

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 17 September 2024

DOCKET NUMBER: AR20230013729

APPLICANT REQUESTS:

a. Reconsideration of his previous request to correct Orders Number D -52-10 to reflect Disability is based on injury or disease received in the Line of Duty as a direct result of Armed Conflict or caused by and instrumentality of war to reflect "Yes" rather than "No." Disability resulted from a combat related injury as defined in Title 10, United States Code (USC), section 104 to reflect "Yes" rather than "No."

b. As a new request correction of:

- Orders Number D 52-10 to show Disability Retirement: "7 years, 10 months, and 12 days" rather than "7 years, 4 months, and 22 days"
- National Guard Bureau (NGB) Form 22 (Report of Separation and Record of Service) item 23 (Authority and Reason) to reflect: "injuries incurred from the performance of duty under conditions simulating war and through an instrumentality of war."

c. A personal appearance before the Board.

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

- DD Form 149 (Application for Correction of Military Record)
- Self-authored letter
- Orders Number D 052-10, 21 February 2020
- NGB Form 23B (Army National Guard (ARNG) Retirement Points History Statement), 1 December 2020
- NGB Form 22, 26 March 2020
- Memorandum – Subject: Incorrect Combat Related Special Compensation (CRSC)/Retirement Pay, 28 April 2023
- Defense Finance and Accounting Service (DFAS) letter, 23 June 2023
- Memorandum – Subject: Advisory Opinion, 26 January 2023
- Memorandum – Subject: Army CRSC Decision letter, 12 October 2023
- Department of Veterans Affairs (DVA) letter, 19 September 2023
- Rating Decision

- Email communication
- Legal Representation letter, 1 September 2023
- Email communication
- Legal Representation letter, 15 October 2023
- Congress of the U.S. letter, 8 November 2023
- Army Board for Correction of Military Records (ABCMR) Docket Number AR20220008785
- DFAS letter, 22 September 2023
- Email communication

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the ABCMR in Docket Number AR20220008785 on 30 March 2023.

2. The applicant states in part, that during his medical board processing his injuries were deemed to be combat related by the Judge Advocate General's office in accordance with Title 10, USC, section 1413a(e), however he was advised to not contest the board's decision but to instead request relief through this Board. On 26 January 2023, the U.S. Army Human Resources Command (AHRC) advised that his injuries met the criteria to be deemed as combat related with entitlement to CRSC with a rating of 40 percent disabling. He further notes that his years of service as reflected on his retirement orders and NGB Form 22 are incorrect. This error is causing his retirement pay to be calculated incorrectly. Previously he was redirected to DFAS. In response, DFAS redirected the applicant back to this Board for action.

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

a. On 19 August 1997, the applicant enlisted in the Regular Army. On 18 August 2000, the applicant was honorably released from active duty and transferred into the U.S. Army Reserve (USAR) Control Group (Reinforcement).

b. On 29 March 2005, AHRC issued Orders Number D-03-511951 honorably discharging the applicant from the USAR, effective 29 March 2005.

c. On 9 September 2008, the applicant enlisted in the ARNG for 6 years, and on 7 June 2014, the applicant elected to his extend his current enlistment in the ARNG by 6 years.

d. On 16 October 2014, the COARNG issued Orders Number 289-106, ordering the applicant to active duty in support of Operation Enduring Freedom – Guantanamo Bay (Cuba), effective 23 October 2014, for a period not to exceed 400 days.

e. On 3 September 2015, the U.S. Army Installation Management Command issued Orders Number 246-0521 releasing the applicant from assignment and duty, effective 3 October 2015.

f. On 3 October 2015, the applicant was honorably released from active duty by reason of completion of required active service and transferred to his ARNG unit. His DD Form 214 shows he completed 11 months and 11 days of net active service with 3 years, 8 months, and 9 days of prior active service. It also shows in item 18 (Remarks) he was ordered to active duty in support of Operation Enduring Freedom – Guantanamo Bay, Cuba and he served in Cuba during the period of 2 December 2014 through 25 August 2015.

