

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2012-042

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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 December 12, 2011, and subsequently prepared the final decision as required by 33 CFR § 52.61(c).

This final decision, dated August 16, 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

The applicant asked the Board to correct his record by changing the reason for his honorable discharge from expiration of enlistment to retirement by reason of physical disability. The applicant enlisted in the Coast Guard for 4 years on December 27, 1983. He extended his enlistment on several occasions to receive medical treatment and for completion of a then-pending medical board.¹ He was discharged on August 7, 1989.

ALLEGATIONS

The applicant alleged that he should have been retired from active duty by reason of physical disability in 1989. He asserted that the Department of Veterans Affairs (DVA), a Coast Guard Medical Board, and a Coast Guard medical officer agree that that he should have been retired due to a physical disability. He asserted that his discharge due to expiration of enlistment was an oversight.

¹ A medical board is a clinical body comprised of 2 or more medical officers who evaluate an individual's condition in light of the requirements of military duty and provide a written professional opinion concerning the evaluatee's physical and mental qualifications in relation to military service and makes certain recommendations regarding the evaluatee. The first such report in each evaluatee's case is an IMB (initial medical board) and all subsequent reports are DMBs (disposition medical boards). Article 2-A-28 of the PDES Manual.

The applicant stated that the DVA recently granted him a 100% disability rating and has compensated him since 1989 based upon a 40% disability rating. He stated that the DVA has provided him with medical care and with books and tuition that allowed him to obtain a medical degree. The applicant indicates that he is a practicing physician.

The applicant stated that he should have been the Coast Guard's responsibility. He stated that he is not seeking money from the Coast Guard and that he is not angry. He stated that he just wants a proper discharge, which he believes is retirement by reason of physical disability. He stated that retirement from the Coast Guard would relieve the DVA of the responsibility for his medical care. He stated that a retirement would also allow him to receive retired pay, which would probably be less than the disability compensation he currently receives from the DVA.

According to the applicant, around the time of the expiration of his enlistment, he was undergoing a Medical Board, which determined that he was not fit for full duty. He stated that during the Medical Board process the Coast Guard would not let him reenlist due to a pending Medical Board; nor would the Coast Guard allow him to be promoted. He alleged that none of the medical documentation stated that he was fit for full duty and he was told that he would be discharged because of his condition.

The applicant stated that he discovered the alleged error on October 1, 2010 when the DVA reviewed his record. He asserted that if his application is untimely, it is in the interest of justice to consider it because the Medical Board, base medical officer, and the Department of Veterans Affairs (DVA) all agree that an error was made in 1989.

PHYSICAL DISABILITY EVALUATION SYSTEM²

The applicant underwent a Medical Board on January 20, 1988 and was diagnosed with generalized seizure disorder, vertigo, mild chiari I malformation, and recent history of closed head trauma. The Narrative Summary³ for the Medical Board indicates that in 1985 the applicant was in a motor vehicle accident and struck his head against a window. About two weeks after the accident, the applicant had sudden generalized tonic clonic seizure. He was treated with medication that appeared to work. However, about a year later in 1986, the applicant was involved in another motor vehicle accident in which he struck his head against the rear view mirror. The narrative summary stated that the applicant suffered a sudden loss of consciousness and he experienced a sudden onset of memory loss in November 1987. The Medical Board opined that the applicant was unable to return to full duty and referred the case to the Central Physical Evaluation Board (CPEB)⁴ for disposition. The applicant was advised of

² The PDES is a Coast Guard structure composed of administrative boards and reviewing and approving authorities whose common purpose is evaluating members for their physical ability to continue the required performance of their duties and the equitable application of the laws relating to separation or retirement of members because of physical disability. Article 2-A-37 of the PDES Manual (1988)

³ The narrative summary for a medical board presents a summary of the pertinent data concerning each complaint, symptom, disease, injury or disability presented by the evaluatee, which causes or is believed by the medical board to cause impairment of the evaluatee's physical condition. Article 3-G-3.a. of the PDES Manual.

⁴ The CPEB is a permanently established administrative body convened to evaluate the physical fitness of active duty and reserve members to perform their assigned duties based upon the record.

the Medical Board findings and recommendations which he acknowledged with his signature. He declined to submit a statement in rebuttal.

