

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 5 June 2024

DOCKET NUMBER: AR20230015116

COUNSEL FOR THE APPLICANT REQUESTS:

This case comes before the Army Board for Correction of Military Records (ABCMR) on a remand from the U.S. Court of Federal Claims, [Case Number], dated 19 December 2023. The Court directs the Army Board for Correction of Military Records (ABCMR) to reconsider and explain whether applicant is entitled to Combat Related Special Compensation (CRSC); seek an advisory opinion from the Office of the Deputy Under Secretary of Defense (Military Personnel Policy); determine and explain whether the applicant is entitled to any correction of his military records, based upon any errs or injustices found; and accept, consider, and address in its decision any other issues, evidence, or arguments applicant raises in a written submission to the ABCMR, including but not limited to:

- Explaining any relationship, or lack thereof, between the Army's grant of CRSC to plaintiff for tinnitus and the Army's denial of CRSC to plaintiff for PTSD
- Addressing any evidence presented related to PTSD and its relation to whether Plaintiff is entitled to CRSC under either or both of the following categories:
Armed Conflict and Instrumentalities of War
- Addressing any differences between its determination and the determinations made by Plaintiff's previous Physical Evaluation Boards concerning the causes of his PTSD

COUNSEL'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

[Name of Counsel] LLP Brief

FACTS:

1. The applicant defers to counsel. Counsel states:

a. The CRSC Statute authorizes the award of CRSC for military retirees with a combat related disability, which is defined as a disability "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." The Program Guidance further defines "armed conflict" as "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 terrorists.”

b. Here, the preponderance of the evidence shows that the applicant’s PTSD was caused by over 100 enemy weapons fire, mortar and rocket attacks. The applicant provided the Army with voluminous evidence that establishes and corroborates both his exposure to such violent attacks and their direct impact on his mental health. This evidence includes the reports of medical professionals who examined the applicant shortly after his PTSD diagnosis and attributed his PTSD to those exact events.

c. Further, the PEB’s finding that the applicant’s PTSD was caused through an instrumentality of war and resulted directly from armed conflict is objective evidence. Accordingly, the ABCMR should rectify its previous error and grant the applicant CRSC for his PTSD. Indeed, the ABCMR has repeatedly granted considerable weight to the findings of the PEB (as well as the Army’s findings in retirement orders) in granting CRSC to veterans. In fact, the PEB and the Army use the same definitions as the CRSC Board and ABCMR to assess combat-relatedness.

d. To that point, the PEB determined that the applicant’s disability “is based on disease or injury incurred in the line of duty in combat with an enemy of the United States and as a direct result of armed conflict or caused by an instrumentality of war” and that the disability “did result from a combat-related injury under the provisions of 26 U.S. Code (USC) section 104 or 10 USC section 10216.” The Army then used the same definition when it released the applicant from duty, observing that his “disability is based on injury or disease received in LOD as a direct result of Armed Conflict or caused by an instrumentality of war.”

e. One of these two provisions—10 USC § 10216—specifically cross-references the definition of “combat-related disability” in 10 USC § 1413a, the CRSC Statute. The other provision cited by the PEB and the Army—26 USC § 104—defines “combat-related injury” almost identically to the CRSC Statute’s definition of “combat-related disability.”

f. Undoubtedly recognizing this, other military branches have adopted policies to ensure that there are no inconsistent findings by the PEB and the CRSC Board on the causes of veterans’ disabilities, stating that: in the absence of clear and convincing evidence the PEB’s determination was in error, “the CRSC Board will adhere to previous PEB determinations that a disability is combat-related in the adjudication of CRSC applications.”

(1) The applicant’s PTSD was Incurred through instrumentalities of war. Pursuant to 10 USC § 1413a(e)(2)(D), a combat-related disability includes a disability that is compensable under the laws administered by the Secretary of Veterans Affairs

and that was incurred as a direct result of armed conflict or through an instrumentality of war. The Program Guidance further states that “[d]eterminations of whether a disability is combat-related will be based on the preponderance of available documentary information. The Program Guidance, with respect to incurrence of a disability through an instrumentality of war, states the following:

(2) An instrumentality of war is “a vehicle, vessel, or device” that is either “designed primarily for Military Service and intended for use in such Service at the time of the occurrence or injury” or that is involved in an occurrence such that it “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.

(3) Incurrence during an actual period of war is not required. However, there must be a direct causal relationship between the instrumentality of war and the disability. The disability must be incurred incident to a hazard or risk of the service.

(4) The first element of the definition of an instrumentality of war as set forth in the Program Guidance states that an instrumentality of war is a “vehicle, vessel, or device designed primarily for Military Service,” and “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 material” (emphasis added).

(5) As documented in his medical records and other evidence, the applicant’s PTSD was caused by his exposure to enemy rocket and mortar attacks as well as enemy weapons fire. The Army’s own publications make clear that mortars are instrumentalities of war. Mortars “are suppressive indirect fire weapons” used “to neutralize, suppress, or destroy area or point targets.” Mortars were designed for military use and are regularly used in military efforts to “provide indirect fire” and “high angle fires” in a way that is “invaluable against dug-in enemy troops.” The rockets and mortars used by enemy combatants would certainly be considered a device or instrumentality that the enemy was using on the battlefield to combat U.S. and coalition service members. Accordingly, there is no question that mortars and rockets are designed for use in military operations and meet the statutory definition of instrumentalities of war for a combat-related disability.

(6) The second element of the definition of an instrumentality of war states that the instrumentality must be “intended for use in such Service at the time of the occurrence or injury.” At the time of the occurrence of his PTSD, the applicant was deployed to the Al Anbar Province of Iraq on military orders. The weapons fire, rockets,

and mortars fired by the enemy were clearly designed to kill and destroy U.S. and coalition service members and property.

(7) Next, there must be a direct causal relationship between the instrumentality of war and the disability. Such a finding “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 . . . [or] injury or sickness caused by fumes, gases, or explosion of military ordnance, vehicles, or material.” Here, the preponderance of the evidence shows that the applicant’s exposure to instrumentalities of war, rockets and mortars, is precisely what caused his PTSD. The applicant now suffers from flashbacks, nightmares, anxiety, and intrusive thoughts. He has frequent dreams of people breaking into his home and struggles with loud noises and sudden changes such that he now removes himself from public, social settings.⁸⁰ If not for the rocket and mortar attacks, the applicant would not have been diagnosed with PTSD soon after his first deployment to Iraq.

(8) Lastly, the applicant’s PTSD was incurred incident to a hazard or risk of military service. It is certainly a risk of military service to be subject to regular enemy weapons fire, mortar and rocket attacks while serving on active duty in Iraq. Accordingly, the applicant’s daily exposure to these instrumentalities of war is more than sufficient to establish that the instrumentalities of war caused the applicant’s PTSD. The ABCMR’s decision in the case at Docket Number AR20190015543 is instructive. There, the ABCMR concluded that the applicant’s “PTSD is a result of exposure to rocket and mortar attacks during her service in Afghanistan, which meets the criteria for CRSC.” The ABCMR based its finding on the Medical Advisor’s conclusion that “[f]requent rocket and mortar attacks (i.e., instrumentality of war) establishes a causal relationship between combat-related event(s) and subsequent PTSD, even when her PTSD was not diagnosed until after her deployment.”

