DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2011-068

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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 January 6, 2011, 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 September 29, 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, former lieutenant (LT) who was honorably discharged from the Reserve on June 30, 1994, asked the Board to correct his military record to show that he has service-connected amyotrophic lateral sclerosis (ALS; also known as Lou Gehrig's disease) and is entitled to processing under the Physical Disability Evaluation System (PDES) and to disability retired pay from the Coast Guard. The applicant stated that he was diagnosed with ALS on April 25, 2009, and was advised that his ALS is deemed to be service connected under the rules of the Department of Veterans' Affairs (DVA). He stated that he has requested disability retired pay from the Coast Guard but was told he did not qualify because he was not disabled at the time of his separation. The applicant argued that because his ALS is service connected, he should be eligible for PDES processing and disability retired pay "regardless of how [he] was at time of separation."

In support of his allegations, the applicant submitted a publication of the ALS Association entitled "ALS in the Military: Unexpected Consequences of Military Service," stating that a study conducted by Harvard University published in the January 11, 2005, edition of *Neurology* "found that men with ***any*** history of military service in the last century are at nearly 60% greater risk of ALS than men who did not serve in the military." The applicant also submitted a printout of a DVA web page with a press release dated September 23, 2008, which states that "ALS will become a presumptively compensable illness for all veterans with 90 days or more of continuously active service in the military."

SUMMARY OF THE RECORD

The applicant enlisted in the Reserve in 1980, was appointed an officer in 1987, and performed more than 10 years of active duty on extended active duty agreements before he was released from active duty into the Reserve on June 29, 1993, and honorably discharged from the Reserve on June 30, 1994, due to his non-selection for promotion to lieutenant commander. Before the applicant was released from active duty, he underwent a pre-separation physical examination on April 19, 1993. On his Report of Medical History, the applicant wrote that he was in good health and was not taking any medications. The Report of Medical Examination shows that a physician found him fit for duty or discharge. There is no evidence that the applicant suffered from or was disabled by ALS before his discharge from the Service.

The applicant's DVA medical records show that in May 2007 he began to have difficulty controlling his right foot. He was initially diagnosed with peroneal neuropathy of the right leg, but his condition progressed and in April 2009 he was diagnosed with ALS at the Mayo Clinic.

VIEWS OF THE COAST GUARD

On May 4, 2011, the Judge Advocate General submitted an advisory opinion in which he recommended that the Board deny relief in this case. He argued that the application is untimely and that based on the information of record, no error or injustice was committed by the Coast Guard when the applicant was separated from the Service. In making this recommendation, the JAG adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

The PSC stated that the under Chapter 2.C.2.a. of the PDES Manual, "[t]he sole standard 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." In addition, the PSC pointed out that under 10 U.S.C. § 1201, to be entitled to disability retired pay, a member must be found unfit for duty because of a physical disability incurred or aggravated while entitled to basic pay. Therefore, the PSC concluded that the applicant is not entitled to disability retired pay because there is no evidence that he was ever found to be unfit to perform his duties while he was entitled to basic pay—i.e., serving on active duty. The PSC noted that there is no evidence that ALS prevented the applicant from performing his duties while he was entitled to basic pay, "nor is there evidence that the applicant exhibited symptoms from the disease at the time he left service. Therefore, by law, the applicant is not entitled to a disability retirement from the [Coast Guard]. The applicant is entitled by law, however, to disability compensation from the [DVA] for his service connected disease." The PSC also noted that the applicant's records show that he is already receiving monetary compensation for ALS through the DVA.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 9, 2011, the Chair sent the applicant a copy of the advisory opinion of the Coast Guard and invited him to respond within 30 days. No response was received.

APPLICABLE LAW

10 U.S.C. § 1201

Under 10 U.S.C. § 1201, a member of the regular Coast Guard or a reservist serving on active duty for a period of more than 30 days may receive disability retired pay if the member is "unfit to perform the duties of the member's office, grade, rank, or rating because of physical disability incurred while entitled to basic pay" and if the Secretary determines that

> (1) based upon accepted medical principles, the disability is of a permanent nature and stable;
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> (2) the disability is not the result of the member's intentional misconduct or willful neglect, and was not incurred during a period of unauthorized absence; and
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> (3) either--
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> (A) the member has at least 20 years of service computed under section 1208 of this title; or
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> (B) the disability is 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; and either--
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> (i) the disability was not noted at the time of the member's entrance on active duty (unless clear and unmistakable evidence demonstrates that the disability existed before the member's entrance on active duty and was not aggravated by active military service);
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> (ii) the disability is the proximate result of performing active duty;
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> (iii) the disability was incurred in line of duty in time of war or national emergency; or
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> (iv) the disability was incurred in line of duty after September 14, 1978.

