DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2010-139

Xxxxxxxxxxxxxxxxxxxx
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FINAL DECISION

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case after receiving the applicant's completed application on March 19, 2010, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated January 13, 2011, is approved and 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, who was medically retired with a 40% disability rating from the Coast Guard on October 14, 2000, after completing 19 years and 4 months of active duty, asked the Board to correct her record to show that she was retired with exactly 20 years of active duty so that she may become legally entitled to concurrent retired and disability pay (CRDP) under 10 U.S.C. § 1414 if the DVA awards her a disability rating of 50% or higher.[1]

The applicant alleged that when deciding whether to accept the 40% disability rating proposed by the Central Physical Evaluation Board (CPEB), an officer working in the Office of the Judge Advocate General (JAG) advised her to accept the 40% rating because the Department of Veterans' Affairs (DVA) would assign her a new rating anyway and that the DVA's rating would likely be higher. However, she received just a 30% rating from the DVA and is "still in an appeal process 10 years later."

The applicant further alleged that the JAG told her that she did not need to worry about the new CRDP law that was expected to be enacted because she had more than 18 years of service. The applicant alleged that had she been counseled properly, she would have contested the

[1] Under 10 U.S.C. § 1414, veterans with at least 20 satisfactory years of service and service-connected disability ratings from the DVA of at least 50% may receive concurrent retired and disability pay (CRDP). Prior to the enactment of CRDP, which went into effect on January 1, 2004, veterans could not receive full retirement pay and disability pay simultaneously.

CPEB's decision and she could have been placed on the Temporary Disabled Retired List (TDRL) for up to five years.[2] She alleged that she "was not only cheated out of the possibility of staying in the Coast Guard but … cheated out of receiving compensation" from the Coast Guard.

The applicant stated that she discovered the alleged error in her record on January 1, 2008, and did not explain the alleged date of discovery. She also stated that it is in the interest of justice for the Board to excuse the untimeliness of her application because the alleged error will affect her quality of life for the rest of her life.

SUMMARY OF THE RECORD

In 2000, the applicant was serving as a xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx in the xxxxxxxxxxxxxxxxxxxxxxx at Coast Guard Headquarters. On May 25, 2000, after she was found unfit for duty by an Initial Medical Board, a CPEB convened, reviewed her records, and recommended that the applicant be permanently retired with a 40% disability rating due to "fibromyalgia: constant or nearly so, and refractory to therapy." The CPEB noted that although the applicant was not fit for duty, she met the medical requirements for retention on active duty and had more than 18 but fewer than 20 years of service.

On June 15, 2000, the applicant consulted with counsel about the CPEB results. On July 6, 2000, she signed the following statement regarding the CPEB's recommendation:

> I have been advised by the above-named counsel regarding acceptance or rejection of the findings and recommended disposition of the Central Physical Evaluation Board and signed the appropriate statement below:
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> • • •
>
> I accept the Central Physical Evaluation Board findings and recommended disposition conditional upon the approval of my attached request for retention on active duty submitted IAW Chap. 17 CG PERSMAN. If my retention request is not approved, then I reject the Central Physical Evaluation board findings and recommended disposition and demand a hearing before a Formal Physical Evaluation Board.

On July 10, 2000, a lieutenant at the Coast Guard Personnel Command (CGPC) sent the applicant an email asking her to send him an official letter requesting retention. In a letter dated July 10, 2000, the applicant requested retention on active duty to complete 20 years of service. She stated that she had been performing her duties satisfactorily and that her "medical appointments are on a follow-up status only and have not affected my commitment to duty." She also wrote the following:

> Contingent on my retirement request for the first day of July 2001, I request to be considered for support allowance duty in the xxxxxxxxxx area, as soon as unit mission permits. This is my home of record and place of selection for retirement. Granting this request will enable me to work closely with the Florida Veterans Administration on my medical disability approvals and boards required to get into the VA system. Additionally, it will allow me to initiate the applications

[2] The applicant did not explain how she believes placement on the TDRL would have benefited her. Placement on the TDRL does not give a member more time in service but may result in reinstatement on active duty if the member becomes fit for duty or in a higher disability rating if the member becomes more disabled during the maximum 5-year period a member may remain on the TDRL. Placement on the TDRL depends upon the CPEB or FPEB (Formal PEB) finding that the member is unfit for duty because of an unstable disability.