(9) Given the corroborated and undisputed evidence that the applicant was directly exposed to daily mortars and rocket attacks, the same result should follow here.

(10) The ABCMR’s decision in AR20120022347 (August 2013) is both illustrative and informative. There, the veteran sought CRSC for his PTSD that was the result of a mortar attack that hit about ten to fifteen feet from the veteran. As here, the PEB found that the veteran’s PTSD “was a result of a mortar attack.” And, also as here, the Army’s retirement orders stated that the veteran’s PTSD “[was] 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 incurring [sic] in the line of duty during a period of war as defined of law” and “resulted from a combat related injury.” Based on the Army’s retirement orders and the PEB’s findings, the ABCMR held that the veteran was entitled to CRSC because his PTSD was caused by the mortar attack, observing that “at least two official documents state [the mortar attack] was a precipitating cause in the development of or aggravation of the applicant’s PTSD.” Similarly, in AR20120017285,

dated August 2013, the ABCMR granted CRSC by relying heavily on the findings of both the PEB and the VA determining the veteran's condition was a direct result of armed conflict or caused by an instrumentality of war.

(11) Finally, the fact that the applicant's PTSD was incurred through an instrumentality of war is demonstrated by the CRSC Board's previous decision in the applicant's own case. Specifically, on the very same facts, the CRSC Board approved the applicant's claim for CRSC as to his tinnitus, reasoning that it was caused by an instrumentality of war. But the applicant's request for CRSC for his tinnitus was based on the very same facts and evidence that also form the basis of his request for CRSC for his PTSD. If such evidence was sufficient to establish a direct causal link between combat-related events and the applicant's tinnitus, it is also sufficient to establish a direct causal link between the same combat-related events and the applicant's PTSD. Indeed, the ABCMR decision in AR20230008456 overturned the CRSC Board's denial of CRSC for the applicant's PTSD that was a direct result of the same facts that caused the applicant's tinnitus for which CRSC was granted.⁹² The ABCMR ultimately agreed with the PEB's determination that, but for the applicant's time in combat, it was more likely than not that the applicant would not have been diagnosed with PTSD.

(12) It is inconsistent to deny the applicant's CRSC for his PTSD which was triggered by the same events and experiences that caused his tinnitus. Accordingly, the applicant's PTSD was incurred "through an instrumentality of war," and he is entitled to CRSC pursuant to 10 USC §1413a.

(13) The applicant's PTSD was Incurred as the Direct Result of Armed Conflict. For the foregoing reasons, the applicant's PTSD is also a direct result of his military service during armed conflict. The applicant incurred his PTSD as the direct result of armed conflict. As discussed above, while the applicant was deployed to Iraq in 2005, he was assigned a variety of front-line security duties. In performing these duties, the applicant regularly experienced enemy fire from rockets and mortars throughout the day and night without notice or warning. The applicant's medical records show that, as a result of his exposure to enemy rockets and mortars, the applicant began experiencing PTSD symptoms of anxiety and depression as early as 2008. These symptoms continued throughout his 2010 deployment to Iraq and following his return. Yet, he was not treated for PTSD until 2016.

(14) As noted above, while deployed to Al Anbar Province as an enlisted Marine, the applicant was required to pull security, stand lookout, and serve on convoys and patrols. In performing these duties, there is no doubt that the applicant was exposed to enemy mortar and rocket attacks. These attacks are certainly battles and firefights in which service members (including the applicant) were engaged with (and by) enemy forces. Further, as explained above, the PEB found that the applicant's PTSD was a direct result of armed conflict. This is objective evidence of the cause of his PTSD, as is

the Officer Evaluation Report that noted that the applicant was the officer in charge of the intelligence officer night shift “during combat operations in Iraq.” Moreover, as stated above, the order from the Secretary of the Army releasing the applicant from active duty and medically retiring him stated “YES” as to whether his disability was “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” (emphasis added) and stated “YES” as to whether his disability resulted from a combat related injury as defined in 26 USC 104.94

(15) Moreover, the “direct result of armed conflict” criteria requires a “definite causal relationship between the armed conflict and the resulting disability,” but it does not require that the applicant be engaged in a direct, face-to-face shootout with the enemy. There is no requirement that the specific factual scenario causing the disability involve “direct” engagement with the enemy, such as might occur in a firefight or hand-to-hand combat. As discussed above, the applicant’s PTSD was a “direct result” of repeated exposure to enemy indirect rocket and mortar fire during “armed conflict” and therefore should have been found combat-related under the “direct result of armed conflict” prong. To suggest that the applicant—who actively defended his country in Iraq while being the target of endless daily attacks by enemy combatants—was not involved in armed conflict belittles the sacrifices that the applicant made for his country and the life-long wounds that he sustained in doing so. Accordingly, the applicant’s PTSD was also incurred as a “direct result of armed conflict.” He is entitled to CRSC pursuant to 10 USC § 1413a.

g. As explained above, the traumatic combat experiences that the applicant suffered during his deployments to Iraq support a finding that his diagnosis of PTSD was a direct result of both armed conflict and instrumentalities of war. Accordingly, he meets the preliminary requirements for CRSC eligibility and has service-connected disabilities—PTSD and tinnitus—that are combat-related under 10 USC § 1413a(e)(2)(A). For the reasons above, the applicant respectfully requests that the ABCMR correct his military record to indicate that his PTSD qualifies for CRSC.

2. The applicant’s service record shows the following:

a. The applicant enlisted in the Regular USMC on 18 March 2002. He served as an Ordnance Machinist and deployed to Iraq from February 2005 through July 2005. He was honorably released from active duty after 4 years’ active service in the USMC on 17 March 2006, and subsequently enlisted in the USMC Reserve on 18 March 2006

b. On 5 May 2008 the applicant was honorably discharged from the USMC Reserve and on 6 May 2008, he enlisted in the ARNG.

c. On 16 August 2008, the applicant was honorably discharged from the ARNG for the purpose of appointment as a commissioned officer. On 17 August 2008, he was appointed as a second lieutenant (2LT) in the ARNG and on 2 September 2009, was awarded the Area of Concentration (AOC) 35D.

d. The applicant was ordered to active duty in support of OIF on 5 December 2009, with service in Iraq from 22 February 2010 through 19 July 2010. He was honorably released from active duty on 8 August 2010, due to the completion of required service and transferred back to the Tennessee Army National Guard (TNARNG).

e. DA Form 199 (Informal Physical Evaluation Board (PEB) Proceedings) reflects the PEB convened on 26 April 2018 and found the applicant physically unfit, recommending a rating of 70 percent and that his disposition be permanent disability retirement. On 27 April 2018, the applicant concurred with the findings and recommendations and waived a formal hearing of his case and indicated he did not request reconsideration of his VA ratings.

