signed a letter of release for the applicant. On or about 25 October 2000, the Fort Campbell G-1 reassigned the applicant to a Corps Support Battalion, with duty in the S-3 as the battalion chemical NCO.

j. The applicant provides medical documentation showing that, on 18 November 2000, he underwent surgery for his Right Cubital Tunnel Syndrome.

k. In June 2001, the applicant filed a complaint with the National Association for the Advancement of Colored People (NAACP) stating the members of the Corps Support Battalion S-3 office had told him he was not welcome because he had previously filed a racial bias complaint.

l. Based on permanent change of station orders, the applicant transferred to Germany and was assigned to an aviation regiment. The applicant arrived at his unit, on 17 September 2001.

m. On 9 January 2002, the applicant prepared a memorandum, addressed to CPT M__ H__, with subject: Request for Redress; the applicant asserted his chain of command and the higher headquarters were mistreating him, in that they were holding information against him that pertained to his previous assignments at Fort Campbell. The applicant maintained they were creating a hostile work environment and their

actions constituted reprisal. After detailing the incidents he believed were relevant, he stated CPT H__ had 15 days to respond, and that, if his concerns were not adequately redressed, he intended to file a formal Article 138, UCMJ complaint.

n. In or around January 2002, the applicant received a relief for cause NCOER, for the rating period 200108 through 200201; the duty position was Battalion Nuclear, Biological, Chemical (NBC) NCOIC.

(1) In Part IV (Army Values/Attributes/Skills/Actions), the rater indicated "No" answers to "Duty: Fulfills their Obligations" and "Selfless Service: Puts the Welfare of the Nation, the Army, and Subordinates before their Own." The comments stated, "exhibits lack of respect, motivation, and concern for the unit" and "more focused on personal desires than appointed duty position."

(2) Part IV (Values/NCO Responsibilities) the rater checked blocks for "Needs Some Improvement" under Competence and Responsibility/Accountability. Part V (Overall Performance and Potential), the rater rated the applicant as "Marginal." In his comments, the rater indicated the applicant showed "poor written communication skills," which affected Soldiers' ability to accomplish assigned tasks, and that the applicant displayed a lack of enthusiasm.

(3) Under Part V, the senior rater gave the applicant a rating of "Fair" for both overall performance and overall potential. The senior rater commented that the applicant seemed "distracted from his daily duties."

o. In March 2002, the applicant appealed his relief for cause NCOER, arguing his rating chain showed bias in their evaluations of him.

p. At some point prior to April 2002, medical authority referred the applicant into the Army's Physical Disability Evaluation System (PDES). On 3 April 2002, an Army physician evaluated the applicant and prepared a Medical Narrative Summary (NARSUM) prior to the convening of a medical evaluation board (MEB). The physician identified the applicant's chief complaints as "right elbow pain" and "left ankle pain."

(1) The doctor noted the applicant had a history of right ulnar nerve decompression and, despite the surgery, the applicant was still unable to rest his elbow on a desk, could not fire a weapon from a prone position, and could only lift 10 pounds; as a result, the applicant required a very restrictive permanent profile.

(2) Concerning the left ankle pain, the applicant sustained an Achilles tendon rupture in 1997 and was treated at the time but continued to experience constant pain. While the pain and morning stiffness tended to improve over the course of the day, the

applicant was still unable to do any prolonged running or jumping, and he could not complete the two-mile run event on his Army Physical Fitness Test.

(3) The physician opined the applicant no longer met medical retention standards, and his prognosis for continued military service was poor.

q. On 1 May 2002, an MEB affirmed the applicant failed medical retention standards for right elbow pain and chronic left ankle pain and recommended referral to a PEB for a fitness determination; on 1 May 2002, the applicant concurred with the MEB's findings and recommendations. On 14 May 2002, a military psychiatrist completed an addendum to the MEB NARSUM.

(1) The military psychiatrist stated that, in November 2001, the applicant had self-referred himself to psychiatry based on his belief that people in his current unit were setting him up for failure, and that certain individuals were intent upon ruining his career. The military psychiatrist diagnosed the applicant as having Delusional Disorder, Persecutory Type, manifested by a persistent belief that he was the object of unfavorable attention from his supervisors due to previous negative reports.

