

IN THE CASE OF: [REDACTED]

BOARD DATE: 12 December 2024

DOCKET NUMBER: AR20230007842

APPLICANT REQUESTS: in effect, after reversing the combat-related determinations made by his physical evaluation board (PEB), amend U.S. Army Physical Disability Agency (USAPDA) Order Number D 291-13, dated 17 October 2016, to show that his disabling conditions resulted from combat-related injuries.

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

- DD Form 149 (Application for Correction of Military Record)
- Afghanistan Deployment Orders with amendment
- Defense Finance and Accounting Service (DFAS) Form 7220/148 (Retiree Account Statement)
- Department of Veterans Affairs (VA) Benefits Letter
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- DA Form 5016 (Chronological Statement of Retirement Points)
- DD Form 261 (Report of Investigation – Line of Duty and Misconduct Status)
- DD Form 2807-1 (Report of Medical History)
- DD Form 2808 (Report of Medical Examination)
- North Atlantic Treaty Organization Travel Order
- USAPDA Order Number 291-13
- Printout, VA Disability Ratings
- Department of Defense (DOD) Military Combat Hazard Pay
- VA Medical Records, in four parts

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, in effect, the U.S. Army Human Resources Command (HRC) denied his request for Combat-Related Special Compensation (CRSC); because of this, he needs his retirement orders to show his medical conditions are combat-related.

Currently, while the orders reflect a 90 percent disability rating, they do not confirm he incurred his conditions while in combat.

a. The applicant points out that, when he enlisted into the Regular Army, he was in perfect health; between 2011 and 2012, he deployed to Afghanistan, and his unit used burn pits, which negatively affected his health. While deployed, he sought medical treatment for respiratory conditions.

b. In 2014, he ended his Regular Army service and joined the U.S. Army Reserve (USAR); as a USAR member, he began to have problems meeting the USAR's physical standards. By that point, the VA had already awarded him a 90 percent disability rating, and he was one of the first individuals to join VA's "burn pit registry."

c. "At the time of my medical retirement, I did not notice that my orders said that my conditions for getting retired were not incurred in combat or during wartime. Therefore, I was denied CRSC benefits despite the medical board knowing that all my medical conditions (all service-connected) were incurred in combat, and they had received all of the necessary medical records that justified my retirement to begin with. I had literally had hundreds and hundreds of medical documents, medical opinions, tests, etc. that I provided them and the VA provided as well which resulted in my medical retirement at the 90 percent from the US Army."

d. "I believe this error of not stating that my conditions were incurred in wartime was a mistake on my orders that now prevents me from applying to CRSC benefits that I'm entitled to. At the same time, my same medical conditions from Afghanistan have continued to deteriorate over the years after my retirement to the point that the VA recently made me 100 percent Permanent and Total disabled veteran with an effective date of 06/15. All I am asking is to get assistance correcting the error on my retirement orders so that it can clearly state that it was all incurred in combat in Afghanistan so that I can qualify for CRSC benefits."

e. "This is also personal to me because one of my grandfathers was in bed for 20 years for unknown cancers and medical conditions after his exposure to Agent Orange. He never received the proper financial assistance he deserved after serving his country. Veterans like myself with burn pit-related medical conditions initially did not get the credit we deserved for multiple years. Medical boards and most medical personnel thought it was just not related to combat."

f. The applicant is asking for the following conditions to be reflected as combat-related; he maintains all were the direct result of exposure to burn pits:

- Asthma/sleep apnea
- Chronic urticarias

- Chronic Migraines
- Post-Traumatic Stress Disorder (PTSD)
- Chronic Sinusitis
- Chronic Rhinitis

3. In support of his request, the applicant provides documents from his service record, a DFAS form showing his retired pay, VA correspondence and rating decisions, and an extract from his VA medical records.