g. On 7 February 2020, an Informal Physical Evaluation Board (PEB) convened finding the applicant physically unfit for continued military service with a recommendation that he be permanently medically retired with a disability rating of 80 percent. DA Form 199 (Informal PEB Proceedings), Section V (Administrative Determinations) provides that the applicant's disability disposition is not based on disease or injury incurred in the line of duty in combat with an enemy of the U.S. 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. Further, the disability did not result from a combat related injury under the provisions of Title 26, USC, section 104 or Title 10, USC, section 10216.

h. On 21 February 2020, the U.S. Army Physical Disability Agency (USAPDA) issued Orders Number D 052-10 releasing the applicant from assignment and duty because of physical disability incurred while entitled to basic pay and under conditions that permit his retirement for permanent physical disability, effective 27 March 2020; Disability Retirement "7 years, 4 months, and 22 days and basic pay 18 years, 6 months, and 23 days." These 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 an incurred in the line of duty during a war period as defined by law "no." "Disability resulted from a combat related injury as defined as Title 25, USC, section 104 "no."

i. On 19 May 2020, NGB Form 22 was issued reflective of the applicant's service in the ARNG from 9 September 2008 – 26 March 2020. Item 23 (Authority and Reason) reflects " Army Regulation (AR) 635-40 (Disability Evaluation for Retention, Retirement, or Separation) "Placement on Permanent Disability Retired List."

j. On 7 April 2020, the COARNG issued Orders Number 309698 placing the applicant on the Permanent Disability Retired List, effective 27 March 2020.

k. On 30 March 2023, in ABCMR Docket Number AR20220008785 the Board noted that after review of the applicant's supporting documents and evidence found within his military record, the requested relief was not warranted. The Board concurred with the conclusions of the AHRC advisory official and the Army Review Boards Agency Medical Advisor that the evidence provided is insufficient as a basis for changing the determinations made by the USAPDA or AHRC. Based on a preponderance of the evidence the Board determined the combat-related determinations made in the applicant's case (as currently constituted following amendment by AHRC) were not in error or unjust. The Board further noted the applicant's inquiry concerning his retired pay and determined that this was a matter for DFAS to address.

4. The applicant provides the following a:

a. NGB Form 23B dated 1 December 2020, reflective of the applicant's qualifying service completed between 23 August 1996 – 1 December 2020

- Total Career points = 2847
- Total Points for Retired Pay = 2832
- Creditable Service for Retired Pay = 14 years, 6 months, and 22 days

b. Memorandum – Subject: Incorrect CRSC/Retirement Pay, dated 28 April 2023, reflective of the applicant's contention with the years of service/points being utilized by DFAS to calculate his disability retirement payment. The applicant again notes that his previously provided NGB Form 23 incorrectly reflected 2740. The corrected document now reflects 2832. This correction needs to be reflected on his retirement orders in order to calculate his retired pay correctly.

c. DFAS letter dated 23 June 2023, reflective of the applicant being redirected to this Board to request correction of his retirement records.

d. Memorandum – Subject: Advisory Opinion, dated 26 January 2023, reflective of the advisory opinion provided by the AHRC with regard to ABCMR Docket Number AR20220008785 wherein the applicant requested entitlement to CRSC. AHRC opined that the applicant was entitled to CRSC for some of the conditions noted but not for others due to lack of a combat related causative event and or instrumentality of war.

e. Memorandum – Subject: Army CRSC Decision letter, dated 12 October 2023, reflective of the applicant being awarded CRSC for five conditions with a combined rating of 80 percent. However, they were unable to award CRSC for six other requested conditions noting the lack of evidence of a combat related causative event.

f. DVA letter dated 19 September 2023, reflective of an acknowledgement letter provided to the applicant concerning his medical claim.

g. Rating Decision reflective of the applicant's rated conditions subject to VA compensation.

h. Email communication, reflective of communication concerning the years of service noted on the applicant's retirement orders. The applicant was advised that due to the amount of time lapsed, he would need to request relief through this Board.