(2) The military psychiatrist's prognosis was "reserved; it is unclear what impact separation from the Service will have upon this individual's symptoms." The doctor added, "In reviewing all case notes and diagnostic criteria for Delusional Disorder, it is concluded that [applicant] does have a mild, specific, and consistent delusional system." Applicant's "desire to leave the military via the MEB process is based on 1) his physical condition, and 2) the fact that he fears this pervasive anger and retribution that he perceives will continue to follow him through his military career. These indicators are consistent with the diagnosis for Delusional Disorder."

r. On 5 June 2002, Mr. B__ W. C__, PEBLO, USAMEDDAC Wuerzburg (Germany) completed two DA Forms 2173 pertaining to the applicant's 1997 ankle injury:

(1) The first shows the applicant had been injured in January 1997 in Tazar, Hungary. Item 9 (Hour and Date Examined) states, "12 May 1997 @ 0739 hrs." Item 15 (Details of Accident or History of Disease) shows, "SM was in a combat training, hand-to-hand training. He slip(ped) and hurt his ankle over larg(e) rocks. He went to the Aid station same day and was diagnosed with a sprain." On 7 June 2002, LTC R__ L. L__, Chief, Patient Administration Division signed the form affirming no formal line of duty investigation was required and the applicant's injury was considered to have been incurred in the line of duty.

2) The second form states, in January 1997, the applicant sustained an injury while in Tazar, Hungary. Item 9 (Hour and Date Examined) states, "12 May 1997 @ 0739 hrs." Item 15 (Details of Accident or History of Disease) shows, "SM was running

in PT (physical training) formation over large rocks when he slipped and hurt his ankle. He went to the Aid station same day and was diagnosed with a sprain. No documentation while downrange, only after SM returned to home station." On 7 June 2002, LTC R__ L. L__, Chief, Patient Administration Division signed the form affirming no formal line of duty investigation was required and the applicant's injury was considered to have been incurred in the line of duty.

s. On 16 July 2002, a PEB found the applicant unfit for continued military service and recommended separation with disability severance pay; the PEB additionally recommended disability ratings of "0" percent for the applicant's Delusional Disorder, Right Elbow Pain without any history of trauma/injury, and Chronic left ankle pain with a past history of an Achilles tendon rupture in 1997. The PEB further determined that the applicant's disabilities did not result from a combat-related injury, as defined in Title 26 (Internal Revenue Code), USC, section 104 (Compensation for Injuries or Sickness).

t. The applicant did not initially concur with the PEB's findings and recommendations, and he demanded a formal hearing; however, on 4 September 2002, he withdrew that request, and agreed to accept the PEB's results. In or around mid-September 2002, the U.S. Total Army Personnel Command directed the applicant's separation with severance pay. On 24 September 2002, Headquarters, U.S. Army, Europe Orders Number 267-006 directed the discharge, effective 9 December 2002.

u. On 18 October 2002, the U.S. Army Enlisted Records and Evaluation Center advised the applicant that the Enlisted Special Review Board (ESRB) had reviewed the applicant's adverse NCOER appeal and determined the evidence did not justify a change to or the withdrawal of the NCOER.

v. On 9 December 2002, the Army honorably discharged the applicant due to physical disability. His DD Form 214 shows he completed 14 years, 1 month, and 9 days of net active duty service.

(1) Item 13 (Decorations, Medals, Badges, Citations, and Campaign Ribbons Awarded or Authorized) lists the following:

- Army Achievement Medal
- Army Good Conduct Medal (4th Award)
- National Defense Service Medal with one bronze service star
- Armed Forces Expeditionary Medal
- Southwest Asia Service Medal with three bronze service stars
- NCO Professional Development Ribbon with Numeral "2"
- Army Service Ribbon
- Overseas Service Ribbon with Numeral "3"

- North Atlantic Treaty Organization Medal
- Kuwait Liberation Medal – Saudi Arabia
- Kuwait Liberation Medal – Government of Kuwait
- Marksman Marksmanship Qualification Badge with Rifle Bar (M-16)

(2) Item 18 (Remarks) showed the applicant was to receive \$62,467.20 in severance pay.

w. On 28 March 2004, the applicant petitioned the ABCMR, requesting a medical retirement. On 13 April 2006 (ABCMR Docket Number AR20050008787), the Board denied the applicant's request, noting the applicant's available record contained no evidence supporting a medical retirement.

