

No. 24-320

IN THE
Supreme Court of the United States

SIMON A. SOTO,
Petitioner,

v.

UNITED STATES,
Respondent.

**On Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit**

JOINT APPENDIX

TACY F. FLINT
J. SIMONE JONES*
**Counsel of Record*
NATHANIEL C. LOVE
EMILY M. WEXLER
ANKUR SHINGAL
CAMILLE SANCHES
SIDLEY AUSTIN LLP
One South Dearborn
CHICAGO, IL 60603
(312) 853-7000
jsimone.jones@sidley.com

SARAH M. HARRIS*
**Counsel of Record*
CAROLINE A. FLYNN
UNITED STATES DEPARTMENT
OF JUSTICE
950 Pennsylvania Ave, NW
Washington, D.C. 20530
(202) 514-2217
supremectbriefs@usdoj.gov

Counsel for Petitioner *Counsel for Respondent*
[Additional counsel listed on inside cover]

PETITION FOR CERTIORARI FILED Sept. 18, 2024
CERTIORARI GRANTED Jan. 17, 2025

BARTON F. STICHMAN
ROCHELLE BOBROFF
RENEE BURBANK
NATIONAL VETERANS
LEGAL SERVICES
PROGRAM
1100 Wilson Blvd
Suite 900
Arlington, VA 22209

LAKEISHA F. MAYS
KIMBERLY R. QUICK
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005

Counsel for Petitioner

TABLE OF CONTENTS

	Page
Class Action Complaint, <i>Soto v. United States</i> , No. 1:17-cv-00051 (S.D. Tex. Mar. 2, 2017)...	1
Answer, <i>Soto v. United States</i> , No. 1:17-cv- 00051 (S.D. Tex. May 31, 2017).....	20
Navy CRSC Denial Letter, <i>Soto v. United States</i> , No. 1:17-cv-00051 (S.D. Tex. June 7, 2017)	33
Navy CRSC Approval Letter, <i>Soto v. United States</i> , No. 1:17-cv-00051 (S.D. Tex. June 7, 2017)	36
Order Denying Defs.’ MSJ on the Pleadings, <i>Soto v. United States</i> , No. 1:17-cv-00051 (S.D. Tex. Aug. 31, 2017)	39
Declaration of Judy M. Raines, <i>Soto v. United States</i> , No. 1:17-cv-00051 (S.D. Tex. Nov. 19, 2018)	46
Joint Statement of Stipulated Facts, <i>Soto v. United States</i> , No. 1:17-cv-00051 (S.D. Tex. Aug. 13, 2021).....	70
Declaration of Simon Soto, <i>Soto v. United States</i> , No. 1:17-cv-00051 (S.D. Tex. Aug. 13, 2021)	74
Exhibit From Cross-Motion For Summary Judgment (Dep’t Of Defense, Directive Type Memorandum, Combat-Related Special Compensation (CRSC), Section 1413a, Title 10, United States Code, As Amended Revised Program Guidance January 2004) Dkt. No. 91-1, <i>Soto v. United States</i> , No. 1:17-cv-00051 (S.D. Tex. Sept. 15, 2021).....	77

Exhibit from Cross-Motion for Summary Judgment (Combat-Related Special Compensation (CRSC), Section 1413a, Title 10, United States Code, As Amended Supplemental Program Guidance January 2008), Dkt. No. 91-1, <i>Soto v. United States</i> , No. 1:17-cv-00051 (S.D. Tex. Sept. 15, 2021).....	108
--	-----

NOTICE

The following documents have been omitted from the printing of this Joint Appendix. They may be found in the Petitioner’s Appendix to the Petition For A Writ Of Certiorari at the following pages:

Opinion, <i>Soto v. United States</i> , 92 F.4th 1094 (Fed. Cir. 2024)	1a
Judgment, <i>Soto v. United States</i> , No. 22-2011 (Fed. Cir. Feb. 12, 2024)	20a
Order Granting Motion for Class Certification, <i>Soto v. United States</i> , No. 1:17-cv-00051, 2019 WL 2069601 (S.D. Tex. Feb. 11, 2019).....	21a
Order Granting Plaintiff’s Motion for Summary Judgment, <i>Soto v. United States</i> , No. 1:17-cv-00051, 2021 WL 7286022 (S.D. Tex. Dec. 16, 2021).....	32a
Final Judgment, <i>Soto v. United States</i> , No. 1:17-cv-00051 (S.D. Tex. Dec. 16, 2021).....	38a
Order Denying Rehearing, <i>Soto v. United States</i> , No. 22-2011 (Fed. Cir. June 20, 2024)	40a
Federal Statutes	42a

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

No.

SIMON A. SOTO, on behalf of himself and all other
individuals similarly situated,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

CLASS ACTION COMPLAINT

Plaintiff Simon A. Soto (“Mr. Soto”) brings this action against the United States of America (“Defendant” or the “United States”) on behalf of a class of certain former members of the U.S. Army, Navy, Marine Corps, Air Force, and Coast Guard awarded Combat-Related Special Compensation (“CRSC”) due to their combat-related disabilities. Plaintiff and the putative class have been denied the full amount of retroactive CRSC to which they are entitled due to Defendant’s nationwide and unlawful policy to pay no more than six years of retroactive CRSC (“the Retroactive Payment Cap”). This action is intended to redress Defendant’s improper withholding of a portion of the class’s retroactive CRSC payments through the unlawful Retroactive Payment Cap. Plaintiff alleges as follows:

JURISDICTION AND VENUE

1. This Court has original jurisdiction pursuant to the Little Tucker Act, 28 U.S.C. §1346(a)(2).
2. This case arises under 10 U.S.C. § 1413a, which requires the payment of CRSC upon successful

application, and therefore, constitutes a money-mandating provision.

3. Mr. Soto is a resident of Brownsville, Texas, which is in this Judicial District.

4. Venue is proper in this District under 28 U.S.C. §1402(a)(1).

5. In accordance with 28 U.S.C. § 2401, this action is brought within six years of the date that Defendant improperly denied Mr. Soto a portion of his retroactive CRSC payment.

PARTIES

6. Mr. Soto is a veteran of the United States Marine Corps, where he attained the rank of Corporal.

7. On October 17, 2016, and contrary to applicable statutes and regulations, the Navy applied a six-year Retroactive Payment Cap to Mr. Soto's award of CRSC, which deprived him of a portion of the retroactive CRSC payment to which he was entitled by law.

8. Through this action, Mr. Soto seeks the rightful restoration of the entire amount of retroactive pay to which he is entitled under the CRSC statute.

9. The Little Tucker Act gives this Court jurisdiction over suits for money "against the United States," the Defendant here under 28 U.S.C. § 1346(a)(2), as acting through the Secretaries of the United States Army, Navy, Air Force, and Homeland Security.

10. Collectively, the Departments of the United States Army, Navy, Air Force, and Homeland Security, through their Secretaries, will be referred to as the "Service Branches" or the "military."

CLASS ALLEGATIONS

11. Plaintiff Mr. Soto brings this action on behalf of himself and all others similarly situated.

12. The nationwide class (the “Class”) consists of all former service members of the Army, Navy, Air Force, Marine Corps, and Coast Guard whose CRSC applications under 10 U.S.C. §1413a were granted, but who were denied the full extent of their retroactive CRSC payment as a result of the Defendant’s use of a Retroactive Payment Cap that is inconsistent with and violates the law. The Class explicitly includes only members who have claims of less than \$10,000.

13. The numerosity requirement of Fed. R. Civ. P. 23(a)(1) is satisfied because, upon information and belief, the members of the Class are so numerous as to make joinder impracticable. While the exact number of Class members is presently unknown to the Plaintiff, and can only be ascertained through appropriate discovery, Plaintiff asserts as follows:

- a. Total CRSC Recipients:* Retirees of the Army, Navy, Marine Corps, Air Force and Coast Guard are potentially eligible for CRSC. The Department of Defense data on numbers of retirees receiving CRSC payments is reported as of September 30 each year. Fiscal Year 2015 (ending September 30, 2015) is the latest year for which data is publicly available. As of September 2015, there were 88,610 military retirees (cumulative of longevity retirees, medical retirees, and reservists) receiving CRSC payments.¹

¹ Statistical Report on the Military Retirement System, Fiscal Year 2015 (DOD Office of the Actuary, July 2016), p. 32 & 199 (available at: <http://actuary.defense.gov/Portals/15/Documents/>)

- b. *Medical Retirees*: Application of the unlawful Retroactive Payment Cap to medical retirees began to result in wrongful withholding of retroactive payments of CRSC in January 2014 (six years after the law making medical retirees eligible for CRSC went into effect).
- i. At least 5,129 medical retirees were awarded CRSC between October 1, 2013, and September 30, 2014.² Assuming that the awards were made evenly over the year, approximately three-fourths of those awards (or 3,846) were made after January 2014, and some percentage of those individuals had a portion of their retroactive CRSC award wrongfully withheld due to Defendant's unlawful Retroactive Payment Cap.

MRS_StatRpt_2015%20Final%20v2.pdf?ver=2016-07-26-162207-987). To be clear, Plaintiff does not know precisely what percentage of the 88,610 military retirees receiving CRSC payments has been affected by the Retroactive Payment Cap.

² *Compare* Statistical Report on the Military Retirement System, Fiscal Year 2014 (DOD Office of the Actuary, June 2015), page 30 (indicating 26,333 disability CRSC recipients) (available at: http://actuary.defense.gov/Portals/15/Documents/MRS_StatRpt_2014.pdf) *with* Statistical Report on the Military Retirement System, Fiscal Year 2013 (DOD Office of the Actuary, July 2014), page 30 (indicating 21,204 disability CRSC recipients) (available at http://actuary.defense.gov/Portals/15/Documents/MRS_StatRpt_2013_July.pdf). Plaintiffs say "at least" because 5,129 is the difference between the number of medical retirees receiving CRSC in FY 2014 and FY 2013. It is not necessarily the number of applications granted, which could exceed the 5,129 figure due to deaths of those receiving CRSC in year 1 or recipients no longer receiving CRSC for other unknown reasons. In Texas, at least 715 medical retirees were granted CRSC between October 1, 2013, and September 30, 2014. *Id.*

- ii. In addition, at least 4,482 medical retirees were awarded CRSC between October 1, 2014, and September 30, 2015.³ Some percentage of those individuals likewise had a portion of their retroactive CRSC award wrongfully withheld due to Defendant's unlawful Retroactive Payment Cap.
- iii. In addition, likely thousands more medical retirees have been granted CRSC between October 1, 2015, and the date of filing this complaint. Some percentage of these post-October 2015 awardees likewise have had a portion of their retroactive CRSC award wrongfully withheld due to the Defendant's unlawful Retroactive Payment Cap.
- c. *Longevity Retirees*: Application of the unlawful Retroactive Payment Cap to longevity retirees began to result in wrongful withholding of retroactive payments of CRSC in July 2009 (six years after the law making longevity retirees eligible for CRSC went into effect). Upon information and belief, the number of affected longevity retirees numbers in the thousands.

³ Compare Statistical Report on the Military Retirement System, Fiscal Year 2014 (DOD Office of the Actuary, June 2015), page 30 (indicating 26,333 disability CRSC recipients) (available at: http://actuary.defense.gov/Portals/15/Documents/MRS_StatRpt_2014.pdf) with Statistical Report on the Military Retirement System, Fiscal Year 2015 (DOD Office of the Actuary, July 2016), p. 32 (indicating 30,815 disability CRSC recipients). Plaintiffs say "at least" because 4,482 is the difference between the number of medical retirees receiving CRSC in FY 2015 and FY 2014. It is not necessarily the number of applications granted. In Texas, at least 612 medical retirees were granted CRSC between October 1, 2014, and September 30, 2015. *Id.*

14. The requirement of Fed. R. Civ. P. 23(a)(2) is satisfied because there are questions of law and fact common to the Class. Common questions include, but are not limited to:

- a. Whether Defendant's position that the six-year statute of limitations contained in 31 U.S.C. § 3702(b) can lawfully be applied as a Retroactive Payment Cap to claims for CRSC under 10 U.S.C. § 1413a is lawful.
- b. Whether any Retroactive Payment Cap can lawfully be applied to claims for CRSC under 10 U.S.C. § 1413a.

15. Defendant acted in a similar manner toward all Class members by denying each the full extent of his or her retroactive CRSC based upon its unlawful, national Retroactive Payment Cap.

16. The requirements of Fed. R. Civ. P. 23(a)(3) and (4) are met because the claims or defenses of Mr. Soto are typical of the claims or defenses of the Class, and Mr. Soto will fairly and adequately protect the interests of the Class.

17. The retained attorneys, being competent and experienced in class actions and Veterans' matters, will also fairly and adequately protect the interests of the Class.

18. The requirements of Fed. R. Civ. P. 23(b)(3) are met because questions of law or fact common to the members of the Class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

19. Permitting Mr. Soto to maintain this action on behalf of the proposed Class will bring the appropriate monetary relief for the Class as a whole.

FACTUAL ALLEGATIONS CRSC Criteria

20. Prior to 2002, retirees from the Service Branches entitled to both retired pay and disability compensation from the Department of Veterans Affairs (“VA”) could not lawfully receive the full amount of both their retired pay and VA disability compensation. They could only receive an aggregate payment equal to the higher of the two entitlements. For example, a retiree entitled to \$800 in monthly retired pay and \$1,700 in monthly VA disability compensation could only lawfully receive an aggregate monthly amount of \$1,700, rather than \$2,500. The law that required this result is commonly known as the “bar to concurrent receipt of both military retired pay and VA disability compensation.” In 2002, Congress enacted the CRSC program as a way to provide some retirees with compensation in addition to the payment made pursuant to the rules barring the concurrent receipt of both military retired pay and VA disability compensation. 10 U.S.C. § 1413a(b); 38 U.S.C. §§ 5304, 5305.

21. Retired service members are eligible to receive CRSC if they can establish two qualifications: first, that they are entitled to retired pay and, second, that they have a compensable VA service-connected disability that meets the definition of “combat-related.” 10 U.S.C. § 1413a(c), (e).

22. The Department of Defense (“DOD”) has provided written guidelines to instruct the Service Branches in establishing procedures for assessing whether a veteran is entitled to CRSC. *Department of Defense,*

Combat-Related Special Compensation (CRSC) Section 1413a, Title 10, United States Code, As Amended Revised Program Guidance January 2004 (April 15, 2004) [hereinafter *2004 CRSC Program Guidance*].

23. The DOD designed a two-step process for the review of a veteran's eligibility for CRSC based on the submission of an application for CRSC. *Id.* at 2.

24. *First*, the appropriate Service Branch reviews an application to ensure that the applicant meets the DOD's preliminary criteria.

25. Under the *2004 CRSC Program Guidance*, an applicant needed to satisfy each of the following conditions to meet the preliminary criteria: (1) completion of at least twenty (20) years of military service; (2) attainment of "retired" status; (3) entitlement to military retired pay; and (4) entitlement to VA service-connected compensation for a disability that is rated by the VA as at least 10 percent disabling. *Id.* at 3–4.

26. In 2008, the preliminary criteria were modified to include retirees who have fewer than twenty (20) years of service and who are medically retired under 10 U.S.C. §§ 1201–1222. *See* Department of Defense, *Combat-Related Special Compensation (CRSC) Section 1413a, Title 10, United States Code, As Amended Supplemental Program Guidance January 2008* (Jan. 1, 2008) [hereinafter *2008 CRSC Program Guidance*] at 1 & n.1.

27. *Second*, after determination that the preliminary criteria have been satisfied, the Service Branch determines whether one or more of the applicant's disabilities that the VA has found to be service-connected with at least a 10% disability rating is a qualifying combat-related disability. *2004 CRSC Program Guidance* at 5.

28. To establish a combat-related disability, an applicant must show by a “preponderance of available documentary information” that the disability was incurred either (1) as a direct result of armed conflict; (2) while engaged in hazardous service; (3) in the performance of duty under conditions simulating war; or (4) through an instrumentality of war. *Id.* at 6, 9; 10 U.S.C. § 1413a(e)(2). A disability also qualifies as combat-related if it is attributable to an injury for which the service member was awarded the Purple Heart. 10 U.S.C. § 1413a(e)(1).

29. Upon determination by the Service Branch that an applicant has met all CRSC criteria, the Service Branch will approve the service member’s application for CRSC. *See 2004 CRSC Program Guidance* at 7.

