

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 25 October 2024

DOCKET NUMBER: AR20240001314

APPLICANT REQUESTS: correction of his records to reflect his disability resulted from a combat-related injury.

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

- DD Form 149 (Application for Correction of Military Record)
- Washington Hospital Center Surgical Pathology Report, dated 27 March 2021
- DA Form 199 (Informal Physical Evaluation Board (PEB) Proceedings), dated 9 May 2022
- Physical Disability Information Report, dated 13 June 2022
- U.S. Army Garrison, Fort Belvoir Orders 179-0003, dated 28 June 2022
- Public Law 117-168, dated 10 August 2022
- DD Form 214 (Certificate of Release or Discharge from Active Duty), covering the period ending 25 October 2022
- three Department of Veterans Affairs (VA) letters, dated 19 January 2023
- partial Fort Belvoir Community Hospital, Clinic Notes, dated 4 April 2023
- MedStar Hematology and Oncology at Georgetown University Hospital, Final Report, dated 31 July 2023
- Fort Belvoir Community Hospital, Computed tomography (CT) Chest, Abdomen, Pelvis, dated 4 December 2023
- VA online information, "Presumptive cancers related to burn pit exposure"

FACTS:

1. The applicant states:

a. He is requesting that his medical retirement be adjusted to reflect combat-related based on PACT Act legislation and the VA list of burn pit-related cancers. He requests that the approval be retroactive to 9 August 2022, the date the President signed the PACT act legislation. He also requests this decision be expedited due to his cancer being stage 4 colon cancer and the mounting medical costs due to his cancer.

b. At the time of his Medical Evaluation Board (MEB) and his retirement, the PACT Act legislation was still being finalized and how it was to be implemented by the Army

was still being worked out. At the time of his MEB for cancer and subsequent retirement, the list of presumptive cancers, which includes his stage 4 colon cancer, was not available for the Army to make the determination that his medical conditions were combat-related.

c. As the attached supporting documentation shows, colon cancer is one of the presumptive cancers listed on the VA website with regard to the PACT Act and as such, his 100 percent permanent disability due to that cancer should be deemed combat-related. He has also included in his supporting documentation his DD Form 214, which shows two deployments to Iraq and two deployments to Afghanistan. During those four deployments, he was exposed to burn pits while performing missions and living on forward operating bases (FOBs), combat outposts (COPs), and camps in austere conditions.

2. The applicant was appointed a commissioned officer in the Army of the United States on 11 May 2002.

3. The applicant deployed to the following locations during the following periods:

- Iraq, from 12 February 2003 through 16 January 2004
- Iraq, from 5 October 2005 through 6 October 2006
- Afghanistan, from 2 December 2011 through 1 December 2012
- Afghanistan, from 21 February 2015 through 20 November 2015

4. A Washington Hospital Center, Surgical Pathology Report, dated 27 March 2021, shows the following specimen were examined and found metastatic:

- Tumor from anterior abdominal wall (fresh), metastatic
- Greater omentum (fresh), metastatic
- Right gastric epiploic lymph node fondle, metastatic
- Greater omentum, metastatic
- Tumor from cal de sac, metastatic
- Recto-sigmoid colon, high-grade dysplasia
- Tumor mass from liver omentum, metastatic
- Tumor from right para celiac gutter, metastatic
- Appendix, metastatic
- Falciform ligament, metastatic
- Tumor from hepatic flexure, metastatic
- Tumor from semi-colon, metastatic

5. The applicant's DA Form 3349 (Physical Profile), DA Form 7652 (Disability Evaluation System (DES) Commander's Performance and Functional Statement), Medical Evaluation Board (MEB) Narrative Summary (NARSUM), DA Form 3947 (MEB

Proceedings), VA Compensation and Pension (C&P) Exam, and VA Proposed Rating Decision for DES purposes, and VA Rating Decision are not in his available records for review and have not been provided by the applicant.

6. A DA Form 199 shows:

a. An Informal PEB convened on 9 May 2022, where the applicant was found physically unfit with a recommended rating of 100 percent and that his disposition be permanent disability retirement.

b. The applicant's conditions determined to be unfitting are:

(1) Rectosigmoid adenocarcinoma with metastasis to colon, abdomen, liver and lung and status post lower left abdomen colostomy (MEB diagnoses (DX) 1,2); 100 percent. The applicant first sought treatment for these condition on 14 December 2020, at Fort Belvoir, VA. When first seeking treatment, the conditions presented insidiously with gastrointestinal distress.

(2) Rectosigmoid adenocarcinoma with metastasis to colon, abdomen, liver and lung (MEB Dx 1); 100 percent. The applicant first sought treatment for these condition on 14 December 2020, at Fort Belvoir, VA. When first seeking treatment, the conditions presented insidiously with gastrointestinal distress.

c. The applicant's conditions determined not to be unfitting are MEB Dx 3-33.

d. Section V: Administrative Determinations shows:

(1) The disability disposition is not based on disease or injury 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.

(2) The disability did not result from a combat-related injury under the provisions of Title 26, U.S. Code, section 104 or Title 10 U.S. Code, section 10216.

e. The applicant signed the form on 20 May 2022, indicating he had been advised of the findings and recommendations of the Informal PEB and concurred, waiving a formal hearing of his case. He additionally indicated he did not request reconsideration of his VA ratings.

7. A Physical Disability Information Report, dated 13 June 2022, shows the applicant would be placed on the retired list effective 26 October 2022 with a 100 percent disability rating. It further shows:

a. His disability was not based on injury or disease received in the LOD as a direct result of armed conflict or caused by an instrumentality of war and incurred in the LOD during a period of war as defined by law

b. His disability did not result from a combat-related injury as defined in Title 26, U.S. Code, section 104.

c. His disability was not incurred in a combat zone or incurred during the performance of duty in combat-related operations as designated by the Secretary of Defense.

