DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2003-085

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FINAL DECISION

ANDREWS, Deputy Chair:

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 May 20, 2003, upon the BCMR's receipt of the application and military and medical records.

This final decision, dated January 22, 2004, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant asked the Board to correct his May 1, 199x, regular retirement to a physical disability retirement. He stated that no disabilities were discovered during his physical examination prior to retirement in November 199x.[1] However, on May 23, 199x, about three weeks after his retirement, he got a nose bleed and, later on, a sore throat. A doctor discovered a bleeding tumor on the base of his tongue. One month later, he had a biopsy that revealed stage IV squamous cell cancer, which required radiation and chemotherapy. A tube was installed to enable him to breathe despite the swelling in his throat.

The applicant alleged that stage IV cancer (the "highest" stage) takes months to develop and was probably present during his physical examination for retirement. He stated that, since the operation to remove the tumor, he has lost his voice and uses tubes to breath, eat, and drain fluids. He stated that he is unemployable and that the Department of Veterans Affairs (DVA) has assigned him a 100% disability rating. Regarding

[1] No copy of the report of this examination could be located by the Coast Guard or the DVA.

the untimeliness of his application, he stated that "with the concurrent pay bill pending in Congress, I feel I should be granted this opportunity to be reviewed."[2]

[2] When the applicant filed his application in September 2002, the law required a veteran's retirement pay to be offset by any amount paid to the veteran by the DVA because of a service-connected physical disability, unless the disability was incurred in combat. Under the National Defense Authorization Act for fiscal year 2003, Congress enacted a gradual elimination of this offset for veterans whose disabilities are rated at least 50% disabling by the DVA.

SUMMARY OF THE RECORD

On August 21, 19xx, the applicant enlisted in the Coast Guard. He served continuously on active duty thereafter until his retirement upon completion of sufficient service on May 1, 199x.

DVA records indicate that on May 23, 199x, the applicant went to a hospital seeking treatment for a nose bleed.[3] His nostrils were "packed" and the bleeding abated.

On June 20, 199x, the applicant went to the hospital complaining of having blood and a bad taste in his mouth, difficulty swallowing, and a sore throat for three days. He was diagnosed with atypical strep throat and treated with antibiotics. However, his symptoms continued.

On June 27, 199x, he was examined by an ear, nose, and throat specialist, who used a flexible nasolaryngoscope and found a laryngeal tumor near the base of his tongue. On July 9, 199x, a biopsy revealed that the tumor was a poorly differentiated squamous cell carcinoma. It was staged as T_4-N_2-M_0.[4] On July 15, 199x, an MRI revealed that the tumor was approximately 2.7 by 3.0 centimeters in size. One doctor recommended that he undergo a glossectomy and laryngectomy (removal of the tongue and larynx), but the applicant chose radiation treatment and chemotherapy. Because of tissue swelling, a tracheotomy tube was inserted to enable him to breathe.

In September 199x, the applicant was evaluated by doctors for the DVA. The DVA found his cancer to be service-connected and rated him as 100% disabled. On September 9, 199x, he was provided a speaking valve to facilitate his speech.

In 199x, the cancer recurred and the applicant underwent a laryngectomy and more radiation. Because of his difficulty with swallowing, the applicant's weight fell from 180 pounds to "the low 80s," and a feeding tube was inserted to help his nutrition, in addition to the tracheotomy tube, which he continued to need. It was noted that he could only whisper. Since that time the applicant has been hospitalized on numerous occasions because of various complications in his condition. In May 199x, the applicant began using a voice synthesizer to speak.

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[3] Nose bleed, or epistaxis, is a possible symptom of laryngeal cancer. *See* Braunwald, E., *et al*., eds., HARRISON'S PRINCIPLES OF INTERNAL MEDICINE, 15th ed. (McGraw-Hill, 2001), p. 560.

[4] Cancer and other illnesses are staged on a scale from 0 to 4, with 0 being undetectable and 4 being most advanced. The notation T_4-N_2-M_0 denotes a tumor at stage 4 (T_4), with some presence in regional nodes (N_2), and no other known metastases (M_0). DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, 29th ed. (W.B. Saunders Co., 2000), p. 1690. Cancer is normally present in a person at least 50 days prior to being clinically detectable. *See* Braunwald, E., *et al*., eds., HARRISON'S PRINCIPLES OF INTERNAL MEDICINE, 15th ed. (McGraw-Hill, 2001), p. 530 (fig. 84-1).

