IN THE CASE OF: [redacted]

BOARD DATE: 25 January 2024

DOCKET NUMBER: AR20230005552

APPLICANT REQUESTS:

- personal appearance before the Board via video or telephone
- in effect, amendment of Headquarters, U.S. Army Physical Disability Agency (USAPDA) Order D 137-09, dated 17 May 2022, to reflect the following:

    - his disability resulted from a combat-related injury as defined in Title 26 U.S. Code, section 104
    - his disability was incurred in the line of duty (LOD) in a combat zone or as the result of performing combat-related operations

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

- DD Form 149 (Application for Correction of Military Record)
- self-authored statement
- DA Form 2173 (Statement of Medical Examination and Duty Status), 9 October 2005
- DA Form 5181 (Screening Note of Acute Medical Care), 13 October 2005
- DD Form 689 (Individual Sick Slip), 13 October 2005
- DD Form 214 (Certificate of Release or Discharge from Active Duty) covering the period ending 7 December 2006
- three witness statements
- Department of Veterans Affairs (VA) Rating Decision, 22 October 2021
- USAPDA Order D 137-09, 17 May 2022
- VA Rating Decision, 26 October 2022
- VA letter, 27 October 2022

FACTS:

1. The applicant states:

a. His records should be corrected to reflect his disability resulted from a combat-related injury as defined in Title 26, U.S. Code, section 104 and it was incurred in the LOD in a combat zone or as the result of performing combat-related operations.

b. The testimony of witnesses pin his original injury to a flip in hand-to-hand combat training at Fort Dix, NJ, during pre-mobilization training, 2 weeks before his deployment to Abu Ghraib, Iraq. This qualifies under the definition for combat-related injuries in Title 26, U.S. Code, of personal injury or sickness under conditions simulating war.

c. He served in the Army National Guard (ARNG) for 24 years and was never in the active Army. The determination that his back condition is not service-connected is incorrect and based on inaccurate information as the reports were falsely recorded. The 2011 incident aggravated a previous injury from 2005, when he was activated to deploy to Iraq.

d. At the time of the 2005 injury, they were mobilized at Fort Dix, NJ, and the training site was isolated from the main post. It consisted of tents for sleeping and operations with one trailer on site for showers. Around 5 October 2005, he was required to train in hand-to-hand combat. The pit was constructed of about 2 inches of crushed rubber over the solid ground. Normal pits are 6 to 8 inches of crushed rubber over sand. They were required to wear their vests that held the weapon ammunition. His vest was slightly large, as he only weighed about 130 pounds, at the height of 5 foot 8 inches. A much shorter man was instructed to flip him onto the ground and when he flipped him, he landed on his back. His ammunition that was in the combat vest drove into his spine and he could not continue the training afterward.

e. The next day he awoke from his cot with his back muscles seized. He was stuck in the fetal position and fell to the floor. Immediate medical attention was called. The next day, on 7 October 2005, he was placed on light duty for about 1 week. The medical facilities at the training site were not capable of properly evaluating the injury and he was not permanent party to the base; therefore, the main medical facility was not available to him.

f. They shipped out to Kuwait within 2 weeks. He aggravated the injury when they landed in Kuwait in early November 2005, and he was ordered to help unload the plane full of duffel bags and heavy weaponry from the storage compartment beneath the plane. He sought medical treatment in Kuwait but was only allowed to search for help within Camp Buehring. They gave him a bag of Percocet and said there was nothing they could do as it was not a full medical facility. He was again placed on light duty for the duration of their stay in Kuwait.

g. They moved to Abu Ghraib shortly thereafter. Abu Ghraib was under a constant threat of mortar attacks and sniper fire. They were ordered to wear their ballistic vests whenever they went outside and while they were on duty. His vest weighed 90 pounds with his weapon and combat helmet. The extra weight compounded his already injured back and he inquired about medical attention, but the medical facility at Abu Ghraib was

only for detainees, not for Soldiers. He was given more Percocet and was told to wait until his return home. His tour lasted from November 2005 until December 2006.

h. When they got back to the U.S., the sergeant (SGT) in charge told him if he had any medical issues, he would spend another year at Walter Reed Medical Center to be evaluated and discharged. After 1 1/2 years away from his wife and family, he could not bear to spend another year away from home.

