

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2006-135

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FINAL DECISION

AUTHOR: Ulmer, D.

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 Chair docketed the case on June 30, 2006, upon receipt of the applicant's completed application and military and medical records.

This final decision, dated May 11, 2007, is approved 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 show that he was retired from the Coast Guard on January 23, 1973, by reason of a physical disability, rather than having been discharged with severance pay. The applicant was discharged from the Coast Guard due to brain disease rated as 10 percent disabling, for which he received severance pay. To be retired from the Coast Guard by reason of physical disability, the applicant's disability must be at least 30 percent disabling.

The applicant alleged that in addition to being diagnosed with brain disease, he was also diagnosed with Meniere's disease¹ which he alleged was not considered by the Formal Physical Evaluation Board (FPEB). He stated that he still has Meniere's Disease, and that it is likely to lead to dementia. The applicant also stated that recently he was diagnosed with Lewy Body Dementia and with a Mild Cognitive Impairment with early signs of Alzheimer's disease. He stated that the Department of Veterans' Affairs (DVA) has rated his disabilities as 80 percent disabling and determined that he is not employable.

With respect to discovery of the alleged errors, the applicant stated that he did not discover them until November 6, 2002, which he stated was less than three years after his

¹ Meniere's disease is defined as hearing loss, tinnitus, and vertigo resulting from non-supportive disease of the labyrinth with edema. Dorland's Illustrated Medical Dictionary, 29th Edition, p. 520.

Meniere's disease was reconfirmed and less than three years after his diagnoses for Lewy Body Dementia and Mild Cognitive Impairment.

SUMMARY OF THE RECORD

On August 5, 1968, the applicant enlisted in the Coast Guard. In February 1969, he suffered head trauma playing football. Approximately one month after that injury, the applicant began complaining of episodic headaches and feelings of unsteadiness.

On August 28, 1970, the applicant was admitted to St. Mary's hospital because of a severe spell of vertigo, followed by momentary unconsciousness. His initial diagnosis was headaches and dizziness. While at St. Mary's the applicant's cold caloric exam² was "strongly positive." When discharged from the hospital on September 2, 1970, he was diagnosed with possible Meniere's disease. However, because the applicant was due to be transferred from St. Mary's to a Marine hospital in Galveston on September 2, 1970, the doctor's discharge note indicated that Galveston would follow up on the diagnosis of possible Meniere's disease.

On September 2, 1970, the applicant was admitted to the Marine hospital and evaluated for complaints of headaches and dizziness. X-rays of the applicant's chest and skull revealed no abnormalities and the urinalysis, uric acid, CBC, FBS, bun, creatinine, and VDRL were all within normal limits. The narrative summary report stated that an EEG, brain scan and echo encephalogram, and skull series were all within normal limits. The report noted that a cold caloric test produced dizziness. The report also noted that the applicant's hearing was within normal limits, but an ear, nose and throat (ENT) specialist stated that the applicant could be suffering from possible Meniere's syndrome and /or an anxiety reaction. The applicant was told to follow-up with ENT as an outpatient. The applicant was discharged from the Galveston hospital with a diagnosis of possible post-concussion syndrome.

On March 9, 1971, the applicant was re-evaluated for headaches. The physician performing the medical examination stated that the applicant's headaches were troublesome but they had not prevented him from working. The medical examination revealed no abnormalities. The physician's impression was as follows:

Post concussion syndrome and labile hypertension. I do not feel any further tests are indicated at this time. A trial of Cafergot in the specified way . . . would seem warranted, and certainly periodic follow-up examination remains indicated. Unfortunately, symptomatic treatment . . . seems all that is presently available in lieu of the negative evaluation.

The medical record shows that the applicant was hospitalized again from September 27, 1971, until October 5, 1971, with complaints dizziness. He was diagnosed with post-concussion syndrome and determined to be fit for modified shore duty until an ENT evaluation.

² The cold caloric test consist of injecting warm or cool water or air into the ear canal to detect involuntary eye movements that occur when a person has vertigo. See <http://health.yahoo.com/ency/healthwise/hw205591>.

On October 18, 1971, the applicant underwent an audiogram, which revealed that his hearing was within normal limits bilaterally. The report noted mild sensorineural³ in both of the applicant's ears.

