

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2005-081

XXXXXXXXXXXXXXXXXXXX.
XXXXXXXXXXXX, MK2 (Ret.)

FINAL DECISION

Author: Ulmer, D.

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 case on March 18, 2005, upon receipt of the applicant's completed application and military records.

This final decision, dated January 5, 2006, is 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 in a manner that would allow him to be paid for 23 days of leave that he was unable to sell back at the time of his retirement.

APPLICANT'S ALLEGATIONS AND SUBMISSIONS

The applicant alleged that for one and a half years prior to his retirement he was unable to take annual leave "because of the continuous need for medical appointments." In this regard, he stated, "I had surgery and soon after returning to work more medical appointments. I am retired for Combat Stress and that requires a lot of appointments. I was also TAD off of a cutter for this reason." The applicant particularly pointed to the fact that prior to retirement he had undergone surgery on his spine.

The applicant had prior military service and enlisted in the Coast Guard on January 22, 1996.

On April 6, 2004, a psychiatrist diagnosed the applicant as suffering from Post Traumatic Stress Syndrome (PTSS) and Irritable Bowel Syndrome and referred his case to a medical board.¹ The psychiatric report noted that the applicant had been treated for this mental condition for two and one-half years, with no significant improvement.

The applicant submitted medical records showing that in approximately April 2004, he began a series of diagnostic tests to determine the cause of his shoulder/neck pain. The diagnostic tests and dates were as follows: x-rays on April 23, 2004, MRI of the cervical spine without contrast on May 10, 2004, x-rays on June 17, 2004, nerve conduction study on May 4, 2004, x-rays of hand and thumb on May 17, 2004, and a cervical myelogram on June 17, 2004. The applicant underwent a surgical procedure on his shoulder for pain on July 21, 2004. Subsequently he had several physical therapy sessions.

A September 21, 2004, medical entry states that the applicant had surgery on his cervical spine on August 23, 2004.² On this date the applicant was placed on light duty as tolerated for a 60-day period.

An October 12, 2004, post-surgical note indicates that the applicant was continued on light duty for 90 days.

On December 12, 2004, the Formal Physical Disability Evaluation Board (FPEB) found the applicant unfit for continued duty and recommended that he be retired from the Coast Guard with a 50% disability rating for Post Traumatic Stress Syndrome (PTSS) and 10% for Irritable Colon Syndrome, for a combined 60% disability rating.

The applicant accepted the findings of the FPEB on December 13, 2004.

On February 14, 2004, the applicant's retirement orders were issued stating that the applicant's retirement would be effective on May 15, 2005.

The applicant's DD Form 214 shows that the applicant was separated from active duty by reason of retirement on March 14, 2005, with 13 years, 1 month, and 22 days of active service.

¹ The purpose of a Medical Board is to evaluate and report upon the present state of health of any member who may be referred to the medical board by an authorized convening authority and provide a recommendation as to whether the member is medically fit for the duties of his or her office, grade, rank, or rating. See Chapter 3.A. of the Physical Disability Evaluation System Manual (COMDTINST M1850.2C).

² There is no indication in the documents of how long the applicant was hospitalized with this surgery.

VIEWS OF THE COAST GUARD

On August 5, 2005, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request. In recommending that the Board deny the applicant's request, the JAG stated the following:

- a. Title 37 of the United States Code limits the number of days of leave [for] which members of the uniformed services can be paid during the course of their careers to 60 days. 37 U.S.C. § 501. Chapter 10 of the Coast Guard Pay Manual implements this law and states members may not be paid for more than 60 days of leave except when serving in support of a contingency operation or reservists on active duty for 31-365 days. COMDTINST M7220.29A, Ch. 10-A-1.a.(2). Neither exception applies to the applicant, and the maximum career total of leave he is eligible to sell is 60 days.
- b. Applicant claims an injustice because he was allegedly not able to take leave for medical reasons. The only evidence Applicant submits in support of his allegation is his medical record. Although Applicant did have many appointments during the 18 months prior to his retirement from active duty, Applicant took approximately 42 days of leave during the period of time between May 2003 and August 2004. Additionally, Applicant has provided no evidence indicating that the Coast Guard in any way prevented him from taking any leave from September 2004 -- when he had back surgery -- until his retirement from active duty in March 2005.
- c. The Coast Guard created no error and worked no injustice; Applicant is not entitled to relief.

