

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
Coast Guard Record of:

BCMR Docket
No. 1998-003

FINAL DECISION

██████████ Deputy Chairman:

This is a proceeding under the provisions of section 1552 of title 10, United States Code. It was commenced on October 6, 1997, by the filing of an application for relief with the Board.

This is the final decision in this case, dated February 25, 1999. It is signed by three duly appointed members who were designated to serve as the Board in this case.

The applicant requested that his military record be corrected to "upgrade type of separation from uncharacterized to honorable and change the reason [for] discharge because [he] was discharged based on a medical disability."

The applicant enlisted in the Coast Guard on June 25, 1996. He was discharged on July 19, 1996, with an uncharacterized discharge, by reason of entry level separation, with a RE-3L reenlistment code. The RE-3L reenlistment code is assigned when a member has failed to adapt to military life and is discharged during the first 180 days of service.

EXCERPTS FROM RECORD AND SUBMISSIONS

Brief Summary

At age 15, the applicant suffered a right knee injury which required arthroscopic surgery. Prior to entering active duty, the applicant underwent a pre-enlistment physical examination and was found fit for duty. Approximately one week after starting active duty, on June 29, 1996, the applicant reported for medical treatment for right knee pain. He stated at that time that he incurred the injury when he stepped off the edge of a curb while running.

The applicant has received a 10% disability rating from the Department of Veterans Affairs (DVA). The applicant made the following statements in support of the DVA claim and has provided these statements in support of his application for the correction of his military record:

I was released for a pre-existing condition relating to my right knee. I filed a claim for service connection. Investigation by the Veteran's Administration found my condition to be service connected and deemed to be service incurred and granted to me a 10 per cent service connected rating. For that reason, I find my release to be unjust and in error.

Because the Coast Guard knew of my problem, they requested further review of my medical condition by [a civilian doctor] at [REDACTED] MEPS [military entrance processing stations] and [a physician's assistant] before I was allowed to enlist. They found my right knee to be normal. I believe the discharge I received was improper and unequitable.

I believe that the Coast Guard should have repaired my right knee and provided physical therapy to me before the final disposition of my case because of medical evidence from [REDACTED]

Applicant's Military Record

On June 30, 1996, the applicant secured emergency medical treatment complaining of an injury to his knee. He was examined and treated with motrin, ice, and crutches. He was referred to physical therapy and for an MRI.

On a July 3, 1996, medical report of the findings of an MRI on the applicant's right knee, the physician stated that there was an "extensive tear involving the posterior horn of medial meniscus. Poorly-seen anterior cruciate ligament, which may indicate underlying tear. Clinical correlation is suggested." The record does not indicate whether this clinical correlation occurred.

On July 9, 1996, the senior medical officer at the applicant's unit recommended that the applicant's battalion officer discharge the applicant by reason of : "Medical Condition: 1) Right knee extensive tear of medial meniscus. EPTE [existed prior to enlistment]."

On July 12, 1996, the applicant acknowledged that he was being discharged by reason of "Right Knee Medial Meniscus Extensive tear, involving the Posterior Horn. EPTE." The applicant also acknowledged that his condition was disqualifying for enlistment. He stated that he did not wish to submit a statement in his behalf.

On July 19, 1996, after 25 days on active duty, the applicant was given an uncharacterized discharge from the Coast Guard. (In certain situations an uncharacterized discharge is given in place of one of the standard types of discharges, i.e., honorable, general, or other than honorable.)

DVA Rating Decision

On March 24, 1997, the DVA granted the applicant a 10% disability rating for "right anterior cruciate ligament and medial meniscus tear" effective July 20, 1996. The DVA's reasons and bases for its decision, which contains the applicant's medical history with respect to the right knee, are set out below:

On 10-23-93, a right knee injury occurred while playing high school football. On 4-5-95, a right partial medial meniscetomy was performed. On 6-25-96, the [applicant] entered active duty. The entry on duty physical noted the prior history, but findings were normal lower extremities. On 6-29-96, treatment resulting from a right knee injury is first recorded. An entry of 7-9-96 records that an MRI records an extensive tear involving the posterior horn of the right medial meniscus and a questionable underlying anterior cruciate (ACL) tear. On 7-11-96, a medical determination was made that the knee condition existed prior to entrance on duty. Later the veteran was separated as not meeting entrance standards. Shortly after release from active duty, the [applicant] sought treatment. This reports recurrent pain, positive testing and difficulty with walking. The inservice MRI report 7-3-96 was obtained by the treating physician, and in his report 2-7-97, he notes the arthroscopy prior to entrance on duty recorded a normal ACL, and that [the applicant] probably would not have been allowed to enter on duty with this deficiency. He further states that the injury in service is the cause of the [applicant's] current problems with the knee.