The applicant requested a Board of Medical Survey (BMS) and was referred for another medical evaluation for that purpose. On March 20, 1972, the BMS physician diagnosed the applicant with a post-concussion syndrome that was treated with analgesics. The physician also determined that the applicant was fit for duty, but referred the applicant for a neurological consultation. The applicant was seen by a neurologist that same day and nothing significant was found.

The BMS met on March 23, 1972. It diagnosed the applicant as suffering from post-concussion syndrome, but found that he was qualified to perform the duties of his rate ashore and at sea. The applicant submitted a statement in response to the BMS and stated that "due to the post concussion syndrome, I believe that I am unable to perform my duties in a responsible and safe manner." He indicated he was concerned for the safety of others should he experience unexpected dizziness or unconsciousness. He also noted that although he had been diagnosed with probable post concussion syndrome and possible Meniere's syndrome, no reason or cure had been found for his headaches and dizziness.

The applicant's case was referred to the Central Physical Evaluation Board (CPEB).⁴ On April 24, 1972, the CPEB met and considered the applicant's case. The CPEB determined that the applicant was fit to perform the duties of his rate.

On May 11, 1972, the applicant requested a hearing before a Formal Physical Evaluation Board (FPEB)⁵ and he also requested representation. Coast Guard counsel was assigned to represent the applicant, and on August 18, 1972, the FPEB held a hearing in the applicant's case. Two doctors were called as witnesses at the hearing.

The applicant's counsel asked one of the doctors whether the applicant suffered from possible Meniere's syndrome. The doctor answered as follows:

Meniere's syndrome is a complex of symptoms classically which include not only dizziness and actually this dizziness is vertigo which is a whirling sensation which usually last anywhere from one to six hours, accompanied by nausea or vomiting. Hearing loss sometimes preceded by feeling a pressure or fullness in the ear, and

³ Sensorineural is defined as pertaining to or affecting a sensory mechanism and/or a sensory nerve. *Id.* p. 1623.

⁴ The Central Physical Evaluation Board is a permanently established administrative body that evaluates on a records basis the fitness for duty of active and reserve members and the fitness for duty of members on the temporary disability retired list. See Chapter 4.A.1. of the Physical Disability Evaluation System Manual (COMDTINST M1850.2C).

⁵ The FPEB is a fact-finding body, which holds an administrative hearing to evaluate a member's fitness for duty and to make recommendations consistent with the findings. This hearing is not an adversarial proceeding, and the implication of litigation must be avoided. See Chapter 5.A.1. of the Physical Disability Evaluation System Manual (COMDTINST M1850.2C).

it's usually accompanied at some point by permanent hearing loss. [S]o [the applicant] doesn't fall in this category because of the way he describes his dizziness.

Then the applicant's counsel asked the following question:

Are symptoms always associated with Meniere's syndrome or is it sometimes present in such a form that all these symptoms can be diagnosed. In other words, what I'm saying is, is it possible that he can have some trace of this but in such a form that [it] can't be diagnosed at this time because it hasn't progressed to such a state?

The physician responded:

It's always possible something might develop later, but right now we can't call it Meniere's because it doesn't fit the description.

After a presentation of evidence by the government and the applicant, the FPEB determined that the applicant was unfit to perform the duties of his rate and should be discharged with a 10% disability rating due to the following:

VA Code number 8045, brain disease, purely subjective complaints such as headaches, dizziness, insomnia, tinnitus, etc. recognized as symptomatic of brain trauma, which will be rated at 10% and no more under diagnostic code 9304, which is chronic brain syndrome associated with brain trauma. This has been tempered by VA Code 8045.

The applicant submitted a rebuttal to the FPEB findings and recommendations. He alleged that he had not had a thorough neurological evaluation and had only seen a neurologist for approximately five minutes. He requested a complete neurological evaluation.

On November 16, 1972, the Physical Review Council concurred in the findings and facts by the FPEB. The PRC also agreed with the recommendation that the applicant be discharged from the Coast Guard with severance pay.

On January 10, 1973, the Chief Counsel of the Coast Guard reviewed the physical evaluation board proceedings and found them to be technically correct, found them to be in acceptable form, and found that the evidence supported the findings.

