

IN THE CASE OF: [REDACTED]

BOARD DATE: 18 November 2024

DOCKET NUMBER: AR20240001296

APPLICANT REQUESTS: in effect, correction to his retirement orders to show he was retired due combat-related disability.

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

- DD Form 149, Application for Correction of Military Record
- Orders 314-0324, 9 November 2016

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.
2. The applicant states, in effect, his was medically retired due to his asthma and a lung condition in 2016, prior to the passage of the Promise to Address Comprehensive Toxics (PACT) Act. The PACT Act made his conditions presumptive disabilities (the Department of Veterans Affairs (VA) automatically presumes the disability was caused by military service) and therefore, should be considered to be combat-related. He contends the block on his retirement orders stating whether the retirement was due to a combat disability was marked "No." He would like that changed to "Yes" since the Department of Veterans Affairs (VA) has determined that his conditions are presumptive and considered combat related.
3. The applicant accepted an appointed as a U.S. Army Reserve Warrant Officer One on 12 May 2009.
4. On 19 October 2016, his moderate persistent asthma was reviewed by an informal Physical Evaluation Board (PEB). The PEB found that the applicant was unfit and recommended a disability rating of 100% and that he be permanently retired due to disability. The applicant concurred with the PEB findings and recommendation on 21 October 2016.

5. Orders 313-0324, 9 November 2016, issued by Headquarters, Joint Readiness Training Center & Fort Polk, Fort Polk, LA directed the applicant be retired on 5 February 2017, and placed on the retirement list effective 6 February 2017. These orders further indicate that his disability DID NOT result from a combat-related injury as defined in Title 26, U.S. Code, section 104.

6. His DD Form 214, Certificate of Release or Discharge from Active Duty, shows he was retired due to permanent disability (enhanced) on 5 February 2017.

7. The applicant applied for Combat-Related Special Compensation subsequent to his retirement on 14 August 2023. The U.S. Army Human Resources Command awarded the applicant a disability rating of 100% for CRSC on 23 January 2024, with an effective date of 17 September 2023. The applicant's asthma, post-traumatic stress disorder, tinnitus, and allergic rhinitis were all verified as being combat-related.

8. The U.S. Army Physical Disability Agency provided an advisory opinion in this case on 24 October 2024. The Legal Advisor found the applicant's request was legally insufficient. He stated-

a. On 19 October 2016, the applicant was found unfit for his referred asthma condition, rated at 100% and placed into permanent disability retirement. He was not awarded any combat codes as the onset of the condition was determined to have occurred in 2007 while stationed at Fort Campbell, KY. On 21 October 2016 he reviewed and accepted the findings. On 5 February 2017 he was medically retired. The applicant's Officer Record Brief shows deployments to Iraq in 2006 and 2008 and to Afghanistan in 2013 and 2015. He now appeals seeking to be awarded a combat code based upon the PACT Acts' presumption of service connect for his unfitting asthma condition.

b. The PACT Act (Act) became effective 10 August 2022. The Act provides for a legal presumption of service connection for 22 medical conditions, including asthma, for service members who served in designated areas throughout the Central Command area of responsibility, including Iraq and Afghanistan. The Act specifically applies to the Department of Veterans Administration (VA); however, the Department of Defense (DOD) is referenced throughout the Act, but mostly in a secondary role such as assisting the VA in collecting data of those who have served in designated areas as well as leasing real property to the VA. The Act does not explicitly apply to the DOD. The Act does not mention nor apply to the awarding of combat codes. Nonetheless, the PACT Act is not applicable here as the Army had already service-connected the applicant's asthma condition, as required by Title 10, U.S. Code, section 1214a, and it adopted the

VA's 100% rating for this condition. The Army did not award a combat code as the onset was determined to have been in 2007, when the applicant was stationed at Fort Campbell, KY (V4 - No). It does not appear from the case file, the condition is the direct result of armed conflict with an enemy (V1 - No), from an instrumentality of war, conditions simulating war, or extra hazardous service (V3- No). Thus, a combat code is not warranted in this case.

9. On 29 October 2024 the applicant responded, in effect, to the advisory opinion stating his conditions was caused by burn pits and fine metal/particle exposure during his deployments and meets the criteria for an instrumentality of war. The PACT Act does not specifically address "combat codes" but he feels that it establishes the precedent that those presumptive conditions would be combat related. Further, his service in Iraq and Afghanistan is listed on his DD Form 214. The shortness of breath he experienced occurred in Iraq in 2007. The advisory opinion incorrectly states it occurred at Fort Campbell, KY.

10. Title 10, U.S. Code, section 1413a, CRSC, defines combat-related disability as a disability that is compensable under the laws administered by the Secretary of Veterans Affairs and that (1) is attributable to an injury for which the member was awarded a Purple Heart; or (2) was incurred (as determined under criteria prescribed by the Secretary of Defense) 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.

