

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2009-251

**XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX**

FINAL DECISION ON RECONSIDERATION

This is a proceeding for reconsideration of a the final decision in Docket No. 2007-080 that was issued under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code on February 21, 2008.¹ Reconsideration was granted on September 8, 2009 and it was given Docket No. 2009-251.

This final decision on reconsideration, dated June 16, 2010, 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 reconsider its decision in BCMR No. 2007-080, denying her request for a correction of her military record to show that she was retained on active duty until she became eligible for retirement by reason of longevity (20 years of active service), at which time she then retired with a 60% disability rating in accordance with the findings of the Central Physical Evaluation Board (CPEB).² This correction would allow the applicant to receive both active duty retired pay and Department of Veterans Affairs (DVA) compensation under 10 U.S.C. § 1414. The applicant was discharged from the Coast Guard on June 30, 1997, because of a physical disability that rendered her unfit to perform the duties of her rate and grade. At the time of her discharge the applicant had served for 19 years and 29 days on

¹ As noted in the original final decision, the Board was unable to obtain a complete copy of the applicant's medical record from either the Personnel Records Center or the Department of Veterans' Affairs, although several requests were made for the medical record. However, this application can be decided on the basis of the Medical Board report and attachments and the Central Physical Evaluation Board report.

² The Physical Disability Evaluation System (PDES) consist of several boards, namely, the Medical Board (MB), the Central Physical Evaluation Board (CPEB), the Formal Physical Evaluation Board (FPEB), the Physical Review Council (PRC), and the Physical Disability Appeal Board (PDAB). The CPEB 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 disability retired list. See Chapter 4.A.1. of the Physical Disability Evaluation System Manual (COMDTINST M1850.2C).

active duty. On February 28, 2008, the Board denied the applicant's request for a correction to her record because the application was untimely and because a cursory review of the merits revealed that the applicant failed to prove that the Coast Guard committed an error or injustice by not retaining her on active duty until she had earned a total of 20 years of active duty. Subsequently, the applicant requested reconsideration based upon the submission of new evidence, in addition to alleging that the Board committed a factual error in finding her original application to be untimely. Reconsideration was granted on September 8, 2009.

Background Summary taken from the Original Final Decision

On February 25, 1997, the CPEB met and diagnosed the applicant with pronounced intervertebral disc syndrome and rated the condition as 60% disabling. The CPEB determined that the applicant was unfit to perform the duties of her grade or rate and recommended that she be permanently retired.

In Section III (Recommendations Regarding Retention) on page 1 of the CPEB report, the CPEB was required to make recommendations regarding the applicant's retention by completing the following items:

"22. The evaluatee has between 18 and 20 years active duty and in the opinion of the CPEB, the evaluatee meets the medical requirements for retention [in accordance with] Chapter 17, CG [Personnel Manual]," to which the CPEB could have marked YES, NO, or NA. The CPEB checked NO.

"23. The evaluatee's request for retention (if submitted with the medical board IAW Chap. 17, CG Personnel Manual) has been approved," to which the CPEB could have marked YES, NO, or NA. The CPEB marked NA.

"24. Type of retirement if evaluatee is to be retained less than 6 months (IAW Chapter 17, CG Personnel Manual) and reevaluation is not required," to which the CPEB could have marked YES, NO, or NA. The CPEB marked NA.

The second page of the CPEB report contained the signed statement of the applicant's CPEB attorney, as follows:

I [CDR G] an attorney has been appointed to advise the evaluatee regarding acceptance of the [CPEB's] findings and recommended disposition which are set out on page one of this form.

"I have reviewed those findings in light of the record in the evaluatee's case, Title 10 U.S. Code, Chapter 61; the Veterans Administration Schedule for Rating Disabilities, applicable Coast Guard personnel regulations, and other applicable materials.

I consulted with the evaluatee on [March 11, 1997], and counseled [her] regarding acceptance or rejection of the [CPEB's] findings and recommendations, in accordance with [Commandant Instruction].

Directly below the attorney's signed statement, the applicant signed and dated the following provision on the CPEB report:

I have been advised by the above named counsel regarding acceptance or rejection of the findings and recommended disposition of the [CPEB] and signed the appropriate statement below:

[Check in block] I accept the [CPEB] findings and recommended disposition and waive my right to a Formal Physical Evaluation Board .

