

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 26 November 2024

DOCKET NUMBER: AR20240001425

APPLICANT REQUESTS: in effect, correction of her DA Form 199 (Informal Physical Evaluation Board (PEB) Proceedings) and retirement orders to show her disability resulted from combat-related injuries.

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

- DD Form 149 (Application for Correction of Military Record)
- Headquarters, Fort Stewart/Hunter Army Airfield Orders 034-0002, 3 February 2011
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- medical record (page 1,472 of 1,501)
- third-party Sworn Declaration
- Department of Veterans Affairs (VA) rating decision, verification of service-connected disabilities, and summary of benefits
- VA combat status codes description table
- DD Form 2860 (Claim for Combat-Related Special Compensation (CRSC))

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 she is requesting the correction to ensure her records accurately reflect her combat-related injuries. She kindly request that the necessary updates be made to include all relevant information pertaining to her combat-related injuries. This will help provide a comprehensive and accurate record of the injuries she incurred during her combat operations in Iraq.
3. The applicant enlisted in the Regular Army on 22 October 1998. Her record shows service in Iraq from 30 December 2004 to 17 May 2005 and from 9 July 2007 to 5 October 2008.

4. On 24 January 2011, a PEB found the applicant unfit for further military service due to migraine headaches. The PEB indicated the applicant has had the headaches since before 2002. The PEB recommended a 50% disability rating and her placement on the Temporary Disability Retired List (TDRL). The PEB found her fit for the following conditions because the conditions met retention standards per the DA Form 3947 (Medical Evaluation Board Proceedings), were found by the PEB to not be unfitting either independently or in combination with any other conditions as a review of the case file supported that the conditions were not a significant limitation on her ability to perform her primary military occupational specialty duties:

- narcolepsy
- left patellofemoral syndrome status post lateral release surgery with residuals of persistence symptoms
- scar and postoperative sensory neuropathy
- left hip tendinopathy
- lumbar strain
- benign premature ventricular contractions.

5. The DA Form 199 contains the following entries in section 10:

a. The Soldier's retirement is not based on disability from 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 in line of duty during a period of war as defined by law.

b. The disability did not result from a combat-related injury under the provisions of Title 26, U.S. Code, section 104

6. Orders 034-0002, dated 3 February 2011, issued by Headquarters, Fort Stewart/Hunter Army Airfield, ordered the applicant's release from assignment and duty because of physical disability and her placement on the TDRL effective 2 April 2011. The orders contain the following entries:

a. Disability is based on injury or disease received in 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 war period as defined by law: No

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

7. The applicant's DD Form 214 shows she was retired on 2 April 2011 under the authority of Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation), chapter 4, by reason of disability, temporary (enhanced).

8. A TDRL DA Form 199, dated 2 November 2015, shows a PEB reevaluated the applicant's unfitting migraine headaches condition and recommended a 50% disability rating and her placement on the Permanent Disability Retired List (PDRL). The DA Form 199 contains the following entries in Section V (Administrative Determinations):

a. The disability disposition is not 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 incurred in the line of duty during a period of war (This determination is made for all compensable cases but pertains to potential benefits for disability retirees employed under Federal Civil Service.)

b. 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.

9. The applicant's available records do not contain orders placing her on the PDRL.

10. The applicant's records shows she submitted claims for CRSC based on her PTSD, migraine headaches, organic sleep related hypovent/hypoxemia, lumbar strain, tendinopathy, left hip, and patellofemoral syndrome. Her claims were denied by the U.S. Army Human Resources Command (AHRC) because their office was unable to verify combat-related events in relation to these conditions.

11. The applicant submitted an application to the ABCMR requesting reversal of AHRC's denial of her CRSC claim. The ABCMR adjudicated her request on 23 February 2023 (Docket Number AR20220007145) and determined there was insufficient evidence of an error or injustice warranting reversal of AHRC's decision.

12. The applicant provided:

a. A medical record (page 1,472 of 1,501) showing she was diagnosed by the VA with post-traumatic stress disorder (PTSD) secondary to her combat experiences.

b. A third-party Sworn Declaration from a former member of her unit in Iraq attesting to the applicant's combat experiences while deployed to Iraq.

c. VA documents showing she was granted service-connected disability compensation for various conditions that include PTSD with a 100% disability rating.

13. The Army rates only conditions determined to be physically unfitting at the time of discharge, which disqualify the Soldier from further military service. The Army disability rating is to compensate the individual for the loss of a military career. The VA does not have authority or responsibility for determining physical fitness for military service. The VA may compensate the individual for loss of civilian employability.

MEDICAL REVIEW:

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 (AHLTA), 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:

The applicant is applying to the ABCMR requesting reversal of the United States Army Physical Disability Agency's (USAPDA) and the United States Army Human Resources Command's (USAHRC) administrative determinations that her military disability – migraine headaches – and other conditions were not related to combat as defined by law. She states: "To ensure that my records accurately reflect my combat related injuries, I kindly request that the necessary updates be made to include all relevant information pertaining to my combat related injuries that have been sustained. This will help provide a comprehensive and accurate record of the injuries I incurred during my combat operations in Iraq. Please correct my combat code from 1 to 2."

The Record of Proceedings details the applicant's military service and the circumstances of the case. Her DD 214 for the period of Service under consideration shows the applicant entered the regular Army on 10 October 1998 and was discharged on 2 April 2011, being permanently retired for physical disability under chapter 4 of AR 635–40, Physical Evaluation for Retention, Retirement, or Separation (8 February 2006).

This request was previously denied by the ABCMR on 23 February 2023 (AR20220007145). This opine will review the case and concentrate on the new evidence submitted by the applicant.

