

IN THE CASE OF: [REDACTED]

BOARD DATE: 3 October 2024

DOCKET NUMBER: AR20230010318

APPLICANT REQUESTS:

- reconsideration of his previous request for medical retirement vice retirement for length of service
- As a new request entitlement to Combat Related Special Compensation (CRSC)
- a personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Certificate of Release or Discharge from Active Duty), 31 July 1993
- Memorandum – Subject: Assistance Provided, 1 March 2023
- Army Review Boards Agency (ARBA) letter, 15 May 2023
- U.S. Army Human Resources Command (AHRC) letter
- Department of Veterans Affairs (DVA) letter
- DVA Rating Decision, 6 February 2020
- Miscellaneous documents (Medical, Personnel, Photographs etc., and reference letters)

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Numbers AR20180008551 on 9 February 2021 and AR20220003076 on 22 November 2022.

2. The applicant states in pertinent part that he should be entitled to CRSC due to multiple injuries sustained during training exercises simulating war. He further contests that he should have been referred to a Medical Evaluation Board (MEB) and medically retired due to hypertension.

CRSC - the applicant notes that during three exercises occurring between 1974 and 1987, he sustained injurious to various portions of his body to include: back, shoulder,

groin, back and jaw. During a training exercise (1985), he fell from a military vehicle while retrieving equipment. After hitting the ground, a large spool of cable fell approximately 15 feet landing on top of him. He notes that following this incident, he received emergency medical care. In 1987, while participating in a training exercise a diesel fuel stove exploded causing injuries to several Soldiers that he was responsible for. He notes that he was later diagnosed with Post Traumatic Stress Disorder (PTSD) and refers to this incident as a contributing factor. Also, in 1974, during a training exercise, a Soldier was fatally injured after being run over by a military vehicle. He notes that this too is a contributing factor to his PTSD. He argues that although he was not deployed during the aforementioned incidents, they were sustained while participating in training exercises that were simulating war conditions and from an instrumentality of war.

Medical Retirement vice Retirement for Length of Service – he notes that 6-months prior to retiring he was unable to complete a physical training event due to the onset of medical difficulties. Following this event, he sought medical assistance and was later diagnosed with hypertension. He adds that he possibly sustained a minor stroke during this event. He was subsequently placed on a performance limiting profile for 60 days preventing him from participating in any physical training. He argues that this condition should have prompted a referral for an MEB. Not longer after he retired, he suffered a stroke.

3. The applicant's submitted request does not contain a specific injury or illness for which he would like to be authorized CRSC. However, in his most recent appeal and final denial by AHRC, the applicant provided the following conditions for consideration: Left Pontine Cerebrovascular Accident (8009), Cerebrovascular Accident with Loss Of Use Of Right Arm And Right Leg (8009-5111), Neurocognitive Disorder With Depression (9326), Hypertension with Chronic Kidney Disease (7530), Left Lower Extremity Weakness (8599-8520), Bowel Dysfunction (7332), Slurred Speech (6519), Erectile Dysfunction (7599-7522).

4. A review of the applicant's available service records reflects the following:

a. On 25 July 1973, the applicant enlisted in the Regular Army. While serving in the military, the applicant successfully held multiple Military Occupational Specialties and duty positions to include 36C (Lineman), 36K (Field Wireman), 31N (Tactical Circuit Continuity Section Chief), 16J (Defense Acquisition Radar Operator) and 31W (Mobile Subscriber Equipment Communications Chief).

b. On or about 19 August 1992, Headquarters, U.S. Army Signal Center and Fort Gordon issued Orders Number 232-242 releasing the applicant from active duty on 31 July 1993 and on the following date placing him on the retired list.

c. On 31 July 1993, the applicant was voluntarily honorably retired from military service.

d. On 14 November 2003, the U.S. Army Physical Disability Agency (USAPDA) (CRSC) disapproved the applicant's initial request for CRSC for Hemorrhage of the Brain (8009) because the disability failed to meet the criteria established for favorable consideration as a direct result of a specific event, performance of duty under conditions simulating war, actual combat, hazardous service or other CRSC categories.