There were two other options the applicant could have chosen but did not. They are as follows:

I accept the [CPEB] findings and recommended disposition conditional upon the approval of my attached request for retention on active duty submitted IAW Chapter 17 CG Personnel Manual. If my retention request is not approved then I reject the CPEB findings and recommended disposition and demand a hearing before a Formal Physical Evaluation Board.

I reject the [CPEB] findings and recommended disposition and demand a hearing before a Formal Physical Evaluation Board.

On April 18, 1997, Commander, Coast Guard Personnel Command (CGPC) informed the applicant by letter that that office had approved the findings of the CPEB and that she would be permanently retired on July 1, 1997, pursuant to Title 10 of the United States Code. CGPC directed that the applicant detach from all duties effective June 30, 1997.

The applicant's DD Form 214, which she signed, shows that at the time of her retirement she had 19 years and 29 days of net active service and 2 months and 11 days of inactive service.³ The applicant indicated that she began her career in the Coast Guard as an enlisted person in 1978. On May 15, 1986, after attending officer candidate school, she was commissioned in the Coast Guard Reserve on active duty. Subsequently, she was integrated into the regular Coast Guard.

Applicant's Arguments in the Original Case

The applicant alleged that she was not given information that she was eligible to request retention on active duty under Chapter 17.A.3.a.(1)&(2) of the Personnel Manual⁴ as part of her

³ The 2 months and 11 days of inactive duty was time spent in the delayed entry program and does not count toward a 20 year active duty retirement. See Article 12.c.2. of the Personnel Manual.

⁴ Chapter 17.A.3.a. of the Personnel Manual states that the following procedures have been implemented in Chapters 3 and 4 of the PDES Manual.

medical board statement. She alleged that she was told that she “had to be within 6 months of [a] 20 year retirement in order [to request retention on active duty] and additionally I was told I could not request this because I was found permanently disabled.” She stated that if she had been given adequate legal guidance she would have accepted the CPEB findings on conditional that her request for retention on active duty be approved. She stated that it is now her understanding that a request for retention is not limited to those within six months of retirement and the pertinent regulation says nothing about permanent or temporary disability. The applicant claimed that she is now ineligible for concurrent receipt of military retired pay and DVA compensation because at the time of her discharge, she was approximately one year short of the 20 years needed for a regular retirement. At the time she was discharged she had 19 years and 29 days of active service. The applicant stated that she currently has a 70 percent disability rating, but she is functionally 100 percent disabled. The applicant stated that she discovered the alleged error on July 18, 2006, when reading a magazine article about concurrent receipt pay.

Views of the Coast Guard in the Original Case

“1. Members may append a request for retention on active duty to their Medical Board at the time they sign the Form CG-4920 acknowledging the medical board findings. The request for retention then will be forwarded along with the Medical Board findings. Concurrent actions will be taken on their request by Commander, (CGPC-opm-1) or CG-emp-a) and the [CPEB], and a coordinated reply transmitted with the CPEB findings for the acceptance or rejection of the member. This procedure is intended for, but not limited to, those members that are within six months of eligibility for a normal 20 year retirement.

“2. Members who have not previously requested retention on active duty, but who subsequently are found unfit for continued service by the CPEB, may request retention on active duty. If they desire, the members may make an acceptance of the CPEB findings conditional upon approval of the retention request.

“3. In the case of those members with more than 18 years but fewer than 20 years active duty, who have not requested retention as described in subparagraph (1) above, the CPEB will append to any unfit for continued service finding a specific opinion as to whether or not the member meets the medical requirements for retention established under 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.”

Article 17.A.3.b. of the Personnel Manual states that “[m]embers found unfit for continued service by a [FPEB] may submit a request for retention on active duty to Commander, (CGPC-opm-1) or CG-emp-1).

Article 17.A.3.c. of the Personnel Manual states that “when the Physical Review Counsel or the Physical Disability Appeal Board has determined that a member is unfit for continued service, the member may request retention on active duty.

Article 17.A.2.a. or b. of the Personnel Manual states that a member desiring retention on active duty in all circumstances should submit a letter request addressed to Commander, (CGPC) and suitability endorsed with regard to the criteria contained in Article 17.A.3.a. or b.

Article 17.A.3.e. of the Personnel Manual states that based on the policy contained in Articles 17.A.1 and 17.A.2., Commander, CGPC determines whether to retain the member or proceed with physical disability retirement or separation proceedings.