CRSC Effective Dates

30. The statute creating CRSC does not limit CRSC to only former service members who became retirees on or after the date of enactment. Rather, the enabling statute makes former service members who became retirees prior to the date of enactment – such as combat veterans of the Vietnam War and the Korean War – eligible for CRSC. Nor does the statute contain any time limitation on when an application may be filed. Thus, a Vietnam veteran who retired based on longevity in 1988 can file a valid initial application for CRSC in 2017. According to the statute, the date of application for CRSC does not affect the amount of retroactive CRSC to which an applicant is entitled. In other words, if medical retiree Jones filed a CRSC application in 2011, and medical retiree Smith filed a CRSC application in 2017, they both would be entitled to CRSC retroactive to 2008 – the date of enactment of CRSC for medical retirees – if (a) Jones and Smith each became a medical retiree prior to 2008, (b) the VA

separately awarded Jones and Smith service-connected disability compensation and assigned to each a disability rating of 10% or more with an effective date prior to 2008, and (c) the Service Branch separately determines that Jones' disability and Smith's disability were each "combat related."

31. Both the *2004 Program Guidance* and *2008 CRSC Program Guidance* state that applicants may submit an application for CRSC "at any time" and, if the appellant qualifies for CRSC, compensation will be paid retroactively. *2004 CRSC Program Guidance* at 2; *2008 CRSC Program Guidance* at 3.

32. For those eligible under the 2004 program for longevity retirees, "compensation will be paid retroactively, to the extent otherwise allowed by law, for any month after May 2003, for which all conditions of eligibility were met." *2004 CRSC Program Guidance* at 2.

33. Those eligible under the 2008 program for medical retirees must likewise "be paid retroactive CRSC for any month after May 2003, in which all conditions of eligibility were met." *2008 CRSC Program Guidance* at 3. While the *2008 Program Guidance* references May 2003 for this second group, the earliest effective date of the entitlement for them "is either January 1, 2008, or the date of the qualifying VA disability award determined to be combat-related, whichever is later." *2008 CRSC Program Guidance* at 3. The date of the "qualifying VA disability award" is the *effective* date of such award (assigned by the VA) and not the issuance date of the VA rating decision, nor is it the issuance date of a CRSC Board opinion.

The Wrongful Application of 31 U.S.C. § 3702(b)

34. The statute establishing a military retiree's entitlement to CRSC does not contain a Retroactive Payment Cap. *See* 10 U.S.C. § 1413a.

35. Nonetheless, in decisions responding to CRSC entitlement applications, the Army has included the following language:

CRSC is subject to the 6-year statute of limitations, 31 U.S.C. Section 3702(b). In order to receive the full retroactive CRSC entitlement, you must file your CRSC claim within 6 years of any VA rating decision that could potentially make you eligible for CRSC or the date you become entitled to retired pay, whichever is more recent. If you file your claim more than 6 years after initial eligibility, you will be restricted to 6 years of any retroactive entitlement.

36. CRSC decisions by the Navy, which also issues decisions for Marine Corps veterans such as Mr. Soto, contain essentially identical language informing applicants of a Retroactive Payment Cap.

37. CRSC decisions by the Air Force likewise contain essentially identical language informing applicants of a Retroactive Payment Cap.

38. Finally, CRSC decisions by the Coast Guard also contain essentially identical language informing applicants of a Retroactive Payment Cap.

39. Defendant's position that it is entitled to apply the Retroactive Payment Cap to awards of CRSC is based on the premise that the six-year statute of limitations found in 31 U.S.C. § 3702(b)(1) applies to CRSC awards. 31 U.S.C. § 3702(b)(1) states:

A claim against the Government presented *under this section* must contain the signature and address of the claimant or an authorized representative. The claim must be received by the official responsible under subsection (a) for settling the claim or by the agency that conducts the activity from which the claim arises within 6 years after the claim accrues, except –

(A) as provided in this chapter or another law;
or

(B) a claim of a State, the District of Columbia, or a territory or possession of the United States.

(emphasis added.)

40. The plain language of § 3702(b) is that it applies only to claims filed “under this section,” not to all claims against the United States. Only the types of claims listed in §3702(a) are filed “under this section.”

41. The claims discussed in 31 U.S.C. 3702(a) are as follows:

(1) The Secretary of Defense shall settle –

(A) claims involving uniformed service members’ pay, allowances, travel, transportation, payments for unused accrued leave, retired pay, and survivor benefits; and

(B) claims by transportation carriers involving amounts collected from them for loss or damage incurred to property incident to shipment at Government expense.

(2) The Director of the Office of Personnel Management shall settle claims involving Federal civilian employees’ compensation and leave.

(3) The Administrator of General Services shall settle claims involving expenses incurred by Federal civilian employees for official travel and transportation, and for relocation expenses incident to transfers of official duty station.

(4) The Director of the Office of Management and Budget shall settle claims not otherwise provided for by this subsection or another provision of law.

42. CRSC claims do not fall within any of the categories listed in § 3702(a).

43. *First*, CRSC is not, by its plain language, “allowances, travel, transportation, payments for unused accrued leave,” or “survivor benefits,” as used in §3702(a)(1)(A).

44. *Second*, CRSC is not “retired pay,” as used in §3702(a)(1)(A). The statute that created CRSC – 10 U.S.C. § 1413a(g) – states explicitly that CRSC compensation is “not retired pay.”

45. *Third*, CRSC also does not fall within the definition of “pay” as used in § 3702(a)(1)(A). The term “pay” is a defined term, meaning “basic pay, special pay, retainer pay, incentive pay, retired pay, and equivalent pay, but does not include allowances.” 10 U.S.C. § 101(15); 37 U.S.C. § 101(21). Title 37 provides an extensive list of specific types of “pay” that would constitute “special pay,” but this list does not include CRSC. *See* 37 U.S.C. §§ 301–355.

46. *Fourth*, CRSC payments also do not fall under the plain language of § 3702(a)(1)(B) (claims by transportation carriers); 3702(a)(2) (Federal civilian employees’ compensation and leave); or 3702(a)(3) (expenses incurred by Federal civilian employees’ compensation and leave).

47. *Finally*, Section 3702(a)(4) sets forth a “catch-all” category of claims, and states that “the Director of the Office of Management and Budget (“OMB”) shall settle claims not otherwise provided for by this subsection or another provision of law.” 31 U.S.C. § 3702(a)(4). CRSC payments do not fit into this category either, as the directive that such claims be settled by the OMB is inconsistent with the CRSC statute’s directive that the “Secretary” of each Service Branch “shall pay” CRSC to eligible retirees. 10 U.S.C. § 1413a(a).

48. Because an application for CRSC is not a claim presented “under this section,” the six-year statute of limitations in § 3702(b) does not apply to CRSC awards and thus § 3702 cannot be the lawful basis of the Retroactive Payment Cap.

49. Nor is there any other legal basis for a Retroactive Payment Cap to be applied to applications for CRSC.

50. It follows that when a retired service member successfully applies for CRSC, he or she should receive a retroactive payment back to the earliest date possible under the *2004* and *2008 CRSC Program Guidance*, and this date cannot be curtailed by a Retroactive Payment Cap. Specifically:

- a. For longevity retirees, “compensation will be paid retroactively, to the extent otherwise allowed by law, for any month after May 2003, for which all conditions of eligibility were met.” *2004 CRSC Program Guidance* at 2.
- b. For medical retirees, the earliest effective date of the entitlement “is either January 1, 2008, or the date of the qualifying VA disability award

determined to be combat-related, whichever is later.” *2008 CRSC Program Guidance* at 3.

Synopsis of Mr. Soto’s Military Service

51. Mr. Soto served honorably in the United States Marine Corps between August 2000 and April 2006.

52. During that time, Mr. Soto was decorated with various honors and citations, including the Army Commendation Medal, the Navy and Marine Corps Achievement Medal, the Navy Meritorious Unit Commendation, the Marine Corps Good Conduct Medal, the National Defense Service Medal, the Iraqi Campaign Medal, the Global War on Terrorism Expeditionary Medal (Iraq), the Global War on Terrorism Service Medal, three Sea Service Deployment Ribbons, a Certificate of Commendation, the Meritorious Mast, a Letter of Appreciation, and a Rifle Marksmanship Badge.

53. Mr. Soto served two tours in Operation Iraqi Freedom, from March 2004 to August 2004 and from August 2004 to February 2005.

54. During his first deployment, Mr. Soto served in Mortuary Affairs. He was assigned to “search for, recover, and process the remains” of war casualties. Any time there was a report of soldiers dying, whether in an explosion, fire fight, or some other incident, the members of Mortuary Affairs were called to go out and place any recovered remains in plastic bags or body bags, and then bring them back to the military base for identification and to ship back to the United States.

55. Mr. Soto has described one mission where “we picked up over 300 pieces of five or seven soldiers in which case it wasn’t really easy to identify who and it

was just literally chunks and pieces of flesh that we were processing.”

56. Due to such experiences, Mr. Soto has found it extremely difficult to adjust to civilian life since returning home, suffering from, among other difficulties, difficulty concentrating, suicidal thoughts, and vivid nightmares.

57. As early as December 19, 2005, doctors documented the relationship between Mr. Soto’s combat experiences in Iraq and his eventual diagnosis of post-traumatic stress disorder (“PTSD”).

Mr. Soto’s Allegations

58. Mr. Soto was medically retired from active duty in the United States Marine Corps on April 28, 2006, and placed on the Temporary Disability Retirement List (TDRL), which entitled him to military retired pay. He was later removed from the TDRL and given permanent disability retirement. Mr. Soto has thus been continuously entitled to military retired pay since April 28, 2006.

59. Mr. Soto sought service-connected disability benefits from the Department of Veterans Affairs (“VA”). On June 10, 2009, the VA issued a rating decision awarding Mr. Soto disability compensation for his PTSD and assigning Mr. Soto a disability rating of 50 percent for his PTSD (effective April 29, 2006), then a rating of 30 percent (effective November 1, 2006), and then a rating of 100 percent (effective December 31, 2008).

60. Mr. Soto has thus fulfilled the preliminary criteria for CRSC in that he is entitled to military retired pay and he has a compensable VA service-connected disability effective April 29, 2006.

61. In June 2016, Mr. Soto submitted an application for CRSC to the Navy, asking that he be awarded CRSC for his PTSD. On October 17, 2016, the Navy awarded Mr. Soto CRSC based on the finding that his PTSD is a combat-related disability. The Navy assigned a CRSC effective date of July 2010, even though Mr. Soto met all of the CRSC entitlement criteria on January 1, 2008, the effective date of the law that extended CRSC entitlement to medical retirees like Mr. Soto.

62. In other words, the Secretary awarded Mr. Soto only six years of retroactive CRSC – from July 2010 to June 2016.

63. Mr. Soto should have received a CRSC “effective date” (and thus retroactive payment of CRSC) back to January 1, 2008. As explained above, for medical retirees, the earliest effective date of the CRSC entitlement “is either January 1, 2008, or the date of the qualifying VA disability award determined to be combat-related, whichever is later.” *2008 CRSC Program Guidance* at 3.

64. Put another way, although Mr. Soto is entitled to approximately eight and one half years of retroactive CRSC pay (starting January 1, 2008, the date he attained the qualifications set forth by 10 U.S.C. § 1413a), the Defendant nonetheless limited Mr. Soto to six years of retroactive CRSC by applying the unlawful Retroactive Payment Cap, thereby wrongfully withholding from Mr. Soto the CRSC to which he was entitled for the period from January 1, 2008 to June 30, 2010.

65. The Secretary based this unlawful withholding of retroactive CRSC upon the statute of limitations contained in 31 U.S.C. § 3702(b), a statute that does not apply to CRSC.

CAUSE OF ACTION
(10 U.S.C. § 1413a)

66. Mr. Soto repeats the allegations contained in paragraphs 1 through 65 as if set forth at length herein.

67. 10 U.S.C. § 1413a confers a substantive right to monetary benefits for qualifying retired veterans.

68. Mr. Soto and the other members of the Class have been denied the full retroactive CRSC compensation to which they are entitled under 10 U.S.C. § 1413a as a result of the Defendant's nationwide policy to impose an unlawful six-year Retroactive Payment Cap on CRSC payments.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests judgment:

- a) entering an order pursuant to Fed R. Civ. P. 23 that this action may be maintained as a class action;
- b) designating Mr. Soto as the representative of the Class;
- c) designating Plaintiffs' Counsel of Record as Class Counsel;
- d) granting money damages to class members that are formulaic in nature in an amount to be determined at trial, but not more than \$10,000 to any individual member of the class or subclass;
- e) awarding Plaintiffs costs and attorneys' fees; and
- f) other such relief as the court may deem appropriate.

Respectfully submitted,

/s/ Tracy LeRoy

Tracy LeRoy

Attorney-in-Charge

State Bar Number: 24062847

S.D. Texas Bar Number: 860752

SIDLEY AUSTIN LLP

1000 Louisiana Street

Suite 6000

Houston, TX 77002

Phone: 713-495-4510

Fax: 713-495-7799

Of Counsel:

Barton F. Stichman

(Pro Hac Vice to be filed)

Thomas A. Moore

(Pro Hac Vice to be filed)

NATIONAL VETERANS LEGAL
SERVICES PROGRAM

1600 K Street NW, Suite 500

Washington, DC 20006-2833

Phone: 202-621-5687

Gerard D. Kelly

(Pro Hac Vice to be filed)

Emily M. Wexler

(Pro Hac Vice to be filed)

Jeff Carroll

(Pro Hac Vice to be filed)

SIDLEY AUSTIN LLP

One South Dearborn Street

Chicago, IL 60603

Phone: 312-853-7000

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Civil Action 1:17-cv-51

SIMON A. SOTO, on behalf of himself and all other
individuals similarly situated,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

ANSWER

The United States of America, by and through undersigned counsel, responds as follows to the allegations in Plaintiff's Original Complaint:

The first unnumbered paragraph constitute Plaintiff's characterization of his case to which no response is required. To the extent that a response is deemed required, Defendant avers that Plaintiff's claims fail as a matter of law and deny that Plaintiff is entitled to any relief whatsoever. The numbered paragraphs of this Answer correspond to the numbered paragraphs of Plaintiff's Complaint.

JURISDICTION AND VENUE

1. The allegations in this paragraph are conclusions of law to which no response is required.
2. The allegations in this paragraph are conclusions of law to which no response is required.

3. In response to the allegations in this paragraph, Defendant admits that Brownsville, Texas is within this Judicial District. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in this paragraph concerning Plaintiff's current place of residence, and on that basis deny them.

4. The allegations in this paragraph are conclusions of law to which no response is required.

5. The allegations in this paragraph are conclusions of law to which no response is required.

PARTIES

6. Defendant admits the allegations in this paragraph.

7. Defendant denies the allegations in this paragraph.

8. The allegations in this paragraph are conclusions of law to which no response is required.

10. This paragraph constitutes Plaintiff's characterization of his Complaint to which no response is required.

CLASS ALLEGATIONS

11. This paragraph constitutes Plaintiff's characterization of his case to which no response is required.

12. This paragraph constitutes Plaintiff's characterization of his Complaint to which no response is required.

13. The allegations contained in the first sentence of this paragraph are conclusions of law to which no response is required. The allegations in the second sentence of this paragraph constitute Plaintiff's characterization of his case to which no response is required.

13.a. Defendant admits the allegation in the first sentence of this paragraph. The remaining allegations in this paragraph purport to describe the “Statistical Report on the Military Retirement System, Fiscal Year 2015,” which speaks for itself and provides the best evidence of its contents. Any allegations contrary to its plain language are denied.

13.b. Defendant denies the allegations in this paragraph.

13.b.i. The allegations in this paragraph purport to describe the Statistical Report on the Military Retirement System, Fiscal Year for 2013 and 2014, which speak for themselves and provide the best evidence of their contents. Any allegations contrary to their plain language are denied.

13.b.ii. The allegations in this paragraph purport to describe the Statistical Report on the Military Retirement System, Fiscal Year for 2014 and 2015, which speak for themselves and provide the best evidence of their contents. Any allegations contrary to their plain language are denied.

13.b.iii. In response to the allegations in this paragraph, Defendant admits that its application of the applicable laws and regulations concerning Combat-Related Special Compensation (CRSC) have not changed since October 1, 2015. Defendant denies the remaining allegations in this paragraph.

13.c. In response to the allegations in this paragraph, Defendant admits that Defendant began applying 31 U.S.C. § 3702 to CRSC claims, which Plaintiff now challenges, approximately six years after the law went into effect. Defendant denies the remaining allegations in this paragraph.

14. The allegations in this paragraph are conclusions of law to which no response is required.

15. Defendant denies the allegations in this paragraph.

16. The allegations in this paragraph are conclusions of law to which no response is required.

17. The allegations in this paragraph are conclusions of law to which no response is required.

18. The allegations in this paragraph are conclusions of law to which no response is required.

19. The allegations in this paragraph are conclusions of law to which no response is required.

FACTUAL ALLEGATIONS
CRSC Criteria

20. In response to the allegations in this paragraph, Defendant admits that in 2002 Congress passed the statute codified at 10 U.S.C. § 1413a(b). This statute speaks for itself. Any allegations contrary to its plain language and meaning are denied. Defendant further admits that Congress passed a statute concerning the prohibition against duplication of benefits, which is codified at 38 U.S.C. §§ 5304, 5305 (waiver). These statutes speak for themselves. Any allegations contrary to their plain language and meaning are denied.

