

IN THE CASE OF: [REDACTED]

BOARD DATE: 14 February 2025

DOCKET NUMBER: AR20230012891

APPLICANT REQUESTS: an amendment to his Orders [REDACTED] dated 30 March 2022, paragraph 2, to show:

- his characterization of discharge is based on combat related injuries
- 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 26 USC 104: Yes

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

- DD Form 149 (Application for Correction of Military Record)
- Orders [REDACTED] 30 March 2022
- A letter issued by the Department of Veterans Affairs (VA), 13 September 2022
- A letter issued by the U.S. Army Human Resources Command (HRC), combat-related special compensation (CRSC), 30 November 2022
- A letter issued by the Defense Finance Accounting Service (DFAS), 29 June 2023

FACTS:

1. The applicant states:

a. An informal physical evaluation board (PEB) convened on 10 February 2022, and determined the applicant was physically unfit with a recommended disability rating of 100 percent (%), due to asthma and allergic bronchopulmonary aspergillosis. The PEB further determined his conditions were not combat related.

b. The VA determined the total combined rating for the applicant's service-connected disabilities is 100 percent (%). Subsequently, the CRSC Board found his conditions to be combat related due to an Instrumentality of War.

c. Since his disabilities are combat related due to an instrumentality of war, he is requesting an amendment to Orders [REDACTED] 30 March 2022 to show his discharge is

based on combat related injuries; the injuries are from armed conflict or caused by an instrumentality of war; his disability did result from a combat-related injury.

d. On 26 June 2023, DFAS advised that Orders [REDACTED] 30 March 2022 be amended, by coding his pay as tax exempt. The requested changes will ensure his retired pay is no longer subjected to federal income tax withholding.

2. The applicant provides:

a. A letter issued by the VA, 13 September 2022, which shows the following disability rating decisions were directly related to military service, with an effective date of 1 July 2022:

- allergic bronchopulmonary aspergillosis, ABPA with asthma and obstructive sleep apnea, 100% evaluation
- posttraumatic stress disorder with major depressive disorder, recurrent moderate, without psychosis, and bruxism (also claimed as anxiety, insomnia, adjustment disorder, PTSD), 70% evaluation
- irritable bowel syndrome (IBS) and diverticulosis with gastroesophageal reflux disease (GERD), 30% evaluation
- migraines, 30% evaluation
- left shoulder strain with impingement syndrome (non-dominant) (also claimed as left shoulder sprain), 20% evaluation
- right shoulder strain with impingement syndrome (dominant) (also claimed as right shoulder AC joint arthrosis), 20% evaluation
- cervical spine strain with degenerative disc disease with intervertebral disc syndrome (also claimed as disc disorder, cervical region), 20% evaluation
- thoracolumbar spine strain with degenerative disc disease and intervertebral disc disease (also claimed as sprain w pain), 20% evaluation
- allergic rhinitis with nasal mucosal hypertrophy, 10% evaluation
- dyshidrotic eczema (also claimed as dry skin, left hand), 10% evaluation
- left lower extremity L5 sciatic nerve radiculopathy (also claimed as sciatica, bilateral), 10% evaluation
- right lower extremity L5 sciatic nerve radiculopathy, 10% evaluation
- right elbow s/p right radial head fracture w residuals, limitation of extension, 0% evaluation
- left hand depuytren's contracture, fifth digit (little finger) (non-dominant) (also claimed as bilateral hand pain), 0% evaluation
- left hand depuytren's contracture, fourth digit (ring finger) (non-dominant) (also claimed as bilateral hand pain), 0% evaluation
- right hand depuytren's contracture, fifth digit (little finger) ( dominant) (also claimed as bilateral hand pain), 0% evaluation

