

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2011-009

**XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX**

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 application upon receipt of the applicant's completed application on October 19, 2010, and subsequently prepared the final decision as required by 33 CFR § 52.61(c).

This final decision, dated July 14, 2011, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

RELIEF REQUESTED AND ALLEGATIONS

The applicant asked the Board to upgrade his reenlistment code from RE-3P (eligible to reenlist with a physical disability waiver) reenlistment code to RE-1 (eligible to reenlist). The applicant enlisted in the Coast Guard on February 5, 1991, and was honorably discharged with severance pay on July 14, 2003, because of a physical disability, with a JFL¹ separation code and an RE-3P reenlistment code.

The applicant alleged that his physical disability discharge was unjust. He stated that he was advised by a military lawyer to accept the severance pay and discharge because if he did not, he risked being discharged as unfit for duty with no severance pay. He stated that he is currently a civilian police officer and has lost no time from work because of an injury. He submitted a copy of a United States Civil Service Commission Certificate of Examination that showed he had no conditions that limited his ability to perform the duties of a police officer.

The applicant also submitted a medical note from the Department of Veterans Affairs (DVA) showing the results of a September 17, 2010 pre-employment physical examination. The DVA medical note indicated that "according to the [applicant], his chronic low back pain had

¹ A JFL separation code means that the applicant was discharged with severance pay because a physical disability.

resolved.” However, the medical report noted that the applicant suffered from post traumatic stress for which he had received treatment, hypercholesterolemia, obesity, and tobacco use.

The applicant stated that he discovered the alleged error on July 14, 2003, and that it is in the interest of justice to consider his application if more than three years have passed since discovery of the error because he has held several jobs, including law enforcement and security positions since his discharge with no problems or loss of work due to an injury.

BACKGROUND

On October 3, 2002, a Medical Board (MB) diagnosed the applicant as suffering from low back pain with radiculopathy. The MB noted that the applicant was on indefinite limited duty, with no sea/boat duty and stated the following:

According to a review of health record, systems, and social and family histories, the evaluatee was well until October 1999 when [the evaluatee] suffered trauma while underway on a deployable pursuit boat. . . He recalls feeling a sudden sharp pain in his lower back and lower leg, and experienced painful ambulation.

Physical examination revealed tenderness to the lumbar area.

Indicated radiologic studies, including x-rays, MRI, and disc myelogram revealed spondylolisthesis, scoliosis, retrolisthesis of L3-L4, DDD of L3-15.

Treatment has consisted of physical therapy, analgesics, NSAIDS, steroid injections, and limited duty for an extended period of time. An Initial Medical Board was convened and submitted in Oct 2000, but was returned because the patient was expected to return to full duty. However, the patient has remained on limited duty due to back pain ever since.

Presently, [the evaluatee] complains of back pain with prolonged sitting, bending and stooping, with occasional radiation to posterior/lateral left lower extremity.

The physical examination is within normal limits, with the exception of limited forward bending to 45 degrees.

It is the opinion of the board that the diagnosis of low back pain with radiculopathy is correct and that the evaluatee is not fit for full duty.

The prognosis for this patient is poor. The patient is never expected to be fit for full duty.

The additional treatment recommended included fusion of the affected vertebrae but was deemed not viable due to involvement of multiple levels. He has had repeated orthopedic consultations that are in agreement with this. His last orthopedic consultation was completed 27 September 2002.

On December 10, 2002, the applicant's commanding officer (CO) wrote that the applicant's duties as a member assigned to Tactical Law Enforcement Team (TACLET) North were as boarding team member, boarding officer, boat engineer, cutter engineer of the watch, and engineering petty officer. The CO also stated that the applicant was limited in the performance of normal MK1 duties because his condition prevented him from performing defensive tactics and from passing the physical fitness qualification standards which were requirements for carrying, using, or operating a weapon, as set forth in the Ordnance Manual and the Maritime Law Enforcement Manual. The CO also stated that the applicant could not sit or stand for prolonged periods, could not engage in heavy lifting or frequent bending. The CO concurred with the medical board that the applicant could not perform the duties normally assigned to an MK1 in an underway billet. The CO stated that the applicant had exhibited exceptional performance to the command, but his condition kept him in a limited duty status for the past 30 months.

On January 23, 2003, the Central Physical Evaluation Board (CPEB) considered the applicant's case and found that he was unfit for duty due to "lumbosacral strain: with characteristic pain and motion." The CPEB rated the condition as 10% disabling.

The applicant accepted the findings and recommendations of the CPEB and waived his right to a formal hearing on May 23, 2003. The Commandant's delegate approved the CPEB findings on July 11, 2003, and directed that the applicant be separated from the Coast Guard severance pay.

On July 14, 2003, the applicant was separated from the Coast Guard because of a physical disability.

VIEWS OF THE COAST GUARD

On February 2, 2011, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request, in accordance with the memorandum from the Commander, Personnel Service Center (PSC).

PSC noted that the application was not timely. With respect to the merits, PSC stated that the applicant was discharged from the Coast Guard and assigned an RE-3P reenlistment code in accordance with policy. PSC also stated the applicant is eligible to reenlist except for a disqualifying physical disability. In order to reenlist, the applicant must seek reenlistment through the recruiting process and persuade a recruiter that his physical disability has been resolved. PSC concluded by stating that the Coast Guard is presumptively correct in the manner in which it processed and handled this case and that the applicant failed to substantiate any error or injustice in his record.