21. The allegations in this paragraph characterize the statute codified at 10 U.S.C. § 1413a(b), which speaks for itself. Any allegations contrary to its plain language and meaning are denied.

22. In response to the allegations in this paragraph, Defendant admits that it has issued a document entitled “Department of Defense, Combat-Related Special Compensation (CRSC) Section 1413a, Title 10,

United States Code, As Amended Revised Program Guidance January 2004.”

23. The allegations in this paragraph characterize “Department of Defense, Combat-Related Special Compensation (CRSC) Section 1413a, Title 10, United States Code, As Amended Revised Program Guidance January 2004” which speaks for itself and provides the best evidence of its contents. Any allegations contrary to its plain language and meaning are denied.

24. The allegations in this paragraph characterize “Department of Defense, Combat-Related Special Compensation (CRSC) Section 1413a, Title 10, United States Code, As Amended Revised Program Guidance January 2004” which speaks for itself and provides the best evidence of its contents. Any allegations contrary to its plain language and meaning are denied.

25. The allegations in this paragraph characterize “Department of Defense, Combat-Related Special Compensation (CRSC) Section 1413a, Title 10, United States Code, As Amended Revised Program Guidance January 2004” which speaks for itself and provides the best evidence of its contents. Any allegations contrary to its plain language and meaning are denied.

26. In response to the allegations in this paragraph, Defendant admits that it has issued a document entitled “Combat-Related Special Compensation (CRSC) Section 1413a, Title 10, United States Code, As Amended Supplemental Program Guidance January 2008.” The remaining allegations in this paragraph characterize this document, which speaks for itself and provides the best evidence of its contents. Any allegations contrary to its plain language and meaning are denied.

27. The allegations in this paragraph characterize “Department of Defense, Combat-Related Special

Compensation (CRSC) Section 1413a, Title 10, United States Code, As Amended Revised Program Guidance January 2004” which speaks for itself and provides the best evidence of its contents. Any allegations contrary to its plain language and meaning are denied.

28. The allegations in the first sentence of this paragraph characterize “Department of Defense, Combat-Related Special Compensation (CRSC) Section 1413a, Title 10, United States Code, As Amended Revised Program Guidance January 2004” which speaks for itself and provides the best evidence of its contents. Any allegations contrary to its plain language and meaning are denied. The allegations in the second sentence of this paragraph characterize 10 U.S.C. § 1413a(e)(1), which speaks for itself. Any allegations contrary to its plain language and meaning are denied.

29. The allegations in this paragraph characterize “Department of Defense, Combat-Related Special Compensation (CRSC) Section 1413a, Title 10, United States Code, As Amended Revised Program Guidance January 2004” which speaks for itself and provides the best evidence of its contents. Any allegations contrary to its plain language and meaning are denied.

CRSC Effective Dates

30. The allegations in this paragraph characterize the statute creating CRSC, which speaks for itself. Any allegations contrary to its plain language and meaning are denied.

31. The allegations in this paragraph characterize “Department of Defense, Combat-Related Special Compensation (CRSC) Section 1413a, Title 10, United States Code, As Amended Revised Program Guidance January 2004” and “Combat-Related Special Compensation (CRSC) Section 1413a, Title 10, United

States Code, As Amended Supplemental Program Guidance January 2008” which speak for themselves and provide the best evidence of their contents. Any allegations contrary to their plain language and meaning are denied.

32. The allegations in this paragraph characterize “Department of Defense, Combat-Related Special Compensation (CRSC) Section 1413a, Title 10, United States Code, As Amended Revised Program Guidance January 2004” which speaks for itself and provides the best evidence of its contents. Any allegations contrary to its plain language and meaning are denied.

33. The allegations in this paragraph characterize “Department of Defense, Combat-Related Special Compensation (CRSC) Section 1413a, Title 10, United States Code, As Amended Revised Program Guidance January 2004” and “Combat-Related Special Compensation (CRSC) Section 1413a, Title 10, United States Code, As Amended Supplemental Program Guidance January 2008” which speak for themselves and provide the best evidence of their contents. Any allegations contrary to their plain language and meaning are denied.

The [Alleged] Wrongful Application of
31 U.S.C. § 3702(b)

34. The allegations in this paragraph characterize 10 U.S.C. § 1413a, which speak for itself. Any allegations contrary to its plain language and meaning are denied.

35. In response to the allegations contained in this paragraph, Defendant admits that the quoted language has been included in CRSC decisions.

36. Defendant admits the allegations in this paragraph.

37. Defendant admits the allegations in this paragraph.

38. Defendant admits the allegations in this paragraph.

39. Defendant admits the allegations in this paragraph.

40. The allegations contained in this paragraph characterize 31 U.S.C. § 3702, which speaks for itself. Any allegation contrary to its plain language and meaning are denied.

41. The allegations contained in this paragraph characterize 31 U.S.C. § 3702, which speaks for itself. Any allegation contrary to its plain language and meaning are denied.

42. The allegations in this paragraph are conclusions of law to which not response it required. Defendant further avers that 31 U.S.C. § 3702 applies to CRSC claims and denies any claims to the contrary.

43. The allegations in this paragraph are conclusions of law to which no response it required. Defendant further avers that 31 U.S.C. § 3702 applies to CRSC claims and denies any claims to the contrary.

44. The allegations in this paragraph are conclusions of law to which no response it required. Defendant further avers that 31 U.S.C. § 3702 applies to CRSC claims and denies any claims to the contrary.

45. The allegations in this paragraph are conclusions of law to which no response it required. Defendant further avers that 31 U.S.C. § 3702 applies to CRSC claims and denies any claims to the contrary.

46. The allegations in this paragraph are conclusions of law to which no response is required. Defendant further avers that 31 U.S.C. § 3702 applies to CRSC claims and denies any claims to the contrary.

47. The allegations in the first sentence of this paragraph characterize 31 U.S.C. § 3702, which speaks for itself. Any allegations contrary to its plain language and meaning are denied. The remaining allegations in this paragraph are conclusions of law to which no response is required. Defendant further avers that 31 U.S.C. § 3702 applies to CRSC claims and denies any claims to the contrary.

48. The allegations in this paragraph are conclusions of law to which no response is required. Defendant further avers that 31 U.S.C. § 3702 applies to CRSC claims and denies any claims to the contrary.

49. The allegations in this paragraph are conclusions of law to which no response is required. Defendant further avers that 31 U.S.C. § 3702 applies to CRSC claims and denies any claims to the contrary.

50. The allegations in this paragraph are conclusions of law to which no response is required. Defendant further avers that 31 U.S.C. § 3702 applies to CRSC claims and denies any claims to the contrary.

50.a. The allegations in this paragraph characterize “Department of Defense, Combat-Related Special Compensation (CRSC) Section 1413a, Title 10, United States Code, As Amended Revised Program Guidance January 2004” which speaks for itself and provides the best evidence of its contents. Any allegations contrary to its plain language and meaning are denied.

50.b. The allegations in this paragraph characterize “Combat-Related Special Compensation (CRSC) Section

1413a, Title 10, United States Code, As Amended Supplemental Program Guidance January 2008” which speaks for itself and provides the best evidence of its contents. Any allegations contrary to its plain language and meaning are denied.

51. Defendant admits the allegations in this paragraph.

52. Defendant admits the allegations in this paragraph.

53. Defendant admits the allegations in this paragraph.

54. Defendant admits the allegations in the first two sentences of this paragraph. The allegations in the last sentence constitute Plaintiff’s description of his mission during his service to which no response is required.

55. The allegations in this paragraph constitute Plaintiff’s description of his mission during his service to which no response is required.

56. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph, and on that basis deny them.

57. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, on that basis, deny them. To the extent that the allegations in this paragraph characterize Department of Defense or Veteran’s Administration medical records, those documents speak for themselves and provide the best evidence of their contents. Any allegations contrary to their plain language and meaning are denied.

Mr. Soto's Allegations

58. Defendant admits the allegations in this paragraph.

59. Defendant admits the allegations in this paragraph.

60. Defendant admits the allegations in this paragraph.

61. Defendant admits the allegations in the first two sentences of this paragraph. In response to the allegations in the last sentence of this paragraph, Defendant admits that the Navy assigned a CRSC effective date of July 2010, restricting Plaintiff to six years of retroactive entitlement based on 31 U.S.C. § 3702.

62. Defendant admits the allegations in this paragraph.

63. Defendant denies the allegations in this paragraph.

64. Defendant denies the allegations in this paragraph.

65. Defendant denies the allegations in this paragraph.

CAUSE OF ACTION
(10 U.S.C. § 1413a)

66. Defendant incorporates by reference each response to the allegations contained in paragraph numbered 1 through 65 above.

67. The allegations in this paragraph are conclusions of law to which no response is required.

68. Defendant denies the allegations in this paragraph.

PRAYER FOR RELIEF

The remaining allegations in the Complaint constitute Plaintiff's request for relief to which no further response is required. To the extent that a response is deemed required, Defendant denies that Plaintiff is entitled to any relief whatsoever.

GENERAL DENIAL

Any of Plaintiff's allegations not admitted in the preceding paragraphs are hereby denied.

AFFIRMATIVE DEFENSES

- (1) Plaintiff's claims are barred by the applicable statute of limitations;
- (2) Plaintiff failed to exhaust available administrative remedies;
- (3) Plaintiff's claims are not ripe;
- (4) Plaintiff's claims fail to state a claim; and
- (5) Defendant is entitled to judgment in its favor as a matter of law.

WHEREFORE, Defendant respectfully requests that this Court enter judgment for Defendant, with parties to bear their own costs and attorney's fees.

DATED: May 31, 2017

Respectfully Submitted,

s/ Jimmy A. Rodriguez
JIMMY A. RODRIGUEZ
Assistant United States Attorney
Southern District of Texas
Attorney in Charge
Texas Bar No. 24037378
Federal ID No. 572175

1000 Louisiana, Suite 2300
Houston, Texas 77002
Tel: (713) 567-9532
Fax: (713) 718-3303

Of Counsel:

Matthew P. Banks
Major, USMC
General Litigation, Code 14
Office of the Judge Advocate General
Department of the Navy
1322 Patterson Ave. SE, suite 3000
Washington Navy Yard, D.C. 20374

CERTIFICATE OF SERVICE

I certify that on May 31, 2017, a true and correct copy of the foregoing was filed with the United States District Clerk for the Southern District of Texas and electronically served on all counsel of record via the District's ECF system.

s/Jimmy A. Rodriguez
JIMMY A. RODRIGUEZ
Assistant United States Attorney

[DEPARTMENT OF DEFENSE UNITED STATES OF
AMERICA SEAL]

DEPARTMENT OF THE NAVY
SECRETARY OF THE NAVY COUNCIL OF
REVIEW BOARDS
720 KENNON STREET SE SUITE 309
WASHINGTON NAVY YARD DC 20374-5023

IN REPLY REFER TO:
1850
CORB: 20
08 Jul 2016

CPL SIMON A SOTO USMC RET

[REDACTED]

[REDACTED]

Subj: DENIAL OF CRSC IN THE CASE OF CPL
SIMON A. SOTO, USMC (RET), [REDACTED],
DOCKET NUMBER MC16-00728

Ref: (a) 10 U.S.C. §1413a

Encl: (1) DD Form 149 Application for Correction of
Military Record

1. Your case for Combat-Related Special Compensation
(CRSC) is not supported by the relevant documentary
information provided.

2. In light of the reference, and after careful examination
of your CRSC application and supporting documenta-
tion, the following determinations were made:

DIAGNOSIS	VASRD	VA%	DETERMINATION
PTSD	9411	100	Not combat-related; circumstances surrounding injury/ illness not combat- related

a. Post-Traumatic Stress Disorder (PTSD) is an anxiety disorder that may develop after exposure to a terrifying event or ordeal in which severe physical harm occurred or was threatened. Traumatic events that may trigger PTSD include violent personal assaults, natural or unnatural disasters, accidents, or military combat.

b. The fact that a member incurred the disability during a period of war (or simulated war) or in an area of armed (or simulated) conflict, or while participating in combat (or simulated combat) operations is not sufficient to support a combat-related determination. There must be a definite causal relationship between the armed (or simulated) conflict and the resulting disability. In general, this covers disabilities resulting from simulated combat activity during military training, such as war games, practice alerts, tactical exercises, airborne operations, grenade and live fire weapons practice, bayonet training, hand-to-hand combat training, rappelling, and negotiation of combat confidence and obstacle courses while in full combat gear. Your application package does not establish that specific combat-related events caused your diagnosis.

c. The fact that the VA established your diagnoses as service connected means they were incurred during your military career; not that they are combat-related. VA is not chartered nor authorized to make combat-related determinations. Your application package does

not establish that specific combat-related events caused your diagnoses.

3. If you believe this decision is incorrect, you may:

a. Request Reconsideration. To do this, send us a letter with information that you believe will result in a revised CRSC decision. Your request should be based upon information that was not already contained in your original application package and should include supporting documentation, as appropriate.

b. Appeal to the Board for Correction of Naval Records (BCNR). If you wish to appeal your CRSC decision then you must submit a request (petition) to BCNR. Per regulation, BCNR is the designated appeal authority to review CRSC decisions. You may contact BCNR at 703-604-6884/6885. The BCNR website, <http://www.public.navy.mil/BUPERS-NPC/CAREER/RECORDSMANAGEMENT/Pages/BCNR.aspx>, offers an overview of the application procedure, an application form (DD Form 149), and assistance in filling out the application. You may use the enclosed DD Form 149 or download a copy from the website and submit it to the following address:

Department of the Navy
Board for Correction of Naval Records
701 South Courthouse Road, Suite 1001
Arlington, VA 22204-2490

4. Thank you for your service to our nation.

/s/ T.D. Sidbury

T. D. SIDBURY

By direction of the President, CRSC Board

[DEPARTMENT OF DEFENSE UNITED STATES OF AMERICA SEAL]

DEPARTMENT OF THE NAVY
SECRETARY OF THE NAVY COUNCIL OF
REVIEW BOARDS
720 KENNON STREET SE SUITE 309
WASHINGTON NAVY YARD DC 20374-5023

IN REPLY REFER TO:
1850
CORB: 20
17 Oct 2016

CPL SIMON A SOTO USMC RET



Subj: APPROVAL OF CRSC UPON RECONSIDERATION IN THE CASE OF CPL SIMON A. SOTO, USMC (RET), [REDACTED], DOCKET MC16-00728

Ref: (a) 10 U.S.C. §1413a

1. Your application for Combat-Related Special Compensation (CRSC) has been reconsidered in light of the additional, clarifying, or new information you provided with your request. Your application is approved per ref (a). The following determinations are made regarding your diagnoses.

COMBAT RELATED:

Diagnosis	VASRD	VA%	Determination	B/L Factor	Claim Date	CRSC Eff Date
PTSD	9411	100	Combat-related; Armed Conflict	No	06/16	07/10

CRSC is subject to the 6-year statute of limitations [United States Code (U.S.C.) 31, Section 3702(b)]. In order to receive the full retroactive CRSC entitlement, you must file your CRSC claim within 6 years of any VA rating decision that could potentially make you eligible for CRSC or the date you become entitled to retired pay, whichever is more recent. If you file your claim more than 6 years after initial eligibility, you will be restricted to 6 years of any retroactive entitlement.

2. The following information is being provided to the Defense Finance and Accounting Service (DFAS) for their internal processing of your CRSC. No further action is required on your part to effect payment.

a. The effective date of this CRSC is:

100% from 01 Jul 2010 for Code 9411 (100%)

Combined %	CRSC Effective Date
100%	Jul 2010

Total Combat-Related Disability: 100%

b. Records reviewed by the CRSC Board indicate the applicant:

IS NOT receiving Special Monthly Compensation (SMC).
 IS NOT receiving Individual Unemployability (IU).

3. DFAS will pay you the CRSC benefit of \$297.00—capped at gross Years of Service (YOS) retired pay within 60 days of receipt of this letter. CRSC pay is based upon what would have been your YOS retired pay with five years and nine months of service. CRSC payments will be made in the same manner as your retired pay. The CRSC board does not compute CRSC pay nor is it involved in the payment of the benefit. Pay inquiries should be addressed to the DFAS Retired and Annuity Pay Contact Center by calling 1-800-321-1080.

4. For more information, including answers to frequently asked questions, please visit the CRSC Board website at:

<http://www.public.navy.mil/asnmra/corb/CRSCB>

5. Thank you again for your service to our nation.

/s/ L. R. Larsen

L. R. LARSEN

President

CRSC Board

Copy to:
DFAS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Civil Action No. 1:17-cv-51

SIMON A. SOTO, on behalf of himself and all
individuals similarly situated,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

ORDER DENYING DEFEDANT’S MOTION FOR
JUDGMENT ON THE PLEADINGS

This case arises from Simon A. Soto’s (hereafter “Plaintiff”) claim for retroactive Combat-Related Special Compensation. Plaintiff requests the Court rule the United States of America (hereafter “Defendant”) unlawfully withheld Combat Related Special Compensation from Plaintiff, and others similarly situated. Currently before the Court is “Defendant’s Motion for Judgement on the Pleadings” (Docket No. 21). For the reasons set forth herein the court DENIES “Defendant’s Motion for Judgement on the Pleadings.”