- right hand depuytren's contracture, fourth digit (ring finger) ( dominant) (also claimed as bilateral hand pain), 0% evaluation
- left hip strain limitation of extension (also claimed as bilateral hip pain), 0% evaluation
- right hip strain limitation of extension (also claimed as bilateral hip pain), 0% evaluation
- right hip strain limitation of abduction, adduction, and rotation (also claimed as bilateral hip pain), 0% evaluation
- left hip strain limitation of abduction, adduction, and rotation (also claimed as bilateral hip pain), 0% evaluation
- bilateral shin splints, 0% evaluation
- costochondritis (also claimed as intercostal pain), 0% evaluation
- nuclear cataract, bilateral (also claimed as cataracts), 0% evaluation
- left ear hearing loss ( also claimed as hearing loss w hearing aids), 0% evaluation
- sinusitis, 0% evaluation
- hemorrhoids (also claimed as internal hemorrhoids), 0% evaluation
- erectile dysfunction (ED), 0% evaluation

b. In a letter issued by DFAS, 29 June 2023, states they cannot take action on his retired pay at this time, due to his retirement Orders not reflecting the proper coding for tax exemption. They further advised that his branch of service could issue retired Orders coding the pay as tax exempt.

3. The applicant's service record reflects the following:

a. DA Form 71 (Oath of Office), 12 May 1995, reflects he was appointed as a Reserve commissioned officer and entered active duty as a member of the Regular Army on 18 May 1995.

b. The applicant's officer record brief (ORB) shows he served in Bosnia for 7 months in the year 1999, and in Afghanistan in support of Operation Enduring Freedom (OEF) from 20 March 2004 through 14 July 2004.

c. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was honorably discharged from active duty on 1 July 2006, due to non-selection, permanent promotion. He completed 11 years, 1 month, 14 days of active service. His grade at the time of discharge was captain (CPT)/O-3.

d. DA Form 71, 2 July 2006, reflects he was later appointed as a Reserve commissioned officer, in the rank/grade of CPT/O-3. He entered active duty as a member of the U.S. Army Reserve on 25 September 2006.

e. DA Form 199 (Informal PEB Proceedings) shows the PEB convened on 10 February 2022, wherein the applicant was found physically unfit with a disability rating of 100%, with the disposition of permanent disability retired for asthma, severe, persistent. Onset of this condition was on 23 September 2010. This document further shows the PEB made the following administrative determinations:

(1) This condition:

- Was incurred or aggravated in the line of duty in a duty status
- It was not due to intentional misconduct, willful neglect, or unauthorized absence
- It is permanent and stable

(2) The disability disposition is not 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 (5 USC 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.).

(3) Evidence of record reflects the Soldier was not a member or obligated to become a member of an Armed Forces or Reserve thereof, or the NOAA or the USPHS on 24 September 1975.

(4) The disability did not result from a combat-related injury under the provisions of 26 USC 104 or 10 USC 10216.

(5) The applicant concurred with the PEB's decision and waived a formal hearing in his case, additionally he did not request reconsideration of his VA ratings.

f. Orders [REDACTED] 30 March 2022 show the applicant was released from assignment and duty because of a physical disability incurred while entitled to basic pay and under conditions that permit retirement for permanent physical disability. Effective date of retirement was 30 June 2022, with a disability rating of 100%. This document further shows:

- 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: No
- Disability resulted from a combat related injury as defined in 26 USC 104: No

g. His DD Form 214 shows he was honorably retired on 30 June 2022 due to disability, permanent. He completed 15 years, 9 months, 6 days of active service. His grade at the time of discharge was lieutenant colonel (LTC)/O-5.

h. A CRSC decision letter issued to the applicant by HRC on 30 November 2022, which shows he was awarded a total combat rated disability rating of 100%, effective July 2022, this document provides the summary of that decision:

- allergic bronchopulmonary aspergillosis, ABPA with asthma and obstructive sleep apnea: 100% disability, verified as combat-related due to an instrumentality of war
- PTSD with major depressive disorder, recurrent moderate, without psychosis, and bruxism, 70% disability, verified as combat-related due to armed conflict
- Tinnitus, 10% disability, combat-related due to an instrumentality of war
- allergic rhinitis with nasal mucosal hypertrophy, 10% disability, verified as combat-related due to an instrumentality of war
- Left Ear Hearing Loss, 0% disability, combat-related due to an instrumentality of war
- Sinusitis, 0% disability, verified as combat-related due to an instrumentality of war

4. On 20 February 2024, the Headquarters, U. S. Army Physical Disability Agency (USAPDA), provided an advisory opinion, which states that the applicant's application appears to have potential merit based on the evidence of record, however the USAPDA is unable to provide full administrative relief because corrective action is outside of its legal authority. Since relief may be appropriate in this case, they recommend that this matter be re-directed, as appropriate, for possible corrective action.

