

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2011-208

**XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX**

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 July 15, 2011, and subsequently prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated April 19, 2012, 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 was medically retired from the Coast Guard on June 10, 1987, with a combined 60% disability rating for severe lumbosacral strain, gout, and hypertension. He had completed 19 years, 10 months, and 5 days of active duty. He asked the Board to correct his record to show that he was retired with exactly 20 years of active duty. The requested correction might make him legally entitled to concurrent retired and disability pay (CRDP) under 10 U.S.C. § 1414.¹ The applicant stated that he discovered the alleged error on January 2, 2011.

SUMMARY OF THE RECORD

The applicant enlisted on active duty on August 4, 1967, as a steward recruit (TR; pay grade E-1). On September 20, 1986, the applicant, then a chief health services technician (HSC), underwent an initial medical board.² He was diagnosed with a lumbosacral spine condition,

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 was signed into law on December 28, 2001 and went into effect on January 1, 2004, veterans could not receive full retirement pay and disability pay simultaneously.

² An initial medical board is a written report of a medical board convened by appropriate authority to evaluate a member's fitness for continued duty due to physical or mental impairments and to make recommendations consistent with the findings. Chapter 2.A.23 of the PDES Manual (1981).

hypertension, and gout. The medical board recommended that the applicant be retained on active duty in a limited duty status to complete 20 years of service. The applicant's medical limitations precluded him from standing for more than 3 to 5 minutes and from repeated tugging, pulling or lifting more than 10 pounds. He was also precluded from unnecessary stair or ladder climbing, physical fitness testing or training activities, and shipboard, overseas or field activities.

On October 14, 1986, the applicant's command commented on the medical board and advised the Commandant that "[the applicant's] desire is to complete his 20 years of active service[,]” but the command requested that the CPEB (Central Physical Evaluation Board)³ review and adjudicate the medical board for a medical disability retirement because of the applicant's continuing back problems and his placement on indefinite limited duty status.

On March 5, 1987, the applicant was reevaluated by the medical board. The Medical Board made the same diagnosis as the earlier medical board and recommended that the applicant's case be reviewed by the CPEB for adjudication and disposition. The medical board stated that the applicant was unable to return to his usual and customary activities in the Coast Guard.

On March 27, 1987, the applicant's CO commented on the medical board and stated that the applicant was not fit for assignment to a ship or station where he would be required to carry patients and heavy medical equipment. The CO again recommended adjudication by the CPEB.

On 13 April 1987, the CPEB reviewed the applicant's case and granted him a combined 60% disability rating for lumbosacral strain and related conditions, gout, and hypertension. The CPEB noted at the time of adjudication that the applicant had served on active duty for 19 years, 8 months, and 5 days.

In Section III (Recommendations Regarding Retention) on page 1 of the CPEB report, the CPEB was required to make recommendations regarding the applicant's retention by completing the following items:

- “22. The evaluatee has between 18 and 20 years active duty and in the opinion of the CPEB, the evaluatee meets the medical requirements for retention [in accordance with] Chapter 17, CG [Personnel Manual],” to which the CPEB could have marked YES, NO, or NA. The CPEB checked NA.

³ The CPEB is a permanently established administrative body convened to evaluate, on a record basis, whether active duty, reservists, or temporarily disabled retired members are fit for duty. Chapter 4.A. of the PDES Manual. If the CPEB finds a member unfit for continued duty, it shall make such findings and propose ratings for those disabilities which are unfitting or which contribute to the condition that causes the member to be unfit. The CPEB may also to make recommendations with regard to retention.

- “23. The evaluatee’s request for retention (if submitted with the medical board IAW Chap. 17, CG Personnel Manual) has been approved,” to which the CPEB could have marked YES, NO, or NA. The CPEB marked NA.
- “24. Type of retirement if evaluatee is to be retained less than 6 months (IAW Chapter 17, CG Personnel Manual) and reevaluation is not required,” to which the CPEB could have marked temporary retirement, permanent retirement, or NA. The CPEB marked NA.

The CPEB recommended that the applicant be permanently retired from the Coast Guard due to physical disability. On April 20, 1987, after consultation with an attorney, the applicant accepted the findings and recommendation of the CPEB and waived his right to a formal hearing.

On May 12, 1987, the Commandant approved the findings and recommendation of the CPEB and directed that the applicant be discharged from the Coast Guard due to a physical disability effective June 10, 1987. At the time of discharge, the applicant was 54 days short of a 20 year active duty retirement.

VIEWS OF THE COAST GUARD

On October 20, 2011, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief “if the Board decides not to consider the applicant’s claim based on its untimely submission” but to grant relief if the Board “decides that it would be in the interest of justice to excuse the failure to file timely.”

In arguing that that the application should be denied for untimeliness, the JAG noted that the applicant retired in 1987, but waited 24 years before filing his application with the BCMR. The JAG also noted the applicant’s assertion that he did not discover the alleged error until January 2, 2011, when he learned of the 2001 passage of the Concurrent Receipt of Retired & Disability Pay law. The JAG stated that the applicant failed to provide any other explanation for his lengthy delay in filing his BCMR.

However, the JAG noted that the Board may waive the untimeliness if the Board finds that it is in the interest of justice to do so. In this regard, the JAG stated that “the decision to medically retire the applicant less than 2 months shy of his statutorily mandated 20-year active duty retirement appears to be contrary to [Coast Guard] policy and inconsistent with past BCMR findings.” The JAG further stated that although the applicant was afforded due process under the Physical Disability Evaluation System (PDES),⁴ the record does not reflect that it was in the Coast Guard’s best interest, and certainly not in the applicant’s best interest, to medically retire the applicant two months shy of a 20-year active duty retirement.