e. On 18 January 2005, USAPDA advised the applicant that his submitted request for CRSC reconsideration for Hemorrhage of the Brain was disapproved.

f. On 30 January 2015, AHRC advised the applicant that they were unable to overturn the USAPDA's previous denial of his request(s) noting that the evidence presented still did not reflect a link to a combat related event. This decision was considered final. Future appeals would need to be directed to ARBA.

g. On 24 April 2018, AHRC advised the applicant that the 30 January 2015 determination was final related to his Hemorrhage of the Brain. Any future appeal request would need to be directed to ARBA.

h. On or about 10 May 2019, AHRC advised the applicant that the 30 January 2015 determination was final related to Hemorrhage of the Brain. Any future appeal request would need to be directed to ARBA.

i. On 20 February 2020, AHRC denied the applicant's request for CRSC based on the following conditions: Left Pontine Cerebrovascular Accident (8009), Neurocognitive Disorder with Depression associated with Cerebrovascular Accident with Loss Of Use Of Right Arm And Right Leg (8009-5111), Hypertension with Chronic Kidney Disease (7530), Left Lower Extremity Weakness (8599-8520), Bowel Dysfunction associated with Cerebrovascular Accident with loss of use of Right Arm and Right Leg (7332), Slurred Speech (6519), Erectile Dysfunction (7599-7522) noting that these conditions were either secondary to a condition not combat related or that there was no evidence reflective of a combat related event causing the condition.

j. On 11 March 2020, AHRC denied the applicant's request for CRSC based on the conditions listed above, noting that these conditions were either secondary to a condition not combat related or that there was no evidence reflective of a combat related event causing the condition.

k. On 18 April 2020, AHRC denied the applicant's request for CRSC based on the conditions listed in 4i, noting that these conditions were either secondary to a condition

not combat related or that there was no evidence reflective of a combat related event causing the condition. This would serve as the final disapproval for Hypertension.

l. On 5 January 2021, the Chief, Special Compensations Branch, AHRC, advised the applicant that after reviewing his submitted and available documentation for the following conditions: Left Pontine Cerebrovascular Accident (8009), Cerebrovascular Accident with Loss Of Use Of Right Arm And Right Leg (8009-5111), Neurocognitive Disorder with Depression (9326), Hypertension with Chronic Kidney Disease (7530), Left Lower Extremity Weakness (8599-8520), Bowel Dysfunction (7332), Slurred Speech (6519), Erectile Dysfunction (7599-7522), they were unable to award CRSC noting that there was no mention of any combat related events in relationship to these disabilities. The applicant was further advised that this claim had previously been processed at the initial, reconsideration, and appeal levels. During each review, their staff made every effort to review all available documentation consistently and fairly, accurately adhering to the program's standards. In view of the foregoing, this determination was now considered final. Future appeals would need to be directed to this Board for review.

m. On 19 February 2021, AHRC advised the applicant that a final determination letter was provided on 5 January 2021. Since that determination was final and all appeals were exhausted, future requests would need to be directed to ARBA.

5. The applicant provides:

a. Memorandum – Subject: Assistance Provided dated 1 March 2023, reflective of the applicant being advised that since he had previously sought relief thorough this Board on 2 occasions, his only remaining option was to file suit in federal court. Since military policy precludes legal representation in court, their office was unable to offer any further assistance in relation to his appeal.

b. ARBA letter dated 15 May 2023, advising the applicant that the ABCMR had previously considered and denied his requested relief. As such, this decision was final. However, the applicant was afforded the right to request reconsideration if he had supporting material not previously presented or considered by the board.

c. AHRC letter reflective of the applicant being advised that his appeal for CRSC based on a brain hemorrhaging was being denied because they were unable to locate any documentation wherein it makes mention of a combat-related causative event in relation to this condition. In the applicant's initial claim, he stated that the injury resulted from the installation and maintenance of a switchboard under conditions simulating war; however, the documentation provided offered no facts that he was engaged with a hostile enemy. Further, a review of the documentation failed to reflect evidence confirming that the injury was attributed to a specific combat related event.

