

**DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2003-046

XXXXXX, XXXXX X.
xxx xx xxxx, XXXX

FINAL DECISION

GARMON, Attorney-Advisor:

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was docketed on March 7, 2003 upon the BCMR's receipt of the applicant's request for correction.

This final decision, dated December 18, 2003, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant asked the Board to correct his record to show that, prior to being retired due to a physical disability, he was advanced to xxxxx, thereby entitling him to the corresponding difference in disability retirement pay.

APPLICANT'S ALLEGATIONS

The applicant alleged that he was eligible to be advanced to xxx on October 1, 19xx but never received this promotion because he was retired on September 13, 19xx due to a physical disability. He asserted that at the time he retired, he had 21 days of unused leave,¹ which he believes he "should have been afforded the opportunity to use...." He alleged that had he been allowed to use the available leave, he would have been promoted to xxx and retired at the higher rank and pay grade.

¹ The applicant had previously sold 60 days of annual leave, the maximum amount allowed by law, but on the date of his retirement, he still had an unused leave balance.

With respect to the untimeliness of his application, the applicant asserted that the Board should find it in the interest of justice to consider his claim because he only recently learned that “there was an avenue for [him] to seek justice in this matter.” In support of his application, the applicant provided a copy of his medical records.

Applicant’s Statement

The applicant also submitted a six-page statement, dated May 18, 19xx, describing what transpired on the day he had a heart attack, March 21, 19xx. The applicant stated that when he arrived at XXXXX at 7:00 a.m., he felt “a sharp pain right in the center of [his] chest.” He stated that as the pain increased, he decided to visit the medical clinic for assistance. There, he stated, a nurse took his vital signs, which appeared to be normal. He stated that he was given Mylanta (an anti-acid medicine) and advised to return to the clinic in one hour if he felt no relief from his symptoms. He stated that he returned to the clinic about 15 minutes later, in more pain and complaining that “something was wrong.” At that time, he stated, he informed the nurse that he had a family history of heart disease.

The nurse telephoned Dr. T in the XXXX clinic who stated that the applicant should have an EKG at the doctor’s location. The applicant told the nurse that he was incapable of driving, and in response, he was advised to take the shuttle bus. He stated that in hindsight, he should have been transported by ambulance but at that time believed that a person his age could not have heart problems. When he arrived at the DOT clinic, he was immediately seen by Dr. T and instructed to proceed to the EKG laboratory. There, the applicant stated, he was required to wait until the lab technician finished a test in progress and tested another member of higher rank who had arrived before him. He stated that he waited for approximately 30 minutes. By the time he was connected to the EKG machine, he stated, pain had radiated to his shoulders and arms. He stated that the readings taken showed that he was having a myocardial infarction (a heart attack). He stated that the technician ran for the assistance of Dr. T, who confirmed the readings and told her to call 911 for an ambulance.

The applicant stated that he was started on an IV and given a nitroglycerin pill but it had no effect. An ambulance crew arrived; gave him nitroglycerin that was effective; and transported him to XXXX Medical Center. He arrived at about 9:50 a.m., and was taken to the Catheter Lab for an angioplasty procedure. During the procedure, treating cardiologists found it necessary to insert three stents into his left anterior descending artery to keep the artery open.

The applicant stated that as a result of the length of time it took for him to receive treatment, a large portion of his heart went into shock. He stated that because his heart

rate was about 165 beats per minute and was not pumping enough blood, an aortic balloon pump was used to assist his heart in pumping blood.

The applicant stated that shortly after midnight, "on Sunday morning [March 24, 19xx] ... it was like someone threw a switch." He stated that his blood pressure, heart rate, and the rest of his vital signs started to return to normal.

SUMMARY OF THE APPLICANT'S RECORD

On October 22, 19xx, the applicant enlisted in the Coast Guard as a seaman recruit. He was advanced to xxxx on July 1, 19xx.

On March 21, 19xx, the applicant sustained an acute myocardial infarction (heart attack). On the same date, he was admitted to xxxxxx Medical Center for an urgent coronary angiogram and coronary intervention. He spent eight days at the medical center for treatment of his condition and was subsequently referred to the xxxxx Medical Center for follow-up care and cardiac rehabilitation.

