

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2005-049

XXXXXXXXXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXXXXX

FINAL DECISION

AUTHOR: Andrews, J.

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 application was received on September 22, 2004, and the Chair docketed it on January 14, 2005, upon receipt of the applicant's military records.

This final decision, dated October 27, 2005, is 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 asked the Board to correct his record so that he may be eligible for concurrent retirement and disability pay (CRDP), pursuant to 10 U.S.C. § 1414. The statute entitles retirees with more than 20 years of active service and disability ratings of at least 50% to receive both retirement pay and physical disability compensation. He alleged that he is not being credited for several months he spent as a drilling reservist in 1972. He alleged that these months are erroneously credited as inactive service and asked that the Board correct this error.

The applicant also alleged that before he was medically retired in 1988 with a 60% disability rating and 19 years, 10 months, and 25 days of active duty, he asked to remain on active duty until he could complete 20 years of service. However, his request was denied. He alleged that his request to remain in the service until he had attained 20 years was denied only because he hired a private attorney to represent him during his disability processing, which "created problems" and prejudice against him. He stated that the Department of Veterans Affairs (DVA) has rated him as 100% disabled. He

alleged that he asked the Coast Guard about his entitlement to CRDP in August 2004, but was denied it and advised to apply to this Board. He alleged that he had not previously known about the BCMR.

SUMMARY OF THE RECORD

On February 21, 1966, the applicant enlisted on active duty in the regular Coast Guard. On February 20, 1970, upon completing exactly four years of active duty, the applicant was released to the Reserve to complete the last two years of his six-year obligation (through February 20, 1972). In the Reserve, the applicant was initially assigned to a non-pay active status pool and did not perform drills or training.

On January 21, 1972, the Reserve issued to the applicant what appear to be retro-active assignment orders placing him in a drill pay status as of January 17, 1972, and requiring him to report for drill on January 18, 1972. The orders note that to remain attached to the unit, he was required to perform at least 12 consecutive days of active duty training during the year and to attend scheduled drills (inactive duty). However, the applicant did not endorse the orders until February 15, 1972, on which day he enlisted in the Reserve. His retirement point statement indicates that the applicant received 3 retirement points for drills performed in May 1972, 4 for June, 5 for July, and 4 for August 1972.

On September 25, 1972, the applicant began serving on a voluntary, two-year extended active duty (EAD) contract. His retirement point statement for the anniversary year ending February 20, 1973, includes the 16 total drill points he earned in May, June, July, and August 1972, and 149 points for his EAD from September 25, 1972, through February 20, 1973. The applicant continued to serve as a reservist on EAD until September 20, 1974, when he reenlisted in the regular Coast Guard.

On May 31, 1985, the applicant accepted a commission as a warrant officer. Beginning in 1986, he began experiencing severe pain in his knees and was placed in a limited duty status. His limited duty was described as "no heavy lifting, running, or prolonged sitting." He underwent two surgeries and also began experiencing severe hip pain due to problems in his spine, as well as joint pain. He never returned to a full duty status.

On October 2, 1987, the applicant submitted a request to retire on September 30, 1988, when he would have completed 20 years of active duty.

On November 11, 1987, an Initial Medical Board (IMB) found that the applicant was not fit for duty and not expected to become fit for duty. The IMB listed his disabilities as follows: (1) herniated nucleus pulposus L4-L5 and L5-S1; (2) osteoarthritis, bilateral knees, right ankle, intervertebral spaces and lumbar spine; (3) status post multiple left knee debridement; (4) old anterior cruciate ligament disruption; (5) bilateral medial degenerative joint disease (severe left knee); and (6) depression, mild.

On December 22, 1987, the Commandant granted the applicant's request for retirement and issued detachment and travel orders for the applicant to retire on September 30, 1988. Also on December 22, 1987, the applicant acknowledged the findings of the IMB and stated that he would not rebut them.