(1) The applicant reported the onset of his PTSD after deployment to Iraq from 2009 to 2010. This condition is attributed to the stressors of indirect fire from mortar and rockets (V1/V3-Yes; direct result of armed conflict). The condition was aggravated during a motor vehicle accident in 2016. He was treated with medication and therapy with no significant improvement to the condition. Although the VA code sheet lists both PTSD and TBI together and awarded 70 percent for it, the discussion in the narrative portion of the Rating Decision discusses how the rating for PTSD was determined. The TBI meets retention standards and there is no indication it is unfitting.

(2) MEB diagnoses 2-14 (migraine headaches, tinnitus, sensation of imbalance, lumbar degenerative disc disease, right shoulder strain, left shoulder labral tear, cervical spine degenerative disc disease, photophobia/visual discomfort, strabismus, amblyopic, bilateral, left anterior cruciate ligament repair, left trigeminal neuralgia, status post closed head injury, bruxism, and painful post-traumatic scars of the head) were deemed not unfitting.

(3) The PEB found the applicant's disability disposition was based on disease or injury incurred in the 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 the LOD during a period of war. This disability did result from a combat-related injury under the provisions of Title 26, U.S. Code, section 104.

(4) On 27 April 2018, the applicant concurred with the findings and recommendations of the IPEB and waived a formal hearing of his case and indicated he did not request reconsideration of his VA ratings.

f. U.S. Army Physical Disability Agency Order D124-11, dated 4 May 2018, reflects the applicant was released 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 8 June 2018, with a 70 percent disability rating.

g. NGB Form 22 (National Guard Report of Separation and Record of Service) shows the applicant was retired from the TNARNG and transferred to the Retired Reserve effective 8 June 2018, after 15 years, 6 months, and 6 days of total service for pay, due to medical disqualification for further military service.

h. A U.S. Army Human Resources Command (AHRC), CRSC Office letter, 26 June 2018, informed the applicant his claim for CRSC was reviewed and he was found to not meet the eligibility requirements because records indicated he did not yet have a retired pay account established.

i. A DD Form 2860, dated 29 October 2018, shows the applicant requested reconsideration of his CRSC claim for the above-listed conditions, all of which he indicated were caused by armed conflict. He included with his reconsideration request his VA Rating Decision dated 18 April 2018, and Standard Form 600, 19 April 2010.

j. An AHRC CRSC decision letter, dated 8 February 2019, informed the applicant his claim for CRSC was reviewed and they were unable to verify the following conditions as combat-related disabilities, for the following reasons:

- PTSD, there is no supporting documentation confirming PTSD was directly caused by a specific combat-related event; VA connects disability to TBI from motor vehicle accident
- post-traumatic headaches, civilian vehicles do not meet the definition under instrumentality of war
- scalp scar status post vehicle accident, civilian vehicles do not meet the definition under instrumentality of war
- lumbar spine, disc herniation, civilian vehicles do not meet the definition under instrumentality of war
- scalp scar status post vehicle accident, civilian vehicles do not meet the definition under instrumentality of war
- left (non-dominant) shoulder labral tear including SLAP, civilian vehicles do not meet the definition under instrumentality of war
- bilateral orchalgia, this condition is secondary to a condition which is not combat-related; medical records associate this with lumbar
- tinnitus, documentation does not show accident or incident to connect to a combat-related event
- left lower extremity radiculopathy, documentation does not show accident or incident to connect to a combat-related event

- right lower extremity radiculopathy, documentation does not show accident or incident to connect to a combat-related event
- left trigeminal neuralgia status post closed head injury, documentation does not show accident or incident to connect to a combat-related event

k. On 17 May 2020, the applicant submitted his second request for CRSC reconsideration, including his PEB paperwork, discharge orders, an VA Rating Decision, dated 9 August 2019.

l. An AHRC, Soldier Programs and Services Division letter, dated 10 June 2020 shows the following:

(1) The applicant was informed the CRSC program office completed processing his reconsideration claim and after carefully reviewing all available documentation, they were able to partially approve a portion of his claim. He was approved for a total CRSC disability rating of 10 percent for tinnitus effective July 2018, as this condition was determined to be combat-related due to an instrumentality of war.

(2) The portion of his CRSC claims for conditions of PTSD, scalp scar status post motor vehicle accident, post-traumatic headaches, lumbar spine disc herniation, scalp scar status post motor vehicle accident, left shoulder labral tear including SLAP, bilateral orchalgia, right lower extremity radiculopathy, left lower extremity radiculopathy, left trigeminal neuralgia status post closed head injury was not approved. No new evidence was provided to show a combat-related event caused these conditions. He provided no details on how his injury occurred as a result of a combat-related event and he was not awarded a Combat Action Badge.

m. On 29 September 2020, the applicant submitted a final request for reconsideration of his CRSC claim. With is request he submitted witness statements, a self-authored statement, his IDES NARSUM, dated 5 March 2018, VA Progress Notes, dated 2008, and a brief from his representing Counsel, all of which have been provided to the current Board for review.

n. The applicant indicates in his self-authored statement with his CRSC claim that while deployed with the USMC, his unit received over 100 indirect fire, mortar, and rocket attacks and he became very sensitive to his environment. He details how his multiple injuries, including his depression, herniated disc, testicle injury were incurred while deployed, therefore combat-related. After his 2010 deployment, he began to drink more heavily to self-medicate and his anxiety and depression were sometimes overwhelming. He continued to have dreams from his deployments which he could not escape. He also details his TBI injury resulting from a motor vehicle accident he incurred after a day of training at Fort Campbell, KY, which caused his PTSD to resurface.

o. An AHRC, Soldier Programs and Services Division letter, dated 23 December 2020, informed the applicant the CRSC program office completed processing his appeal and after carefully reviewing the available documentation could not overturn their prior decision. Unfortunately, the documentation he submitted makes no mention of a combat-related event in relationship to his disabilities. His claim has been previously processed at the initial, reconsideration, and appeal levels and they now considered this determination final. The applicant was advised of his right to appeal to the ABCMR.

3. In a prior ABCMR request, Docket Number AR20210012101, dated 24 May 2022, Counsel requested, in pertinent part, for this applicant the following:

- approval of his claim for Combat Related Special Compensation (CRSC)
- an advisory opinion from the Director, Military Compensation Policy within the Office of the Under Secretary of Defense for Personnel and Readiness

4. The Board, based on a preponderance of evidence, determined the applicant did not warrant relief.

a. Prior to adjudicating the applicant's case, the Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's military service records. After reviewing available documents, the medical reviewer stated that the applicant's PEB was completed on 26 Apr 2018. He was found unfit due to PTSD with a rating of 70%. The PEB opined his PTSD was due to direct result of armed conflict or caused by an instrumentality of war. On 8 February 2018, AHRC determined his PTSD did not meet criteria for CRSC. His physical conditions were a result a civilian vehicle accident or were found to not be connected to a combat-related event. His TBI was related to civilian motor vehicle accident. His PTSD was related to deployment but not a specific combat-related event. The applicant appealed the CRSC decision and was denied his claim with respect to PTSD. Upon review of all documents and records, CRSC for the applicant's PTSD disability is not warranted. It is acknowledged that the applicant's PTSD is a result of his deployments and exacerbated by his MVA. However, the applicant was not engaged in direct combat with the enemy. Concur with the CRSC determination from HRC.

b. The Board noted that the CRSC criteria are specifically for those military retirees who have combat related disabilities. Incurring disabilities while in a theater of operations or in training exercises is not, in and of itself, sufficient to grant a military retiree CRSC. The military retiree must show the disability was incurred while engaged in combat, while performing duties simulating combat conditions, or while performing especially hazardous duties such as parachuting or scuba diving. The HRC CRSC Office reviewed his claims and all of the evidence he submitted on three separate occasions. In each case there was no evidence to show a combat-related event caused his conditions. Being in a combat zone is not, in and of itself, sufficient to award CRSC.

