

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 28 August 2024

DOCKET NUMBER: AR20230008048

APPLICANT REQUESTS: correction of his records to accurately reflect

- Combat Related Special Compensation (CRSC)
- Retirement
- Back pay
- Personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- DD Forms 214 (Report of Separation from Active Duty)
- DD Form 215 (Correction to DD Form 214)
- DA Form 2-1 (Personnel Qualification Record)
- Department of Veterans Affairs (VA) Rating Decision
- Memorandum to the Office of the Surgeon General (OTSG)
- DA Form 199 (Informal Physical Evaluation Board (PEB) Proceedings)
- Physical Disability Information Report
- VA Verification of Service-Connected Disabilities
- DA Forms 2860 (Claim for CRSC)
- CRSC Application
- Letter to Applicant from U.S. Army Human Resources Command (AHRC)
- Verified as Combat Related
- Army CRSC Reference Guide
- CRSC Pay Statement

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's complete service record was not available for the Board's review; however, the documents provided by the applicant and the documents that were available from his service record are sufficient for the Board to make a determination in his case.

3. The applicant's attorney states, on behalf of the applicant, the applicant has requested and received CRSC and the calculation from AHRC is in error. The applicant believes the miscalculation is both procedurally and substantively defective. The applicant requests back pay and correction of his records to accurately reflect CRSC and retirement. The applicant believes AHRC and Defense Finance and Accounting Service (DFAS) incorrectly relied upon the VA to set the retirement and CRSC calculations. This resulted in an erroneous calculation of benefits and pay.

4. The applicant provides the following documents:

a. DD Form 214, which shows he was honorably discharged from the Regular Army on 9 August 1979. DD Form 215, 8 December 2021, corrected the DD Form 214 to show retirement for disability permanent and transferred him to the U.S. Army Reserve Control Group (Retirement).

b. DA Form 2-1 (Personnel Qualification Record) shows he had service in Germany on three occasions and in Vietnam for 21 months.

c. VA Rating Decision, 14 November 2018, shows he had service-connected disability for:

- Post traumatic stress disorder (PTSD) with traumatic brain injury (TBI), 70 percent, 3 August 2018
- Gunshot wound bladder with recurrent urethral structure and urinary tract infections, 20 percent, 10 August 1979
- Status post gunshot wound left gastrocnemius muscle, 10 percent, 14 June 2012
- Status post shrapnel wound of left thigh, leg, and ankle, 10 percent, 14 June 2012
- Traumatic nerve injury, right lower extremity, 10 percent, 14 June 2012
- Traumatic nerve injury, left lower extremity, 10 percent, 14 June 2012
- Right knee degenerative arthritis, 10 percent, 3 August 2018
- Tinnitus, 10 percent, 3 August 2018
- Migraine headaches, 10 percent, 3 August 2018

d. Letter from the ABCMR to OTSG, 30 October 2020, states the recommendation of the ABCMR was approved. They requested necessary administrative action be taken to effect the correction of records no later than 29 March 2021.

e. DA Form 199, 13 September 2021, shows he had PTSD and TBI at a rating of 50 percent disability and recurrent urethral/bulbar stricture status post multiple dilation via cystoscopy, recurrent urinary tract infections and gunshot wound complications of severe dysuria and terminal hematuria at a rating of 20 percent disability. The PEB found he was physically unfit for duty and recommended a rating of 60 percent and that he be permanently retired due to disability. He concurred with the findings and waived a formal hearing of his case.

f. Physical Disability Information Report, 7 December 2021, shows his date of separation was 9 August 1979 and date placed on the retired list was 10 August 1979. His disability is based on injury or disease received in the line of duty as a direct result of armed conflict or caused by an instrumentality of war and incurred in the line of duty during a period of war as defined by law.

g. DD Forms 2860, 14 January 2014, shows he was requesting CRSC for:

- PTSD and TBI
- gunshot wound bladder with recurrent urethral structure and urinary tract infections
- right knee degenerative arthritis
- status post gunshot wound left gastrocnemius muscle
- status post shrapnel wound of left thigh, leg, and ankle
- traumatic nerve injury, right lower extremity
- tinnitus
- migraine headaches
- malaria
- multiple well healed shrapnel wounds to trunk
- removal lipoma right chest
- multiple well healed shrapnel wounds to left knee
- multiple well healed shrapnel wounds to pelvis
- residual scars from shrapnel wounds lower left extremity
- residual scars shrapnel wounds lower left extremity previously diagnosed as multiple healed wounds to left knee
- loss of use of creative organ associated with traumatic nerve injury right lower extremity

h. Letter from AHRC, CRSC application, 20 January 2022, states they were unable to process his CRSC claim for one or more of the following reasons they were unable to verify his retired pay account and records showed he did not have a VA waiver.

i. Letter from AHRC, CRSC, 25 August 2022, shows AHRC reviewed his claim for CRSC and had approved his claim in accordance with current program guidance. The following conditions were verified as combat related:

- PTSD with TBI, 30 percent, effective January 2008 through October 2008
- PTSD with TBI, 50 percent, effective November 2008 through August 2018
- PTSD with TBI, 70 percent, effective September 2018
- S/P gunshot wound, bladder with recurrent urethral structure and urinary tract infections, 20 percent, effective January 2008
- Bilateral status post gunshot wound left gastrocnemius muscle, 10 percent, effective July 2012
- Bilateral status post shrapnel wound of left thigh, leg, ankle, 10 percent, effective July 2012
- Bilateral, status post shrapnel wound of left, thigh, leg, and ankle, 10 percent, effective July 2012
- Bilateral, traumatic nerve injury, right lower extremity, 10 percent, effective July 2012
- Bilateral, traumatic nerve injury, left lower extremity, 10 percent, effective July 2012
- Tinnitus, 10 percent, effective September 2018
- Migraine headaches, 0 percent, effective June 2009 through August 2018
- Migraine headaches, 10 percent, effective September 2018
- Multiple well healed shrapnel wounds to trunk, 0 percent, effective January 2008
- Multiple well healed shrapnel wounds to left knee, 0 percent, effective January 2008 through June 2012
- Multiple well healed shrapnel wounds to pelvis, 0 percent, effective January 2008
- Residual scars from shrapnel wounds, left lower extremity, 0 percent, effective July 2012
- Residual scars shrapnel wounds, left lower extremity, 0 percent, effective July 2012
- Loss of use of creative organ, 0 percent, effective September 2018

As of September 2018, his total combat related disability was 90 percent.

5. The applicant's service record contains the following documents:

- a. DD Form 4 shows he enlisted in the Regular Army on 9 September 1968 and remained in the Regular Army through reenlistments.
- b. Disposition Form subject request for separation from the U.S. Army, 9 August 1979 shows the applicant requested separation from the Army.
- c. The applicant's medical records, which are available for the Board's review.

6. The applicant petitioned the Board to change his honorable discharge to show he was medically retired due to a physical disability in AR20110000723. On 26 July 2011, the Board found the evidence presented did not demonstrate the existence of a probable error or injustice. Therefore, the Board determined that the overall merits of the case were insufficient as a basis for correction of his records.

7. The applicant petitioned the Board, through counsel and via court remand, to correct his records to show he retired by reason of physical disability and approval of retroactive CRSC effective 1 January 2008 for combat wounds from gunfire and mortar/rocket fire during his service in Vietnam in AR20180000006. On 18 September 2020, the Board determined the evidence presented was sufficient to warrant partial amendment of the decision of the ABCMR set forth in AR20110000723, 26 July 2011. As a result, the Board recommended that all of his Department of the Army records be corrected by referring his records to the OTSG for review to determine if he had any conditions that did not meet medical retention standards.

a. If OTSG identified conditions that did not meet retention standards, he should be afforded processing through the Disability Evaluation System to determine if any conditions not meeting medical retention standards were unfitting, at the time.

b. If any unfitting conditions are identified, they should be rated in accordance with the governing policies and the appropriate disposition should be implemented (discharge with severance pay or retirement due to disability).

8. On 22 August 2023, the Chief, Special Compensation Branch, AHRC, provided an advisory opinion, which states:

a. The CRSC office has reviewed the available electronic personnel records for the applicant. The CRSC percentages previously awarded to him were correct.

b. In March 2023, he received a rating percentage increase from the VA. This change increased his percentage for PTSD from 70 percent to 100 percent. His CRSC decision letter has been updated to reflect this change. A copy of the letter has been sent to the applicant and to DFAS for review of his entitlement.

c. Should the VA rating percentages of his CRSC approved conditions change, he should inform the CRSC office of the changes.