4. A review of the applicant's service record shows the following:

a. On 8 June 2010, the applicant enlisted into the Regular Army for 4 years; upon completion of initial entry training and the award of military occupational specialty 89A (Stock Control Accounting Specialist), orders assigned him to Fort Drum, NY, and he arrived at his new unit, on or about 5 November 2010.

b. On 14 October 2011, the applicant deployed to Afghanistan; on 31 August 2012, he redeployed to Fort Drum. On 24 February 2014, the Army honorably released the applicant from active duty and transferred him to the USAR Control Group (Reinforcement). His DD Form 214 shows he completed 3 years, 8 months, and 17 days of his 4-year enlistment contract.

c. Effective 28 April 2014, based on the applicant's voluntary request, HRC transferred him to a Troop Program Unit (TPU). On 1 January 2016, the applicant's TPU command promoted him to staff sergeant (SSG)/E-6.

d. On 28 June 2016, the applicant's command completed two line of duty (LOD) investigations, one pertaining to Asthma, and the other regarding Chronic Urticaria; the LOD investigating officer recommended a finding of in-line-of-duty for both, and, on 16 July 2016, the recommendations were approved.

e. On 4 October 2016, a PEB found the applicant unfit for continued military service due to asthma, back, skin, and bilateral knee conditions; the PEB specifically attributed the applicant's asthma and skin conditions to burn pit exposure. The PEB additionally recommended permanent disability retirement at a 90 percent disability rating.

f. Effective 21 November 2016, USAPDA Order Number D 291-13 placed the applicant on the Permanent Disability Retired List. The Order included the following two comments:

- "Disability is based on injury or disease received in LOD (line of duty) 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: NO"

- "Disability resulted from a combat related injury as defined in (Title) 26 USC (U.S. Code) (section) 104 (Compensation for Injuries or Sickness): NO"

g. On 15 March 2017, the applicant applied for CRSC.

(1) The applicant identified the following conditions as qualifying for CRSC:

- Asthma with sleep apnea
- Chronic Idiopathic Urticaria
- Rhinitis with Turbinate Hypertrophy and Deviated Septum
- Sinusitis

(2) On 23 March 2018, HRC denied the applicant's request, stating it was unable to verify the foregoing conditions as combat-related.

h. On 29 June 2023, the applicant requested reconsideration of HRC's previous determination, due to VA's decision to grant him a 100 percent disability rating after finding his service-connected conditions were related to burn pit exposure in Afghanistan. On 16 November 2023, HRC partially approved the applicant's request. While HRC still was unable to verify the applicant's Chronic Idiopathic Urticaria as combat-related, the following were validated:

- Asthma with sleep apnea
- Rhinitis with Turbinate Hypertrophy and Deviated Septum
- Sinusitis

5. On 23 October 2023, USAPDA provided an advisory opinion.

a. USAPDA noted that, per the PACT Act, the applicant's conditions were now considered combat-related; as a result, USAPDA determined the applicant's request to be "legally insufficient." (The Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics (PACT) Act of 2022, is a law that expands VA health care and benefits for Veterans exposed to toxic substances during Vietnam, the Gulf War, and the Post-9/11 era. The Act covers 23 presumptive conditions, including asthma).

a. "The PACT Act provides a legal presumption of service connection for a specific list of conditions associated with burn pit exposure due to service in several countries, including Afghanistan. The presumption of service connection is for VA medical and compensation benefits. The PACT Act does not appear to extend the presumption of service connection to the DOD."

b. "USAPDA has requested legal guidance from the DOD as to the PACT Act's applicability to Disability Evaluation System (DES) cases but has not yet received such guidance. Moreover, the PACT Act does not create a right to Combat Related Special Compensation (CRSC) pay. CRSC is a DOD benefit that is not included or referenced in the PACT Act. We do not apply CRSC, as it is awarded or denied by HRC on behalf of the DOD."

c. In the applicant's case, he "did not present any specific evidence of what was being burned in the burn pits he was exposed to at the time of his service. Burn pits are used world-wide to dispose of all sorts of trash from industrial to medical waste to everyday trash. None of these would qualify as engaging with an enemy of the U.S. (identified by USAPDA as a "V1 Code"), instrumentality of war or ultra-hazardous service (V3 code). Without knowing what was being burned in the burn pit at the time of [applicant's] exposure, it would be speculative, at best, to say he should have been awarded a v1/3 combat code."

d. "Finally, in a related case, on 17 August 2023, the Army Physical Disability Appeal Board (APDAB) agreed with (USAPDA) that exposure to burn pits on its face does not confer v1/3 codes, but it does confer a V4 (incurred in a combat zone) code if the condition arose in a combat zone."