x. On 27 August 2004, the applicant submitted his first CRSC application; he argued that, although the VA was still evaluating his case, he believed he was eligible for CRSC because he had PTSD and was exposed to toxins like radiation and mustard gas while serving in the Gulf War. On 3 November 2004, the USAPDA declined the applicant's request, stating the applicant had not completed 20 years of active service.

y. In January 2007, the applicant applied again for CRSC, noting VA had awarded him a combined 100 percent disability rating; on 6 March 2007, USAPDA advised the applicant that he did not meet the preliminary eligibility requirements, in that he had not completed 20 years of active duty service.

z. On 23 March 2007, the applicant requested the ABCMR reconsider his previous request for a medical retirement, citing VA's disability determinations; on 30 October 2007 (ABCMR Docket Number AR20070004909), the Board voted to deny relief.

z. On 3 June 2012, the applicant applied to the DOD PDBR, requesting a reevaluation of the PEB's disability ratings. On 30 November 2012, the PDBR recommended increases in the applicant's disability ratings.

(1) Delusional Disorder.

(a) "Although the PEB rating preceded the promulgation of the National Defense Authorization Act (NDAA) 2008 mandate for DOD adherence to VASRD (Veterans Affairs Schedule for Rating Disabilities), section 4.129 (Mental Disorders due to Traumatic Stress), IAW (in accordance with) DODI (DOD Instruction) 6040.44 (PDBR) and DOD guidance, the Board must apply section 4.129 to all relevant Board cases. The salient question before the Board is whether the [applicant's] psychiatric condition meets the section 4.129 definition of 'a mental disorder that develops in service as a result of a highly stressful event [that] is severe enough to bring about the veteran's release from active military service.'"

(b) "Although the VA Compensation and Pension (C&P) exam performed remote from separation suggests the unfitting delusional disorder condition may have resulted from exposure to stressful events while deployed in 1991, the clinical record does not provide evidence this was the case. The Board majority concludes that the application of section 4.129 is not appropriate in this case and will premise its rating recommendation on the psychiatric acuity at separation. The [applicant's] symptoms at the time of the MEB could best be described as moderate."

(c) "The NARSUM psychiatrist reported a history of self-referral in November 2001 with complaints that certain individuals were out to ruin his career. Paranoid thinking resulted in multiple congressional and IG complaints that alleged unfair treatment from multiple units. He was assigned to three different units over an 18-month year period of time."

(d) "The [applicant] related a fear that a hovering helicopter was investigating him, that his phone lines were tampered with and that scratches on his car were in the shape of eyes and were messages intended for him. He reported some symptoms suggesting possible depression, including decreased sleep, diminished appetite without weight loss and depressed mood but declined medication for this. Mental status exam (MSE) at the time of the initial self-referral was reported to observe significant circumstantial thought processing, paranoid content, dysphoric mood, suspiciousness and flat affect."

(e) "The NARSUM examiner indicated that there never was a history of suicidal or homicidal thoughts. He recently divorced his wife of 11 years and was noted to display occasional isolation behaviors such as keeping windows closed with curtains drawn, or rarely venturing far from his room or off post. He was not working in his MOS because his chain of command did not think he was capable. Once the [applicant] was aware he would be getting out of the military, he became calm and relieved."

(f) "The [applicant's] performance report for the period August 2001 to January 2002 documented a lack of enthusiasm and inspiration, poor written communication skills, and repeated absences from formations and training. The overall assessment by the senior rater was that his performance was unacceptable. Reports from the 2 prior years indicated a successful performance; he was deemed "fully capable" with no areas of deficiency noted."

(g) "The first VA evaluation in evidence was a mental health examination performed on 28 August 2004 (22 months after separation). The [applicant] was noted to be a very poor historian and vague about his symptoms. He displayed no insight into his ongoing paranoid symptoms and felt like there was 'some kind of game going on.'" "The psychiatric C&P exam was not performed until 20 June 2005. The examiner noted

that the [applicant] had been unable to work since separation because of his mental health condition, and that there had never been remission in symptoms since they began in 2000."