On January 7, 1988, the applicant's supervisor forwarded the IMB's report to the Maintenance and Logistics Command. He indicated that he could not endorse it as the commanding officer because he did not hold that designation. He also noted that the applicant "has been advised of his right to submit a request for retention on active duty and does not wish to avail himself of the right."

On January 26, 1988, the Commander, Coast Guard Maintenance and Logistics Command Pacific, forwarded the medical board report to the Central Physical Evaluation Board (CPEB). He stated that the applicant was unable to perform the duties of his rate as he could not climb stairs or ladders, stand or sit still for any length of time, or kneel or squat. The commanding officer noted that as an engineering officer, the applicant's duties would normally include bending and squatting to gain access to confined areas of a ship or files in a cabinet, sitting at a desk or computer terminal, and repetitive stair and ladder climbing. He also stated that the applicant was "unable to work a full day at the present time due to progressively increasing pain during the workday."

On February 3, 1988, the CPEB reviewed the applicant's case. No copy of the CPEB report or of the applicant's rebuttal to the report appears in the record. A lieutenant commander (LCDR R) who was neither a lawyer nor a law specialist was appointed to serve as the applicant's counsel "in arriving at a decision regarding the findings and recommended disposition" of the CPEB. A captain certified that there was no lawyer or law specialist available to serve as counsel for the applicant.

On March 4, 1988, the applicant signed a statement of his rights and indicated that he wanted to appear at a hearing and would be represented by civilian counsel from the Disabled Veterans of America at his own expense.

On March 15, 1988, the applicant appeared at a hearing before a Formal Physical Evaluation Board (FPEB) with LCDR R as his representative. The transcript of the hearing indicates that no civilian counsel was present. LCDR R requested a 40% disability rating for the applicant's back condition, a 30% rating for his left knee problem, and a 20% rating for arthritis. The applicant testified that although he reported to an office each day, he could do little work because of his physical limitations and often left early due to pain and weakness. He stated that he was given non-urgent desk jobs, such as making corrections to contracts, and but could not sit for more than 40 minutes at a time without losing feeling in his right leg and foot. He stated that when he sat on an airplane for 40 minutes on his way to the hearing, his right leg lost feeling. During the hearing, the FPEB president asked the applicant exactly how much time in service

he had and where he planned to retire to. However, no one at the hearing mentioned any request to retain the applicant until he attained 20 years of service.

The FPEB recommended that the applicant be placed on the Temporary Disability Retired List (TDRL) with a 60% combined disability rating, including 40% for his back condition, 20% for his left knee problem, and 10% for arthritis. The FPEB also recommended that the applicant be placed in Home Awaiting Orders Status (HAOS) until his placement on the TDRL. Also on March 15, 1998, the applicant acknowledged receipt of the FPEB report and indicated that he would not rebut the findings and recommendation.

On April 11, 1988, the Physical Review Council (PRC) concurred in the findings and recommendation of the FPEB and forwarded the case to the Chief Counsel's office, which, after review, forwarded it to the Chief of the Office of Personnel, who approved the FPEB's recommendation on April 27, 1988. On April 28, 1988, the Commandant issued orders for the applicant to be retired and placed on the TDRL as of May 23, 1988.

On May 4, 1988, the Chief of the Officer Personnel Division sent a memorandum to the Chief of the Office of Personnel recommending that the applicant be given another opportunity to rebut the findings of the FPEB. The memorandum notes that the applicant had been selected for promotion to CWO3 in 1987 and, but for his disability, would be promoted on June 1, 1989. The memorandum states that the Coast Guard's retirement guide, COMDTINST M1800.4A, erroneously indicated that if a warrant officer whose name was on a selection list for promotion were retired due to a physical disability, he would be "retired in the higher selected grade." The memorandum stated that the applicant should have another opportunity to rebut the FPEB's recommendation because when he waived his right to rebut, he believed he would be retired as a CWO3 based on the erroneous language in COMDTINST M1800.4A. The memorandum stated that the Chief Counsel had recently determined that the law that allowed for retirement at the higher selected grade did not apply to warrant officers. In accordance with the memorandum, the applicant was authorized to submit a rebuttal to the FPEB's recommendation no later than May 20, 1988.