11. Determinations of whether a disability is combat-related will be based on the preponderance of available documentary information where 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.

12. The burden of proof that a disability is combat-related rests with the applicant, who is required to provide copies of documents in his or her possession to the best of his or her ability. A record submitted by a member may be used in support of his or her application if that record appears regular on its face and is consistent with Military Service documents and procedures in use at the time, based on the best information available.

13. The PACT) Act, signed into law in August 2022, addresses health care, presumption of service-connection, research, resources and other matters related to veterans who were exposed to toxic substances during military service. It expands the VA health care and benefits for veterans exposed to burn pits, Agent Orange, and other toxic substances. The PACT Act brings these changes:

- a. Expands and extends eligibility for VA health care for veterans with toxic exposures and veterans of the Vietnam, Gulf War, and post-9/11 eras.
- b. Adds 20 plus more presumptive conditions for burn pits, Agent Orange, and other toxic exposures, asthma being among them.

BOARD DISCUSSION:

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. The evidence shows in October 2016, a PEB found the applicant unfit for his asthma condition, rated at 100% and placed into permanent disability retirement. The PEB did not find his medical condition combat related. To determine combat relation, the Board considered the onset of his condition. The onset of this condition was determined to have occurred in 2007 while stationed at Fort Campbell, KY. It was neither a direct result of an armed conflict, nor caused by an instrumentality of war. Like the PEB, this Board finds no evidence that the applicant's condition was the direct result of armed combat; 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. Therefore, the Board found insufficient probative evidence upon which to designate the disability that led to his medical retirement as combat related. As a side note, the Board noted that the PACT Act specifically applies to the Department of Veterans Administration.

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.

11/18/2024

X

CHAIRPERSON

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

REFERENCES:

1. Title 10, U.S. Code, section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.

2. Title 10, U.S. Code, section 1413a, Combat-Related Special Compensation (CRSC), defines combat-related disability as a disability that is compensable under the laws administered by the Secretary of Veterans Affairs and that (1) is attributable to an injury for which the member was awarded a Purple Heart; or (2) was incurred (as determined under criteria prescribed by the Secretary of Defense) 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.

3. DOD 7000.14-R, Financial Management Regulation, Volume 7B, Chapter 63, Combat Related Special Compensation (CRSC) states the following criteria, terms, definitions, and explanations will apply to making combat-related determinations in the CRSC Program.

a. Direct Result of Armed Conflict.

(1) 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.

(2) 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.

(3) 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.

b. 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.

c. 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.

d. Instrumentality of War.

(1) 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.

(2) 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.

(3) 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.

(4) 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.

e. Determinations of whether a disability is combat-related will be based on the preponderance of available documentary information where 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.

f. The burden of proof that a disability is combat-related rests with the applicant, who is required to provide copies of documents in his or her possession to the best of his or her ability. A record submitted by a member may be used in support of his or her application if that record appears regular on its face and is consistent with Military Service documents and procedures in use at the time, based on the best information available.

4. Title 26, U.S. Code, section 104, Compensation for Injuries or Sickness, establishes special rules for combat-related injuries. For purposes of this subsection, the term “combat-related injury” means personal injury or sickness –

a. which is incurred -

(1) as a direct result of armed conflict,

(2) while engaged in extrahazardous service, or

(3) under conditions simulating war; or

b. which is caused by an instrumentality of war.

5. The Sergeant First Class (SFC) Heath Robinson Honoring our Promise to Address Comprehensive Toxics (PACT) Act, signed into law in August 2022, addresses health care, presumption of service-connection, research, resources and other matters related to veterans who were exposed to toxic substances during military service. It expands the Department of Veterans Affairs (VA) health care and benefits for veterans exposed to burn pits, Agent Orange, and other toxic substances. The PACT Act brings these changes:

a. Expands and extends eligibility for VA health care for veterans with toxic exposures and veterans of the Vietnam, Gulf War, and post-9/11 eras.

b. Adds 20 plus more presumptive conditions for burn pits, Agent Orange, and other toxic exposures, asthma being among them.

c. Adds more presumptive-exposure locations for Agent Orange and radiation, Afghanistan being among them.

d. Requires VA to provide a toxic exposure to screening to every veteran enrolled in VA healthcare.

e. Helps improve VA research, staff education, and treatment related to toxic exposures.

6. AR 15-185, Boards, Commissions, and Committees-ABCMR, prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR. The ABCMR begins its consideration of each case with the presumption of administrative regularity. The ABCMR will decide cases on the evidence of record. It is not an investigative body. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

//NOTHING FOLLOWS//