(h) "It was reported that since his time in Desert Storm in 1991 he experienced nightmares and intrusive thoughts, but no flashbacks. He reported being easily startled, fear of crowds, irritability and constant suspiciousness. MSE revealed normal orientation, but poor concentration and short term memory. There was no evidence of hallucinations, sleep impairment or panic attacks, but there was evidence of depression. He was somewhat incoherent but appeared to be logical and have reasonable thinking speed most of the time. The GAF was 50, and the examiner opined that some, if not all, of his symptoms were related to PTSD stemming from his experiences in Desert Storm."

(i) "The 70 percent rating by the VA was based on an evaluation that documented a worsening condition, but that was performed well after separation. As previously discussed, such delayed exams carry little probative value in the Board's deliberations regarding rating at the time of separation; however the Board assigns significant probative value in this case to the post-separation employment history obtained from the two VA exams." "Board members agreed that the section 4.130 (Mental Disorders) threshold for a 10 percent rating were well exceeded at the time of separation...After due deliberation, considering all of the evidence and mindful of VASRD section 4.3 (Resolution of Reasonable Doubt), the Board recommends a disability rating of 50 percent for the delusional disorder condition."

(2) Right Elbow Pain Condition. Symptoms improved after the applicant underwent right ulnar nerve decompression surgery in November 2000, but the intermittent numbness in the applicant's little finger and the marked tenderness in the applicant's elbow persisted. "After due deliberation, considering all of the evidence and mindful of VASRD section 4.3, the Board recommends a disability rating of 10 percent for the right elbow pain condition."

(3) Chronic Left Ankle Pain Condition. "The [applicant] suffered from presumed left Achilles tendinitis for several months during 1997, but a magnetic resonance imaging (MRI) study in early 1998 showed a partial Achilles tendon tear. This was treated with immobilization and resulted in complete tendon healing, as shown by a follow-up MRI in May 1998; but pain with certain activities persisted." "After due deliberation, considering all of the evidence and mindful of VASRD section 4.3, the Board recommends a disability rating of 10 percent for the chronic left ankle pain condition."

aa. On 11 January 2013, the Deputy Assistant Secretary of the Army (DASA) (Army Review Boards (RB)) advised USAPDA that the Army approved the PDBR's

recommendations and directed the recharacterization of the applicant's disability separation. The DASA (RB) ordered "all Department of the Army records of the individual concerned be corrected accordingly no later than 120 days from the date of this memorandum:"

(1) "Providing a correction to the individual's separation document showing that the individual was separated by reason of permanent disability retirement effective the date of the original medical separation for disability with severance pay."

(2) "Providing orders showing that the individual was retired with permanent disability effective the date of the original medical separation for disability with severance pay."

(3) "Adjusting pay and allowances accordingly. Pay and allowance adjustment will account for recoupment of severance pay, and payment of permanent retired pay at 60 percent effective the date of the original medical separation for disability with severance pay."

(4) "Affording the individual the opportunity to elect Survivor Benefit Plan (SBP) and medical TRICARE retiree options."

bb. On 24 April 2013, Installation Management Command Europe rescinded the applicant's 24 September 2002 discharge orders (Headquarters, U.S. Army, Europe Orders Number 267-006).

cc. On 26 April 2013, USAPDA completed a letter, addressed to the applicant's home address (same as the address listed on applicant's current application), that announced the approved changes to the applicant's disability ratings and his placement on the PDRL.

(1) With the letter, USAPDA provided a copy of the orders retiring the applicant, effective 9 December 2002, and placing him on the PDRL, effective 10 December 2002.

(2) Also included was a DD Form 215 that corrected the applicant's DD Form 214, ending 9 December 2002, to show the applicant's retirement, per Army Regulation (AR) 635-40 (Physical Evaluation for Retention, Retirement, or Separation), paragraph 4-24b (1) (Final Disposition – Permanent Retirement for Physical Disability).

dd. On 21 June 2013, 8 August 2013, and 19 December 2014, the applicant requested HRC to award him CRSC; HRC denied each request stating it could not verify the applicant's medical conditions were combat-related. In its 20 May 2015 response, HRC additionally pointed out that the applicant's July 2002 PEB had stated Delusional Disorder with PTSD was not combat-related, and, in order to appeal

HRC's decision, the applicant would need to submit a "notice of disagreement" to the ABCMR.