9. AHRC included the CRSC letter, 23 August 2023, which shows they had reviewed his reconsideration request for CRSC and had approved his claim in accordance with current program guidance. His disability rating for PTSD with TBI was increased to 100 percent effective April 2023. His total combat related disability was at 100 percent effective April 2023.

10. On 30 August 2023, the advisory opinion was provided to the applicant and his attorney to allow them the opportunity to respond. On 4 September 2023, his attorney responded stating:

a. The applicant, a former member of the U.S. Army, has requested to correct his retroactive retirement and CRSC compensation. This request stems from the advisory opinion provided by AHRC, which conducted an incomplete investigation into the matter. The advisory opinion referenced two documents: The Department of Defense Financial Management Regulation and Title 10 U.S. Code (USC) 1413a.

b. The CRSC office reviewed the applicant's electronic personnel records and found that the CRSC percentages awarded to him were correct. He received a rating percentage increase from the VA in March 2023, which increased his percentage for PTSD from 70 percent to 100 percent. The CRSC decision letter has been updated to reflect this change and was sent to him and DFAS. He disagrees with AHRC's analysis of the case and is providing a rebuttal to the advisory opinion for his case.

c. In this instance, Army Regulations have modified the criteria for awards pertaining to service-connected injuries. These changes apply from the original effective date of 8 August 1979, designated as his retroactive retirement date, up to the present regulation. Both the compensation system of the U.S. Army and the VA have undergone changes since his retirement. Throughout the years, various versions of Army Regulations and directives have been implemented. Servicemembers who suffered service-connected injuries resulting in their separation from the U.S. Army in 1979 received compensation directly from the U.S. Army and administered by the U.S. Army, without involving the VA. However, as of 8 December 2021, when this Board made its decision, the system had undergone a transformation. The VA now serves as the governing body responsible for directly compensating wounded and retired servicemembers, in accordance with the current regulations.

d. For the applicant's situation, it is imperative to refer to the regulations and directives that were in effect on 8 August 1979, rather than those in effect on 8 December 2021. This ensures accuracy and adherence to the appropriate guidelines for his case. This also would be equitable in the administration of the benefits.

e. The current VA disability compensation system should not have been considered as the regulations in effect on 8 August 1979, did not defer to the VA, nor was the VA any part of the Army Retirement Compensation system, at that time. The applicant had his disability retroactively determined by the PEB as of 8 August 1979, which would have been 60 percent for PTSD and 60 percent for TBI. Had the proper version of the regulations and directives been applied, his disability rating should have been at a minimum of 50 percent, not the 30 percent that was initially assigned by the VA around 2004. This discrepancy is being ignored by AHRC's advisory opinion and is changing

the way the overall evaluation process would have worked for the applicant had he been properly retired on 8 August 1979.

f. The Board should prioritize the relevant regulations effective as of 8 August 1979, and exclude the involvement of the VA in the decision-making process. Once the DOA established his medical retirement rating on 8 August 1979, that should have been the rating for determining his retirement and subsequent eligibility for CRSC. The U.S. Army should have solely handled his basic retirement, free from an interference from the VA. According to the U.S. Army's Medical Evaluation Board system, he should have initiated the retirement process with a minimum disability rating of 60 percent, considering all his injuries and other factors that could potentially contribute to a disability rating of approximately 70 percent or higher.

g. Regarding his eligibility for CRSC, if the appropriate regulations and directives had been applied to determine his retroactive retirement, his DOA retirement rating of at least 50 percent should have been utilized, similar to how other servicemembers who retired in 1979 were grandfathered into CRSC with their DOA retirement ratings when it was introduced in 2004.

h. He served in the U.S. Army from 1968 to 1979, and by the time of his discharge from the Army in 1979, the Army did not evaluate him. However, in 2021, at the direction of this Board, the PEB, on 8 December 2021, retroactively determined his disability rating as 60 percent, effective 8 August 1979. In determining his retroactive retirement compensation, the involvement of the VA in his retirement was incorrect. As the VA had no authority or say in DOA retirement policy until 2004. The incorrect calculation of the CRSC and the initial involvement of the VA in his retirement created an error that should be corrected.

i. Additionally, there is argument that he would be precluded from requesting additional compensation beyond the 2004 date. CRSC is subject to a 6 year statute of limitations. The applicant, in this case, would file his CRSC claim within 6 years of any VA rating decision that could make him eligible for CRSC or the date he becomes entitled to retirement pay. He would be exempt from this limitation because his claim is based on an ABCMR decision, which changes his original dates of notice.

j. The applicant disputes the advisory opinion in this case, and requests AHRC respond to the above analysis.