The applicant's Physical Evaluation Board (PEB) Proceedings (DA Form 199) dated 24 January 2011 shows the board determined her migraine headaches were her sole unfitting condition for continued military service. The PEB determined the remaining five conditions were not unfitting for continued service: "Narcolepsy; left patellofemoral syndrome status post lateral release surgery with residuals of persistence symptoms, scar and postoperative sensory neuropathy; left hip tendinopathy; lumbar strain; and benign premature ventricular contractions."

The PEB made the administrative determination the disability was not 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.

The onset of her migraine headaches as noted in the rationale for her disabilities on his DA 199: "Migraine headaches. The Soldier has had these headaches since before 2002. She reports that they have worsened. Her Commander reports that she misses an extreme amount of time for appointments for her migraines. Although she doesn't specifically state that she misses time for the headaches. However, this is unfitting because the Soldier is missing an extensive amount of time due to her migraines and she is not producing at all for the government."

Combat related is defined in Section b(3) of 26 U.S. Code § 104, and requires there be a direct cause and effect relationship:

(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.

Combat-related disability for CRSC is defined in 10 U.S.C. § 1413a(e) as a disability that is "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."

Paragraph 631001A of Department of Defense Financial Management Regulation 7000.14-R Volume 7B Chapter 63 "Combat-Related Special Compensation (CRSC)" defines the basis for determining combat related for the purposes of awarding CRSC:

"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."

Paragraph 630601A of Department of Defense Financial Management Regulation 7000.14-R, Volume 78, Chapter 63: "To support a combat-related determination it is not sufficient to only state the fact that a member incurred the disability during a period of war, or in an area of armed conflict or while participating in combat operations. There must be a definite causal relationship between the armed conflict and the resulting liability."

The applicant is not in receipt of a Purple Heart, Combat Action Badge, and no corroborating documentation was found. A note in paragraph 630502 of DoD FMR 7000.14-R Volume 7B Chapter 63 CRSC notes the requirement for documentation, stating in part: "An uncorroborated statement in a record that a disability is combat-related will not, by itself, be considered determinative for purposes of meeting the combat-related standards for CRSC prescribed herein. CRSC determinations must be made based on the program criteria."

For the purpose of granting CRSC, these are defined in paragraphs 630602, 630603, and 630604 respectively of Department of Defense Financial Management Regulation 7000.14-R, Volume 78, Chapter 63:

"630602. 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 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."

"630603. 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."

630604. Instrumentality of War: A. There must be a direct causal relationship between the instrumentality of war and the disability. It is not required that a member's disability be incurred during an actual period of war. The disability must be incurred incident to a hazard or risk of the service.

B. An instrumentality of war is a vehicle, vessel, or device designed primarily for Military Service and intended for use in such Service at the time of the occurrence or injury. It may also include such instrumentality not designed primarily for Military Service if use of or occurrence involving such instrumentality subjects the individual to a hazard peculiar to Military Service. Such use or occurrence differs from the use or occurrence under similar circumstances in civilian pursuits.

C. A determination that a disability is the result of an instrumentality of war may be made if the disability was incurred in any period of service as a result of such diverse causes as wounds caused by a military weapon, accidents involving a military combat vehicle, injury or sickness caused by fumes, gases, or explosion of military ordnance, vehicles, or materiel.”

Review of the submitted documentation found no probative evidence to support a combat related finding for any of these circumstances. The applicants’ witness statements were also reviewed. They do not meet the requirement that such statements be from the Soldier’s wartime chain of command, and none of the events described in them would render mental health or other conditions combat related IAW Section b(3) of 26 U.S. Code § 104 or Chapter 63, Volume 78, of Department of Defense Financial Management Regulation 7000.14-R.

It is the opinion of the ARBA Medical Advisor there is insufficient probative evidence upon which to reverse either the United States Army Physical Disability Agency’s or the United States Army Human Resources Command’s previous non-combat related determinations for military disability or other VA service-connected conditions.

#### 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 the applicant was separated from the Army in 2015 for disability with a 50% rating for migraine headaches. The PEB did not find her medical condition combat related. The PEB found no evidence her condition which began in 2002 and worsened over the years, was either a direct result of an armed conflict or caused by an instrumentality of war. Like the PEB, this Board considered the onset of the condition and found 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 her medical retirement as combat related.

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 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. Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation) establishes the Army Disability Evaluation System and sets forth policies, responsibilities, and procedures that apply in determining whether a Soldier is unfit because of physical disability to reasonably perform the duties of his office, grade, rank, or rating.



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

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

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

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

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

(1) As a direct result of armed conflict.

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

(3) Caused by an instrumentality of war. Occurrence during a period of war is not required. A favorable determination is made if the disability was incurred during any period of service as a result of such diverse causes as wounds caused by a military weapon, accidents involving a military combat vehicle, injury, or sickness caused by

fumes, gases, or explosion of military ordnance, vehicles, or material. However, there must be a direct causal relationship between the instrumentality of war and the disability. For example, if a Soldier is on a field exercise and is engaged in a sporting activity and falls and strikes an armored vehicle, the injury will not be considered to result from the instrumentality of war (the armored vehicle), because it was the sporting activity that was the cause of the injury, not the vehicle. On the other hand, if the individual was engaged in the same sporting activity and the armored vehicle struck the Soldier, the injury would be considered the result of an instrumentality of war (the armored vehicle).

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

4. Title 38, U.S. Code, 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.

5. Title 38, Code of Federal Regulations, Part IV is the VA Schedule for Rating Disabilities. The VA awards disability ratings to veterans for service-connected conditions, including those conditions detected after discharge. As a result, the VA, operating under different policies, may award a disability rating where the Army did not find the member to be unfit to perform his duties. Unlike the Army, the VA can evaluate a veteran throughout his or her lifetime, adjusting the percentage of disability based upon that agency's examinations and findings.

6. 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//