

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 1 December 2023

DOCKET NUMBER: AR20230008456

APPLICANT REQUESTS: This case comes before the Army Board for Correction of Military Records (ABCMR) on a remand from the United States Court of Federal Claims. The Court directs the ABCMR to reconsider entitlement to Combat Related Special Compensation (CRSC) for Post-Traumatic Stress Disorder (PTSD).

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

- U. S. Court of Federal Claims – Complaint
- U. S. Court of Federal Claims – Motion for Voluntary Remand and Stay
- U. S. Court of Federal Claims – Order
- U. S. Court of Federal Claims – Letter
- U. S. Court of Federal Claims – Remand Support Brief

FACTS:

1. The applicant filed his original ABCMR application in 2021. At that time his request to correct his record to show he was entitled to CRSC was denied. The Board found relief was not warranted. After consideration of the applicant's statement, his record of service and Veteran Affairs (VA) documents, the Board found no evidence that any one of his disabilities were a 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. Though the applicant provided a statement, there was nothing from his commander or first sergeant as directed for the criteria regarding statements. The Board agreed with the previous findings from U.S. Army Human Resources Command (HRC) finding insufficient evidence to support the claim that a combat related event caused his condition. Furthermore, the burden of proof lies on the applicant and the Board found there to be a lack of medical records to substantiate his request as combat related. The applicant then filed the instant lawsuit. Therefore, the parties asked to remand the case for the ABCMR to hear and reconsider the CRSC issue. Both parties requested that the Court grant the motion to voluntarily remand the case to the agency for further action and stay proceedings until a determination is rendered by the ABCMR. A federal agency's motion for a voluntary remand is commonly granted because it allows an

agency to correct its own potential errors without expending the resources of the court in reviewing a record that may be incorrect or incomplete.

2. On remand, the ABCMR shall reconsider and explain whether the applicant is entitled to CRSC for his PTSD based on the claims asserted by the applicant in this action and the governing statutes and regulations in this case. In making this determination, the ABCMR shall explain whether it is crediting statements provided by the applicant, and, if it is not crediting statements provided upon the basis that they were not by his commander or first sergeant, explain the legal basis for this requirement. Additionally, the ABCMR shall explain whether the Army inconsistently granted the applicant CRSC for his tinnitus while denying CRSC for his PTSD, as well as expressly address: (1) the 14 September 2015 psychiatry note by Doctor T- B-; (2) the applicant's 7 July 2015 VA PTSD Disability Benefits Questionnaire; (3) the September 2015 and August 2017 findings by Physical Evaluation Boards (PEB) concerning the causes of the applicant's PTSD; and (4) the October 2015 and September 2017 Army retirement orders and their findings concerning the causes of the applicant's PTSD.

The ABCMR shall consider all the above issues raised by the parties, and other issues the ABCMR deems appropriate, pursuant to the ABCMR's broad authority.

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

a. The applicant enlisted in the U. S. Army Reserve (USAR) on 16 July 2009 in the Delayed Entry Program (DEP). On 27 July 2009, he was discharged from the DEP and enlisted in the Regular Army (RA).

b. The applicant's Enlisted Record Brief shows he:

- served in Afghanistan during the period of 10 May 2011 through 1 June 2012
- served in Kuwait during the period of 24 July 2013 through 14 April 2014
- held the primary military occupational specialty (MOS) AH-64 Armament/Electrical/Avionics Systems Repairer (15Y)

c. On 13 April 2011, Orders Number HO-103-0591, issued by Headquarters (HQs), III Corps and Fort Hood, the applicant was deployed in a Temporary Change of Station (TCS) status to Afghanistan in support of Operation Enduring Freedom on or about 1 June 2011 with assignment to D Company, 4th Aviation Support Battalion, 227th Aviation Regiment.

d. On 20 June 2013, Orders Number HO-171-0176, issued by HQs, III Corps and Fort Hood, the applicant was deployed in a TCS status to Kuwait in support of

Operation Enduring Freedom on or about 2 August 2013 with assignment to D Company, 4th Aviation Support Battalion, 227th Aviation Regiment.

e. The applicant reenlisted in the RA on 1 November 2013 and 28 September 2015.

f. On 5 October 2015, Orders Number 278-0102, issued by HQs, III Corps and Fort Hood, the applicant was placed on the Temporary Disability Retired List (TDRL) on 25 December 2015 with a 50 percent disability. The orders state:

- 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: Yes
- Disability resulted from a combat related injury as defined in Title 26, United States Code (USC) 104: Yes

g. On 24 December 2015, the applicant was honorably retired under the provisions of Army Regulation (AR) 635-40 (Physical Evaluation for Retention, Retirement, or Separation, chapter 4 (Disability Evaluation) and assigned to the USAR Control Group (Retired Reserve). DD Form 214 (Certificate of Release or Discharge from Active Duty) shows the applicant completed 6-years, 4-months and 28-days of active service. It also shows in item 18 (Remarks): service in Afghanistan 10 May 2011 through 1 June 2012 and service in Kuwait 14 July 2013 through 14 April 2014.

h. On 7 August 2017, the informal PEB found the applicant physically unfit for retention and recommended he be placed on the Permanent Disability Retired List (PDRL) with 30 percent disability for PTSD which was incurred or aggravated in the line of duty. Section V (Administrative Determinations) stated the PEB made the findings:

- disability disposition is based on disease or injury incurred in the line of duty in combat with an enemy of the United States and 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 (Title 5 USC, sections 8332, 3502, and 6303 ), (This determination is made for all compensable cases but pertains to potential benefits for disability retirees employed under Federal Civil Service)
- disability did result from a combat related injury under the provisions of Title 26 USC, section 104 or Title 10 USC, section 10216

On 7 August 2017, the applicant concurred with the finding of the PEB and waived a formal hearing.

i. On 26 September 2017, Orders Number D269-54, issued by the U.S. Army Physical Disability Agency, the applicant was removed from the TDRL and placed on the PDRL, effective 26 September 2017, with 30 percent disability. The orders state:

- disability is based on injury or disease received in line of duty as a direct result of armed conflict or caused by an instrumentality of war period as defined by law: Yes
- disability resulted from a combat related injury as defined in Title 26 USC, section 104: Yes

j. On 13 May 2020, the U.S. Army HRC notified the applicant his request for reconsideration of his original claim for Tinnitus as combat related due to an instrumentality of war was approved and awarded 10 percent combat related disability. The remainder of his claims were denied for:

- Major Depressive Disorder with Anxious Distress and PTSD
- Coronary Artery Disease, Stable Angina, Heart Block
- Obstructive Sleep Apnea
- Thoracic-Lumbosacral Spine Strain with Degenerative Arthritis and intervertebral Disc Syndrome
- Right Knee Osteoarthritis With History of Right Shin Splint
- Left Knee Strain With History Of Left Shin Splint
- Internal Or External Hemorrhoids
- Spider Veins Left Lower Extremity
- Spider Veins Right Lower
- Erectile Dysfunction

HRC opined that no new evidence was provided to show a combat-related event caused his conditions. The applicant did not provide details on how his injuries occurred as a result of a combat related event and/or was he awarded a Combat Action Badge.

k. On 31 August 2020, the U.S. Army HRC notified that his claims were denied for:

- Major Depressive Disorder with Anxious Distress and PTSD
- Coronary Artery Disease, Stable Angina, Heart Block
- Obstructive Sleep Apnea
- Thoracic-Lumbosacral Spine Strain with Degenerative Arthritis and intervertebral Disc Syndrome
- Right Knee Osteoarthritis With History Of Right Shin Splint
- Left Knee Strain With History Of Left Shin Splint
- Internal or External Hemorrhoids
- Spider Veins Left Lower Extremity
- Spider Veins Right Lower
- Erectile Dysfunction

The documentation the applicant provided made no mention of a combat related event in relationship to his disabilities. His claims were processed in the initial, reconsideration and appeal levels.

4. The applicant provides:

a. Through the applicant's legal counsel, he served honorably as an avionics and weapons mechanic for over 6-years with multiple combat tours before being medically retired in 2015 with multiple disabilities, including:

- PTSD
- Tinnitus
- coronary artery disease
- sleep apnea
- recurrent kidney stones
- thoracic-lumbosacral spine strain with degenerative arthritis
- intervertebral disc syndrome
- right knee osteoarthritis
- left knee strain
- hemorrhoids
- gastroesophageal reflux disorder
- left and right lower extremity radiculopathy

The PEB determined twice that his PTSD was a direct result of combat-related events. Yet the U.S. Army HRC and the ABCMR denied his claim for CRSC for his PTSD. These denials are arbitrary, capricious, unsupported by substantial evidence and contrary to law. The ABCMR's reason for the denial was a statement from his commander or first sergeant were required for CRSC, which was contrary to law and further compounded its errors by applying a more stringent and inapplicable standard for Traumatic Service Members Group Life Insurance (TSGLI) claims.