The disability must be linked to a specific combat-related event. The applicant has submitted evidence to show that his PTSD is service related. The available evidence does not show a combat-related event caused his PTSD or cervical degenerative disc and joint disease. The fact that he was in a theater of operations is insufficient, in and of itself, to warrant approval of CRSC.

5. The United States Court of Federal Claims case, dated 27 December 2023, states the following:

a. In this military pay case, Plaintiff has alleged that Defendant, the United States - acting by and through the Army, including the ABCMR and the Army Review Board Agency - erred by denying his claim for combat related special compensation ("CRSC") related to plaintiff's post-traumatic stress disorder ("PTSD"). ECF No. 1 at 10. On November 22, 2023, the government responded by filing a motion to remand pursuant to RCFC 52.2. ECF No. 7. The government represents, and Plaintiff has confirmed, that this motion is unopposed. *Id.* at 1.

b. The motion for remand is Granted. In accordance with the motion's proposed instructions, the ABCMR shall:

- (1) Reconsider and explain whether Plaintiff is entitled to CRSC;
- (2) Seek an advisory opinion from the Office of the Deputy Under Secretary of Defense (Military Personnel Policy);
- (3) Accept, consider, and address in its decision any other issues, evidence, or arguments Plaintiff raises in a written submission to the ABCMR, including but not limited to:
 - Explaining any relationship, or lack thereof, between the Army's grant of CRSC to plaintiff for tinnitus and the Army's denial of CRSC to plaintiff for PTSD
 - Addressing any evidence presented related to PTSD and its relation to whether Plaintiff is entitled to CRSC under either or both of the following categories: Armed Conflict and Instrumentalities of War
 - Addressing any differences between its determination and the determinations made by Plaintiff's previous Physical Evaluation Boards concerning the causes of his PTSD

c. Determine and explain whether Plaintiff is entitled to any correction of his military records, based upon any errors or injustices found.

d. On or before January 19, 2024, or such other time that the board may deem appropriate, Plaintiff shall file an application and any additional documents, evidence, or arguments that he wishes the ABCMR to consider during the remand proceedings. If Plaintiff is unable to submit applicable Army records because he has been unable to obtain them, he shall so inform the board which records he has been unable to obtain and provide documentary evidence of his efforts to obtain such records.

e. ABCMR shall promptly forward by email its decision to plaintiff's counsel of record and to counsel of record for the United States, and forward two copies to the Clerk of this Court. It may do so through Defendant's counsel.

f. Each Party shall file a notice, within 30 days following the remand decision, indicating their respective positions on whether the remand decision affords a satisfactory basis for disposition of the case or whether further proceedings before the Court are required and, if so, the nature of such proceedings.

g. The government shall file a status report on or before March 19, 2024, and again on or before May 20, 2024, advising the Court of the status of the remand proceedings

h. Further proceedings in this action are Stayed pending completion of the remand. Absent any extensions of time granted by this Court, the remand shall be completed on or before June 18, 2024.

6. An advisory opinion was requested from the DOD Office of the Deputy Under Secretary of Defense for Military Personnel Policy. DOD responded on 30 January 2024 regarding Combat-Related Special Compensation, which states:

a. "This memorandum provides the advisory opinion requested in reference (a), as required by reference (b) at the time the subject named officer's petition was received by the Army Board for correction of Military Records (ABCMR), regarding the application for Combat-Related Special Compensation (CRSC) in the case of Captain (CPT) S.C., United States Army National Guard (Retired). This advisory opinion is issued after a thorough and detailed review of the applicant's application and supporting documentary evidence submitted to the Court of Federal Claims and the ABCMR. It is based on applicable provisions of law, regulation, and policy, contained in references (c) and (g), governing entitlements to, and administration of, CRSC.

b. To be entitled to CRSC, a claimant must file an application with the CRSC Board of the Military Department from which he or she retired and meet the eligibility criteria under reference (c) and the DoD policies and regulations contained in references (d) through (g). Specifically, a claimant must:

(1) Be in a retired status (including retirement for physical disability under 10 USC, Chapter 61

(2) Be entitled to, and in receipt of, retired pay (to include retainer pay), notwithstanding that such retired pay may be reduced due to receipt of Department of Veterans Affairs (VA) disability compensation;

(3) Not be in receipt of Concurrent Retirement and Disability Payments (CRDP); or, if in receipt of CRDP, have knowledge that if electing to receive CRSC, entitlement to CRDP shall cease for as long as CRSC is received;

(4) Have one or more service-connected qualifying disability ratings from the VA for which the retiree receives VA disability compensation, and have agreed to an offset of retired or retainer pay based on such receipt of VA disability compensation; and,

(5) Have a disability with an assigned medical diagnosis code from the VA Schedule for Rating Disabilities (VASRD) that:

- Is attributable to an injury for which the member was awarded the Purple Heart; or,
- Was incurred: (1) as a direct result of armed conflict; (2) while engaged in hazardous service; (3) in the performance of duty under conditions simulating war; or (4) through an instrumentality of war; or,
- Was incurred as a result of Agent Orange exposure (herbicides) or radiation exposure; or,
- Is among the disabilities presumptively determined by the VA to be related to service in the Persian Gulf War or exposure to mustard gas or lewisite.

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

d. Specific to the determination of CRSC in the applicant's case, the definitions for disabilities incurred as a direct result of armed conflict and through an instrumentality of war are included below.

e. Direct Result of Armed Conflict: 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 relationship between the armed conflict and the resulting disability.

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

(2) Armed conflict may also include incidents involving a member while interred as a prisoner of war, while detained against his or her will in the custody of a hostile or belligerent force, or while escaping or attempting to escape from such confinement, prisoner of war, or detained status.

a. Instrumentality of War: 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.

(1) 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 conditions in civilian pursuits.

(2) 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 explosions of military ordnance, vehicles, or materiel.

(3) For example, if a member is engaging in a sporting activity while on a field exercise and falls and strikes an armored vehicle, the injury would not be considered the result of an 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.

b. These combat-related disabilities are defined in accordance with references (d) through (g).

c. Background. The applicant applies for CRSC for Post-traumatic stress disorder (PTSD) and traumatic brain injury (TBI) with vertigo, bruxism (also claimed as sleep disturbances, head injury, jaw, imbalance, neurological signs and symptoms, photophobia) that he claims he incurred either as a direct result of armed conflict or through an instrumentality of war. Specifically, he claims that his PTSD is caused by indirect rocket and artillery fire he received while deployed to Iraq. His PTSD is currently rated at 70 percent by the VA. Included below is a summary of the relevant facts as documented in the applicant's record.