i. He suffered from anxiety, not wanting to leave his house. He did not trust people and did not trust driving on roads after all the improvised explosive device (IED) incidents. After 4 months of mental and physical anguish, he sought medical attention and employment. He was hired for the third shift at [redacted] in [redacted] He used his sleep time to go to the James A. Haley VA Hospital, where he filed a claim. The Military Police (MP) unit was with did not keep medical files, so he had no evidence of service-connected injury at the time. His file was lost or denied by the VA and because of this they would not help him. He did not have medical insurance so he could not seek private medical care. As the old Army phrase goes, he "sucked it up and drove on."

j. Every year since then, at the Physical Health Assessment, he informed the doctors of what happened. At these screenings, the ARNG rushes approximately 200-300 Soldiers through medical evaluation of a 2-day period. It is only to document current health, not to actually assist in care or treatment. The paperwork from Fort Dix, NJ, was never put into his file; it stayed at Fort Dix until his medical SGT retrieved it in 2020.

k. In August 2011, he reinjured his back during the sit-up event of the Army Physical Fitness Test (APFT). He was immediately rushed to [redacted] Hospital. With the approved LOD from this injury, he could now seek medical attention at the VA. This is when the doctors misdiagnosed him with stenosis. At first, they sent him to a chiropractor. The next attempt was physical therapy. After that, he never received any appointments; they stopped treatment, and he could not contact his doctor. He attempted an emergency room visit at the [redacted] VA at one point, only to be told by the doctor that they would not do surgery on him. They gave him medication he was allergic to and could not take. He attempted to get the name of his doctor during an unscheduled visit at the [redacted] VA, but the desk clerk refused to help him. She eventually called the police to "Baker Act" him and put him in the [redacted] Hospital for psychological evaluation for the night. At this point, he did have health insurance and sought private doctors for medical treatment.

l. He eventually found a neurosurgeon by the name of Dr. [redacted] who discovered his L4-L5 disc was herniated, and he performed surgery in April 2015. At this point, he filed his claim for disability. When he went to the claims department at the VA in [redacted] he was first told he could not get an identification (ID) card because

his current address did not match his records. He was required to produce the deed to his house in order to have his address changed and he did not possess the record at that time. The next step was for the clerk creating his claim to contact his ARNG unit to retrieve his medical records from his medical file, which were extensive due to the LOD injury. These records were not retrieved, and the process was never explained at any step of the journey.

m. In 2018, he again sought assistance from the Veteran Service Officer (VSO) in [redacted] He was informed that it was not the VSO's job to get these medical records and he left his claim open for 1 year. He scheduled medical appointments during this time at the [redacted] VA then scheduled an appointment with a VSO in [redacted] He informed the applicant why his 2015 claim was denied when he read his claim file. It was denied because he did not go to any of his appointments, but this was because they were all mailed to is old address, which they would not change due to him not having the deed to his house. They tried to have that file appealed, but his VSO decided it was best to open a new claim with the new address.

n. He attended his VA medical appointment in [redacted] The doctor did not listen and only went by the blood work presented to him. He was diagnosed with a B12 vitamin deficiency and arthritis. When he requested a physician's statement required by the [redacted]ARNG, the doctor's only response was that was beyond his scope of practice. If this doctor cannot diagnose the bulging discs that he suffers from after all these years of horrible treatment, how is he capable of diagnosis stenosis and arthritis in his spine? Shouldn't that also be beyond his scope of practice? The treatment records from the VA are inconsistent with the treatment records he has from his private doctors, whose scope of practice is in neurology and neurosurgery. Since then, he received his 2019 decision, with service-connection for his back denied due to false claims of a lack of military-connected injury, supplemented by misdiagnoses of his conditions by doctors who are not qualified to make such decisions.