Article 17.A.3.f. of the Personnel Manual states that CGPC will respond by letter to all requests for retention.

On June 19, 2007, the Judge Advocate General of the Coast Guard recommended that the Board deny relief in based upon a memorandum from the Commander, Coast Guard Personnel Command (CGPC). CGPC noted that the application was untimely. CGPC also stated the following:

The applicant's statement that she was improperly counseled regarding her entitlement to request retention as a condition of her acceptance of the CPEB findings is based solely upon her own assertion. The record and information provided by the applicant do not support that she was improperly counseled. [The CPEB report] clearly indicates that the applicant was provided legal counsel before accepting the findings of the CPEB. Additionally, since the applicant had over 18 years of service, her case was reviewed for consideration of retention pursuant to [the Personnel Manual] as indicated in section III of [the CPEB report]. The [CPEB] found that her disability did not meet the requirements for retention. This is the same standard that would have applied to her case had she submitted such a request for retention. Had the applicant elected to request retention, her case would not have received the same adjudication regarding the retention request. At the time she accepted the findings of the CPEB, she had the option to elect a conditional acceptance and retention request; the applicant elected not to make such an election.

The applicant contends that she would have remained on active duty for the additional year to gain eligibility for CRDP [concurrent retirement and disability pay] and that "there is a conflict of interest to discharge a member after their retirement physical and avoid CRDP." CRDP was not legislatively enacted until after her retirement and therefore had no bearing on her election to accept the findings of the CPEB in 1997. The PDES process provides for a fair and impartial review of the service member's record and the applicant's record supports that she was provided legal counsel, due process and her case was adjudicated according to Coast Guard policy. There is no error or injustice presented in this case.

Applicant's Reply to the Coast Guard Views in the Original Case

On October 11, 2007, the Board received the applicant's reply to the views of the Coast Guard. She disagreed with them. She stated that the Coast Guard took the position that her application was untimely since it was submitted more than three years after her retirement in 1997. She stated that 10 U.S.C. § 1551 counts the time from the later of when the error or injustice occurred and when it was discovered. She stated that she did not discover the alleged error until 2006 when reading a magazine article on concurrent receipt of military and DVA benefits. It was then that she learned the various retired statuses and the implication of the different types of retirement. The applicant argued that even if the Board determines that her application is untimely, the statute of limitation should be waived and her case considered on the merits in the interest of justice because her military record is above reproach, she is seriously disabled, and the her circumstances on their face indicated that she was a victim of error and/or injustice.

The applicant pointed to the statement from the Coast Guard lawyer who advised her while her case was in the PDES process in support of her contention that she was confused about the retention issue. She stated that CDR G points to the confusing form used at the time and acknowledged that the applicant could very well have been confused. She stated that she was under the impression that because § III block 22 on the CPEB report was marked “No” and block 23 was marked “N/A” she was ineligible for the relief provided in Chapter 17 of the Personnel Manual. She recalled that she discussed this with her lawyer and was led to believe that she could not request such relief. She noted that today the Coast Guard uses a 20-page guide and clearer forms to make certain that evaluatees are fully and clearly informed; but she argued that these improved measures were not in place when she had to decide what to do. She stated again that it was her understanding that because she was more than six months from eligibility for a 20-year retirement and was found by the CPEB to be permanently disabled, she was ineligible for retention under Article 17 of the Personnel Manual, which was erroneous.

The applicant stated that the Coast Guard’s implication that it would have been futile for her to seek retention because the CPEB found that she did not meet the medical requirements is without merit. She argued that the CPEB made this finding without any input from her. Second, she argued that the CPEB would not have had final authority on her retention if she had checked that option on the CPEB form. She stated that if she had requested retention and the Commandant had disapproved it, she would have been entitled to a full and fair hearing before the FPEB. The applicant noted that a request for retention may be submitted even after action by the Physical Review Council and the Physical Disability Evaluation Board. She stated that the advisory opinion furnishes no information whatever as to the actual pattern and practice followed by the Coast Guard with respect to retention requests. She stated that the PEB attorney’s statement makes it clear that retention requests from personnel in the applicant’s position were favorably considered.

