

**DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 1999-043

FINAL DECISION

ANDREWS, Attorney-Advisor:

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was docketed on February 26, 1999, upon the BCMR's receipt of the applicant's completed application.¹

This final decision, dated June 8, 2000, is signed by the three duly appointed members who were designated to serve as the Board in this case.

REQUEST FOR RELIEF

The applicant, a xxxxxxxxxxx who retired from the Coast Guard on November 1, 199x, asked the Board to change his retirement to a physical disability retirement.

APPLICANT'S ALLEGATIONS

The applicant alleged that at the time he retired, he suffered from pustular psoriasis on his feet and had recently undergone back surgery, a spinal fusion laminectomy of L4 and L5 with bone grafting, at xxxxxx. He alleged that prior to his release from xxxxxxxx, he was told he would have to return for two follow-up appointments. He was told that he would be notified later to schedule the

¹ The applicant filed his application on January 4, 1999. It was completed upon the receipt of his military records on February 26, 1999. He subsequently requested two 90-day extensions of the time in which to respond to the Coast Guard's advisory opinion. Therefore, the 10-month deadline for his case expires on June 20, 2000.

follow-up visits. The applicant alleged that he was retired before he was ever contacted for the appointments.

The applicant alleged that since that time he has lived in agonizing pain. He alleged that the Department of Veterans Affairs (DVA) found him to have been 50 percent disabled since the date of his retirement, 40 percent due to his back problem and 10 percent due to his psoriasis. He alleged that he has also recently "been diagnosed with two pre-existing conditions: shortness of breath and an eye problem called floaters, which will eventually require surgery."

The applicant alleged that he did not discover he should have been given a physical disability retirement until December 1998, when someone in the Coast Guard told him so.

SUMMARY OF THE RECORD

The applicant submitted his military and DVA medical records in support of his application. Records from the 1970s and 1980s show that he suffered from lower back pain and pain and numbness in his legs.

12/5/9x The applicant underwent xrays and testing due to his chronic lower back pain. He was diagnosed with "displacement of the posterior longitudinal ligament," "hypertrophy of the ligamentum flavum and apophyseal fact joints," and "spinal stenosis at the L4-L5 level."

12/12/9x The applicant sought treatment for pustular lesions on his feet and was diagnosed with pustular psoriasis.

2/25/9x The applicant sought treatment for pustular lesions on his feet, which he reported had existed for about three months.

4/24/9x The applicant underwent a physical examination in anticipation of his scheduled retirement on November 1, 199x. The report of the applicant's physical examination (SF-88) indicates that Dr. x, a physician for the U.S. Public Health Service, found that the applicant had pustules on his feet and decreased flexion and extension in his spine. A CAT scan revealed that the applicant had spinal stenosis in the lumbar region (L7 to L5) secondary to a central herniated disc. Dr. x noted that the applicant had been evaluated by an orthopedic surgeon at xxxxx and was scheduled to have corrective surgery in July.

7/26/9x The applicant was admitted to xxxxxxxxxxxxxxxxxxxxxxxx for surgery. He reported a history of increasing chronic lower back pain since

197x, when he was involved in a boat rescue that required heavy lifting. He also reported shooting pains in his left leg and hypesthesia (decreased sensitivity) in his right thigh. A physician found that he had a full range of motion, but his back was "tender in the midline at L4 to S1." Xrays indicated that he had "spondylosis at the L4 L5 disc space. It is also noted to be hypertrophic facets bilaterally."

8/5/9x Prior to the applicant's discharge, Dr. y, in the Orthopedic Service at xxxxxxxxxxxx, reported that the applicant had undergone a

posterior spinal fusion from the level of L4 to L5. ... The patient tolerated the procedure well and had a fairly normal post operative course. He was ambulating on his 3rd day. A Dermatology Consult was obtained regarding the lesions on his feet. He was rendered the diagnosis of palma plantar pustulosis of both feet. ... At the time of discharge, the patient did not complain and is ambulating with difficulty. He reports that his leg pain has disappeared as so with the sensory changes in his right lower extremity. He's being discharged to his duty station at the Coast Guard in xxxxxxx with the recommendation for 30 days of convalescent leave. ... The patient is instructed to wear the Jewel extension brace with day to day activity and whenever he is up and walking about. It is recommended that he be placed on 30 days of convalescent leave from his home duty station. ... He is to follow-up in the Orthopedic Spine Clinic at the end of his convalescent leave for a post operative evaluation.