d. DVA letter reflective of a listing of the applicant's service-connected disabilities and the ratings assigned to each.

e. DVA Rating Decision dated 6 February 2020, reflective of the applicant's PTSD being rated at 100 percent disabling. This document(s) offers no additional information pertaining to this rated condition.

f. Miscellaneous documents (Medical, Personnel etc., and Reference letters), reflective of health care received by the applicant while serving on active duty as well as since he retired. Upon review of the reference letters, the nexus appears to be related to the applicant's PTSD. Mr. [REDACTED] references the 1987 incident mentioned in the applicant's opening remarks wherein several Soldiers sustained injuries following the explosion of a diesel stove. Mr. [REDACTED] notes that the applicant's Soldiers were physically injured during this incident and the applicant endured an extreme level of stress because of it. In an additional reference letter, Mr. [REDACTED] notes that the applicant was physically present for the 1974 fatality incident and took the result very hard. The applicant also provided a statement expanding on his opening remarks to this Board wherein he refers to the fall incident in 1985 noting that he fell approximately 15 feet and a 75-pound cable reel landed on his groin, back and jaw. During a medical exam conducted on 11 January 1993, the applicant notes various medical conditions to include hypertension. He denies ever being treated for a mental health condition. He denies consultation or treatment history within the past 5 years for other than minor illnesses. He further denies ever being rejected for military service because of a physical or mental health condition. On 20 January 1993, a physical evaluation was performed noting one or more abnormal cardiovascular risk factors. These risk factors served as clinical markers for possible future cardiovascular problems in asymptomatic individuals. The applicant was placed on a 179-day performance limiting profile restricting his handling of materials weighing more than 10 pounds and prohibiting mandatory physical activity. These documents are further provided in their entirety within the supporting documents for the board member's review.

6. On 9 February 2021, in ABCMR Docket Number AR20180008551 the Board denied the applicant's request for a medical discharge stating, "based upon the available documentation and the findings and recommendation of the medical advisor, the Board concluded there was insufficient evidence of an error or injustice which would warrant a change to the applicant's record."

7. On 22 November 2022, in ABCMR Docket Number AR20220003076 the Board denied the applicant's request to be medically retired vice retirement for length of service. The 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 (AHLTA), the VA electronic medical record (Joint Legacy Viewer), the electronic Physical Evaluation Board (ePEB),

the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor noted that, in accordance with Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation) in effect provides that the mere presence of an impairment does not, of itself, justify a finding of unfitness because of physical disability. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier reasonably may be expected to perform because of his or her office, grade, rank, or rating.

The Board carefully considered the applicant's request and statement, supporting documents, evidence in the records, and his record of service. The Board noted that on 18 August 1992, the applicant requested voluntary retirement with a desired retirement date of 1 August 1993. His request was approved. A DA Form 3713 (Data for Retired Pay) was processed reflecting type of retirement-non disability. He completed 20 years and 6 days of active service. Regulatory guidance stipulates that when a Soldier is being processed for separation or retirement for reasons other than physical disability, continued performance of assigned duty commensurate with his or her rank or grade until the Soldier is scheduled for separation or retirement, creates a presumption that the Soldier is fit. The Board reviewed and concurred with the advisory official's finding that there is no evidence the applicant had a medical condition would have failed the medical retention standards prior to his voluntary retirement. Thus, there was no cause for referral to the Disability Evaluation System. Furthermore, there is no evidence that any medical condition prevented the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his voluntary length of service retirement.

