

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2003-022

XXXXX, Xxxxxx X.
xxx xx xxxx, XXX

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 December 23, 2002 upon the BCMR's receipt of the applicant's request for correction.

This final decision, dated November 20, 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 he retired from the Coast Guard Reserve due to a physical disability under the Temporary special retirement authority (10 U.S.C. § 12731a.).

APPLICANT'S ALLEGATIONS

The applicant stated that he was a member of the New York City Fire Department, where he served as a lieutenant for xx years. He alleged that because he was attending funerals for firemen killed in the September 11, 2001 attack, he missed the deadline to apply for early retirement from the Coast Guard Reserve. The applicant stated that the deadline for applying for early retirement was December 31, 2001. He admitted that the Coast Guard received his application in January 20xx.

SUMMARY OF THE RECORD AND SUBMISSIONS

On May 19, 19xx, the applicant enlisted in the Coast Guard Reserve. Prior to entering the Reserve, the applicant had served for more than six years on active duty in the Navy. On May 18, 19xx, he completed 16 years of satisfactory service.

On June 1, 19xx, the applicant was transferred from the selected reserve (SELRES) into the individual ready reserve (IRR).

On January 15, 20xx, the applicant wrote the Commander, Integrated Support Command Boston stating that he believed he may be eligible for retired pay at age 60. He attached statements from his doctor in support of his request.

On February 8, 20xx, the Commander, Integrated Support Command Boston informed the applicant that his request was returned without action because the authority for requesting an early retirement under 10 USC § 12731a had expired.

As of November 14, 20xx, the applicant's military medical records could not be located by the Coast Guard.

Summary of the Applicant's Medical Evidence

Radiology Reports

- The applicant submitted a radiological report, dated April 25, 20xx, containing the results of an MRI of the brain. The radiologist's impression was "BILATERAL SMALL LACUNA INFRACT. NO EVIDENCE OF HEMORRHAGE OR MASSES. NO LARGE TERRITORIAL FOCAL INFRACTS."
- The applicant also submitted a radiological report, dated December 29, 19xx, containing the results of an MRI of his right shoulder. The impression was listed as follows:
 1. Findings consistent with either severe inflammation and/or partial tear of the supraspinatus tendon of the rotator cuff.
 2. Mild subacromial impingement.

Letter from Applicant's Psychiatrist

In support of his application, the applicant submitted a letter, dated January 11, 20xx, from his psychiatrist, Dr. K, who wrote that the applicant had been his patient since April 19xx and was initially seen for Attention Deficit Disorder. Dr. K stated that, in late 19xx the applicant discovered that his wife was ill with cancer, which, along with the bilateral rotator cuff injuries to his shoulders forced the applicant to retire from the Fire Department. Dr. K stated that the applicant became depressed after his wife passed away in May 19xx. Dr. K concluded by stating that at the time the applicant was

unable to perform his usual duties in the Coast Guard Reserve because he was caring for his wife as well as dealing with his own injuries and illnesses.

Disability Report

On March 3, 19xx, the applicant was examined by Dr. B at a civilian hospital for purposes of a disability determination. In the disability report, Dr B. stated that the applicant's chief complaint was "I cannot work mentally and physically." The doctor noted that while working as a fireman, the applicant had sustained a rotator cuff tear in 19xx, for which he was treated with physical therapy; that the applicant was complaining of pain since falling on ice in November or December 19xx; that he had stopped working as a fireman in January 19xx due to his disability; and that he was being treated by a psychiatrist for stress that was affecting his concentration. Dr. B reported the following physical findings:

Neck examination shows tenderness over the left C7 paraspinal muscles and left upper trap[ezius] with full range of motion negative spurling's.

Right shoulder: the patient can actively abduct the right shoulder. However, there is a component of scapulo-thoracic movement the first 30 degrees and then the patient is able to abduct with glenohumeral movement, after 30 degrees all the way to 150 degrees. Positive drop arm. Muscle testing 4+/5. No muscle atrophy. Muscle tone is normal. There is tenderness of rotator cuff insertion.