The evidence records that there was a medical meniscus repair prior to service from which full recovery is recorded. During service, this recurred due to injury, therefore this was aggravated by service. This same injury resulted in an ACL injury and based on the evidence now of record, it is deemed to be service connected.

Views of the Coast Guard

The Coast Guard recommended that the applicant receive an honorable discharge by reason of physical disability. The Coast Guard did not recommend that the applicant receive the 10% disability rating that he was given by the DVA. The Chief Counsel asserted that the applicant should apply to the Coast Guard for severance pay.

With respect to the physical disability discharge, the Chief Counsel stated as follows:

- a. The applicant had negative Lachman's and a normal anterior cruciate prior to entering the military. After his injury while in service, he was

found to have positive Lachman's and insufficient anterior cruciate ligament.

b. Though the applicant signed twice that he did not disagree with his discharge, the form he signed does not specify the type of discharge, it only specifies his injury.

c. There was no clinical correlation done after the MRI to verify a tear to his anterior cruciate prior to his discharge.

The Chief Counsel argued that the findings of the DVA regarding the applicant's alleged disability have no bearing on the Coast Guard's medical findings and characterization of discharge.

The Chief Counsel stated that the law that provides for physical disability retirement or separation and associated benefits (chapter 61, Title 10, United States Code) is designed to compensate members whose military service is terminated due to a service connected disability, and to prevent the arbitrary separation of individuals who incur disabling injuries. The Chief Counsel stated that the sole basis for a physical disability determination in the Coast Guard is unfitness to perform duty. 10 U.S.C. § 1201 and Article 1-A, COMDTINST M1850.2B. ~~Moreover, to render a member unfit for duty for purposes of separation or retirement, the disability must be of a permanent nature and stable. Article 2-C-2a(1), COMDTINST M1850.2B. The Chief Counsel concluded that the Coast Guard properly found that there was no basis under Chapter 61 of title 10, United States Code to discharge the applicant with a physical disability.~~

The Chief Counsel stated that DVA ratings are not determinative of the issues involved in military disability retirement cases. The Chief Counsel stated that according to Lord v. United States, 2 Ct. Cl. 749, 754 (1983), the DVA determines to what extent a veteran's earning capacity has been reduced as a result of specific injuries or combinations of injuries. The armed forces, on the other hand, determine to what extent a member has been rendered unfit to perform the duties of his rate and specialty.

The Chief Counsel stated that the applicant received a separation physical and was found fit for discharge under Article 12.B.53 of the Personnel Manual. He also stated that even if the applicant was not further evaluated by a doctor prior to discharge from active duty, he has not established that this was error. In support of this statement, the Chief Counsel cited Article 2-C-2b(2) of COMDTINST M1850.2B. This provision states that service members being processed for separation or retirement for reasons other than disability shall not be referred for disability evaluation unless their physical condition reasonably prompts doubt that they are fit to continue to perform adequately in their assigned duties.

The Chief Counsel stated that the applicant has not shown that his failure to receive a medical retirement from recruit training was an error or injustice. He stated

that any long term diminution in the applicant's earning capacity attributable to his military service is properly a matter for determination by the Department of Veterans Affairs, not the Coast Guard or the BCMR.

Applicant's Response to the Views of the Coast Guard

On February 19, 1999, the applicant responded to the views of the Coast Guard. He did not disagree with them.

APPLICABLE REGULATIONS

Article 12.B.20.a. (Uncharacterized Discharge) of the Personnel Manual states the following:

"1. Uncharacterized discharges are authorized for all members separated at the entry level on or after 15 June 1983 who:

- a. Have fewer than 180 days of active service on discharge.
- b. Demonstrate poor proficiency, conduct, aptitude or unsuitability for further service during the period from enlistment through recruit training.

"2. An uncharacterized discharge is used for most recruit separation, except for disability, prior service members entering recruit training, or in cases when another type of discharge may be appropriate"

Article 12.B.20.e. (Counseling) of the Personnel Manual provides as follows:

"As with most other types of separations, Commanding Officer, Training Center Cape May should not initiate uncharacterized discharge processing until he or she has formally counseled the member about deficiencies and afforded him or her an opportunity to overcome them as reflected in appropriate counseling or personnel records."