The applicant argued that if she had been afforded an opportunity to request retention, either by submission to the CPEB or in a live “full and fair” FPEB hearing, she could have made a very strong case for retention for the few months remaining before her 20 years were complete. She stated that she was serving as a Training Officer at Training Center Petaluma and her command wanted her to remain on active duty, where she was slated to “fleet up” to the Branch Chief position. She stated that her chain of command was shocked that she was not being retained, as is evidenced by a statement from her then executive officer.

The applicant stated that she fully understands that the concurrent receipt legislation was not enacted until after she was retired. Nonetheless, the applicant stated that had she correctly understood her options, she would have requested retention.

Statement from the applicant’s PEB Attorney

The applicant’s PEB attorney wrote that Item 22 in Section III of the CPEB Form stated “The evaluatee has between 18 and 20 years active duty and in the opinion of the CPEB, the evaluatee meets the medical requirements for the retention IAW Chap 17, CG PERSMAN” with three boxes for a mark of “yes”, “no”, or “na” was often the source of confusion. The

applicant's counsel stated that the assumption was that if the box was marked "no" the member did not have between 18 and 20 years of service and that the box was only marked yes if the member had between 18 and 20 years of service. He stated that item 22 was rarely marked no for members with over 18 years of service. He stated that the CPEB form has been revised to remove the language contained in item 22 and that the decision to retain a member found unfit for medical reasons is ultimately a personnel decision that involves the member, command, and the needs of the service.

The applicant's counsel stated that if the applicant had requested retention until she completed 20 years of active service with a positive command endorsement, she would have been retained. He stated that to the best of his knowledge, an officer with 18 or more years was all but assured of being retained to complete 20 years of service if that officer's command was willing to retain the officer. He stated that some officers with less than 18 years of active service who requested retention with a positive command endorsement were also retained.

With respect to the allegation that he failed to advise the applicant of her right to ask for retention pursuant to the Personnel Manual, the PEB attorney stated that he remembered speaking to the applicant on more than one occasion and that if his recollection was correct, he remembered her concerns or dilemma about being involuntarily retired. "She seemed confused or uncertain about what she should do in light of her findings and the confusion created by sections 3. 22 and 23 on her [CPEB form]. She was reluctant to accept her findings, despite the 60 percent rating. There would be only one obvious reason for her reluctance to accept a 60 percent rating and that would be because she wanted to be retained." The applicant's PEB attorney further stated:

It's very difficult to reconstruct the events associated with this case without having a copy of [the applicant's] initial medical board, command endorsement, and my notes. Based on the known circumstances, [the applicant] could very easily have been confused by the information on her [CPEB form] and she may have concluded that her command had not supported her retention. Furthermore, I do not recall contacting her command or discussing her retention with the Coast Guard. If I had, I believe that I would remember doing so. As a result of all of these factors and my limited recollections, I would urge the BCMR to grant relief.

The applicant also submitted a letter from the Assistant Training Officer for whom she worked prior to retirement. This individual stated it is my opinion that [the applicant] could have continued her excellent performance of duties in the billet assigned at Training Center Petaluma, without presenting a hazard to herself or others beyond her retirement in 1997.

Board's Findings and Conclusions in Original Case

In BCMR No 2007-080, the Board reached the following pertinent findings and conclusions:

3. The applicant's request for correction of her record to show that she had the necessary 20 years of service for a regular active duty retirement is not timely. To be timely, an application or request for correction of a military record must be submitted within three years after the applicant discovered or should have discovered the alleged error or injustice. See 33 CFR 52.22. The applicant claimed that she did not discover the alleged injustice until July 18, 2006, when reading an article in a military related magazine about concurrent receipt pay. However, the law establishing concurrent receipt pay was enacted on December 28, 2001 and therefore the applicant should have filed her application within three years of the date the law was enacted. Therefore, her application is not timely.

4. 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." For the reasons discussed below, the Board, having performed a cursory review of the merits in this case, finds it unlikely that the applicant will prevail on the merits of her claim and therefore finds that it is not in the interest of justice to waive the statute of limitations in this case.

5. The applicant has failed to prove that she was not given information about requesting retention on active duty under Chapter 17 of the Personnel Manual as part of her medical board statement. Neither the applicant, nor the Board was able to locate a copy of her medical board. The Board attempts to find all pertinent military records; however, according to 33 CFR § 52.24, the applicant has the burden of proof and it is the applicant's responsibility "to procure and submit with his or her application such evidence, including official records, as the applicant desires to present in support of his or her case." Moreover, as discussed below, having the actual medical board report would not strengthen the applicant's case.