8/12/9x The applicant had his surgical staples removed by a doctor at the Coast Guard base in xxxxxx. He complained of "mild incision tenderness."

9/27/9x Dr. x added a note to the applicant's SF-88 indicating that in July 199x, he had undergone "posterior spinal fusion L4-L5 with steel plate instrumentation" at xxxxxxxx. Dr. x wrote that the applicant's "post operative course has been uneventful" and recommended that he have an "orthopedic follow-up" in January 199x. He marked on the SF-88 that the applicant was qualified for retirement.

9/30/9x The applicant was informed of Dr. x's findings and asked to sign a statement indicating his agreement or disagreement with the findings. The applicant signed a statement indicating that he agreed with the doctor's findings and did not wish to submit a statement in rebuttal.

10/1/9x A health services technician in the administrative office at the applicant's command reviewed the SF-88 and marked on it that the applicant did "meet the physical standards for ... retirement ... as pre-

scribed in Section 3-C of the CG Medical Manual (COMDTINST M6000.1).”

11/1/9x The applicant was retired from the Coast Guard, having completed over 20 years of active duty.

11/21/9x The applicant applied for disability compensation from the DVA.

2/28/9x The DVA granted the applicant service connection for his back problems and psoriasis. He received a 20-percent disability rating for his back problems as of the date of his retirement and a 0-percent disability rating for his psoriasis. The DVA’s report states the following:

General medical examination revealed lumbar forward flexion 75 degrees, backward 20 degrees, with 20 degrees lateral defluxion. ... For three months following the July 19, 199x, surgical procedure, he reported improvement. However, in the last three months, he has suffered a recurrence of symptoms, including back stiffness with pain radiating to the legs. ...

Examination revealed bilateral multiple petechiae and pustules, with scaling in the medial arches of the feet in the plantar surfaces. ... General medical examination revealed some evidence of scabbing on the soles of both feet.

3/25/9x The applicant’s DVA claim was reopened. Based on outpatient treatment reports from December 24, 199x, to March 30, 199x, his disability rating for his back was increased to 40 percent and his disability rating for his psoriasis was increased to 10 percent, for a combined total of 50 percent. In addition, these ratings were back-dated to the date of his retirement because the conditions were determined to have been chronic and continuous since his release from military service.

8/6/9x Based on outpatient treatment reports from the DVA Medical Center in xxxxx, the DVA renewed the applicant’s 40-percent disability rating for his back problem and 10-percent disability rating for his psoriasis, for a combined disability rating of 50 percent.

VIEWES OF THE COAST GUARD

Advisory Opinion of the Chief Counsel

On November 5, 1999, the Chief Counsel of the Coast Guard recommended that the Board deny the applicant the requested relief.

The Chief Counsel first argued that the Board should deny relief because the applicant “failed to prove that the Coast Guard committed either an error or

an injustice that would merit the waiver of the Statute of Limitations.” According to the Chief Counsel, the applicant “was or should have been aware of ... the nature of his discharge and the particulars of his medical condition ... no later than the date of his retirement. Therefore, Applicant submitted his application more than five (5) years after the Statute of Limitations expired.” Furthermore, the Chief Counsel argued, under *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995), a cursory review of the evidence indicates that the applicant has failed to “present[] sufficient evidence to warrant a finding that it would be in the interest of justice to excuse the failure to file [his application to the BCMR] timely.”

Should the Board decide to waive the statute of limitations, the Chief Counsel argued that it should deny relief for lack of merit. Citing Article 1.A. of the PDES Manual, he stated that “[t]he law that provides for physical disability retirement or separation and associated benefits (Chapter 61, Title 10, United States Code) is designed to compensate members whose military service is terminated due to a service connected disability, and to prevent the arbitrary separation of individuals who incur disabling injuries.” Furthermore, he argued, under 10 U.S.C. § 1201 and Article 2.C.2.a. of the PDES Manual, “[t]he sole basis for a physical disability determination in the Coast Guard is unfitness to perform duty.” Article 2.C.2.b. of the PDES Manual, he stated, expressly “prohibit[s] use of this authority to bestow compensation benefits on those who are retiring or separating and have continued on unlimited active duty while tolerating impairments that have not actually precluded Coast Guard service.” The Chief Counsel further argued that “strong evidence” of error or injustice would be required to rebut the legal presumption that officers have carried out their duties correctly, lawfully, and in good faith. *Arens v. United States*, 969 F.2d 1034, 1037 (1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

Under Article 2.C.2.b.1., the Chief Counsel argued, “[c]ontinued performance of duty until a service member is scheduled for separation or retirement for reasons other than physical disability creates a presumption of fitness for duty. ... If the evidence establishes that service members adequately performed the duties of their office, grade, rate or rating until the time they were referred for physical evaluation, they might be considered fit for duty even though medical evidence indicates they have impairments.”

