

IN THE CASE OF: ██████████

BOARD DATE: 25 January 2024

DOCKET NUMBER: AR20230005542

APPLICANT REQUESTS: in effect, correction of his retirement orders, D250-04, dated 7 September 2010 to add combat codes and show the below entries:

- Disability retirement: 4 Years, 5 Months, 9 Days
- Basic Pay: 10 Years, 4 Months, 08 days
- Disability is based on injury or disease received in line of duty (LOD) as a direct Result of Armed Conflict or caused by and instrumentality of war and incurred in LOD during a war period as defined by law: YES
- Disability resulted from a combat related injury as defined in 26 USC 104: YES

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

- DD Form 149 (Application for Correction of Military Record)
- Narrative Summary
- Fitness for duty memo, 9 August 2007
- DA Form 199 (Physical Evaluation Board (PEB) Proceedings, 10 June 2008
- Orders D183-04, 1 July 2008
- DA Form 199, 24 August 2010
- Orders D250-04, 7 September 2010

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.
2. The applicant states permanent retirement orders D250-04 dated 7 September 2010, were not found to be inaccurate until the retired service member applied for a federal job in February 2022 and a Human Resources officer pointed out the error.
  - a. In his narrative summary the applicant states, in effect, the retirement orders that placed him on the permanent disability retired list (PDRL) contain errors that were not

on his retirement orders that placed him on the temporary disability retired list (TDRL). The areas of his orders that contain errors were all listed as not applicable. Those areas are disability retirement, basic pay, Disability is based on injury or disease received in LOD as a direct Result of Armed Conflict or caused by and instrumentality of war and incurred in LOD during a war period as defined by law, and Disability resulted from a combat related injury as defined in 26 USC 104.

b. His Formal PEB DA Form 199 dated 10 June 2008, section 8b states: "For purposes of determining minimum years of service for computing current, or future, severance pay entitlement, the onset and or incurrence of the unfitting conditions is deemed to have been in a combat zone or during performance of duty in combat-related operation as designated by the Secretary of Defense (10 USC 1212-NDAA 2008 Sec 1646)."

c. The Formal PEB DA Form 199 dated 10 June 2008 clearly states the unfitting condition is a result of a LOD in a combat zone. Orders D 183-04 dated 1 July 2008 correctly listed the sections that a LOD injury was received during an act of war, and that disability was a result of a combat related injury as defined in 266 USC 104. No part of Permanent PEB DA Form 199 signed 24 August 2010 revoked that finding from the Formal PEB finding of 10 June 2008.

d. Therefore, orders D250-04 need to be corrected to reflect the findings of the Formal and Permanent PEB sections, and Orders D 183-04 dated 1 July 2008 that a LOD injury was received during an act of war, and that disability was a result of a combat related injury as defined in 26 USC 104.

3. The applicant enlisted in the [REDACTED] Army National Guard ([REDACTED] ARNG) on 2 April 1998.

4. He entered a period of active-duty training (ADT) on 31 May 1998. He was honorably released from ADT on 2 October 1998, after completion of required ADT. He had other periods of active duty throughout his career as shown below:

- 4 October 2001 – 14 May 2002 in support of Operation Noble Eagle (Continental United States (CONUS))
- 1 November 2002 – 6 February 2003 in support of Operation Noble Eagle CONUS
- 7 February 2003 – 5 May 2004 in support of Operation Enduring Freedom, Service in Iraq from 6 April 2003 – 18 April 2004
- 1 October 2004 – 31 March 2005 in support of Operation Noble Eagle

5. A fitness for duty memo, 9 August 2007, shows the Deputy State Surgeon requested the applicant have a medical evaluation, and that the Medical Evaluation Board review

the findings along with the attached medical documentation and make the determination as to whether the applicant was fit for duty.

