


**DEPARTMENT OF TRANSPORTATION  
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for Correction of  
Coast Guard Record of:


BCMR Docket  
No. 2000-029

**FINAL DECISION**

 Deputy Chairman:

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was docketed on December 6, 1999, upon receipt of the applicant's complete application for correction of his military record.

This final decision, dated October 26, 2000, is signed by three duly appointed members who were designated to serve as the Board in this case.

The applicant, a retired  pay grade E-5), asked the Board to correct his record by increasing his disability rating from 30% to 100%. The applicant was permanently retired on September 20, 1988, by reason of physical disability due to "Spine, Ankylosis of - Cervical - Favorable."

**EXCERPTS FROM RECORD AND SUBMISSIONS**

The applicant stated that he believed his record to be in error in the following particulars:

I did not have a medical evaluation by the US Coast Guard after surgery.

I have not had a medical evaluation to determine my current medical condition.

Neither the physical evaluation board [PEB] or the physical review council [PRC] reviewed the medical treatments rendered by the USCG dispensary Governors Island, New York, dated August 18, 1980 and August 22, 1980.

Recorded was a mild concussion . . . and muscle strain. This diagnosis was directly related to the accident of August 13, 1980 which acerbated the tinnitus in my ears, especially my left ear.

These impairments to my ears [occurred] before I was released from ACTDUTRA [active duty training] and was recorded in the medical records of the USCG dispensary.

During the hearing at the physical evaluation board Dr. L. explained the difference between the 1st and 2nd vertebrae [sic] and the 5th and 6th cervical nerve radiculopathy. He also explained carpal tunnel syndrome.

I have a history of problems with swollen fingers and numbness. Both . . . sites for my fusion are constantly swollen and painful. These symptoms and findings are the result of trauma and severe depression caused by the accident of August 13, 1980 while I was on ACTDUTRA.

The applicant enlisted in the Coast Guard Reserve on July 2, 1973. He remained a member of the Coast Guard Reserve until October 14, 1983 when he was placed on the temporary disability retired list (TDRL).

From August 11, 1980 until August 22, 1980, the applicant performed a period of active duty for training. On [REDACTED] while on active duty, the applicant was involved in an automobile accident. The applicant submitted an entry from his medical record dated August 18, 1980 that indicates he received treatment for whiplash from a Coast Guard dispensary. A narrative summary record prepared for the applicant's medical board, dated October 12, 1981, stated that at the time of the applicant's initial treatment for alleged injuries due to the motor vehicle accident, he complained of neck pain radiating to both shoulders. In finding the applicant fit for full duty, the doctor stated in the medical summary that the X-rays of the cervical spine were interpreted to be within normal limits. The doctor offered the following prognosis: "It is felt that [the applicant] is fit for full duty. Although he continues to complain of occasional neck pain, repeated examinations have failed to demonstrate any structural or pathological abnormalities to substantiate his symptoms. In view of this, the patient should be continued on symptomatic, conservative treatment of analgesics, heat, and cervical collar support when he is experiencing symptoms." There was no mention in this medical report of lower back pain or tinnitus.

The applicant rebutted the findings of the medical board and the case was sent to the central physical evaluation board (CPEB). That Board met on April 14, 1982, and determined that the applicant suffered from "Spine, Limitation of Motion of - Cervical - Slight." The CPEB rated the applicant's injury as 10% disabling. The CPEB noted that a "review of the X-Ray Findings obtained prior to [a] reinjury in February 1982 do not show the C1, C2 instability currently demonstrated." The medical records reveal that the applicant was reinjured while performing his duties as a civilian police officer. On March 21, 1982, he had an altercation with a prisoner, in which they wrestled and the applicant fell to the floor. In a medical record from [REDACTED] Hospital dated, April 28, 1983, the physician wrote that in addition to the motor vehicle accident in August 1980, the applicant incurred an additional injury in 1982. The physician wrote that in addition to aggravating his neck, the applicant stated that he "sustained low back injury and also injury to the dorsal area." The applicant was also diagnosed at this time as having tinnitus of the left ear of undetermined etiology.