⁴ The Coast Guard PDES is composed of administrative boards and reviewing and approving authorities that evaluate a member’s physical ability to perform the duties associated with the member’s office, rank, grade, or rating. The components of the PDES are the medical board, Central Physical Evaluation Board, Formal Physical Evaluation Board, the Physical Review Council, and the Physical Disability Appeal Board.

The JAG noted that the applicant's first medical board recommended his retention on active duty in a limited duty status until he earned 20 years of service, which is consistent with Coast Guard policy to retain personnel who have at least 18 but fewer than 20 years of service when they are determined to be unfit for continued duty. The JAG further stated:

Based on the first [medical] board's transcript, it would appear the board was attempting to follow the Coast Guard's policy as previously mentioned. The record does not reflect any indication to show that the applicant should not have remained on active duty a few weeks longer to gain a 20 year active duty retirement. Therefore, it is the Coast Guard's opinion that the applicant should have remained on active duty based on the facts and circumstances of this particular case until he reached his 20-year active duty retirement date.

The JAG noted that if the BCMR waives the statute of limitations and grants relief in this case, "[a]ny relief granted should be in accordance with the policy and law during the time-frame of the applicant's computed 20-year retirement date. Any monetary retirement benefits should be offset by corresponding disability payments as prescribed by applicable laws in effect at that time. Calculations of any back-pay should also correspond with applicable law and regulations during the appropriate time-frame(s)." The JAG noted that his recommendation was based on the unique circumstances of the case and "should not be viewed as establishing/setting new precedent."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 7, 2011, the Board received the applicant's response to the views of the Coast Guard. He explained that he was told by his lawyer that he had to accept the offer to retire permanently due to his disability. He stated that he was not aware of the repercussions of not earning a 20-year retirement and had no way of knowing that some 20 years later the Congress would pass a law authorizing concurrent receipt of retired and disability pay. He stated that because he is 54 days shy of 20 years of active service, he is deprived of approximately \$1900 per month. He argued that the Coast Guard should have retained him for the 54-day period under Article 17.A.2. of the Personnel Manual. He asked that the Board grant his request for a correction to show that he served on active duty for 20 years.

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 the alleged error. The Board finds that the applicant knew when he retired in 1987 due to a medical disability that he did not have 20 years of active service because his length of service is written on the CPEB documentation that he signed. However, the Board is persuaded that the date of retirement is not the date that should be

used to determine whether the applicant's application is timely because until the passage of the CRDP law in December 2001, a member could not receive both retired pay and disability compensation.

3. The applicant stated that he did not discover the CRDP law until January 2, 2011, approximately 10 years after its passage. However, he did not provide the Board with sufficient facts and information about how he learned of the law in 2011 for the Board to find that January 2, 2011 is the date on which he discovered the error or injustice. Therefore, the Board agrees with the JAG that the application is untimely.

4. Although the application is untimely, the Board must still perform at least a cursory review of the merits to determine whether it is the interest of justice to waive the statute of limitations. 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.

5. The Board finds that it is interest of justice to waive the untimeliness in this case based upon the strength of its merits. In this regard, the JAG admitted in the advisory opinion that the Coast Guard did not follow its policy when it retired the applicant 54 days short of 20 years of active service. This unfortunate error has resulted in the applicant's ineligibility to receive both retired and disability pay under the CRDP law and constitutes a continuing injustice. The Board notes that today, members like the applicant, have the benefit of counsel who are aware of CRDP and would probably contest any attempt to retire a member with between 18 and 20 years of active service. Therefore, as stated above, the untimeliness is excused.

6. The Board agrees with the JAG that the decision to retire the applicant 54 days short of his earning a 20-year retirement is contrary to Coast Guard policy. Under Article 17.A.2.b. of the Personnel Manual, the policy is to retain disabled members with more than 18 years of active duty until their 20-year retirement date, if they would not be a hazard to themselves or others and they could perform useful service. There is no evidence in the record that the applicant could not have performed some useful service or that he would have been a hazard to himself or others.

7. The Board also finds, as admitted by the JAG, that the applicant wanted to remain on active duty until he reached 20 years of active service and the first medical board to evaluate his case recommended his retention until his 20th active duty anniversary. There is some evidence in the record that the applicant could not perform all of the duties of a health services technician, but that is not proof that he could not perform some other useful service to the Coast Guard in a limited duty status, which is the standard for determining the retention of members with disabilities and who have 18 or more years of active duty. In addition, there is no explanation by the CPEB for not making a recommendation with regard to the applicant's retention. Accordingly, the Board finds that the Coast Guard committed an error or injustice by not retaining the applicant for 54 days to allow him to reach his 20th year of active service.

8. The Board notes that the instant case is similar to BCMR Docket No. 2005-049. In that case 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. Prior to his retirement due to a disability, 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 in the advisory opinion that the Board grant relief. 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.”⁵ The Board granted relief by correcting the date of the applicant’s placement on the TDRL to his 20th active duty anniversary

9. In light of the above findings, the Board finds and the JAG agrees, that the applicant’s request should be granted by correcting his retirement date to his 20th active duty anniversary so that he shall have exactly 20 years of active duty and by paying him any amount due as a result of this correction in accordance with applicable laws and regulations.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

⁵ Although the Board found the application in 2005-049 to be untimely, it excused the untimeliness because the applicant had filed it within three years of the enactment of Public Law 107-107 on December 28, 2001.

ORDER

The application of XXXXXXXXXXXXXXXXXXXXXXXXXX, for correction of his military record is granted.

The Coast Guard shall correct the date of his retirement to his 20th active duty anniversary so that he shall be credited with exactly 20 years of active duty. The Coast Guard shall pay him any amount due as a result of this correction in accordance with applicable laws and regulations.

Anthony C. DeFelice

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