On January 15, 1973, the Coast Guard Chief of the Office of Personnel approved the FPEB and directed that the applicant be separated from the Coast Guard with severance pay.

On January 23, 1973, the applicant was honorably discharged with a ten percent disability rating and severance pay.

Decision of the Department of Veterans Affairs (DVA)

On July 20, 2001, the DVA issued a decision denying the applicant's request for disability compensation for Meniere's syndrome. Subsequently, the applicant filed a request to reopen that claim.

On November 7, 2003, the DVA issued a decision granting the applicant a 30% disability rating for Meniere's syndrome effective from January 29, 2001, the date of the reopened claim. The DVA stated the following:

The injury occurred on August 27, 1970 in which you were diagnosed with Meniere's syndrome by the military doctor after the physician performed an examination in service. The doctor notes that you were having such symptoms as headaches and dizziness as far back as 1969. Testing and examination revealed a diagnosis of Meniere's syndrome in service as noted in 1970. You also sustained a head injury in service and have service connected hearing loss and tinnitus related to service. VA examinations cited shows your inner ear dizziness and pathology does not indicate it is a vestibular-type dysfunction based on Dix-Hallpike testing on VA exam of [May 2001]. Your dizziness is most likely not from an inner ear pathology. However, the tinnitus as noted on prior examination was not ruled-out to be unrelated to the head injury and electrocution as well.

You had this diagnosis in service and your treating physician, an ENT, notes you still carry this disease to date with hearing loss. VAMC treatment reports as recent as January 2003, shows your doctor notes you have had worsening tinnitus related to Meniere's disease over the last three months and occasional vertigo with the last significant attack six months ago. Exam shows normal ears and nose. The physician diagnosed Meniere's disease, stable hearing, with increase in tinnitus. The statement from your physician clearly shows you have the syndrome and records confirm the diagnosis even though the VA exam cited shows the negative finding for Meniere's. The evidence from an ENT specialist is afforded more weight in granting service connection. All doubt has been resolved in favor of the claim.

In addition to the 30% disability rating for Meniere's syndrome, the DVA increased the applicant's disability rating for post-concussive syndrome with headaches and cognitive impairment to 70 percent. The DVA also granted the applicant a 10-percent disability rating for tinnitus and 0 percent disability rating for hearing loss, for a combined 80-percent total disability rating.

The DVA determined that the applicant not to be employable effective March 12, 2002. The DVA's psychological compensation and pension examination dated April 21, 2003, stated that the applicant was a highly successful businessman until approximately 1997. It further reported that he had worked in the oil fields as an oil gauger, as a ship manager, as a ship agent coordinating loading and unloading oil tankers, and as an import/export agent helping to transport crushed rock, and that he had worked in Saudi Arabia and in the Caribbean. The DVA

doctor, who examined the applicant for hypertension in August 2002, noted that the applicant had worked in electronics and in administration and management from 1973 to 1998.

VIEWS OF THE COAST GUARD

On November 20, 2006, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request and to accept the comments from Commander, Coast Guard Personnel Command (CGPC) as the advisory opinion.

CGPC noted that the application was not timely. In this regard, CGPC stated that although the applicant contended that his application was submitted within three years of a 2002 confirmatory diagnosis of Meniere's syndrome and a new diagnosis of Lewy Body Dementia, these subsequent diagnoses do not justify an error or omission regarding his original record. CGPC further stated:

2. I find no evidence that the Coast Guard's decision in this matter was in error or unjust. The record indicates that the findings and recommendations were reasonable and appropriate. Furthermore, the matters of record strongly support a conclusion that the applicant was afforded his full due process rights. From the Initial Medical Board . . . the applicant's case continued through the PDES, including the applicant's appearance before the FPEB . . . and evaluation by the Physical Review Council, which supported the FPEB findings . . . The applicant's [FPEB] was also reviewed by the Coast Guard Chief Counsel and approved by the Final Approving Authority for the Commandant. I find no error in this process or the decision of the Board.

