

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE:

DOCKET NUMBER: AR20240001546

APPLICANT REQUESTS: reconsideration of his previous request for the correction of his retirement orders to reflect his injuries were combat related.

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

- DD Form 149 (Application for Correction of Military Record)
- Applicant's explanation of events related to combat injury
- U.S. Army Aeromedical Research Laboratory article
- DA Form 759 (Individual Flight Record and Flight Certificate – Army)
- U.S. Army Physical Disability Agency Memorandum, Subject: Request for Rating
- Headquarters (HQs), 101st Airborne Division (Air Assault) and Fort Campbell Orders Number 135-0605
- U.S Army Human Resources Command (AHRC) letter
- Summary of medical records

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20190010110 on 5 March 2020. The applicant's Physical Evaluation Board (PEB) was conducted in accordance with law and regulations. He concurred with the recommendation of the PEB. In order for specific injuries to be combat related, the injury must have occurred or been sustained during combat or in a combat zone, otherwise the injury is categorized as non-combat related. The applicant applied for Combat Related Special Compensation (CRSC) and was approved for 60 percent disability rating for his injuries occurring while performing hazardous service, not a direct result of an armed conflict not an instrumentality of war. There was no error or injustice in the applicant's case.

2. The applicant states after his retirement, his claim for CRSC was approved based on an instrumentality of war. His retirement orders stated his disability was not based on an injury or disease received as a direct result of an armed conflict or caused by an instrumentality of war and was not incurred in the line of duty during a period of war. He feels his retirement orders should be amended to match the CRSC decision.

3. A review of the applicant's service record shows:

a. Officer Record Brief shows the applicant served in Afghanistan:

- 6-months ending 5 February 2011
- 9-months ending 14 May 2013
- 5-months ending 23 September 2015

b. With prior enlisted Regular Army service, on 23 May 2008, Orders Number 144-341-A-661, issued by HQs, U.S. Army Garrison, Fort Rucker, the applicant was ordered to active duty for a 6-year active duty commitment, effective 6 June 2008.

c. On 6 June 2008, the applicant executed his oath of office and was appointed as a Reserve warrant officer in the rank of warrant officer one.

d. During the applicant's service, he was awarded four Air Medals for his meritorious service in aerial flight in Afghanistan as an Apache Attack Pilot supporting Operation Enduring Freedom and Safety Officer supporting Operation Freedom Sentinel.

e. On 5 February 2011, the applicant was awarded the Army Commendation Medal for his service as an AH-64D Apache pilot with Task Force Destiny at Kandahar Airbase, Afghanistan during the period of 1 August 2010 through 28 January 2010.

f. The applicant was awarded the Army Commendation Medal for his service as the Company Mission Planner with Task Force No Mercy in support of Operation Enduring Freedom XII through XIII in Afghanistan during the period of 31 August 2012 through 12 May 2013.

g. On 3 October 2014, Permanent Orders Number 276-01, issued by AHRC, the applicant's unit was awarded the Meritorious Unit Commendation for the period of service during 28 August 2012 through 20 May 2013 for exceptionally meritorious service in support of Operation Enduring Freedom XIII through XIV. The unit's mission execution set a new standard for aviation operations in Afghanistan.

h. On 12 September 2015, Orders Number LN-5255-00003, issued by Landstuhl Regional Medical Center, the applicant was medically evacuated and reassigned to Blanchfield Army Community Hospital, Fort Campbell, KY, effective 13 September 2015 for further medical treatment.

i. On 3 March 2017, an informal PEB found the applicant physically unfit for retention and recommended he be placed on the permanent disability retired list with a 30 percent disability due to:

(1) Thoracolumbar degenerative disc disease, spinal stenosis with lower extremity radiculopathy, the applicant reported the onset of this condition in March 2013 while deployed to Afghanistan. The injury was not a direct result of an armed conflict nor was it caused by an instrumentality of war. Reasonable performance of AH-64D Attack Pilot required him to perform certain activities. He was rated with a 10 percent disability.

(2) Right lower extremity radiculopathy like pain, the applicant reported the onset of this condition in March 2013 while deployed to Afghanistan. The injury was not a direct result of an armed conflict nor was it caused by an instrumentality of war. Reasonable performance of AH-64D Attack Pilot required him to perform certain activities. He was rated with a 10 percent disability.