On April 26, 19xx, a xxxxx Medical Center medical board convened in the applicant's case. That board diagnosed the applicant with the following:

1. Coronary artery disease
2. Status post anterior wall myocardial infarction
3. Congestive heart failure resolved
4. Status post PTCA with stent placement
5. Hypertriglyceridemia
6. Indigestion

The medical board recommended that the applicant be found fit for limited duty for a period of six months, expiring on October 23, 19xx, with the following limitations: no heavy lifting, no PRT, and only routine exercise.

On June 6, 19xx, a senior medical officer of the Coast Guard concurred in the medical board findings. On June 10, 19xx, the applicant returned to work on light duty status while still enrolled in a cardiac rehabilitation program.

By memorandum dated February 27, 19xx, the Commander of Coast Guard Personnel Command (CGPC) published the names of all personnel "eligible for advancement to pay grade E-5 through E-9, as determined by final multiple rankings which include the May and November 19xx Servicewide Exam (SWE)." The eligibility list for xxxxx was effective from January 1, 19xx through December 31, 19xx. The memorandum went on to explain the following:

- a. ... Cutoff points on each list will be indicated by an asterisk to the left of the last person placing above the cutoff. Those personnel at or above the asterisk are expected to be advanced during the calendar year 19xx.
- b. Personnel whose names appear at or above the cutoffs ... will not have to re compete in the same examination ...

The above-noted cutoff point listed on the xxxxx eligibility list was number xx. The applicant placed at number xx on the list, below the cutoff.

On June 12, 19xx, the Central Physical Evaluation Board (CPEB) considered the applicant's medical board held on January 10, 19xx and found him unfit to perform the duties of his grade or rate due to "arteriosclerotic heart disease: following typical coronary occlusion, ordinary manual labor feasible." The CPEB assigned him a thirty percent disability rating and recommended that the applicant be temporarily retired. The applicant concurred in the CPEB findings.

On July 21, 19xx, the Coast Guard released a general announcement which stated that members who placed at numbers xx and xx on the xxx eligibility list would be advanced on August 1, 19xx.

On August 6, 19xx, the findings and recommendations of the CPEB were approved by the Commander of CGPC.

On September 13, 19xx, the applicant was placed on the temporary disability retired list (TDRL) and retired honorably from the Coast Guard for a "temporary physical disability." He was assigned an RE-3P reenlistment code (eligible for reenlistment except for disqualifying factor (e.g., physical disability)) and an SKF separation code, which denotes a "mandatory retirement required by law due to temporary physical disability."

On September 16, 19xx, the Coast Guard released a general announcement which stated that members who placed at numbers xx, xx, xx, xx, xx, and xx on the xxx eligibility list would be advanced on October 1, 19xx.

In January 19xx, the applicant was evaluated for his first periodic physical reevaluation on the TDRL. The TDRL examination report states that the applicant "was asymptomatic" and that "[m]yocardial perfusion imaging revealed evidence of scarring in the anterior wall which was unchanged from his previous thallium treadmill test performed on 15 May 19xx." The applicant was diagnosed with coronary artery disease, status post wall myocardial infarction in 19xx; hyperlipidemia; and psoriasis.

On May 17, 19xx, the CPEB considered the applicant's first periodic physical reevaluation and found him unfit for duty due to "arteriosclerotic heart disease." The

CPEB assigned him a thirty percent disability rating and recommended that the applicant be permanently retired. On June 15, 19xx, the applicant concurred in the CPEB findings.

On July 7, 19xx, the Commander of CGPC approved the findings and recommendations of the CPEB. He ordered that the applicant be removed from the TDRL and permanently retired, effective August 4, 19xx. At the time of his separation, the applicant was serving in the grade of XX and was credited with 17 years, 6 months, and 3 days of active duty service.

