

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2000-086

FINAL DECISION

[REDACTED] Attorney-Advisor:

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 application was filed on January 21, 2000, and completed on March 15, 2000, upon the BCMR's receipt of the applicant's military and medical records.

This final decision, dated April 12, 2001, is 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, a former seaman apprentice (SA; pay grade E-2) in the Coast Guard, asked the Board to correct his military record to show that the disability for which he was medically discharged on March 25, 1981, was caused by an injury he received while serving on active duty. He asked that his record be corrected to show that he was medically discharged due to a 20-percent disability.¹ He alleged that "recent diagnostic findings by the VA show evidence that my back injury was a result of lifting a 50 lb fender bender at the time of my service with the USCG." He alleged that his application for correction is timely because he first discovered that his disability was service connected on August 9, 1999.

SUMMARY OF THE APPLICANT'S MEDICAL AND MILITARY RECORDS

On January 21, 1980, the applicant enlisted in the Coast Guard for a term of four years. The applicant's pre-enlistment and pre-training physical examinations revealed no problems with his back. He underwent basic training and was transferred to the Coast Guard cutter [REDACTED] on April 8, 1980.

¹ The applicant apparently believes that a finding of 20-percent disability would entitle him to disability retirement payments.

On May 23, 1980, the applicant reported to sick call, complaining of a sharp pain in his lower back while using a deck buffer. He stated that he had fallen down a ladder while underway and then on May 21, 1980, had fallen on his back while playing basketball, but the pain did not begin until he was using the deck buffer or "chipping deck." The doctor's examination revealed back strain (rigid lower back muscles) and slight scoliosis of the lower thoracic and upper lumbar region. Xrays revealed a mild curvature of the spine.

In June 1980, the applicant sought medical attention for lower back pain several times. He was given limited duty with no heavy lifting but continued to complain of back pain. He visited the clinic daily for heat treatments. An orthopedist who examined him on June 18, 1980, found that his complaints of neck and back pain were "not much related" to his mild scoliosis. The orthopedist stated that the patient requested shore duty so that he could be near to his mother, as he was her only son. He concluded that the applicant's stressful situation was contributing to his pain and found him fit for full duty. The applicant was referred to a psychologist.

On July 3, 1980, the applicant was evaluated by a psychiatrist. He complained of loss of sleep, loss of interest in activities, and nervousness, as well as back and neck pain. The psychiatrist stated that the applicant thought the Coast Guard should stop requiring him to lift heavy things and should assign him to [REDACTED], where he would be just 45 minutes from his mother's house. The psychiatrist also stated that he was "demanding" and that his primary affect was anger. In their referral, his superiors had described him as "manipulative." The applicant was found fit for duty and referred for biofeedback and relaxation training to reduce his "muscle spasm related to stress." However, the psychiatrist reported that the applicant was not interested in undergoing this training.

On August 15, 1980, the applicant went to the Emergency Room at the Public Health Service (PHS) Hospital on [REDACTED] complaining of lower back pain. A doctor reported that he was a "chronic complainer" who felt that he should not be required to lift heavy things and showed a "strong desire" to be stationed near his mother. He was evaluated by a psychologist and diagnosed as a "malingerer" who was mentally and physically fit for duty. The psychologist reported that the applicant's "essential feature is the voluntary production & presentation of false or grossly exaggerated physical or psychological symptoms produced in pursuit of a goal that is obviously recognizable ... to avoid work. Rx—Administrative problem." He also reported that the applicant told him that he wanted to get out of the Coast Guard.

On August 21, 1980, a doctor at the PHS Hospital reviewed the applicant's record and determined that his neck and back pain were "psychosomatic." He was found fit for duty.

On September 5, 1980, the applicant attended sick call complaining of lower back pain. However, his movement and flexibility were normal. The doctor found him fit for duty and noted that, as his cutter was getting underway the next morning, the applicant was trying to avoid sea duty.

On September 19, 1980, the applicant's commanding officer recommended that he be evaluated by an Initial Medical Board (IMB) because of his chronic complaints of back pain, desire to live near his mother, and "minimal production in his work habits." Throughout the fall and winter, the applicant continued to complain of back pain.

On November 12, 1980, the Commander of the [REDACTED] District authorized the IMB. From December 16 to 31, 1980, the applicant was evaluated at the PHS Hospital. Xrays showed mild scoliosis of the thoracolumbar spine at the 11th and 12th vertebrae, as well as congenital thoracic lordosis.