o. The Army decided to conduct a second Medical Evaluation Board (MEB) on him. The decision to do so was based on recurring injury to his back. At this point, the VA was still denying service-connection for his back injury. The MEB concluded that his back injury was service-connected and proceeded with the evaluation. Even though the testimony for post-traumatic stress disorder (PTSD) and hearing loss were provided, he was told by the unit's medical noncommissioned officer (NCO) that PTSD and hearing loss would not be included as he did not have an LOD from 2005 for those conditions. His Army-assigned lawyer scheduled an appeal for his findings, but a day before the hearing told him that he could not add PTSD and hearing loss to his MEB, and he had to sign his DA Form 199 (Informal Physical Evaluation Board (PEB) Proceedings) as-is.

p. The VA decided to agree with service-connection in October 2022, but they have refused to treat him. Two doctors, a psychiatrist, and a counselor have all quit on him

over the last year. He lost his health insurance because he was removed from his position as a Federal employee due to being medically retired from the ARNG.

2. The applicant enlisted in the ARNG on 14 August 1998.

3. The applicant was ordered to active duty in support of Operation Iraqi Freedom (OIF) on 29 August 2005.

4. A Statement of Medical Examination and Duty Status shows:

a. While in an activated status, the applicant was injured on 7 October 2005, at Fort Dix, NJ.

b. He was seen as an outpatient at Walson Troop Medical Clinic (TMC), Fort Dix, NJ, on 9 October 2005.

c. The details of the accident show the applicant was seen for complaints of left rib contusion with spasm and pain he rated at 7 to 9 on a 1-10 scale. The problem started 2 days ago.

d. The form is unsigned by a medical professional and the unit commander or unit advisor.

5. A Screening Note of Acute Medical Care, dated 13 October 2005, provides the following screening notes of acute medical care:

a. The applicant was seen on 9 October 2005, for complaints of bruised ribs and spasms that began 5 days prior.

b. His left rib was bruised, and his side swollen. He stated with certain movement his pain increased. He was seen at the Forward Operating Base (FOB) and given a muscle relaxant for pain. He is healing gradually and needs to keep taking the medication as prescribed. He should improve in 2-3 weeks and follow-up at that time.

c. He was placed on light duty and given Ibuprofen for muscle ache and soreness.

6. An Individual Sick Slip, dated 13 October 2005, shows:

a. The Unit Commander's Section, signed by the unit commander, shows the applicant received a back/rib injury during combatives class that was in the LOD.

b. The Medical Officer's Section is signed by the medical officer and shows the applicant was given 24 hours of quarters for his injury and was to follow up at the FOB.

7. The applicant served in Iraq from 21 November 2005 through 6 November 2006. He was honorably released from active duty on 7 December 2006, due to completion or required active service and transferred back to his ARNG unit. He was credited with 1 year, 3 months, and 9 days of net active service.

8. A VA Rating Decision, dated 22 October 2021, shows:

a. Evaluation of PTSD and generalized anxiety disorder with traumatic brain injury (TBI) and post-concussion syndrome, which was currently 50 percent disabling, was increased to 70 percent effective 3 February 2021.

b. Service-connection for erectile dysfunction due to TBI was granted with an evaluation of 0 percent effective 3 February 2021.

c. Evaluation of bilateral hearing loss, which was currently 0 percent was continued.

d. A decision on entitlement to compensation for the following conditions was deferred:

- claw hand aggravation of pre-existing condition
- periorificial dermatitis
- right knee strain

e. Service-connection for the following conditions was denied:

- eustachian tube disorder
- degenerative arthritis of the cervical spine
- fatigue
- bilateral feet plantar fasciitis
- acne
- left ankle strain
- left elbow medial epicondylitis (non-dominant)
- left lower extremity lumbar radiculopathy
- left shoulder strain (non-dominant)
- left ulnar neuropathy (non-dominant)
- nerve condition/spasms of the left shoulder (non-dominant)
- nerve condition/spasms of the right fingers (dominant)
- nerve condition/spasms or the right shoulder (dominant)
- right ankle strain
- right elbow medial epicondylitis (dominant)
- right shoulder strain (dominant)
- sleep apnea

- welts all over

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

10. A DA Form 199 shows:

a. An informal PEB convened on 21 December 2021, where the applicant was found unfit with a recommended disability rating of 40 percent and that his disposition be permanent disability retirement.

b. The applicant's disability is listed as lumbar degenerative arthritis and status post lumbar microdiscectomy (MEB diagnoses (Dx) 1, 2), 40 percent.