APPLICABLE LAW

Personnel Manual (COMDTINST M1000.6A)

Article 12.C.15.f. of the Personnel Manual in effect in 19xx governs the grade or rate in which a Coast Guard member having a physical disability retires. It states that members who retire because of a physical disability or are placed on the TDRL are entitled to the grade or rate equal to the highest of the following:

1. The grade or rate in which the member served on the date his or her name was placed on the TDRL or, if his or her name was not carried on that list, on the date when the member retires.
2. The highest grade or rate in which the member served satisfactorily, as the Commandant determines.
3. The permanent regular or Reserve grade or rate to which the member would have been promoted had it not been for the physical disability for which he or she retired and which was found to exist as a result of the member's physical examination for promotion.

* * *

Article 17.B.6.a. of the Personnel Manual provides the following with respect to the effective date of a member's disability retirement or separation. It states as follows:

When temporary or permanent disability retirement or disability separation is directed, the effective date of such retirement or separation normally is 20 working days following the date of Commander, Coast Guard Personnel Command's action. However, the separation or retirement date may be delayed for not more than 24 months if a member has requested, retention on active duty in accordance with the provisions of Article 17.A. and the member's request has been approved. In all other areas in which requests for retention on active duty have been approved, final action will be held in abeyance until there has been final reconsideration of recommended findings and disposition as provided for in Article 17.A.1.g.

VIEWS OF THE COAST GUARD

On July 18, 2003, the Chief Counsel of the Coast Guard submitted an advisory opinion to which he attached a memorandum on the case prepared by CGPC. In adopting the analysis of CGPC, the Chief Counsel recommended that the Board deny the applicant's request for relief.

The Chief Counsel argued that the applicant submitted an untimely application and has provided the Board with no reason why it is in the interest of justice to excuse the delay. He alleged that the applicant's request, dated January 18, 2003, was submitted more than five years after he was placed on the TDRL. He argued that the three-year filing requirement under 33 C.F.R. § 52.22 should not be waived because the applicant asserted that he "just recently learned" about the BCMR.

The Chief Counsel argued that a service member "has no absolute right to remain in the service" and "may be appropriately and administratively discharged" prior to the end of his or her enlistment, provided that all applicable laws and regulations are complied with. Giglio v. United States, 17 Cl. Ct. 160, 166 (1989); Rowe v. United States, 167 Ct. Cl. 468, 472 (1964), *cert. denied*, 380 U.S. 961 (1965); Keef v. United States, 185 Ct. Cl. 454, 463 (1963); McAuley v. United States, 158 Ct. Cl. 359, 364 (1962).

The Chief Counsel argued that although the applicant claims that he would have been promoted to an XX on October 1, 19xx, that date is irrelevant to the determination of his proper disability retirement pay grade. He argued that in order to ensure that a disabled member is given the highest possible grade on retirement, the Personnel Manual provides several means for determining a member's pay grade on retiring due to a physical disability. However, he argued, neither of the applicable alternative methods justifies the applicant's promotion to an XX.

The Chief Counsel stated that under Article 12.C.15.f.1. of the Personnel Manual, the dispositive date that should be used to determine the applicant's disability rank is September 14, 19xx—the date his name was placed on the TDRL. He argued that because the applicant's name was placed on the TDRL before the Coast Guard decided to advance members on the advancement eligibility list below the "expected" cutoff point of xx on September 16, 19xx, the applicant was never selected for promotion before his separation.

The Chief Counsel argued that the provisions of Article 12.C.15.f.3. are inapplicable to the applicant's case because the last phrase in that article which requires that the disability have been discovered as the result of a "physical examination for promotion." He stated that the article is inapplicable because the applicant's disability was not discovered during a promotion physical. He asserted that CGPC has consistently interpreted the phrase "at the grade or rated to which the member would

have been promoted,” found in Article 12.C.15.f.3., to mean those members whose names appear at or above the cutoff for advancement on the advancement eligibility list. Consequently, he argued, the relevant date for determining the applicant’s retirement pay grade is August 8, 19xx—when the applicant was “below the cut on the relevant promotion list.”