6. The Board finds that the medical board probably would not have been of assistance to the applicant in proving that she was provided with erroneous information about requesting retention on active duty. Pursuant to Chapter 3 of the Physical Disability Evaluations Systems (PDES) Manual, neither the Medical Board Report nor the "Patient's Statement Regarding the Findings of the Medical Board," samples of which are in the PDES Manual, contained an entry or question about retention. The "Patient's Statement Regarding the Findings of the Medical Board," which the applicant would have been required to complete, explained the findings of the medical board to the applicant and required that she affirmatively indicate whether she desired to submit or not submit a rebuttal to the medical board. Again, there is nothing on this statement that required an acknowledgement of the opportunity to request retention. Article 3.H. and Exhibit 3-4 of the PDES Manual indicate that it is the responsibility of the applicant's command to inform her about the opportunity to request retention

after receipt of the medical board. Accordingly, the Board presumes that the applicant's command notified her of her right to request retention under the Personnel Manual upon completion of the medical board in accordance with the regulation. The applicant's current statement to the contrary about an event that occurred approximately nine years ago is insufficient to prove error or injustice on the part of the Coast Guard.

7. The applicant alleged but failed to prove by a preponderance of the evidence that her CPEB attorney erroneously advised her that she could not request retention because she was not within 6 months of having 20 years of active service and because her disability was permanent. Contrary to the applicant's contention, her CPEB attorney verified by his signature on page 2 of the CPEB form that he had reviewed the findings on page one of the CPEB report (that included section III) in the applicant's case, as well as the applicable laws and regulations, and that he had consulted and counseled her regarding acceptance or rejections of the findings and recommendations. Moreover, the applicant acknowledged that she had been counseled by her PEB attorney with respect to accepting or rejecting the CPEB findings and recommended disposition and that she accepted them and waived her right to a FPEB.

8. In addition, the Board finds it highly improbable that the applicant's PDES attorney would have provided such erroneous advice since the Personnel Manual clearly states that an evaluatee may request retention not only after the medical board, the CPEB, and the FPEB, but also after findings of unfitness by the Physical Review Council and the Physical Disability Appeal Board, which are the last two steps available in the PDES process. Indeed, the applicant's CPEB attorney stated that he remembered speaking to the applicant on more than one occasion and remembered that she had concerns about being involuntarily retired. However, he never stated that he advised the applicant that she could not submit a request for retention because she was not within 6 months of having 20 years of active duty or because her disability was of a permanent nature. Therefore, the Board concludes that the applicant's PEB attorney performed his duties in accordance with applicable regulations and did not provide advice that was inconsistent with Coast Guard regulations. The evidence offered by the applicant is insufficient to prove otherwise.

9. In addition, the Board presumes that the applicant read the CPEB report and that if she was confused by any of the information on that form she had the opportunity to discuss it in detail with her attorney at that time. Further, she could have read Chapter 17 of the Personnel Manual for herself. The Board notes that each of the three options in section III regarding retention on the CPEB report form mentions Chapter 17 of the Personnel Manual. Confusion, if any, could have been cleared up by reading the Personnel Manual.

10. The argument and evidence suggesting that she might have been allowed to remain on active duty, if she had requested it, do not prove that the

Coast Guard committed an error or injustice in processing the applicant for separation under the PDES. Without persuasive proof of error or injustice on the part of the Coast Guard, the Board will not correct this applicant's record to grant her a year of active duty that she did not earn.

11. Due to the untimeliness of her application and the lack of probable success on the merits, the Board finds that it is not in the interest to waive the statute of limitations in this case.

12. Accordingly, the application should be denied because it is untimely and because of its lack of apparent merit.

BCMR NO. 2009-251 (RECONSIDERATION OF ORIGINAL CASE)

The applicant was granted reconsideration after she submitted new evidence in support of her original allegation that she was misled or confused about her eligibility to request retention on active duty under Chapter 17 of the Personnel Manual during her PDES processing. The applicant also submitted evidence showing that the Board may have committed a factual error in finding her original application untimely. The law authorizing the receipt of both retirement and disability pay was enacted on December 28, 2001 but amended significantly on November 24, 2003. See 10 U.S.C. § 1414. Therefore, the date on which the Board based its finding of untimeliness of the original application is arguably incorrect under the circumstances of the applicant's case.