> required for the VA's "Vocational Rehabilitation and Employment Program." Furthermore, this authorization will allow me to continue to serve the U.S. Coast Guard while alleviating the hardship of being isolated without any support system. Being in close proximity to a support system (family) would be medically therapeutic for my transition.

The applicant's command endorsed her request for retention on active duty, although her medical condition had "resulted in her routinely missing several days per week from work," and her request for an assignment to xxxxx. He noted that she should not be left in her current billet because her inability to work had created a "significant disparity in the tasks and duties of other personnel assigned" to the office. He echoed her reasons for wanting an assignment to xxxxx and stated that if she could not be assigned to xxxxx, she should be reassigned to the Headquarters Support Command (HSC) so that her current billet could be filled and the Coast Guard's medical and Work-Life facilities would be immediately available to her.

On July 31, 2000, the applicant sent the lieutenant an email asking about the status of her retention request. On August 1, 2000, the lieutenant informed the applicant that her request for retention until she attained 20 years of active duty had been approved but that she would be assigned to the HSC and that her request for an assignment in xxxxx "was not approved due to a higher service need for your talents here."

On August 2, 2000, the applicant withdrew her request for retention and the contingent acceptance of the CPEB's recommendation and signed the following acceptance instead:

> I accept the Central Physical Evaluation Board findings and recommended disposition and waive my right to a formal hearing before a Physical Evaluation Board.

The CPEB's proceedings and recommendation were reviewed and approved, and on October 14, 2000, the applicant was medically retired with a 40% disability rating.

VIEWS OF THE COAST GUARD

On June 18, 2010, the JAG submitted an advisory opinion and recommended that the Board deny relief in this case. In so doing, the JAG adopted the findings and analysis of the case provided in a memorandum by the Personnel Service Center (PSC).

The PSC stated that the applicant's retirement date of October 15, 2000, "was two years prior to the proposal of concurrent receipt submitted to the Subcommittee on Personnel, Committee on Armed Services, U.S. Senate." The PSC further stated that the applicant's request for retention on active duty until she could retire with 20 years of service was approved, but she did not accept her retention orders because she wanted to transfer to xxxxx. The PSC stated that her request to transfer to xxxxx was not approved because there was a greater need for her services at Coast Guard Headquarters. The applicant "elected retirement due to a disability over retention to the 20th year of service." Therefore, the PSC argued, she "is not entitled to relief for her decision to retire due to a disability."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 25, 2010, the Chair sent the applicant a copy of the Coast Guard's advisory opinion and invited her to respond within 30 days. The applicant did not request an extension and submitted her response late, on December 20, 2010. The applicant stated that at the time of her separation, she thought she "was being counseled by the best JAG officers the military could offer or train" and she did not question his advice. She alleged that he "was very adamant about the law of 'concurrent receipt' and sounded very sure of himself as to the law." She alleged that he told her "you are over 18 years you will be covered because you will be a medical retirement over 18 years." The applicant stated that she was very depressed, had no female colleagues in her xxxxxxxxxxxxx office, and was commuting by Metro every day, which "took a toll on my body and psyche." At the office, her job was to redact criminal cases on homicide, drug busts, and suicides, and she "worked behind a bullet proof window/office with no interaction except with the six or so male agents." She stated that she decided not to remain on active duty to complete 20 years because the proposed Headquarters assignment "would have only added to my stress, depression and frustration due to the time and hours that it would have required me to get to work each day. Upon reflection, it was a way to force me out of the Coast Guard at best."

The applicant argued that given her 19 years and 4 months on active duty and previous 4 months and 5 days in the Reserve under the delayed entry program,[3] it is unreasonable for anyone to think that she would elect retirement with so little remaining time until her 20th anniversary unless she "was given a conditional response or advice." She alleged that she "left the service based on reliance by Coast Guard legal that I would be covered to my 20th year." The applicant stated that for her "to have complete resolution, and to look back on my career in the service with goodwill, I am asking you to either grant me the needed time to complete 4 months and 5 days[4], put me in a reserve status to complete my time or put me back on active duty for the remaining time needed to complete my retirement."