Physical Disability Evaluation System (PDES) Manual

Article 2.A. of the PDES Manual defines "fit for duty" as "[t]he status of a member who is physically and mentally able to perform the duties of office, grade, rank or rating." "Not fit for duty" is defined as being "unable to perform the essential duties of the member's office, grade, rank, or rating."

Article 2.C.2. of the PDES Manual states the following:

> a. The sole standard 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. Each case is to be considered by relating the nature and degree of physical disability of the evaluee concerned to the requirements and duties that a member may reasonably be expected to perform in his or her office, grade, rank or rating. …

> b. The law that provides for disability retirement or separation (10 U.S.C., chapter 61) is designed to compensate a member whose military service is terminated due to a physical disability that has rendered him or her 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.

DVA Regulation: Presumptive Service Connection for Amyotrophic Lateral Sclerosis

Title 33 C.F.R. § 3.318, added to the code on September 23, 2008, states the following:

> (a) Except as provided in paragraph (b) of this section, the development of amyotrophic lateral sclerosis [ALS] manifested at any time after discharge or release from active military, naval, or air service is sufficient to establish service connection for that disease.
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> (b) Service connection will not be established under this section:
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> (1) If there is affirmative evidence that amyotrophic lateral sclerosis was not incurred during or aggravated by active military, naval, or air service;
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> (2) If there is affirmative evidence that amyotrophic lateral sclerosis is due to the veteran's own willful misconduct; or
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> (3) If the veteran did not have active, continuous service of 90 days or more.

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 or injustice.[1] The applicant alleged that his application is timely because within the past three years, he has been diagnosed with ALS and learned that the DVA considers his ALS to be service-connected. However, the applicant was released from active duty without PDES processing in 1993 and discharged from the Reserve in 1994, about fifteen years before his diagnosis. He knew in 1994 that he had not been processed under the PDES, which is the alleged error he wants corrected, and there is no evidence that he actually suffered from ALS or any symptoms of ALS before his discharge. Nor is there any evidence that he was misdiagnosed or in any way misled about his medical condition by the Coast Guard. Therefore, his application is untimely.

3. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.[2] 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

[1] 10 U.S.C. § 1552(b).
[2] *Id.*

the claim based on a cursory review."[3] In addition, "the longer the delay has been and the weaker the reasons are for the delay, the more compelling the merits … need to be to justify a full review."[4]

4. Regarding the delay of his application, the applicant explained that he did not know that he had ALS or that his ALS is considered a service-connected medical condition by the DVA until recently.

5. A cursory review of the merits of this case shows that the applicant underwent a pre-separation physical examination in 1993 and was found fit for duty and separation without PDES processing or disability retired pay from the Coast Guard. His Coast Guard medical records are presumptively correct,[5] and he has submitted nothing to show that he was not fit for duty at that time. Specifically, he has not shown that he was "unfit to perform the duties of the member's office, grade, rank, or rating" at the time of his separation, as is required for a disability retirement under 10 U.S.C. § 1201. This statute is reflected in the Coast Guard's regulations: Chapter 2.C.2. of the PDES Manual states that "[t]he sole standard 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" and "[t]he law that provides for disability retirement or separation (10 U.S.C., chapter 61) is designed to compensate a member whose military service is terminated due to a physical disability that has rendered him or her unfit for continued duty." There is no evidence that the applicant's military service was terminated because of a physical disability or that he suffered a disqualifying disability in 1993 or 1994. The fact that the applicant has been diagnosed with ALS and is presumptively entitled to DVA benefits under DVA rules because of the diagnosis does not prove that, under the laws applicable to the Coast Guard, he is entitled to PDES processing or disability retired pay from the Coast Guard. Based on the laws applicable to the Coast Guard and the applicant's records, the Board finds that the applicant's claim cannot prevail on the merits.

6. Accordingly, the Board will not waive the statute of limitations. The applicant's request should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

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[3] *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).
[4] *Id.* at 164-65; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).
[5] 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.").

ORDER

The application of former xxxxxxxxxxxxxxxxxxxxxxxxxxx, USCGR, for correction of his military record is denied.

James E. McLeod

Vicki J. Ray

Julia Doig Wilcox