6. On 30 October 2023, the Army Review Boards Agency provided the applicant a copy of USAPDA's advisory for review and the opportunity to submit matters and/or evidence in rebuttal; the applicant did not respond.

#### 7. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. Documentation reviewed included the applicant's ABCMR application and accompanying documentation, the military electronic medical record (EMR – AHLTA and/or MHS Genesis), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and/or the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant has applied to the ABCMR requesting reversal of the United States Army Physical Disability Agency's (USAPDA) and the United States Army Human Resources Command's (USAHRC) determinations that his Chronic Idiopathic Urticaria was not combat related. He states in part:

“Our unit had burn pits and I lived and worked around them during the entire deployment. I had additional duties to burn things using the burn pits as well. While in Afghanistan I had to be seen at the hospital for respiratory conditions that I began to develop. While deployed and to present, I have developed chronic asthma, sleep apnea, chronic sinusitis, chronic rhinitis, severe chronic urticarias (hives), severe chronic migraines, and PTSD

All of the below conditions pinned point directly to the start of my deployment in Afghanistan and I did not have them prior to deploying. Also, all directly related to burn pits:

1. Asthma/sleep apnea (60%) which is the highest rating
2. Chronic urticarias (60%) which is the highest rating
3. Chronic Migraines (50%) which is the highest rating
4. PTSD (50%)
5. Chronic sinusitis (0%) I had surgery performed by VA to improve condition
6. Chronic rhinitis (0%) I had surgery performed by VA to improve condition.”

c. The Record of Proceedings details the applicant’s military service and the circumstances of the case. Orders published by USAPDA on 17 October 2016 show he was permanently retired for physical disability Retirement on 21 November 2016 under provisions provided in chapter 4 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (20 March 2012), and that none of his disabilities were determined to have been combat related.

d. USAHRC’s Combat Related Special Compensation (CRSC) service has already determined his Asthma with Sleep Apnea, Rhinitis with Turbinated Hypertrophy and Traumatic Deviated Septum, and Sinusitis to be combat related for the purpose of receiving CRSC (page 270 of the supporting documents). Neither his Chronic Migraines nor PTSD were found unfitting by USAPDA and he has not applied to USAHRC requesting CRSC for either condition. Thus, these conditions will not be addressed.

e. On 11 December 2007, his informal PEB determined he had five (5) medical conditions unfitting condition for continued service: “Asthma with Sleep Apnea,”

“Lumbosacral Strain,” “Chronic Idiopathic Urticaria,” “Right Patellofemoral Syndrome,” “Left Patellofemoral Syndrome.” The remaining conditions (Allergic Rhinitis/Chronic Sinusitis; Obstructive Sleep Apnea; and Acne) were determined to not be unfitting for continued service.

f. The PEB noted the onset of his Chronic Idiopathic Urticaria was while deployed in Afghanistan and his “Method of injury is related to burn pit exposure.” They made the administrative determination the condition was not combat related: They found no evidence that it was the direct result of armed combat; was related to the use of combat devices (instrumentalities of war); the result of combat training; incurred while performing extra hazardous service though not engaged in combat; incurred while performing activities or training in preparation for armed conflict in conditions simulating war; or that he was a member of the military on or before 24 September 1975.

g. Section b (3) of 26 U.S. Code § 104 requires there be a cause-and-effect relationship in order to establish the finding that a medical condition is combat related:

(3) Special rules for combat-related injuries: 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.

