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NATIONAL VETERANS LEGAL SERVICES PROGRAM

Smoke et al. v. Driscoll and U.S. Army Designation of Burn Pits as "Instrumentalities of War" for Medical Retirement Combat-Related Findings

Frequently Asked Questions

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Smoke et al. v. Driscoll and U.S. Army Designation of Burn Pits as "Instrumentalities of War" for Medical Retirement Combat-Related Findings

Frequently Asked Questions

What was *Smoke et al. v. Driscoll*?
NVLSP and Sidley Austin LLP filed a class action lawsuit in 2024 on behalf of Kyle Smoke, Jennifer McIntyre, and a class of similarly situated Army veterans who were denied a "combat-related" designation by the Physical Evaluation Board (PEB) for disabilities presumed to be caused by exposure to military burn pits under the Sergeant First Class Heath Robinson Honoring Our Promise to Address Comprehensive Toxics (PACT) Act of 2022, a designation that would make these Army veterans' disability retirement pay tax-free. The complaint requested that the Court hold unlawful and set aside the Army's policy of concluding that burn pits are not an instrumentality of war.

What is Medical Retirement?
A service member whose disabilities render them unable to perform the duties of their office, grade, rank, or rating should be evaluated for medical retirement by a Medical Evaluation Board ("MEB") and a PEB. The PEB evaluates all major illnesses or disabilities and decides whether any of them make the member unfit for continued service, and, if so, which ones cause the member to be "unfit." Once the PEB determines which conditions make a member unfit, a disability rating (reflecting the severity of the disability) is assigned to each unfitting condition. The PEB also determines whether each unfitting condition is combat-related, including whether the condition resulted from an instrumentality of war. To qualify for a medical retirement, the total combined disability rating of a service member's unfitting conditions must be a minimum of 30%.

What does the Department of Defense (DoD) consider a combat-related disability?
A disability is considered combat-related if it makes the service member unfit or contributes to unfitness and the preponderance of the evidence shows that it was incurred under one of several circumstances. Conditions incurred as a direct result of armed conflict are combat-related. These circumstances further include disabilities incurred while engaged in hazardous service, such as aerial flight duty, parachute duty, demolition duty, or diving duty. A disability may also be considered combat-related if it occurred under conditions simulating war. Finally, a disability may be considered combat-related if it was caused by an instrumentality of war.

What is an Instrumentality of War?
Department of Defense regulation defines instrumentalities of war as 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."

Do conditions caused by burn pits qualify as disabilities caused by an instrumentality of war?
Department of Defense regulation provides that a disability may be found to be the result of an instrumentality of war "if the disability was incurred in any period of service as a result of such diverse causes as . . . injury or sickness *caused by fumes, gases*, or explosion of military ordnance, vehicles, or material." The regulation further requires a direct causal relationship between the instrumentality of war and the disability.

What is the benefit of having a combat-related designation when obtaining medical retirement?
When the PEB determines that a service member's unfitting disability(s) are combat-related, the disability retirement pay will be excluded from Federal gross income for federal income taxes. The PEB designating a condition as combat-related means that the veteran's disability retirement pay will receive tax-exempt status.

Is a Combat-Related PEB Designation the Same as Combat-Related Special Compensation (CRSC)?
No. A combat-related designation made by the PEB during the disability evaluation process is not the same as CRSC, although the two determinations are related. The PEB's combat-related determination determines the tax treatment of disability retirement pay. Congress created CRSC benefits to provide extra compensation to military retirees whose disabilities are combat-related. To be eligible for CRSC, an applicant must be retired, either through medical retirement or based on years of service, with "a combat-related disability" for which the VA has awarded service-connected disability compensation. A "combat-related disability" for CRSC includes a disability incurred "through an instrumentality of war." The definition of instrumentality of war is the same for CRSC and for the PEB's determination in medical retirement.

If the PEB determines that my disability is combat-related, do I automatically receive CRSC?
No. To receive CRSC, a retiree must submit a separate application to their branch of service, which independently determines eligibility. Importantly, a PEB combat-related determination is not required to apply for CRSC. Military retirees may apply for CRSC for any VA service-connected disability they believe is combat-related, even if that condition was not found unfitting by the PEB or was not part of the medical retirement decision. The retiree's branch of service will review the application and determine whether the disability qualifies as combat-related for CRSC purposes.

