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

Application for the Correction of
the Coast Guard Record of:

**BCMR Docket No. 2011-096**

Xxxxxxxxxxxxxxxxxxx
xxxxxxxxxxxxxxxxxxxx

## 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. The Chair docketed the case after receiving the applicant's completed application on February 10, 2011, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated November 18, 2011, is approved and 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 was medically retired from the Coast Guard on December 20, 1979, with a 50% disability rating for acute depression. He had completed 19 years, 11 months, and 17 days of active duty. He asked the Board to correct his record to show that he was retired with exactly 20 years of active duty. The requested correction might make him legally entitled to concurrent retired and disability pay (CRDP) under 10 U.S.C. § 1414.[1]

The applicant alleged that at the time of his retirement he was serving "on heavy narcotic depression medication." Previously, he had earned three Good Conduct Medals as an enlisted electrical technician and an Achievement Medal as a chief warrant officer. However, while on active duty, his first wife and one of his three children died and he served two tours of duty on St. Paul Island in the Bering Sea without his family. The applicant also once received a shock of 2,000 volts of direct current while repairing a radio transmitter, which burned some of the flesh off his left arm. His second to last tour of duty was at another isolated unit, Johnston Island, about 800 miles west of Hawaii. During this assignment, the applicant alleged, he was exposed to "hundreds if not thousands of rusty 55 gallon barrels of what I was told was Agent Orange stored, left over from Vietnam." Upon his return to the States after a year on Johnston Island, his

[1] Under 10 U.S.C. § 1414, veterans with at least 20 satisfactory years of service and service-connected disability ratings from the DVA of at least 50% may receive concurrent retired and disability pay (CRDP). Prior to the enactment of CRDP, which went into effect on January 1, 2004, veterans could not receive full retirement pay and disability pay simultaneously.

second wife and their child together did not meet him at the airport, and his parents informed him that his wife had filed for divorce because his next duty station was supposed to be in Alaska, and she did not want to go. His orders changed, but she still divorced him. The applicant became extremely depressed, began to see a psychiatrist, and was prescribed "several hard narcotic medicines for acute depression." He alleged that he also felt responsible for the death of his first wife and child. Under the influence of his depression and these medications, he began driving his truck to Mexico and was gone for more than a week. Soon thereafter, his command convened a medical board and, as a result, he was medically retired with a 50% disability rating for acute depression less than two weeks shy of the day he would have earned a 20-year retirement.

The applicant also described his subsequent history of supporting himself with short-term, part-time jobs, living in motor homes, having his son commit suicide, being estranged from family members, and suffering significant medical illnesses since his medical retirement from the Coast Guard.

Regarding the timing of his application, the applicant alleged that he had always accepted his 50% disability rating from the Coast Guard and did not seek to convert it or increase it through the Department of Veterans' Affairs (DVA) until January 2011. He alleged that he learned from the DVA that he should apply to the Board to have his record corrected in December 2010. He submitted with his application a letter he wrote to the DVA, dated January 18, 2011, in which he asked "to convert my 50% USCG medical disability to a VA disability."

## SUMMARY OF THE RECORD

The applicant enlisted on active duty on November 10, 1959, and was honorably discharged on November 8, 1963, with a Good Conduct Medal. He had already advanced to first class petty officer as an electrician's mate (ET1). The applicant reenlisted less than two months later, on January 2, 1964, and served continuously, earning two more Good Conduct Medals, until he was honorably discharged June 30, 1972, to accept an appointment as a chief warrant officer (CWO). The applicant's performance evaluations show that he received high marks, and his rating officials commented that he "is a doer who shuns no assignment and actively seeks responsibilities and tasks"; "has done an outstanding job of maintaining the electronics equipment of Group San Diego"; "attacks his collateral duty as an Aids to Navigation officer with a passion"; and "spends many after duty and weekend hours on his assignments for this command." He was awarded an Achievement Medal for "outstanding achievement and superior performance of duty from September 1974 through September 1976," when he served as the Officer in Charge of the Electronics Shop in Group San Diego.