8. U.S. Army Garrison, Fort Belvoir Orders 179-0003, dated 28 June 2022, placed the applicant on the Permanent Disability Retired List (PDRL) effective 26 October 2022, with a disability rating of 100 percent. The orders further show:

a. His disability was not based on injury or disease received in the LOD as a direct result of armed conflict or caused by an instrumentality of war and incurred in the LOD during a period of war as defined by law.

b. His disability did not result from a combat-related injury as defined in Title 26, U.S. Code, section 104.

9. The applicant's DD Form 214 shows he was retired under the provisions of Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation) on 25 October 2022, due to permanent disability, with corresponding separation code SEJ. He was credited with 20 years, 5 months, and 15 days of net active service.

10. The applicant provided three VA letters, all dated 19 January 2023, which show:

a. He honorably served in the Army from 11 May 2002 through 25 October 2022.

b. He receives a 100 percent service connected disability effective 1 December 2022.

c. He is considered to be totally and permanently disabled due solely to his service-connected disabilities effective 26 October 2022.

11. A VA letter, dated 16 March 2023, shows

a. He honorably served in the Army from 11 May 2002 through 25 October 2022.

b. He receives a 100 percent service connected disability effective 1 December 2022.

c. He is considered to be totally and permanently disabled due solely to his service-connected disabilities effective 26 October 2022.

12. MedStar Hematology and Oncology at Georgetown University Hospital, Final Report, dated 31 July 2023, has been provided in full to the Board for review and shows impressions of progressive intrathoracic metastatic disease and grossly stable peritoneal metastatic disease.

13. Fort Belvoir Community Hospital, Computed tomography (CT) Chest, Abdomen, Pelvis, dated 4 December 2023, has been provided in full to the Board for review and shows impressions of interval progression of metastatic disease within the chest, left great than right and moderate left pleural effusion, likely malignant.

14. VA online information, "Presumptive cancers related to burn pit exposure" lists colorectal or colon cancer (including adenocarcinoma, carcinoid, gastrointestinal stromal tumor and lymphoma) as presumptive conditions, i.e.. presumed to be caused by service, for eligible Gulf War and post-9/11 veterans

15. Title 38, USC, Sections 1110 and 1131, permit the VA to award compensation for disabilities which were incurred in or aggravated by active military service. However, an award of a VA rating does not establish an error or injustice on the part of the Army.

16. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. Documentation reviewed included the applicant's ABCMR application and accompanying documentation, the military electronic medical record EMR (AHLTA and/or MHS Genesis), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and/or the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant is applying to the ABCMR requesting that his medically unfitting colon cancer be determined to have been combat related under the Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics Act of 2022.

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. His DD 214 shows for the period of Service under consideration shows he entered the Regular Army on 11 May 2002 and was permanently retired for physical disability on 25 October 2022 under provisions provided

in chapter 4 of AR 635–40, Physical Evaluation for Retention, Retirement, or Separation (17 January 2017).

d. The applicant’s Informal Physical Evaluation Board (PEB) Proceedings (DA 199) shows that on 9 May 2022 the PEB determined he had two conditions which were unfitting for continued military service: “Rectosigmoid adenocarcinoma with metastasis to colon, abdomen, liver, and lung, and status post lower left abdomen colostomy,” and “Rectosigmoid adenocarcinoma with metastasis to colon, abdomen, liver, and lung.”

e. The PEB made the administrative determination that neither of these conditions was combat related: They found no evidence that one of these disabilities was the direct result of armed combat; was related to the use of combat devices (instrumentalities of war); the result of combat training; incurred while performing extra hazardous service though not engaged in combat; incurred while performing activities or training in preparation for armed conflict in conditions simulating war; or that he was a member of the military on or before 24 September 1975.

f. Section b(3) of 26 U.S. Code § 104 requires there be a cause-and-effect relationship in order to establish the finding that a medical condition is combat related:

(3) 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—

(i) as a direct result of armed conflict,

(ii) while engaged in extra-hazardous service, or

(iii) under conditions simulating war; or

(B) which is caused by an instrumentality of war.

g. The PEB applied the VA derived disability rating of 100% and 100% respectively and recommended the applicant be permanently retired for physical disability. On 20 May 2022, after having been counseled on the Board’s findings and recommendation by his PEB liaison officer, the applicant concurred with the PEB, waived his right to a formal hearing, and declined to request a VA reconsideration of his ratings.

h. There was no evidence submitted with the application nor identified in his ePEB case file or the EMR demonstrating that his unfitting metastatic cancer was combat related.

**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 Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive review based on law, policy and regulation. Upon review of the applicant's petition, available military record, and the medical review, the Board concurred with the advising official finding no evidence to support the applicant's unfitting metastatic cancer was combat related. The Board found, based on a preponderance of the evidence, there was insufficient evidence to amend the results of the informal physical evaluation board proceedings and subsequent separation proceedings to reflect his disability was received in the line of duty as a direct result of armed conflict or caused by an instrumentality of war and incurred in the line of duty during a period of war.

**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.



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. Department of Defense Instruction (DODI) 1332.38 (Physical Disability Evaluation), paragraph E3.P5.2.2 (Combat-Related), covers those injuries and diseases attributable to the special dangers associated with armed conflict or the preparation or training for armed conflict. A physical disability shall be considered combat related if it makes the member unfit or contributes to unfitness and was incurred under any of the following circumstances:

- as a direct result of armed conflict
- while engaged in hazardous service
- under conditions simulating war
- caused by an instrumentality of war

2. 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.

3. 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 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.

4. 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, colorectal cancer and colon cancer 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.

5. 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.

6. 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.

//NOTHING FOLLOWS//