

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2004-165

XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXX

FINAL DECISION

AUTHOR: Andrews, J.

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. The application was docketed on August 11, 2004, upon receipt of the applicant's completed application and military and medical records.

This final decision, dated April 21, 2005, 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 record to make him eligible to reenlist. His discharge form DD 214 indicates that his reenlistment code is RE-4, which makes him ineligible to reenlist. An RE-1 code would make him eligible to reenlist.

The applicant alleged that at the time of his discharge in 1998, he was misdiagnosed with right optic nerve atrophy. He alleged that in July 2002, he learned that he does not have that condition and that he actually has glaucoma, which "is treatable and not a viable reason for discharge." He stated that he wants to reenlist. In support of his allegations, he provided the address of the regional medical center of the Department of Veterans Affairs (DVA).

SUMMARY OF THE RECORD

On August 12, 1985, the applicant enlisted in the Coast Guard. He advanced to the rating YN2 (yeoman, second class).

On May 22, 1995, the applicant sought medical treatment for blurred distance vision and photophobia. Upon examination, the doctor determined that he had bilateral asymmetrical cupping of the optic discs and that his intraocular pressures were abnormal. Visual field testing on June 29, 1995, indicated that he had highly contracted visual fields in both eyes. At a follow-up examination on July 12, 1995, the applicant's visual fields had improved. However, the doctor noted that because of the atrophy, an Initial Medical Board (IMB) should be convened even though the applicant was fit for duty.

On January 6, 1996, the applicant was evaluated by an IMB, which found that his diagnosis was "generalized right optic nerve atrophy" that did not exist prior to his enlistment. The IMB found that his condition did not interfere with his duties as a yeoman and that he was fit for full duty. On January 9, 1996, the applicant acknowledged the findings of the IMB and indicated that he did not wish to rebut them. On March 26, 1996, the applicant's commanding officer forwarded the report of the IMB to the Coast Guard Personnel Command (CGPC). He stated that he agreed with the report because the applicant's condition did not interfere with his performance of duties.

On April 24, 1996, the CPEB found that the applicant was fit for full duty. On May 21, 1996, he was counseled about the finding by a law specialist. On June 5, 1996, CGPC informed the applicant's command that the findings of the CPEB convened on April 24, 1996, had been approved and that, therefore, the applicant would not be retired or separated because of his physical disability.

On February 12, 1997, an ophthalmologist noted that the applicant might have either right optic nerve atrophy or glaucoma and should be evaluated by a specialist.

On November 13, 1997, a Disposition Medical Board (DMB) convened to re-evaluate the applicant's condition. The Board noted that although his diagnoses were right optic nerve atrophy, right visual field defect, and asymmetrical disk cupping, a glaucoma specialist "is unsure of whether the patient suffers from early glaucoma versus idiopathic optic nerve atrophy." The DMB determined that the applicant was not fit for world-wide duty and referred his case to the CPEB.

On December 19, 1997, after consulting with counsel about the DMB's findings, the applicant signed an acknowledgement indicating that he would submit a rebuttal. No copy of the rebuttal appears in the record. On March 16, 1998, the applicant's commanding officer endorsed the rebuttal to the IMB. He stated that the applicant "continues to deal with the challenges associated with the symptoms of his medical condition" and that because of "both performance considerations and his developing medical situation, [he had] been assigned to various responsibilities ... over the past

two years. During this period, his performance of duty has been average to above average, and he has capably demonstrated cooperation, flexibility, and resilience.”

On April 24, 1998, another CPEB was convened to evaluate the applicant. It found that he was unfit for duty because of his optic nerve atrophy and recommended that he be discharged with a zero-percent disability rating and severance pay. On May 13, 1998, the applicant was counseled about the finding by an attorney. On May 17, 1998, the applicant accepted the CPEB’s findings and recommendation and waived his right to a hearing before a Formal Physical Evaluation Board. On May 26, 1998, CGPC approved the CPEB’s findings and recommendation and ordered that the applicant be separated with severance pay.

On July 16, 1998, the applicant was honorably discharged with severance pay due to a physical disability with an RE-4 reenlistment code (ineligible to reenlist) and a JFL separation code.

On August 20, 1998, the applicant applied to the DVA for medical benefits. On June 30, 1999, a DVA doctor noted he did “not feel that the patient’s history, findings, or optic disk appearance is indicative of a glaucomatous condition.” On April 30, 2001, the applicant received zero-percent disability ratings for right optic atrophy and several other conditions and a thirty-percent rating for migraine headaches, effective from the date of his discharge. He later received a ten-percent disability rating for a severe sprain of his right ankle, for a combined rating of forty percent.