3. While the applicant continues to disagree with the findings of the FPEB, his concerns were adequately addressed by the [FPEB]. The applicant was afforded due process and properly represented by counsel during the proceedings. The FPEB properly considered expert testimony during the proceedings in weighing the disability rating decision. The applicant is basing his contention of an error or injustice . . . upon the presumption that the Board did not consider the diagnosis of Meniere's syndrome in determining his disability rating. The Report of Proceedings . . . indicates that the [FPEB] considered the provisional diagnosis of Meniere's syndrome was inconclusive. [One of the two medical doctors at the FPEB stated,] "right now we can't call it Meniere's because it doesn't fit the description."

4. The applicant indicates that the VA awarded him a disability rating of 80%. The subsequent VA disability (30 years post discharge) does not reflect an incorrect rating or omission when he was processed through the PDES. The military disability system determines unfitness for duty and then rates only the extent that the unfitting medical condition or conditions prevent the member from performing their duties at that time. The VA ratings are based on an evaluation of the whole person, including the evaluation of the evaluatee's employability status

and earning capacity. Accordingly, VA ratings are not determinative of the issues involved in military disability rating determinations. Fluctuation in rating over time is not unexpected and the Applicant's current physical disabilities are being addressed through the appropriate venue. The evaluation of the applicant at the time of discharge is not effected by subsequent VA disability rating.

APPLICANT'S RESPONSE TO THE COAST GUARD'S VIEWS

On February 2, 2007, the Board received the applicant's reply to the views of the Coast Guard. On February 4, 2007, the applicant submitted an addendum to his original reply. The applicant alleged in each response that the FPEB did not consider the medical documentation that showed that he had been diagnosed with Meniere's disease. In this regard, he stated the following:

1. If the condition of Meniere's disease would have been considered by the [FPEB] based upon the medical diagnosis provided by Dr. [B], . . . and Dr. [C], MD/ENT, an assignment of 30% disability would have been appropriate to that finding. However, prior to convening the Board, I requested to present the findings from these doctors dated September 1970, but was denied that opportunity.
2. The brain disease/head trauma findings would have increased the disability rating, and had it been fully understood as to the extent of the trauma, it would have probably been a much higher rating.
3. Even though I continued to suffer from many symptoms of the above conditions, including headaches, dizziness, nausea, loss of memory, inability to concentrate, tinnitus, etc., I was denied further treatment. I rebutted the findings of the FEB and requested further medical evaluation. This was denied by the fact of the medical discharge awarded by the Board.
4. Although I was provided with a counselor, he was not assigned in advance of the PEB meeting, eliminating the possibility that we could discuss my case. Further, the counselor had no legal or medical training on which to rely to help in presenting my case.

* * *

I rebutted the findings of the MEB and PEB. I requested in my rebuttal that I be provided with additional testing and evaluation to determine the full nature of my medical condition. The counsel provided me was not appropriately and timely provided, and did not possess the knowledge, skills, or training to assist in a medical setting or Physical Evaluation Board. My medical condition at the time of the MEB and PEB was not at sufficient capacity to properly represent myself, in that I suffered from memory loss, confusion and inability to concentrate, as

documented in the PEB report. I do not consider this to have been “a full and fair hearing.”

SUMMARY OF APPLICABLE LAW

Disability Statutes

Title 10 U.S.C. § 1201 provides that a member 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 10 U.S.C. § 1203 provides that such a member whose disability is rated at only 10 or 20 percent under the VASRD shall be discharged with severance pay. Title 10 U.S.C. § 1214 states that “[n]o member of the armed forces may be retired or separated for physical disability without a full and fair hearing if he demands it.”

Provisions of the PDES Manual (COMDTINST M1850.2C)⁶

The PDES Manual governs the separation of members due to physical disability. Chapter 3 provides that an IMB of two medical officers shall conduct a thorough medical examination, review all available records, and issue a report with a narrative description of the member’s impairments, an opinion as to the member’s fitness for duty and potential for further military service, and if the member is found unfit, a referral to a CPEB. The member is advised about the PDES and permitted to submit a response to the IMB report.

Chapter 4 provides that a CPEB, composed of at least one senior commissioned officer and one medical officer (not members of the IMB), shall review the IMB report, the CO’s endorsement, and the member’s medical records. Chapter 4.A.5.7. provides that if the CPEB finds that the evidence is insufficient for a proper determination, it will return the case to the member’s command for a Disposition Medical Board (DMB) to amplify the record.

