

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2010-101

**XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX**

FINAL DECISION

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case upon receipt of the applicant's completed application and military records on January 15, 2010, and subsequently prepared the final decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated October 21, 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 AND ALLEGATIONS

The applicant asked the Board to correct his record to show that he is entitled to a 20% disability rating for post traumatic stress disorder (PTSD) from August 8, 1979 to July 17, 2009. He stated that he only received 10% compensation for back strain for 30 years. He stated that he did not discover the error until July 17, 2009, when he received a copy of his military medical record. The applicant submitted a copy of a page from a physical evaluation board showing that that board found him unfit for duty due to "hysterical neurosis, conversion type, exhibits emotional tension or other evidence of anxiety productive of moderate social and industrial impairment" rated as 10% disabling. That Board also gave the applicant a 10% disability rating for depressive neurosis rated as 10% disabling, a combined 20% disability rating.

SUMMARY OF THE RECORD

On October 30, 1978, a medical board diagnosed the applicant with "low back pain-subjective" and anxiety but found him fit for duty. His case was referred to the Central Physical Evaluation Board (CPEB). The applicant was informed of the medical board findings and submitted a rebuttal to them.

On December 14, 1978, the CPEB met and found that the applicant was fit for duty. On December 15, 1978, the applicant rejected the findings of the CPEB and demanded a formal hearing before the Formal Physical Evaluation Board (FPEB).

On February 8, 1979, the FPEB held a hearing in which the applicant was represented by military counsel. The FPEB determined that the applicant was unfit for duty and diagnosed him as suffering from “hysterical neurosis, conversion type, exhibits emotional tension or other evidence of anxiety productive of moderate social and industrial impairment” rated as 10% disabling. The applicant was also given a 10% disability rating for depressive neurosis, for a combined 20% disability rating. A majority of the five-member FPEB recommended that the applicant be separated from the Coast Guard with severance pay. The president of the FBEP did not agree that the applicant was not fit for duty and wrote that “all available evidence indicates that [the applicant] is fit for duty.”

On June 4, 1979, the Physical Review Council (PRC) reviewed the applicant’s FPEB and found that he was unfit for duty due to “hysterical neurosis, conversion type, exhibits emotional tension or other evidence of anxiety productive of moderate social and industrial impairment” rated as 10% disabling. PRC explained its decision as follows:

After consideration of all the available information contained in the Board, the [PRC] council is of the opinion that the evaluatee’s condition is more accurately described as indicated above.

In accordance with Article 17-L-1(d), CG Personnel Manual, it is illegal to apply more than one rating to any area or system of the body when the total functional impairment of that area of system is adequately reflected under a single appropriate code. Related diagnoses should be merged for rating purposes when the VA Schedule provides a single code covering all their manifestations. The PRC members agree that VA Code 9402 (hysterical neurosis) is the appropriate code in this case. Therefore, VA code 9405 (depressive neurosis) has been deleted from the Board’s findings.

Accordingly, separation with severance pay at 10% is recommended.

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A copy of the PRC substitute findings is being forward to the evaluatee for information purposes.

On June 13, 1979, the PDES proceedings and recommended findings of the PRC were reviewed and approved by the Chief Counsel of the Coast Guard.

On June 14, 1979, the Chief of the Office of Personnel of the Coast Guard approved the recommended findings of the PRC and directed that the applicant be discharged from the Coast Guard with severance pay.

On August 8, 1979, the applicant was discharged from the Coast Guard with severance pay.

VIEWS OF THE COAST GUARD

On June 18, 2010, the Board received an advisory opinion from the Judge Advocate General (JAG) of the Coast Guard. He recommended that the applicant's request for relief be denied for untimeliness and lack of evidence that the Coast Guard committed an error or injustice. The JAG asked that comments from the Commander, Personnel Service Center (PSC) be accepted as a part of the advisory opinion.

PSC recommended that the Board deny relief and stated the applicant was entitled to and received a full and fair hearing before the FPEB. PSC further stated the following:

The member signed documentation with the understanding that he would be separated from service with a 10% severance pay. The VASRD (Veterans Administration Schedule for Rating Disabilities) diagnostic code (DC) on the CPEB, FPEB, and PRC all utilized 9402 Hysterical Neurosis (with the correction at the PRC [to avoid] pyramiding . . .)