On May 16, 1988, the applicant submitted a rebuttal to the FPEB's recommendation. He argued that his arthritis and the condition of his knee warranted higher disability ratings. He did not request retention until he would attain 20 years of service.

On May 25, 1988, the PRC again concurred in the findings and recommendation of the FPEB and forwarded the case to the Chief Counsel's office.

On June 21, 1988, the Commandant denied a request by the applicant to remain on active duty until he had 20 years of service. The Commandant's letter explains that "[y]our physical condition does not meet the criteria in [Article 17-A of the Personnel

Manual] for retention. If disability retirement orders are issued, the retirement date will be established in accordance with [Article 17-B]." The letter indicates that it was prepared in response to a letter from the applicant dated May 25, 1988.

On July 19, 1988, the Chief Counsel's office completed its second review of the findings and recommendation of the applicant's FPEB and forwarded it to the Chief of the Office of Personnel, who re-approved the FPEB's recommendation on July 20, 1988.

On July 21, 1988, the Commandant issued orders for the applicant to be placed on the TDRL in the grade of CWO3 as of August 19, 1988. On July 26, 1988, the applicant's command asked that the applicant be placed in HAOS until his TDRL retirement. On July 28, 1988, Headquarters placed the applicant in HAOS.

On August 18, 1988, the Coast Guard retired the applicant as a CWO2 with a 60% disability rating. He was placed on the TDRL on August 19, 1988. His DD 214 shows that he had completed 19 years, 10 months, and 25 days of active service and 2 years, 7 months, and 4 days of inactive service. It shows no days of accrued leave paid.

Following his first periodic physical examination in December 1989, the Coast Guard determined that the applicant's condition was still unstable and retained him on the TDRL. After his second physical examination in June 1991, the CPEB recommended that the applicant be permanently retired with the same disability ratings he had been assigned in 1988. The applicant was assigned a law specialist and, after consultation, accepted the CPEB's findings and recommendation on July 8, 1991. After review by the PRC and the Chief Counsel's office, the Chief of the Office of Personnel approved the CPEB's recommendation and ordered that the applicant be permanently retired as of August 19, 1991.

The applicant's record contains a letter from the Chief of the Coast Guard's Pay Maintenance Branch dated May 21, 1992, asking the National Personnel Records Center for copies of certain records from the applicant's record because the applicant was "considering employment by the federal government" and the documentation was needed "in determining whether or not to offset his retired pay according to the Dual Compensation Statute."

A letter in the applicant's record dated October 18, 1996, indicates that in 1994, the DVA determined that the applicant was permanently and totally disabled and unemployable for DVA purposes. Therefore, the DVA had raised his 70% disability rating to 100%.

On August 11, 2004, the Coast Guard corrected the applicant's DD 214 to show that he was retired in pay grade CWO3.

IEWS OF THE COAST GUARD

On June 2, 2005, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion prepared by the Coast Guard Personnel Command (CGPC), which recommended that the Board grant relief in this case.

CGPC stated that when the applicant was transferred to the TDRL on August 19, 1988, he had completed 19 years, 10 months, and 25 days of active service for retirement purposes. In addition, his record showed 2 years and 7 months of "inactive status for pay purposes," during which he was ordered to perform inactive duty training. However, CGPC stated, in light of the assignment orders dated January 21, 1972, it appears that the applicant's record may be erroneous in that between January and September 1972, the applicant "would have been expected to attend scheduled drills." CGPC stated that it could find no records of drills in the applicant's record. Moreover, CGPC stated that "due to the lack of available information in his record and since the Applicant has been retired for nearly 17 years, we do not oppose granting the Applicant credit to obtain a total of 20 years of service."