I. FACTUAL BACKGROUND¹

Plaintiff is a veteran of the United States Marine Corps, serving between August 2000 and April 2006. During his first deployment, Plaintiff was assigned to

¹ The factual statements set forth herein were obtained from the following documents: Docket Nos. 1 and 21

“search for, recover, and process the remains” of war casualties. Plaintiff began suffering from mental health issues, particularly post-traumatic stress disorder (PTSD), and began receiving treatment for such disorder on December 19, 2005. Plaintiff was medically retired from active duty on April 28, 2006 and was placed on the Temporary Disability Retirement List (TDRL). Plaintiff was later removed from TDRL and awarded a permanent medical disability retirement.

Plaintiff sought service-connected disability benefits from the Department of Veteran Affairs (VA) and on June 10, 2009, was awarded disability compensation for his PTSD, as well as a 50 percent disability rating (effective April 29, 2006). He later received a disability rating of 30 percent (effective November 1, 2006), and later a rating of 100 percent (effective December 31, 2008).

In June 2016, Plaintiff submitted an application for Combat-Related Special Compensation (hereafter “CRSC”). A medically retired veteran applying for CRSC must be entitled to retired pay and be determined by the VA to have a service-connected disability compensable under the VA laws to be eligible. In July 2016, Plaintiff's claim was denied. After a request for reconsideration, the Navy Council of Review Boards (hereafter “Navy”) awarded CRSC to Plaintiff in October 2016 (effective July 1, 2010). However, the Navy limited said award to six years of retroactive CRSC; specifically, the Navy's correspondence included the following language:

CRSC is subject to the 6-year statute of limitations [United States Code (U.S.C.) 31, Section 3702(b)]. In order to receive the full retroactive CRSC entitlement, you must file your CRSC claim within 6 years of any VA rating decision that could potentially make you eligible for CRSC or the date

you became entitled to retired pay, whichever is most recent. If you file your claim more than 6 years after initial eligibility, you will be restricted to 6 years of any retroactive entitlement.

Docket No. 21-3.

Plaintiff argues he should have received retroactive CRSC payments back to January 1, 2008, since medical retirees become entitled to CRSC either January 1, 2008, or the date of the qualifying VA disability award determined to be combat-related (April 29, 2006), whichever is later. Defendant argues that (1) Plaintiff has not exhausted his administrative remedies and (2) the Barring Act's (31 U.S.C. § 3702) six-year statute of limitations applies to Plaintiff's CRSC application.

II. PROCEDURAL HISTORY

Plaintiff filed his complaint and motion for class certification on March 2, 2017. Docket No. 1, 3. Plaintiff seeks designation as the representative of the class action, money damages to class members not to exceed \$10,000 to any individual, and Plaintiffs costs and attorneys' fees. Docket No. 1 at 16. On June 7, 2017, Defendant filed a "Motion for Judgment on the Pleadings," claiming Defendant is entitled to judgment as a matter of law. *See* Docket No. 21. On July 6, 2017, Plaintiff filed a "Response to Defendant's Motion for Judgment on the Pleadings." Docket No. 36. On July 17, 2017, Defendant filed a "Reply in Support of Defendant's Motion for Judgment on the Pleadings." Docket No. 37.

III. DISCUSSION

The standard for evaluating a Rule 12(c) motion for judgment on the pleadings is the same as the standard applicable to a Rule 12(b)(6) motion for failure to

state a claim. *Johnson v. Johnson*, 385 F.3d 503, 529 (5th Cir. 2004) (citation omitted). In reviewing a 12(b)(6) motion, well-pleaded facts are accepted as true and viewed in the light most favorable to the plaintiff. *Id.* Judgment on the pleadings is only appropriate where material facts are not in dispute and only questions of law remain. *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887, 891 (5th Cir. 1998).

The Court has jurisdiction pursuant to the “Little Tucker Act,” 28 U.S.C. § 1346(a)(2), which grants original jurisdiction to district courts in a civil action for money against the United States. Accordingly, Federal Circuit case law controls. *See* 28 U.S.C. § 1295(a)(2) (granting Federal Circuit jurisdiction over final decisions of a district court on non-tax claims under the Little Tucker Act); *United States v. One (1) 1979 Cadillac Coupe De Ville*, 833 F.2d 994, 998 (Fed. Cir. 1987) (“It would contravene the intent of Congress to achieve uniformity in the adjudication of Tucker Act claims for us to apply regional circuit law in appeals from district court Little Tucker Act decisions”); *Heisig v. United States*, 719 F.2d 1153, 1156 (Fed. Cir. 1983) (district courts should apply a similar standard of review as Federal Circuit courts in adjudicating Little Tucker Act claims).

A. Plaintiff was not required to exhaust administrative remedies before filing suit.

It is well settled “no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.” *Rollock Co. v. United States*, 115 Fed. Cl. 317, 329 (2014) (quoting *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51 (1938)). In determining whether exhaustion of administrative remedies is required

before bringing suit in federal court, congressional intent is of “paramount importance.” *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992). Statutory exhaustion is required “[w]here Congress specifically mandates” it. *Id.* “[W]here Congress has not clearly required exhaustion, sound judicial discretion governs.” *Id.* (citations omitted). Deciding whether to invoke the doctrine of exhaustion “entails a case-by-case analysis of the competing individual and institutional interests” *Maggitt v. West*, 202 F.3d 1370, 1378 (Fed. Cir. 2000).

The Supreme Court and the Federal Circuit have held permissive administrative remedies do not require exhaustion before a plaintiff may bring suit under the Tucker Act. *Soriano v. United States*, 352 U.S. 270, 274–75 (1957) (exhaustion of administrative remedies as a prerequisite to filing a Tucker Act suit would frustrate the purpose of Congress); *see Martinez v. United States*, 333 F.3d 1295, 1306 (Fed. Cir. 2003) (plaintiff is not required to exhaust permissive administrative remedies before filing suit under the Tucker Act). Accordingly, the Court declines to require Plaintiff’s exhaustion of permissive administrative appeal remedies in this case.

B. The Barring Act does not apply to CRSC claims.

The Barring Act states as follows:

§ 3702. Authority to settle claims

(a) Except as provided in this chapter or another law, all claims of or against the United States Government shall be settled as follows:

(1) The Secretary of Defense shall settle—

(A) claims involving uniformed service members’ pay, allowances, travel, transportation,

payments for unused accrued leave, retired pay, and survivor benefits

(b)(1) A claim against the Government presented under this section must be received by the official responsible under subsection (a) for settling the claim or by the agency that conducts the activity from which the claim arises within 6 years after the claim accrues

31 U.S.C. § 3702.

As demonstrated above, combat related pay, or CRSC, is not listed in any of the categories applicable to the Barring Act's six-year statute of limitations set forth in § 3702.

In a statutory construction case, courts must “start, of course, with the statutory text,” and unless otherwise defined, “statutory terms are generally interpreted in accordance with their ordinary meaning.” *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006) (citations omitted). Where a textual ambiguity exists, courts are to resolve such doubt in favor of veterans. *Brown v. Gardner*, 513 U.S. 115, 117–18 (1994). Governing law also provides, “[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.” *Morton v. Mancari*, 417 U.S. 535, 550–51 (1974) (citations omitted).

Entitlement to CRSC is set forth by statute in 10 U.S.C. §1413a, which grants the Secretary concerned the authority to pay an “eligible combat-related disabled uniformed services retiree” a monthly amount of benefits for the combat-related disability. *The statute specifically states: “Payments under this section are not retired pay.” 10 U.S.C. §1413a(g).* The Court is aware of no legal basis to conclude that Congress intended any

other statute to govern CRSC claims. The Barring Act added the relevant six year limitation language in 1997, while the CRSC statute, which includes no mention of the Barring Act's statute of limitation or possible application thereof, was enacted five years later in 2003. Accordingly, in this scenario, the Barring Act falls within the definition of a "general act" applicable to a multitude of uniformed service members' claims, while a CRSC claim falls within the definition of a "specific act" statute. *Mancari*, 417 U.S. at 550–51; *Hernandez v. Dept of Air Force*, 498 F.3d 1328, 1331–32 (Fed. Cir. 2007) (holding a specific statute was not governed by the Barring Act where there was no indication Congress intended the Act or any other statute to govern the specific statute); *Angelica Textile Servs., Inc. v. United States*, 95 Fed. Cl. 208, 222 (2010) ("It is a general maxim of statutory interpretation that a specific statute of specific intention takes precedence over a general statute, particularly when the specific statute was later enacted.").

ORDER

For the foregoing reasons, "Defendant's Motion for Judgment on the Pleadings" (Docket No. 21) is DENIED.

Signed on this 31st day of August, 2017.

/s/ Rolando Olvera
Rolando Olvera
United States District Judge

Exhibit 4

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Civil Action No. 1:17-cv-51 (RO)

SIMON A. SOTO,

Plaintiff,

v.

THE UNITED STATES OF AMERICA

Defendant.

DECLARATION OF JUDY M. RAINES

I, JUDY M. RAINES make the following declaration in the case of Simon A. Soto v. United States of America Civil Action No. 1:17-cv-5 1 (RO) pursuant to 28 U.S.C. § 1746. I am aware that this declaration will be filed with the United States District Court for the Southern District of Texas, Brownsville Division, and that it is the legal equivalent of a statement under oath. I am at least 18 years of age and competent to provide the information herein.

I am a Lead Military Pay Technician in the Concurrent Retirement Disability Pay (CRDP) and Combat-Related Special Compensation (CRSC) processing department for Defense Finance and Accounting Services (DFAS) 1240 East 9th Street, Cleveland OH 44199-2055. I have worked for DFAS for the last 13 years either as a contract employee or a government employee. During those 13 years, I have always been assigned to work in

the section that handles processing of CRSC awards for payment. For the last 6 years I have been a lead. As Lead Military Pay Technician I currently have 8 employees on my team who are responsible to verify data for new CRSC accounts, establish new CRSC accounts, maintain CRSC records, ensure changes (such as increases in disability awards) are processed and pay CRSC entitlements. Part of the data verification process involves reviewing the action the CRSC board took and validating that it is facially consistent with the statutory guidance prior to issuing any payments. I am responsible to support the members on my team and am responsible for ensuring that members of my team understand how to properly perform the functions above. DFAS received approximately 800–1000 new or amended CRSC award letters each month. Additionally, each month DFAS exchanges data with the VA on approximately 180000 accounts to ensure the CRSC accounts are updated with current VA data. The information exchanged pertains to changes in VA disability award levels as well as dependency changes that impact on the VA disability compensation and can impact on CRSC. I have personal knowledge regarding the administration of the CRSC program. I also have knowledge of the mechanisms of CRSC entitlements for specific, retired military members. In my capacity as a Lead Military Pay Technician in the CRSC/CRDP Processing section, I have access to DFAS records that allow me to understand and explain the payments made in specific cases. I, or my team, also have access to relevant VA records that further allow me to understand and explain the payments made in specific cases.

In my time in my current position, I have conducted review of thousands of retired pay accounts for the purpose of determining CRSC entitlement. As part of

my position, I am required to be familiar with and apply the law found in 10 U.S.C. § 1413a; as part of that process, I am required to understand the different versions of the law that have existed since its initial passage in 2002. Each CRSC claim potentially falls within a different version of the statute (or multiple versions applicable for different periods), so in order for me to calculate a CRSC entitlement, I must first determine under which version of the statute the application falls. In order to do this, I am required to understand how each version differs and how the differences ultimately impact an applicant's eligibility and potential payments. When a member is entitled retroactively to CRSC for periods encompassing more than one version of the CRSC law, I am required to compute the entitlements for each separate period using the law that applied to the applicable period.

Along with understanding and applying the CRSC statute, I also am familiar with the military retirement system. There are numerous statutes that authorize military members to retire based on their particular circumstances. The statutes authorizing retirement that most directly impact CRSC entitlement are the statutes authorizing retirement for disability. In this regard, military members often become disabled (and are retired for disability) before becoming otherwise eligible for longevity retirement, which usually requires 20 or more years of creditable service. A service member retired for disability may select one of two available options for calculating their monthly military retired pay:

1. Longevity Formula. Retired pay is (generally) computed by multiplying the years of service times 2.5% and then times the pay base.

2. Disability Formula. Retired pay is computed by multiplying the DOD disability percentage by the pay base.

For disabled members with a high disability rating and/or a low number of creditable years of service, the disability percentage method is usually more favorable.

Understanding the military retired pay longevity formula is important for understanding CRSC entitlements because for certain retirees, the law caps CRSC payments at the level to which the retiree could have qualified based longevity. In some instances, that cap limits or completely eliminates CRSC entitlement. In my area of expertise, and under the CRSC law, this longevity cap for disability retirees with less than 20 years is known as the “special rule.”

In light of the disability retirement process, the various differing versions of the CRSC statute and varying facts within each service members specific set of circumstances, individual retiree’s CRSC eligibility and entitlement can only be determined on an individual, case by case basis.

The lifecycle of a CRSC claim from presentation of the claim through final payments may be explained as follows. The retiree is responsible to make a claim for the CRSC by submitting an application (DD Form 2860) to the applicable service CRSC Board. The service CRSC Board then verifies that the claimant is in a retired status and is entitled to VA disability compensation for a service-connected disability (or disabilities). For each separate disability with an assigned medical diagnosis code from the VA Schedule for Rating Disabilities (VASRD), the service CRSC Board then determines whether the disability is combat related (or not). For each disability determined

to be combat related, the service CRSC Board then determines the earliest CRSC entitlement effective date. Determining the earliest CRSC entitlement effective date involves multiple variables that, depending on circumstances, include the retirement date, retirement statute, years of creditable service, VA disability award date, disability percentage, and whether the member has been awarded a Purple Heart award. To be entitled to CRSC for any given month, a member must meet *all* of the eligibility requirements of the statute. If, for example, a member met all but one of the eligibility requirements in 2007 and then, due to a change in the law which became effective January 1, 2008, the remaining eligibility requirement was met on January 1, 2008, then the earliest CRSC eligibility date would be January 1, 2008.

Another variable that the service CRSC Boards use when determining the earliest CRSC entitlement effective date is the impact, if any, of the Barring Act to the CRSC claim. I am familiar with the Barring Act and I understand how the CRSC Boards are expected to apply the Barring Act to limit CRSC claims. To apply the Barring Act to a CRSC claim, the first task that must be done is to determine the date that the CRSC claim “accrued”. A CRSC claim “accrues” when all of the conditions exist that would entitle the member to CRSC under the law. Using the example just provided, if a member met all but one of the eligibility requirements in 2007 and then, due to a change in the law which became effective January 1, 2008, the remaining eligibility requirement was met on January 1, 2008, then the conditions first existed that would entitle the member to CRSC on January 1, 2008 and the CRSC claim accrued on January 1, 2008. The next task required (to determine whether the Barring Act impacts on a CRSC claim) is to determine

the date that the claim was presented. That is the date that the CRSC application was received by the service CRSC Board. The next task is to determine whether the CRSC claim was presented within 6 years of the date the CRSC claim accrued. If the CRSC claim was presented within 6 years of the date the CRSC claim accrued, then the Barring Act should not be used by the service CRSC Boards to limit the CRSC claim retroactively. If, on the other hand, the CRSC claim was *not* presented within 6 years of the date the CRSC claim accrued, then the service CRSC boards have been limiting the CRSC claim extending retroactively only so far as the first eligibility month which is six years antecedent to the date the CRSC claim was presented.

After the CRSC Board determines the earliest CRSC entitlement effective date and the impact, if any, of the Barring Act to the CRSC claim, it issues an award letter. A typical award letter might include the following information (for example):

Combat related:

Diagnosis	VASRD	VA %	Determination	Claim Date	CRSC Effective date
PTSD	9411	70%	Combat related	14 Jun 2010	Mar 2008
Hearing Loss	6411	10%	Combat related	14 Jun 2010	Jun 2007

Note that the CRSC award letter already includes the CRSC effective date. If the CRSC board determined that the Barring Act limited the claim, then the CRSC Board will reflect that limitation in the award letter.