Chapter 2.C.2.a. provides that the “sole standard” that a CPEB or FPEB may use in “making determinations of physical disability as a basis for retirement or separation shall be unfitness to perform the duties of office, grade, rank or rating because of disease or injury incurred or aggravated through military service.”

Chapter 2.C.3.a.(3)(a) provides that, if a CPEB (or subsequently an FPEB) finds that the member is unfit for duty because of a permanent disability, it will

propose ratings for those disabilities which are themselves physically unfitting or which relate to or contribute to the condition(s) that cause the evaluatee to be unfit for continued duty. The board shall not rate an impairment that does not contribute to the condition of unfitness or cause the

⁶ The Board does not maintain regulations that governed the Physical Evaluation Board in 1973. The applicant has provided no evidence that earlier regulations, if they existed, were significantly different from the current one.

evaluee to be unfit for duty along with another condition that is determined to be disqualifying in arriving at the rated degree of incapacity incident to retirement from military service for disability. In making this professional judgment, board members will only rate those disabilities which make an evaluatee unfit for military service or which contribute to his or her inability to perform military duty. In accordance with the current VASRD, the percentage of disability existing at the time of evaluation, the code number and diagnostic nomenclature for each disability and the combined percentage of disability will be provided.

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.

2. The application was not timely. An application for correction of a military record must be submitted within three years after the applicant discovered or should have discovered the alleged error or injustice. See 33 CFR 52.22. This application was submitted approximately thirty-two years after the applicant's FPEB proceedings and discharge from the Coast Guard. The applicant suggested that his application is timely because it was submitted within three years after his Meniere's disease was reconfirmed and within three years after his diagnosis of Lewy Body Dementia and Mild Cognitive Impairment with early signs of Alzheimer's. However, the applicant knew that he had been diagnosed with possible Meniere's syndrome in 1970. He also knew that the FPEB did not agree that he suffered from Meniere's disease at that time. The transcript of the FPEB hearing has a discussion between the applicant's counsel and a doctor about the applicant having a diagnosis of possible Meniere's disease. Therefore, the applicant knew at the time of his discharge that he had not been found unfit due to Meniere's disease and should have filed his application within three years of his discharge.

3. However, the Board may still consider the application on the merits, if it finds it is in the interest of justice to do so. In Allen v. Card, 799 F. Supp. 158, 164 (D.D.C. 1992), the court stated that in assessing whether the interest of justice supports a waiver of the statute of limitations, the Board "should analyze both the reasons for the delay and the potential merits of the claim based on a cursory review." The court further stated that "the longer the delay has been and the weaker the reasons are for the delay, the more compelling the merits would need to be to justify a full review." Id. at 164, 165.

4. Based upon a review of the merits in this case, the Board finds that it is not in the interest of justice to waive the statute of limitations and consider the application on the merits. Although there is some evidence in the Coast Guard medical records that the applicant was diagnosed with possible with Meniere's disease in 1970, there is other evidence that he did not suffer from Meniere's disease while in the Coast Guard. In this regard, the Board notes that after the St. Mary's and Galveston hospitalizations, the applicant was evaluated three other times, none of which produced a diagnosis of Meniere's disease. On March 9, 1971, the applicant was re-evaluated for headaches and diagnosed with post-concussion syndrome and labile hypertension. The physician performing the medical examination stated that the applicant's headaches were troublesome but they had not prevented him from working. The medical

examination revealed no abnormalities. The September 27, 1971, hospital discharge summary stated that the applicant was diagnosed with post-concussion syndrome, but he was determined to be fit for modified shore duty until an ENT evaluation. The audiogram ordered by ENT revealed hearing within normal limits with minimal sensorineural noted bilaterally. Further, a March 20, 1972 medical examination for the MEB found the applicant fit for duty. Moreover, a medical witness at the FPEB stated that based on the applicant's description of his dizziness, his symptoms did not fall within the category of Meniere's disease. The applicant had any number of tests during the approximately three-year period that he was being evaluated for headaches and dizziness, with only one test, a cold choleric test in 1970, being "strongly positive," the Board assumes for possible vertigo. However, neither that one test nor the 1970 diagnosis of possible Meniere's disease is sufficient to prove that the Coast Guard committed an error by not diagnosing the applicant with Meniere's disease upon his discharge in 1973. In this regard, the Board finds that the overwhelming majority of the other medical tests and physical evaluations in the applicant's Coast Guard medical record showed only that he suffered from post-concussion syndrome.

