

IN THE CASE OF: [REDACTED]

BOARD DATE: 6 June 2024

DOCKET NUMBER: AR20230013481

APPLICANT REQUESTS: in effect -

a. correction of his DA Form 199 (Informal Physical Evaluation Board (PEB) Proceedings) to show his unfitting condition of degenerative arthritis of the lumbar spine with right lower extremity radiculopathy resulted from a combat-related injury; and

b. correction of his DD Form 214 (Certificate of Release or Discharge from Active Duty) for the period ending 1 February 2005, to show award of the Combat Action Badge (CAB). (Note: The Board will not consider this request, as his record contains orders awarding him the Combat action Badge. His request for the CAB will be corrected via an administrative correction without action by the Board.)

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

- DD Form 149 (Application for Correction of Military Record)
- Self-authored Statement
- Letter, Army Board for Correction of Military Records, 3 August 2023
- Officer Record Brief
- Screenshot Interactive Personnel Electronic Records Management System (iPERMS)
- Partial Screenshot of Permanent Order 380-18, Headquarters and Headquarters Battalion, 1st Infantry Division, 8 June 2005
- DD Form 214

FACTS:

1. The applicant states, in effect:

a. His Medical Evaluation Board (MEB), PEB, and medical separation and retirement took 3.5 years and completed only after an inspector general investigation, all the while erroneously upholding his promotion to lieutenant colonel. Prior to the final completion of the PEB portion, his State Retirement Officer instructed him to ensure that all applicable documents (DA Form 199 and retirement order) indicated that the "catalyst" injury (degenerative arthritis of the lumbar spine et al) was reflected as

combat-related and incurred in the line of duty (LOD) to ensure later Combat-Related Special Compensation (CRSC) eligibility.

b. Before signing the final PEB, he requested his PEB Liaison Officer (PEBLO) verify his injury was reflected as incurred in combat and in LOD on both the DA Form 199 and retirement orders. The PEBLO assured him the injury was reflected his injury was reflected as incurred in combat and in LOD, as reflected within attached documents. After receiving his PEBLO's assurance, he forfeited all further PEB appeals, counsel, and requests for changes to the DA Form 199 and simply signed it. The PEBLO is the expert, so he assumed all was "exactly as it should be." What he did not know was his PEBLO was not correct nor completely forthright. He was unaware of the upcoming longer-term ramifications and challenges related to fighting for CRSC due to the misguidance.

c. He applied for CRSC (1st submission) and received the determination from the CRSC board on or around 14 June 2021. To his shock, it stated that the injury responsible for his medical retirement was determined to be "not combat related," and therefore not eligible for CRSC. This directly countered his PEBLO, his retirement orders, LOD, MEB, medical documentation, and what he was told by his PEBLO about his DA Form 199. He resubmitted to CRSC a second time. He assumed the issue was an easy fix or misunderstanding. He believed it would be simple to add additional medical documentation and point out that his DA Form 199 and PEBLO states: To satisfy the determination required by Section 3 of Appendix 5 to Enclosure 3 of DoDI 1332.18 (as implemented by Section 020303 B of DoD 7000.14-5, VOL 7A), the Soldier's disability retirement is due to a disability incurred in the LOD in a combat zone or as the result of performing combat related operations. This should resolve the discrepancy. It did not. The decision came back as denied once again as: 1) still not combat related per his DA Form 199, and 2) because the DD Form 689 (Individual Sick Slip) did not state reason for injury. How can it not be combat related? It says it right there in Section VI (of DA form 199)— just as his PEBLO stated months prior.

d. In his frustration, he reached out to the CRSC board once again. They in turn instructed him to contact his PEBLO and the Integrated Disability Evaluation System (IDES). He did. This time, he was informed by his PEBLO that although it states combat related as he previously indicated, the codes V1 and V3 are not always used and therefore, for the purposes of CRSC, the DA Form 199 would not support CRSC for the back condition. This was not what he was informed of previously, nor prior to his signing away his ability to appeal or seek further clarification. He was livid. The story had now changed. CRSC cannot change the DA Form 199 and the PEBLO/IDES was now pointing him to the Army Review Boards Agency (ARBA) because the PEB was complete.