(1) The applicant enlisted in the Marines in March 2002 and served until his honorable discharge in March 2006, attaining the pay grade of E-4. During this time, he was deployed to Iraq from February 2005 -July 2005.

(2) On January 10, 2008, the applicant had a psychosocial assessment and PTSD evaluation. The notes from this appointment read, in part "[v]et worked perimeter security in Al Asad, Iraq, he left the base on only a couple occasions. Subject to numerous mortar and rocket attacks during the last 3 months of his tour was required to guard Iraqi POW [sic]. Vet has a pronounced startle reaction. He has occasional flashbacks, nightmares, intrusive thoughts, and anxiety." He has occasional, nightmares, intrusive thoughts, and anxiety." Notes from a February 22, 2008, social work appointment list PTSD as a diagnosis.

(3) Later in 2008, the applicant obtained his commission, joining the Tennessee Army National Guard. His April 2018 entrance Report of Medical History and Report of Medical Examination do not list any medical or mental health issues. "No significant medical hx/concerns" were mentioned.

(4) The applicant deployed to Iraq for a second time from February 22, 2010 – July 19, 2010.

(5) The applicant continued to serve in the Tennessee Army National Guard but on April 7, 2016 was in a significant motor vehicle accident while driving his personal vehicle when returning from active duty training at Fort Campbell, KY. Records show the applicant's TBI is attributable to this accident and resulted in his being placed on limited duty by his TNARNG unit. This accident also led to his eventual medical retirement from the ARNG as of June 19, 2018.

(6) On August 4, 2016, the applicant completed his PTSD Disability Benefits Questionnaire (VA Form 21-0960P-3, Oct 2012). His examiner noted that his PTSD was "[a]t least as likely as not incurred in Iraq tour." When discussing this tour, the record states he 'had a 7 month long tour in Iraq in 2005; never in direct firefight but received indirect fire (mortars and missiles). No combat or V device decoration as reported by the Vet'. The examiner lists two stressors-, the first being the applicant's Iraq tour and the

second being the applicant's motor vehicle accident. In a narrative section, the examiner writes "[l]ife-threatening stressors- Iraq tour and [motor vehicle accident] ... Commenting on which and how much of each of these 2 life-threatening stressors caused PTSD will be a speculation."

(7) The applicant received his Integrated Disability Evaluation System Narrative Summary on March 5, 2018. The narrative summary notes that the applicant did not engage in combat activity and found his PTSD to be disqualifying for future service. When discussing the onset of his PTSD, the Narrative Summary reads:

The applicant had symptoms suggestive of an anxiety disorder as early as 2008, and a diagnosis of PTSD first appears in the VA record that year, but the soldier appears not to have been treated for the problem until 2016. Although the initial PTSD DBQ of 08/04/16 mentions stress due to indirect fire from mortars and rockets while the soldier was deployed to Iraq, the principal stressor responsible for the applicant's psychiatric deterioration appears to have been a rollover motor vehicle accident in April 2016. SM was returning to his home from military training when his car was struck by a truck, left the road and rolled over several times. SM was ambulatory at the scene and was not admitted to hospital, but his mental function has been abnormal since. The soldier's current symptoms are not clearly reflective of his combat stressors from over a decade ago.

(8) The applicant's April 18, 2018, VA rating decision lists his condition as "Post-traumatic stress disorder, and traumatic brain injury with vertigo, bruxism (also claimed as sleep disturbances, head injury, jaw, imbalance, neurological signs and symptoms, photophobia) [PTSD -Non-Combat/Fear-Easing Standard]," In a note to the MEB/PEB, the VA mentions "[t]he referred issue of PTSD is 70 percent disabling on its own without TBI."

(9) On April 26, 2018, the Informal Physical Evaluation Board (PEB) released their findings, concluding that the applicant's PTSD does not meet retention standards. In the narrative section of their decision, the PEB wrote:

The Officer reports onset of this condition after deployment to Iraq (2009-2010). This condition is attributed to the following stressors: The Officer was exposed to indirect fire from mortar and rockets (VIN3- Yes: Direct result of armed conflict). The condition was aggravated during a motor vehicle accident in 2016 in Tennessee when the Officer was returning from military training.

(10) The PEB found that his disability was incurred as direct of armed conflict. His May 4, 2018, retirement orders echo this.

(11) On June 17, 2018, the applicant applied for CRSC for a number of disabilities, including his PTSD. In the narrative section accompanying his PTSD, he wrote:

I was deployed in 2005 to Iraq with the Marines and took indirect fire from mortars and rockets. Some close enough to make me jump out of my bed asleep. When I returned home I did not understand how it affected me when CO NUS at my duty station in South Carolina. My wife seemed to express that I slept a lot and had a drinking problem. I commissioned in the Tennessee Army National Guard in 2008 and deployed to Iraq in 2010 with the Guard. The indirect fire seemed to bring back memory's [sic] in 2005 and had me on alert. When I returned I complained of unexplained aches and seemed to be depression [sic] at the time. I had wreck in 2016 while on orders with the Guard that was caused by someone hitting me on the interstate causing my truck to roll several times. I was out of work with symptoms of TBI and PTSD.

(12) In a separate entry, for his Left Labral tear including SLAP, he wrote:

I was headed back from a class at FT Campbell and another vehicle hit my truck from behind causing my truck to roll several times. I was knocked out unconscious. I was scheduled to go to- my Captains Career Course in 3 days and return to go to Poland for a 3 month Deployment with the Tennessee Army National Guard. I did not make my school or deployment. I am medical retired from issues from [t]he accident. The wreck caused severe anxiety and PTSD.

(13) The applicant subsequently had to reapply after his initial application was rejected due to lack of retired pay. After fixing his application, the applicant was denied CRSC on February 8, 2019. In denying his claim for PTSD, the CRSC board explained "[t]here were no supporting documents in your claim that confirm that PTSD was directly caused by a specific combat-related event. VA connects disability to TBI from motor vehicle accident." Further, the Board notes "[t]o award Combat-Related Special Compensation (CRSC) the disability or injury must be linked to a combat related event. Your request states that your disabilities are due to a civilian motor vehicle accident where you were hit by another vehicle causing your truck to roll three times. All your disabilities have been associated to your civilian motor vehicle accident. Therefore, your request does not meet CRSC guidelines, and we are unable to authorize compensation,"

(14) On June 10, 2020, the applicant's CRSC application was approved for Tinnitus (instrumentality of war) but was denied for every other disability applied for.

(15) In support of a later CRSC appeal, the applicant submitted personal statements from himself, his wife, and Marine Corporal T.T.

(16) Corporal T's statement is dated July 22, 2020, and reads, in relevant part, "[d]uring his time in theater, Corporal C and company found themselves surrounded by indirect enemy fire on multiple occasions. Rockets, mortars, and unidentified artillery projectiles were common during all parts of the day and night during our time in theater without notice or warning." Corporal T; however, caveats his statement by writing "I write to you to give written testimony as to the applicant's time in theater. I cannot testify as to what he encountered on a personal level as much as I can from a situational perspective." The applicant's statement is dated September 25, 2020. Regarding his 2005 deployment, the applicant wrote:

I served at Beaufort, SC till February 2005 when I was deployed to Al Asad, Iraq. I was stationed at the base till the end of July 2005. During my time serving as a Security Force Marine, my unit received over 100 indirect fire (IDF), mortar and rocket attacks, I became very sensitive to my environment. I was woken up several times to mortar attacks and knocked out of my rack to IDF.