He deployed twice overseas, first to Kandahar Airfield, an imminent danger pay area in Afghanistan and then to Kuwait. While at Kandahar Airfield, he was subjected to constant violent attacks which occurred thirty to forty times every day by mortars and rocket propelled grenades and was subjected to suicide bombing. The direct and constant exposure to attacks and explosions caused his mental health to deteriorate and resulted in a PTSD diagnosis while he was in Kuwait. The near constant attacks and explosions also caused him to develop tinnitus.

The CRSC board recognized his tinnitus was caused by the attacks and explosions in combat and awarded him CRSC, finding it was caused by an instrumentality of war. However, the CRSC board decided his PTSD was not combat related and denied his CRSC claim for PTSD. After his denials, he petitioned the ABCMR for relief, although

the ABCMR acknowledged the statements he provided in support of his claim, he was denied relief.

The ABCMR's determination that his PTSD was not combat related was arbitrary and capricious in three ways. First, the ABCMR applied the incorrect legal standard. Though the PEB and CRSC board apply nearly identical standards to determine combat relatedness, the ABCMR's decision was in direct conflict with the PEB conclusions that his PTSD was combat related. The ABCMR applied a wholly inapplicable and more stringent standard for TSGLI claims to his CRSC claim, a clear error of law.

Second, the ABCMR failed to apply the proper standard of proof of preponderance of the evidence to his case. Rather than review all relevant documentary information and decide based on available documentary information as required by applicable laws and guidelines, the ABCMR improperly required evidence not mandated by the applicable statute and guidelines and denied his claim based on the absence of such records.

Third, the ABCMR denied his claim on the basis that his PTSD was caused by indirect fire, though the ABCMR has repeatedly granted CRSC for indirect fire in other matters and the CRSC board granted CRSC for his tinnitus.

He served his country loyally for over 6-years and received numerous medals and other awards. Before his deployment to Afghanistan, he had no history of mental illness; however, after his multiple combat tours he now suffers from physical and mental disabilities caused by the extreme violence and destruction he experienced. Despite the robust supporting record and the fact, he was medically retired for the PTSD he developed as a result of his decorated service, the Army refuses to compensate him for his PTSD which was clearly combat related. He requests the court to correct the ABCMR's erroneous decision.

b. The unopposed motion for a voluntary remand and stay stated the applicant did not oppose the motion by the United States for the court to remand the case to the Secretary of the Army with instructions for the ABCMR to reconsider the claims for relief by the applicant and the court to stay the proceedings in the matter pending the completion of the remand.

c. Brief in support of the applicant on remand states the applicant deployed to Kandahar Airfield, Afghanistan, he was directly exposed to daily violent attacks and explosions. Insurgents attacked the airfield thirty to forty times every day using mortars, rocket propelled grenades and even suicide bombings. Many of the attacks and explosions came within feet of striking the applicant. The direct and constant exposure to these violent attacks and explosions caused his mental health to deteriorate and resulted in his PTSD diagnosis while he was deployed in Kuwait.

The PEB, VA and medical professionals who examined the applicant after his PTSD diagnosis found the PTSD was caused by combat related events. For example, a clinical psychologist found that his exposure to daily mortar attacks contributed to his PTSD and was adequate to support a diagnosis of PTSD. The psychologist also found his PTSD was clearly attributed to directly experiencing the traumatic events. The PEB agreed, finding his PTSD was a direct result of armed conflict or caused by an instrumentality of war. The U.S. Army HRC found his tinnitus was combat related due to an instrumentality of war. Yet on the very same facts the CRSC board and ABCMR denied his request for CRSC for PTSD. The United States recognized it was not clear from the ABCMR decision or the CRSC procedures and criteria where the commander or first sergeant statements were a requirement was derived. It further admitted the ABCMR did not explicitly address the inconsistency between the ABCMR decision to deny CRSC for his PTSD and the CRSC board decision to grant CRSC for tinnitus, which raised concern about whether the ABCMR adequately considered the decision.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was warranted. The Board carefully considered the applicant's contentions, the military record, and regulatory guidance. The Board considered the PEB determination and the conditions under which CRSC can be awarded. The Board agreed that but for the applicant's time in combat, it was more likely than not that the applicant would not have been diagnosed with PTSD; therefore a causal relationship does exist between his time in combat and the subsequent diagnosis of PTSD. After due consideration of the applicant's request the Board agreed that the applicant is entitled CRSC based on the diagnosis of Post-Traumatic Stress Disorder and a recommendation for relief is warranted.