The CPEB considered the January 1988 Medical Board and determined that the applicant's case was not sufficiently resolved to make a final determination. The CPEB directed that a Disposition Medical Board (DMB)⁵ be convened on or about August 1, 1988 and report back to the CPEB. The CPEB ordered the DMB to obtain a neurology consult.

The DMB met on September 20, 1988 and considered the Narrative Summary medical evaluation. The diagnoses were a generalized seizure disorder versus post traumatic seizure, benign positional vertigo, resolved, mild chiari I Malformation, and history of closed head trauma. The Narrative Summary for the DMB included the following prognosis:

The near future prognosis for this patient is considered uncertain in terms of his seizure disorder. Prognosis for a diagnosis of post traumatic epilepsy is felt to be much better than that of a diagnosis of generalized seizure disorder. So far, both diagnoses have been mentioned by consulting neurologists. Hopefully, a final determination as to which diagnosis is appropriate can be made at the time of his next six month neurology appointment . . . At that time he will have been one year on an anticonvulsant. Therefore, *the board considers the patient able to resume all duties of his rate and rank with the exception that he is not fit for sea or isolated duty. No additional treatment is recommended at this time.* [Emphasis added.]

On September 28, 1988, the applicant signed a "Patient's Statement Regarding the Findings of His [Disposition] Medical Board." He was informed of the diagnoses and that he was fit to resume the duties of his rate, except that he was not fit for sea or isolated duty. He did not submit a statement in rebuttal to the findings and recommendation of the MB. The DMB was forwarded to the CPEB for action.

On December 22, 1988 the CPEB met and considered the September 28, 1988 DMB. The CPEB determined that the applicant's case was not sufficiently resolved to make a final determination. The CPEB directed that another DMB be convened on or about April 1, 1989. The CPEB directed the DMB to obtain a neurology consult.

On April 3, 1989, the DMB met to consider the applicant's case. A neurology consult was obtained. The applicant's diagnoses were probable post traumatic seizure disorder, benign positional vertigo, resolved, mild chiari I malformation, and history of closed head trauma August 1985. The Narrative Summary for the DMB stated that the applicant was *fit for full duty*. The Narrative Summary stated that the applicant had been on anticonvulsant therapy for over a year without seizure activity and that that amounted to a good prognosis. The Narrative Summary also stated:

⁵ The Disposition Medical Board (DMB) is the report of a medical board ordered by the President of the CPEB to reevaluate those conditions addressed by an initial medical board. DMB's are usually ordered when the president of the CPEB or the convened CPEB feels that the evaluatee's case was not sufficiently stable at the time of the IMB for adjudication of the case. Article 2-A-12. of the PDES.

[The applicant] is still not out of the period of time where a seizure could occur. On the other hand the percentage, although not stated in the neurology consult, would be so slim the board believes there should be no restriction as to the evaluatee's duties. Also, the question of whether the patient has a generalized seizure disorder or post traumatic seizure disorder was never fully clarified as requested on the referral SF 513 although the neurology consult did start off narrative by stating that the patient "suffers from post traumatic epilepsy." From the neurologist's standpoint he did not see any reason the evaluatee could not be returned to full duties and the board concurs with this. The evaluatee should never be so far away from medical treatment that he could not obtain periodic prescription refills, drug levels and an annual physical exam. Should another head injury occur or seizure activity develop then a medical board should be reopened. No additional treatment other than those mentioned . . . are recommended. It is the recommendation of the board that [the applicant] be referred to the CPEB for adjudication.