ee. On 1 June 2015, applicant petitioned the ABCMR, stating that HRC had disapproved his CRSC request three times and had suggested the applicant needed to apply to the ABCMR for relief. He argued that, because the VA had awarded him a service-connection for PTSD, based on his exposure to trauma in combat, the Board should also grant his request for CRSC. On 30 August 2016, the Board voted to deny relief (ABCMR Docket AR20150009937). The Board stated:

(1) "There is no evidence of record and the applicant provided none showing he met all of the requirements for CRSC as provided for by law. As stated above, the CRSC criteria states for military retirees who have combat-related disabilities, the military retiree must show that the disability incurred while engaged in combat, while performing duties simulating combat conditions, or while performing especially hazardous duties."

(2) "CRSC determinations require evidence of a direct causal relationship to the military retiree's VA-rated disabilities to war or the simulation of war. Without evidence to establish a direct, causal relationship of his requested conditions to war or the simulation of war, not just by being deployed into a hazardous area during a period of war, there is insufficient evidence to support the reversal of HRC decisions to deny him CRSC benefits."

(3) "The VA awarded the applicant service connection for PTSD from his evaluation of delusional disorder based on self-reported incidents that occurred during his military service. He provides no documentary evidence to support a specific incident of trauma showing his PTSD was caused by an instrumentality of war or a simulation of war."

ff. On 22 September 2016, the applicant resubmitted his request for CRSC to HRC; on 12 July 2017, HRC responded, "Records in our database indicate that you received a final CRSC determination letter dated 2015 May 20. That decision was final and CRSC cannot process your Reconsideration request. Your only recourse is to contact ARBA and initiate an appeal to have your military records corrected."

gg. On 27 September 2016, the applicant requested reconsideration of his request to award him CRSC. He contended, in effect, that he incurred his injuries in conditions simulating combat, and his Delusional Disorder with PTSD was caused by those conditions and his exposure to trauma during the Gulf War.

(1) On 14 November 2017, an ARBA Medical Advisor provided an advisory opinion. The ARBA Medical Advisor opined:

(a) "Based on a thorough review of available medical records, there is evidence [applicant] was diagnosed with a Delusional Disorder while in service, which was determined to be a medically unacceptable condition by the MEB and PEB. Post-service, [applicant] was diagnosed with Delusional Disorder with PTSD by the VA and PDBR. His PTSD was determined to be service connected by the VA; however, there is no indication that his Delusional Disorder was the direct result of armed conflict or that a combat-related event caused the condition."

(b) "This observation does not negate [applicant's] service connected diagnosis of PTSD; however, the VA conducts evaluations based on different standards and regulations. Furthermore, although Delusional Disorders can be associated with factors such as stress, the condition is more strongly linked to genetics and biological factors, such as brain abnormalities. In summary, there is no evidence that would support awarding CRSC as the guidance states in order for a condition to be considered combat-related, it must have a direct, causal relationship to war or the simulation of war."

(2) On 21 November 2017, the applicant submitted his rebuttal to the medical advisory, stating:

(a) The medical advisory never mentioned that the applicant incurred his right cubital tunnel syndrome during a live-fire weapons exercise; such an exercise is simulating war.

(b) Additionally, although the advisory claimed his Delusional Disorder with PTSD had nothing to do with CRSC, one need only look at the reprisals and racial bias he suffered; "I am not the smartest person but is this not simulated arm(ed) conflict, and the resulting disability is Delusional Disorder with PTSD, because I was treated un-fair due to discrimination. I was not doing my job-related (duties) but trying to run a live fire range the best I knew how and (I) was discriminated against."

(c) "(The) advisory says that there is no evidence that would support awarding CRSC. The guidance states in order for a condition to be considered combat-related, it must have a direct, causal relationship to war or the simulation of war." The causal relationship was that he fell on his right arm and pinched a nerve while participating in a live fire exercise.

(d) The applicant concluded, "when I was in a combat training with live (ammunition) going through drills after drills in combat gear and got discriminated against, and my brain got brain abnormalities, as if I got shot in the head during combat training...I may be a 'retard,' but I am not dumb here. I want to be compensated for my

combat training because I have never been the same since. Advisor...you need to see what I see...my training is combat-related."