The applicant's new evidence consisted of a copy of the MB report, the Patient's Statement Regarding the Findings of the MB, and her CO's endorsement to the MB. The MB stated that the applicant was not fit for full duty, was not expected to return to full duty, and was not fit for worldwide assignment due to back, spine, and other conditions. "However it is clear that she is able to carry out all her currently assigned duties."

The Patient's Statement Regarding the Findings of the MB listed 8 different diagnoses and recommended that the applicant's case be referred to the CPEB because she was unfit for duty to physical disability. The applicant indicated by her signature that she did not desire to submit a rebuttal to the findings and recommendations of the MB. The applicant also acknowledged the following by signing the Patient's statement: "I further understand that the [MB's] opinions and recommendations are not binding on the Coast Guard and that my case will be subjected to review and final disposition by high authority."

The applicant's CO agreed with the MB that she was not fit for world wide assignment by reason of physical disability, but she was fit for her then-currently assigned duties. The CO recommended that the applicant "be assigned [to her current unit] until she is tour complete and has completed 20 years of service, June 1998." The CO stated that although the applicant was normally assigned to the marine and safety field, her then-current duties were as a performance consultant, which involved working in classrooms, facilitating work groups, one-on-one consultations and travel to outlying units. The CO further stated the following:

[The applicant] is limited in the performance of the normal duties of her grade and the marine safety career path due to the medical conditions . . . It is expected that she will never be able to function fully as needed for her to continue a career in marine safety or afloat duties. She is, however, capable of performing her currently assigned duties as a performance consultant. She has contributed significantly to propelling the momentum of shared focus on performance improvement in the Coast Guard.

Applicant's Arguments on Reconsideration

The applicant put forth a new allegation in her request for reconsideration. She alleged that the X mark in the "No" box to item 22 on the CPEB form that reads "the evaluatee has between 18 and 20 years active duty and in the opinion of the CPEB meets the medical requirements for retention IAW Chap. 17, [Personnel Manual]" was a typographical error and the X mark should have been placed in the Yes box. The applicant stated that there is no evidence in the CPEB report, the Medical Board (MB), or the command endorsement to the MB that supports the CPEB recommendation that she did not meet the medical requirements for retention in accordance with Chapter 17 of the Personnel Manual. She also noted that the military lawyer assigned to advise her with regard to her CPEB stated that she was confused about the "X" in the "NO" block on the CPEB form and that she challenged the mark. She stated that her PDES lawyer wrote that he does "not recall contacting or discussing her retention with the Coast Guard. If I had, I believe that I would remember doing so. As a result of all these factors and my limited recollection, I would urge the BCMR to grant relief."

The applicant also alleged that the new evidence calls into question some of the findings made by the Board in the original case. In this regard, she challenged the finding that states in pertinent part:

[T]he Board presumes that the applicant read the CPEB report and that if she was confused by any of the information on that form she had the opportunity to discuss it in detail with her attorney at that time. Further, she could have read Chapter 17 of the Personnel Manual for herself. The Board notes that each of the three options in section III regarding retention on the CPEB report form mentions Chapter 17 of the Personnel Manual. Confusion, if any, could have been cleared up by reading the Personnel Manual.

In response to that finding, the applicant argued that she consulted the Personnel Manual even though it was not mentioned in the March 5, 1997 letter to her from Commander, CGPC or the Patient's Statement Regarding the Findings of the MB. She alleges that it was her honest belief that her command and MB felt that she would not be discharged until June 1998 because she was fit to perform the duties of her then-current assignment and would be able to complete 20 years of service. The applicant stated that even after reading chapter 17 of the Personnel Manual, she still believed that because her disability was permanent she was not eligible for retention on active duty. She stated that she did not know there was a difference between a retirement under Chapter 61 (disability) and a retirement for longevity, until she read the article about concurrent receipt pay in 2006. She stated that before she read the article, she believed

that she was entitled to concurrent receipt pay “since no one spends 19 years in the military not expecting to be considered a retiree when retired.” She alleged that because of confusion with regard Item 22, the CPEB form has been redesigned to avoid such confusion.

In addition, regarding the Board’s finding in the original case that it was the CO’s responsibility to inform her about the opportunity to request retention, the applicant stated that she believed the CO had done so in his endorsement to the MB by requesting that she remain on active duty to complete 20 years of service.