(3) Left lower extremity radiculopathy like pain, the applicant reported the onset of this condition in March 2013 while deployed to Afghanistan. The injury was not a direct result of an armed conflict nor was it caused by an instrumentality of war. Reasonable performance of AH-64D Attack Pilot required him to perform certain activities. He was rated with a 10 percent disability.

The applicant's following conditions were physically fit for retention:

- mild multilevel cervical spondylosis
- left ear sensorineural hearing loss, range of 6,000 hertz
- subjective tinnitus
- obstructive sleep apnea on continuous positive airway pressure
- left wrist sprain
- right upper extremity radicular symptoms
- left upper extremity radicular symptoms
- loss of right hand grip strength secondary to cervical spine condition
- loss of left hand grip strength secondary to cervical spine condition
- Gastroesophageal Reflux Disease
- Overactive bladder

The PEB found the applicant's conditions were not based on disease or injury incurred in the line of duty in combat with an enemy of the United States and was not a direct result of an armed conflict or caused by an instrumentality of war and was not incurred in the line of duty during a period of war. His disability(s) were not a result from combat related injury. The DA Form 199 provided by the applicant for ABCMR Docket Number AR20190010110 was not signed by the applicant to show he made his elections of options nor that he concurred or non-concurred with the PEB findings. His record does not contain his DA Form 199.

j. On 15 May 2017, Orders Number 135-0605, issued by HQs, 101st Airborne Division (Air Assault) and Fort Campbell, the applicant was released from active duty because of a physical disability incurred while entitled to basic pay. He was placed on the permanent disability retired list, effective 5 August 2017, with 30 percent disability. The order stated his disability was not based on injury or disease received in the line of duty as a direct result of an armed conflict or caused by an instrumentality of war nor incurred in the line of duty during a period of war. His disability did not result from a combat related injury.

k. On 26 June 2017, Permanent Orders Number 177-024, issued by the 101st Combat Aviation Brigade, the applicant was awarded the Army Commendation Medal for his meritorious service as an AH-64 D/E Pilot and Safety Officer. His demonstrated superior leadership, loyalty and dedicated service was instrumental to the success of his company mission accomplishment.

l. On 4 August 2017, the applicant was honorably retired from active duty due to a permanent disability. DD Form 214 (Certificate of Release or Discharge from Active Duty) shows the applicant completed 9-years, 1-month, and 29-days of active service. It also shows in:

- Item 13 (Decorations, Medals, Badges, Citations and Campaign Ribbons Awarded or Authorized):
 - Afghanistan Campaign Medal with two Campaign Stars
 - Air Medal (4th Award)
 - Army Commendation Medal (2nd Award)
 - Army Achievement Medal
 - North Atlantic Treaty Organization Medal (2nd Award)
 - Valorous Unit Award
 - National Defense Service Medal
 - Global war on Terrorism Service Medal
 - Army Service Ribbon
 - Overseas Service Ribbon (3rd Award)
 - Basic Aviator Badge
- Item 18 (Remarks): the applicant served in:
 - Afghanistan during the period of 6 August 2010 through 5 February 2011
 - Afghanistan during the period of 15 August 2012 through 14 May 2013
 - Afghanistan during the period of 24 April through 23 September 2015

m. On 18 December 2018, AHRC notified the applicant his claim for CRSC was approved with documentation that supported evidence his injury(s) effective September

2017 with a total combat related disability of 60 percent while performing hazardous service for:

- radicular nerve group bilateral, left upper extremity radiculopathy (non-dominant) – 20 percent
- radicular nerve group bilateral, right upper extremity radiculopathy (dominant) – 20 percent
- cervical spine spondylosis with arthritis – 10 percent
- thoracolumbar degenerative disc disease with spinal stenosis – 10 percent
- bilateral tinnitus – 10 percent
- bilateral, left lower extremity radiculopathy – 10 percent
- bilateral, right lower extremity radiculopathy – 10 percent
- hearing loss, left ear – 0 percent