c. Although the applicant stated to the VA C&P examiner that the onset of this condition was in 2005, while conducting hand-to-hand combat training, there is insufficient evidence in the MEB case file to support this assertion. The available medical evidence indicates the applicant first sought treatment for this condition in August 2011, while serving in the [redacted]ARNG. He was seen at [redacted] Hospital. This condition presented as acute pain while conducting the sit-up portion of the APFT.

d. Section V: Administrative Determinations shows the PEB made the following findings:

- 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
- 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. The applicant signed the form on 10 May 2022, indicating he was advised of the findings and recommendations of the informal PEB and concurred and waived a formal hearing of his case. He also indicated he did not request reconsideration of his VA ratings.

11. USAPDA Order D 137-09, dated 17 May 2022, shows:

a. The applicant was released from assignment and duty because of physical disability incurred while entitled to basic pay and under conditions that permit his

retirement for permanent physical disability effective 16 June 2022, with a disability rating of 40 percent.

b. His disability was not based on injury or disease received in the LOD as a direct result of armed conflict or caused by an instrumentality of war and incurred in the LOD during a war period as defined by law.

c. His disability did not result from a combat-related injury as defined in Title 26, U.S. Code, section 104.

d. His disability was not incurred in the LOD in a combat zone or as the result of performing combat-related operations.

12. The applicant's National Guard Bureau (NGB) Form 22 (National Guard Report of Separation and Record of Service shows he was placed on the Permanent Disability Retired List (PDRL) on 5 October 2023 and credited with 23 years of total service for retired pay.

13. The applicant provided three witness statements, all of which have been provided in full to the Board for review. All three statements detail the applicant's injuries and state the injuries were sustained during pre-deployments and deployments.

14. A VA Rating Decision, dated 26 October 2022, shows the issue of the applicant's herniated disc and stenosis, lumbar spine status post microdiscectomy was returned for correction of a duty to assist error in the prior decision. They assigned a 40 percent evaluation for his herniated disc and stenosis.

15. The Army rates only conditions determined to be physically unfitting at the time of discharge, which disqualify the Soldier from further military service. The Army disability rating is to compensate the individual for the loss of a military career. The VA does not have authority or responsibility for determining physical fitness for military service. The VA may compensate the individual for loss of civilian employability.

16. 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 in-service incurred back condition disability. He also indicated that PTSD was related to his claim. He provided a personal statement and a statement from his wife describing the impact of his medical conditions to include PTSD, on their lives. In essence, it

appears the applicant requests an Army rating for PTSD with combat code designation as well.

b. The applicant's records were summarized in the ABCMR ROP. He entered the Army National Guard 16Sep1998. He entered a period of active service 29Aug2005. His MOS was 63B20 Wheeled Vehicle Mechanic. He was deployed in Iraq from 20051121 to 20061106. He was released from active duty on 07Dec2006 under AR 635-200 chapter 4 due to completion of required active service. He also was on active orders from 20100102 to 20110209 with deployment to Kuwait 20100302 to 20101212. He was medically retired for back permanent disability at 40% on 16Jun2022.

c. Below are conditions the applicant alleges are directly combat incurred or combat related.

d. Back Condition (Lumbar Degenerative Arthritis and Status Post Lumbar Microdiscectomy)