In 1978, however, following his return from duty on Johnston Island, the applicant was diagnosed with a "depressive neurosis" that interfered with his performance. His medical records show that he was prescribed various anti-depressant medications and was frequently found not fit for duty. However, his condition did not improve, and his command initiated his medical separation under the Physical Disability Evaluation System (PDES). An Initial Medical Board (IMB) report dated December 5, 1978, states that upon the applicant's return from Johnston Island in January 1978, he discovered that his wife had left him for another man and taken

their child and most of their possessions with her. The applicant began living in a trailer, and his older two children had to live with friends and relatives. The applicant had become very angry at his wife, the Coast Guard, and his country, and he had written letters to his commanding officer and an admiral that damaged his career. He had also had suicidal ideations. Following the IMB, the applicant's PDES processing was delayed for six months to allow time for him to adjust to his divorce and to reorganize his life. However, his condition did not improve.

At a hearing of a Formal Physical Evaluation Board (FPEB) on September 28, 1979, a psychiatrist testified that during the prior 18 months, the applicant had suffered from a depressive neurosis that had its origins in the deaths of his first wife and a child and had been exacerbated by his unexpected divorce by his second wife resulting in him having very little contact with his children. The psychiatrist was uncertain as to whether the depression would be permanent. A chief electrical technician (ETC) testified that over the prior 18 months, the applicant (his supervisor) had been unable to timely process most of the division's paperwork either because he was on sick leave or just could not do it, and so the ETC had done most of the applicant's work for him.

After deliberating the case, the FPEB advised the applicant and his counsel that their recommendation would be that the applicant should be retained on active duty until his 20-year retirement date, which the president of the FPEB said would occur in February 1980, and then placed on the temporary disabled retired list (TDRL) with a 50% disability rating. The transcript shows that when the applicant's counsel questioned the recommendation for retention until February 1980, the president of the FPEB acknowledged that the recommendation might not be approved because of the finding of unfitness but stated that the FPEB thought that the applicant could "use constructively the sheltering of his service relationship which we think is actually a strength. Now maybe in discussion with him, he may say that this is something that isn't going to help or that he would prefer not be the case. If that's the case, we would honor that viewpoint." Then the FPEB president asked the applicant if he would prefer to continue on duty until his 20-year retirement date in February 1980, and the applicant said he "would prefer not going back. … It would be a lot easier on me … not going back." Then the applicant's counsel asked the applicant, "if you are returned to full active duty and go back to work on Monday morning at quarter of eight, [will you] be able to perform your duties fully and completely or not?" The applicant responded, "I don't think I can but … uh …" The applicant's counsel interrupted him, saying "That's the answer to the question. Nothing further." Shortly thereafter, the FPEB decided that it would not recommend the applicant's retention and that he would be placed in home awaiting orders status until the case was resolved. On November 28, 1979, the Chief of the Office of Personnel approved the FPEB's recommendation and placed the applicant on the TDRL effective as of December 20, 1979.

The applicant's last day of active duty was December 19, 1979, and he was placed on the TDRL on December 20, 1979. A Statement of Creditable Service prepared for him on March 8, 1984, shows that he was permanently retired on November 1, 1982, with a 50% disability rating and that he had 19 years, 11 months, and 17 days of active duty service and 1 month and 23 days of inactive service.

## VIEWS OF THE COAST GUARD

On July 11, 2011, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief "if the Board decides not to consider the applicant's claim based on its untimely submission" but to grant relief if the Board "decides that it would be in the interest of justice to excuse the failure to file timely."

The JAG first argued that the application should be denied for untimeliness. He noted that the applicant was retired in 1979 and "has failed to provide any documentation or justification regarding the lengthy delay in filing his BCMR." However, the JAG noted that the Board may waive the three-year statute of limitations if the Board finds that it is in the interest of justice to do so. In this regard, the JAG stated that "the decision to medically retire the applicant a few weeks shy of his statutorily mandated 20-year active duty retirement appears to be contrary to CG policy and inconsistent with past BCMR findings."

The JAG stated that the applicant appeared before a Formal Physical Evaluation Board on September 28, 1979, and was represented by appointed military counsel. He was found unfit for duty and placed on the TDRL with a 50% disability rating as of December 20, 1979, when he had 19 years, 11 months, and 17 days of active duty service. The JAG stated that although the applicant was afforded due process under the PDES,

> the record does not reflect that it was in the CG's best interest and certainly not in the applicant's best interest to medically retire the applicant two weeks shy of a 20-year active duty retirement. When analyzing the FPEB's transcript, the Board initially wanted to recommend the applicant to return to duty until his 20-year active duty retirement date. The Board commented heavily on the applicant's outstanding military career and its reluctance to end such with 19 plus years of service. The Board acknowledged the "temporary" nature in which it found the applicant's disability to be and how the Board was "reticent to terminate the applicant's relationship with the Service which has been such a significant part of his life." The Board indicated its potentially conflicting results of finding the applicant unfit in terms of functionality but disinclined to have him retire any earlier than his normal retirement date.