On April 5, 1989, the applicant signed a "Patient's Statement Regarding the Findings of the [Disposition] Medical Board." The applicant acknowledged the diagnoses and that his case was referred to the CPEB. The applicant did not desire to submit a statement in rebuttal to the Medical Board's findings and recommendations.⁶

On April 25, 1989, the CPEB met and found the applicant fit for full duty. On May 30, 1989, an attorney signed a statement that he was appointed to advise the applicant regarding acceptance of the CPEB findings and recommended disposition. The attorney noted that the applicant could not reject the CPEB's fitness for full duty determination pursuant to Article 4-A-14.a. of the Physical Disability Evaluation System (PDES) Manual. This provision states that

[w]hen an evaluatee is found FFD (fit for duty)⁷ by the CPEB, the evaluatee may not reject, but may submit a rebuttal in writing to the CPEB which may include a request for reconsideration of the fit for duty finding or request a FPEB (Formal Physical Evaluation Board). The rebuttal shall be submitted via the member's chain of command with a copy forwarded directly to Commandant

...

(The record does not contain any documentation that the applicant submitted a rebuttal to the CPEB's findings and recommendation.)

⁶ The Patient's Statement regarding the medical board signed by the applicant also included the following acknowledgments:

"I feel that all my impairments have been evaluated adequately by the Medical Board, and that these diagnosis (listed above) will be considered by the CPEB for its independent evaluation.

"I understand that the medical board's report with my rebuttal, if any, will become part of my official record.

"I further understand that the Medical Board's opinions and recommendations are not binding on the Coast Guard and that my case will be subjected to review and final disposition by higher authority."

⁷ Fit for duty is the status of a member who is physically and mentally able to perform the duties of office, grade, rank or rating. Article 2-A-15 of the PDES Manual.

On June 6, 1989, the President of the Physical Review Council⁸ forwarded the case to the Chief Counsel of the Coast Guard for legal review.

On June 15, 1989, the Chief Counsel of the Coast Guard reviewed the CPEB and found the proceedings to be in acceptable form and technically correct. The Chief Counsel also found the findings and recommendation to be supported by the evidence of record.

On June 20, 1989, the Acting Chief of the Office of Personnel and Training took final action on the CPEB and approved the findings and recommendation of the CPEB. The final action directed that the applicant *not be retired or separated by reason of physical disability*.

On August 7, 1989, the applicant was discharged from the Coast Guard due to expiration of enlistment, with an RE-1 (eligible to reenlist) reenlistment code. His military record contains a DD 214 with his signature verifying this information. Other documents in the military record show that on August 8, 1989, the applicant enlisted in the Coast Guard Reserve for 3 years. He was honorably discharged from the Reserve on August 7, 1992.

DVA MEDICAL RECORDS

The applicant filed a claim with the DVA on October 10, 1989. The DVA granted him a 40% disability rating for post-traumatic seizure disorder and 10% disability rating for dizziness described as positional vertigo residuals of close head trauma. In its rating decision, the DVA noted that a 1988 Medical Board was the only Coast Guard medical record it had pertaining to the applicant. It also noted that the applicant stated during his DVA medical examination that he had been able to keep his seizures under control but experienced occasional dizziness. According to the rating decision, the applicant also stated that his last seizure was in September 1989. The rating decision stated that the applicant could have had a seizure in September 1989 “since the last Medical Board was in 1988 and they let him stay on active duty, did not give him severance pay and let him out because his term of enlistment had expired.”

DVA documentation indicates that the applicant’s DVA disability rating for post traumatic seizure disorder has changed several times. In a May 18, 2007 DVA rating decision, the applicant was given a 100% disability rating because the applicant was hospitalized on April 27, 2007 for treatment after having three grand mall seizures on April 26, 2007. The rating decision stated that the 100% disability rating was not permanent since there was a likelihood of improvement.

DVA records indicate that on April 27, 2010, the DVA modified the applicant’s disability rating to a combined 90% that included post-traumatic seizure disorder, injuries to the right and left shoulders, and dizziness described as positional vertigo residual of closed-head injury.

⁸ The Physical Review Council is a three member review body responsible for ensuring that physical disability cases are accorded fair and uniform consideration under applicable laws, policies, and directions. Article 6-A-1. of the PDES Manual. Subsection 6-A-3 states, in pertinent part, that the President of the PRC reviews the records and recommended findings of all CPEBs that have been accepted by the evaluatees.