VIEWS OF THE COAST GUARD

On October 2, 2003, the Chief Counsel of the Coast Guard recommended that the Board deny the applicant the requested relief because of its untimeliness and, if not, because of its lack of merit.

Regarding the application's untimeliness, the Chief Counsel argued that under 10 U.S.C. § 1552(b), the application should have been filed within three years of the applicant's discovery of his illness and that the applicant has failed to show why it would be in the interest of justice to excuse his delay. The Chief Counsel pointed out that the applicant "admits to receiving a discharge physical and that he did not complain of any problems with his tongue or throat while he was serving on active duty. The Physical Disability Evaluation System [PDES] is designed to evaluate and compensate, when appropriate, those members who are no longer able to serve in the military due to physical disability. At the time Applicant was discharged, he was suffering from no physical disability that interfered with his ability to perform his Coast Guard duties. Speculation about whether the disease he currently has was asymptomatically present at the time of his retirement is unlikely to prevail on the merits."

The Chief Counsel stated the legislation to which the applicant referred in his application would allow veterans to receive retired pay and medical disability pay concurrently. However, he argued, even if the applicant were correct in suggesting that he might fail to qualify for concurrent payments under the new legislation, it would not constitute "treatment by military authorities that shocks the sense of justice." *Reale v. United States*, 208 Ct. Cl. 1010, 1011, *cert. denied*, 249 U.S. 854 (1976); BCMR No. 239-89 (Decision of the Deputy General Counsel). Therefore, he argued, the Board should not waive the statute of limitations in this case.

Regarding the merits of the case, the Chief Counsel stated that although the report of the applicant's physical examination for retirement is missing, there is no reason to believe that it was inadequate. He pointed out that the applicant made no such allegations. He also pointed out that the applicant has not alleged that he felt or reported any symptoms of his cancer prior to his retirement. He stated that it cannot be proven that the cancer existed when the physical examination was made or, if it did, that it should have been found at that time. He argued that while "it may be likely that the inception of the Applicant's cancer occurred prior to his retirement, it had not yet progressed to a point where it made him unfit for continued service or a regular retirement. There are no provisions under law or regulation to allow members to obtain a disability retirement retroactively when a condition manifests itself after retirement unless there is evidence the condition was known to exist while on active duty and was not properly evaluated through the [PDES]."

The Chief Counsel noted that the record indicates that even when the applicant began experiencing symptoms after his retirement, his doctors had considerable difficulty in finding the cause and diagnosing his condition. He stated that the applicant has a "substantial burden of proving that his disabilities at the time of his retirement were clearly sufficient to have rendered him unfit for full military duty." *Callan v. United States*, 196 Ct. Cl. 392, 401, 02 (1971). BCMR No. 239-89 (Decision of the Deputy General Counsel). "The DVA's finding that the Applicant was 100% disabled subsequent to his retirement from the Coast Guard is not relevant to the Coast Guard's finding that he was fit to perform his military duties at the time of his retirement. The sole standard for a physical disability determination in the Coast Guard is unfitness to perform duty."

The Chief Counsel argued that the DVA's findings "have no bearing on the Coast Guard's decision to retire Applicant upon his request and before any disability manifested itself. … The DVA rating awarded to Applicant is not determinative of the same issues involved in military disability cases." *Lord v. United States*, 2 Cl. Ct. 749, 754 (1983). "The DVA determines to what extent a veteran's earning capacity has been reduced as a result of [his service-connected disability]. 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. Any long-term diminution in his earning capacity attributable to military service is properly a matter for determination by the [DVA], not the Coast Guard or the BCMR."

APPLICANT'S RESPONSE TO THE COAST GUARD'S VIEWS

On October 14, 2003, the Chair sent a copy of the Chief Counsel's advisory opinion to the applicant and invited him to respond within 30 days. No response was received.

APPLICABLE REGULATIONS

Disability Compensation Statutes

Title 10 U.S.C. § 1201 provides that a member of the armed forces who is found to be "unfit to perform the duties of the member's office, grade, rank, or rating because of physical disability incurred while entitled to basic pay" may be retired if the disability is (1) permanent and stable, (2) not a result of misconduct, and (3) for members with less than 20 years of service, "at least 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs at the time of the determination."