On January 5, 1981, the IMB reported that the applicant suffered from mild scoliosis at the 11th and 12th vertebrae, congenital thoracic lordosis, and chronic thoracolumbar pain. The IMB report states that his pain was most likely associated with his pre-existing spinal deformity and that it would likely increase. He was given a corset, found not fit for duty, and referred to a Central Physical Evaluation Board (CPEB). He was also notified of the IMB's findings and recommendation. On January 28, 1981, the Commander of the [REDACTED] District endorsed the IMB report and recommended that the applicant be separated without severance pay. On February 10, 1981, the report of the IMB was approved.

On February 11, 1981, the applicant's case was reviewed by a CPEB, which found that the applicant suffered from "right thoracolumbar scoliosis and congenital thoracic lordosis." The CPEB found that these conditions predated the applicant's enlistment and recommended that he be separated without severance pay.

On February 19, 1981, the applicant was advised by counsel concerning the findings and recommendations of the CPEB. On February 24, 1981, he signed a form, SF-4809, accepting the CPEB's findings and waiving his right to a hearing before a Formal Physical Evaluation Board (FPEB).

On March 25, 1981, the applicant was awarded an honorable discharge by reason of "physical disability existing prior to enlistment" with no service-connected disability percentage or severance pay.

In 1995, the applicant was in a car accident in which he injured his neck, back, and ankle. On September 24, 1999, the Department of Veterans Affairs (DVA) determined that the applicant's back condition was service connected and that he was 10 percent disabled by it.

VIEWS OF THE COAST GUARD

On September 22, 2000, the Chief Counsel of the Coast Guard recommended that the Board deny the applicant's request for its untimeliness and lack of merit.

The Chief Counsel alleged that the applicant knew or should have known of the alleged error in his record upon his discharge in 1981. Therefore, he argued, relief should be denied because the applicant filed his application some 16 years after the expiration of the BCMR's 3-year statute of limitations. Moreover, he argued, although the Board may waive the statute of limitations, a cursory review of the merits of the

case, required under *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995), indicates that the applicant has not proved that the Coast Guard committed any error or injustice in determining that his back problem existed prior to his enlistment. Therefore, he argued, the Board should find that there is no reason to waive the statute of limitations.

The Chief Counsel also argued that, under 33 C.F.R. § 52.13(b), because the applicant signed the form SF-4809 on February 24, 1981, waiving his right to have his case heard by an FPEB, the Board must dismiss his application for failure to exhaust his administrative remedies. The Chief Counsel argued that under *Barnett v. International Business Machine Corp.*, 885 F.Supp. 581, 588 (S.D.N.Y. 1995), "where a plaintiff failed in a timely fashion to pursue administrative remedies that were available and open, the plaintiff cannot later claim futility based on her inability to pursue those remedies any longer."

The Chief Counsel further argued that, even if the Board should decide to waive the statute of limitations and ignore the applicant's failure to exhaust administrative remedies, relief should be denied for lack of merit. He argued that, absent strong evidence to the contrary, the Board must assume that when the applicant waived his right to an FPEB and accepted the CPEB's report on February 24, 1981, his counsel properly advised him of his rights and otherwise "performed his duties lawfully, correctly, 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).

Under the same presumption of regularity, the Chief Counsel argued, the Board should find that the applicant has not proved that the CPEB erred in finding that his back conditions predated his enlistment. He alleged that the disability rating determination by the DVA "is irrelevant for purposes of rebutting the CPEB's determination" because the DVA reached its decision about service connection "under the differing standards of evaluation employed by the DVA." The Chief Counsel did not explain what difference exists in the standards for determining service connection but stated that in setting disability ratings "[t]he 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 because of a physical disability." He also stated that the documentation of service connection provided by the applicant was inconclusive and insufficient to overcome the presumption that the CPEB's report was correct.

The Chief Counsel included with his advisory opinion a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC). CGPC stated that "there was never an investigation as to the cause of the applicant's alleged work incurred grievances" and pointed out that there is no record of the applicant's ever having complained about injuring his back upon lifting a "fender bender" prior to his discharge. CGPC alleged that the record suggests the applicant's complaints were motivated by a desire to leave the Coast Guard and recommended that no relief be granted.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 22, 2000, the BCMR sent the applicant a copy of the views of the Coast Guard and invited him to respond within 15 days. On October 19, 2000, the applicant responded. He stated that the CPEB misinformed him about the cause of his back pain. He also requested an extension so that he could seek legal counsel.