(3) On 27 June 2019 (ABCMR Docket Number AR20160017386), after considering the applicant's requests, evidence, and available evidence, the Board denied the applicant's requests, stating, "The Board concurred with the conclusions of the advising official and found insufficient evidence in the records or provided by the applicant to support a change to the applicant's record to show eligibility for CRSC."

hh. Between June 2019 and February 2021, the applicant submitted five more CRSC requests with HRC; in each case, HRC advised the applicant that it was unable to award CRSC for the applicant's disabling conditions, and his only recourse was to file an appeal with the ABCMR.

ii. On 30 September 2020, he petitioned the ABCMR, requesting CRSC approval, based on new criteria for PTSD claims and arguing his submitted evidence proved his entitlement to CRSC.

(1) HRC Special Compensation Branch provided an advisory opinion.

(a) HRC noted the applicant's multiple requests, reconsiderations, and appeals for CRSC, and stated, "In order to classify a condition as combat-related, applicants for CRSC are required to submit official military documentation that shows a direct link between a combat-related event and the disability claimed. In this case, the applicant has not presented the office with official military documentation that shows his disabilities are the result of a combat-related event."

(b) Additionally, "The applicant's claim for PTSD resulting from being discriminated against during a military training exercise does not meet the criteria for the award of CRSC. The fact that a member incurred the disability during a period of simulating war or in an area of simulated armed conflict or while participating in a simulated combat operation is not sufficient by itself to support a combat-related determination. There must be a definite, documented, causal relationship between the simulated armed conflict and the resulting disability."

(c) "We have noted the applicant's service in Southwest Asia during Operations Desert Shield/Storm from December 1990 to May 1991; however, serving in a combat zone is not, in and of itself, sufficient to award CRSC. (HRC) reviewed his DD Form 214 and military service record but did not find documentation which confirms his personal exposure to armed conflict."

(d) "To award CRSC for his PTSD under the category of armed conflict, he must submit official documentation that shows how the condition is combat related as defined by CRSC program guidance. Official documentation includes wartime chain of

command endorsements which confirms exposure to armed conflict (wartime chain of command must be first sergeant and/or company commander or higher), copies of combat decorations (certificates, combat badges, and DA Forms 638 (Recommendation for Award)), and evaluation reports which support exposure to armed conflict."

(2) The ARBA Medical Advisor provided a medical review, which concluded the available evidence, to include that submitted by the applicant, did not support the award of CRSC. "It is acknowledged the applicant has service connected diagnoses of PTSD and Delusional Disorder. However, this does not support or justify CRSC. There is no direct linkage between his conditions and a specific combat related event. There is no documentation to support his medical conditions were sustained as a direct result of a combat related event."

(3) On 5 November 2021 (ABCMR Docket Number AR20210006799), the Board considered the applicant's evidence and arguments, as well as the advisory and medical review, and determined relief was not warranted. "The Board found insufficient evidence to support a conclusion that there is a direct, causal relationship to war or the simulation of war and any of the applicant's service connected disabilities. The Board determined the decision to deny the applicant's CRSC claim was not in error or unjust."

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. The applicant served in the Army from 1 November 1988 to 9 December 2002. A PEB found him unfit for Delusional Disorder, Right elbow pain without any history of trauma/injury, and Chronic left ankle pain, and recommended separation with disability severance pay. The PEB further determined that the applicant's disabilities did not result from a combat-related injury, as defined in 26 USC section 104. The applicant concurred. The applicant was discharged from active duty due to disability with zero percent disability rating. He applied for and began receiving VA service-connected disability compensation.

b. In November 2012, following his petition, the DOD Physical Disability Review Board (PDBR) recommended recharacterization of the applicant's discharge to show permanent disability retirement at a combined disability rating of 60%, based a disability rating of 50% for delusional disorder, 10% rating for right elbow pain, and 10% for chronic left ankle pain. On 11 January 2013, the DASA (RB) accepted the PDBR's findings and recommendation. The applicant was issued permanent disability retirement order, retroactive to his separation date in December 2002. The PDBR also arrived at a finding that the applicant did not meet the requirements for 38 CFR, section 4.129 (Mental Disorders due to Traumatic Stress), but did fulfill 4.130 (Mental Disorders). Significantly, the PDBR stated, "Although the VA Compensation and Pension (C&P)

exam performed remote from separation suggests the unfitting delusional disorder condition may have resulted from exposure to stressful events while deployed in 1991, the clinical record does not provide evidence this was the case. The PDBR's majority concludes that the application of section 4.129 is not appropriate in this case and will premise its rating recommendation on the psychiatric acuity at separation. The applicant's symptoms at the time of the MEB could best be described as moderate."