- 11Jan2004 Report of Medical History (for retention in National Guard). The applicant reported having injured his back in September 2001 when he fell off a ladder ([redacted] Hospital, [redacted]). He received treatment by a chiropractor with relief. During a chiropractor consultation in April 2011, he described prior chiropractic treatment as once a week and then twice a week for a year. He also divulged that 2 weeks prior, he had reinjured his back lifting a heavy box at his civilian work. He reported residual occasional mild back pain.
- 23Nov2005 Buehring TMC. He reported a one-day history of low back pain after repetitive lifting. There were no associated neurologic symptoms. The exam revealed normal lumbosacral spine motion. Straight leg testing was normal. Diagnosis: Backache. He was placed on profile from 23Nov2005 to 30Nov2005. He was to return as needed. The next back treatment record was 6 years later.
- 09Nov2006 Post Deployment Health Assessment (PDHA). He endorsed that he experienced back pain that developed during deployment. He also endorsed that his health stayed about the same or got better while deployed.
- 17Dec2009 Periodic Health Assessment (PHA). He endorsed having occasional back pain after lifting a heavy object in November 2005. He reported that there had been no treatment. He took regulation PT test, with APFT score 205. He selected that he experienced "recurrent back or neck pain, numbness or tingling".
- 15Dec2010 PDHA. He denied symptoms of back pain requiring sick call, quarters, or any continued back pain symptoms during deployment. He denied blast exposure, vehicle accidents, falls and other events.
- 02Apr2011 Post Deployment Health Re-Assessment. He had not been wounded, injured, assaulted, or otherwise physically hurt during deployment.
- 21Apr2011 Primary Care. The visit was to establish care at the [redacted] VA[redacted]. The applicant reported intermittent low back pain. He stated that he had injured

his back “unloading weapons”. In the 23Jun2011 note “unloading of equipment” was reported as the inciting event. Follow-up lumbosacral spine film was normal.

- 29Jul2011 Chiropractic Consult. He reported low back pain started in November 2005, in Kuwait, when he dragged a heavy weapon in a crate and felt his back pop and could not stand up. He was treated with medicine and a back film was completed. He also reported a flair one month prior during which he could not stand or sit due to pain—he took 1 week off work. The pain improved with stretching. Current pain 1/10. There was no radiation of pain into the leg. He began chiropractic treatment.
- 08Aug2011 Chiropractic Note (follow up). He was exercising a lot. The back pain was rated as 1/10 and there was no radiation of pain. The exam showed lumbar motion within normal limits. Negative straight leg testing.
- 14Aug2011 [redacted] Hospital Emergency Department. He had back pain (sharp) that occurred 40 minutes earlier while doing sit-ups. MR imaging at the time showed asymmetric disc bulge at L3-L4 and L4-L5.
- 18Sep2011 signed Statement of Medical Examination and Duty Status showed that on 14Aug2011 in [redacted] (while on inactive duty training), he was doing the sit-up event during his annual APFT and felt a sharp pain radiating down his back. Diagnoses: Degenerative Disc Disease and Back Sprain.
- 30Jun2021 Back Conditions DBQ indicated the service treatment record showed a 2001 back injury. No further details were provided. The applicant reported his back condition began in 2005 when he was flipped during hand-to-hand combat.
- 20Aug2021 MEB NARSUM indicated the onset of the back condition as 2011.
- 21Dec2021 Informal Physical Evaluation Board found sole condition Lumbar Degenerative Arthritis and Status Post Lumbar Microdiscectomy unfitting for continued service at 40%. The case was adjudicated as part of the Integrated Evaluation System (IDES); therefore, the rating was determined by the VA rating authority using VASRD principles. The PEB determined the disability was not based on combat or combat related injury or due to an instrumentality of war.

e. Rationale/Opinion

The ARBA Medical Reviewer makes the following observations concerning the applicant’s back condition: First back injury due to fall from ladder in September 2001 (no LOD determination was found) from which he recovered with medication and chiropractor services. Second back injury (in 2001) lifting a heavy box at his civilian work resulting in residual mild intermittent back pain. Third back injury occurred in theatre in November 2005 (due to repetitive lifting and at least one occurrence involving a heavy military weapon) that did not require specialist intervention with residual occasional, non-duty limiting back pain. He deployed without incident in 2010/2011. Then upon return from deployment in April 2011 while unloading weapons/equipment he had an acute exacerbation of back pain requiring specialist intervention and a week off from work (no LOD determination was found). The back film was normal at that time and there was no radiation of pain. On 14Aug2011 he developed severe acute back

pain during the sit up portion of the APFT (approved In-LOD for Asymmetric Disc Bulging L3-L4 and L4-L5). After this injury, multispecialty intervention was required over time to include physical therapy (2011), back surgery by neurosurgery in April 2015, and field blocks in 2020 and lumbar facet injection in March 2021 by pain management. While the applicant sustained multiple back injuries over time, the August 2011 injury was a significant injury— prior to this injury, he did not have radiation of back pain into the leg and the concurrent lumbar MRI revealed multilevel disc herniations as well. Despite multimodal interventions, after the 2011 injury, he was ultimately found unfit for continued service. The MEB NARSUM indicated the condition onset for Lumbar Degenerative Arthritis and Status Post Lumbar Microdiscectomy was 14Aug2011 due to injury while doing sit-ups.