The JAG stated that despite the FPEB's inclination, the applicant's counsel was dissatisfied and "[a]lthough we can only speculate as to why the applicant's counsel pursued an alternate determination by the Board, it calls into question counsel's effective assistance as it pertains to anything other than the applicant's unfitness for duty determination." The JAG noted that the applicant could have accepted the FPEB's initial findings and requested a waiver to remain on active duty until his 20-year retirement date or could have asked to be placed on the TDRL on his 20-year retirement date. Instead, the counsel posed questions to the applicant that "elicited responses that appear contrary to applicant's best interest regarding applicant's ability to continue on active duty." The JAG noted that at the time, Article 17.A.2.b. of the Personnel Manual stated that "[m]embers who have at least 18 but fewer than 20 years of service when they are found unfit for continued service … will remain on active duty until they complete 20 years of service if they meet these criteria: (1) They 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." The JAG stated that it appears from the FPEB transcript that the FPEB would have followed this policy but for the applicant's counsel's intervention, and there is no evidence that the applicant did not qualify for continued service until his 20-year retirement

date under the policy. Therefore, the JAG believes that the applicant should have remained on active duty until his 20-year retirement date based on his condition and the policy at the time. The JAG noted that if the BCMR waives the statute of limitations and grants relief in this case, "[a]ny relief granted should be in accordance with the policy and law during the time-frame of the applicant's computed 20-year retirement date. Any monetary retirement benefits should be offset by corresponding disability payments as prescribed by applicable laws in effect at that time. Calculations of any back-pay should also correspond with applicable law and regulations during the appropriate time-frame(s)." The JAG noted that his recommendation was based on the unique circumstances of the case and "should not be viewed as establishing/setting new precedent."

The JAG also adopted the findings and analysis of the case provided in a memorandum by the Personnel Service Center (PSC), which recommended that the Board deny relief. The PSC noted that the applicant was found to be 50% disabled by "depressive neurosis; substantially impaired social and industrial relationships; and with a functional disability outlook labeled as severe." The PSC also noted that during the FPEB hearing, the applicant responded to his counsel's questions by stating that he would prefer not to return to duty and that he did not believe that he would be able to perform his duties "fully and completely" if he were ordered to return to duty the next Monday morning at 7:45. The PSC further stated that

> we are unable to precisely determine how or why December 19, 1979, was the date chosen and approved as the applicant's final day on active duty. We can only speculate now that due to the need to maintain good order and discipline and under the prevailing circumstances surrounding the applicant's diagnosed medical condition, it was in the Coast Guard's *and* the applicant's best interest that he be separated sooner rather than later.
>
> … We understand that retiring the applicant approximately 13 days short of having completed 20 years of active duty service does appear to create an injustice; however, under the Doctrine of Laches, the applicant's 30+ year delay in applying to the Board has prejudiced the Coast Guard's ability to produce more evidence to show that the disputed military record is correct and just. *See Lebrun v. England,* 212 F. Supp. 2d 5, 13 (D.D.C. 2002). It's also important to mention that the applicant and his counsel were aware of the member's years of service, which was seriously considered by the Board, but in the end the applicant opted not to return to work to complete his 20 years of service and accepted the [FPEB's] findings to place him on the TDRL.

## APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 3, 2011, the Board received the applicant's response to the views of the Coast Guard. The applicant repeated some of his allegations and described how he had continued to suffer greatly from depression following his separation from the Coast Guard. He noted that because his wife divorced him because she did not want to go to Alaska with him, he "took all my Coast Guard records to the dump" and did not have a copy of his DD 214, showing that he had been medically retired. In addition, he once took all of his medals and his sword and left them on an admiral's doorstep. Several months after his discharge, he quit the drugs he had been prescribed "cold turkey" and "rolled around on the carpet at home for days." Later, he believed he had been retired with 20 years of service.