SUMMARY OF THE LAW

On December 28, 2001, President Bush signed the National Defense Authorization Act for Fiscal Year 2002, Public Law 107-107,[5] and Section 641 of the act stated the following in pertinent part:

> SEC. 641. CONTINGENT AUTHORITY FOR CONCURRENT RECEIPT OF MILITARY RETIRED PAY AND VETERANS' DISABILITY COMPENSATION AND ENHANCEMENT OF SPECIAL COMPENSATION AUTHORITY.
>
> (a) RESTORATION OF RETIRED PAY BENEFITS.--Chapter 71 of title 10, United States Code, is amended by adding at the end the following new section:
>
> "§ 1414. Members eligible for retired pay who have service-connected disabilities: payment of retired pay and veterans' disability compensation; contingent authority

[3] Only the applicant's 19 years and 4 months of active duty count toward her retirement eligibility because her time in the delayed entry program was not satisfactory for retirement purposes.

[4] With 19 years and 4 months of total active duty, the applicant needs 8 months of active duty to have 20 years of satisfactory service for retirement purposes.

[5] National Defense Authorization Act for Fiscal Year 2002, Pub. L. 107-107, 115 Stat. 1012 (Dec. 28, 2001).

"(a) PAYMENT OF BOTH RETIRED PAY AND COMPENSATION.--Subject to subsection (b), a member or former member of the uniformed services who is entitled to retired pay (other than as specified in subsection (c)) and who is also entitled to veterans' disability compensation is entitled to be paid both without regard to sections 5304 and 5305 of title 38, subject to the enactment of qualifying offsetting legislation as specified in subsection (f).

"(b) SPECIAL RULE FOR CHAPTER 61 CAREER RETIREES.--The retired pay of a member retired under chapter 61 of this title [disability retirement] with 20 years or more of service otherwise creditable under section 1405 of this title at the time of the member's retirement 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 of this title 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.

"(c) EXCEPTION.--Subsection (a) does not apply to a member retired under chapter 61 of this title with less than 20 years of service otherwise creditable under section 1405 of this title at the time of the member's retirement.

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"(e) EFFECTIVE DATE.--If qualifying offsetting legislation (as defined in subsection (f)) is enacted, the provisions of subsection (a) shall take effect on—

"(1) the first day of the first month beginning after the date of the enactment of such qualifying offsetting legislation; or

"(2) the first day of the fiscal year that begins in the calendar year in which such legislation is enacted, if that date is later than the date specified in paragraph (1).

"(f) EFFECTIVENESS CONTINGENT ON ENACTMENT OF OFFSETTING LEGISLATION.

(1) The provisions of subsection (a) shall be effective only if—

"(A) the President, in the budget for any fiscal year, proposes the enactment of legislation that, if enacted, would be qualifying offsetting legislation; and

"(B) after that budget is submitted to Congress, there is enacted qualifying offsetting legislation. …"

Under 10 U.S.C. § 1414(a)(1), "[s]ubject 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 [laws requiring offsets]." Paragraph (a)(2) defines a "qualifying service-connected disability" as 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."

PRIOR CRDP CASES BEFORE THE BCMR

BCMR Docket Nos. 2007-080 and 2009-251

In BCMR Docket No. 2007-080, the applicant had been medically retired with a 60% disability rating and 19 years and 29 days of active duty after the CPEB reported that she did not meet the standards for retention until her 20th active duty anniversary. She had not requested retention, and she argued that her CPEB attorney told her that because she was so disabled and was more than 6 months from her 20th anniversary, she could not request retention. She also argued that the form used to accept or reject the CPEB results misled her into thinking she could

not request retention because the CPEB had noted that she did not meet the standards for retention and marked "NA" in a block concerning her right to request retention as if it were inapplicable to her case. The applicant submitted a statement from the attorney who had counseled her, and he supported her claim that the form was misleading and that she might have been confused about her right to request retention. He also stated that, in his experience working with CPEB evaluees, if the applicant had requested retention, she would have been retained. The applicant also submitted a letter from her last supervisor, who stated that if the applicant had requested retention, the command would have supported her request.