c. Although the applicant had a VA service-connected disability rating of 50% or more, he does not qualify for concurrent receipt of retired pay and VA service-connection since he had not completed 20 years or more of active service. Since the applicant was (1) permanently retired, and (2) was/is receiving service-connection disability compensation, a VA waiver applied. The law requires that a military retiree waive a portion of their gross Army retired pay, dollar for dollar, by the amount of their VA disability compensation pay; this is known as the VA waiver (or VA offset).

d. In July 2013, September 2013, and May 2015, HRC denied him payment of CRSC because of lack of evidence in his claims to show that a combat-related event caused any of his three conditions. In December 2014, the VA awarded him service-connection for PTSD. Additionally, in August 2016, following a medical review by a staff psychologist, the ABCMR also denied his request for CRSC stating there was no evidence of record and he had not provided sufficient evidence showing he met all the requirements for CRSC as provided by law, as there no evidence of a traumatic event (as defined by the Department of Defense) to preliminarily qualify him for CRSC consideration, or that he met the requirements for CRSC. In November 2021, on reconsideration, the ABCMR again denied his request for CRSC after he claimed PTSD.

e. In order to classify a condition as combat-related, applicants for CRSC are required to submit official military documentation that shows a direct link between a combat-related event and the disability claimed. In this case, the applicant has not presented official military documentation that shows his disabilities are the result of a combat-related event. Additionally, the applicant's claim for PTSD resulting from being discriminated against during a military training exercise does not meet the criteria for the award of CRSC. The Board noted the applicant's service in Southwest Asia during Operations Desert Shield/Storm from December 1990 to May 1991; however, serving in a combat zone is not, in and of itself, sufficient to award CRSC. The fact that a member incurred the disability during a period of simulating war or in an area of simulated armed conflict or while participating in a simulated combat operation is not sufficient by itself to support a combat-related determination. There must be a definite, documented, causal relationship between the simulated armed conflict and the resulting disability.

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:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis to amend the decision of the ABCMR set forth in ABCMR Dockets Number:

- AR20050008787, on 13 April 2006
- AR20070004909, on 30 October 2007
- AR20150009937, on 30 August 2016
- AR20160017386, on 27 June 2019
- AR20210006799, on 5 November 2021



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, USC, section 1413a, as amended, provides for the payment of money to an eligible combat-related disabled military retiree (i.e., a member of the uniformed services who is entitled to retired pay and has a combat-related disability). The term "combat-related disability" means a disability that is compensable under the laws administered by the Secretary of Veterans Affairs and that:

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

b. Was incurred (as determined under criteria prescribed by the Secretary of Defense):

- as a direct result of armed conflict;
- while engaged in hazardous service;
- in the performance of duty under conditions simulating war; or
- through an instrumentality of war

2. Effective 1 January 2008, DOD implemented supplemental guidance due to the enactment of the Fiscal Year 2008 NDAA. This change provided special rules for CRSC eligible retirees with fewer than 20 years of service who retired under chapter 61 (Retirement or Separation for Physical Disability) of Title 10, U.S. Code, and for Temporary Early Retirement Authority (more than 15 but less than 20 years of total active service).

3. Title 26, section 104 (b) (3) (Compensation for Injuries or Sickness – Special Rules for Combat-Related Injuries) states, for the purposes of the subsection, the term "combat-related injury" means a personal injury or sickness that occurred as a direct result of armed conflict; or while engaged in extra-hazardous service; or under conditions simulating war; or was caused by an instrumentality of war.

4. 38 Code of Federal Regulations, section 3.700 (General) states not more than one award of pension, compensation, or emergency officers', regular or reserve retirement pay will be made concurrently to any person based on his or her own service. Where payment of readjustment pay (i.e., disability severance pay) was made after September 30, 1996, VA will recoup from disability compensation an amount equal to the total amount of readjustment pay less the amount of Federal income tax withheld from such pay.

5. The Department of Defense Financial Management Regulation 7000.14-R, Volume 7B, currently in effect, states:

a. Disability Severance Pay (DSP).