APPLICABLE LAW

Under 10 U.S.C. § 1414, which was enacted on December 28, 2001, veterans with at least 20 years of active service and disability ratings from the DVA of at least 50% may receive concurrent retired and disability pay as follows:

(a)(1) Subject 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 [which statutes prohibit receipt of both disability retirement pay and retirement pay for years of service]. ...

(2) Qualifying service-connected disability. In this section, the term 'qualifying service-connected disability' means 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.

(b) Special rules for chapter 61 disability retirees.

(1) Career retirees. The retired pay of a member retired under chapter 61 of this title with 20 years or more of service otherwise creditable under section 1405 of this title, or at least 20 years of service computed under section 12732 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 [disability] 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.

(2) Disability retirees with less than 20 years of service. Subsection (a) does not apply to a member retired under chapter 61 of this title with less than 20 years of service other-

wise creditable under section 1405 of this title, or with less than 20 years of service computed under section 12732 of this title, at the time of the member's retirement. ...

Under Article 17-A-2(b) of the Personnel Manual in effect in 1988, “[m]embers who have at least 18 but less than 20 years’ service at the time they are found unfit for duty ... will be retained on active duty until they complete 20 years of service if they meet the following criteria:

“1. They can perform useful service in an established billet for their grade, specialty, or rating.

“2. Their retention will not be detrimental to their health nor a hazard to their associates.”

Article 17.A.2.b. of the Personnel Manual currently in effect contains the same language.

Article 17-A-3 provided the procedure for members who wished to remain on active duty in accordance with Article 17-A-2(b) until attain 20 years of service. It allowed such members to append a request to remain on active duty to their acknowledgment of the findings of the IMB or to the report of the CPEB, the FPEB, or the PRC. Subparagraph (a)(3) of Article 17-A-3 provided that for “those members having greater than 18 but less than 20 years [of] active duty, who have not requested retention as described in subparagraph (1) above, the CPEB will append to any NFD finding a specific opinion as to whether or not the member meets the medical requirements for retention established in this chapter. This provision is intended to encourage members who are approaching eligibility for a normal 20 year retirement to conditionally accept the CPEB findings and request retention on active duty.” Subparagraph (e) provided that the Commandant “will respond to all requests for retention by letter.”

Article 17-A-5 provided that a member retired due to a physical disability should be retired 10 working days following the date of the Commandant’s order but that the “retirement date may be delayed for not more than 6 months if a member has requested, in accordance with the provisions of Section 17-A hereof, retention on active duty and the member’s request has been approved.”

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 of when the applicant discovers the alleged error in his record. 10 U.S.C. § 1552(b). The applicant knew or should have known that his request for retention had been denied and that he had been retired about one month shy of the day he would have completed twenty years of active service at the time of his temporary retirement in 1988 or at least upon his permanent retirement in 1991. Thus, his 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 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. A cursory review of the record indicates that it may well have merit as the Coast Guard has recommended that the Board grant relief. Moreover, although the applicant waited more than 15 years to seek correction of his record, his delay is explained by the fact that CRDP was not enacted until December 28, 2001. The requirement of having 20 years of active service to be eligible for CRDP could not have been known earlier than December 28, 2001, and the applicant did submit his application within three years of that date. To deny this application on the basis of untimeliness would defeat this applicant's claim for CDRP because his military record would show that he has less than 20 years of active service. Therefore, the Board finds that it is in the interest of justice to excuse the application's untimeliness and consider it on the merits of the applicant's request.