With respect to his alleged hearing disability, the applicant pointed to an annual Coast Guard medical examination dated November 1978 that contained the following comment in block 74: "Member has high frequency hearing loss L[eft] ear. No significant threshold change since last audiogram. Not employed in hearing hazardous

area. Protective devices not considered necessary. SNM counseled accordingly. - NCD." A retention physical dated June 7, 1980 contains the following entry in block 74: "Examinee has partial hearing loss bilaterally."

On October 4, 1982, the applicant rejected the CPEB findings and demanded a hearing before the formal central physical evaluation board (FPEB).

On June 9, 1983, the FPEB held a hearing which the applicant and his lawyer attended. The FPEB determined that the applicant was unfit for duty with a 60% disability rating. It described the applicant's disability as follows: "Cervical; code number 5290 - 30 percent. Lumbosacral or lower back; 5295 - 0 percent. Radiculopathy; 8510 - bilateral - 20 percent in each case. The tinnitus; 6260 - 10 percent which we have combined for a total of 60 percent disability."

On September 8, 1983, the physical review council (PRC) reviewed the applicant's case and reduced his disability rating to 30%. The PRC stated that the applicant suffered from "Spine, Limitation of Motion of, Cervical, Severe." The PRC provided the following explanatory note:

Upon review, the physical review council finds that the physical evaluation board erred in application of the provisions of COMDTINST M1850.2 and the VASRD [Veterans Administration's Schedule for Rating Disabilities]. Specifically, with regard to the evaluatee's cervical spine impairment, the Board rated both cervical spine limitation under VA Code 5290 and the associated 5th and 6th cervical nerve syndrome under VA Code 8510. This constitutes pyramiding and is impermissible. Both the limitation of cervical spine motion and the 5th and 6th cervical nerve radiculopathy derive from the same cervical spine pathology. Of these two residual impairments, the limitation of spinal motion is higher-rated, and accordingly the disability should be based on that residual. Further, the physical review council finds that the evaluatee's lumbosacral strain and tinnitus both constitute impairments incurred after the evaluatee's release from ACTDUTRA, meaning that neither can be considered to have been incurred while the evaluatee was entitled to receive basic pay. Neither can be considered the proximate result of the performance of inactive duty for training. As such neither the lumbosacral spine impairment nor the tinnitus are compensable as service-connected disabilities. Should either of these impairments persist when the evaluatee is removed from the TDRL at final adjudication, they may then be rated for the record as non-compensable disabilities.

On September 6, 1983, the President of the PRC notified the applicant of its decision. The applicant was given 15 days to rebut the PRC's findings and recommendation, if he chose to do so. There is no evidence in the record that the applicant rebutted the PRC.

On September 28, 1983, the Commandant advised the applicant that effective October 14, 1983, he would be placed on the temporary disability retired list.

### Post-TDRL evidence

A medical summary from a hospital, dated February 26, 1988, indicates that the applicant was involved in another motor vehicle accident dated [REDACTED]. The report states that the applicant underwent surgery for "[f]usion of cervical vertebrae, 1 to 2. posteriorly, using right iliac bone graft." The preoperative and post-operative diagnosis was "[s]ubluxation of C1 on C2 with rupture of transverse ligament."

Another medical summary from the same hospital, dated February 22, 1988, provided the following history of the [REDACTED] motor vehicle accident.

The patient was the driver and sole occupant of his vehicle . . . Another vehicle made a U-turn from the shoulder and the patient's vehicle struck this car broadside on the other vehicle's driver's side. The patient denies loss of consciousness and denies striking his head. He says he was able to get out of his own vehicle. He was brought to the emergency room and x-rays . . . revealed subluxation of C1 and C2. . . . Of note is the fact that in 1980 the patient was involved in a motor vehicle accident. The patient was admitted to a [REDACTED] Hospital at that time with lower back and neck problems. The patient states that the neck problem was a problem with the first and second vertebrae. He was treated in a stiff collar for six months and, subsequent to that, for two to three years he would wear the collar off and on, depending upon the weather and the degree of stiffness in his neck.