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 Board determined the evidence presented is sufficient to warrant amendment of the ABCMR's decision in Docket Number AC87-09267 on 14 September 1988. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by affording the applicant reevaluation by the Physical Evaluation Board in reconsideration of entitlement to Combat Related Special Compensation (CRSC) for Post-Traumatic Stress Disorder (PTSD).

[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, USC, section 1413a (Combat Related Special Compensation (CRSC) (c) (Eligible Retirees), an eligible combat related disabled uniformed services retiree is a member of the uniformed services who: is entitled to retired pay (other than by reason of section 12731b of this title); and has a combat-related disability. Effective date shall take effect not later than 180-days after the date of the enactment of this act of 2 December 2002. (e) (Combat-Related Disability), "combat-related disability" means a disability that is compensable under the laws administered by the Secretary of Veterans Affairs and that: (1) is attributable to an injury for which the member was awarded the Purple Heart; or (2) was incurred (as determined under criteria prescribed by the Secretary of Defense); as a direct result of armed conflict; while engaged in hazardous service; in the performance of duty under conditions simulating war; or through an instrumentality of war.

2. Title 10, USC, chapter 61, section 1201 (Regulars and members on active duty for more than 30 days: retirement), (a) Retirement - upon a determination by the Secretary concerned that a member is unfit to perform the duties of the member's office, grade, rank, or rating because of physical disability incurred while entitled to basic pay, the Secretary may retire the member, with retired pay if the Secretary also makes the determinations with respect to the member and that disability specified in subsection (b). (b) Required Determinations of Disability - determinations by the Secretary that: (1) based upon accepted medical principles, the disability is of a permanent nature and stable; (2) the disability is not the result of the member's intentional misconduct or willful neglect, and was not incurred during a period of unauthorized absence; and (3) either; (A) the member has at least 20 years of service; or (B) the disability is at least 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs at the time of the determination; and either (i) the disability was not noted at the time of the member's entrance on active duty (unless clear and unmistakable evidence demonstrates that the disability existed before the member's entrance on active duty and was not aggravated by active military service); (ii) the disability is the proximate result of performing active duty; (iii) the disability was incurred in line of duty in time of war or national emergency; or (iv) the disability was incurred in line of duty after 14 September 1978.

3. Department of Defense Financial Management Regulation 7000.14-R, Volume 7B, (Military Pay Policy – Retired Pay), provides information for the specific qualifications and entitlement for military retired pay, describes the basic types of retirement (regular, non-regular, and disability), discusses voluntary and involuntary retirements, and explains basic qualifications for the differing military retired pay programs.

a. Chapter 63, Combat Related Special Compensation (CRSC), paragraph 1.1 Effective Date. The CRSC program became effective 31 May 2003. Payments are

made on the first day of the first month following the month in which the compensation accrued, provided the member is receiving VA disability compensation for a disability that has been determined to be combat related by the Military Department. No CRSC is payable for any month prior to June 2003.

b. Paragraph 1.1.1.3, for an eligible member who is retired under Title 10, United States Code, Chapter 61 (10 U.S.C. Chapter 61) with less than 20 years of active duty or with less than sufficient service and age to qualify for retirement under 10 USC, section 12731, compensation is effective 1 January 2008.

c. Paragraph 5.2 (Other Combat Related Disabilities) states uncorroborated statements in a record that a disability is combat related will not, by itself, be considered determinative for purpose of meeting the combat related standards for CRSC. CRSC determinations must be made based on the program criteria.

d. Section 630502 states, a combat-related disability is a disability with an assigned medical diagnosis code from the VA Schedule Rating of Disabilities (VASRD). The Military Departments will determine whether a disability is combat-related based on the following criteria:

- 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

e. The Department will record for each disability determined to be combat-related which of the circumstances provided qualifies the disability as combat-related. A determination of combat-relatedness (see section 6306) will be made with respect to each separate disability with an assigned medical diagnosis code from the VASRD. A retiree may have disabilities that are not combat-related. Such disabilities will not be considered in determining eligibility for CRSC or the amount of CRSC payable. 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 on the basis of the program criteria.

f. Paragraph 6.0 (Determinations of Combat Relatedness)

(1) Direct Result of Armed Conflict:

a. The disability is a disease or injury incurred in the line of duty as a direct result of armed conflict. To support a combat-related determination, it is not sufficient to only state the fact that a member incurred the disability during a period of war, 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 disability.

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

(2) While Engaged in Hazardous Service, hazardous service is service that 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 hazardous service requires that the injury or disease be the direct result of actions taken in the performance of such service. Travel to and from such service, or actions incidental to a normal duty status not considered hazardous, are not included.

(3) In the Performance of Duty Under Conditions Simulating War. In general, performance of duty under conditions simulating war 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. It does not include physical training activities such as calisthenics, jogging, formation running, or supervised sport activities.

(4) Instrumentality of War:

a. There must be a direct causal relationship between the instrumentality of war and the disability. It is not required that a member's disability be incurred during an actual period of war. The disability must be incurred incident to a hazard or risk of the service.

b. An instrumentality of war is a vehicle, vessel, or device designed primarily for military service and intended for use in such service at the time of the occurrence or injury. It may also include such instrumentality not designed primarily for military service if use of or occurrence involving such instrumentality subjects the individual to a hazard peculiar to military service. Such use or occurrence differs from the use or occurrence under similar circumstances in civilian pursuits.

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

d. For example, if a member is on a field exercise, and is engaged in a sporting activity and falls and strikes an armored vehicle, then the injury will not be considered to result from the instrumentality of war (armored vehicle) because it was the sporting activity that was the cause of the injury, not the vehicle. On the other hand, if the individual was engaged in the same sporting activity and the armored vehicle struck the member, then the injury would be considered the result of an instrumentality of war.

g. Paragraph 10.1 (Basis for Determination)

(1) Determinations of whether a disability is combat-related will be based on the preponderance of available documentary information where quality of information is more important than quantity. All relevant documentary information is to be weighed in relation to known facts and circumstances, and determinations will be made on the basis of credible, objective documentary information in the records as distinguished from personal opinion, speculation, or conjecture.

(2) The burden of proof that a disability is combat-related rests with the applicant, who is required to provide copies of documents in his or her possession to the best of his or her ability. A record submitted by a member may be used in support of his or her application if that record appears regular on its face and is consistent with Military Service documents and procedures in use at the time, based on the best information available. Military Departments may compile a list of typical documents used in various time periods. If necessary, the Military Departments, under agreement with VA may request copies of certain documents (i.e., DD 214, "Certificate of Release or Discharge from Active Duty", medical records, final VA ratings) from VA to support CRSC determinations.

4. Title 38, USC, sections 1110 and 1131, permit the VA to award compensation for a medical condition which was incurred in or aggravated by active military service. The VA, however, is not required by law to determine medical unfitness for further military service. The VA, in accordance with its own policies and regulations, awards compensation solely on the basis that a medical condition exists and that said medical condition reduces or impairs the social or industrial adaptability of the individual concerned. Consequently, due to the two concepts involved, an individual's medical condition, although not considered physically unfit for military service at the time of processing for separation, discharge, or retirement, may be sufficient to qualify the individual for VA benefits based on an evaluation by that agency.

5. Title 26 USC, section 104 (Compensation for injuries or sickness), (b) (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; as a direct result of armed conflict, while engaged in extra hazardous service, or under conditions

simulating war; or (B) which is caused by an instrumentality of war. In the case of an individual who is not described in subparagraph (A) or (B) of paragraph (2), except as provided in paragraph (4), the only amounts considered shall be the amounts which he receives by reason of a combat-related injury. (4) Amount excluded to be not less than veterans' disability compensation in the case of any individual described in paragraph (2), the amounts excludable under subsection (a) (4) for any period with respect to any individual shall not be less than the maximum amount which such individual, on application therefor, would be entitled to receive as disability compensation from the Veterans Administration.

//NOTHING FOLLOWS//