The Chief Counsel stated that the applicant “has not presented any evidence that he was unable to fulfill his duties while on active duty prior to and coincident with his voluntary retirement.” The applicant’s “record does not refute the presumption that he performed his duties in a highly satisfactory manner during his career up to and including the time of his retirement.” The Chief Counsel alleged that the applicant’s “back condition did not prevent [him] from

adequately fulfilling his duties in his assigned grade or position. Therefore, there was no basis to evaluate him under PDES for a physical disability retirement nor was there any legal basis to medically retire the Applicant.”

The Chief Counsel also argued that, under *Lord v. United States*, 2 Ct. Cl. 749, 754 (1983), disability ratings awarded by the DVA “are not determinative of the issues involved in military disability retirement cases. ... The DVA determines to what extent a veteran’s earning capacity has been reduced as a result of specific injuries or combinations of injuries. The Armed Forces, on the other hand, determine to what extent a member has been rendered unfit to perform the duties of his rate and specialty ... because of a physical disability.” The Chief Counsel alleged that applicant’s DVA rating does not prove that he was unfit to perform his assigned duties when he was retired in 199x. The Chief Counsel concluded that the applicant’s voluntary retirement was neither erroneous nor unjust and that “[a]ny long-term diminution in his earning capacity attributable to his military service is properly a matter for determination by the [DVA].”

APPLICANT’S RESPONSE TO THE COAST GUARD’S VIEWS

On November 9, 1999, the BCMR sent the applicant a copy of the Chief Counsel’s advisory opinion and invited him to respond within 15 days. The applicant requested two 90-day extensions and responded on April 12, 2000.

The applicant alleged that one of the people who signed his “discharge physical” just two days before his retirement told him that he should have his case reviewed by a medical board.

APPLICABLE STATUTES AND REGULATIONS

Disability Retirement Statute

Under 10 U.S.C. § 1201(a), “[u]pon a determination by the Secretary concerned that a member [entitled to basic pay] is unfit to perform the duties of the member’s office, grade, rank, or rating because of physical disability incurred while entitled to basic pay ... the Secretary may retire the member, with retired pay computed under section 1401 of this title, if the Secretary also makes the determinations with respect to the member and that disability specified in subsection (b).”

Provisions of the Personnel Manual (COMDTINST M1000.6A)

Article 12.B.6.a. requires enlisted members to undergo a physical examination at least six months prior to their retirement. Article 12.B.6. also provides the following:

b. When the physical examination is completed and the member is found to be physically qualified for separation, the member will be so advised and will be required to make a signed statement as to agreement or disagreement with the findings. ...

c. When a member makes an objection to the findings of being physically qualified for separation, Standard Form 88 together with the written objections of the member concerned will be forwarded immediately to Commandant ... for review. If necessary the member may be retained in service beyond the date of expiration of enlistment under authority of article 12-B-11i. ...

d. When disqualifying physical or mental impairments are found upon examination for separation, the procedures outlined herein shall be followed:

• • •

(3) If the member ... is being discharged for reasons other than expiration of enlistment, and the physical or mental impairment is deemed to be of a permanent nature, a medical board shall be held in accordance with chapter 17 and the member shall be retained in service in accordance with article 12-B-11i.

Provisions of the Medical Manual (COMDTINST M6000.1B)

According to Article 3.B.3.a.(1) of the Medical Manual, during the medical examination a member must undergo prior to separation, “the examiner shall consult the appropriate standards of this chapter to determine if any of the defects noted are disqualifying for the purpose of the physical examination.” Article 3.F. lists medical conditions that “are normally disqualifying” for administrative retirement from the Service. Persons with “listed conditions or defects (and any other not listed) considered disqualifying shall be referred to an Initial

Medical Board" Among those conditions listed in Article 3.F. are extensive, uncontrollable psoriasis and a herniated disc with "[m]ore than mild symptoms following appropriate treatment or remediable measures, with sufficient objective findings to demonstrate interference with the satisfactory performance of duty."