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. The Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation. Upon review of the applicant's petition, available military records and the U.S. Army Human Resources Command – Special Compensation Branch advisory opinion, the Board concurred with the advising official finding that the CRSC percentages awarded to the applicant were correct. The opine noted, he received a rating percentage increase from the VA in March 2023, which increased his percentage for PTSD from 70 percent to 100 percent.

2. The Board determined there is insufficient evidence that supports the applicant's contentions for retirement and back pay. Evidence in the records determined that the applicant's CRSC percentage is correct. The Board noted, per regulatory guidance to award CRSC for PTSD under the category of armed conflict, the claimant must submit official documentation that shows how the condition is combat related as defined by CRSC program guidance. Based on the evidence in the record and advising official opine, the Board denied relief.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
■	■	■	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

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

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. Army Regulation (AR) 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.
3. AR 40-501 governs medical fitness standards for enlistment, induction, appointment (including officer procurement programs), retention, and separation (including retirement).
 - a. Chapter 2 describes the lower extremities as the pelvic region, thigh, lower leg, ankle, and/or foot.
 - b. Chapter 3 provides the various medical conditions and physical defects which may render a Soldier unfit for further military service. Soldiers with conditions listed in

this chapter who do not meet the required medical standards will be evaluated by an MEB and will be referred to a PEB.

c. Chapter 7 prescribes a system for classifying individuals according to functional abilities. The functions have been considered under six factors designated "P-U-L-H-ES." Four numerical designations are used to reflect different levels of functional capacity. The basic purpose of the physical profile serial is to provide an index to overall functional capacity. Therefore, the functional capacity of a particular organ or system of the body, rather than the defect per se, will be evaluated in determining the numerical designation "1," "2," "3," or "4."

(1) An individual having a numerical designation of "1" under all factors is considered to possess a high level of medical fitness.

(2) A physical profile designator of "2" under any or all factors indicates an individual possesses some medical condition or physical defect that may require some activity limitations.

(3) A profile serial containing one or more numerical designators of "3" signifies the individual has one or more medical conditions or physical defects that may require significant limitations. The individual should receive assignments commensurate with his or her physical capability for military duty.

(4) A profile serial containing one or more numerical designators of "4" indicates the individual has one or more medical conditions or physical defects of such severity that performance of military duty must be drastically limited.

4. AR 635-40 establishes the Physical Disability Evaluation System 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.

a. The mere presence of impairment does not, in and of itself, justify a finding of unfitness because of physical disability.

b. The medical treatment facility commander with primary care responsibility evaluates those referred to him or her and, if it appears as though the member is not medically qualified to perform duty or fails to meet retention criteria, refers the member to an MEB. Those members who do not meet medical retention standards are referred to a PEB for a determination of whether they are able to perform the duties of their grade and military specialty with the medically disqualifying condition. Only the unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for

disability.

c. Disability compensation is not an entitlement acquired by reason of a 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.

5. Title 10, USC, chapter 61, provides for the disability retirement or separation of a member who is physically unfit to perform the duties of his or her office, rank, grade, or rating because of a disability incurred while entitled to basic pay.

6. Title 10, USC, section 1201, provides for the physical disability retirement of a member who has at least 20 years of service or a disability rating of at least 30 percent.

7. Title 10, USC, section 1203, provides for the physical disability separation of a member who has less than 20 years of service and a disability rating of less than 30 percent.