(17) After this deployment, he writes:

I dealt with a lot of depression and was worse than I thought after looking back during that time of my life. I was hard to be around and still am it seems. My wife finally persuaded me to go to the VA to seek counseling. I also had been to doctor visits during the time between 2006-2009. I had gone for help for my depression and anxiety. I continued to try to self-medicate and stay busy during that time. I decided to enlist in the TN Army National Guard in 2008. I felt like I was missing something and I felt like I could cope with my feelings better since I would be around more people that may have the same experience that I have had.

(18) On his 2010 deployment, he wrote:

I deployed back to Iraq in 2010 with the 278th ACR to Taji, Iraq. I was a 2nd LT Military Intelligence officer. I worked the second shift (12 hours) and compiled reports of the unit and surrounding areas of operations. Every day the reports contained detailed and graphic pictures of war, The horrible details of people killing their neighbors, blue on blue, red on green, and green on green. It seemed that every day was the same day before. We would be attacked with mortars and rockets throughout the deployment. I was depressed most of the days and some days had difficult time motivating my soldiers.

(19) And finally, regarding his car accident he writes:

In April 2016 after completing a day of training, I was returning from Ft Campbell when someone hit me on the interstate in Chattanooga, TN causing my truck to roll several times. I sustained several injuries along with a TBI. I was out of work for about 5 months due to my injuries. During that time, I did return to drilling with my unit in July but was put on limited duty due to my emotional instability. I had expressed that I was trying to deal with some emotional and physical feelings. I know that the wreck caused my PTSD to resurface since I was hurt and emotionally damaged like before in my past deployments. This situation in my life aggravated my feelings and scars from my PTSD from my past deployments.

(20) His wife, A.C., also authored a statement on September 25, 2020. On his 2020 deployment, she writes:

He deployed to Taji, Iraq as a 2nd LT in the 278th Armored Cavalry Regiment as a military intelligence officer. When he returned, he complained of aches and lack of sleep and he started to drink more often. He talked about the mortars and rockets he faced, as well as the intelligence reports he had to compile which consisted of deaths and the miserable behaviors of war. He seemed to be like he was when we first met: anxious and depressed and irritable. He showed signs of paranoia of certain things.

(21) And on his car accident, she writes: "On his way back from Chattanooga, someone hit him on the interstate causing a wreck that rolled his truck several times resulting in a traumatic brain injury (TBI) which knocked him unconscious. After his wreck, he tried to continue a normal life. He was in a lot of pain although he tried not to let me and the kids be affected by it. When he started to physically heal and become more mobile and returned to the regular guard drills, he started to become more depressed and more anxious just as he had been after his deployments. He went to see a psychiatrist and family counseling at a VA center during his time. He told me that he was still dealing with the past deployments and it seemed to make him more vulnerable, as the past emotional scars and damage were resurfacing more and more. He was not very emotionally stable.

(22) On December 23, 2020, the applicant's CRSC appeal was denied due to lack of evidence tying his injuries to a combat related event.

(23) On May 24, 2021, the applicant applied for correction of his military records in an effort to be awarded CRSC.

(24) On May 24, 2022, the ABCMR denied the applicant's application for the correction of his military records. In their disposition of the case. the ABCMR sought a medical review of the applicant's record. The ABCMR medical advisor wrote, "[u]pon review of all documents and records, CRSC for the applicant's PTSD is not warranted. It is acknowledged that the applicant's PTSD is a result of his deployments and

exacerbated by his MVA. However, the applicant was not engaged in direct combat with the enemy. Concur with the CRSC determination from HRC." In rejecting the application, the BMCR reasoned, "[b]eing in a combat zone is not, in and of itself, sufficient to award CRSC. The disability must be linked to a specific combat-related event. The applicant has submitted evidence to show that his PTSD is service related. The available evidence does not show a combat-related event caused his PTSD. The fact that he was in a theater of operations is insufficient, in and of itself, to warrant approval of CRSC."

(25) Following this denial, the applicant sued in the Court of Federal Claims on August 14, 2023, in an effort to be awarded CRSC. The applicant submitted records indicating that he is in receipt of VA Disability Compensation and that his military retired pay is subject to offset under the provisions of sections 5304 and 5305 of Title 38 U.S.C.

(26) Discussion. The applicant's record does not support a combat related determination for his PTSD, nor for his TBI. The applicant does appear to have an initial diagnosis of PTSD in February 2008; however, less than two months later, his entrance medical examination for the Tennessee Army National Guard lists no medical or psychological issues. He served in the Army National Guard for several more years and redeployed to Iraq -with no issues noted. His PTSD then resurfaced in 2016 following his car accident (which is the clear cause of his TBI) in Tennessee, after which he was found unfit for continued service as a result of his now diagnosed PTSD and TBI. His PTSD and TBI diagnoses and his retirement from the Army National Guard both follow directly from his motor vehicle accident.

(27) The medical opinions available regarding the applicant's PTSD appear mixed on what the principal cause of his PTSD is. The VA examiner opined that "[c]ommenting on which and how much of each of these 2 life-threatening stressors caused PTSD will be a speculation." In 2018, the Medical Evaluation Board stated, "the principal stressor responsible for CPT Caldwell's psychiatric deterioration appears to have been a rollover motor vehicle accident" and that "[t]he soldier's current symptoms are not clearly reflective of his combat stressors from over a decade ago." The VA then lists his condition as non-combat in the initial rating decision. Only a month after the Medical Evaluation Board decision, the Physical Evaluation Board alternatively finds that the applicant's PTSD was incurred as a direct result of armed conflict due to the indirect fire he received during his deployments. Finally, the ABCMR medical advisor weighs in that the applicant's PTSD is not combat related.

(28) The applicant himself seems to admit to the uncertain causes of his PTSD. In the PTSD portion of his CRSC application and in his later personal statement, the applicant discusses both the indirect fire he received while deployed and the car accident as causes of his PTSD. In a separate portion of the CRSC application

discussing his left shoulder labral tear including SLAP, he writes that the car accident caused his severe anxiety and PTSD and that he is medically retired as a result of the accident.

(29) There are no mixed opinions or uncertain comments regarding the applicant's TBI, however. Both the VA's disabilities ratings decision and his own comments clearly connect the cause of the applicant's TBI (and the disabilities resulting from it, such as the vertigo and bruxism) to the motor vehicle accident he was involved in on April 7, 2016, and absolutely no evidence was provided to link this accident to a combat-related occurrence.

(30) On the weight of the available evidence regarding the applicant's PTSD, I do not believe he has carried the burden required to show that his PTSD is combat related. The preponderance of the available evidence does not directly link the applicant's PTSD to a combat related occurrence. Instead, it appears that the applicant's civilian motor vehicle accident plays a significant role in his eventual PTSD diagnosis. Further, the preponderance of evidence clearly shows that the applicant's TBI is a direct result of his civilian motor vehicle accident and not a combat-related cause. As a result, the applicant does not meet the criteria for CRSC.