Article 12-B-15d. of the Personnel Manual provides as follows:

"Commanding officers of training centers conducting recruit training are authorized to discharge an enlisted member in an original enlistment, who has less than 60 days' active service, for physical disability that was not incurred in (that is, a preexisting physical defect) or aggravated by a period of active military service, under the conditions set forth in paragraph c. hereof.

(1) The individual shall be discharged . . . as an erroneous enlistment. "

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 submission, and applicable law:

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

2. The applicant has established that his uncharacterized discharge is erroneous and unfair. The Coast Guard has agreed that the applicant's record should be corrected to show that he received an honorable discharge by reason of physical disability, when he was discharged on July 19, 1996.

3. Although the applicant suffered a right knee injury prior to his enlistment in the Coast Guard, the medical evidence establishes that he had completely recovered from that injury prior to his enlistment. Coast Guard doctors found that the applicant was fit for duty prior to his enlistment. The record also establishes that the applicant re-injured the same right knee while on active duty. The MRI, taken after his injury on active duty, revealed that the applicant suffered an "extensive tear involving the posterior horn of medial meniscus. Poorly - seen anterior cruciate ligament, which may indicate underlying tear." Although clinical correlation was suggested by the radiologist, none took place. The Board finds that the applicant suffered a new knee injury while on active duty. His military record indicates that this is the only reason for the applicant's discharge. Article 12.B.20.a.2. of the Personnel Manual prohibits the awarding of an uncharacterized discharge in cases of physical disability.

4. Although the Coast Guard agreed to the correction of the applicant's record with respect to the type of discharge and the reason for it, the Coast Guard objected to giving the applicant a 10% disability rating based on the 10% rating by the DVA. The Chief Counsel argued that the applicant should apply to the Coast Guard for severance pay.

5. DVA ratings are not determinative of military disability ratings. See Lord v. United States, 2 Ct. Cl. 749, 754 (1983). Therefore, Board finds that the Coast Guard should evaluate the applicant's condition and determine his disability rating at the time of his discharge.

6. The Board also finds that the amount of severance pay or a medical retirement is dependent on the percentage of disability awarded to the applicant. Percentages of disability are determined by the Central Physical Evaluation Board (CPEB), which is part of the Coast Guard's Physical Disability Evaluation System. Since the Coast Guard discharged the applicant without processing him through that system, the Board does not have the benefit of Coast Guard doctors' opinions as to how much the applicant's ability to perform the duties of his rate was affected by his injury. The Board finds that

the Coast Guard, through its CPEB, should determine the percentage of the applicant's disability.

7. The Coast Guard should complete this process within 60 days from the date the Board enters a final decision in this case. The Coast Guard should immediately notify the applicant and the Board of its determination.

8. If the applicant believes that an error or injustice exists with respect to the disability rating given to him by the Coast Guard, he shall have 60 days from the date he is notified of the Coast Guard's determination to request further consideration with respect to that disability rating.

9. Even if the Board were to accept that the applicant's disability existed prior to his entry on to active duty, the uncharacterized discharge would be in error because Article 12-B-15d. of the Personnel Manual does not permit an uncharacterized discharge by reason of physical disability. Moreover, the applicant signed a document that stated that he was being discharged based on an injury to his right knee that existed prior to his enlistment. There is nothing in the applicant's record to indicate that his reason for separation was due to anything other than the right knee injury.

[ORDER AND SIGNATURES ON NEXT PAGE]

ORDER

The application of _____, USCG, for correction of his military record is granted as follows: His record shall be corrected by showing that on July 19, 1996, he was honorably discharged by reason of physical disability. Within 60 days from the date of this decision, the Coast Guard is directed to evaluate and determine the applicant's percentage of disability due to his knee injury. After the Coast Guard has determined the applicant's percentage of disability, it will issue a corrected DD Form 214 showing the applicant was honorably discharged by reason of physical disability, with an appropriate indication as to the disability rating and or severance pay, and an appropriate reenlistment code. The Coast Guard shall immediately notify the applicant and the Board of the disability rating awarded to the applicant.

If the applicant disagrees with the percentage of disability granted to him by the Coast Guard, he shall have 60 days from the date of notification of the Coast Guard's decision to file a request for further consideration with this Board.

The applicant is advised that any severance pay that he receives from the Coast Guard may lead to an offset in DVA benefits.