Title 38 U.S.C. § 1155 provides that "[t]he Secretary [of DVA] shall adopt and apply a schedule of ratings of reductions in earning capacity from specific injuries or

combination of injuries. The ratings shall be based, as far as practicable, upon the average impairments of earning capacity resulting from such injuries in civil occupations."

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

Article 12.B.6. requires members to undergo a physical examination within one year of and at least six months prior to retirement to allow sufficient time for complete processing. If the member is found unfit to perform his duties, he is processed in accordance with the PDES Manual.

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

The Medical Manual provides the rules regarding physical examinations. According to Article 3.B.3.a., 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 discharge in the Service. Persons with such disqualifying conditions "shall be referred to an Initial Medical Board." The list includes, at Article 3.F.20., malignant tumors that "are unresponsive to therapy or when the residuals of treatment are in themselves disqualifying under other provisions of this section."

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 disposition of members with physical disabilities. 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.

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 10 U.S.C. § 1552.

2. An application to the Board must be filed within three years after the applicant discovers the alleged error in his record.[5] The applicant was retired and discovered his illness in 199x. Therefore, his application was untimely.

3. Pursuant to 10 U.S.C. § 1552(b), 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 and consider the reasons for the delay.[6] The applicant did not explain why he delayed applying to the Board. He only explained what finally motivated him to apply. However, a cursory review of the merits of this case indicates that the applicant had undiagnosed laryngeal cancer at the time of his retirement. Therefore, the Board finds that it is in the interest of justice to waive the statute of limitations in this case.

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[5] 10 U.S.C. § 1552(b).

[6] *Dickson v. Sec'y of Defense*, 68 F.3d 1396 (D.D.C. 1995); *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

4. The applicant began suffering symptoms of his cancer just a few weeks after his retirement on May 1, 199x, and his tumor, when biopsied ten weeks after his retirement in July 199x, was already sizable and in stage IV. Therefore, the Board finds that the preponderance of the evidence in the record proves that the applicant incurred laryngeal cancer while serving on active duty in the Coast Guard.

5. There is no evidence in the record that the Coast Guard committed any error in administratively retiring the applicant upon his request. There is no evidence that he complained of any symptoms of his cancer prior to his retirement or that the doctor who conducted his physical examination approximately six months prior to his retirement in accordance with Article 12.B.6. of the Personnel Manual could have or should have detected the cancer in the applicant's larynx. The record indicates that the tumor was found only upon investigation by a specialist with a flexible nasolaryngoscope when the applicant's symptoms did not abate. Therefore, the applicant has not proved that the Coast Guard committed any error in failing to diagnose his incipient cancer and in failing to retire him by reason of physical disability.

6. In addition to correcting errors in a veteran's record, the Board is also authorized to correct injustices in the record.[7] Contrary to the Chief Counsel's view, such injustices do not necessarily have to reflect "treatment by military authorities that shocks the sense of justice" to merit correction by the Board. The Board sometimes corrects records that are found to be unjust only with the benefit of hindsight.[8]

7. The applicant alleged that his record is unjust because his cancer must have existed prior to his retirement and he is now 100% disabled. As the Chief Counsel stated, however, the disability benefit systems administered by the DVA and by the Coast Guard and other armed forces serve different purposes. The DVA system compensates veterans to the extent that their civilian employment after separation is diminished by a service-connected disability, whereas the armed forces compensate members to the extent that they become unfit for duty prior to separation because of a disability incurred during their service.[9] Congress created these two systems to address veterans' medical problems under the two different circumstances. In this case, the Board finds that the applicant was clearly able to perform his duties prior to his retirement, but his service-connected condition made him unemployable after his retirement. Therefore, the applicant's compensation clearly falls properly within the aegis of the DVA under

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[7] 10 U.S.C. § 1552(a).

[8] *See, e.g.,* BCMR Dkt. Nos. 2003-015, 2002-110.

[9] *Lord v. United States*, 2 Cl. Ct. 749, 754 (1983) (citing 38 U.S.C. § 355 (now 38 U.S.C. § 1155) for the purpose of the DVA's system and 10 U.S.C. § 1201 for the purpose of the armed forces' system). PDES Manual, Article. 2-C-2.(b); Medical Manual, Article 3.F.1.c.