e. His PEBLO instructed him to provide ARBA with additional documentation and substantiation, which coincidentally, he would have provided to the PEB if he knew that it was necessary prior to PEB finalization. The PEB did not appear to have read all related medical documents as dates were incorrectly reflected on the DA Form 199 and elsewhere, which he believes may have affected what was indicted on the DA Form 199 more accurately as well.

f. How he finally came to ARBA: In December 2021, He was awarded Department of Veterans Affairs (VA) compensation for tinnitus. He understood that he was to inform the CRSC board of any changes to his VA benefits or conditions. He did just that by submitting it for CRSC consideration. Later he received a third CRSC determination letter stating tinnitus granted, and back injury denied? He had not submitted anything for the back condition, as he was only submitting for tinnitus. Unknowingly, he had now just expended all three CRSC submission opportunities. As much as he tried to explain to the CRSC board that it was not his intent, the answer was: "that is not how we operate, and it is all or nothing" which seemed counter to their guidance.

g. The CRSC project specialist then informed him that he would now have to go to ARBA for relief or any changes, as necessary. Injury occurred in May 2004 enroute to Fallujah, Iraq - as indicated. As he was a detachment commander at the time, he sought to downplay any effects it may have and informally sought conservative treatment for what he thought was a simple back spasm and sore legs and feet do to the height of the jump and weight of his load and equipment. It is detailed in his LOD, attached documents, his statements, and even on the DA Form 199. He was in a combat zone when he exited the vehicle at the rear while they were taking fire. The fact that his supporting DD Form 689 sick call slip does not say how the injury occurred is because it was the only evidence he has of the ongoing and enduring conservative treatment he sought throughout the remainder of the deployment – which is dated November 2004.

h. All other deployment medical documentation was supposed to have been saved to PIV (personal identity verification) cards by the 30th HSB prior to redeployment – a new and untested process. That process failed and it was not discovered until reaching the demobilization station. He now has no access to any additional or like medical documentation. He has one original DD Form 689 which certainly indicates a back injury in a combat zone. This has all been explained and reexplained. Additionally, he has continued treatment post-deployment from 2005 until the injury manifested itself to the point of limb paralysis in 2009, and up to and including today. That is indicated in the continuity of care document and VA nexus letter per his primary care physician.

i. Upon receiving a thorough denial from the Board, he was shocked that his CAB could not be found and would be used as evidence to deny his application. He is currently dealing with cancer in the family and divorce simultaneously. He asks, how anyone under these circumstances could accept the Board's ruling yet have the

wherewithal to continue this endless process. Due to his personal situation, he has conceded and immediately submitted the denial and his case for Congressional Inquiry – Senatorial. At this time, he cannot deal with all matters personally; however, he requests the Board immediately review his case based on this new evidence.

2. Following enlisted service in the Army National Guard (ARNG), the applicant was appointed an officer in the ARNG effective 25 July 1998. Evidence shows he entered active duty on 18 December 2003, and he served in Iraq from 15 March to 29 December 2004. On 1 February 2005, he was honorably released from active duty upon the completion of his required active service. The DD Form 214 he was issued does not show award of the CAB.

3. A DA Form 2173 (Statement of Medical Examination and Duty Status) shows that on 31 May 2004, the sustained an injury while deployed to Iraq causing low back pain and radiculopathy, lumbar region. The injury occurred after he jumped out of a light medium tactical vehicle in full gear plus assault pack. The form also shows the injury was considered to have been incurred in LOD.

4. A DD Form 689, dated 14 November 2004, shows the applicant was examined while deployed to Iraq due to muscle spasm (back). The form also shows the injury was incurred in LOD.