6. His DA Form 199, shows a PEB, which convened on 10 June 2008, determined he was physically unfit and recommended a combined rating of 50 percent and that his disposition be placement on the TDRL with reexamination during December 2009. The unfitting condition was post-traumatic stress disorder (PTSD) rated at 50 percent.

a. PTSD resulting from February 2003 to April 2004 deployment during which time there was exposure to combat conditions including combatant and civilian deaths and improvised explosive device explosions (10 A/C, CAB). Rated 50% for occupational and social impairment with frequent panic attacks and significant disturbance in motivation and mood resulting in reduced reliability and productivity. Symptom overlap of PTSD with major depressive disorder precludes separate disability ratings per VASRD para 4.14.

b. item 8b (Disability Description) states: For purposes of determining minimum years of service for computing current, or future, severance pay entitlement, the onset and/or incurrence of the unfitting conditions is deemed to have been in a combat zone or during the performance of duty in combat-related operations as designated by the Secretary of Defense (10 USC 1212 - NDAA 2008 Sec 1646).

c. Item 10 (If retired because of disability, the Board makes the recommended finding that): Parts A and C state

- The Soldier's retirement is based on disability from injury or disease received in the line of duty as a direct result of armed conflict or caused by an instrumentality of war and incurring in line of duty during a period of war as defined by law
- The disability did result from a combat related injury as defined in 26 U.S.C. 104

d. The applicant elected not to appear and was represented by the regularly appointed counsel.

7. Orders D 183-04, issued by United States Army Physical Disability Agency (USAPDA), Washington, DC, on 1 July 2008, shows he was retired with 50 percent disability and placed on the TDRL on 6 August 2008. The orders also show:

- Disability retirement: 04 Years, 05 Months, 09 Days
- Basic Pay: 10 Years, 04 Months, 08 Days

- Disability is based on injury or disease received in LOD as a direct Result of Armed Conflict or caused by and instrumentality of war and incurred in LOD during a war period as defined by law: YES
- Disability resulted from a combat related injury as defined in 26 USC 104: YES

8. His NGB Form 22 (Report of Separation and Record of Service) shows he was honorably released from the ILARNG and transferred to USAR Control Group (Retired) on 6 August 2008. He completed 10 years, 4 months, and 5 days net service this period.

9. A DA Form 199 shows a PEB convened on 24 August 2010, and the board determined he was found physically unfit and recommended a combined rating of 50 percent and that his disposition be placement on the PDRL. Item 10 reflects not applicable. The applicant concurred and waived a formal hearing of his case.

10. Orders D250-04, issued by USAPDA, Washington, DC on 7 September 2010, shows he was removed from the TDRL on 7 September 2010. He was placed on the PDRL with 50 percent disability the following date. The orders also show:

- Disability retirement: Not Applicable
- Basic Pay: Not Applicable
- Disability is based on injury or disease received in line of duty (LOD) as a direct Result of Armed Conflict or caused by and instrumentality of war and incurred in LOD during a war period as defined by law: Not Applicable
- Disability resulted from a combat related injury as defined in 26 USC 104: Not Applicable

11. During the processing of this case an advisory opinion was received by Headquarters, USAPDA, Joint Base San Antonio, on 10 October 2023. The legal advisor found the request of the applicant to be legally insufficient in part and legally sufficient in part.

a. Background: On 6 June 2008, the applicant was found to be unfit for his PTSD condition. The PEB found that the condition warranted a combat code (10 a/c which now translates to V1/3). On 6 August 2008, the applicant was placed on the TDRL. His orders (D 183-04) awarded him combat codes. Due to him being placed on the TDRL list, the orders also listed his years of service for disability retirement and for basic pay purpose. These two pieces of administrative information are required for those Soldiers on the TDRL. On 24 August 2010, the PEB reconvened and recommended that the applicant be placed into PDRL. The 24 August 2012, PEB did not make any finding with respect to his previous awarding of combat codes. The applicant was placed into PDRL effective 7 August 2008. The orders placing him into PDRL (D250-04) were dated