The applicant also disagreed with the Board’s finding in the original case, which stated in pertinent part:

[The applicant’s] CPEB attorney verified by his signature on page 2 of the CPEB form that he had reviewed the findings on page one of the CPEB report (that included section III) in the applicant’s case, as well as the applicable laws and regulations, and that he had consulted and counseled her regarding acceptance or rejections of the findings and recommendations. Moreover, the applicant acknowledged that she had been counseled by her PEB attorney with respect to accepting or rejecting the CPEB findings and recommended disposition and that she accepted them and waived her right to a FPEB.

In regard to this finding, the applicant argued that her signature and that of her attorney merely indicate that she understood what she was counseled on, which was that she had not met the Coast Guard’s requirement for retention and that the CPEB’s decision could not be contested because she was found permanently disabled.

The applicant concluded her statement to the Board with the following:

I sincerely believe that several errors were made and not caught, and although I consider myself a very astute, intelligent individual, I put my faith in my PDES lawyer to explain what appeared to be a process with no recourse for me. I began my career with the Coast Guard on a delayed entry enlistment in February 1978, and left the Coast Guard on July 1, 1997.

Views of the Coast Guard on Reconsideration

On January 27, 2010, the Judge Advocate General (JAG) submitted a memorandum asking the Board to accept the comments from the Personnel Service Command, (PSC) as the advisory opinion. PSC recommended relief and stated the following:

According to [finding and conclusion 10 of the final decision in the original case], “the argument and evidence suggesting that [the applicant] might have been allowed to remain on active duty, if she had requested it, do not prove that the Coast Guard committed an error or injustice in processing the applicant for separation under the PDES. Without persuasive proof of error or injustice on the part of the Coast Guard, the Board will not correct this applicant’s record to grant

her a year of active duty that she did not earn.” The persuasive proof cited by the Board as being needed to grant relief is found in newly submitted [MB and the CO’s endorsement]. Collectively, [the MB and CO’s endorsement] demonstrate through a preponderance of evidence that the applicant was wronged in not being allowed to remain on active duty in order to complete 20 years of satisfactory service. Through the MB and CO’s endorsement, it can be reasonably assumed that the applicant could have and should have been retained in her current active duty status.

According to [Chapter 1.A. of the PDES Manual], “the PDES exists to ensure equitable application of the provisions of title 10, United States Code, Chapter 61, which relates to the separation or retirement of military personnel by reason of physical disability. These laws were enacted primarily for the purpose of maintaining a vital and fit military organization will full consciousness of the necessity for maximum use of the available work force. These laws provide benefits for eligible members whose military service is terminated due to a service-connected disability, and they prevent the arbitrary separation from the service of those members who incur a disability injury or disease, yet remain fit for duty.” In accordance with the policy prescribed in this COMDTINST, the applicant is found to have been administratively processed incorrectly. The applicant should have been allowed to remain in her current assignment pursuant to the recommendation of the [MB] as well as her commanding officer . . .

According to [Article 17.A.2. of the Personnel Manual], “members who have at least 18 but fewer than 20 years service when they are found unfit for continued service or who remain on active duty under Article 17 who attain 18 years of service will remain on active duty until they complete 20 years of service if they meet these criteria:

- They can perform useful service in an established billet for their grade, specialty, or rating.
- Their retention will not be detrimental to their health nor a hazard to their associates.

In light of the new evidence submitted for consideration not available to [PSC] during the applicant’s first petition, [PSC] finds it within reason that a wrong was committed by the Coast Guard. Had a member today, with all the same merits of the case as the applicant’s asked to be retained on active duty, that member’s request would be granted. Therefore, in the interest of equity for the applicant . . . PSC recommends the Board grant relief to the applicant.

Applicant’s Reply to the Views of the Coast Guard on Reconsideration

On February 16, 2010, the Board received the applicant’s response to the views of the Coast Guard in the current case. She stated that she had no objection to them.

FINDINGS AND CONCLUSIONS ON RECONSIDERATION

The Board, upon reconsideration, 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 request for reconsideration was timely.