On October 26, 2000, the Board sent the applicant a letter granting him an extension of 60 days to respond to the advisory opinion. The letter also informed him that if he needed another extension, he was required to request one in writing prior to the expiration of the extension on December 6, 2000. No further responses were ever received from the applicant.

APPLICABLE LAW

Disability Retirement Statute

Title 10 U.S.C. § 1201 provided the following for members who were serving on active duty for more than 30 continuous days:

- (a) Retirement. Upon a determination by the Secretary concerned that a member described in subsection (c) is unfit to perform the duties of the member's office, grade, rank, or rating because of physical disability incurred while entitled to basic pay ..., the Secretary may retire the member, with retired pay computed under section 1401 of this title, if the Secretary also makes the determinations with respect to the member and that disability specified in subsection (b).
 - (b) Required determinations of disability. Determinations referred to in subsection (a) are determinations by the Secretary that--
 - (1) based upon accepted medical principles, the disability is of a permanent nature;
 - (2) the disability is not the result of the member's intentional misconduct or willful neglect, and was not incurred during a period of unauthorized absence; and
 - (3) either--
 - (A) the member has at least 20 years of service computed under section 1208 of this title; or
 - (B) the disability is at least 30 percent under the standard schedule of rating disabilities in use by the Veterans' Administration at the time of the determination, and either--
 - (i) the member has at least eight years of service computed under section 1208 of this title;
 - (ii) the disability is the proximate result of performing active duty;
 - (iii) the disability was incurred in line of duty in time of war or national emergency; or
 - (iv) the disability was incurred in line of duty after September 14, 1978.

Applicable Provisions of the Medical Manual

The Coast Guard Medical Manual (CG-294) in effect in 1981 governed the disposition of members with physical disabilities. According to Chapter 3-C-15(b)(5), persons with scoliosis, kyphosis, or lordosis were qualified for enlistment as long as their

condition did not cause pain or noticeable deformity or impair their mobility or weight-bearing power. According to Chapter 3-I-17, a member discovered to have scoliosis causing "severe deformity with over two inches deviation of tips of spinous processes from the midline" was unqualified for retention in the Coast Guard.

Applicable Provisions of the Personnel Manual

Article 12-B-15(a) of the Coast Guard Personnel Manual in effect in 1981 (CG-207) stated that members rendered unfit for duty by one of the disqualifying medical conditions listed in the Medical Manual should be evaluated by a medical board in accordance with the terms of Article 17. Article 12-B-15(c) stated that the Commandant could direct the discharge of a member under the following conditions:

- (1) A medical board has expressed the opinion:
 - a. That the member does not meet the minimum standards for retention on active duty.
 - b. That the member is unfit for further Coast Guard service by reason of physical disability, and
 - c. that the physical disability was neither incurred in nor aggravated by a period of active military service.
- (2) The member's commanding officer and/or district commander concur in the opinion of the board.
- (3) The member has been fully informed of the right to a full and fair hearing and has stated in writing that such a hearing is not demanded. ...

According to Article 17-B-7, an IMB report was required to "present a summary of the pertinent data concerning each complaint, symptom, disease, injury or disability presented by the evaluatee, which causes or is alleged to cause impairment of his health. ... the report must contain data to permit a reviewer to conclude whether the evaluatee suffers impairment of health in any respect, and the degree thereof. The report of the medical board shall not assign a percentage rating." The IMB report was also required to indicate whether the member was fit for duty. If the member was found unfit for duty by reason of physical disability, the IMB was supposed to refer him to a CPEB. Article 17-B-8 allowed the member to indicate his acceptance of the IMB report or to submit a reply, rebutting the IMB's findings.

According to Article 17-C-5, a CPEB was required to review the IMB report and make a finding as to whether the member was (1) fit for duty, (2) unfit for duty by reason of a condition or defect that was not a disability, or (3) unfit for duty by reason of a physical disability. For each physical disability found, the CPEB was required to assign a percentage of disability and to indicate whether the disability was incurred or aggravated while the member served on active duty.

Article 17-L-1(j) provided that "[i]n cases involving aggravation by active service, the rating will reflect only the degree of disability over and above the degree existing at the time of entrance into the active service, whether the particular condition was noted at the time of entrance into the active service or is determined upon evidence of record to have existed at that time. It is necessary, therefore, in all cases of this character to

deduct from the present degree of disability, the degree, if ascertainable, of the disability existing at the time of entrance into active service"

Under Article 17-C-9, each member was entitled to be counseled about the CPEB process by an attorney or law specialist. After the CPEB issued a report, the counsel was required to review the case and advise the member regarding his right to reject the CPEB's findings and demand a full hearing before an FPEB. If the member accepted the CPEB's findings, the report was forwarded to the Commandant for final action. Under Article 17-D-8, if a member rejected the CPEB's findings, he was entitled to be represented by counsel before an FPEB. The counsel was supposed to be "an attorney or [an officer] who is well acquainted with the regulations and procedures governing physical evaluation boards." The counsel was required to "prepare his case in accordance with the law and regulations and the best interest of the evaluee."