(1) When the Secretary concerned approves a recommendation from the PDBR to award military disability retirement, DFAS must take action to recoup any disability severance pay previously paid to that member. In most cases, members entitled to DSP will also qualify for VA disability compensation. In order to avoid duplicate collection, DFAS will reduce the recovery amount of disability severance pay by any amount already separately recovered by the VA through reduction of the VA disability compensation. In such cases, the amount deducted by the VA from the disability compensation will reduce the gross amount of disability severance pay to be recouped by the DOD.

(2) To determine the retroactive entitlement of retired pay that is payable to the member, offset the entire VA disability compensation amount that is awarded (prior to any reduction of such VA disability compensation to offset the collection of disability severance pay) from the total retroactive retired pay entitlement. This will result in an amount of the VA disability compensation plus military retired pay paid to the member that is equal to that which the member would have been entitled to had he/she originally been retired instead of separated.

(3) DFAS will first apply the entire amount of any retroactive retired pay and/or CRSC entitlement to any required recoupment of disability severance pay without regard to the percentage limitations. In determining the retroactive entitlement to retired pay, service members must be treated as though they were retired on the original date of separation, without regard to any disability severance payment received or any reduction in the VA disability compensation to recoup previously paid disability severance pay. In order to determine the amount subject to recoupment, as well as any amount payable to a member, DFAS will determine the amount of retired pay that would have been available had the member originally been retired instead of separated. The total amount to recoup will be the full gross amount of disability severance pay originally paid to the member.

(4) The VA deducts disability severance compensation from any VA compensation for the same disability to which the member or member's dependents become entitled under any law administered by the VA. There are two exceptions:

- The VA will make no deduction in the case of disability severance pay received by a member for a disability incurred in the line of duty in a combat zone or incurred during performance of duty in combat-related operations as designated by the Secretary of Defense
- The VA will make no deduction from any death compensation to which a member's dependents become entitled after the member's death

b. Combat-related injury definitions:

(1) Direct Result of Armed Conflict.

(a) The disability is a disease or injury incurred in the line of duty as a direct result of armed conflict. To support a combat-related determination it is not sufficient to only state the fact that a member incurred the disability during a period of war, or in an area of armed conflict or while participating in combat operations. There must be a definite causal relationship between the armed conflict and the resulting liability.

(b) Armed conflict includes a war, expedition, occupation of an area or territory, battle, skirmish, raid, invasion, rebellion, insurrection, guerilla action, riot, or any other action in which Service members are engaged with a hostile or belligerent nation, faction, force, or with terrorists.

(c) Armed conflict may also include such situations as incidents involving a member while interned as a prisoner of war or while detained against his or her will in custody of a hostile or belligerent force, or while escaping or attempting to escape from such confinement, prisoner of war, or detained status.

(2) While Engaged in Hazardous Service. Such service includes, but is not limited to, aerial flight, parachute duty, demolition duty, experimental stress duty, and diving duty. A finding that a disability is the result of such hazardous service requires that the injury or disease be the direct result of actions taken in the performance of such service.

(3) 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 weapon practice, bayonet training, hand-to-hand combat training, repelling, and negotiation of combat confidence and obstacle courses.

(4) Instrumentality of War.

(a) Incurrence during an actual period of war is not required. 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 the service.

(b) An instrumentality of war is a vehicle, vessel, or device designed primarily for Military Service and intended for use in such Service at the time of the occurrence or injury. It may also include such instrumentality not designed primarily for Military Service if use of or occurrence involving such instrumentality subjects the individual to a hazard

peculiar to Military Service. Such use or occurrence differs from the use or occurrence under similar circumstances in civilian pursuits.

(c) A determination that a disability is the result of an instrumentality of war may be made if the disability was incurred in any period of service as a result of such diverse causes as wounds caused by a military weapon, accidents involving a military combat vehicle, injury or sickness caused by fumes, gases, or explosion of military ordnance, vehicles, or materiel.

b. VA Disability Compensation. In some cases, members entitled to disability retired pay will also qualify for the VA disability compensation. In such cases, the amount deducted to recoup the separation payment by the VA will reduce the gross amount of separation, severance or readjustment pay to be recouped by DoD.

//NOTHING FOLLOWS//