4. The applicant provides:

a. Applicant describes the events that surround his disability, stating that the AH-64D/E helicopter's sole purpose is for combat or combat training. The aircraft sacrifices ergonomics for survivability and armor, specifically regarding the seat position for the aviator. The effects of flying a military helicopter has caused lower back pain. The pilots are required to carry an extra 50 to 60 pounds of gear on their upper torso. The applicant believes his injuries were produced as a direct result of hazards associated with piloting an AH-64 D/E which is an instrumentation of war. His medical records focused on the limitations, symptoms and treatment for his lower back injuries not the cause. He also believes there is clear evidence to substantiate the relationship between his injuries and the operation of an instrument of war. The posture of a pilot flying this aircraft shortens the deep spinal muscles and stretches the superficial muscles. It also forces the front edges of the vertebrae together while pulling the posterior edges apart which puts even more uneven pressure on the intervertebral discs. The entire document is available in the supporting documents for the Board's review.

b. The U.S. Army Aeromedical Research Laboratory article dated December 2012 on Low Back Pain: Considerations for Rotary Wing Aircrew stated Low back pain remains a significant issue among helicopter aircrew. There is a considerable body of scientific literature devoted to the problem, including epidemiologic and experimental studies addressing prevalence, characteristics, primary etiology, and contributing factors. It is endemic and multinational, with a prevalence ranging from 50 to 92 percent. Archetypal pain begins with flight or within hours of flight, is mostly targeted in the low back/lumbar region and/or buttocks, is transient, and is commonly described as dull and achy. A minority develop chronic, persistent pain that is variously described with dissimilar characteristics. The pernicious effects of back pain or discomfort while piloting may affect flight performance and safety, including reduced operational

effectiveness and lost duty time, occupational attrition, curtailed or cancelled missions, compromised emergency egress, and performance deficits during critical phases of flight. The majority of etiologic studies have focused on the pathophysical posture adopted by pilots for aircraft control and exposure to whole body vibration. With more evidence for the former, it remains likely that both, as well as other factors, may have a contributory and perhaps integrative or concerted role. Corrective and mitigation strategies have addressed lumbar support, seat and cockpit ergonomic redesign, and improved aircrew health. Flight surgeons should be familiar with this prevalent issue and future research must address longitudinal cohort studies with clear definitions, relevant and valid exposure data, dose response detail, and control for contributing factors and confounders.

c. DA Form 759 shows which aircraft the applicant flew and the duration of the flights. The applicant flew a total of 1,312.7 flight hours. The document is available in the supporting documents for a more in-depth review by the Board.

d. U.S. Army Physical Disability Agency, Memorandum, Subject: Requesting Rating of Chief Warrant Three A-C- (the applicant), dated 1 February 2017, requesting a disability rating from the Department of Veterans Affairs to provide a disability rating percentage for the following conditions:

- Thoracolumbar degenerative disc disease, spinal stenosis with lower extremity radiculopathy
- Right lower extremity radiculopathy-like pain
- Left lower extremity radiculopathy-like pain

e. Three pages of a Summary of Medical Records for back pain which does not reflect the applicant's name.

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. The evidence shows the applicant was permanently retired due to disability. The PEB determined the applicant's conditions which had failed medical retention standards were unfitting for continued military service are: Thoracolumbar degenerative disc disease, spinal stenosis with lower extremity radiculopathy, Right lower extremity radiculopathy like pain, and Left lower extremity radiculopathy like pain. To determine combat relation, the Board considered the onset of these conditions. The onset of these conditions while deployed to Afghanistan but none was a direct result of an armed conflict, and none was caused by an instrumentality of war. The PEB made the administrative

2. Prior to closing the case, the Board did note the analyst of record administrative notes below, and recommended the correction is completed to more accurately depict the military service of the applicant.

Mr 1	Mr 2	Mr 3
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Except for the correction addressed in Administrative Note(s) below, the evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis to amend the decision of the ABCMR set forth in Docket Number AR20190010110 on 5 March 2020.2.

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ADMINISTRATIVE NOTE(S):

1. Reference the enclosed request for correction of military records from the subject individual to correct his DD Form 214 (Certificate of Release or Discharge from Active Duty) for the period of 6 June 2008 through 4 August 2017, by:

a. Delete: Afghanistan Campaign Medal with two campaign stars and the Army Commendation Medal (2nd Award).

b. Add: Item 13:

- Afghanistan Campaign Medal with three Bronze Service Star
- Army Commendation Medal (3rd Award)
- Meritorious Unit Commendation (Army)
- Army Lapel Button

2. A review of the records listed below (enclosed) is sufficient to substantiate correction of the DD Form 214 without action by the Board.