The JAG recommended denying relief, and the Board denied relief based on the application's untimeliness and on the lack of evidence that the applicant was not told that she could request retention. The Board found that under the applicable regulations, the applicant's command presumably informed her of her right to request retention. The Board also found that the applicant had not proved that she had been miscounseled by her attorney about her right to request retention since the attorney did not say so in his statement on her behalf.

The applicant in BCMR Docket No. 2007-080, however, requested reconsideration and submitted probative new evidence supporting her claim that she was confused about her right to request retention on active duty. The applicant submitted a copy of her Initial Medical Board (IMB) report and her commanding officer's (CO's) endorsement to the report, which were not in the record when Docket No. 2007-080 was considered. The CO wrote in his endorsement that the applicant was able to carry out all of her assigned duties and recommended that she remain in her assignment until she had completed 20 years of service. The applicant also argued that the CPEB made a typographical error in marking the box indicating that she did not meet the standards for retention since nothing in the IMB report or the CO's endorsement supported such a finding. Her request for reconsideration was granted and, upon further review in BCMR Docket No. 2009-251, the JAG recommended that the Board grant relief, finding that the IMB report and the CO's endorsement "demonstrate through a preponderance of evidence that the applicant was wronged in not being allowed to remain on active duty in order to complete 20 years of satisfactory service." The Board agreed with the JAG and granted relief by changing her retirement date to her 20th active duty anniversary.

BCMR Docket No. 2005-049

In BCMR Docket No. 2005-049, the applicant had been placed on the TDRL in 1988 with a 60% disability rating and 19 years, 10 months, and 25 days of active duty and 2 years, 7 months, and 4 days of inactive service. He had asked to be retained on active duty until he could complete 20 years of service, but his request was denied. The JAG recommended that the Board grant relief and noted that the applicant's drill records had been lost. The Board found that the application was untimely but excused the untimeliness because the applicant had filed it within three years of the enactment of Public Law 107-107 on December 28, 2001. The Board found that at the time of his placement on the TDRL, "the applicant was physically able to perform some useful work for the Coast Guard, even though pain prohibited him from working full days and from performing all of the physical tasks that might be expected of an engineering officer in certain billets." The Board granted relief by correcting the date of the applicant's placement on the TDRL to his 20th active duty anniversary based on the following reasoning:

8. In a memorandum to the Board dated July 2, 1976, the delegate of the Secretary stated that in deciding whether a veteran's discharge is unduly severe, the Board may take into account current standards and mores. Similarly, the Board may consider in this case whether the applicant's separation one month and five days shy of a 20-year retirement was unduly severe and not in accordance with current standards even if the Commandant did not clearly abuse his discretion in 1988 in deciding that the applicant could not perform useful service in his grade or billet. The written standards for retention under Article 17.A.2.b. of the Personnel Manual have not changed since 1988. However, the fact that both the JAG and CGPC recommended that the Board grant relief strongly suggests that today, a CWO in the applicant's circumstances would not be separated one month and five days shy of his 20th active duty anniversary but would be retained until he had completed 20 years of active service. The Board notes that because a veteran could not receive duplicate benefits (concurrent retirement and disability pay) in 1988, the impact of the Commandant's decision at the time was much less severe than the impact such a decision would have today. Therefore, the applicant's request likely received less consideration than it would today following the authorization of CRDP under 10 U.S.C. § 1414.

9. "Injustice" as used in 10 U.S.C. § 1552(a) is "treatment by the military authorities that shocks the sense of justice, but is not technically illegal." *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976); Decision of the Deputy General Counsel, BCMR Docket No. 2001-043. "The BCMR has the authority to decide on a case-by-case basis if the Coast Guard has committed an error or injustice." Decision of the Deputy General Counsel, BCMR Docket No. 2002-040. In light of all the circumstances of the applicant's case, the Board finds that, in retrospect, his temporary retirement one month and five days shy of 20 years shocks the sense of justice.