2. The applicant has met the requirements for reconsideration of Docket No. 2007-080, in accordance with the Board's rules at 33 CFR 52.67 through the submission of new relevant evidence that was not considered by the Board in the original proceeding. The new evidence consisted of the MB report which diagnosed the applicant with several medical conditions, found that she was unfit for full duty, and found that she was able to perform the duties of her then-current assignment. The applicant also submitted the Patient's Statement Regarding the Findings of the MB in which she signed that she did not desire to submit a rebuttal to the MB. The applicant also submitted her CO's endorsement to the MB wherein he agreed that she was unfit for full duty, but was capable of performing her then-current duties. The CO also recommended that the applicant be retained for approximately one year so that she would have 20 years of total active duty upon retirement.⁵

3. The applicant asked the Board, as she did in the original application, to correct her record to credit her with approximately one year of active duty that she did not serve. To be entitled to such credit the applicant must prove that her retirement by reason of physical disability with 19 years and 29 days of active duty instead of being retained on active duty until she reached 20 years of service was in error or unjust.

4. The applicant alleged that the MB's and the CO's statements prove that she requested retention, and that she believed that she would be retained on active duty based on those statements. Related to this allegation is her argument that the CPEB committed a typographical error when it placed a mark of "X" in the No block to question 22, which read: "The evaluatee has between 18 and 20 years active duty and in the opinion of the CPEB, the evaluatee meets the medical requirements for retention [in accordance with] Chapter 17, CG [Personnel Manual]." The applicant continued to argue, as she did in the original application, that she was misled by her CPEB attorney into believing that she could not request retention because her disability was diagnosed as permanent. She also contended that she continued in that belief even after reading Chapter 17 of the Personnel Manual for herself. The Board begins its analysis by presuming that

⁵ The Chair also granted reconsideration in the interest of justice because the Board's finding that the original application was untimely because it was not submitted within three years of December 28, 2001, the date the Board determined that the concurrent receipt law was enacted was arguably incorrect under the applicant's circumstances. The applicant presented evidence that the concurrent receipt pay law was significantly amended on November 24, 2003. Using this later date, the original application would have been timely. Confusion existed because an older version of concurrent receipt existed until November 24, 2003. The recent law is much more expansive and inclusive than the older version, and if the applicant had 20 years of active duty at the time of retirement she would be eligible for concurrent receipt pay under the amended law.

the applicant's military record is correct, and the applicant bears the burden of proving by a preponderance of the evidence that the record is erroneous or unjust. *See*, 33 C.F.R. § 52.24(b).

6. The JAG determined, and the Board agreed, that the new evidence proves that the applicant suffered a "wrong" when she was retired with 19 years and 29 days of service due to a physical disability, instead of being retained until she earned 20 years of active duty. The Board interprets "wrong" to mean that the Coast Guard committed an injustice against the applicant. For the purposes of the BCMRs, "[i]njustice", when not also "error", 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). In this regard, the JAG stated that it is Coast Guard policy to retain a member with at least 18 but less than 20 years of service. The JAG further stated that "Had a member today, with all the same merits of the case as the applicant's asked to be retained on active duty, that member's request would be granted." Although there is no evidence that the applicant actually requested retention, the Coast Guard should have verified whether or not she wanted to remain on active duty in light of the MB's and CO's strong recommendations that she be retained.

7. Moreover, the Board finds that the applicant met the requirements for retention under Chapter 17.A.2.b. of the Coast Guard Personnel Manual, which states that members with at least 18 years but fewer than 20 years service will be retained on active duty if they can perform useful service and their retention is not detrimental to their health or a hazard to others. The MB report and CO's endorsement to the MB establish that the applicant was able to perform the duties to which she was then-currently assigned, and neither indicated that her retention would be a danger to herself or to others. Therefore, the Coast Guard should have retained the applicant on active duty or at the very least obtained verification that she did not want to remain on active duty. Its failure to do constituted an injustice.

8. Accordingly, the applicant is entitled to relief.

ORDER

The application of XXXXXXXXXXXXXXX, USCG (Ret.), for correction of her military record upon reconsideration is granted. Her record shall be corrected to show that she was not retired on June 30, 1997, but that she was retained on active duty until she had earned 20 years, 00 months, and 00 days of active duty. Her record shall be further corrected to show that upon completing her 20th year of active duty she retired due to physical disability with a 60% disability rating in accordance with the CPEB. The Coast Guard shall pay the applicant the amount due as a result of this correction.

Philip B. Busch

Vicki J. Ray

Kathryn Sinniger