## SUMMARY OF THE LAW

On December 28, 2001, President Bush signed the National Defense Authorization Act for Fiscal Year 2002, Public Law 107-107,[2] and Section 641 of the act stated the following in pertinent part:

> SEC. 641. CONTINGENT AUTHORITY FOR CONCURRENT RECEIPT OF MILITARY RETIRED PAY AND VETERANS' DISABILITY COMPENSATION AND ENHANCEMENT OF SPECIAL COMPENSATION AUTHORITY.
>
> (a) RESTORATION OF RETIRED PAY BENEFITS.--Chapter 71 of title 10, United States Code, is amended by adding at the end the following new section:
>
> "§ 1414. Members eligible for retired pay who have service-connected disabilities: payment of retired pay and veterans' disability compensation; contingent authority
>
> "(a) PAYMENT OF BOTH RETIRED PAY AND COMPENSATION.--Subject to subsection (b), a member or former member of the uniformed services who is entitled to retired pay (other than as specified in subsection (c)) and who is also entitled to veterans' disability compensation is entitled to be paid both without regard to sections 5304 and 5305 of title 38, subject to the enactment of qualifying offsetting legislation as specified in subsection (f).
>
> "(b) SPECIAL RULE FOR CHAPTER 61 CAREER RETIREES.--The retired pay of a member retired under chapter 61 of this title [disability retirement] with 20 years or more of service otherwise creditable under section 1405 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 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.
>
> "(c) EXCEPTION.--Subsection (a) does not apply to a member retired under chapter 61 of this title with less than 20 years of service otherwise creditable under section 1405 of this title at the time of the member's retirement.
>
> • • •
>
> "(e) EFFECTIVE DATE.--If qualifying offsetting legislation (as defined in subsection (f)) is enacted, the provisions of subsection (a) shall take effect on—
>
> "(1) the first day of the first month beginning after the date of the enactment of such qualifying offsetting legislation; or
>
> "(2) the first day of the fiscal year that begins in the calendar year in which such legislation is enacted, if that date is later than the date specified in paragraph (1).
>
> "(f) EFFECTIVENESS CONTINGENT ON ENACTMENT OF OFFSETTING LEGISLATION.
>
> (1) The provisions of subsection (a) shall be effective only if—
>
> "(A) the President, in the budget for any fiscal year, proposes the enactment of legislation that, if enacted, would be qualifying offsetting legislation; and
>
> "(B) after that budget is submitted to Congress, there is enacted qualifying offsetting legislation. …"

Under 10 U.S.C. § 1414(a)(1), "[s]ubject 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

[2] National Defense Authorization Act for Fiscal Year 2002, Pub. L. 107-107, 115 Stat. 1012 (Dec. 28, 2001).

(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 [laws requiring offsets]." Paragraph (a)(2) defines a "qualifying service-connected disability" as 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."

## PRIOR CRDP CASES BEFORE THE BCMR

### *BCMR Docket No. 2010-139*

In BCMR Docket No. 2010-139, the applicant had been medically retired on October 14, 2000, with a 40% disability rating for fibromyalgia and having completed 19 years and 4 months of active duty. The applicant alleged that she had rejected retention until her 20-year retirement date based on poor legal advice. The records showed that she was advised that she could request retention until her 20-year retirement date; that she requested retention; and that her request was granted. However, the applicant also asked to be transferred to a unit in her hometown for her final year on active duty, and when her transfer request was denied based on the needs of the Service, she withdrew her request for retention until her 20-year retirement date and was medically retired. The Coast Guard recommended that the Board deny relief because the applicant had been offered but rejected retention until her 20-year retirement date, and the Board denied relief, finding that

> [u]nlike the applicants in BCMR Docket Nos. 2009-251 and 2005-049, the applicant was not erroneously or unjustly denied retention until her 20th active duty anniversary. She was counseled by an attorney and initially requested retention, and her request was approved. The record shows that she then voluntarily rejected retention until her 20th anniversary because she wanted to move to Tampa. The applicant has not shown that the Coast Guard's denial of her request to transfer to Tampa for a year was erroneous or unjust.

### *BCMR Docket Nos. 2007-080 and 2009-251*

In BCMR Docket No. 2007-080, the applicant had been medically retired with a 60% disability rating and 19 years and 29 days of active duty after the CPEB reported that she did not meet the standards for retention until her 20th active duty anniversary. She had not requested retention, and she argued that her CPEB attorney told her that because she was so disabled and was more than 6 months from her 20th anniversary, she could not request retention. She also argued that the form used to accept or reject the CPEB results misled her into thinking she could not request retention because the CPEB had noted that she did not meet the standards for retention and marked "NA" in a block concerning her right to request retention as if it were inapplicable to her case. The applicant submitted a statement from the attorney who had counseled her, and he supported her claim that the form was misleading and that she might have been confused about her right to request retention. He also stated that, in his experience working with CPEB evaluees, if the applicant had requested retention, she would have been retained. The applicant also submitted a letter from her last supervisor, who stated that if the applicant had requested retention, the command would have supported her request.