(31) Conclusion. Based on the applicable provisions of law, regulation, and policy governing entitlement to, and administration of, CRSC, it is my opinion that the applicant's service-connected VA compensable PTSD and TBI do not meet the qualifying criteria required to establish that they are combat-related for purposes of entitlement to CRSC as incurred as a direct result of armed conflict or through an instrumentality of war. The applicant's claimed PTSD and TBI do not qualify for payment of CRSC and his petition to the ABCMR should be DENIED.

9. In response to the advisory opinion, Counsel states, "The applicant respectfully disagrees with the findings in the Advisory Opinion for the reasons set forth below:"

a. A Preponderance of the Evidence Shows that the applicant's PTSD is Combat-Related. Both the CRSC statute and Department of Defense Program Guidance define "combat-related disability" in relevant part as a disability that was "incurred" "as a direct result of armed conflict" or "through an instrumentality of war." The Program Guidance elaborates that "direct result of armed conflict" means that the disability was "incurred in the line of duty" with "a definite causal relationship between the armed conflict and the resulting disability." Similarly, "there must be a direct causal relationship between [an] instrumentality of war and the disability." The CRSC applicant must satisfy these requirements by a preponderance of the evidence – i.e., show that the applicant more likely than not meets the requirements.

(1) The Advisory Opinion erred by finding insufficient evidence that the applicant met either of these criteria. Moreover, the Advisory Opinion misapplies the burden of proof for CRSC cases, stating that “it appears that the applicant’s civilian motor vehicle accident played a significant role in his eventual PTSD diagnosis.” The applicant is not required to show, however, that other, later events had no impact on his PTSD or did not contribute to the severity of his symptoms. He is only required to show that it is more likely than not that his PTSD is a “result of combat-related events.”

(2) The applicant’s PTSD is directly connected to his daily exposure to hundreds of weapons fire, mortar, and rocket attacks while he was deployed. His medical and personnel records unquestionably demonstrate that he experienced combat in Iraq that directly caused him to be diagnosed with PTSD. Indeed, the Advisory Opinion explicitly notes that the applicant has an initial PTSD diagnosis as early as 2008, eight years prior to the motor vehicle accident that the Advisory Opinion references. In fact, the following documents clearly reflect that the applicant was diagnosed by the VA prior to his motor vehicle accident as resulting from the documented stressor of combat-related events:

- The VA assigned a 50% evaluation to the applicant’s PTSD and TBI effective December 1, 2015, prior to the date of his 2016 motor vehicle accident
- On August 4, 2016, the applicant’s initial PTSD Disability Benefits Questionnaire indicated that his PTSD was the result of enemy fire while deployed in Iraq (and was later aggravated by his car accident). The Questionnaire specifically noted that the “stressor” event of his Iraq tour meets the criterion to support the diagnosis of PTSD.
- On April 26, 2018, the PEB determined that the applicant’s PTSD was caused by his exposure to enemy “indirect fire from mortar and rockets” during his deployment to Iraq in 2010 and was therefore a combat-related injury incurred as a “direct result of armed conflict.”
- On May 4, 2018, the order from the Secretary of the Army, releasing the applicant from assignment and duty because of his permanent physical disability, indicated “YES” for the following two causes of the applicant’s disability
- 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:
- Disability resulted from a combat related injury as defined in 26 USC 104: YES (emphasis added)

(3) The Advisory Opinion ignores these objective facts. Moreover, the Advisory Opinion fails to explain how, operating under the same burden of proof as the PEB that is, a preponderance of the evidence it comes to the opposite conclusion of the PEB.

(4) Additionally, Navy policy, which governs cases for Marines, requires the Combat-Related Special Compensation Board (“CRSC Board”) to “adhere to previous PEB determinations that a disability is combat related in the adjudication of CRSC applications.

(5) In fact, the Navy Policy was adopted for this exact purpose, to ensure that there are no inconsistent findings by the PEB and the CRSC Board on the causes of veterans’ disabilities. The PEB found that the applicant provided, by a preponderance of evidence, that his PTSD was incurred as a direct result of armed conflict and instrumentalities of war. There is no evidence that the PEB’s determination was in error – let alone “clear and convincing” evidence to contravene the PEB.

(6) However, not only does the Advisory Opinion not reference the Navy Policy, the Advisory Opinion purports to require the applicant to provide evidence regarding his PTSD that is not required under the CRSC statute or the Program Guidance. The Advisory Opinion states that:

(7) Less than two months [after the initial PTSD diagnosis], the applicant’s entrance medical examination for the Tennessee Army National Guard lists no medical or psychological issues. He served in the Army National Guard for several more years and redeployed to Iraq with no issues noted.

(8) The Advisory Opinion’s reliance on the above statement in denying the applicant’s request for CRSC is flawed for several reasons. First, the applicant is not required, under either the CRSC statute or the Program Guidance, to show that his PTSD remained at an elevated and symptomatic level that would preclude military service . Instead, he simply must show that the initial cause of his initial diagnosis of PTSD is combat-related. The applicant has done so through the body of evidence provided to the ABCMR.

(9) Secondly, the Advisory Opinion’s statement misunderstands the reality of a PTSD diagnosis. There is a body of medical literature in which medical experts have found that PTSD symptoms subside and re-emerge over time. The U.S. Department of Veterans Affairs states: “PTSD symptoms usually start after the traumatic event, but they may not appear until months or years later. They also may come and go over many years. Moreover, while stigmas surrounding mental illness in the military have steadily decreased over time, such stigmas are still prevalent, and studies show that veterans often do not seek treatment for their PTSD symptoms because of a desire to avoid being labeled as having a mental illness. Being seen as weak” is cited as the most prevalent barrier. Notably, the applicant has stated that he joined the Tennessee Army National Guard in 2008 because he thought he could cope with his depression and anxiety if he surrounded himself with others who had similar experiences. Not only does

the Advisory Opinion unduly require Cpt. Caldwell to prove a burden of proof he is not required to meet, it also misunderstands the nature of PTSD diagnoses entirely

b. The Advisory Opinion does not Provide any Rationale for the Grant of CRSC for Tinnitus and the Denial of CRSC for PTSD. On June 10, 2020, the Department of the Army awarded CRSC to the applicant with respect to his tinnitus on the ground that it was combat-related due to an instrumentality of war. But the applicant's request for CRSC for his tinnitus was based on the very same facts evidence that also forms the basis of his request for CRSC for his PTSD. The Advisory Opinion did not rationally explain how the CRSC Board could award CRSC for tinnitus incurred from combat, but deny it for PTSD caused by the same combat.

(1) Indeed, the Court's Remand Order specifically ordered the ABCMR to issue a decision among other things, "explaining any relationship, or lack thereof, between the Army's grant of CRSC to [the applicant] for tinnitus and the Army's denial of CRSC to [the applicant] for PTSD." The Advisory Opinion did not grapple with the evidence to explain how the CRSC Board could award CRSC for tinnitus, but deny if for PTSD, based on the same grounds.