Left shoulder: shows rotator cuff insertion tenderness and tenderness over the bicipital tendon with positive speeds, negative drop arm. Positive painful arc. 150 degrees flexion and abduction with pain end range. 4+/5. Normal muscle tone and no atrophy.

Bilaterally elbows, bilateral grip within normal limits.

Lower extremities: Full range of motion with tenderness over the left piriformis and left gluteal muscles. 5-/5 left hip otherwise 5/5 across all joints. The right foot shows tenderness over the metatarsal pad between first and second toes, no masses felt. Sensory is intact, deep tendon reflexes +2.

Back examination: shows mild tenderness over the left lumbosacral paraspinal muscles with full truncal range of motion and negative straight leg raise. Negative Saber/negative Faber/negative Fadir.

Functional Activity: Independent upper and lower extremities dressing. Independent ambulation without assistive devices, there is reciprocal gait. Able to heel walk, tandem walk and do a mini squat. Able to toe walk through there is a limp on the right because of the right fore foot pain.

Impression:

1. Right rotator cuff tear.
2. Rule out rotator cuff tendonitis/bicipital tendonitis, left.

3. Rule out neuroma right foot between the first and second toes.
4. Rule out depression/anxiety.

Based on history and physical examination the patient should be able to walk two blocks without assisted device. Sit 1/2 hour, stand 1/2 hour, carry up to 10# weight.

The patient should continue follow-up care with orthopedist as well as continue follow-up with psychiatrist and possibly psychotherapist if not yet seeing one.

Prognosis: Guarded.

VIEWS OF THE COAST GUARD

On May 30, 2003, the Chief Counsel of the Coast Guard asked the Board to accept the comments from the Coast Guard Personnel Command (CGPC) as the Coast Guard's advisory opinion. CGPC recommended that the Board deny the applicant's request for relief.

CGPC stated that under 10 U.S.C. § 12731, retired pay is earned when one reaches 60 years of age and has completed 20 years of satisfactory service. CGPC stated that the applicant was 60 years old on September 13, 20xx.

However, CGPC commented that 10 U.S.C. § 12731a provided temporary special retirement qualification authority to the Secretary to retire certain members of the Selected Reserve with at least 15 years of service but less than 20 years of satisfactory service, from October 23, 1992 to December 31, 2001. CGPC asserted that the Coast Guard's stated policy with respect to this program was that "selected Reserve members could voluntarily request special retirement under this statute if they were involuntarily removed from a Selected Reserve billet due to billet removal from the Reserve Personnel Allowance List and no suitable replacement billet was available within the reservist's normal commuting radius."

According to CGPC, the applicant was not eligible for retirement under 10 U.S.C. § 12371a because the statutory authority for the early retirement expired on December 31, 2001, and the applicant's letter inquiring about retired pay was dated January 15, 20xx. CGPC further stated that even if the applicant's request had been timely and had been made prior to June 1, 1999, the applicant was still ineligible for early retirement because the billet to which he was assigned had not been abolished and was within reasonable commuting distance from the applicant's residence.

CGPC stated that 10 U.S.C. § 12731b authorizes the Secretary to offer early retirement to members of the SELRES with at least 15 but less than 20 years of satisfactory service who no longer meet the qualifications for membership in the

Selected Reserve solely because the member is unfit due to a physical disability. CGPC argued that the applicant did not meet the requirements of this section of the law because he was not in the SELRES at the time of the request and significant important medical evidence is dated after the applicant became a member of the IRR on June 1, 19xx.

With respect to the medical evidence submitted by the applicant in support of his application, CGPC had its Chief Medical Officer, CAPT J, review its content. CAPT J offered the following opinion:

Although medical records are old (most recent dated 1/11/xx-letter), information provided indicates member is not fit for duty. He is not entitled to disability via the Coast Guard's PDES as his injuries and mental disease did not occur while on active duty. Determination of early retirement rests on CGPC (rpm).

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 2, 2003, the Chair sent a copy of the views of the Coast Guard to the applicant and invited him to respond within 30 days. He was granted a 60-day extension and responded on September 17, 2003.