f. Left Rib Contusion and Muscle Spasm

The applicant submitted an Individual Sick Slip dated 13Oct2005 pertaining to a back/rib injury during combatives class. Treatment notes indicated the injury area was left flank and left ribs. He had pain with coughing and deep breaths. He had pain with direct pressure to the site or with bending to the side. He did not have pain with lifting. Pertinent exam findings included palpable tenderness in the left 7th and 8th intercostal space (between the ribs) and observed muscle spasm. There was no tenderness of the spine. Diagnoses: Left Rib Contusion and Muscle Spasm. The applicant's unsigned Statement of Medical Examination and Duty Status showed a left rib contusion with spasm and pain injury occurred on 07Oct2005 at Ft Dix, NJ, while he was on active duty. Treatment notes indicated he was given quarters first, then on 09Oct2005, he was given a profile with light duty and no IBA for 72 hours. He was also treated with anti-inflammatories and muscle relaxant. He was last seen for this condition on 13Oct2005 when he was continued on light duty and given quarters for another 24 hours. He was healing gradually, and it was anticipated that that he would be better in 2-3 weeks. He was to return for follow up at that time. were no records for this condition after 13Oct2005.

g. Rationale/Opinion

The applicant contends the injury noted on Individual Sick Slip pertaining to a back/rib injury during combatives class, was the onset of his back condition and alleges it is a combat related injury. However, details in treatment records showed this was a left rib condition/left flank condition, distinct from the lumbar spine condition. A DA Form 2173 was completed; however, a LOD determination was not found for the rib condition. The applicant was not rated by the VA for a left rib condition. The condition apparently did not warrant further medical intervention and therefore did not fail medical retention standards of AR 40-501 chapter 3 at the time of medical retirement from service.

h. BH Condition. The applicant claimed PTSD to include Anxiety; however, this condition was not included in the MEB Proceedings.

- 17Dec2009 PHA. He denied behavioral health (BH) concerns.
- 15Dec2010 PDHA. He declined the need for TBI and mental health referral.
- 21Apr2011 Psychology Note. The applicant recently returned from deployment and was establishing care at the [redacted] VA[redacted]. He recalled repeated exposure to indirect fire while in Iraq. Most significant combat stressor incident: A mortar landed 25 meters from him but did not explode. The PCL-C score of 17 was not consistent with PTSD (threshold is 50). PHQ score of 0 was consistent with minimal depressive symptoms. GAD-7 score of 0 was consistent with minimal anxiety symptoms. The BH specialist deemed a BH referral was not needed at the time and he agreed.
- 17Aug2013 [redacted] Medical Center. He was psychiatrically admitted per Baker Act (involuntary hold) for "suicide risk". The applicant adamantly denied suicide ideation but stated he was experiencing extreme frustration due to (perceived) lack of treatment for his back. He endorsed being happily married 12 years and working 15 years for the military as a mechanic. The mental status exam showed sad mood and flat affect range. He was sleeping 3 hours/night. No prior BH history including suicide/homicide ideation or attempts, mania, or psychosis. No prior treatment to include meds, counseling, or hospitalization. Rare alcohol use, no drug use. He was discharged the next day by his request. Diagnosis: Chronic Pain Disorder (Back). The provider wrote "no psychotropic meds were started as not warranted". He was to follow up at [redacted] VA[redacted].
- 22Aug2013 he was issued a temporary 90-day S3 profile for Suicide Ideation.
- 04May2014 and 07Jan2018 PHA. No mental health concerns.
- 09Jan2016 and 07Jan2018 Deployment Mental Health Assessment. No mental health concerns.
- 08Oct2019 American Legion Rating Decision showed service connection was granted for PTSD to include Generalized Anxiety Disorder (GAD) at 50% effective 29Jul2019.
- NCO Evaluation Reports from 20180403 thru 20190402 and from 20190403 thru 20200402 rated overall performance as 'exceeded standards" and senior rater overall potential as "highly qualified".
- Commander's Performance and Functional Statement (DA Form 7652) signed 27Feb2021 indicated the applicant made reasonable decisions including complex or unfamiliar ones; he had effective relationships with both supervisors and co-workers; he performed well, and his medical conditions did not appear to have any negative impact on performance of duty and did not impact the unit's mission. He was deployable and could perform his duties without limitations.
- 20Aug2021 permanent physical profile was S1.
- 22Oct2021 VA Rating Decision showed PTSD and GAD with TBI and post-concussion syndrome currently at 50% was increased to 70%.