The JAG recommended denying relief, and the Board denied relief based on the application's untimeliness and on the lack of evidence that the applicant was not told that she could request retention. The Board found that under the applicable regulations, the applicant's command presumably informed her of her right to request retention. The Board also found that the applicant had not proved that she had been miscounseled by her attorney about her right to request retention since the attorney did not say so in his statement on her behalf.

The applicant in BCMR Docket No. 2007-080, however, requested reconsideration and submitted probative new evidence supporting her claim that she was confused about her right to request retention on active duty. The applicant submitted a copy of her Initial Medical Board (IMB) report and her commanding officer's (CO's) endorsement to the report, which were not in the record when Docket No. 2007-080 was considered. The CO wrote in his endorsement that the applicant was able to carry out all of her assigned duties and recommended that she remain in her assignment until she had completed 20 years of service. The applicant also argued that the CPEB made a typographical error in marking the box indicating that she did not meet the standards for retention since nothing in the IMB report or the CO's endorsement supported such a finding. Her request for reconsideration was granted and, upon further review in BCMR Docket No. 2009-251, the JAG recommended that the Board grant relief, finding that the IMB report and the 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." The Board agreed with the JAG and granted relief by changing her retirement date to her 20th active duty anniversary.

***BCMR Docket No. 2005-049***

In BCMR Docket No. 2005-049, the applicant had been placed on the TDRL in 1988 with a 60% disability rating and 19 years, 10 months, and 25 days of active duty and 2 years, 7 months, and 4 days of inactive service. He had asked to be retained on active duty until he could complete 20 years of service, but his request was denied. The JAG recommended that the Board grant relief and noted that the applicant's drill records had been lost. The Board found that the application was untimely but excused the untimeliness because the applicant had filed it within three years of the enactment of Public Law 107-107 on December 28, 2001. The Board found that at the time of his placement on the TDRL, "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." The Board granted relief by correcting the date of the applicant's placement on the TDRL to his 20th active duty anniversary based on the following reasoning:

> 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.

## 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. Under 10 U.S.C. § 1552 and 33 C.F.R. § 52.22, an application to the Board must be filed within three years after the applicant discovers or reasonably should have discovered the alleged error in her record. The Board finds that the applicant knew or should have known that he had not been credited with 20 years of active duty service upon his retirement in 1979. Therefore, 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 instructed 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."[3]

4. The record shows that the applicant was retired from the Coast Guard in 1979 with disabling depression that prevented him from performing his duties, such as processing paperwork on the job. There is no evidence that the applicant's mental condition has alleviated in the interim, and he apparently never sought additional monetary benefits from the DVA, despite frequent employment problems, until quite recently. Therefore, the Board finds that the preponderance of the evidence shows that the applicant's depression substantially explains and excuses his failure to file his BCMR application sooner. Moreover, there is no way the applicant could have known about the benefit of a 20-year retirement prior to the enactment of CRDP on December 28, 2001, and there is no evidence that the applicant was informed of CRDP by the Coast Guard or the DVA following its enactment in 2001 or its effective date in 2004. Given the Coast Guard's recommendation in the advisory opinion indicating that his claim has some merit,

[3] *Allen v. Card*, 799 F. Supp. 158, 164-5 (D.D.C. 1992); *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

the Board finds that it is in the interest of justice to excuse the application's untimeliness and to decide the case on the merits.

5. The record shows that the applicant was medically retired with a 50% disability rating on December 20, 1979, just thirteen days shy of the date he would have qualified for a full 20-year regular retirement. At the time, he was suffering from disabling depression, and a subordinate had been performing many of his duties for the previous 18 months. Under Article 17.A.2.b. of the Personnel Manual then in effect, the policy was to retain disabled members with more than 18 years of active duty until their 20-year retirement date if they would not be a hazard to themselves or others and they could perform useful service. Although the FPEB initially advised the applicant and his counsel that they would recommend retention pursuant to this policy, the FPEB apparently changed its recommendation based on the applicant's admission that he did not want to return to full duty and that, if returned, he did not think he could "fully and completely" perform his assigned duties as a CWO in charge of an electronics division, which is far different from being able to perform "useful" service. In addition, the transcript of the FPEB hearing reveals no inquiry into whether the applicant would be a hazard to himself or others if returned to duty pending his 20-year retirement date.