8. 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 (AHLTA), 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 is again applying to the ABCMR requesting a reconsideration of the Board's prior denial of his request to have his length of service (LOS) retirement revoked and that he subsequently be granted a permanent retirement for physical disability. So, in essence, a referral to the Disability Evaluation System (DES). On his DD 149, he had indicated that PTSD is a condition related to his request.

c. In this application, he is also requesting the reversal of the United States Army Human Resources Command's (USAHRC) prior determinations that none of his medical conditions are combat related and therefore not eligible for Combat Related Special Compensation (CRSC). He states:

“I have applied for and previously been denied Combat-Related Special Compensation (CRSC). I request that I be granted CRSC for injuries sustained in the performance of duty under conditions simulating war in 1984, 1985, and 1987. I also request that my records be amended to reflect medical retirement for hypertension, because I should have been referred to a Medical Evaluation Board.”

d. The Record of Proceedings details the applicant's military service and the circumstances of the case. The applicant's DD 214 shows he entered the Regular Army 25 February 1977 and was retired for length of service on 31 July 1993 under the separation authority provided in chapter 12 of AR 635-200, Personnel Separations – Enlisted Personnel (17 October 1990).

e. Request for Referral to DES

f. This request for a referral to the DES was previously denied by the ABCMR on 9 February 2021 (AR20180008551) and again on 22 November 2022 (AR20220003076). Rather than repeat their findings here, the board is referred to the records of proceedings and medical advisory opinions for those case. This review will concentrate on the new evidence submitted by the applicant.

g. Documentation in this case, like the prior case, shows the applicant was treated for hypertension while in the Army.

h. As previously noted, the applicant's request for a voluntary LOS retirement was approved on 18 August 1992 with his retirement to be effective 1 August 1993. Orders number 232-242 show he was to be retired on 31 July 1993 and this retirement is confirmed on his DD 214.

i. The DES compensates disabilities when they cause or contribute to career termination. Paragraph 3-2b of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (1 September 1990) states:

(1) Disability compensation is not an entitlement acquired by reason of service-incurred illness or injury; rather, it is provided to soldiers whose service is interrupted and they can no longer continue to reasonably perform because of a physical disability incurred or aggravated in service.

(2) When a soldier is being processed for separation or retirement for reasons other than physical disability, continued performance of assigned duty commensurate with

his or her rank or grade until the soldier is scheduled for separation or retirement, creates a presumption that the soldier is fit.

j. Paragraph 3-1 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (1 September 1990) states:

The mere presence of an impairment does not, of itself, justify a finding of unfitness because of physical disability. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier reasonably may be expected to perform because of his or her office, grade, rank, or rating.

k. There remains no probative evidence the applicant had a medical condition that would have failed the medical retention standards of chapter 3, AR 40-501 prior to his voluntary retirement. Thus, there was no cause for referral to the Disability Evaluation System. Furthermore, there is no evidence that any medical condition prevented the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his voluntary LOS retirement.

l. Review of his records in JLV shows he has been awarded multiple VA service-connected disability ratings. However, the DES compensates an individual only for service incurred medical condition(s) which have been determined to disqualify him or her from further military service. The DES has neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions which were incurred or permanently aggravated during their military service; or which did not cause or contribute to the termination of their military career. These roles and authorities are granted by Congress to the Department of Veterans Affairs and executed under a different set of laws.

m. Request for CRSC

n. The applicant does not identify which of his 14 VA service-connected disabilities he now asserts is combat related:

Loss Of Use of One Hand and One Foot (100% Sc)

Hemorrhage ff the Brain (100% Sc)

Brain Syndrome (100% Sc)

Chronic Renal Disease (60% Sc)

Injury of the Bladder (40% Sc)

Stricture of Esophagus (30% Sc)

Impaired Hearing (30% Sc)

Paralysis of Sciatic Nerve (20% Sc)

Degenerative Arthritis of The Spine (10% Sc)

Impairment of Sphincter Control (10% Sc)

Tinnitus (10% Sc)

Eczema (0% Sc)

Aphonia (0% Sc)

Deformity of The Penis (0% Sc)

o. He also has not indicated how exactly they are combat related, simply stating “CRSC for injuries sustained in the performance of duty under conditions simulating war in 1984, 1985, and 1987.”