The award letter is then provided to DFAS. DFAS uses the CRSC award letter to establish his CRSC records and then compute retroactive amounts of CRSC due. At all times during the computation of eligibility and then entitlement, the various dates at issue will have a significant impact on the application of the CRSC statute to the applicant's particular circumstances. For each CRSC claim provided to DFAS by the service CRSC boards, a specialist in my office will manually review the award for the purpose of establishing an account. Before establishing the account, the technician will review the dates of eligibility to ensure that they are facially acceptable. In general, we rely on the dates of eligibility as established by the service CRSC Board and reflected in the CRSC award letter. However, in a few (infrequent) cases where our review of the facts of the case reveals an apparent error by the service CRSC Board, we return the case to the service CRSC Board for validation and correction as necessary. If, based on the circumstances of the particular case there is no reason to doubt the dates of eligibility as established by the service CRSC Board, then we rely on the dates of eligibility as established by the service CRSC Board and reflected in the CRSC award letter. Although I and my staff are not involved with applying the rules to determine whether a member should be awarded CRSC, we all are sufficiently familiar with how the CRSC boards perform this function to identify apparent errors when they occur.

After the account is established, an automated system conducts an automated audit to determine amounts due (if any). A sizeable percentage of the accounts (15–20%) reject from the automated audit and must be audited manually. That function is performed by another section in my office. After the audit is complete, retroactive payments are issued on

a payroll and paid to the member upon approval. My team is responsible for ensuring monthly payments are issued and maintain the account for any changes.

As part of my review of this case, I reviewed the particular facts in Mr. Soto's claim. Under the facts of Mr. Soto's claim, if the Barring Act had not been applied to limit his retroactive payment his entitlement to CRSC commenced on January 1, 2008 as a result of the change in the CRSC statute. This is because effective January 1, 2008, Congress expanded eligibility to his particular class of retiree, which is a disability retiree with less than 20 years of service.

For Mr. Soto's particular set of circumstances, the change in the law acted as the triggering point for his claim to "accrue." The first date that the conditions existed that would entitle Mr. Soto to CRSC was January 1, 2008. I also reviewed and determined that if we hypothetically change one variable, Mr. Soto's CRSC eligibility would have commenced even earlier. If Mr. Soto had hypothetically been retired for longevity with more than 20 years of service before December 2, 2002, (when the CRSC statute was first enacted but not yet effective), his eligibility could have commenced on January 1, 2004, again as a result of a change in the law. If we hypothetically change an additional variable, Mr. Soto's CRSC eligibility would have commenced even earlier. Mr. Soto's VA rating did not exceed 50% until December 31, 2008. If Mr. Soto had hypothetically been retired with more than 20 years of service before December 2, 2002 and he had also been awarded a Purple Heart or had received a higher qualifying disability rating of 60%, his eligibility could have commenced even earlier.

In addition to reviewing Mr. Soto's case file, I reviewed several other CRSC cases we have in our

system at DFAS. In reviewing each case, I was able to review DFAS records archived in the Retired and Annuity Pay Information — DRAS (RAPID), the CRSC Database (DB2) System and the Retired Casualty Pay System (RCPS) system and purged data from that system. I was also able to review VA records in the VA's SHARE and VBMS (Veteran Benefit Management Systems) to access the VETSNET systems which are VA systems that contains a veteran's VA disability compensation award, payment history, and historical VA documents. For each case file, I pulled information from all of these systems in order to summarize the case history.

I understand that the Plaintiff's in this case have asked the government to identify accounts meeting certain criteria in an effort to capture potential class members. In particular, Plaintiff requested data on "[CRSC] applicants who were sent a CRSC Decision Letter whose CRSC Retroactive Payment Date is later in time than those applicants' CRSC Eligibility Dates." However, it bears emphasizing that there are inherent difficulties in attempting to comprehensively identify the population of military retirees whose CRSC claims were limited by the Barring Act where the barred amount was less than \$10,000. The military retired pay systems are designed to deliver services and benefits to retired military members, not to search for accounts of retiree, both living and deceased, who meet the particularized criteria to which the Plaintiffs have limited their complaints. None of the automated retired military pay systems were designed to capture data on which CRSC claims have been limited by the Barring Act and which have not; nor do they have an entry showing the individual tally of the amount that each member would have been entitled to if the Barring Act had not been applied. That information

could only be obtained through a manual case by case review of closed CRSC claims by the service CRSC boards to identify CRSC claims that have been limited by the Barring Act followed by a re-audit of each account that is identified by the service CRSC boards.

As someone with experience in evaluating and reviewing CRSC claims, it is difficult to explain or understand the law without an individual's particular set of circumstances against which I can compare the law. As an analogy, it is like trying to explain which tax deductions are available to a given taxpayer — the only way to know the answer is to first know the taxpayer's information. In short, CRSC guidelines and requirements vary dramatically from individual to individual as the following examples indicate.

Example 1: Member with creditable service that exceeds 20 years. Claim was timely. Barring Act was not applied. Not eligible for relief.

I personally reviewed the records in this member's case. This member had between 20 and 30 years of service and retired on September 1, 2003 pursuant to 10 U.S.C. § 3914; he is therefore what we refer to as a "longevity retiree." He was rated by the VA as having multiple compensable disabilities for multiple medical conditions found on the VASRD at different percentages of disability. The service CRSC Board reviewed those various disabilities and found that one of his disabilities (rated at 10%) was combat related with an effective date of September 1, 2003. The VA decision granting him the VA disability compensation award for that disability is dated September 9, 2003 and the VA disability compensation award was effective on September 1, 2003, payable by VA on October 1, 2003.

Based on this member's circumstances, the earliest date that he could have qualified for CRSC is January 1, 2004, because of the interplay between the member's set of circumstances and the revision to the CRSC statute. Although his VA disability compensation award was effective in September 2003, because this member only had 10% of his disability recognized as combat related, he was not actually eligible for CRSC until the statute changed in January 2004. In approving and awarding this member CRSC payments, my office reviews all of these factors and can determine that on January 1, 2004, all of the events had arisen which entitled this member to make a claim. Specifically, in this case, the revision to the CRSC statute was the latest-occurring event to establish CRSC eligibility, and thus is the date the member's claim "accrued."

The member applied for CRSC on August 6, 2009. The application was submitted within 6 years of January 1, 2004, which is the date of his first eligibility for CRSC.

The CRSC award was granted by letter of December 2, 2013. The CRSC award letter limited the retroactive CRSC award to January 2004 (i.e. the date of his first eligibility for CRSC). The retroactive CRSC award was not impacted by the Barring Act. It was limited retroactively to January 2004 based on another factor entirely, namely, that January 1, 2004 was the earliest date that he could qualify for CRSC under 10 U.S.C. § 1413a. After conducting this analysis, DFAS made CRSC payments to the member to cover the period from January 1, 2004, forward.

Example 2: Member retired for disability with creditable service of fewer than 20 years. Claim was timely. Barring Act was not applied. Not eligible for relief.

I personally reviewed the records in this member's case. This member retired on November 30, 2006, with less than 20 years of service; he was retired as a result of a disability pursuant to 10 U.S.C. § 1202 and is typically referred to as a disability retiree. He was rated by the VA as having multiple compensable disabilities for multiple medical conditions found on the VASRD at different percentages of disability. The service CRSC Board reviewed those various disabilities and found that one of his disabilities (rated at 10%) was combat related with an effective date of December 28, 2006. The VA decision granting him the VA disability compensation award is dated June 22, 2007, and the VA disability compensation award was effective on December 28, 2006, with payment from VA starting January 1, 2007

Based on this member's circumstances, the earliest date that he could have qualified for CRSC is January 1, 2008, because of the interplay between the member's set of circumstances and the revision to the CRSC statute. The member had fewer than 20 years of service. Prior to the enactment of the 2008 CRSC statute, a member with fewer than 20 years of service did not qualify for CRSC even if (s)he had a combat related disability. It was only after the 2008 amendment that a member with fewer than 20 years of service could qualify for CRSC. In approving and awarding this member CRSC payments, my office reviews all of these factors and can determine that on January 1, 2008, all of the events had arisen which entitled this member to make a claim. Specifically, in this case, the revision to the CRSC statute was the latest-occurring event to establish CRSC eligibility, and thus is the date the member's claim "accrued." As compared with the first example, this individual is a "disability retiree" rather

than a “longevity retiree.” Mr. Soto is, likewise, a “disability retiree.”

On January 1, 2008, all of the events had arisen which entitled this member to make a claim. He applied for CRSC in December 2013. As with the first example, the application was submitted within 6 years of January 1, 2008, which is the date of his first eligibility for CRSC based on the change in the statute.

His CRSC award was granted by letter of January 22, 2014. The CRSC award letter limited the retroactive CRSC award to January 2008.

Once again, the retroactive CRSC award was not impacted by the Barring Act. It was limited retroactively to January 2008 because the member only became eligible at that time. January 1, 2008, was the earliest date that he could qualify for CRSC under 10 U.S.C. § 1413a.

Example 3: Member retired for disability with creditable service of fewer than 20 years. Barring Act was applied but did not harm the member. Not eligible for relief.

I personally reviewed the records in this member’s case. This member retired on March 7, 2009, pursuant to 10 U.S.C. § 1205 (Members on active duty for 30 days or less: temporary disability retired list) and is typically referred to as a “disability” retiree. He was rated by the VA as having multiple compensable disabilities for multiple medical conditions found on the VASRD at different percentages of disability. The service CRSC Board reviewed those various disabilities and found that one of his disabilities (rated at 30%) was combat related with an effective date of August 20, 2008, payable by the VA September 1, 2008. The VA decision granting him the VA disability compensation

award is dated January 8, 2009, and the VA disability compensation award was effective on August 20, 2008, payable by the VA September 1, 2008

Based on this member's circumstances, the earliest date that he could have qualified for CRSC is April 1, 2009 because that is the first full month of eligibility after his retirement date of March 7, 2009 and CRSC is only payable based on full months of eligibility. This is because he did not retire until March 7, 2009. In this case, although the member had an approved VA-rated disability, he could not become eligible for CRSC until he retired.

He applied for CRSC on December 7, 2015. The application was not submitted within 6 years of March 7, 2009, which is the earliest date that he could have qualified for CRSC.

His CRSC award was granted by letter of June 17, 2016. The CRSC award letter applied the Barring Act and limited the retroactive CRSC award to January 2010 (i.e. the first entitlement month after the date that is 6 years antecedent to the CRSC application date of December 7, 2015). Therefore, if the Barring Act had not been applied to limit the claim to January 2010, the CRSC award would have been payable to April 2009 (i.e. the first eligibility month after his retirement). Since the Barring Act was applied, amounts due between April 2009 and December 2009 were barred. However, the amount of retroactive CRSC that would have been due for the period between April 2009 and December 2009 is \$0.

Between April 2009 and December 2009, the special rule that applies to disability retirees with fewer than 20 years of service requires that the CRSC entitlement be computed by taking the VA disability compensation

amount and reducing it by “the amount (if any) by which the amount of the member’s retired pay under chapter 61 ... exceeds the amount equal to 2½ percent of the member’s years of creditable service multiplied by the member’s retired pay base.” In this case, after reducing the VA Disability Compensation amount by the formula above, the retroactive CRSC entitlement for the period between April 2009 and December 2009 (i.e. the months that were barred) is \$0. The Barring Act was applied to this CRSC claim (by the CRSC Board limiting the retroactive effective date to January 2010). However, even if the Barring Act had not been applied, no additional compensation would have become due for the barred period between April 2009 and December 2009.

Example 4: Member with creditable service that exceeds 20 years. Barring Act was applied to CRSC claim and the Barred amount exceeds \$10,000. Not eligible for relief.

I personally reviewed the records in this member’s case. This member retired on March 1, 1982, pursuant to 10 U.S.C. § 3911 (Twenty years or more: regular or reserve commissioned officers).

He was rated by the VA as having a compensable disability for a medical condition found on the VASRD at 100 % with an effective date of December 17, 1991. The VA decision granting him the VA disability compensation award is dated April 1, 1997. The service CRSC Board reviewed that disability and found that it was combat related.

Based on this member’s circumstances, the earliest date that he could have qualified for CRSC is June 1, 2003, when the CRSC statute was initially effective after enactment. This is because his disability rating

was at 100% and his creditable service exceeded 20 years. On June 1, 2003, all of the events had arisen which entitled him to make a claim.

He applied for CRSC on June 17, 2010. Note, the CRSC application was submitted more than 6 years after June 1, 2003 (when all of the events had arisen which entitled him to make a claim).

His CRSC award was granted by letter of February 14, 2011.¹ The CRSC award letter applied the Barring Act and limited the retroactive CRSC award to July 2004 (i.e. the first entitlement month after the date that is 6 years antecedent to the CRSC application date of June 17, 2010). If the Barring Act had not been applied to limit the claim to July 2004, the CRSC award would have been payable retroactively to June 2003. Since the Barring Act was applied, amounts due between June 2003 and June 2004 were barred.

The amount of retroactive CRSC that was due for the period between June 2003 and June 2004, except for the application of the Barring Act was \$25,069.00.

Example 5: Member with Barring Act applied to CRSC claim where member subsequently sought and received a waiver of the application of the Barring Act and the Barred amounts have been paid. Not eligible for relief.

¹ The member was initially provided a CRSC award letter dated October 21, 2010 with CRSC effective date of December 2007. However, DFAS recognized that the effective date established by the CRSC Board was based on VA data that had become outdated due to a system conversion. Subsequent validation verified that the VA diagnostic code for this member's combat related disability was effective back to 1991. The CRSC Board therefore issued a corrected award letter but applied the Barring Act to limit the retroactive award to July, 2004.

I personally reviewed the records in this member's case. This member retired on January 30, 2006, pursuant to 10 U.S.C. § 1202 (Regulars and members on active duty for more than 30 days: temporary disability retired list) and is a "disability" retiree. He was rated by the VA as having multiple compensable disabilities for multiple medical conditions found on the VASRD at different percentages of disability with effective dates of January 30, 2006, payable by the VA on February 1, 2006. The VA decision granting him the VA disability compensation awards is dated March 14, 2006. The service CRSC Board reviewed those various disabilities and found that several of his disabilities were combat related.

Based on this member's circumstances, the earliest date that he could have qualified for CRSC is January 1, 2008. This is because he was a disability retiree with fewer than 20 years of service. Prior to the enactment of the 2008 CRSC statute, a retiree with fewer than 20 years of service did not qualify for CRSC even if (s)he had a combat related disability. It was only after the 2008 amendment that a retiree with fewer than 20 years of service could qualify for CRSC.

On January 1, 2008, all of the events had arisen which entitled this member to make a claim. He applied for CRSC on April 13, 2017. The CRSC application was submitted more than 6 years after January 1, 2008 (when all of the events had arisen which entitled him to make a claim).

His CRSC award was granted by letter of April 24, 2017. The CRSC award letter applied the Barring Act and limited the retroactive CRSC award to May 2011 (i.e. the first entitlement month after the date that is 6 years antecedent to the CRSC application date of April 13, 2017). If the Barring Act had not been applied

to limit the claim to May 2011, the CRSC award would have been payable retroactively to January 2008. Since the Barring Act was applied, amounts otherwise due between January 2008 and April 2011 were barred.

This member subsequently applied for a waiver of the application of the Barring Act. His request was granted and he was paid all amounts of CRSC due between January 2008 and April 2011.

Example 6: Member previously elected Concurrent Retired and Disability Pay (CRDP) under 10 U.S.C. § 1414 which exceeds CRSC award. Eligible for Relief, but \$0 in CRSC.

An important variable in CRSC eligibility and entitlement not discussed heretofore is whether a member whose disabilities are found to be combat related previously elected Concurrent Retired and Disability Pay (CRDP) under 10 U.S.C. § 1414. The CRDP program, effective from January 1, 2004, permits qualified members to receive both military retired pay and VA Disability Compensation if certain minimum qualifications are met. However, no member may be paid both CRSC and CRDP for the same period. See 10 U.S.C. § 1414(d). In cases where the member becomes entitled to both benefits prospectively, the member is allowed to choose which benefit to receive. In cases where the member becomes entitled to both benefits retrospectively, DFAS pays the most beneficial.

Whether CRSC is more beneficial to a member retroactively is a determination that is made on case by case basis. However, it is quite common for the VA to find that a retired member has multiple separate disabilities with separate medical diagnoses from the VASRD but for the CRSC board to find that only one of those multiple disabilities is combat related. A

career member with multiple separate non-combat related disabilities with a combined rating above 50 % will qualify for CRDP under 10 U.S.C. § 1414. If that same member subsequently applies for CRSC and the CRSC board finds that only one of those multiple disabilities is combat related (for example at 10%), then, in most cases, the retroactive CRDP that was already paid exceeds the retroactive CRSC that would be due. Put another way, when a member has already received CRDP pursuant to 10 U.S.C. § 1414 and then subsequently receives a CRSC award, if the CRDP already paid exceeds what would have been paid in CRSC, then CRDP is more favorable to the member and no CRSC is paid. A member may not be paid for both CRSC and CRDP for the same period. 10 U.S.C. § 1414(d). This holds true whether the Barring Act was applied or not.

In the examples above, if, hypothetically each member had sufficient creditable service and a sufficient level of VA disability such that (s)he qualified for and had already received CRDP pursuant to 10 U.S.C. § 1414, and then subsequently received a CRSC award where the CRDP already paid exceeds what would have been paid in CRSC, then the amount of CRSC that would have been payable retroactively is \$0.