According to Article 3.B.5., which is entitled "Objection to Assumption of Fitness for Duty at Separation,"

[a]ny member undergoing separation from the service who disagrees with the assumption of fitness for duty and claims to have a physical disability as defined in section 2-A-38 of COMDTINST M1850.2 (series), Physical Disability Evaluation System, shall submit written objections, within 10 days of signing the Chronological Record of Service (CG-4057), to Commander [Military Personnel Command]. . . .

. . . Commander [Military Personnel Command] will evaluate each case and, based upon information submitted, take one of the following actions:

- (1) find separation appropriate, in which case the individual will be so notified and the normal separation process completed;
- (2) find separation inappropriate, in which case the entire record will be returned and appropriate action recommended; or
- (3) request additional documentation before making a determination.

According to Article 3.B.6., which is entitled "Separation Not Appropriate by Reason of Physical Disability,"

[w]hen a member has an impairment (in accordance with section 3-F of this manual) an Initial Medical Board shall be convened only if the conditions listed in paragraph 2-C-2.(b) [of the PDES Manual] are also met. Otherwise the member is suitable for separation.

Article 3.F.1.c. of the Medical Manual states the following:

Fitness for Duty. Members are ordinarily considered fit for duty unless they have a physical impairment (or impairments) which interferes with the performance of the duties of their grade or rating. A determination of fitness or unfitness depends upon the individual's ability to reasonably perform those duties. Members considered temporarily or permanently unfit for duty shall be referred to an Initial Medical Board for appropriate disposition.

Provisions of the PDES Manual (COMDTINST M1850.2B)

The PDES Manual governs the separation of members due to physical disability. Article 2.C.2. of the PDES Manual states the following:

b. The law that provides for disability retirement or separation (Chapter 61, Title 10, U.S. Code) is designed to compensate members whose military service is terminated due to a physical disability that has rendered the member unfit for continued duty. That law and this disability evaluation system are not to be misused to bestow compensation benefits on those who are voluntarily or mandatorily retiring or separating and have theretofore drawn pay and allowances, received promotions, and continued on unlimited active duty status while tolerating physical impairments that have not actually precluded Coast Guard service. The following policies apply.

(1) Continued performance of duty until a service member is scheduled for separation or retirement for reasons other than physical disability creates a presumption of fitness for duty. This presumption may be overcome if it is established by a preponderance of the evidence that:

(a) the service member, because of disability, was physically unable to perform adequately the duties of office, grade, rank or rating; or

(b) acute, grave illness or injury, or other deterioration of the member's physical condition occurred immediately prior to or coincident with processing for separation or retirement for reasons other than physical disability which rendered the service member unfit for further duty.

(2) Service members who are being processed for separation or retirement for reasons other than physical disability shall not be referred for disability evaluation unless their physical condition reasonably prompts doubt that they are fit to continue to perform the duties of their office, grade, rank or rating.

c. If the evidence establishes that service members adequately performed the duties of their office, grade, rank or rating until the time they were referred for physical evaluation, they might be considered fit for duty even though medical evidence indicates they have impairments.

• • •

i. The existence of a physical defect or condition that is ratable under the standard schedule of rating disabilities in use by the [Department of Veterans Affairs] does not of itself provide justification for, or entitlement to, separation or retirement from military service because of physical disability. Although a member may have physical impairments ratable in accordance with the VASRD, such impairments do not necessarily render the member unfit for military duty. . . .

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 submissions, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code. The application was timely.

2. An application to the Board must be filed within three years after the applicant discovers the alleged error in his record. 10 U.S.C. § 1552. The record indicates that the applicant knew or should have known the terms of his retirement when he signed and received his separation form, DD 214, in 199x. Thus, his application was untimely by more than four years.

3. Pursuant to 10 U.S.C. § 1552, the Board may waive the three-year statute of limitations if it is in the interest of justice to do so. To determine whether it is in the interest of justice to waive the statute of limitations, the Board should conduct a cursory review of the merits of the case. *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992). Because a cursory review of the applicant's records indicates that he underwent an operation on his spine three months prior to his retirement and the DVA has assigned him a 50-percent disability rating since the date of his retirement, the Board finds that it is in the interest of justice to waive the statute of limitations in this case.