(2) Notably, the ABCMR has recently granted CRSC under similar facts involving exposure to mortars and other instrumentalities of war. The ABCMR decision in AR20230008456 overturned the CRSC Board's denial of CRSC for the applicant's PTSD that was a direct result of the same facts that cause the applicant's tinnitus for which CRSC had already been granted.¹⁷ After a court ordered remand of the PTSD claim in that matter, which specifically noted the award of CRSC for tinnitus and denial of CRSC for PTSD under the same facts, the ABCMR agreed with the PEB's determination that, but for the applicant's time in combat, it was more likely than not that the applicant would not have been diagnosed with PTSD.

(3) It is inconsistent to deny the applicant CRSC for his PTSD which was triggered by the same mortar attacks and other events and experiences that caused his tinnitus, and which the ABCMR found in a similar matter involving mortar attacks met the criteria for CRSC.

c. The ABCMR is Not Required to Accept the Advisory Opinion's Finding. The Program Guidance states that the relevant board for the correction of military records will seek an advisory opinion from the Director of Compensation, Office of the Deputy Under Secretary of Defense (Military Personnel Policy). However, the Program Guidance does not require that the ABCMR rely on the advisory opinion. Given the Army PEB objective determination that combat was the principal cause of the applicant's PTSD, and the preponderance of objective evidence, including the VA diagnosis of combat-related PTSD prior to the date of the motor vehicle accident, the ABCMR should find in favor of the applicant.

BOARD DISCUSSION:

1. 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, and the Board found insufficient evidence to support granting Combat Related Special Compensation (CRSC) for the applicant's PTSD.
2. The Board acknowledged that the applicant's tinnitus, which had been granted CRSC, and his PTSD, which had been denied, originated from the same deployment experiences and that the applicant's PTSD diagnosis was made after that deployment. However, the Board agreed with the DoD advisory opinion's analysis regarding the applicant's later car accident being the major contributor to the present level of severity of the PTSD. The Board ultimately concluded that the non-duty-related car accident was the primary cause of the applicant's PTSD as it existed at the time of his medical retirement and today. Therefore, it was not persuaded to grant CRSC for PTSD by the previous grant of CRSC for tinnitus.
3. The Board also considered the applicant's Physical Evaluation Board (PEB)'s determination that his PTSD was a direct result of armed conflict. While the PEB's determination was a factor in its deliberations, the Board noted that the DoD is not bound by a PEB's findings as to CRSC determinations; likewise, the Board is not bound by the PEB's findings as it determines whether the applicant's CRSC results should be amended. The Board concluded that the greater weight of evidence supported a finding that the applicant's PTSD was not a direct result of armed conflict or an instrumentality of war, but rather the applicant's later car accident. This was further supported by the applicant's successful service after his PTSD diagnosis up to the car accident. Therefore, notwithstanding the PEB's conclusion as to the applicant's PTSD, the Board determined that CRSC was not warranted for the applicant's PTSD.

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 the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.

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I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

REFERENCES:

1. Title 10, U.S. Code, section 1413a, as amended, established CRSC. CRSC 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 who have disabilities that are the direct result of armed conflict, especially hazardous military duty, training exercises that simulate war, or caused by an instrumentality of war. CRSC eligibility includes disabilities incurred as a direct result of:

- armed conflict (gunshot wounds, Purple Heart, etc.)
- training that simulates war (exercises, field training, etc.)
- hazardous duty (flight, diving, parachute duty)
- an instrumentality of war (combat vehicles, weapons, Agent Orange, etc.)

2. The Office of the Under Secretary of Defense for Military Personnel Policy provided guidance for processing CRSC appeals. This guidance stipulated that in order for a condition to be considered combat-related, there must be evidence of the condition having a direct, causal relationship to war or the simulation of war or caused by an instrumentality of war.

3. DODI 1332.38, paragraph E3.P5.2.2.3 (Under Conditions Simulating War), in general, covers disabilities resulting from military training, such as war games, practice alerts, tactical exercises, airborne operations, leadership reaction courses, grenade and live-fire weapons practice, bayonet training, hand-to-hand combat training, rappelling, and negotiation of combat confidence and obstacle courses. It does not include physical training activities, such as calisthenics and jogging or formation running and supervised sports.

4. Appendix 5 (Administrative Determinations) to enclosure 3 of DODI 1332.18 (Disability Evaluation System) (DES) currently in effect, defines armed conflict and instrumentality of war as follows:

a. Incurred in Combat with an Enemy of the United States: The disease or injury was incurred in the LOD in combat with an enemy of the United States.

b. Armed Conflict: The disease or injury was incurred in the line of duty (LOD) as a direct result of armed conflict (see Glossary) in accordance with sections 3501 and 6303 of Reference (d). The fact that a Service member may have incurred a disability during a period of war, in an area of armed conflict, or while participating in combat

operations is not sufficient to support this finding. There must be a definite causal relationship between the armed conflict and the resulting unfitting disability.

c. 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.

d. Under Conditions Simulating War: In general, this covers disabilities resulting from military training, such as war games, practice alerts, tactical exercises, airborne operations, and leadership reaction courses; grenade and live fire weapons practice; bayonet training; hand-to-hand combat training; rappelling; and negotiation of combat confidence and obstacle courses. It does not include physical training activities, such as calisthenics and jogging or formation running and supervised sports.

e. Caused by an Instrumentality of War: Occurrence during a period of war is not a requirement to qualify. If the disability was incurred during any period of service as a result of 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, the criteria are met. However, there must be a direct causal relationship between the instrumentality of war and the disability. For example, an injury resulting from a Service member falling on the deck of a ship while participating in a sports activity would not normally be considered an injury caused by an instrumentality of war (the ship) since the sports activity and not the ship caused the fall. The exception occurs if the operation of the ship caused the fall.

5. A memorandum from the Deputy Secretary of Defense, dated 27 January 2022, details the rescission of the requirement for advisory opinions concerning Combat-Related Special Compensation Claims (CRSC).

a. It states the CRSC program provides compensation to certain military service retirees. Since the program started in 2003, Boards for Correction of Military/Naval Records (BCM/NRs) have been required to seek advisory opinions concerning CRSC applications from the Director, Military Compensation Policy within the Office of the Under Secretary of Defense for Personnel and Readiness.

b. In the years since the requirement for advisory opinions was implemented, the Services have developed broad operational expertise in considering these applications. Therefore, he is restringing the requirement for BCM/NRs to obtain such advisory opinions on CRSC. This policy is effective for CRSC applications submitted to the BCM/NRs on or after the date of this memorandum.

6. Title 38, U.S. Code, 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.

7. Title 38, U.S. Code, section 1131 (Peacetime Disability Compensation – 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 other than 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.

8. On 27 January 2022, the Office of the Undersecretary of Defense published guidance rescinding the requirement in paragraph 3.3 of DoD Directive 1332.41 (Boards for Correction of Military Records (BCMRs) and Discharge Review Boards (DRBs)), for Boards for Correction of Military/Naval Records (BCM/NRs) to obtain advisory opinions concerning CRSC applications from the Director, Military Compensation Policy within Office of the Under Secretary of Defense for Personnel and Readiness.

9. Title 10, U.S. Code, section 1556 requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to ABCMR applicants (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//