6. The transcript of the FPEB hearing shows that when the applicant was asked on September 28, 1979, about whether he wanted to return to active duty until his 20-year retirement date—in lieu of remaining "home awaiting orders" until his medical retirement was approved—he was misinformed by the FPEB president about how long he would have to serve on active duty. The president of the FPEB stated that the applicant's 20-year retirement date would occur sometime in February 1980, when in fact it was in the first week of January 1980. Although the applicant's attorney should have known the correct date and corrected the error, he did not. Given the applicant's break in service and depressed mental condition, it is possible that when he said he did not want to return to duty, he was confused by the FPEB president's statement and believed that attaining a 20-year retirement would require a month or more of active duty that he would not actually have had to serve.

7. 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 thirteen days shy of a 20-year retirement was unduly severe and not in accordance with current standards even if the Chief of the Office of Personnel did not clearly abuse his discretion on November 28, 1979, in deciding that the applicant should not be retained on active duty an additional thirteen days beyond December 19, 1979. The written standards for retention under Article 17.A.2.b. of the Personnel Manual have not changed since 1979. However, because of the enactment of CRDP, a CWO in the applicant's circumstances today would not be separated thirteen days shy of his 20$^{th}$ active duty anniversary but would be retained until he had completed 20 years of active duty. The Board notes that because a veteran could not receive duplicate benefits (concurrent retirement and disability pay) in 1979, the impact of the decision at the time was much less severe than the impact such a decision would have today. Therefore, the applicant, his attorney, the members of the FPEB, and the Chief of the Office of Personnel presumably paid much less attention to this issue in 1979 than they would today following the authorization of CRDP under 10 U.S.C. § 1414. In fact, the Board believes it is quite

possible that on November 28, 1979, the Chief of the Office of Personnel, an admiral, was unaware that in authorizing the applicant's placement on the TDRL as of December 20, 1979, he was depriving the applicant of a 20-year retirement by just thirteen days.

8. In light of all the circumstances of this case, the Board is persuaded that the applicant's medical retirement for depression just thirteen days before he qualified for a regular, 20-year retirement constitutes an injustice.[4] The PSC argued that the applicant's claim should be barred by the doctrine of laches because the passage of time has prejudiced the Coast Guard's ability to produce evidence to prove that the applicant's retirement date is correct and just. It may be that, aside from misstating the applicant's 20-year retirement date during the FPEB, the Coast Guard committed no error or injustice in medically retiring him on December 20, 1979. However, Congress did not limit the injustices that can be corrected under § 1552 to those caused by the military services. Even if an injustice in an applicant's record was not caused by the Coast Guard, the Board may still correct it.[5] In addition, the BCMR has the authority to decide whether an injustice exists in an applicant's record on a case-by-case basis.[6] Given the evidence that the applicant and his counsel persuaded the FPEB not to recommend retaining him until his 20-year retirement date, the Board is not convinced that the Coast Guard caused the injustice in the applicant's military record, but it is nonetheless persuaded by all of the circumstances of this case that the applicant's retirement date is unjust and requires correction under 10 U.S.C. § 1552.

9. Accordingly, the applicant's request should be granted by correcting his TDRL retirement date to his 20th active duty anniversary so that he shall have exactly 20 years of active duty and by paying him any amount due as a result of this correction in accordance with applicable laws and regulations.

**[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]**

[4] Under 10 U.S.C. § 1552(a), the Board may correct both errors and injustices in military records.
[5] 41 Op. Att'y Gen. 94 (1952) (finding that "[t]he words 'error' and 'injustice' as used in this section do not have a limited or technical meaning and, to be made the basis for remedial action, the 'error' or 'injustice' need not have been caused by the service involved.").
[6] Decision of the Deputy General Counsel, BCMR Docket No. 2001-043.

## ORDER

The application of xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCG (Retired), for correction of his military record is granted.

The Coast Guard shall correct the date of his placement on the TDRL to his 20th active duty anniversary so that he shall be credited with exactly 20 years of active duty. The Coast Guard shall pay him any amount due as a result of this correction in accordance with applicable laws and regulations.

Evan R. Franke

Randall J. Kaplan

H. Quinton Lucie