The member's request for relief is based on a document that is incomplete, as there were two more pages to the original document The document provided by the applicant was the original findings of the FPEB without the additional recorded findings of the PRC. Therefore, it should be noted that the member['s] . . . recommended 10% [disability] rating with severance pay was correct in 1979 and is correct today.

The applicant's appropriate avenue of relief at this time is a request for service connected compensation from the Veterans Administration.

APPLICANT'S REPLY TO THE VIEWS OF THE COAST GUARD

On June 22, 2010, a copy of the Coast Guard views was mailed to the applicant with an invitation for him to submit a response. The BCMR did not receive a response from the applicant.¹

APPLICABLE LAW

Disability Statutes

Title 10 U.S.C. § 1201 provides that a member who is found to be "unfit to perform the duties of the member's office, grade, rank, or rating because of physical disability incurred while entitled to basic pay" may be retired if the disability is (1) permanent and stable, (2) not a result of misconduct, and (3) for members with less than 20 years of service, "at least 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs at the time of the determination." Title 10 U.S.C. § 1203 provides that such a member whose disability

¹ The Board's June 22, 2010 letter to the applicant was returned to the Board with the notation "not at this address." The staff phoned the applicant at the number he provided and left a message that we needed his address. The applicant has not contacted the Board.

is rated at only 10 or 20 percent under the VASRD shall be discharged with severance pay. Title 10 U.S.C. § 1214 states that “[n]o member of the armed forces may be retired or separated for physical disability without a full and fair hearing if he demands it.”

Physical Disability Evaluation System (PDES) Manual

Article 9.A.4. of the PDES Manual prohibits pyramiding which is the application of more than one rating under the Veterans Administration Schedule for Rating Disabilities (VASRD) for any area or system of the body when the total functional impairment of that area or system is more appropriately reflected under a single diagnostic code. The prohibition against pyramiding prevents overrating the disability.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant’s record and submissions, the Coast Guard’s submission, and applicable law:

1. The BCMR has jurisdiction of the case pursuant to section 1552 of title 10, United States Code. The application was timely.

2. The application was not timely. To be timely, an application 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. This application was submitted approximately thirty years after the applicant’s FPEB proceedings and discharge from the Coast Guard. The applicant claimed that he discovered the alleged error in July 2009 but he did not offer an explanation why he could not have discovered the alleged error earlier. The Board finds that he should have discovered the alleged error at the time of or within three years of his discharge in 1979. In this regard the PRC noted on its report that it was sending a copy of its substituted findings granting only a 10% disability rating to the applicant. The applicant has not stated that he did not receive this information at that time.

3. Although the application is not timely, the Board must still perform at least a cursory review of the merits to determine whether it is the interest of justice to waive the statute of limitations. 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.” The court further stated that “the longer the delay has been and the weaker the reasons are for the delay, the more compelling the merits would need to be to justify a full review.” *Id.* at 164, 165.

4. With respect to the merits, the applicant has failed to prove by a preponderance of the evidence that the Coast Guard committed an error by discharging him with a 10% disability rating. Contrary to the applicant’s contention, he never had a disability rating from the Coast Guard for back strain. His disability rating from the Coast Guard was always for neurosis. During the PDES process, the FPEB gave the applicant a 10% disability rating for hysterical neurosis and a 10% disability rating for depressive neurosis, for a combined 20% rating.

However, the PRC, a review board, found that “the applicant was entitled to only a 10% rating for hysterical neurosis because the Personnel Manual prohibited applying more than one rating to any area or system of the body when the total functional impairment of that area or system is adequately reflected under a single appropriate code.” The PRC noted that its decision was being forwarded to the applicant. The record indicates that the applicant received severance pay for his 10% disability upon his discharge from the Coast Guard. The Coast Guard is entitled to the presumption that its officers carried out their duties “correctly, lawfully, and in good faith.” *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979). The applicant has presented no evidence otherwise. Nor has he presented any evidence that he was entitled to a higher disability rating from the Coast Guard.

5. Accordingly, the applicant’s request for relief should be denied because it is untimely and because it lack merit.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of former XXXXXXXXXXXXXXXX, USCG, for correction of his military record is denied.

Philip B. Busch

Paul B. Oman

Dorothy J. Ulmer