APPLICANT'S RESPONSE TO THE COAST GUARD'S VIEWS

On March 7, 2011, the Board received the applicant's response to the views of the Coast Guard. The applicant argued that the RE-3P reenlistment code is unjust because he performed his

duties in an excellent manner from the date of his injury in 1999 until his discharge in 2003, even earning sailor of the quarter during this period.^{2, 3} The applicant stated that while receiving treatment for his back, he continued to perform his duties to the best of his ability. He stated that he was deployed to New York after the terrorist attacks where he was instrumental in forming the Coast Guard Rapid Deployment teams.

With regard to the timeliness of his application, the applicant stated that he was unaware that he could have the reenlistment code changed until his congressman's office informed that he could do so. The applicant commented that if his application is untimely, so were the physical evaluation boards. In this regard, he stated that the IMB started in 1999, but he was not discharged until 2003.

The applicant alleged that his diagnosis was false and he had no disqualifying condition. He argued that the Board should direct that he undergo a military entrance physical (MEP) in order to prove the disqualifying factor has been resolved.

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. To be timely, an application for correction of a military record must be submitted within three years after the applicant discovered the alleged error or injustice. See 33 CFR 52.22. The applicant admitted that he discovered the alleged error at the time of his discharge in 2003, but argued that he did not learn that he could petition the BCMR to upgrade the reenlistment code until he was told that he could do so by his congressman. The applicant did not provide the date on which his congressman provided him with information about the BCMR. Nor did the applicant explain why he could not have obtained knowledge about the BCMR sooner, particularly since he was aware of the error in 2003. Other than contacting his congressman, the applicant did not state what other efforts he made, if any, to obtain a change in his reenlistment code. Therefore the application is untimely.

² The applicant's military record does not contain any documentation that he was sailor of the quarter during the period from 1999 to 2003. There is documentation in the military record that he was sailor of the quarter for the quarter ending March 31, 1994.

³ Alcohol Incident. The applicant's military record indicates that on March 30, 2001, he was involved in a serious motor vehicle accident that resulted in his receiving near fatal injuries. He was charged with driving under the influence of alcohol. His blood alcohol level tested at .29. The administrative remarks page (page 7) dated June 8, 2001 states that the applicant spent nearly a week in the hospital and almost a month convalescing from injuries sustained in the accident. The page 7 informed the applicant that this was his second alcohol incident and normally a member with two alcohol incidents would be separated from the Coast Guard, but the command was seeking his retention in the service. On August 31, 2001, Commander, Coast Guard Personnel Command (CGPC) approved the applicant's retention provided the applicant complete an appropriate treatment and aftercare program.

3. The applicant argued that if his application is untimely, the Board should excuse the untimeliness because he served and performed his duties in an exceptional manner even while being treated for his injury. He noted that during the period he was being treated for his back injury he was deployed to New York after the terrorist attacks. The Board agrees that despite incurring his second alcohol incident that involved a vehicle accident in which he sustained serious injuries during his limited duty period, the applicant's performance of his assigned limited duties was generally good. However, the applicant's good performance while in a limited duty status does not explain why he could not have submitted his application within three years after his discharge from the Coast Guard; nor does it persuade the Board to excuse the untimeliness.

4. The Board notes the applicant's argument that if his application is untimely, the Board should consider that the physical evaluation boards acted untimely in resolving his physical disability issue because his back problem was diagnosed in 1999 and he was not discharged until 2003. However, the applicant has not shown that he was prejudiced by the length of time it took the PDES to resolve his case or that the Coast Guard acted in a deliberate dilatory manner in evaluating his physical disability. The applicant was allowed to remain on active duty in a limited duty status for over 30 months, which allowed time for him to heal as much as possible and time for the physical evaluation boards to determine whether his physical disability was permanent. The Board is not persuaded to excuse the applicant's untimeliness because it took over 30 months for the Coast Guard to determine whether the applicant should be discharged because of a physical disability. Additionally, there is no time period for completion of processing under the Physical Disability Evaluation System.

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

4. With respect to the merits, the Board finds that the applicant is not likely to prevail. The applicant was discharged due to a physical disability. He did not object to the CPEB's findings and recommendations that he was unfit for duty due to a lumbar strain with pain on motion and that he should be discharged because of the disability with severance pay. The applicant waived his right to a formal hearing on the issues related to the CPEB's findings and recommendations. The fact that current or recent civilian physical examinations show that his back problem has resolved does not prove that his 2002 diagnosis was incorrect. The applicant's then-CO noted that the applicant had been in a limited duty status for over 30 months and that he could not perform all of his assigned duties because of his disability.

5. Nor has the applicant shown that his reenlistment code is erroneous. It was assigned in accordance with the Separation Program Designator Handbook. The applicant argued that his reenlistment code should be changed so that he can reenlist. The Board notes that an RE-3P

code is not a bar to reenlistment. The applicant is eligible to reenlist if he can persuade a branch of the armed services that he no longer has a back problem. However, to be considered for enlistment in the armed forces, the applicant should apply through his local recruiting office and present them with the evidence that he has presented to this Board. The Board notes that before applying for reenlistment the applicant may want to consider addressing his current PTSD diagnosis.

6. Accordingly, the Board finds that it is not in the interest of justice to waive the statute of limitations in this case and it should be denied because it is untimely.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

Troy D. Byers

Francis H. Esposito

Dana Ledger