After approximately five years on the TDRL, the CPEB determined, on July 20, 1988, that the applicant should be permanently retired with a 30% disability rating due to "Spine, Ankylosis of - Cervical - Favorable."

In a letter dated September 22, 1988, the applicant was notified that he had been determined to be unfit for duty by reason of physical disability. He was permanently retired effective [REDACTED].

Other medical records submitted by the applicant indicate that he has received continuing treatment for his back since 1988. Medical notes dated October 29, 1996, and February 4, 1997, indicate that the applicant was involved in another motor vehicle accident in 1992. This entry noted the applicant's 1988 motor vehicle accident and also stated that the applicant "was ok until car accident in 1992-93. . . . [Applicant] was not able to get out of bed. Can go 1-2 months [without] excessive pain. Described as a "7" out of a "10". . . . Very stiff in neck area. Sharp pain elevated [with] sudden movements . . . . Pain has radiated to shoulders, arms, [right] middle/ring finger . . . ."

### Views of the Coast Guard

The Coast Guard recommended that the applicant's request be denied because it is untimely and for lack of proof of error or injustice.

The Chief Counsel stated that the applicant submitted his application approximately eight years after the three-year statute of limitations expired. The



applicant's reason for not filing his application sooner is not persuasive, since ignorance of the law is not a viable excuse. Therefore, since the applicant has not demonstrated error or injustice, his case should be denied for untimeliness.

The Chief Counsel stated that even if the Board should find a basis to waive the statute of limitations, there is no merit to this case. According to the Chief Counsel, the applicant, with counsel, waived his rights to further proceedings within the Physical Disability Evaluation System (PDES) when he did not request that his case be reviewed by the FPEB, presumably after the decision by the CPEB to permanently retire the applicant with a 30% disability rating.

With respect to the applicant's allegation that the Coast Guard failed to follow its regulation by not conducting periodic examinations while he was on the TDRL, the Chief Counsel stated that Coast Guard officials involved in the scheduling and conducting of periodic TDRL examinations are presumed to have carried to their duties correctly, lawfully, and in good faith. In this regard, the Chief Counsel stated that the applicant offered no evidence, except for his own allegation, that he did not receive the required periodic examinations.

In reply to the applicant's allegation that he did not have a medical examination to determine his current medical condition, the Chief Counsel stated that having been permanently retired by reason of physical disability on October 14, 1988, the applicant's PDES case is now closed. There is no federal law or Coast Guard regulation that requires the Coast Guard PDES to reevaluate members after they have been permanently retired. Therefore, the Chief Counsel asserted that the applicant's request should be denied.

### **Request for Additional Information**

On September 27, 2000, the Board requested the Chief Counsel to address the following issues: 1) How the CPEB determined that the applicant should be permanently retired with a 30% disability rating, if no periodic evaluations were performed and 2) Whether the Coast Guard complied with Article 4-A-14.b. by counseling the applicant that he had been found unfit for continued active duty and that the CPEB had recommended that he be permanently retired with a 30% disability rating.

On September 29, 2000, the Chief Counsel responded to the questions raised by the Board. The Chief Counsel stated that the CPEB convened in July 1988, five months after the applicant underwent surgery caused in part by an automobile accident in February 1988. He stated that while the record presented to the CPEB is not available for review, the following observations are noted:

- A CPEB decision was required by 10 USC 1210(b) and could not be postponed since the maximum 5-year duration of [the applicant's] TDRL would expire on 13 Oct. 88.

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- Post-surgical residuals were likely to exist, and the surgery had been performed to correct an injury that clearly was not related to Coast Guard Service.

- The CPEB had to have some medical records from [REDACTED] Hospital in order to decide there was no evidence of natural progression of the condition for which [the applicant] was placed on the TDRL. Any such records would also clearly show non-service aggravation of that condition.

