

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2005-173

XXXXXX.

xxxxxxxxx, RM3/E-4 (former)

Author: Hale, D.

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. It was docketed on September 30, 2005, upon the BCMR's receipt of the applicant's completed application for correction.

This final decision, dated June 20, 2006, 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, a former radioman (RM3; pay grade E-4) who was medically retired from the Coast Guard in 1995 due to a physical disability, asked the Board to correct her record to show that the disability resulted from an injury or disease caused by an armed conflict or an instrumentality of war. The applicant stated that she was medically retired due to post traumatic stress disorder (PTSD) and that her depression was the result of a terrorist attack on her Coast Guard station in April 1986. She alleged that the Coast Guard failed to note in her record that her disability resulted from an armed conflict or instrumentality of war, and that this error has caused the IRS to deem her disability payments as taxable and to seek back taxes, interest, and penalties. She stated that IRS regulations provide that her disability payments are not subject to federal tax because her service-connected disability resulted from armed conflict and/or a terrorist attack or military action.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on May 31, 1983. In April 1986 she was serving as a radioman at LORAN (Long Range Aids to Navigation) Station

Lampedusa, off the coast of Italy. On April 15, 1986, the Libyan military launched several Scud missiles against the applicant's station in retaliation for the U.S. bombing of terrorist-related targets in Tripoli and Benghazi the day before. However, the Libyan missiles fell considerably short of their target and plunged into the Mediterranean Sea. LORAN Lampedusa did not sustain any damage from the attack.

Over the next couple of years, the patient sought medical attention on numerous occasions for complaints of depression and suicidal ideation, and was hospitalized twice for depression in 1989. On December 18, 1989, the Coast Guard convened an initial medical board to determine the applicant's fitness for continued duty. The medical board diagnosed the applicant as having atypical depression with mood incongruent psychotic features, post traumatic stress disorder, chronic and recurrent, borderline personality disorder, and temporal lobe epilepsy. The medical board determined that the applicant was not fit for duty because of a physical disability and that her case should be referred to the Central Physical Evaluation Board (CPEB).¹

In January 1990, the CPEB convened to determine if the applicant should remain on active duty or if she should be discharged with a medical disability. The CPEB determined that the applicant was "not fit for duty due to major depression with psychotic features — definite impairment of social and industrial adaptability." The CPEB noted that the applicant's disability was the "proximate result of performance of active duty or inactive duty training or incurred in line of duty during war or national emergency." She was assigned a 30% disability rating and the CPEB recommended that she be placed on the temporary disabled retirement list (TDRL).² On February 10, 1990, the applicant acknowledged and noted that she did not object to the CPEB's findings and recommendations.

The applicant was temporarily retired from the Coast Guard on April 10, 1990. Her DD Form 214 indicates that she received an honorable discharge. She was placed on TDRL effective April 11, 1990.

On November 2, 1995, the Coast Guard notified the applicant by letter that she had been found unfit to perform the duties of her rate by reason of permanent physical disability. The letter stated that she was being permanently retired from the Coast Guard effective April 11, 1995.

¹ The Central Physical Evaluation Board is a permanently established administrative body convened to evaluate, on a records basis, the fitness for duty of active and reserve members and the fitness for duty of members on the temporary disabled retirement list (TDRL). See Chapter 4.A.1. of the Physical Disability Evaluation System Manual (COMDTINST M1850.2C).

² Members whose disabilities have not stabilized to a degree where permanent disposition is warranted will be placed on the TDRL, provided they are otherwise qualified for physical disability retirement. See Chapter 8.A.2. of the Physical Disability Evaluation System Manual (COMDTINST M1850.2B).

VIEWS OF THE COAST GUARD

On February 9, 2005, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he adopted the findings of the Coast Guard Personnel Command (CGPC) and recommended that the Board grant the applicant's request. The JAG stated that Coast Guard policy in effect at the time required the CPEB to make a finding in the applicant's case "whether the disability resulted from an injury or disease which was caused by an armed conflict or an instrumentality of war."

The JAG further stated that the applicant's record clearly supports a finding that her disability was a result of armed conflict or instrumentality of war. Therefore, he recommended that the CPEB's findings and recommended disposition be corrected to include this sentence: "The disability in item 10 resulted from an injury or disease that was caused by an armed conflict or an instrumentality of war." He also noted that the Coast Guard should correct the applicant's "retired pay reporting transactions affected by this change."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On February 15, 2006, the BCMR sent the applicant a copy of the views of the Coast Guard and invited her to respond within 30 days. The applicant responded on February 23, 2006, and did not object to the Coast Guard's recommendation.

APPLICABLE REGULATIONS

Chapter 2.C.3.a.3.f. of the Physical Disability Evaluation System (PDES) Manual (COMDINST M1850.2B), requires that when the CPEB makes a finding that an evaluatee is unfit for continued duty by reason of physical disability, the CPEB shall also make a finding "whether the disability resulted from an injury or disease which was caused by an armed conflict or an instrumentality of war."

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. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. An application to the Board must be filed within three years of when the applicant discovers the alleged error in her record. 10 U.S.C. § 1552(b). The applicant was permanently retired from the Coast Guard on April 11, 1995, and started receiving disability payments shortly thereafter. Although the alleged error in her record was present when she accepted the CPEB's findings on February 10, 1990, she alleged that she did not discover the error until the IRS contacted her in 2005 demanding back taxes, interest, and penalties on her disability payments. Thus, her application was timely because she did not discover the error until 2005.

4. The applicant alleged that the CPEB failed to include in its findings that her disabling condition was caused by an armed conflict or an instrumentality of war. She further alleged that this error, in turn, caused the IRS to deem her disability payments as taxable and to seek back taxes, interest, and penalties from her. The Board finds that the CPEB indeed failed to include in its findings whether the applicant's injury resulted from an armed conflict or an instrumentality of war. Pursuant to Chapter 2.C.3.a.3.f. of the PDES Manual, when the CPEB found the applicant unfit to perform her duties and determined that she should be medically discharged, they were required to include a finding that stated "whether the disability resulted from an injury or disease which was caused by an armed conflict or an instrumentality of war." The CPEB failed to make the finding as required by Chapter 2.C.3.a.f. of the PDES Manual.

5. The JAG and CGPC stated that the applicant's disability was "directly attributed to the conflict that occurred while she was assigned to LORAN Station Lampedusa, Italy." The applicant's medical records support this conclusion. Therefore, the Board finds that the CPEB's report failed to include a finding that the applicant's disability resulted from an injury or disease which was caused by an armed conflict or an instrumentality of war.

6. The applicant is entitled to the relief requested, including the issuance of change to the CPEB's Findings and Recommended Disposition (CGHQ-4808) to include "The disability in item 10 resulted from an injury or disease which was caused by an armed conflict or an instrumentality of war." In addition, the Coast Guard should ensure that corresponding corrections are made to its retired pay reporting transactions.

[ORDER AND SIGNATURES APPEAR BELOW]

ORDER

The application of former RM3 xxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of her military record is granted as follows:

The Coast Guard shall correct her record by changing the CPEB's Findings and Recommended Disposition (CGHQ-4808) to include: "The disability in item 10 resulted from an injury or disease which was caused by an armed conflict or an instrumentality of war." The Coast Guard shall also correct her retired pay reporting transactions affected by this order. The Coast Guard shall ensure that a copy of the changes is sent to her.

George J. Jordan

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