What is the PACT Act?
The Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics Act, known as the PACT Act, was enacted on August 10, 2022. The PACT Act expanded eligibility for VA benefits, including for post-9/11 veterans who served in certain locations with military burn pits. The PACT Act set forth a "presumption of service connection for certain diseases associated with exposure to burn pits and other toxins." The PACT Act's "[p]resumption of service connection for certain diseases associated with exposure to burn pits and other toxins" requires the VA to consider the PACT Act Conditions to "have been incurred in or aggravated during active military, naval air, or space service, notwithstanding that there is no record of evidence of such disease during the period of such service" for covered veterans.

Does the Army provide Combat-Related PEB Designation for PACT Act conditions?
Prior to the settlement in *Smoke et al. v. Driscoll*, the Army PEB did not grant combat-related designations for unfitting conditions listed in the PACT Act, even for veterans who served in the locations and time periods covered by the Act. The Army denied combat-related findings on the ground that service members could not prove exactly what materials were burned in the burn pits that caused their conditions. Instead, the PEB classified these disabilities as combat-zone conditions, which meant the resulting disability retirement pay remained taxable. This approach conflicted with the Army's CRSC determinations. After passage of the PACT Act, the Army routinely granted CRSC for many of PACT Act conditions, finding them combat-related due to an instrumentality of war without requiring proof of the specific substances burned in the pits.

Did the Army change its policy under the settlement agreement in *Smoke et al. v. Driscoll*?
Yes, the Army agreed to change their policy in the settlement. The Army published a new policy, entitled: "Application of Instrumentality of War Coding for Unfitting Condition(s) Resulting from Burn Pit Exposure in a Designated Combat Zone." The purpose of the policy is to "provide guidance to the United States Army Physical Disability Agency regarding application of combat coding for injuries caused by the fumes from Open-Air Burn Pits in Contingency Operations." The policy states: "Open-air burn pits, … located in combat zones, are instrumentalities of war for purposes of" combat-related findings for medical retirement. The policy defines a combat zone to include (1) a qualified hazardous duty area designated by Congress where Soldiers earn hostile fire pay or imminent danger pay, and (2) an area outside the combat zone or qualified hazardous duty area when the DoD certifies that such service is in direct support of military operations in a combat zone

or qualified hazardous duty area, and where Soldiers receives hostile fire pay or imminent danger pay. The Army posted its new policy at: https://www.hrc.army.mil/content/US%20Army%20Physical%20Disability%20Agency

Did the Army agree to grant relief to the named plaintiffs and other veterans who were impacted by the previous policy?

Yes, the Army corrected the records of the named plaintiffs, designating their unfitting conditions as combat-related. The Army agreed to make reasonable efforts to identify Army service members who were medically retired on or after August 10, 2022, for a condition qualifying under the PACT Act legislation, but who were not assigned a combat-related designation. The Army agreed to review their records under the new policy and issue revised determinations consistent with the settlement, the revised policy, and applicable law. The Army agreed to make reasonable efforts to complete this review and any revisions within six (6) months of the effective date of the settlement, which was March 6, 2026.

Which veterans may benefit from the settlement in *Smoke et al. v. Driscoll*?

- Previously medically retired Army Veterans who were medically retired based solely on at least one PACT Act condition, but where none of the unfitting conditions were granted combat-related status.
- Army Soldiers medically retired in the future, for whom at least one of the unfitting conditions is a PACT Act condition.

What are the benefits of the new Army policy recognizing that burn pits are instrumentalities of war?

When the Army PEB determines that unfitting conditions, such as those listed in the PACT Act, are due to exposure to burn pits, those conditions should be deemed combat-related due to instrumentalities of war.

What about other military branches?

- Veterans who retired from the Air Force, Navy, Marine Corps, and/or Coast Guard who are similarly situated are welcome to contact NVLSP's Pro Bono Program Lawyers Serving Warriors® Program at: lsw.classaction@nvlsp.org.

Although no branch other than the Army has officially adopted the settlement in *Smoke et al v. Driscoll*, the Air Force recently granted an unfitting PACT Act condition a combat-related finding. Initially, the Informal PEB and Formal PEB denied that the Pact Act condition was combat-related. However, the Air Force Personnel Center ("AFPC") overruled the PEB and awarded a combat related finding to the unfitting PACT Act condition. AFPC identified two principal bases for its decision: (1) the enactment of the PACT Act in 2022, and (2) the Army's recent settlement in *Smoke et al v. Driscoll.*

What if I need help with medical retirement or CRSC?

You may contact NVLSP to see if you qualify for our free legal assistance with seeking assistance with medical retirement, including combat-related determinations in medical retirement, or CRSC. You may apply online at https://www.nvlsp.org/what-we-do/lawyers-serving-warriors/