- Although it is common practice to rely on military doctors, Coast Guard PEBs are empowered to accept appropriate medical records. They may have accepted medical records from [REDACTED] Hospital, in particular, due to the hospital's unique history. It was founded as a public health hospital for merchant mariners and was staffed by the U.S. Health Service until 1981, when it became a [REDACTED] hospital. . . .

- The CPEB would have been faced with the following overall sequence of events:

- (1) Coast Guard-related cervical injury;
- (2) non-Coast Guard cervical injury; and
- (3) recent-cervical repair of non-Coast Guard cervical injury.

- It would not have been possible for any PEB to distinguish the Coast Guard's portion of responsibility in such a case from the non-service connected injuries Applicant sustained. Therefore, the CPEB would have affirmed the finding of 30% disability decided by the 1983 CPEB as equitable to the member. Under the circumstances, a timely medical examination would not have been helpful. [Emphasis in original.]

The Chief Counsel stated that notwithstanding the fact that there is no evidence in the record showing that the applicant was counseled about the CPEB findings and recommendation with respect to the permanent disability rating, "[u]nder a presumption of regularity and in view of the fact that our files no longer contain key documents, the Board should conclude [the applicant] accepted the findings and recommended disposition of the 1988 CPEB." In addition, the Chief Counsel noted that the applicant was familiar with the PDES process and his options with respect to the CPEB findings and recommendation, having had a series of 3 boards (PEB, FPEB, PRC) in the process of being placed on the TDRL in 1983.

The Chief Counsel stated that records from 1983 through 1988 are not currently available to assess whether or not the Coast Guard performed periodic physical examinations during the applicant's temporary retirement. Therefore, under the doctrine of laches, the Board should not hold the Coast Guard responsible for the failure to affirmatively rebut such an allegation of error.

### **Applicant's Response to the Coast Guard Views**

The advisory opinion and supplemental comments were sent to the applicant for any reply he wanted to make. He did not submit a response to the advisory opinion.

### **APPLICABLE LAW**

Section 1204 of title 10, United States Code (Members on active duty for 30 days or less) states that:

Upon a determination by the Secretary concerned that a member of the armed forces not covered by section 1201, 1202, or 1203 of this title is unfit to perform the duties of his office, grade, rank, or rating because of physical disability, the Secretary may retire the member with retired pay . . . . if the Secretary also determines that -- (1) based upon accepted medical principles, the disability is of a permanent nature and stable; (2) the disability is the proximate result of, or was incurred in line of duty . . . as a result of -- (A) performing active duty or inactive-duty training; (B) traveling directly to or from the place at which such duty is performed; . . . (4) either--(A) the member has at least 20 years of service . . . (B) the disability is at least 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans' Affairs at the time of determination;

Section 204(g)(1) of title 37, United States Code provides that "A member of a reserve component of a uniformed service is entitled to the pay and allowances provided by law or regulation for a member of a regular component of a uniformed service . . . whenever such member is physically disabled as the result of an injury, illness, or disease incurred or aggravated - (A) in [the] line of duty while performing active duty; (B) in [the] line of duty while performing inactive-duty training . . . ."

### **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 is untimely.

2. To be timely, an application for correction of a military record must be submitted within three years after the discovery of the alleged error or injustice. See 33 CFR 52.22. The applicant retired from the Coast Guard approximately eleven years ago. He should have discovered the alleged error at that time. The Board may still consider the application on the merits, however, if it finds it is in the interest of justice to do so. The interest of justice is determined by taking into consideration the reasons for and the length of the delay and the likelihood of success on the merits of the claim. See Allen v. Card, 799 F. Supp 158 (D.D.C. 1992).

3. The applicant stated that he did not file his application sooner because he was not aware of the existence of the Board. This reasoning does not persuade the Board, particularly since the statute creating the Board and the regulations pertaining thereto are in the public domain. The Coast Guard notified the applicant, on August 22, 1988, that he would be permanently retired with a 30% disability effective September 20, 1988. He presented no evidence that he made any other efforts during the eleven years preceding the filing of this application to search for a means of correcting the disability rating that he now claims is in error.