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. Under 10 U.S.C. § 1552 and 33 C.F.R. § 52.22, an application to the Board must be filed within three years after the applicant discovers or reasonably should have discovered the alleged error in her record. The Board finds that the applicant knew or should have known that she had not been credited with 20 years of service upon her retirement in 2000, and she knew or should have known that she was not entitled to CRDP in 2004. Although she claimed that she discovered the alleged error on January 1, 2008, she provided no explanation or justification for this alleged date of discovery. Therefore, the Board finds that her application was untimely.

3. Pursuant to 10 U.S.C. § 1552(b), the Board may excuse the untimeliness of an application if 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 to determine 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."[6]

[6] *Allen v. Card*, 799 F. Supp. 158, 164-5 (D.D.C. 1992); *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

4. The applicant argued that the Board should excuse the untimeliness of her application because the alleged error in her record will affect her quality of life. This statement, however, does not explain or justify her long delay in seeking a 20-year retirement.

5. The Board's review of the merits of this case shows that it lacks merit. The record shows that the applicant, following consultation with counsel, requested retention until her 20th active duty anniversary, and her request was approved. However, when the Coast Guard refused to move her to a unit near her home of record for her final year on active duty, she quickly elected an earlier, medical retirement. Although the applicant alleged that she opted to refuse retention based on poor legal advice, she submitted nothing to prove this allegation. Her argument that poor legal advice is the only reason she would have refused retention is not persuasive. Nor is there anything in the legislative history of 10 U.S.C. § 1414 that might have caused the JAG to tell her that a veteran with less than 20 years of satisfactory service for retirement purposes would be entitled to CRDP.[7] The applicant also alleged that she accepted the recommendation of the CPEB based on poor legal advice but has submitted nothing to support this claim either. The fact that the DVA has assigned her a lower disability rating for her fibromyalgia than did the CPEB is unusual, but certainly not evidence of poor legal advice. Nor has the applicant supported her claim that she should have been placed on the TDRL, and there is no evidence that she would have received a higher disability rating or been returned to active duty had she been placed on the TDRL. The applicant's military records, which are presumptively correct,[8] contain no evidence substantiating her allegations of error and injustice. Based on the record before it, the Board finds that the applicant's claims cannot prevail on the merits.

6. The Board notes that this applicant's case is quite different from other CRDP cases in which the Board has granted relief. Unlike the applicants in BCMR Docket Nos. 2009-251 and 2005-049, the applicant was not erroneously or unjustly denied retention until her 20th active duty anniversary. She was counseled by an attorney and initially requested retention, and her request was approved. The record shows that she then voluntarily rejected retention until her 20th anniversary because she wanted to move to xxxxx. The applicant has not shown that the Coast Guard's denial of her request to transfer to xxxxx for a year was erroneous or unjust.[9]

7. Accordingly, the Board will not excuse the application's untimeliness or waive the statute of limitations. The applicant's request should be denied because she has not justified her delay in seeking the requested correction and she has not shown that her medical retirement with 19 years and 4 months of active duty was or is erroneous or unjust.

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[7] *See, e.g.*, National Defense Authorization Act for Fiscal Year 2002, Pub. L. 107-107, 115 Stat. 1012 (Dec. 28, 2001); H.R. Conf. Rep. No. 107-333 (2001), *as reprinted in* 2001 U.S.C.C.A.N. 1021, at 1099, 2001 WL 1597757.

[8] 33 C.F.R. § 52.24(b); *see Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992) (citing *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979), for the required presumption, absent evidence to the contrary, that Government officials have carried out their duties "correctly, lawfully, and in good faith.").

[9] "Injustice" as used in 10 U.S.C. § 1552(a) is "treatment by the military authorities that shocks the sense of justice, but is not technically illegal." *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976).

ORDER

The application of xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCG (Retired), for correction of her military record is denied.

Donna M. Bivona

Evan R. Franke

Dorothy J. Ulmer