Other. Retroactive Payment Calculations are Complex and Potentially Impact Two Separate Agencies – DFAS and the VA.

Although I did not review a particular individual, I am aware of another category of CRSC applicants where calculating payments requires complex, individualized review in order to determine to what payments the member is eligible and who must make the payments. Certain Retroactive CRSC awards trigger a retroactive entitlement that must be paid, in part, by

the VA and, in part, by DFAS. The best way to simplify what is a complicated analysis for my office is to use a hypothetical example with basic numbers and facts. Because this example demonstrates basic principles, I have intentionally excluded many complicating factors such as CRSC statute revisions, whether a member is required to share a portion of retired pay with an ex-spouse, and other similar factors.

A. At the outset, the “general rule” is that a veteran cannot receive both VA Disability Compensation and military retired pay for the same period. VA funds are used to pay VA disability awards and DoD funds (paid by DFAS) are used to pay military retirement payments; the appropriated funds in each account cannot be used for the other’s purpose. Thus, imagine a circumstance where a member is entitled on February 1 of a given year to the following:

Retired Pay Entitlement	VA Disability Entitlement
\$1000	\$0

In this situation, DFAS would pay \$1000 in military retired pay; the VA would pay \$0. Under this set of facts, DFAS would pay this member \$1000 on February 1. (And the VA would pay this member \$0 on February 1).

B. Continuing to apply the “general rule” discussed above, assume the VA grants VA Disability Compensation to the retiree in the amount of \$1000, but makes that determination after DFAS has already paid the retired pay entitlement and makes the award retroactive to February 1. Under this new set of facts, the member is entitled on February 1 (retroactively) to the following:

Retired Pay Entitlement	VA Disability Entitlement
-------------------------	---------------------------

\$1000	\$1000 (effective retroactively to February 1)
--------	--

The change in facts presents two issues:

Issue 1: How to “settle” the retroactive VA award (for the February 1 pay day that has already passed).

Issue 2: How to “pay” prospectively (for the upcoming March 1 pay day).

Regarding issue 1: Since DFAS has “already” made a February 1 payment (in the amount of \$1000) and, since the “general rule” is that a veteran cannot receive both VA Disability Compensation and military retired pay for the same month, no additional monies would be paid to the veteran as a result of the retroactive VA Disability award. The February 1 payment settlement can thus now be depicted as follows:

Retired Pay Entitlement	VA Disability Entitlement	VA entitlement that was “withheld”
\$1000	\$1000	\$1000

The \$1000 in retroactive VA disability compensation is considered (retroactively) to have been “withheld” from VA. VA could not pay it because of the “general rule.” In other words, the member is eligible for disability compensation, but is not entitled to any retroactive payments.

Issue 2: (i.e. How to “pay” prospectively).

Starting on 1 March, the payments would be as follows:

Retired Pay Entitlement	Retired Pay entitlement that is withheld (or “waived to receive VA Disability Compensation)	VA Disability Entitlement	VA entitlement that was “withheld”
\$1000		\$1000	\$1000

Starting on 1 March, DFAS would pay \$0 in military retired pay. DFAS would “withhold” the military retired pay so that the member could receive VA Disability Compensation. VA would pay \$1000. Essentially, from the award date moving forward, the member would be entitled to payment from one source but not the other.² Once again, the government is in compliance with the “general rule”. The member is not receiving both VA Disability Compensation and military retired pay for the same month. He is now only getting compensation from VA.

C. Continuing with this scenario, assume that after the March 1 VA Disability Compensation payment, the member becomes entitled to CRSC retroactive to February.³ Now there is a situation where the “general

² In these scenarios, disability pay is nontaxable while retired pay is taxable, so in almost all cases, members will opt for the nontaxable, VA disability pay over the taxable DFAS retired pay. That decision is reflected here, although it is possible a member may elect to continue taxable DFAS payments of \$1,000 and VA “withheld” non-taxable entitlements of \$1,000.

³ In the real world, this is the normal sequence of events, as a member routinely retires and shortly thereafter begins receiving retired pay. The VA disability determination process can take

rule” does not apply and the member is entitled to payments for both disability pay and retired pay. The government now has to “restore” the money that was “not paid” on February 1 (by the VA) and on March 1 (by DFAS).

In order to comply with the fiscal requirements reference above, the restoration must come from two different sources. The restoration for February 1 must come from VA. The restoration for March 1 must come from DFAS. The restoration can be depicted as follows:

Pay date	Retired Pay actually paid by DFAS	Retired Pay that was withheld (or “waived” to receive VA Disability Compensation)	VA Disability that was actually paid by VA	VA entitlement that was “withheld” by VA	Amount DFAS must “restore”	Amount VA must “restore”
Feb 1	\$1000	\$0	\$0	\$1000	\$0	\$1000
Mar 1	\$0	\$1000	\$1000	\$0	\$1000	\$0

The above example demonstrates why in some cases CRSC awards trigger a retroactive entitlement that must be paid, in part, by the VA and, in part, by DFAS. I applied these principles to Mr. Soto’s case and found that if the Barring Act had not been applied, payment during the barred period would have become due retroactively from both DFAS and the VA.

months, even years, and is ordinarily decided on a retroactive basis. A member can only then take the retroactive VA disability determination back to his or her service to make a CRSC determination, which is also typically retroactive. Thus, the hypothetical scenario presented is common for these sorts of cases.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 16th day of November, 2018.

/s/ Judy M. Raines
JUDY M. RAINES
Lead Military Pay Technician
CRDP/CRSC Processing

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Civil Action 1:17-cv-51

SIMON A. SOTO, on behalf of himself and all other
individuals similarly situated,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

JOINT STATEMENT OF STIPULATED FACTS

Plaintiff Simon A. Soto and Defendant the United States of America (collectively, the “Parties”) have conferred and do hereby submit the following Joint Statement of Stipulated Facts:

1. Plaintiff Simon A. Soto (“Mr. Soto”) brings this action against the United States of America (“Defendant” or the “government”) on behalf of a class of certain former members of the United States Army, Navy, Marine Corps, Air Force, and Coast Guard (hereinafter “servicemembers”) awarded Combat-Related Special Compensation (“CRSC”) due to their combat-related disabilities. This case presents the legal question of whether the government lawfully applied (and continues to apply) 31 U.S.C. § 3702 (“the Barring Act”) to CRSC benefits. The Parties stipulate that the Court can answer that question based on the facts contained herein.

2. Mr. Soto is a veteran of the United States Marine Corps. He has a combat-related disability. On October 17, 2016, the United States Department of the Navy approved Mr. Soto's CRSC application and awarded him CRSC benefits under 10 U.S.C. § 1413a. *See* Exhibit A. The Navy applied the six-year statute of limitations set forth in the Barring Act to Mr. Soto's retroactive CRSC benefits. If the Barring Act had not been applied to Mr. Soto's retroactive CRSC benefits, he would have been entitled to additional CRSC benefits. The amount of Mr. Soto's retroactive CRSC benefits that the government deemed barred is less than \$10,000.

3. The Court has certified the following class:

Former service members of the United States Army, Navy, Marine Corps, Air Force, or Coast Guard whose CRSC applications under 10 U.S.C. § 1413a were granted, but whose amount of CRSC payment was limited by Defendant's application of the statute of limitations contained in 31 U.S.C. § 3702 and have a claim of less than \$10,000.

Doc. No. 61. The Court ordered the Parties to notify the potential class members of the establishment of the class and of their legal rights in this action. *Id.* In order to accomplish the class notification process, the government identified the former servicemembers whose CRSC benefits had been limited by the government's application of the Barring Act. The government identified 9,108 persons.¹ These potential class members

¹ This list of persons identified was current through September 30, 2020. *See* Doc. No. 83. In addition, and as previously noted, this list does not distinguish between those servicemembers whose amount of barred CRSC benefits was above or below \$10,000. *Id.* However, the government stipulates that, of the

were mailed notifications and advised that they had until July 5, 2021, to opt out of the class. At the conclusion of the notification process, 11 of the 9,108 had opted out of the class.

4. The government acknowledges that it applies the six-year statute of limitations set forth in the Barring Act to CRSC benefits. The government has applied the Barring Act to CRSC benefits since CRSC was established and took effect in 2003. The government has continued to apply the Barring Act to CRSC benefits as Congress has amended the statute to expand the categories of persons eligible for CRSC.

Respectfully Submitted,

Jennifer B. Lowery
Acting United States Attorney

s/ Jimmy A. Rodriguez

Jimmy A. Rodriguez
Assistant United States Attorney
Southern District of Texas
Attorney in Charge for Defendant
Texas Bar No. 24037378
Federal ID No. 572175
1000 Louisiana, Suite 2300
Houston, Texas 77002
Tel: (713) 567-9532
Fax: (713) 718-3303

Attorneys for Defendant

s/ Duston K. McFaul (with permission)

Duston K. McFaul
Attorney-in-Charge

persons identified on the list, thousands of them have claims of less than \$10,000.

State Bar Number: 24003309
S.D. Texas Bar Number: 21769
SIDLEY AUSTIN LLP
1000 Louisiana Street
Suite 6000
Houston, TX 77002
Phone: 713-495-4500
Fax: 713-495-7799

Of Counsel:

Barton F. Stichman (Pro Hac Vice)
NATIONAL VETERANS LEGAL
SERVICES PROGRAM
1600 K Street NW, Suite 500
Washington, DC 20006-2833
Phone: 202-621-5677

Gerard D. Kelly (Pro Hac Vice)
Emily M. Wexler (Pro Hac Vice)
Simone Jones (Pro Hac Vice)
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, IL 60603
Phone: 312-853-7000

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on August 13, 2021, a true and correct copy of the foregoing was filed with the United States District Clerk for the Southern District of Texas and electronically served on all counsel of record via the District's ECF system.

s/ Jimmy A. Rodriguez
Jimmy A. Rodriguez
Assistant United States Attorney

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

No. 1:17-cv-00051

SIMON A. SOTO, on behalf of himself and all other
individuals similarly situated,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

DECLARATION OF SIMON SOTO

I, Simon Soto, declare as follows:

1. I am over the age of eighteen and the Named Plaintiff in the above-captioned lawsuit. I understand that this Declaration will be filed in support of my Motion for Summary Judgment. I have personal knowledge of the facts set forth in this Declaration and could and would testify competently under oath if called as a witness.

2. I enlisted in the United States Marine Corps in August 2000. During my first of two tours in Operation Iraqi Freedom, I served in Mortuary Affairs and was assigned to search for, recover, and process the remains of war casualties. I began experiencing, among other things, suicidal thoughts, vivid nightmares, and difficulty concentrating as a result of my experiences in Mortuary Affairs, including one mission in which my

colleagues and I retrieved over 300 pieces of five to seven soldiers who had been killed. I was treated in December 2005. At that time, my doctors documented the relationship between my combat experiences in Iraq and my later post-traumatic stress disorder diagnosis (“PTSD”).

3. I medically retired from active duty on April 28, 2006 after honorably serving in the United States Marine Corps. I was placed on the Temporary Disability Retirement List (“TDRL”) at that time. Subsequently, I was removed from the TDRL and given permanent disability status. I later sought service-connected disability benefits from the Department of Veterans Affairs (the “VA”) and, in June 2009, the VA issued a rating decision awarding me disability compensation for my PTSD and assigning me a rating of 50 percent for my PTSD (effective April 29, 2006), then a rating of 30 percent (effective November 1, 2006), and then a rating of 100 percent (effective December 31, 2008).

4. I submitted an application to the Navy in June 2016 seeking Combat-Related Special Compensation (“CRSC”) based on my PTSD diagnosis. In October 2016, the Navy found that my PTSD is a combat-related disability and awarded me CRSC. The Navy assigned a CRSC effective date of July 2010, and the Secretary of the United States Navy (the “Secretary”) awarded me six years of retroactive CRSC payments (from July 2010 to June 2016), withholding the remaining retroactive CRSC to which I am entitled (from January 1, 2008 through June 30, 2010). The Secretary based the withholding of retroactive CRSC on the statute of limitations contained in the Barring Act.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge.

76

Executed this 13th day of August 2021, in
Brownsville, Texas.

/s/ Simon Soto
Simon Soto

[LOGO]

DEPARTMENT OF DEFENSE

OFFICE OF THE UNDER
SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

MEMORANDUM FOR ASSISTANT SECRETARY
OF THE ARMY (M&RA) ASSISTANT SECRETARY
OF THE NAVY (M&RA) ASSISTANT SECRETARY
OF THE AIR FORCE (MR) DIRECTOR, DEFENSE
FINANCE AND ACCOUNTING SERVICE

SUBJECT: Directive Type Memorandum — Revised
Guidance on Combat-Related Special
(CRSC)

This memorandum provides uniform implementing guidance (attached) for Combat-Related Special Compensation (CRSC) as enacted by section 636 of the National Defense Authorization Act for Fiscal Year 2003, Public Law 107-314, December 2, 2002, and codified as section 1413a, title 10, United States Code, and subsequently amended by sections 641 and 642, of the FY 2004 NDAA. This guidance replaces that issued by memorandum of May 21, 2003, concerning this program, for benefits pertaining to periods on or after January 1, 2004. Entitlements for months prior to January 2004 are payable under the guidance issued by the May 21, 2003, memorandum unless that guidance is specifically modified herein with respect to such periods.

This memorandum prescribes the procedures and criteria under which members may apply for CRSC. The Military Departments determine which applicants are entitled to CRSC. The finance center

administers CRSC payments and coordinates needed information with the Department of Veterans Affairs.

/s/ Charles S. Abell

Charles S. Abell
Principal Deputy

Attachment:
As stated

cc:

Commandant (G-HR), U.S. Coast Guard

Director, Division of Commissioned Personnel,
U.S. Public Health Service

Director, National Oceanic and Atmospheric
Administration Corps

Combat-Related Special Compensation (CRSC)
Section 1413a, Title 10, United States Code,
As Amended
Revised Program Guidance January 2004

GENERAL: This guidance supersedes that issued by PDUSD(P&R) Memorandum, May 21, 2003, and is effective January 1, 2004, with respect to entitlements for an otherwise qualified member for any month beginning on or after that date. Entitlements for months prior to January 2004, are payable under the requirements prescribed in the PDUSD(P&R) Memorandum of May 21, 2003, unless that guidance is specifically modified herein with respect to such periods.

TAX CONSIDERATIONS: The Armed Forces Tax Council (AFTC) has determined that all CRSC payments are exempt from Federal income tax under section 104 of title 26, United States Code.

FUNDING AND PAYMENT: The law continues to provide that Combat-Related Special Compensation (CRSC) is *not* military retired pay. Nevertheless, effective October 1, 2003, the source of funds for CRSC payments to members of the Army, Navy, Air Force, and Marine Corps, shall be from the Department of Defense Military Retirement Fund (MRF). The Defense Finance and Accounting Service (DFAS) will ensure, with respect to any payments made for a period during fiscal year 2004 and not paid from the MRF, are treated as if paid from the MRF, making the administrative adjustments as authorized under section 641(c)(6) of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108-136).

RELATIONSHIP TO OTHER PROVISIONS: Since CRSC is not retired pay, it is not subject to the

provisions of section 1408 of title 10, United States Code, relating to payment of retired or retainer pay in compliance with court orders. CRSC is also not subject to any survivor benefit provisions of chapter 73 of title 10, United States Code. CRSC is subject to a Treasury offset to recover a debt owed to the United States, as well as to garnishment for child support or alimony.

NON-DOD UNIFORMED SERVICES: CRSC applies to retired members of any Uniformed Service, including retired members of the U.S. Coast Guard, and the Commissioned Corps of the National Oceanic and Atmospheric Administration and the Public Health Service. Non-DoD Services should modify these procedures as appropriate for their Departments with supplemental guidance and instructions to correlate responsibilities and effect implementation for their agency. Internal DoD processes and procedures should be shared with these Services to assist them in establishing parallel procedures as appropriate.

ENTITLEMENT: CRSC is a monthly entitlement and is to be paid only in whole month increments according to these procedures. To be entitled to CRSC, a member must file an application with the Military Department from which the member retired in accordance with these procedures and meet the criteria prescribed. Applications for CRSC will be processed by the respective Military Department under these guidelines. A retiree is entitled to CRSC for each month during which, for the entire month, the retiree:

- a. Has applied for and elected CRSC under these provisions, and

- b. Meets Preliminary CRSC Criteria, and
- c. Meets Final CRSC Criteria — (that is, has a qualifying combat-related disability or disabilities)

APPLICATION AND ELECTION OF CRSC: A member may not be paid CRSC unless he/she has applied for and elected to receive compensation under the CRSC program. Such application must be submitted in accordance with the procedures and criteria as prescribed herein using a current DD Form 2860. Earlier versions may be accepted by the Military Department as long as the member provides the information and documentation needed to determine CRSC entitlement. Members seeking CRSC compensation will submit CRSC applications to the designated office of the Military Department from which they retired. Members may submit an application for CRSC at any time and, if otherwise qualified for CRSC, compensation will be paid retroactively, to the extent otherwise allowed by law, for any month after May 2003, for which all conditions of eligibility were met, determined according to the requirements and entitlements as they applied each month for which benefits are considered.