4. Additionally, after a review of the merits, the Board finds that the applicant has failed to establish by a preponderance of the evidence that the Coast Guard committed an error or injustice by awarding him a 30% disability rating. The applicant alleged that he did not have a medical examination after the cervical surgery in February 1988, and there is no evidence in the record that the Coast Guard performed any periodic examinations while the applicant was on the TDRL. However, the Chief Counsel asserts that this error is harmless because the applicant has reinjured his cervical spine twice since his original injury. One reinjury occurred approximately a year after his temporary retirement while performing his civilian [REDACTED] and the last reinjury resulted from an automobile accident that occurred in 1988, for which the applicant underwent surgery. The Coast Guard argued that these additional injuries to the same area as the original injury would have made it impossible for it to determine what percentage of the disability was due to the original Coast Guard injury.

5. The applicant has not presented any evidence that he was entitled to more than a 30% disability rating for the injury he sustained while performing active duty for training. Nor has he provided any evidence that would contradict the evidence provided by the Coast Guard that it is impossible to determine with accuracy what percentage of his disability is attributable to the injury he incurred while on active duty. The 30% disability rating as determined by the Coast Guard gives the applicant a medical retirement and is no less than that accepted by the applicant when he was placed on the TDRL.

6. Moreover, it would be even more difficult today for the Coast Guard to determine the percentage of disability that is attributable to the injury that the applicant incurred on active duty for training because recent medical entries indicate that in 1993 the applicant was involved in yet another motor vehicle accident.

7. Contrary to the applicant's allegations there is evidence in the record that the CPFB, FPFB, and the PRC considered the Coast Guard Dispensary medical entries. An orthopedic consultation report prepared for the medical board, dated October 12, 1981, noted that the applicant had been seen on August 13 and August 22, 1980 complaining about neck strain. The medical board review is the first step in PDES process. Therefore there is a presumption of regularity that the PFB and the PRC also saw the orthopedic consultation. The applicant has not presented any evidence, except for his own speculation, that these boards did not review these early medical entries.

8. The military record does not support the applicant's claim for a medical disability due to a hearing loss. Pursuant to two medical entries the applicant's hearing loss occurred prior to his motor vehicle accident in August 1980. The first entry he

points to documented a physical examination that occurred in 1978. The second entry documented a retention physical that occurred on June 7, 1980. The applicant was not on continuous active duty, but rather was a reservist who performed mostly weekend drills and occasional periods of active duty for training. He has not provided sufficient evidence that his hearing loss occurred while he was on active duty, rather than in his civilian life. In addition, a physician wrote in a medical entry from [REDACTED] Hospital, dated April 28, 1983, that the tinnitus in the applicant's ears was of undetermined etiology.

9. The PRC in its review of the FPEB in 1983 informed the applicant that neither the lumbosacral spine impairment nor the tinnitus were compensable service-connected disabilities. This was part of the PDES process placing the applicant on the TDRL. He was represented by counsel during this process but did not object to the PRC findings at the time. Accordingly, there is insufficient evidence that the applicant incurred a compensable hearing loss or a lumbosacral sprain impairment while on active duty.

10. The Board notes that the record does not indicate that the applicant was given an opportunity to reject the findings and recommendation of the CPEB that determined he should be placed on the PDRL with a 30% disability rating. However, the Board further notes that the applicant was advised in August 1988 that such a determination had been reached and he could have objected at that time. As the Chief Counsel stated, the applicant was well aware of the PDES process, having gone through it prior to being placed on the TDRL. As stated above the applicant has not demonstrated that he would have received a higher disability rating had he objected to the 1988 PEB findings and recommendation.

11. Due to the applicant's lengthy delay in bringing this claim, his lack of a persuasive reason for not filing his application sooner, and the lack of any success on the merits of this claim, the Board finds that it is not in the interest of justice to waive the statute of limitations in this case.

12. Accordingly, the applicant's application should be denied



**ORDER**

The application of  
military record is denied.

, USCG, for correction of his