5. On 5 February 2021, an informal PEB found the applicant unfit for further military service based on degenerative arthritis of the lumbar spine with right lower extremity radiculopathy (VA diagnosis: intervertebral disc syndrome of the lumbar spine and lumbar radiculopathy). The PEB indicated the following:

Per the Army National Guard Soldier's Narrative Summary (NARSUM) and LOD determination, the Soldier reports onset for this condition in May 2004 after dismounting a Light Medium Tactical Vehicle (LMTV) in full gear and upon landing he felt pain to his lower back while deployed to Iraq (2004). The condition was intermittent, however, began worsening with lower back pain radiating down his right leg to include numbness and right foot tingling from no mechanism of injury or trauma.

6. The PEB recommended a 40% disability rating and the applicant's permanent disability retirement. The DA Form 199 contains the following statement in:

a. Section V:

(1) The disability disposition is not based on disease or injury incurred in LOD 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 LOD during a period of war (Title 5,

U.S. Code, 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.)

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

b. Section VI: To satisfy the determination required by Section 3 of Appendix 5 to Enclosure 3 of DoDI 1332.18 (as implemented by Section 020303 B of DoD 7000.14-5, VOL 7A), the Soldier's disability retirement is due to a disability incurred in LOD in a combat zone or as the result of performing combat related operations.

7. Orders Number 055-16, issued by the U.S. Army Physical Disability Agency on 24 February 2021, directed the applicant's retirement due to physical disability effective 31 March 2021. The orders contain the following entries:

a. Disability is based on injury or disease received in LOD as a direct result of armed conflict or caused by an instrumentality of war and incurred in the LOD during a war period as defined by law: NO

b. Disability resulted from a combat related injury as defined in Title 26, U.S. Code, section 104: NO

c. Disability incurred in the LOD in a combat zone or result of performing combat related operations: YES.

8. The applicant's CRSC record shows -

a. He was awarded CRSC for the following conditions:

- post-traumatic stress disorder
- gastrointestinal disorder, functional
- tinnitus
- left ear hearing loss

b. His request for CRSC for the following conditions was disapproved because the medical evidence does not show a combat-related event caused the condition(s):

- lumbar spine degenerative disc disease, spinal stenosis, spondylolisthesis, intervertebral disc syndrome, and arthritis
- radiculopathy, right lower extremity (sciatic nerve)
- radiculopathy, right lower extremity (femoral nerve)
- radiculopathy, left lower extremity (femoral nerve)

9. The applicant's VA rating decision shows he was granted service-connected disability compensation for, among other conditions:

- lumbar spine degenerative disc disease, spinal stenosis, spondylolisthesis, intervertebral disc syndrome, and arthritis
- radiculopathy, right lower extremity (sciatic nerve)
- radiculopathy, right and left lower extremities (femoral nerve)

10. The applicant provides a partial copy of Permanent Order 380-18, Headquarters and Headquarters Battalion, 1st Infantry Division, 8 June 2005, which awarded him the CAB for actions on 9 December 2004.

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.

2. The Board noted that a disabling condition will be considered combat related if it was incurred as a direct result of armed conflict; while engaged in hazardous service such as aerial flight duty, parachute duty, demolition duty, experimental stress duty, and diving duty; or if it is caused by an instrumentality of war. The Board found insufficient evidence to support a conclusion that the applicant's unfitting condition (degenerative arthritis of the lumbar spine with right lower extremity radiculopathy) met the criteria to be considered combat related. Although the evidence does confirm the applicant's participation on combat (i.e., he was awarded the Combat Action Badge), the Board found the evidence does not link his unfitting condition to the armed conflict he was engaged in on 9 December 2004. Based on a preponderance of the evidence, the Board determined the PEB's administrative determination that his unfitting condition was not combat related 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:

Other than the correction addressed in Administrative Note(s) below, the Board determined 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 otherwise insufficient as a basis for correction of the records of the individual concerned.