The Chief Counsel concluded by arguing that even under Article 12.C.15.f.1. of the Personnel Manual, the applicant was never selected for promotion prior to his separation. He asserted that because the applicant’s name was placed on the TDRL prior to the date on which the Coast Guard decided to advance members below the expected cutoff, the applicant has not proved any error in the grade in which he was retired.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On July 21, 2003, the Chair sent a copy of the views of the Coast Guard to the applicant and invited him to respond within 30 days. The Board received no response.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's military record and submissions, the Coast Guard's submission, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552.

2. The applicant was retired from the Coast Guard on August 4, 19xx. The alleged error or injustice was or with reasonable diligence should have been discovered in August 19xx, when the final action in his case became effective. The application for correction in this case is dated January 18, 2003. Title 10 U.S.C. § 1552(b) provides that applications for correction of military records must be filed within three years after the discovery of the alleged error or injustice. Therefore, the application was untimely.

3. Failure to file within three years may be excused by the Board, however, if it finds that it would be in the interest of justice to do so. The Board’s regulations state that “[i]f an application is untimely, the applicant shall set forth reasons in the application why its acceptance is in the interest of justice. An untimely application shall be denied unless the Board finds that sufficient evidence has been presented to warrant a finding that it would be in the interest of justice to excuse the failure to file timely.” 33 C.F.R. § 52.22. The applicant asked that the Board waive the statute of limitations because he “only recently discovered” that there was an avenue available to correct the alleged error or injustice in his record. However, the Board is not persuaded that his

reason satisfactorily demonstrates by competent evidence that it would be in the interest of justice to excuse the failure to apply within the time allotted.

4. In addition to examining the length of delay and the reasons for it, the Board must also perform a cursory review of the merits to determine the likelihood of success on the merits of the claim. See Dickson v. Secretary of Defense, 68 F.3d 1396 (D.D.C. 1995).

5. The applicant asked that his record be corrected to show that he was advanced to xxx because he “was to be advanced” to that rank on October 1, 19xx, and would have been retired in that higher rank and pay grade. Under Article 12.C.15.f. of the Personnel Manual, the grade in which a member with a physical disability is retired is the highest grade to which a member is entitled according to the alternatives provided under this provision.

6. In the applicant’s case, the Board notes that he was eligible for promotion to EMC. However, the Board finds that the applicant was not a member “who would have been promoted” because when he was placed on the TDRL on September 14, 19xx, he was not at or above the established cutoff for xxx. Moreover, because the physical examination that the applicant received in connection with his medical board did not constitute a “physical examination [for the purpose of qualifying for] promotion,” the record fails to support a finding that the applicant’s disability was “found to exist” as a result of a physical examination for promotion within the meaning of Article 12.C.15.f.3. of the Personnel Manual.

7. With respect to Article 12.C.15.f.2. of the Personnel Manual, the applicant would have to show that he actually served as an xxx. Given that the applicant never served as an xxx prior to being retired, advancement to that rank under Article 12.C.15.f.2. would be inappropriate. Furthermore, the applicant cited no regulation or statute that would otherwise entitle him to a higher grade. Therefore, in accordance with Article 12.C.15.f.1., the Board finds that the highest grade to which the applicant is entitled is xxx (pay grade xx), the grade in which he was retired and served until September 14, 19xx, when his name was placed on the TDRL.

8. The applicant’s allegation that he should have been allowed to use his 21 days of available leave is likewise not persuasive. According to the Personnel Manual, a separation or retirement date is normally established as 20 working days following the date of CGPC’s action but “may be delayed ... if a member has requested retention and the member’s request has been approved.” However, the record fails to indicate that the applicant requested such a delay or that such a request would have been approved. Consequently, the Board finds no evidence in the applicant’s record to prove that the Coast Guard erred in not promoting him to xxx before he was retired for a physical disability.

9. Accordingly, the Board finds that it is not in the interest of justice to waive the statute of limitations in this case. The applicant's request should be denied for untimeliness because it lacks merit.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of XXX XXXXX X. XXXXX, xxx xx xxxx, USCG, for the correction of his military record is hereby denied.

Julia Andrews

George J. Jordan

Kathryn Sinniger