5. Even if Meniere's disease had been noted on the Medical Survey, the applicant has not shown that it was a condition that caused him to be unfit for continued duty at the time of his discharge. Chapter 2.C.2.a. provides that the "sole standard" that a CPEB or FPEB may use in "making determinations of physical disability as a basis for retirement or separation shall be unfitness to perform the duties of office, grade, rank or rating because of disease or injury incurred or aggravated through military service." Chapter 2.C.2.f.i. makes it clear that a member may have physical impairments ratable in accordance with the VASRD, but such impairments may not necessarily render the member unfit for military duty. The preponderance of the evidence at the time of the applicant's discharge did not support a finding of unfitness for duty due to Meniere's disease. A medical diagnosis by the DVA some thirty years after the applicant's discharge from the Coast Guard does not establish that at the time of his 1973 discharge the applicant was unfit to perform the duties of his rate due to Meniere's disease or any of the other conditions currently rated by the DVA, except for post concussion syndrome.

6. The Board would also note that after his discharge the applicant's dizziness and headaches did not prevent him from gainful employment in the oil fields as an oil gauger, as a ship manager, as a ship agent coordinating and loading and unloading oil tankers, as an import/export agent helping to transport crushed rock, or working in Saudi Arabia and in the Caribbean. The DVA psychological compensation and pension examination dated April 21, 2003, stated that the applicant was a highly successful businessman until approximately 1997. The DVA doctor, who examined the applicant for hypertension in August 2002, noted that the applicant had worked in electronics and in administration and management from 1973 to 1998. The applicant's ability to successfully engage in such employment for approximately twenty-three years after his discharge supports the 10% disability rating awarded by the FPEB, which indicated that the interference of the applicant's disability with his ability to perform his military duties was limited.

7. Although the applicant submitted evidence showing that the DVA has recently increased his post concussion syndrome disability rating, granted additional disability ratings for other conditions, and determined that he is not employable, such evidence does not establish

error by the Coast Guard. This Board has consistently held that a higher disability rating from the DVA does not of itself establish that the Coast Guard committed an error or injustice by assigning a lower disability rating. In Lord v. United States, 2 Cl. Ct. 749, 754 (1983), the Court of Federal Claims stated "[d]isability ratings by the Veterans Administration [now the Department of Veterans Affairs] and by the Armed Forces are made for different purposes. The Veterans Administration determines to what extent a veteran's earning capacity has been reduced as a result of specific injuries or combination of injuries. [Citation omitted.] 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. [Citation omitted.] Accordingly, Veterans' Administration ratings are not determinative of issues involved in military disability retirement cases."

8. For those conditions that are currently rated by the DVA as service connected and disabling but were not present or had not manifested themselves at the time of the applicant's discharge, the DVA is the appropriate forum for the applicant to receive compensation and treatment for the additional disabilities and/or aggravations.

9. The applicant made various complaints about the competence of his Coast Guard counsel and the alleged denial of due process in the FPEB hearing. These are matters that the applicant was aware of or should have been aware of at the time of his discharge. A challenge to the FPEB proceedings should have been brought well before thirty years had elapsed. In addition, the Board notes that the evidence offered by the applicant to prove ineffective assistance of counsel and the lack of a fair hearing before the FPEB consists only of his own statement. Mere allegations are insufficient to prove an error or injustice in the PEB process or in discharging the applicant.

10. Accordingly, due to the approximately thirty-year delay in bringing this claim, the lack of a persuasive reason for not acting sooner, and the probable lack of success on the merits of his application, the Board finds that it is not in the interest of justice to waive the statute of limitations. Nor is there persuasive evidence of error or injustice by the Coast Guard. Therefore, the applicant's request for relief should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of former xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is denied.

Toby Bishop

James E. McLeod

Adrian Sevier