p. Review of his four response letters from the USAHRC’s CRSC section dated 18 January 20 February 2020, 11 March 2020, and 18 April 2020 show they have repeatedly denied CRSC for all claimed conditions:

Cerebrovascular Accident With Loss Use Of Right Arm And Right Leg

Neurocognitive Disorder With Depression

Hypertension With Chronic Kidney Disease

Left Lower Extremity Weakness

Bowel Dysfunction

Slurred Speech

Erectile Dysfunction

q. JLV neurology encounters show he suffered a pontine infarction 1995. His claimed conditions are either related to this stroke or chronic diseases such as hypertension or erectile dysfunction. While diseases can be combat related, there is no evidence the origins for these conditions were combat related as defined in 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.”

r. 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."

s. Paragraph 630601A of Department of Defense Financial Management Regulation 7000.14-R, Volume 78, Chapter 63:

“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.”

t. Chapter 63, Volume 7B of DoD 7000.14R, Financial Management Regulation, is titled “Combat-Related Special Compensation (CSRC)”. Paragraph 630603 defines 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.”

u. It is the opinion of the Agency medical advisor that neither a referral of his case to the DES of a reversal of one or more of USAHRC’s non-combat related determinations is warranted.

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 the evidence does not show the applicant had any duty-limiting medical conditions that would have been a basis for referring him to the Disability Evaluation System prior to his voluntary retirement for length of service. Based on a preponderance of the evidence, the Board determined his retirement for length of service is not in error or unjust.

3. The Board also found no evidence linking any of the applicant's service-connected disabling conditions to one of the four categories for which CRSC can be awarded. Based on a preponderance of the evidence, the Board determined the decision to deny CRSC is not in error or unjust.

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 that the overall merits of this case are insufficient as a basis to amend the decisions of the ABCMR set forth in Docket Numbers AR20180008551 on 9 February 2021 and AR20220003076 on 22 November 2022.

3/29/2025

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. Department of Defense Financial Management Regulation, Volume 7B:

a. Section 630301 states a member may not be paid CRSC unless he or she has applied for and elected to receive compensation under the CRSC program by filing an application on DD Form 2860 (Claim for CRSC), with the Military Department from which he or she retired. A member may submit an application for CRSC at any time and, if otherwise qualified for CRSC, compensation will be paid for any month after May 2003 for which all conditions of eligibility were met.

b. 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

c. 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.

d. Section 6306 (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.

(c) 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.

(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 such 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.

2. Army Regulation (AR) 635-40 (Physical Evaluation for Retention, Retirement, or Separation), Chapter 3 (Policies) provides that the mere presences of an impairment does not, of itself, justify a finding of unfitness because of physical disability. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier reasonably may be expected to perform because of his or her office, grade, rank, or rating. All relevant evidence must be considered in evaluating the fitness of a Soldier. Once a Soldier has been enlisted, inducted, or commissioned, the fact that the Soldier may later fall below initial entry physical standards does not, in itself, authorize separation or retirement unless it is also established that the Soldier is unfit because of physical disability.

a. Findings with respect to fitness or unfitness for military service will be made on the basis of the preponderance of the evidence. Thus, if the preponderance of evidence indicates unfitness, a finding to that effect will be made.

b. If the evidence establishes the fact that the Soldier adequately performed the normal duties of his or her office, grade, rank, or rating until the time of referral for physical evaluation, the Soldier might be considered fit for duty. This is true even though medical evidence indicates the Soldier's physical ability to perform such duties may be questionable.

c. When a Soldier is being processed for separation or retirement for reasons other than physical disability, continued performance of assigned duty commensurate with his or her rank or grade until the Soldier is scheduled for separation or retirement, creates a presumption that the Soldier is fit.

3. AR 15-185 (Army Board for Correction of Military Records (ABCMR)) paragraph 2-9 states the ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence. Additionally, it states in paragraph 2-11 that applicant's do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

//NOTHING FOLLOWS//