The applicant asserted that the medical evidence he submitted clearly documents that his physical and mental problems began before he was transferred out of the SELRES. He argued that based on this medical evidence, he has satisfied the requirements under 10 U.S.C. § 12731b because he "no longer [met] the qualifications for membership in the Selected Reserve solely because the member is unfit because of physical disability."

The applicant argued that his Reserve unit never informed him about any entitlement to an early retirement. He asserted that when he informed the Coast Guard "of [his] situation," he was "told ... that he would be put into the IRR." He argued that the Coast Guard "involuntarily removed [him] from the Selected Reserve, without [his] knowledge of any option."

With respect to CGPC's argument that his billet was intact and within reasonable commuting distance when he transferred to the IRR, the applicant asserted that no billet was appropriate for him because he "was sleeping all the time" and not allowed to drive. He asserted that he was in contact with a chief warrant officer (CWO) prior to the deadline but had to "begin the process all over again" when the petty officer either retired or was transferred.

APPLICABLE STATUTES AND REGULATIONS

Title 10 U.S.C. § 12731a provides the following with respect to the authority for early retirement benefits to Reserve members:

(a) Retirement With At Least 15 Years of Service. -

For the purposes of section 12731 of this title [at least 60 years of age and performed at least 20 years of service], the Secretary concerned may –

- (1) during the period described in subsection (b), determine to treat a member of the Selected Reserve of a reserve component of the armed force under the jurisdiction of that Secretary as having met the service requirements of subsection (a)(2) of that section and provide the member with the notification required by subsection (d) of that section if the member –
 - (A) as of October 1, 1991, has completed at least 15, and less than 20 , years of service computed under section 12732 of this title; or
 - (B) after that date and before the end of the period described in subsection (b) [December 31, 2001], completes 15 years of service computed under that section; and
- (2) upon the request of the member submitted to the Secretary, transfer the member to the Retired Reserve.

* * *

(c) Applicability Subject to Needs of the Service

* * *

- (3) Notwithstanding the provisions of section 4415(2) of the Defense Conversion, Reinvestment, and Transition Assistance Act of 1992 (division D of Public Law 102-484; 106 Stat. 2714), the Secretary concerned may, consistent with the other provisions of this section, provide the notification required by section 12731(d) of this title to a member who no longer meets the qualifications for membership in the Selected Reserve solely because the member is unfit because of physical disability. Such notification may not be made if the disability is the result of the member's intentional misconduct, willful neglect, or willful failure to comply with standards and qualifications for retention established by the Secretary concerned or was incurred during a period of unauthorized absence.

* * *

(e) Regulations. -

The authority provided in this section shall be subject to regulations prescribed by the Secretary of Defense and by the Secretary of Transportation with respect to the Coast Guard.

Title 10 U.S.C. § 12731b, entitled "Special rule for members with physical disabilities not incurred in the line of duty," was enacted on October 5, 1999. It provided the following

- (a) In the case of a member of the Selected Reserve of a reserve component who no longer meets the qualifications for membership in the Selected Reserve solely because the member is unfit because of physical disability, the Secretary concerned may, for purposes of section 12731 of this title, determine to treat the member as having met the service requirements of subsection (a)(2) of that section and provide the member with the notification required by subsection (d) of that section if the member has completed at least 15, and less than 20, years of service computed under section 12732 of this title.
- (b) Notification under subsection (a) may not be made if –
 - (1) the disability was the result of the member's intentional misconduct, willful neglect, or willful failure to comply with standards and qualifications for retention established by the Secretary concerned; or
 - (2) the disability was incurred during a period of unauthorized absence.

Reserve Policy Manual (RPM) (COMDTINST M1001.28)

Chapter 8, Section E, of the Reserve Policy Manual in effect in 19xx provided guidance for the implementation of transition programs for members of the Coast Guard SELRES. According to Article 8.E.1. of the RPM, Section E describes "the protections, preferences and benefits accorded to qualifying members or former members of the Coast Guard Reserve who are involuntarily transferred from the Selected Reserve."