5. From February 21, 1966, to February 20, 1970, and from September 25, 1972, until his disability retirement on August 18, 1988, the applicant completed a total of 19 years, 10 months, and 25 days of active duty. He also completed 2 years, 7 months, and 4 days of inactive duty from February 21, 1970, through September 24, 1972. During the last eight months of the latter period, he was in a "drill pay status" under orders to perform scheduled drills. The applicant alleged that those eight months should be counted as active duty. However, under Article 2.A.2. of the Reserve Policy Manual, drilling by a reservist—even in a pay status—counts as inactive duty. Under Article 12.C.2. of the Personnel Manual, only active duty, such as extended active duty and active duty for training, counts toward a regular retirement. According to the retirement point statement in the applicant's record, he did not perform any active duty during the anniversary year ending February 20, 1973, until he began EAD on September 25, 1972. He received 149 points for his 149 consecutive days of EAD between September 25, 1972, and February 20, 1973. The applicant's eight months in a drill pay

status from January 17, 1972, to September 24, 1972, included only inactive duty (drills), which cannot be counted toward a regular, 20-year retirement.¹

6. Under Article 17-A-2(b) of the Personnel Manual in effect in 1988, as well as the corresponding regulation currently in effect, a disabled member with more than 18 years of active duty need only be retained on active duty to the point of attaining 20 years if “[t]hey can perform useful service in an established billet for their grade, specialty, or rating” and if “[t]heir retention will not be detrimental to their health nor a hazard to their associates.” The record indicates that on May 25, 1988, the applicant requested retention, and the Commandant denied his request on June 21, 1988. As there is no evidence in the record indicating that retention would have been detrimental to the applicant’s health or a hazard to his associates, the Board presumes that the Commandant decided that the applicant could not perform useful service in an established billet for his grade, specialty, or rating.

7. In his endorsement to the IMB report, the Commander, Maintenance and Logistics Command Pacific, stated that the applicant could not perform the usual duties of an engineering officer because he could not squat or bend to gain access to confined areas of a ship or a low cabinet drawer, could not sit at a desk or computer terminal for prolonged periods, and could not climb stair or ladders repetitively. He also stated that the applicant was “unable to work a full day at the present time due to progressively increasing pain during the workday.” However, the applicant was apparently still performing some duties during the months between the IMB and the day the Commandant ordered his retirement. At the FPEB hearing, the applicant stated that he reported for work each day and performed deskwork, such as amending contracts, though he could not sit for prolonged periods. As an example of a prolonged period, the applicant noted that when he sat on an airplane for 40 minutes on his way to the hearing, his right leg lost feeling. Moreover, the Board notes that the applicant’s command did not seek HAOS for him until July 26, 1988, after the Commandant denied his request for retention and ordered his separation on August 18, 1988. In addition, a letter in the applicant’s record dated May 21, 1992, indicates that the Coast Guard was interested in hiring him at that time. Therefore, the Board concludes that the preponderance of the evidence indicates that, at the time of his separation, 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.

¹ Drilling, if performed regularly so that the member earns at least 50 points in the anniversary year, counts toward a non-regular, Reserve retirement, under 10 U.S.C. § 12732. However, to receive a non-regular, Reserve retirement, the member’s last 6 years of service must have been in a Reserve component. 10 U.S.C. § 12731. Because the applicant was a member of the regular Coast Guard at the time of his retirement, he is ineligible for a Reserve retirement.

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.

10. Accordingly, the applicant's request should be granted by correcting his record to show that he was temporarily retired on September 25, 1988, upon completing exactly 20 years of active service and by awarding him any amount he may be due as a result of this correction. The applicant may thereafter be eligible for and apply to the Coast Guard for CRDP.

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

ORDER

The application of retired CWO xxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is granted as follows:

The Coast Guard shall correct his record to show that he was retained on active duty in accordance with Article 17-A-2(b) of the Personnel Manual and placed on the Temporary Disability Retired List (TDRL) on September 25, 1988, upon completion of 20 years, 00 months, and 00 days of active service, instead of on August 19, 1988.

The Coast Guard shall pay him any amount he may be due as a result of this correction.

Jordan S. Fried

Steven J. Pecinovsky

Kathryn Sinniger