i. Legal Representation letter dated 1 September 2023, reflective of a subsequent inquiry submitted on behalf of the applicant concerning his request for correction of his retirement orders to accurately reflect his Disability Years of service as "7 years, 10 months, and 12 days." Counsel again requests that the applicant's NGB Form 22 and retirement order be amended to reflect the combat relation of the applicant's condition which prompted his medical retirement. This document is further provided in its entirety within the supporting documents for the Board member's review.

j. Email communication reflective of the applicant being advised that since his retirement order was issued by the USAPDA, the State was precluded from amending the document.

k. Legal Representation letter dated 15 October 2023, reflective of a supplemental request to have the applicant's retirement order amended to reflect the combat relation of the injuries incurred which predicated his medical retirement from military service. This document is further provided in its entirety within the supporting documents for the Board member's review.

l. Congress of the U.S. letter dated 8 November 2023, reflective of their expressed interest in the applicant's requested relief. The applicant request's a personal hearing and to expedite his submitted request for reconsideration.

m. DFAS letter dated 22 September 2023, reflective of their response to the applicant's Congressional Representative concerning his requested relief. DFAS advised that the applicant's pay account was established on 26 February 2020, based on his retirement orders which reflect 7 years, 4 months, and 22 days. Although his total career points statement received on 2 May 2023, reflects 7 years and 9 months, (2847 points), they were required to comply with what is stated on the retirement order. Any corrections to the orders would need to be addressed by this Board.

n. Email communication reflective of additional attempts made by the applicant to have his retirement order amended to reflect the correct years of service. He was redirected to the USAPDA.

BOARD DISCUSSION:

1. The Board determined the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.
2. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered.

a. Combat Related: Deny. The applicant requests reversal of the United States Army Physical Disability Agency's (USAPDA) and the U.S. Army Human Resources Command's (AHRC) administrative determinations that found his disabilities were not related to combat as defined by law.

(1) The evidence shows a PEB determined his PTSD and cervical spine condition were unfitting conditions for continued military service. The PEB determined that neither condition was combat related: The PEB found no evidence that one of these disabilities was the 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; or that he was a member of the military on or before 24 September 1975.

(2) In order 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. The Board reviewed the applicant's previous submission as well as his current submission, together with the medical documents and statements he provides, and agreed with the medical reviewer's determination that there is no probative evidence to support a combat related finding for the requested disabilities.

b. Disability Retirement of 7 years, 10 months, and 12 days vice 7 years, 4 months, and 22 days: Deny. The total disability retirement is based on total active duty completed. The applicant's NGB Form 23B reflects the total service he completed. Any errors related to this form should be addressed to the State ARNG.

c. Correction of the NGB Form 22 to reflect: "injuries incurred from the performance of duty under conditions simulating war and through an instrumentality of war: No

BOARD VOTE:

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

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis to amend the decision of the ABCMR set forth in Docket Number AR20220008785 on 30 March 2023.

7

REFERENCES:

1. Title 10, USC, section 12733 (Computation of Retired Pay: Computation of Years of Service) provides the person's years of service and any fraction of such a year are computed by dividing 360 into the sum of the following:

- days of active service
- the person's days of full-time service under sections 316, 502, 503, 504, and 505 of Title 32 while performing annual training duty or while attending a prescribed course of instruction at a school designated as a service school by law or by the Secretary concerned
- one day for each point credited to the person

2. Title 26, USC, Section 104 (Compensation for Injuries or Sickness) provides that "combat related injuries" are those which is caused by an instrumentality of war or which incurred as –

- as a direct result of armed conflict
- while engaged in extra hazardous service, or
- under conditions simulating war

3. 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.

3. National Guard Regulation 600-200 (Enlisted Personnel Management), provides that correction of cosmetic or typographical administrative errors will be made on written application of the individual to the State MPMO/G1. When determined from official records that NGB Form 22 (National Guard Report of Separation and Record of Service) contains an error or omission of pertinent facts, discharge authorities may issue NGB Form 22A. NGB Form 22, item 23 (Authority and Reason) will contain the authority cited on the discharge order and/or the reason from chapter 6 of this regulation.

4. AR 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it

states in paragraph 2-11 that 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//