

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2008-131

**XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX**

FINAL DECISION

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 may 20, 2008, upon receipt of the applicant's completed application, and subsequently prepared the final decision for the Board as required by 33 CFR § 52.61(c).

This final decision, dated February 12, 2009, is approved and 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 by directing the Coast Guard to pay him severance pay due to his separation by reason of physical disability due to schizophrenia on November 26, 1980. The applicant stated that he is owed the pay because his DD Form 214 noted that he was separated by physical disability with severance pay.

The Commandant approved the findings of Physical Evaluation Board (PED) and directed that the applicant be separated by reason of physical disability incident to service. The Commandant noted that severance pay would be in accordance with volume 2 of the Comptroller Manual (COMPTMAN). The Commandant noted at that time that the applicant had 3 months and 0 days of active service as of October 21, 1980. At the time of the applicant's actual discharge on November 26, 1980 he had 4 months and 5 days of active service.

The applicant noted that he did not discover the alleged error until May 16, 2008. He further stated that it is in the interest of justice for the Board to consider his application to set the record straight even if it has been more than 3 years since discovery of the error.

VIEWS OF THE COAST GUARD

On October 14, 2008, the Board received an advisory opinion from the Office of the Judge Advocate General (JAG) of the Coast Guard in which he recommended that the Board

deny relief. In recommending denial of the application, the JAG noted that the application was not timely and further stated the following:

The applicant served a total of 4 months and 5 days . . . before being discharged as a result of a medical board approved by the Commandant . . . The applicant was recommended for separation with severance pay due to a combined 20% disability rating . . . The applicant's discharge and severance pay were directed by the Commandant . . . in accordance with VOL2 COMPTMAN^[1] . . . Because the applicant had less than six months of active duty service, he was not then and is not now entitled to disability severance pay . . .

The JAG noted Article 10.G.2. of the Coast Guard Pay Manual, which states, "A member who has completed 6 months or more but less than 20 years of active service at the time separated is entitled to disability separation pay." The JAG stated that this was the policy at the time of the applicant's discharge and that it is the current policy. The JAG stated that the applicant's DD Form 214 should have indicated disability severance payment in the amount of \$0.

The JAG attached a memorandum to the advisory opinion from the Commander, Coast Guard Personnel Command (CGPC). CGPC noted 10 USC § 1212(a)(A) states that upon the separation from the armed force under 10 USC § 1203 or 106, a member is entitled to disability severance pay computed by multiplying his years of service, not more than 12, by twice the amount of monthly basic pay. Subsection (b) of this law further explains that "a part of a year of active service that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded." CGPC stated that the computation of severance pay in the applicant's case amounted to zero, since fractions of a year less than six months are not included in the computation.

APPLICANT'S REPLY TO THE VIEWS OF THE COAST GUARD

On November 16, 2008, a copy of the Coast Guard views was sent to the applicant for a response. The BCMR did not receive a response.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's record and submissions, the Coast Guard's submission, and applicable law:

1. The BCMR has jurisdiction of the case pursuant to section 1552 of title 10, United States Code. The application was not timely.

¹ The advisory opinion noted that COMPTMAN is not available and the information relative to disability severance pay is contained in the Coast Guard Pay Manual. The advisory opinion noted that based upon the Coast Guard's research there has been no change in policy that would have entitled the applicant to severance pay at the time of his discharge.

2. To be timely, an application for correction must be filed within three years of the date the alleged error or injustice was, or should have been, discovered. See 10 U.S.C. § 1552, 33 CFR § 52.22. The applicant stated that he discovered the alleged error or injustice in April 2008. However, the applicant should have been aware at the time of his discharge from the Coast Guard or shortly thereafter that he had not received severance pay. The notation about severance pay was on the DD Form 214 that the applicant received upon his discharge. Therefore, his application was submitted approximately 25 years past the statute of limitations.

3. 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 instructed 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. See also *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

4. The applicant did not offer a persuasive why it is in the interest of justice to excuse his delay in bringing his claim. Although, the applicant was discharged due to a mental illness, he offered no evidence that the illness adversely affected his ability to seek an earlier correction to his record.

5. With respect to the merits, the Board finds that the applicant is not likely to prevail. When the calculation for severance pay under 10 USC 1212 is applied to the applicant's situation, the amount of such pay would be zero. The result of this calculation is the same whether done in 1980 or today. Accordingly, the applicant was not entitled to severance pay because he did not have 6 months or more of active service.

6. Accordingly, the applicant's request should be denied because it is untimely and because of its lack of merit.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

Lillian Cheng

Paul B. Oman

Darren S. Wall