38 U.S.C. § 1155, rather than under 10 U.S.C. § 1201.[10] He has not proved that his failure to receive disability retirement benefits from the Coast Guard instead of the DVA constitutes an injustice in his record.

8. The two compensation schemes provided for by Congress under the DVA and the armed forces are not identical. (For example, compensation from the DVA is tax exempt.) For various reasons, some veterans prefer to receive compensation from one source over the other. Although the applicant has not contested the source of his compensation since 199x, he apparently now believes that he would benefit from new legislation if he received his disability compensation from the Coast Guard under 10 U.S.C. § 1201, instead of from the DVA. Congress recently enacted Public Law 108-136, revising 10 U.S.C. § 1414 to allow disabled retired veterans to receive concurrent retirement pay and disability benefits from the DVA without any offset.[11] However, the

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[10] *See Parthemore v. United States*, 1 Cl. Ct. 199, 202 (1982) (holding that the Army BCMR did not err in denying the plaintiff's request for a disability retirement since his metastatic melanoma had been treated and had not recurred prior to his discharge); *Callan v. United States*, 196 Ct. Cl. 392, 399 (1971) (holding that the plaintiff's regular retirement was proper because, although he had pre-cancerous lesions on his hands prior to his retirement "[t]he uncontested fact is that at the time of plaintiff's retirement he was performing all duties assigned to him in a manner satisfactory to his superiors"); and *San Millan v. United States*, 139 Ct. Cl. 485, 496 (1957) (holding that the plaintiff was not entitled to a disability retirement from the Army because, although he had complained to his friends of abdominal pain many times prior to his discharge and probably had incipient intestinal cancer during his service, he had continued to perform his duties and never reported or sought treatment for the pain until after his discharge (at which point the tumor was discovered)).

[11] 10 U.S.C. § 1414 now reads as follows in pertinent part:

§ 1414. Members eligible for retired pay who are also eligible for veterans' disability compensation for disabilities rated 50 percent or higher: concurrent payment of retired pay and veterans' disability compensation

(a) Payment of both retired pay and compensation.

(1) In general. Subject to subsection (b), a member or former member of the uniformed services who is entitled for any month to retired pay and who is also entitled for that month to veterans' disability compensation for a qualifying service-connected disability (hereinafter in this section referred to as a "qualified retiree") is entitled to be paid both for that month without regard to sections 5304 and 5305 of title 38 [which prohibit concurrent pay]. During the period beginning on January 1, 2004, and ending on December 31, 2013, payment of retired pay to such a qualified retiree is subject to subsection (c).

(2) Qualifying service-connected disability. In this section, the term "qualifying service-connected disability" means a service-connected disability or combination of service-connected disabilities that is rated as not less than 50 percent disabling by the Secretary of Veterans Affairs.

(b) Special rules for chapter 61 disability retirees.

(1) Career retirees. The retired pay of a member retired under chapter 61 of this title [10 USCS §§ 1201 et seq.] with 20 years or more of service … is subject to reduction under sections 5304 and 5305 of title 38, but only to the extent that the amount of the member's retired pay under chapter 61 … exceeds the amount of retired pay to which the member would have been entitled under any other provision of law based upon the member's service in the uniformed services if the member had not been retired under chapter 61 of this title.

Board fails to see how the applicant would benefit by the sought-after correction under the new law. Under subsection (b) of 10 U.S.C. § 1414, the retired pay of a veteran retired under 10 U.S.C. § 1201 is subject to reduction to the level of retired pay received for a regular retirement. Moreover, even if the new law would benefit the applicant in some way if he had been retired under 10 U.S.C. § 1201, a legislative change in the benefits Congress grants veterans under 10 U.S.C. § 1201 or 38 U.S.C. § 1155 does not warrant a finding by this Board that an applicant's receipt of disability benefits from the DVA rather than the Coast Guard constitutes a significant injustice in his record, particularly when the veteran has accepted compensation from the DVA without complaint for xx years.

9. Accordingly, the applicant's request for correction should be denied.

[ORDER AND SIGNATURES APPEAR ON FOLLOWING PAGE]

ORDER

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

Stephen H. Barber

Harold C. Davis, M.D.

Dorothy J. Ulmer