11/1/2024


XCHAIRPERSON


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.

ADMINISTRATIVE NOTE(S): administratively correct his DD Form 214 for the period ending on 1 February 2005 to add the Combat Action Badge per Permanent Order 380-18, Headquarters and Headquarters Battalion, 1st Infantry Division, 8 June 2005.

REFERENCES:

1. Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation) establishes the Army Disability Evaluation System (DES) 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 office, grade, rank, or rating. It states PEBs determine fitness for purposes of Soldiers retention, separation, or retirement for disability. The PEB also makes certain administrative determinations that may have benefit implications under other provisions of law. The regulation states in:

a. Paragraph 5-24 (Determination for Purposes of Federal Civil Service Employment) the physical disability evaluation will include a decision and supporting documentation regarding whether the injury or disease that makes the Soldier unfit or that contributes to unfitness was incurred in combat with an enemy of the United States, was the result of armed conflict, or was caused by an instrumentality of war during a period of war. These determinations impact the eligibility of certain military retirees for certain benefits when employed under the Federal Civil Service System.

(1) The determinations will be recorded on the record of proceedings of the Soldier's adjudication.

(2) Armed Conflict: The fact that a Soldier may have incurred a medical impairment during a period of war, in an area of armed conflict, or while participating in combat operations, is not sufficient to support a finding that the disability resulted from armed conflict. There must be a definite causal relationship between the armed conflict and the resulting unfitting disability.

b. Paragraph 5-25 (Determination for Federal Tax Benefits) physical disability evaluation will include a determination and supporting documentation on whether the Soldier's disability compensation is excluded from Federal gross income under the provisions of Title 26, U.S. Code, section 104. The entitlement to this exclusion is based on the Soldier having a certain status on 24 September 1975 or being retired or separated for a disability determined to be combat related as set forth in this paragraph. The determination will be recorded on the record of proceedings of the Soldier's adjudication.

c. Combat related: This standard covers those injuries and diseases attributable to the special dangers associated with armed conflict or the preparation or training for armed conflict. A physical disability will be considered combat-related if it causes the Soldier to be unfit or contributes to unfitness and was incurred under any of the following circumstances:

(1) As a direct result of armed conflict.

(2) While engaged in hazardous service. Such service includes, but is not limited to, aerial flight duty, parachute duty, demolition duty, experimental stress duty, and diving duty.

(3) Caused by an instrumentality of war. Occurrence during a period of war is not required. A favorable determination is made if the disability was incurred during 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 material. However, there must be a direct causal relationship between the instrumentality of war and the disability. For example, if a Soldier is on a field exercise and is engaged in a sporting activity, falls, and strikes an armored vehicle, the injury will not be considered to result from the instrumentality of war (the 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 were engaged in the same sporting activity and the armored vehicle struck the Soldier, the injury would be considered the result of an instrumentality of war (the armored vehicle).

2. Title 26, U.S. Code, section 104, states that for the purpose of this subsection, the term "combat-related injury" means personal injury or sickness which is incurred as a direct result of armed conflict, while engaged in extra hazardous service, or under conditions simulating war; or which is caused by an instrumentality of war.

3. CRSC, established by Title 10, United States Code, section 1413a, provides for the payment of the amount of money a military retiree would receive from the VA for combat-related disabilities if it were not for the statutory prohibition for a military retiree to receive a VA disability pension. Payment is made by the military department, not the VA, and is tax free. Eligible members are those retirees who have 20 years of service for retired pay computation (or 20 years of service creditable for Reserve retirement at age 60) and retirees with fewer than 20 years of service who retired for physical disability and who have disabilities that are the direct result of armed conflict, especially hazardous military duty, training exercises that simulate war, or cause by an instrumentality of war.

//NOTHING FOLLOWS//