

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

Simon A. Soto, on behalf of himself and all other)
individuals similarly situated,)
)
) Plaintiff,)
) No.
 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
- 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).

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/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.

- 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.
- 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

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.*

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.*

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.

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

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