On April 3, 2003, a DVA doctor who was treating the applicant for migraines noted that the applicant had been prescribed eye drops three times a day to treat “possible low tension glaucoma.” On March 30, 2004, the DVA sent the applicant a letter noting that it required more information to process his claim for migraine headaches and glaucoma.

VIEWS OF THE COAST GUARD

On January 3, 2005, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board excuse the untimeliness of the application and grant the applicant partial relief by upgrading his reenlistment code to RE-3P.

The JAG based his recommendation on a memorandum on the case prepared by CGPC. CGPC stated that the medical records received from the DVA provided “no clear diagnosis of glaucoma vice optic nerve atrophy,” although there was clearly “the possibility that the diagnosis [of optic nerve atrophy] at the time of the Applicant’s discharge may have been a mistake in that the Applicant has been on continuous medication for glaucoma.” CGPC pointed out, however, that the applicant had been diag-

nosed with “intractable migraines” and an ankle condition, which would render him ineligible for enlistment.

In light of the applicant’s current diagnoses, CGPC stated, he is ineligible for reenlistment and “cannot justifiably be assigned a reenlistment code of RE-1.” However, because the applicant’s conditions might be treatable, CGPC recommended that his RE code be upgraded to RE-3P, which “does not automatically bar or allow his accession, but will require him to fully document and demonstrate to service recruiting authorities that he has overcome and resolved any disabilities.”

APPLICANT’S RESPONSE TO THE COAST GUARD’S VIEWS

On January 4, 2005, the BCMR sent the applicant a copy of the Chief Counsel’s advisory opinion and invited him to respond within 30 days. The mailing was returned to the BCMR by the Post Office with the notation “Return to Sender/Forwarding Expire” on the envelope.

SUMMARY OF APPLICABLE LAW

Article 3.F. of the Medical Manual provides that members with medical conditions that “are normally disqualifying” for retention in the Service shall be referred to an IMB by their commands for processing under the Physical Disability Evaluation System. Under Article 3.F.5.a., optic nerve atrophy and glaucoma that is “resistant to treatment, or affecting visual fields, or if side effects of required medications are functionally incapacitating” are normally disqualifying conditions.

According to the Separation Program Designator (SPD) Handbook, a member who is discharged with a JFL separation code due to a physical disability should receive an RE-3P reenlistment code. The RE-4 code is not authorized. An RE-3P code means that the veteran is eligible to reenlist except for a disqualifying condition (the disability). To reenlist the veteran, a recruiter must seek a waiver.

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. 10 U.S.C. § 1552. The applicant knew

or should have known of his RE-4 reenlistment code upon his discharge in 1998. However, he apparently believed the diagnosis of the Coast Guard's doctors until July 2002, when he allegedly was diagnosed with and began to be treated for low tension glaucoma. Moreover, the Board notes that if the Discharge Review Board (DRB) did not categorically reject applications concerning medical matters, even when no monetary claim has been made, the applicant would have been able to seek relief from the DRB within fifteen years of his discharge, and his application to the BCMR would have been timely pursuant to *Ortiz v. Sec'y of Defense*, 41 F.3d 738, 743 (D.C.C. 1994). Therefore, and in light of the apparent error in the applicant's record and the reason for his delay, the Board finds that it is in the interest of justice to waive the statute of limitations. *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).

3. The applicant asked the Board to correct his record to allow him to reenlist. His RE-4 reenlistment code makes him ineligible to reenlist. An RE-1 code would allow him to reenlist without any consideration of his physical condition.

4. Under the SPD Handbook, the only reenlistment code authorized for members such as the applicant who are discharged due to a physical disability is an RE-3P. Therefore, the RE-4 reenlistment code on the applicant's DD 214 is erroneous. The Coast Guard has recommended that the Board upgrade the applicant's code to RE-3P.

5. The Board agrees with the Coast Guard that the applicant has submitted insufficient evidence to justify upgrading his reenlistment code to RE-1. He has not proved that the optical/visual problem that caused his discharge has been entirely resolved by treatment. In addition, his medical records indicate that he has developed medical problems since his discharge that might disqualify him for reenlistment. However, as his RE-4 code is clearly erroneous under the provisions of the SPD Handbook, his reenlistment code should be upgraded to RE-3P. With an RE-3P, he will have a chance of proving to a recruiter that he is sufficiently fit for duty to receive a waiver so that he can reenlist.

6. Accordingly, partial relief should be granted.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of former xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is granted in part as follows:

The Coast Guard shall correct his reenlistment code to RE-3P and shall issue him a new DD 214 with the RE-3P code in block 27.

Nancy L. Friedman

Adrian Sevier

Thomas H. Van Horn