- DD Form 214 for service during the period of 6 June 2008 through 4 August 2017
- DD Form 214 for service ending 5 June 2008
- Officer Record Brief
- DA Form 4980-14 (The Army Commendation Medal Certificate) Permanent Orders Number 036-003
- DA Form 4980-14 Permanent Orders Number 020-153
- U.S. AHRC Permanent Orders Number 276-01
- DA Form 4980-14 Permanent Orders Number 177-024
- Army Regulation 600-8-22 (Military Awards)

3. Please correct the applicant's DD Form 214 by deleting and adding the item shown in paragraph 1 above. Provide the applicant a copy of the corrections, and as applicable the medals and citations. Please ensure that the corrections are recorded in the applicant's official military personnel record.

REFERENCES:

1. Title 10 United States Code (USC), section 1201 (Regulars and members on active duty for more than 30 days: retirement), (Required Determinations of Disability), determinations referred to in subsection (a) are determinations by the Secretary that:

- based upon accepted medical principles, the disability is of a permanent nature and stable;
- disability is not the result of the member's intentional misconduct or willful neglect, and was not incurred during a period of unauthorized absence; and
- either:
 - member has at least 20-years of service; or
 - disability is at least 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs at the time of the determination; and either:
 - disability was not noted at the time of the member's entrance on active duty (unless clear and unmistakable evidence demonstrates that the disability existed before the member's entrance on active duty and was not aggravated by active military service);
 - disability is the proximate result of performing active duty;
 - disability was incurred in line of duty in time of war or national emergency; or
 - disability was incurred in line of duty after 14 September 1978

2. Army Regulation (AR) 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. Only the unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability.

a. Paragraph 4-22g, election options and impact of statement of appeals. The Soldier has the following election options to IPEB decisions.

- accept the PEB decision, thereby waiving his or her right to a formal hearing, presiding officer signs the PEB's findings and forwards the case to USAPDA for any required or quality assurance reviews and final processing
- Non-concur with the PEB decision and demand or request, as applicable, a formal hearing with or without a statement of appeal (also called a statement of rebuttal)

- Non-concur with the PEB decision with or without submitting a statement of appeal without demanding a formal hearing
- accept or request reconsideration of the VA preliminary ratings, VA will only reconsider when there is new medical evidence or sufficient justification of an error to warrant reconsideration

b. Paragraph 5-9 (Compensable criteria under 10 USC, section 1201 through section 1203), statutory requirements listed below concerning unfit, duty status, in sound condition, and line of duty determine compensability. The requirements listed below concerning stability, years of service, or disability rating percentage determine disposition (retirement or separation). The disability is permanent and stable. The member has:

- at least 20-years of service; or
- disability is at least 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs at the time of the determination, and either that disability:
 - was not noted at the time of the member's entrance on active duty unless the Secretary of the Military Department concerned demonstrates with clear and unmistakable evidence that the disability existed before the member's entrance on active duty and was not aggravated by active military Service;
 - is the proximate result of performing active duty;
 - was incurred in the line of duty in time of war or national emergency; or
 - disability was incurred in the line of duty after 14 September 1978

c. Paragraph 5-24f (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.

- to be considered incurred as a result of armed conflict does not require the armed conflict to have been occurred during a period of war
- armed conflict includes a war, expedition, occupation of an area or territory, battle, skirmish, raid, invasion, rebellion, insurrection, guerrilla action, riot, or any other action in which Soldiers are engaged with a hostile or belligerent nation, faction, force, or terrorists
- armed conflict may also include such situations as incidents involving a Soldier while interned as a prisoner of war or while detained against their 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

- normally Soldiers who sustain injuries while assigned to administrative, supply, or other support duties in the rear area are not considered to be in the area of combat operations unless the injury is actually incurred during an enemy attack in the immediate area

d. Paragraph 5-25d (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 following 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, under conditions simulating war; this 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 (combatives 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) 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; there must be a direct causal relationship between the instrumentality of war and the disability, 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, 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 10 USC, section 1413a (Combat-related special compensation), 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. (e) (Combat-Related Disability), the term "combat-related disability" means a disability that is compensable under the laws administered by the Secretary of Veterans Affairs and that:

- attributable to an injury for which the member was awarded the Purple Heart; or
- was incurred (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

4. Title 10, USC, section 1552 states, the Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice.

//NOTHING FOLLOWS//