h. Combat-related disability for CRSC is defined in 10 U.S.C. § 1413a(e) as a disability that is "attributable to an injury for which the member was awarded the Purple Heart" or was incurred "as a direct result of armed conflict," "through an instrumentality of war," "while engaged in hazardous service," or "in the performance of duty under conditions simulating war."

i. The pulmonary notes and the DA 199 Rationale state the applicant was exposed to burn pit smoke but this does not meet the criteria for a combat related finding under instrumentality of war. An instrumentality of war is defined as a vehicle, vessel, or device designed primarily for military service and intended for use in such Service at the time of the occurrence or injury. They may also include such instrumentalities not designed primarily for military service if use of or occurrence involving such

instrumentality subjects the individual to a hazard peculiar to military service. For a disability to be incurred as a result of an instrumentality of war under the Department of Defense's 2004 Program Guidance, (1) the "disability must be incurred incident to a hazard or risk of the service" and (2) there "must be a direct causal relationship between the instrumentality of war and the disability."

j. Neither burn pit fires, the burning of oil or refuse are instrumentalities, vehicle fumes, nor dusts are instrumentalities of war designed primarily for a military purpose. While there has been much study into the effects of the oil produced smoke and burn pit smoke on Soldiers and smoke in general is hazardous, smoke from these sources is not an instrumentality of war; nor is exposure to smoke from burning oil, refuse, burn pits, or structures uniquely military and different from occurrences in similar circumstances in civilian pursuits. Fumes or gases which may render a condition combat related via an instrumentality of war when the condition is directly caused by enemy attack (e.g., a chemical agent) or when caused from the burning of such items as military ordnance, vehicles, or other military material. There is no evidence this was the case.

k. In addition, there is a note in paragraph 630502 of DoD 7000.14R:

"An uncorroborated statement in a record that a disability is combat-related will not, by itself, be considered determinative for purposes of meeting the combat-related standards for CRSC prescribed herein. CRSC determinations must be made based on the program criteria."

l. It is the opinion of the ARBA medical advisor there is insufficient probative evidence to warrant reversals of USAPDA's and or USAHRC's determinations that his Chronic Idiopathic Urticaria was not combat related.

#### BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted.

2. The Board carefully considered the applicant's contentions, his record of service, evidence in the military record, the MEB/PEB determination and his medical retirement from active duty. The Board considered the applicant's statement regarding his conditions, his VA rating, the USAPDA legal review and the review and conclusions of the Agency medical advising official. The Board found insufficient evidence to conclude that the requested condition was the result of direct ground combat or incurred as a result of an instrumentality of war under the Department of Defense's 2004 Program Guidance. The Board found insufficient cause and effect evidence to warrant reversals

of USAPDA's and or USAHRC's determinations that his Chronic Idiopathic Urticaria was not combat related. Based on a preponderance of evidence, the Board determined that the categorization of the applicant's Chronic Idiopathic Urticaria was not in error or unjust.

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 for correction of the records of the individual concerned.

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. Title 10, U.S. Code, section 1556 (Ex Parte Communications Prohibited) 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 applicant's (and/or their counsel) prior to adjudication.

3. Title 10, U.S. Code, section 1413a (Combat-Related Special Compensation (CRSC)), 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

3. Effective 1 January 2008, Department of Defense (DOD) implemented supplemental guidance based on the enactment of the Fiscal Year 2008 National Defense Authorization Act (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).

4. Title 26 (Internal Revenue Code), U.S. Code, 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.

5. Title 38 Code of Federal Regulations (CFR) (Pensions, Bonuses, and Veterans' Relief), 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.

6. The DOD Financial Management Regulation 7000.14-R, Volume 7B (Military Pay Policy – Retired Pay), currently in effect, includes combat-related injury definitions:

a. Direct Result of Armed Conflict.

(1) 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.

(2) 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.

(3) 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.

b. 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.

c. 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.

d. Instrumentality of War.

(1) 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.

(2) 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.

(3) 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.

//NOTHING FOLLOWS//