Article 8.E.2. sets forth the definition of "involuntary separation." It states as follows:

The discharge of a member of the Coast Guard Reserve or transfer of such member from the SELRES which is effective during the period beginning on 01 October 1991 and ending on 30 September 1999 shall be considered an involuntary separation for the purposes of the programs implemented by this guidance unless one or more of the following conditions applies:

- a. The member was discharged or transferred from the SELRES:
 - (1) At the member's request except as modified by section 8.E.6.

* * *

- (3) Because the member did not meet the qualifications for membership in the SELRES under law or regulations, to include medical fitness standards, which were in effect on 01 October 1991.

Article 8.B.14. of the RPM provides for the separation of a member of the Reserve for a disqualifying physical condition. It states as follows:

The unit commander shall direct a medical officer to provide a report on any reservist found to have a disqualifying physical condition per section 3-F, Medical Manual, COMDTINST M6000.1 (series). This report shall include a review of the medical file, the circumstances which resulted in the condition, and an opinion concerning service-connection. Based on the medical officer's report, the unit commander will determine whether the condition is service-connected and take the following action:

* * *

- b. Initiate separation action when the condition is found not to be service-connected. The unit commander shall gather relevant medical and administrative documentation and forward it with recommendations to CGPC-rpm, copying the servicing ISC, for final determination and separation authority.

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. The applicant requested that his record be corrected to show that he timely applied for early retirement from the Coast Guard Reserve under 10 U.S.C. § 12731a before the December 31, 2001 deadline. According to the Medical Manual, fitness for duty is determined by the "individual's ability to reasonably perform ... duties" of a member's grade or rating. The applicant asserted that he could not perform any duties beginning in June 19xx because he "was sleeping all the time" and unable to drive. The applicant also submitted a report from a disability examination completed just two months prior to his transfer to the IRR. According to the report, the applicant could "sit for [30 minutes], stand for [30 minutes], and carry up to ten pounds of weight." Based on a review of this and other medical evidence submitted by the applicant, CAPT J opined that the information provided by the applicant "indicates [that the] member is not fit for duty."

3. Pursuant to 10 U.S.C. §12731a, the Coast Guard issued guidance for submitting and processing requests for eligible members and former members of the SELRES to receive early retirement benefits due to force reduction. See COMDTINST 1001.37 and ALDIST 345/93. The contents of ALDIST 345/93 were subsequently incorporated into Chapter 8.E. of the RPM in effect in 1999. Therein, the Coast Guard

specifically excluded from early retirement eligibility “[the member who was discharged or transferred] because [he or she] did not meet qualifications for membership in the SELRES under law or regulations, to include medical fitness standards” See Article 8.E.2.(a).3. of the RPM. Moreover, Commandant Instruction 1001.37 provided that “involuntary” transfers and separations from the SELRES were “due to downsizing” and occurred “during the period of force drawdown.” Given the foregoing express exclusion in the RPM and the use of such language as “due to downsizing,” the record fails to demonstrate that the protections of the Reserve Transition Benefits (RTB) Program were intended to cover situations in which a member of the SELRES could no longer drill because of a disability. Consequently, the applicant has failed to prove by a preponderance of the evidence that he was eligible for early retirement under 10 U.S.C. § 12731a and Coast Guard regulations promulgated thereto.

4. In the alternative, the applicant argued that because the medical evidence he submitted establishes that he was unfit for duty on or about June 1, 19xx, he should be entitled to early retirement under 10 U.S.C. § 12731b. However, this provision did not become effective until October 1999, and therefore, is not the controlling authority in this case. Prior to the effective date of 10 U.S.C. § 12731b, reservists who were found unfit due to a non-service connected disability were processed for separation in accordance with Article 8.B.14. of the RPM. According to the medical evidence, the applicant’s injuries were sustained while working as a firefighter. The applicant has not proved that he would not have been processed for separation under Article 8.B.14. of the RPM had he been found unfit in June 1999. Nor has the applicant proved that he was erroneously removed from the SELRES or erroneously precluded from reentering the SELRES.

5. Accordingly, the applicant’s request should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

Patricia V. Kingcade

James G. Parks

Dorothy J. Ulmer