8. Title 38, USC, sections 1110 and 1131, permit the VA to award compensation for disabilities which were incurred in or aggravated by active military service. However, an award of a higher VA rating does not establish error or injustice in the Army rating. An Army disability rating is intended to compensate an individual for interruption of a military career after it has been determined that the individual suffers from impairment that disqualifies him or her from further military service. The VA, which has neither the authority nor the responsibility for determining physical fitness for military service, awards disability ratings to veterans for conditions that it determines were incurred during military service and subsequently affect the individual's civilian employability. Accordingly, it is not unusual for the two agencies of the government, operating under different policies, to arrive at a different disability rating based on the same impairment. Furthermore, unlike the Army, the VA can evaluate a veteran throughout his or her lifetime, adjusting the percentage of disability based upon that agency's examinations and findings. The Army rates only conditions determined to be physically unfitting at the time of discharge, thus compensating the individual for loss of a career; while the VA may rate any service-connected impairment, including those that are detected after discharge, in order to compensate the individual for loss of civilian employability.

9. CRSC, as established by Title 10, USC, section 1413a, as amended, states eligible members are those retirees who have 20 years of service for retired pay computation – or 20 years of service creditable for Reserve retired pay at age 60 – and who have disabilities that are the direct result of armed conflict, specially hazardous military duty, training exercises that simulate war, or caused by an instrumentality of war. Such disabilities must be compensated by the VA and rated at least 10-percent disabling. CRSC benefits are equal to the amount of VA disability compensation offset from retired

pay based on those disabilities determined to be combat related. Title 31, USC, section 3702(b), states CRSC is subject to a 6-year statute of limitations. CRSC applicants are entitled to submit up to three appeals before a final determination is granted.

a. To qualify for CRSC an individual must: be entitled to and/or receiving military retired pay, be rated at least 10-percent disabled by the VA, waive VA pay from retired pay, and file a CRSC application.

b. Disabilities that may be considered combat related include injuries incurred as a direct result of: armed conflict, hazardous duty, an instrumentality of war, or simulated war.

c. Disability retirees with less than 20 years of service will be automatically limited to a retroactive date of 1 January 2008 as required by legislation passed by Congress effective 2008.

d. All retroactive pay is limited to 6 years from the date the VA awarded compensation for each disability.

10. As a result of the extensive research conducted by the medical community and the relatively recent issuance of revised criteria regarding the causes, diagnosis, and treatment of PTSD, the Department of Defense (DOD) acknowledges that some Soldiers who were administratively discharged under other than honorable conditions may have had an undiagnosed condition of PTSD at the time of their discharges. It is also acknowledged that in some cases this undiagnosed condition of PTSD may have been a mitigating factor in the Soldiers' misconduct which served as a catalyst for their discharge. Research has also shown that misconduct stemming from PTSD is typically based upon a spur of the moment decision resulting from a temporary lapse in judgment; therefore, PTSD is not a likely cause for either premeditated misconduct or misconduct that continues for an extended period of time.

11. On 3 September 2014 in view of the foregoing information, the Secretary of Defense directed the Service Discharge Review Boards (DRBs) and Service Boards for Correction of Military/Naval Records (BCM/NRs) to carefully consider the revised PTSD criteria, detailed medical considerations, and mitigating factors when taking action on applications from former service members administratively discharged under other than honorable conditions and who have been diagnosed with PTSD by a competent mental health professional representing a civilian healthcare provider in order to determine if it would be appropriate to upgrade the characterization of the applicants' service.

12. On 25 August 2017, the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to DRBs and BCM/NRs when considering requests by veterans for modification of their

discharges due in whole or in part to: mental health conditions, including PTSD, traumatic brain injury, sexual assault, or sexual harassment. Boards are to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based, in whole or in part, on those conditions or experiences. The guidance further describes evidence sources and criteria and requires boards to consider the conditions or experiences presented in evidence as potential mitigation for misconduct that led to the discharge.

13. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military DRBs and BCM/NRs regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. BCM/NRs may grant clemency regardless of the court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds. This guidance does not mandate relief, but rather provides standards and principles to guide BCM/NRs in application of their equitable relief authority. In determining whether to grant relief on the basis of equity, injustice, or clemency grounds, BCM/NRs shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment. Changes to the narrative reason for discharge and/or an upgraded character of service granted solely on equity, injustice, or clemency grounds normally should not result in separation pay, retroactive promotions, and payment of past medical expenses or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded service characterization.

14. Title 10, USC, 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.

//NOTHING FOLLOWS//