4. According to Article 3.F. of the Medical Manual, if a member is found to have a "disqualifying" physical impairment during a medical examination, a medical board "shall" be held to determine the member's disposition. However, Article 3.B.6. states that the Coast Guard shall convene a medical board for members with disqualifying impairments who are being separated for reasons other than a disability only if the requirements of Article 2.C.2.b. of the PDES Manual are met. That article requires members to prove by a preponderance of the evidence that they are not fit for duty because of a disability. It also states that members who are being processed for separation for reasons other than physical disability shall not be referred to a medical board "unless their physical condition reasonably prompts doubt that they are fit to continue to perform the duties of their office, grade, rank or rating." The record indicates that the applicant was processed for retirement in 199x because he had completed over 20 years of active service and not because he was physically unable to perform his duties. Therefore, the Board finds that, to prove that the Coast Guard erred by not convening a medical board to evaluate him for a disability retirement, the applicant must prove that, at the time of his retirement, he had a disqualifying physical impairment which rendered him unfit for duty or his physical condition reasonably prompted doubt as to his fitness for duty.

5. The record indicates that the applicant suffered from psoriasis and a herniated disc while on active duty. Depending on how severe these two conditions are, they may be considered "disqualifying" physical impairments and require a member's evaluation by a medical board. COMDTINST M6000.1B, Article 3.F. The applicant's physician had examined him and was fully aware of these two conditions when he found the applicant medically qualified for an administrative retirement on September 27, 199x. Absent strong evidence to the

contrary, Coast Guard officers are presumed to have executed their duties correctly, lawfully, and in good faith. See *Arens v. United States*, 969 F.2d 1034, 1037 (1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979). Moreover, although the Board has authority to correct records reflecting the medical decisions of physicians, it should give great deference to the professional assessment of a physician who actually examined a member at the pertinent time in question.

6. On September 30, 199x, a month before his retirement, the applicant signed a statement indicating that he agreed with his physician's assessment that he was fit for duty and therefore qualified for an administrative retirement. Moreover, the applicant presented no evidence to indicate that he was unable to perform his job during the last two months before his retirement.

7. The record indicates that the applicant's initial post-operative recovery was "uneventful." On September 27, 199x, his physician examined him and recommended that he have an "orthopedic follow-up" in January 199x. There is no indication that the applicant sought medical treatment for back pain or severe psoriasis after that examination and prior to his retirement on November 1, 199x. Furthermore, upon application to the DVA, he reported that his condition was improved during the first three months following his surgery on July 26, 199x.

8. When the DVA initially examined the applicant, it found him to be 20 percent disabled by his back problem and 0 percent disabled by psoriasis. These ratings were later raised to 40 percent and 10 percent, respectively, after it was determined that they were chronic. Having a ratable disability under the DVA system does not entitle a member of the Coast Guard to a physical disability retirement or to a medical board. Title 10 U.S.C. § 1201(a) provides the minimum statutory requirements a member of the Coast Guard must meet before the Secretary may award him or her a physical disability retirement. The Coast Guard's regulations create additional requirements that must be met before members are entitled to a physical disability retirement. Pursuant to Article 2.C.2.i. of the PDES Manual, the fact that the applicant's conditions are ratable disabilities under the DVA rating systems does not prove that he would have been found unfit for duty by a medical board. The Court of Federal Claims has held that "[d]isability ratings by the Veterans Administration [now the Department of Veterans Affairs] and by the Armed Forces are made for different purposes. The [DVA] determines to what extent a veteran's earning capacity has been reduced as a result of specific injuries or combination of injuries. . . . The Armed Forces, on the other hand, determine to what extent a member has been rendered unfit to perform the duties of his office, grade, rank, or rating because of a physical disability. . . . Accordingly, [DVA] ratings are not determinative of

issues involved in military disability retirement cases." *Lord v. United States*, 2 Cl. Ct. 749, 754 (1983).

9. Although the applicant's records indicate that his medical condition worsened in the months after his retirement, the Board's decision must be based on the evidence concerning his health and ability to perform his duty in October 199x, just prior to his retirement. The applicant has not proved by a preponderance of the evidence that in October 199x, he suffered from a disqualifying physical condition that rendered him unfit for duty or that his condition "reasonably prompted doubt as to his fitness for duty."

10. Therefore, the Board finds that the applicant has not proved by a preponderance of the evidence that the Coast Guard erred or committed injustice by not convening a medical board to evaluate his conditions or by not retiring him by reason of physical disability.

11. Accordingly, the applicant's request for relief should be denied.

[ORDER AND SIGNATURES APPEAR ON FOLLOWING PAGE]

ORDER

The application of retired XXXXXXXX, USCG, for correction of his military record is hereby denied.

Terence W. Carlson

Pamela M. Pelcovits

Edmund T. Sommer, Jr.