ELECTION OF CRSC UNDER SECTION 1413a OF TITLE 10, UNITED STATES CODE, OR SPECIAL COMPENSATION UNDER SECTION 1413 OF THE SAME TITLE: Benefits under section 1413 of title 10, United States Code, were repealed, effective January 1, 2004. However, for periods before that date, the law required that a member eligible for both CRSC, as provided by section 1413a of title 10, United States Code, and Special Compensation for Severely Disabled retirees (SCSD), as previously provided by section 1413 of title 10, United States

Code, may not receive both. DFAS will pay the member for such periods by offsetting and adjusting payments and accounts as appropriate to the revised entitlements compared to those previously paid.

ELECTION OF CRSC UNDER SECTION 1413a OF TITLE 10, USC, OR CONCURRENT RETIREMENT AND DISABILITY PAYMENTS UNDER SECTION 1414 OF THE SAME TITLE: The law requires that a member eligible for both CRSC, as provided by section 1413a of title 10, United States Code, and Concurrent Retirement and Disability Payments (CRDP), as provided by section 1414 of title 10, United States Code, may not receive both but must elect which compensation to receive.

DFAS will pay CRDP to an otherwise qualified member unless that member has an approved application for CRSC. A member may not be paid both CRSC and CRDP. An approved application for CRSC will cause the member's CRDP payments to be reconsidered. CRSC payments will apply instead of CRDP if the member has applied for and been approved for such benefits and they are found to exceed the amount payable under CRDP unless the member elects otherwise as prescribed below. The option to allow the finance center to elect the greater payment will be incorporated in the CRSC application form. The finance center will advise the member which of the two payments is being paid pursuant to this election and will also provide further notice in the event the amounts payable under either program cause such election to change. A member will be allowed one opportunity annually to

reverse the current election. This allows the member to assess the impact of annual adjustments to retired pay, VA disability compensation, CRSC, and CRDP. DFAS will prescribe the content and procedures to effect such elections and advise members to ensure they are aware of their options.

PRELIMINARY CRSC CRITERIA: A retired member of the Uniformed Services who meets each of the four following conditions will be considered to meet the Preliminary CRSC Criteria:

1. Has 20 or more years of service in the Uniformed Services for purposes of computing the amount of retired pay or is entitled to retired pay under section 12731 of title 10, United States Code, unless such retirement is under section 12731b of that same title.
 - a. NOTE 1: Members retired under the provisions of section 4403 of the National Defense Authorization Act for Fiscal Year 1993 (Public Law 102-484), October 23, 1992, commonly referred to as the TERA program – Temporary Early Retirement Authority – are not generally eligible unless the member is credited with sufficient service for a 50% multiplier or has been recalled to active duty long enough to accumulate 20 years or more of service in the Uniformed Services for purposes of computing the amount of retired pay. Service in Public And Community Service (PACS) positions creditable for re-computation of retired pay at age 62 does not count for these purposes. The

20 years of service required for computing the amount of retired pay (other than non-regular—reserve—retirements) may be inferred from the retired pay multiplier. However, the Military Departments are not bound by such presumption if there is documentary information to the contrary, such as a TERA retirement. In such cases the Military Departments shall base their determinations on the documentary information available.

Example: Consider a member with a 50% multiplier who is a TERA retiree with a 10% increase in retired pay granted on the basis of extraordinary heroism. Such documentary information would be used to deny CRSC qualification.

- b. A member who retired for years of service (not for disability under chapter 61 of title 10) who has a retired pay multiplier not less than 50 percent, or a member retired under REDUX who is still under age 62 with a retired pay multiplier not less than 40 percent, may be presumed to have 20 years of service for retired pay computation purposes. A member who retired under chapter 61 of title 10 should be evaluated in terms of what the multiplier would be if not retired for disability. Reserve Personnel Centers may need to provide evidence of qualifying service under section 12731 of title 10, United States Code.

- c. NOTE 2. For months beginning on or after January 1, 2004, the requirements applicable to Reserve retirements is changed as described below. For months prior to that month, reserve retirees had to have 7,200 points to qualify for CRSC. A retired Reservist with retired pay computed under section 12731 of title 10, United States Code, is eligible for CRSC unless retired for disability under section 12731b of title 10, United States Code, with more than 15 but less than the 20 years required under section 12731(a)(2) of title 10, United States Code. Specifically, those retired under the Temporary Early Retirement Authority for Reserves (Reserve TERA) as prescribed in section 12731a of title 10, United States Code, and served fewer than 20 years but were considered to meet the criteria of 10 USC 12731(a)(2) are eligible under these provisions.
2. Is in a retired status (i.e., is on the retired rolls, or has been transferred to the Fleet Reserve or Fleet Marine Corps Reserve).
 - a. NOTE: Members recalled to, or retained on, active duty are not, for the purposes of CRSC, in a retired status during the period of such recall or retention.
3. Is entitled to retired pay, notwithstanding that such retired pay may be reduced due to receipt of VA disability compensation.

- a. A member who waives military retired pay in order to credit military service for purposes of a civil service retirement, or for any reason other than to receive disability compensation from the VA, is not eligible for CRSC.
 - b. A reservist not yet entitled to retired pay due to not yet having attained age 60 is not eligible to receive CRSC payments.
4. Has qualifying disability ratings (percentages): A retiree must be entitled to compensation for service-connected disabilities under title 38, United States Code, by the VA.

If a member does not satisfy each of the Preliminary CRSC Criteria in paragraphs 1 through 4 above, no further consideration by the Military Department is necessary. The member does not meet Preliminary CRSC Criteria and the application will be denied accordingly. A member should reapply at such time as his/her ratings satisfy the specific thresholds and he/she meets all four Preliminary CRSC Criteria.

Note that while disability ratings by the Secretary of the Military Department, as of the date on which the member retired, may be used to help make determinations of whether the member meets Preliminary CRSC Criteria, the actual computation of CRSC amount (see section below — Monthly Amount of CRSC) is based solely on VA disability determinations and the amount of VA compensation paid, without regard to any disability that is not combat related. Military retirement decisions may be used to

determine whether such disabilities are combat-related.

If the applicant meets each of the Preliminary CRSC Criteria of paragraphs 1 through 4 above, the Military Departments will determine whether the member's disabilities are qualifying combat-related disabilities as prescribed below.

FINAL CRSC CRITERIA — QUALIFYING COMBAT-RELATED DISABILITY: A retiree is entitled to CRSC only if the Service determines that the member has Combat-Related Disabilities (which includes any Purple Heart Disabilities) that are compensated by the VA.

PURPLE HEART DISABILITY: A Purple Heart Disability is a disability with an assigned medical diagnosis code from the VA Schedule for Rating Disabilities (VASRD) that was attributed to injuries for which the member was awarded a Purple Heart.

If a member meets the Preliminary CRSC Criteria and has been awarded a Purple Heart, the Military Department must determine which disabilities of the member, if any, are attributable to such Purple Heart injuries. If the member has not been awarded a Purple Heart, no such determinations will be made.

Determination that a disability is a Purple Heart Disability requires documentary information that there is a sufficient causal relationship between the disability and the injury for which a Purple Heart was awarded to conclude that the disability is attributable to such injury. Such a disability

will be classified as a Purple Heart Disability and will also be included in any other CRSC determinations based on combat-related disabilities. With respect to an application of a retiree who meets Preliminary CRSC Criteria and who was awarded the Purple Heart, the Military Department will record whether or not each disability rated by the VA is or is not attributable to an injury for which the member was awarded the Purple Heart.

OTHER COMBAT-RELATED DISABILITIES: A combat-related disability is a disability with an assigned medical diagnosis code from the VASRD that was incurred:

- a. As a direct result of armed conflict,
- b. While engaged in hazardous service,
- c. In the performance of duty under conditions simulating war, or
- d. Through an instrumentality of war.

The Military Departments will determine whether a disability is combat-related under a, b, c, or d, above, using the definitions and criteria set forth in attachment 1-1 and this memorandum.

The Military Department shall record for each disability determined to be combat-related which of the circumstances above (a, b, c, or d) qualifies the disability as combat-related.

A determination of combat-relatedness will be made with respect to each separate disability with an assigned medical diagnosis code from the VASRD.

A retiree may have disabilities that are not combat-related. Such disabilities will not be considered in determining eligibility for CRSC or the amount of CRSC payable.

With respect to VA awards of service-connection based on presumptive conditions under the provisions of sections 1112(b)–(c), 1116, 1117, and 1118 of title 38, United States Code, and of 38 CFR 3.316, CRSC determinations will presume such disability to also be combat-related if the VA Initial Rating Form (or other substantiating documentary information) indicates that the VA rating for the disability is based on such presumption. Thus, disabilities rated by the VA on the basis of POW status, exposure to radiation, mustard gas or lewisite, Agent Orange, and those disabilities associated with Persian Gulf service that are presumed by the VA to be service-connected shall be presumed by the Military Department to be combat-related absent documentary information that the disability was incurred under circumstances that were not combat-related.

With respect to VA awards of service-connection for presumptive conditions under section 1112(a) of title 38, United States Code, and Post Traumatic Stress Disorder (PTSD – VASRD Code 9411), the Military Department must independently determine the relationship between that disability and the qualifying criteria.

The Military Departments are not bound by any presumption described above if there is documentary information that the disability is not combat-related. The Military Departments shall base their determinations on such information.

An uncorroborated statement in a record that a disability is combat-related will not, in and of itself, be considered determinative for purposes of meeting the combat-related standards for CRSC prescribed herein. CRSC determinations must be made on the basis of the program criteria.

SPECIAL MONTHLY COMPENSATION (SMC): Each Military Department will make special determinations regarding any member determined to have combat-related disabilities under the Combat-Related Special Compensation (CRSC) program who also receives SMC from the VA under section 1114(k)-(s) of title 38, United States Code.

The Service need not make such determination for any member who would not receive added compensation even if SMC was determined to be combat-related. For instance, if a member has been determined to have a CRSC rating of 100% but has a retired pay entitlement of less than \$2,000, there will be no added benefit from any SMC under the CRSC program and there is no need to make the determination. The amount of retired pay already restored under the CRSC compared to the member's maximum retired pay entitlement is conclusive in this instance. Any SMC on such member will be passed to DFAS as undetermined as to combat-relatedness (U-SMC). Such members include those who have fewer years of service than the amount indicated for their retired grade according to the following table if rated as 100% combat-related. The Director of Compensation, ODUSD(MPP) may issue changes to these grade and years of service combina-

tions to better reflect known retired pay thresholds that would normally exclude members from any additional CRSC entitlement. Any member whose SMC is undetermined as a result of this screening, but who is later found to have the potential for added compensation under the CRSC program would have their SMC reevaluated for combat-relatedness by the Military Department.

Table of Grade and Years of Service
Not Requiring SMC Determinations

E-6	30	W-1	26
E-7	24	W-2	23
E-8	22	W-3	21
E-9	21	O-1	30
		O-2	26

For members whose CRSC compensation could be increased as a result of an SMC determination, the Military Departments will first determine whether all their VA compensated disabilities have been determined to be Combat-Related disabilities under the CRSC program. If so, the member's SMC should be classified as Combat-Related SMC, CR-SMC, and DFAS notified accordingly. This is simply a recognition that no other disabilities exist that could cause the SMC to not be considered combat-related.

For any remaining members with disabilities compensated by the VA that are both combat-related and others not combat-

related, the Military Department will attempt to classify each award of SMC as either Combat-Related Special Monthly Compensation (CR-SMC) or not (NonCR-SMC) consistent with the corresponding determination of the diagnostic codes on which the SMC is based. DFAS will be notified of all such determinations. The Director of Compensation ODUSD(MPP), will coordinate with the VA to provide the Military Departments informational descriptions of the compensation classification schemes used by the VA to award different types of SMC. The VA has provided a point of contact to assist the Military Departments in making determinations that are unusual. The classification of SMC as combat-related will be based on the evidence that is consistent with the compensation classification schemes of the VA, but will disregard any disabilities of the member that are not combat-related.

DFAS will include any CR-SMC in CRSC computations.

PROCESSING OF APPLICATIONS: Each Military Department will receive and process CRSC applications submitted by members retired from that Military Department. Applications will be reviewed, and an application will be approved only if the applicant satisfies both Preliminary and Final CRSC criteria. The member's respective finance center will be notified of an approved application for processing and payment as appropriate. If the applicant does not satisfy both sets of criteria, the application will be denied. The member may reapply at such time as

he/she satisfies the specified criteria or is able to present documentation establishing that all criteria have been satisfied. Military Departments will notify members of all decisions with respect to their applications.

When an application is denied, the Military Department will inform the member of (1) the reason for denial and (2) the options for reconsideration and/or appeal (see section below—DENIAL AND APPEALS). Reasons for denial should state any criteria the application fails to meet. The Director of Compensation, ODUSD(MPP) will coordinate with the Military Departments to prepare a listing of criteria that can be used as a checklist for this purpose. Each Military Department will retain all records related to applications and their disposition until further guidance is provided concerning record retention policy.

The objective in processing a CRSC application is to determine whether an applicant can be identified as a Uniformed Services retiree, determined to meet Preliminary CRSC Criteria, and if so, determined to meet Final CRSC Criteria. Final CRSC Criteria requires a determination by the Military Department of which, if any, of the member's disabilities compensated by the VA are Purple Heart Disabilities and/or combat-related disabilities. VA ratings are the sole discretion of the VA and not subject to challenge through the CRSC program. If the member disagrees with the evaluation assigned by the VA, the retiree must seek an increased evaluation through the VA.

BASIS FOR DETERMINATIONS: 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.

The burden of proof that a disability is combat-related rests with the applicant and members will be required to provide copies of documents in their possession to the best of their ability. A record submitted by a member may be used in support of his/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. Military Departments may compile a list of typical documents used in various time periods (with samples, as appropriate).

When documentary information provided by the member, in conjunction with automated Service records, is insufficient to support a determination that the disability is combat-related, the Military Departments may seek such additional documentary information as would likely be useful in making their determinations. Such information may include documents from the National Personnel Records Center and/or the VA. The VA, has agreed to provide a record extract to support CRSC determinations at the specific request of a Military Department. The Services will file such requests in accordance with procedures established by the VA point of contact for this program. In response to such requests, the VA will provide a record extract containing:

- a. A copy of any DD Form 214s on file.

- b. A copy of the Service Medical Record
- c. A copy of any final ratings prepared by the VA.

DENIAL AND APPEALS: When a Military Department denies a CRSC application, it will provide a letter to the member specifying the reason(s) for the denial. The Military Department will inform the member that he/she may seek reconsideration by submitting additional, clarifying, and/or new documentary information to the Military Department in support of his or her application. The Military Department will review the additional, clarifying, and/or new documentary information and will inform the member of the results of the review. The Military Department will also inform the member that CRSC is subject to the same appeals and correction processes applicable to military pay and allowances generally, including application to the appropriate Board for Correction of Military Records (BCMR) under the provisions of section 1552 of title 10, United States Code. The Military Department will provide the member a DD Form 149, Application for Correction of Military Records, and the address of the BCMR, including its website. In considering an application where the issue of whether a disability is combat-related for the purposes of CRSC, the BCMR will seek an advisory opinion from the Director of Compensation, Office of the Deputy Under Secretary of Defense (Military Personnel Policy), and comply with the requirements of section 1556 of title 10, United States Code. The BCMR will provide the Director of Compensation a copy of any final decision concerning any application involving a determination as to whether a disability is combat-related.

MONTHLY AMOUNT OF CRSC: The monthly amount of CRSC is equal to the Full Monthly Amount prescribed in paragraph a. below, reduced as prescribed in paragraph b and limited according to paragraph c.

- a. **Full Monthly Amount:** The monthly amount of disability compensation the member would be paid by the VA under the provisions of title 38, United States Code, if compensated solely for the disabilities determined to be attributable to an injury for which the member received the Purple Heart or determined to be otherwise combat-related, as described above. Applicable compensation is set forth in chapter 11 of title 38, United States Code.

Example a-1: A member with a spouse and two children has qualifying combat-related disabilities rated at 100% by the VA. The member's current monthly VA benefit amount is \$2,523 — the prescribed rate for a 100% disability for a veteran with a spouse and two children. The Full Monthly Amount for CRSC purposes is based on this full rate and not just the veteran alone amounts, as applied to CRSC for periods beginning on or after January 1, 2004. Thus, the CRSC full monthly amount is \$2,523. Use the previous guidance for benefits applicable to periods before January 2004.