7 September 2010. The D250-04 orders did not list his years of service for disability retirement or for basic pay. The reason being is because he was placed on PDRL and was no longer subject to potentially being awarded separation with severance pay. In other words, that information was no longer potentially needed as he was being medically retired and not separated.

b. Analysis: It is more likely than not that the 24 August 2010, PEB did not comment on the previous awarding of combat codes since that determination was not germane to the reason why he was placed onto the TDRL in the first place. He was placed onto the TDRL because his PTSD was deemed to be unstable at the time of the PEB. This has nothing to do with the onset of the PTSD itself. Thus, when orders D250-04 were issued it appears they did not include the earlier combat codes because the 24 August 2010 PEB made no mention of them. With respect to leaving out the administrative information for his disability pay and basic pay that is not required for Soldiers who are being medically retired.

c. Conclusion: Based upon the above, the advisor found the applicant's request to be awarded combat codes based upon his initial findings on 6 June 2008, wherein the PEB awarded combat codes 10 a/c (now V1/3) should be granted. However, his request to have the administrative data of his years for disability pay and basic pay added should not be granted as that information is not needed since he was medically retired. As such, the applicant's appeal is legally insufficient in part and legally sufficient in part.

9. The applicant was provided a copy of the USAPDA legal advisory opinion on 13 October 2023, 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.

#### BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found partial relief is warranted.
2. The Board concurred with the conclusion of the advisory official that the entry on PDRL Orders D250-04 stating the combat codes were not applicable is likely because the applicant's TDRL PEB did not comment on the codes. However, since that determination had already been made, the entry "yes" should have been carried forward from the orders that placed him on the TDRL.
3. The Board further concurred with the advisory official's conclusion that the entry "not applicable" on Orders D250-4 as it relates to length of service is correct due the fact that

the applicant was being permanently retired and that information became irrelevant. The Board determined the entries related to length of service should not be changed.

BOARD VOTE:

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

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined the evidence presented is sufficient to warrant a recommendation for partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by amending USAPDA Orders D250-04, 7 September 2010, to show the following entries:

- Disability is based on injury or disease received in LOD as a direct result of armed conflict or caused by an instrumentality of war and incurred in LOD during a war period as defined by law: YES
- Disability resulted from a combat related injury as defined in 26 USC 104: YES

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

4/24/2024

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. Title 10, U.S. Code, section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.

2. 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

3. 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.

4. 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.

5. Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation) establishes the Physical Disability Evaluation System (PDES) and sets forth policies, responsibilities, and procedures that apply in determining whether a Soldier is unfit because of physical disability to reasonably perform the duties of his or her office, grade, rank, or rating. It provides that an MEB is convened to document a Soldier's medical status and duty limitations insofar as duty is affected by the Soldier's status. A decision is made as to the Soldier's medical qualifications for retention based on the criteria in Army Regulation 40-501. Disability compensation is not an entitlement acquired by reason of service-incurred illness or injury; rather, it is provided to Soldiers whose service is interrupted and who can no longer continue to reasonably perform because of a physical disability incurred or aggravated in service.

a. Paragraph 4-12 provides that each case is first considered by an informal PEB. Informal procedures reduce the overall time required to process a case through the disability evaluation system. An informal board must ensure that each case considered is complete and correct. All evidence in the case file must be closely examined and additional evidence obtained, if required.

b. After the Soldier has been processed through the PDES and a PEB has made a determination that the Soldier is qualified for disability retirement but for the fact that his or her disability is determined not to be of a permanent nature and stable can be placed on the temporary disability retired list (TDRL). The TDRL is used in the nature of a



"pending list." It provides a safeguard for the Government against permanently retiring a Soldier who can later fully recover, or nearly recover, from the disability causing him or her to be unfit. Conversely, the TDRL safeguards the Soldier from being permanently retired with a condition that may reasonably be expected to develop into a more serious permanent disability.

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//