5. On 8 March 2024, the applicant was provided with a copy of the advisory opinion for review and/or comment.

6. The applicant provided the following response, which is available in its entirety for the Board's review:

a. He concurs with the USAPDA's assessment that the evidence of record demonstrates potential of merit (to approve administrative correction to retirement Orders Number [REDACTED] to reflect Combat Related based on findings of CRSC).

b. He concurs with the findings of the USAPDA, that relief in this case may be appropriate.

c. He concurs with the assessment that the USAPDA is not the proper agency to take the necessary corrective action to correct the record. The USAPDA does not have

the legal authority to affect the appropriate change to retirement orders, and that this matter should be re-directed to the appropriate agency for possible corrective action.

d. Based on the advisory opinion of the USAPDA and the determination of CRSC, he requests that the Army Review Boards Agency (ARBA) approves his request to administratively correct his retirement orders to reflect unfitting conditions were combat related and forward the decision to appropriate agency for corrective action.

#### 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 record of service, documents submitted in support of the petition, and executed a comprehensive review based on law, policy, and regulation. The Board reviewed and concurred with the U.S. Army Physical Disability Agency advising official finding that although relief may be appropriate in the applicant's case, corrective action is outside their authority. Additionally, the Board found the applicant was granted Combat Related Special Compensation for combat-related injuries due to instrumentalities of war and therefore determined relief was warranted to his orders to show his characterization of discharge is based on combat related injuries, 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 and that his disability resulted from a combat related injury as defined in 26 USC 104.



REFERENCES:

1. Army Regulation 15-185 (Army Board for Correction of Military Records (ABCMR)), currently in effect, prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR. 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.

2. Title 10, United States Code (USC) (Armed Forces), chapter 61, provides the Secretaries of the Military Departments with authority to retire or discharge a member if they find the member unfit to perform military duties because of physical disability. The U.S. Army Physical Disability Agency is responsible for administering the Army physical disability evaluation system and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with Department of Defense (DOD) Directive 1332.18 and AR 635-40 (Physical Evaluation for Retention, Retirement, or Separation).

a. Soldiers are referred to the disability system when they no longer meet medical retention standards in accordance with Army Regulation 40-501 (Standards of Medical Fitness), chapter 3, as evidenced in a Medical Evaluation Board (MEB); when they receive a permanent medical profile rating of 3 or 4 in any factor and are referred by an MOS Medical Retention Board; and/or they are command-referred for a fitness-for-duty medical examination.

b. The disability evaluation assessment process involves two distinct stages: the MEB and the Informal Physical Evaluation Board (PEB) Proceedings. The purpose of the MEB is to determine whether the service member's injury or illness is severe enough to compromise his/her ability to return to full duty based on the job specialty designation of the branch of service. A PEB is an administrative body possessing the authority to determine whether or not a service member is fit for duty. A designation of "unfit for duty" is required before an individual can be separated from the military because of an injury or medical condition. Service members who are determined to be unfit for duty due to disability either are separated from the military or are permanently retired, depending on the severity of the disability and length of military service. Individuals who are "separated" receive a one-time severance payment, while veterans who retire based upon disability receive monthly military retired pay and have access to all other benefits afforded to military retirees.

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



Reasonable performance of the preponderance of duties will invariably result in a finding of fitness for continued duty. A Soldier is physically unfit when a medical impairment prevents reasonable performance of the duties required of the Soldier's office, grade, rank, or rating.

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

4. Title 26, United States Code (USC) (Armed Forces), section 104, states the term "combat-related injury" means personal injury or sickness that is incurred as a direct result of armed conflict; while engaged in extra hazardous service, under conditions simulating war; or which is caused by an instrumentality of war.

5. Army Regulation 15-185 (ABCMR), states the Army, by law, may pay claims for amounts due to applicants as a result of correction of military records. The ABCMR will furnish the Defense Finance and Accounting Service (DFAS) copies of decisions potentially affecting monetary entitlement or benefits. The DFAS will treat such decisions as claims for payment by or on behalf of the applicant and settle claims on the basis of the corrected military record. The applicant's acceptance of a settlement fully satisfies the claim concerned.

//NOTHING FOLLOWS//