- In 2022, he was referred by his primary care provider for treatment for "chronic PTSD, anxiety, and memory loss (25Mar2022 Outpatient Evaluation [redacted] VA[redacted], a few months prior to discharge). Despite a positive family history for suicide (father and cousin), he had no premilitary psychiatric history. He was married 20 years and employed as a mechanic for the [redacted] National Guard. He completed deployments to Iraq and Kuwait. He endorsed having depression symptoms, and characteristic PTSD symptoms (hypervigilance, intrusive thoughts) that were more prominent in the past. Major current concerns were poor sleep due to back pain and anxiety; and worry concerning whether he would be able to work much longer due to physical concerns. Diagnoses: GAD and PTSD. An anti-psychotropic and medication for sleep were prescribed. Therapy was scheduled. He stopped taking the anti-psychotropic, but he continued the sleep aid. He attended follow up visits the remainder of his time in service and afterward.

i. Rationale/Opinion

The 30Aug2019 Initial PTSD DBQ, 25Jun2021 Review PTSD DBQ, and 25Jun2021 Initial TBI DBQ, were not available for this review. The applicant's BH condition was not reviewed during the MEB proceedings. He first presented for BH treatment several months after completion of the MEB NARSUM (narrative summary). The BH condition required minimal treatment while the applicant was in service. Command did not indicate that his BH condition had significantly impacted his military performance. He maintained close family relations and long-term employment with the Florida National Guard. Based on records available for review, there was insufficient evidence to support the BH condition to include PTSD with TBI and GAD, failed medical retention standards of AR 40-501 chapter 3 at the time he was medically retired. Referral for medical discharge processing for the BH condition is not warranted. Conditions that are found unfitting by the PEB receive ratings determined by the VA rating authority. The PEB renders a decision for combat designation on conditions that are found unfitting.

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. The Board found the available evidence sufficient to consider this case fully and fairly without a personal appearance by the applicant.

2. The Board found insufficient evidence to support changing the PEB's determination that his disabling condition did not meet the definition of "combat related" as defined in law. Based on a preponderance of the evidence, the Board determined the PEB's determination that his disabling condition is not combat related was not in error or unjust.

BOARD VOTE:

Mbr 1	Mbr 2	Mbr 3	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
[redacted]	[redacted]	[redacted]	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.

4/24/2024

X [redacted]

CHAIRPERSON

[redacted]

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 1413a, as amended, established Combat-Related Special Compensation (CRSC). CRSC provides for the payment of the amount of money a military retiree would receive from the VA for combat-related disabilities if it were not for the statutory prohibition for a military retiree to receive a VA disability pension. Payment is made by the Military Department, not the VA, and is tax free. Eligible members are those retirees who have 20 years of service for retired pay computation (or 20 years of service creditable for Reserve retirement at age 60) and who have a physical disability retirement with less than 20 years' service for injuries that are the direct result of armed conflict, especially hazardous military duty, training exercises that simulate war, or caused by an instrumentality of war. CRSC eligibility includes disabilities incurred as a direct result of:

- armed conflict (gunshot wounds, Purple Heart, etc.)
- training that simulates war (exercises, field training, etc.)
- hazardous duty (flight, diving, parachute duty)
- an instrumentality of war (combat vehicles, weapons, Agent Orange, etc.)

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

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

7. 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.

8. Army Regulation 15-185 (Army Board for Correction of Military Records (ABCMR)) prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR. Paragraph 2-11 states applicants do not have a right to a formal hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

//NOTHING FOLLOWS//