VIEWS OF THE COAST GUARD

On February 24, 2012, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief. The JAG stated that the application was untimely since the applicant was discharged in 1989 and knew or should have known the circumstances surrounding his release from active duty at that time. The JAG argued that the applicant has not provided a rationale for waiting until 2010 to file an application with the Board. The JAG noted that the Board has the authority to waive the three-year statute of limitations if it is in the interest of justice to do so. The JAG argued that “due to the approximately twenty-year delay in bringing his claim, the lack of a persuasive reason for not acting sooner, and the probable lack of success on the merits of his application, the Board should find that it is not in the interest of justice to waive the statute of limitations”

The JAG stated that the applicant based his argument that he should have been medically retired instead of discharged on a subsequent 2007 100% DVA disability rating. The JAG stated that it is a well-settled principal that a member may have physical impairments ratable in accordance with the VASRD (Veterans Administration Schedule for Rating Disabilities), but such impairments may not necessarily render the member unfit for military duty. The JAG cited the final decision in BCMR No. 2009-086, where the Board ruled that “Although the DVA granted the applicant a disability rating for [his condition] this Board has consistently held that a disability rating from the DVA does not by itself establish that the Coast Guard committed an error or injustice by finding the applicant fit for separation.”

The JAG stated that in addition to the approval of the 1989 CPEB that found the applicant fit for full duty, the applicant underwent a separation physical on January 23, 1989, that found him fit for separation, and the applicant agreed with that determination by signing and acknowledging such on a “Termination of Health Record” document (on July 21, 1989). The JAG also stated the following:

The applicant has provided no evidence to suggest he did not agree with the findings of his separation physical. The Coast Guard Medical Manual (COMDTINST M6000.1 Series) Article 3.B.5.a. states, “that any member undergoing separation from the service who disagrees with the assumption of fitness for duty and claims to have a physical disability shall submit written objections within 10 days of signing the chronological record of service to CGPC (now PSC). The member is responsible for submitting copies of the following along with written objections: (1) report of medical examination (SF-88)l (2) Report of Medical History (SF-93); signed copy of chronological record of service (CG-44057); [3] appropriate consultations and reports; and (5) other pertinent documentation.” (BCMR Docket No. 2008-083).

The JAG stated that he agreed with the memorandum submitted by the Commander, Personnel Service Command (PSC) and asked that it be accepted as a part of the advisory opinion.

PSC stated that the Coast Guard's PDES determined that the applicant was fit for full duty and was thus not entitled to be medically retired or separated. In this regard, PSC stated that Article 2.C.2.b. of the PDES Manual states, "The law that provides for disability retirement or separation . . . 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."

PSC stated that the applicant was given a disability a DVA rating after his discharge from the Coast Guard and that it is important to note that DVA disability ratings and Armed Forces disability ratings are made for different purposes. The DVA determines to what extent a veteran's civilian earning capacity has been reduced as a result of specific injuries or combination of injuries. The Armed Forces, on the other hand, determines to what extent a member has been rendered unfit to perform the duties of his office, grade, rank, or rating because of physical disability. Therefore, DVA ratings are not determinative of issues relative to military disability retirement cases.

PSC stated that applicant has not established an error or injustice in his PDES process. Therefore, the Coast Guard is presumptively correct and the applicant has failed to substantiate any error of injustice with regard to his record.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On or about March 12, 2012, the Board received the applicant's response to the advisory opinion. The applicant disagreed with it.

The applicant argued that he was never found fit for full duty and he continued to rely on the 1988 Disposition Medical Board that found him fit for duty, except for sea or isolated duty. He argued that if he was not fit for sea or isolated duty, he was not fit for full duty.

With respect to the advisory opinion's comments on the untimeliness of his application, the applicant stated that he is not seeking any financial gain from the Coast Guard. He stated that he would never have left the Coast Guard if he could have been promoted. He stated that the last statement that he signed was February 1, 1988, stated that he was not fit for duty. He argued that his final discharge was not signed by a doctor but by a chief hospital service technician.

The applicant stated that the "fit for duty with exceptions" comment was a gross error. He stated that a finding of fit for full duty should state just that with no limitations.

The applicant stated that the time period allowed for "reporting a claim" should never be a disqualifying factor for correcting a gross error, because the error still occurred.