The JAG attached a memorandum from Commander, Coast Guard Personnel Command (CGPC) as Enclosure (1) to the advisory opinion and asked the Board to accept it as part of the advisory opinion.

CGPC stated that the applicant's March 31, 2005 leave and earnings statement showed that the applicant had already sold 31 days of leave during his military career and that he sold an additional 29 days of accrued leave upon his retirement, for a total of 60 days. CGPC further stated that the applicant had 35 days of unused leave at the time of his retirement for which he may not receive pay.

CGPC stated that according to "Direct Access record, Absence Summary by Employee" the last date for which the applicant was charged any leave was August 6, 2004. CGPC also stated that this document indicated that the applicant was on sick leave from August 27 through September 27, 2004.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 2, 2005, the BCMR sent the applicant a copy of the views of the Coast Guard and invited him to respond. The BCMR did not receive a reply from the applicant.

APPLICABLE LAW

Section 501(b)(3) of title 37 of the United States Code states that the number of days of leave for which payment can be made may not exceed sixty, less the number of days for which payment was previously made under this section of law.

Article 7.A.20.a. of the Personnel Manual (COMDTINST M1000.6A) states, "Each member on active duty . . . is entitled to a lump sum leave payment for unused earned leave accrued to his or her credit on date of discharge, separation from active duty, or the date preceding the effective date of first extension of enlistment regardless of duration, to a maximum career total of 60 days."

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. The application was timely.

2. The applicant failed to prove that the Coast Guard committed an error by not allowing him to sell approximately 23 days of accrued leave upon his retirement by reason of physical disability. The law limits the number of leave days that may be sold during a person's military career to 60, with limited exceptions. Earlier in his career, the applicant sold 31 days of accrued leave and therefore was only eligible to sell an additional 29 days upon his retirement, which the Coast Guard allowed him to do. Accordingly, the Coast Guard did not commit an error by not allowing the applicant to sell leave in excess of that permitted by law.

3. Neither has the applicant persuaded the Board that he suffered an injustice of a nature that would require corrective action by this Board. See Reale v. United States,

208 Ct. Cl. 1010, 1011, cert denied, 429 U.S. 854 (1976), stating that injustice, when not error, is treatment by the military authorities that "shocks the sense of justice." In this regard, the Board notes that even though the applicant had numerous medical appointments during the year and a half immediately prior to his retirement, he has submitted insufficient evidence to show that he could not have arranged to take approximately 23 days of leave in total or in part prior to his retirement. The applicant was on notice on April 23, 2004, that he would probably be separated from the Coast Guard due to mental disability because on this day the treating psychiatrist informed the applicant that his case would be referred to a medical board. The applicant should have planned at that time to begin disposing of his accrued leave. He presented no evidence that he made requests for leave prior to or after his surgery. There appears to be no reason that the applicant could not have taken leave during this period, particularly during the approximately five months that he was on light duty. Moreover, the applicant does not deny that he was aware of the leave sell back policy, and the Board notes that early in his career he benefited from the policy by selling 31 days of accrued leave.

4. It is unfortunate that the applicant lost approximately 23 days of accrued leave, but the Coast Guard committed neither an error nor an injustice in this situation.

5. Accordingly, the applicant's request should be denied.

ORDER

The application of MK2 XXXXXXXXXXXXXXXX, USCG (Ret.), for correction of his military record is denied.

Stephen H. Barber

Harold C. Davis, M.D.

David Morgan Frost