Compensation for Dependents: Additional compensation for dependents is to be included as part of any applicable CRSC compensation. DFAS will use the same dependency rates for the combat-related compensation as the VA uses to determine the members full disability compensation. For example, if a member is compensated by the VA at the 100% disability rate for a veteran with spouse and one child and the Combat-related percentage is 60%, the CRSC will be determined as the 60% rate for a veteran with a spouse and one child. The rates of such compensation are set forth in section 1115 of title 38, United States Code.

Amounts of SMC will be considered as part of CRSC compensation only if the SMC is paid on the basis of disabilities determined by the Military Department to be combat-related, as described above.

Retirees Considered Unemployable: DFAS shall establish a process in coordination with the VA to ascertain whether a member is compensated by the VA under section 1114(j) of title 38, United States Code, by virtue of such rating on the basis of being unemployable (IU) under the provisions of 38 CFR 4.16 or 4.18 for any member whose current combined combat-related disability percentage is 60% or greater. Such members shall be given a combined CRSC disability rated as total (100%). This information can be obtained from the VA M-I3 screen under the EMPL field. An entry of "NO" in this field indicates the retiree is in receipt of compensation under IU.

- b. Reduction for Chapter 61 retirees: The Full Monthly Amount specified in paragraph a. above will be reduced by the amount by which a member's current retired pay under chapter 61 exceeds the

amount of retired pay the member would receive if retired under any other provision of law based on service in the Uniformed Services.

Example b-1: The same member, as described in example a-1, retired after 22 years of service with high-three basic pay of \$3,000 and has been determined to have a qualifying combat-related disability rated at 100% by the VA. However, the member was retired under chapter 61 with a disability rating from the Secretary of the Military Department of only 60%. Thus, the member receives retired pay of \$1,800 monthly (60% of \$3,000). Had this member retired under longevity provisions with 22 years of service, the retired pay would have been \$1,650 monthly (55% of \$3,000). The member's CRSC payment will be reduced by the difference in these two amounts, or \$150 (\$1,800 - \$1,650). This reduction reflects the amount by which his disability retired pay exceeds his longevity retired pay. The member's potential CRSC benefit would now be reduced from \$2,523, as determined under Step a., to \$2,373 under Step b. (\$2,523 minus \$150).

Note: A retired Reserve who was retired under the provisions of chapter 61 with fewer than 20 years

of active service but who would be qualified for retired pay under chapter 1223 upon attainment of age 60 will be considered under that provision of law. Thus, until age 60, there can be no entitlement. CRSC benefits may begin at 60 years of age, but will be reduced under this paragraph by the amount of retired pay in excess of what the member's reserve retired pay would be if paid.

- c. **Maximum Amount:** The maximum CRSC payment may not exceed the current reduction in retired pay applicable to the retiree under sections 5304 and 5305 of title 38, United States Code. Thus, CRSC is not payable if there is no reduction under sections 5304 and 5305 because the member is not receiving any monthly disability compensation from the VA, or because the member is not receiving retired pay for other reasons (such as a member who waives military retired pay in order to credit military service for a civil service retirement). The final amount of a member's CRSC entitlement plus any amount of retired pay not offset under sections 5304 and 5305 of title 38, United States Code, cannot be greater than the member's full retired pay entitlement.

Example c-1: Consider the same member described in examples a-1 and b-1. The CRSC Full Monthly Amount of \$2,523 determined in

“Step a.” has been reduced by \$150 under “Step b.” to \$2,373, but is limited here in “Step c.” to no pay no more than the member’s full amount that was offset from the member’s retired pay due to receipt of VA disability compensation. In this example then, since the member’s entire retired pay of \$1,800 was fully reduced, no more than \$1,800 can be paid in CRSC.

Combined Disability Rating Percentage: The VA Combined Ratings Table is used to combine multiple disability ratings. This table and its uses are set forth in 38 CFR. 4.25. The table is based on the consideration of an individual’s efficiency, as affected by the most disabling condition and less disabling conditions, if any, in the order of severity. Thus, a person having a 60% disability is considered 40% efficient. The effect of a 30% disability is to leave only 70% after consideration of the first disability (70% of 40%) leaving 28% efficiency altogether. The individual is thus 72% disabled.

When more than two disabilities are combined, this process continues by combining other lesser disabilities with the resultant disability thus far. No rounding is done until the last disability has been combined. After the last disability has been combined, the result will be rounded to a percent divisible by 10, and combined values ending in 5 or greater will be adjusted upward and those ending in 4 or less adjusted downward.

The combined percentage for the combat-related disabilities will include bilateral factor adjustments whenever appropriate to the disabilities concerned.

In application, a combined rating of multiple disabilities is obtained as follows:

1. Subtract each disability percent from 100% to obtain the remaining efficiency.
2. Multiply the remaining efficiencies together.
3. Subtract the result from 100%.
4. Round to the nearest 10%, round up for 5% and above, down otherwise.

Example 1: Consider a member having 3 disabilities: one rated 50%, one rated 40%, and one rated 30%. If added together the total would be 120%. Instead, the member's combined rating is determined as follows:

1. The three disabilities leave efficiencies of 50%, 60%, and 70% respectively.
2. These multiply against each other as $50\% * 60\% * 70\% = 21\%$.
3. The disability is $100\% - 21\% = 79\%$.
4. Adjust this result upward to 80% combined disability.

Example 1-1: Now consider what happens if the Military Department determines that only the 40% and 30% disabilities are combat-related, then the member's combined disability rating for CRSC would be:

1. The two disabilities of 40% and 30% leave efficiencies of 60% and 70%.
2. These multiply against each other as $60\% * 70\% = 42\%$.
3. The disability is $100\% - 42\% = 58\%$.

4. Adjust this result upward to 60% combined disability rating.

VA Retroactive Increase: When the VA makes a retroactive increase in a member's VA disability compensation pertinent to a member's combat-related disabilities under CRSC, no retroactive amount will be paid under CRSC as there is no retroactive adjustment in retired pay for such increased compensation. Any increase affecting CRSC qualified disabilities in the current month requires that CRSC be recomputed. DFAS may coordinate payments with the VA to account for retroactive adjustments of VA entitlements by crediting one payment against the other in determination of amounts due the member so as to pay the member the re-determined entitlement, but no more.

RESPONSIBILITIES WITHIN DOD: In order to facilitate the implementation and administration of section 1413a of title 10, United States Code, each agency with responsibilities shall designate a point of contact to the Director of Compensation, Office of the Deputy Under Secretary of Defense (Military Personnel Management), or OSD Director of Compensation.

DIRECTOR OF COMPENSATION, OFFICE OF THE DEPUTY UNDER SECRETARY OF DEFENSE (MILITARY PERSONNEL POLICY):
The Director of Compensation shall:

- a. Serve as the central point of contact among all agencies that have implementation responsibilities and coordinate resolution of problems that might prevent timely payment of CRSC.
- b. Develop and maintain a CRSC application form.

- c. Provide assistance to the Military Departments in the interpretation of guidance and application requirements, to include the provision of examples to explain and compute CRSC.
- d. Provide advisory opinions upon request of a Board for Correction of Military Records.
- e. Collect information from the Military Departments to assess the consistency and uniformity of determinations under this program and pursue supplemental guidance as necessary to achieve reasonable uniformity.
- f. Collect information on entitlement to SMC and form a working group to propose a comprehensive method for making combat-related determinations on such compensation no later than June 1, 2004.

DEFENSE FINANCE AND ACCOUNTING SERVICE: DFAS shall:

- a. Receive determinations on combat-related disabilities from the Military Departments and coordinate that information with information provided by the Department of Veterans Affairs relating to such disabilities. DFAS will exchange such data with the VA as needed to support the continuing adjustment of CRSC payments, including the determination of when a member is rated as unemployable.

- b. Compute the CRSC amount payable based on the determinations of the Military Departments and data provided by the VA.
- c. Develop and implement standard accounting and administration policies needed to support payment of CRSC.
- d. Assist Services in their determinations of whether CRSC applicants meet Preliminary CRSC Criteria.
- e. Seek revisions to the VA/DoD MOU as appropriate to support this program.

MILITARY DEPARTMENTS: Each Department shall:

- a. Identify for DFAS a primary Point of Contact for CRSC funding issues. The POC must ensure DFAS has access to funds required to pay CRSC.
- b. Provide an address for members to submit applications for CRSC.
- c. Implement a review and determination process for the CRSC applications submitted by members retired from that Military Department.
- d. Report to DFAS all determinations regarding members entitled to CRSC in a manner prescribed by DFAS.
- e. Support DFAS with timely and accurate data on retirees of the Military Department.
- f. Provide timely correction of erroneous data or records.

- g. Refer issues raised in the administration of the program to the OSD Director of Compensation.
- h. Provide information to the OSD Director of Compensation requested in support of appeals and reviews of policy issues.
- i. Submit information and reports to the OSD Director of Compensation, as required herein or as later requested by the Director of Compensation.

ATTACHMENT 1-1: DETERMINATIONS OF COMBAT-RELATEDNESS

The following criteria, terms, definitions, explanations will apply to making combat-related determinations in the CRSC program.

Direct Result of Armed Conflict - The disability is a disease or injury incurred in the line of duty as a direct result of armed conflict. The fact that a member incurred the disability during a period of war or an area of armed conflict or while participating in combat operations is not sufficient to support a combat-related determination. There must be a definite causal relationship between the armed conflict and the resulting disability.

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 terrorists.

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.

While Engaged in Hazardous Service - Such service 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.

In the Performance of Duty Under Conditions Simulating War - In general 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, repelling, 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 sport activities.

Instrumentality of War - incurrence during an actual period of war is not required. However, there must be a direct causal relationship between the instrumentality of war and the disability. The disability must be incurred incident to a hazard or risk of the service.

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 instrumentalities 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.

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 material.

For example, if a member 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 (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, the injury would be considered the result of an instrumentality of war.

[LOGO]

DEPARTMENT OF DEFENSE

OFFICE OF THE UNDER
SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, DC 20301-4000

MEMORANDUM FOR ASSISTANT SECRETARY
OF THE ARMY (M&RA) ASSISTANT SECRETARY
OF THE NAVY (M&RA) ASSISTANT SECRETARY
OF THE AIR FORCE (MR) DIRECTOR, DEFENSE
FINANCE AND ACCOUNTING SERVICE

SUBJECT: Supplemental Guidance on Combat-
Related Special Compensation (CRSC)

Effective January 1, 2008, this memorandum supplements the implementing guidance for Combat-Related Special Compensation (CRSC), as issued by Principal Deputy, Under Secretary of Defense memoranda dated April 27, 2004 and May 21, 2003. The attached supplemental guidance is required as a result of enactment of section 641 of the National Defense Authorization Act for Fiscal Year 2008, Public Law 110-181, that made changes to the CRSC program (10 U.S.C. § 1413a). This change provides special rules for CRSC eligible retirees with fewer than 20 years of service who are retired under chapter 61 of title 10, United States Code. The change does not include a uniformed services Reserve Component retiree who receives retired pay for early retirement with physical disabilities under section 12731b of title 10, United States Code. Applications for eligibility for periods prior to January 1, 2008, will have eligibility determined under previously issued guidance.

Retired military members meeting the preliminary CRSC qualification criteria may apply to their parent Military Service immediately using DD Form 2860.

/s/ Michael L. Dominguez
Michael L. Dominguez
Principal Deputy

Attachment
As stated

cc:

Assistant Secretary of Defense (Reserve Affairs)

Joint Staff/J1

Commandant (CG-1), U.S. Coast Guard

Director, Office of Commissioned Corps

Force Management,

U.S. Public Health Service

Director, National Oceanic and

Atmospheric Administration Corps

Combat-Related Special Compensation (CRSC)
Section 1413a, Title 10, United States Code,
As Amended
Supplemental Program Guidance January 2008

GENERAL: Effective January 1, 2008, for applications on or after that date, this guidance supplements the PDUSS(P&R) Memoranda, dated April 21, 2004, and May 21, 2003. Applicants who were previously determined to be ineligible because they had not completed 20 years of creditable service must re-apply, unless the service concerned advises otherwise.

ENTITLEMENT: As of January 1, 2008, section 641 of the National Defense Authorization Act for Fiscal Year 2008 (NDAA FY08), Public Law 110-181, provided special rules for CRSC eligible retirees with fewer than 20 years of service, to include members who have waived their retired pay in order to receive VA disability compensation. This expanded authority includes both Chapter 61¹ disability retirees and Temporary Early Retirement Authority (TERA) retirees. However, a uniformed services Reserve Component retiree who receives retired pay for early retirement with physical disabilities under section 12731b of title 10, United States Code, is specifically excluded under section 641.

ENTITLEMENT EFFECTIVE DATE: Qualifying applicants who have completed at least 20 years of service creditable for purposes of computing the amount of retired pay or who are entitled to retired pay for non-regular (reserve) under section 12731 (specifically excluding 12731b) of title 10, United States Code, will have their CRSC entitlement

¹ 10 U.S.C. §§ 1201–1222.

determined under provisions in effect at the time of their first eligibility.

The effective date for CRSC applicants who qualify based upon the expanded authority under section 641 of the NDAA FY08, is either January 1, 2008, or the date of the qualifying VA disability award determined to be combat-related, whichever is later.

TEMPORARY EARLY RETIREMENT AUTHORITY (TERA) RETIREES: Otherwise qualifying applicants who are entitled to retired pay under the TERA authority of Public Law 102-484, § 4403, as amended, are now entitled to CRSC. The monthly amount of CRSC payable to qualifying TERA retirees shall not be reduced under the special rules for CRSC entitled retirees with less than 20 years of service which are applicable only to Chapter 61 retirees.

SPECIAL RULES FOR CHAPTER 61 DISABILITY RETIREES: The CRSC entitlement of qualifying applicants receiving retired pay based on Department of Defense assigned percentage of disability under Chapter 61 of title 10, United States Code, is subject to reduction up to the full CRSC amount. The CRSC reduction shall be the amount, if any, by which the Chapter 61 retiree's retired pay based on percentage of disability exceeds either the retired pay that would have been paid for 20 or more years of service, or, for those with less than 20 years of service, the longevity equivalent. This reduction represents the additional retired pay awarded by the Department solely by reason of the disability. It is duplicative of the disability compensation awarded by the Department of Veterans Affairs and therefore is applied to reduce the CRSC payment.

CHAPTER 61 DISABILITY RETIREES WITH 20 OR MORE YEARS OF SERVICE: Qualifying applicants who are receiving retired pay based on a percentage of disability under Chapter 61, who have 20 years or more service creditable for purposes of computing the amount of retired pay (see section 1208 of title 10, United States Code) and who initially apply for CRSC on or after January 1, 2008, shall have their CRSC entitlement reduced by the amount, if any, that the retired pay under Chapter 61 exceeds the amount of retired pay to which the member would have been entitled under any other provision of law based on the member's service in the uniformed services if the member had not been retired under Chapter 61. Applicants who accepted the Career Status Bonus will have the reduced amount calculated based on retired pay that would otherwise have been computed under section 1409(b)(2) of title 10, United States Code.

CHAPTER 61 DISABILITY RETIREES WITH FEWER THAN 20 YEARS OF SERVICE: Qualifying applicants who are receiving retired pay based on a percentage of disability under Chapter 61, who have fewer than 20 years of service creditable for purposes of computing the amount of retired pay (see section 1208 of title 10, United States Code) and who initially apply for CRSC on or after January 1, 2008, shall have their CRSC entitlement reduced by the amount, if any, resulting from the following formula:

Member's disability retired pay under chapter 61 less the amount equal to $2\frac{1}{2}$ percent times the years of creditable service multiplied by the member's applicable retired pay base.

The years of creditable service are those described in section 1208 of title 10, United States Code. The

applicable retired pay base for an applicant who first became a member before September 8, 1980, is the pay base described in the table under section 1406(b)(1) of title 10 United States Code, for a member entitled to disability retired pay. The retired pay base for an applicant who first became a member on or after September 8, 1980, is the member's high 36 months of basic pay as determined under section 1407 of title 10, United States Code.

In some cases, where the Chapter 61 disability retired pay is based on a relatively high percentage of disability and the years of creditable service are relatively few, the computation may result in little or no CRSC due.

CHAPTER 61 DISABILITY RETIREE OUT-YEAR DEDUCTIONS: In all cases, once established (based on date the member was first placed on either the Permanent or Temporary Disability Retirement List), the CRSC reduction amount will be increased by each increase in the retired pay cost of living allowance (COLA). It will not be recomputed using current pay tables unless the member otherwise qualifies for recomputation of retired pay by reason of recall to duty or correction of official records.

CLAIMS FOR CRSC: Applications must be submitted using a DD Form 2860 in accordance with prescribed procedures and criteria. Members may submit an application for CRSC at any time. To the extent otherwise authorized by law, an eligible, qualified applicant will be paid retroactive CRSC for any month after May 2003, in which all conditions of eligibility were met.