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 submission 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. 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. This application was submitted approximately 20 years after final action on the applicant's CPEB and his August 1989 discharge from the Coast Guard. Although the applicant claimed that he did not discover the error until 2010 when the DVA reviewed his records, all of the information that was necessary for the applicant to know of the alleged error was available to the applicant in 1989. The applicant knew at the time of his discharge in 1989 that the basis for his discharge was expiration of enlistment and not physical disability. He signed a DD 214 with this information on it.

3. 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.

3. The applicant argued that the Board should excuse the untimeliness because a medical board, a base medical officer, and the DVA agreed that an error was committed when he was discharged due to expiration of enlistment instead of a medical retirement. The applicant relies on the September 20, 1988 DMB for his conclusion that he was never found fit for full duty. The September 1988 DMB that stated that the applicant was fit for full duty, except for sea and isolated duty, was only an interim step in the PDES process. A subsequent DMB met on April 3, 1989 and found the applicant fit for full duty and the CPEB reviewed the applicant's case and found him fit for full duty on April 25, 1989. Evidence of record proves that the applicant was aware of the 1989 fit for full duty finding because he signed a patient's rights statement with regard to the Medical Board and because his attorney counsel signed a statement that he had counseled the applicant on the findings of the CPEB's fitness for full duty determination. The applicant's statement that the Medical Board agreed that he was not fit for duty in 1989 or at the time of his August 1989 discharge is not supported by the record; nor is his assertion that the DVA agreed that he should have been retired persuasive to the Board. In this regard, the DVA, like the applicant, apparently relied on an interim Medical Board finding and not the April 25, 1989 CPEB and final action that determined the applicant was fit for full duty. Last, the applicant's statement that a base medical officer agreed that he should have been retired fails for lack of evidence. The applicant presented no evidence that after the 1989 CPEB's fit for full duty determination that a base medical officer had a different medical opinion. The applicant's reason for not filing his application sooner is not supported by the evidence and is not persuasive to the Board.

4. Although the applicant's reason for not filing his application timely is not persuasive, the Board, in accordance with Allen, the Board must perform a cursory review of the merits in making a determination whether it is in the interest of justice to excuse the untimeliness and to

consider the application on the full merits. A cursory review of the merits reveals that the applicant is not likely to prevail on his claim that he should have been retired by reason of physical disability instead of discharged by expiration of enlistment. In this regard, the Board finds that the applicant suffered a head injury in 1985 from which complications arose. He entered the PDES to determine his fitness for duty with his initial Medical Board on January 20, 1988. Because his condition was not sufficiently resolved to make a final determination at that time, the CPEB ordered two subsequent DMBs. As a result of a finding of fitness for full duty by the last disposition medical board, the applicant's case was referred to the CPEB. The CBEP found the applicant fit for full duty on April 25, 1989 and that finding was approved by the Acting Chief of the Office of Personnel and Training on June 20, 1989. At each step of the PDES process, the applicant was afforded his due process rights. He signed statements acknowledging the findings and recommendations of each medical board and he had counsel to advise him about the findings and recommendations of the CPEB. He did not submit a rebuttal to medical boards or the CPEB findings and recommendations. He has pointed to no error in the PDES process that found him fit for duty.

5. The applicant received an honorable discharge and an RE-1 reenlistment code, which means that he was eligible to reenlist. He chose not to reenlist on active duty. His suggestion that he was somehow forced out of the service or treated unfairly with regard to allegedly not being retained in the service is not supported by the record. The Board notes that he enlisted in the Coast Guard Reserve immediately after his discharge from active duty.

6. Additionally, the Board notes that the DVA granted the applicant a disability rating after his discharge. However the DVA disability rating does not prove the Coast Guard's determinations are erroneous. The applicant has presented no evidence, except for his statement, that the April 1989 finding of fit for full duty was erroneous or unjust.

7. Therefore, due to the applicant's approximately twenty-year delay in bringing his claim, the lack of a persuasive reason for not acting sooner, and the probable lack of success on the merits of his application, the Board finds that it is not in the interest of justice to waive the statute of limitations.

8. The application is untimely and should be denied.

ORDER

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

Marion T. Cordova

Anthony C. DeFelice

Rebecca D. Orban