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 section 1552 of title 10 of the United States Code.

2. An application to the Board must be filed within 3 years of the day the applicant discovers the alleged error in his record. 10 U.S.C. § 1552(b). The Chief Counsel argued that the application was more than 16 years untimely because the applicant knew or should have known of the alleged error in his record—no service connection for his back problems—upon his discharge in 1981. The Board finds that Coast Guard members should normally be able to rely on the findings of Coast Guard medical personnel. Therefore, a member who is told by Coast Guard doctors that his condition is congenital and therefore not service connected but who later discovers that the condition is service connected should not necessarily be barred from applying for relief because he has mistakenly relied on the erroneous findings of Coast Guard doctors.

3. In the present case, however, it is clear that in 1980, the applicant told his doctors several times that his back pain had begun shortly after a series of accidents that happened while he was serving on active duty. Nevertheless, on February 24, 1981, after consulting with counsel, he accepted the finding of the CPEB that his condition had been neither incurred nor aggravated while he served on active duty. Therefore, the Board concludes that the applicant's request is untimely because he knew or should have known of the alleged error in his record in 1981.

4. The Board may waive the 3-year statute of limitations if it is in the interest of justice to do so. 10 U.S.C. § 1552(b). To determine whether it is in the interest of justice to waive the statute of limitations, the Board should conduct a cursory review of the merits of the case. *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

5. A cursory review of the applicant's record indicates that, while serving on active duty, he frequently sought treatment for back pain, which he attributed to a fall

from a ladder, a fall on the basketball court, and working with heavy equipment. After a series of orthopedic and psychological examinations, his doctors concluded that although he had mild scoliosis and lordosis and may have strained his back in May 1980, his continuing complaints were not caused by actual pain but were motivated by his desire to avoid sea duty. On August 15, 1980, he was diagnosed as a "malingerer."

6. The record also reveals that following his discharge in 1981, the applicant did not again seek treatment for his back until after a car accident in 1995. Although the DVA may have decided that the applicant's current condition is service connected because he once strained his back while serving on active duty in 1980, this does not prove that the Coast Guard erred in 1981 in determining that the condition for which he was being discharged was not caused or aggravated by his service in the Coast Guard.

7. The record indicates that the applicant was discharged in 1981 because the CPEB convened to evaluate his case determined that his mild scoliosis and lordosis, which predated his enlistment, were permanent disabilities that rendered him unfit for further active duty. Although his condition may not have technically disqualified him for retention on active duty under Chapter 3-I-17 of the Medical Manual, the Board finds that, in light of the applicant's chronic complaints, the CPEB's recommendation that he be separated because of his scoliosis and lordosis was reasonable.

8. The fact that the applicant strained his back in May 1980 does not prove that the scoliosis and lordosis for which he was discharged were incurred or aggravated while he served on active duty. Nor has he proved that his continuing complaints of back pain were caused by any incident that occurred while he served on active duty rather than by his desire to avoid sea duty and leave the service or by his pre-existing scoliosis and lordosis, as his doctors concluded. Absent strong evidence to the contrary, government officials must be presumed to have performed their duties lawfully, correctly, and in good faith. *See Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979). Therefore, the Board finds that the applicant has not proved that the CPEB erred or committed an injustice in concluding that, under Article 17-L-1(j) of the Personnel Manual, while his conditions were deemed 10 percent disabling, none of his disability could be attributed to his service in the Coast Guard.

9. On February 24, 1980, after being advised by counsel about his rights under the law, the applicant voluntarily accepted the findings and recommendations of the CPEB and waived his right to contest them before an FPEB. The Chief Counsel argued that the Board should dismiss this case for failure to exhaust administrative remedies. However, the Board finds that a member's previous waiver of his right to an FPEB should not necessarily bar his application to the Board because that waiver may have been made based upon the erroneous medical findings of Coast Guard doctors.

10. The applicant has not proved by a preponderance of the evidence that the Coast Guard committed any error or injustice in discharging him by reason of physical disability with zero percent of his disability attributed to his service on active duty.

11. Accordingly, the applicant's request should be denied both because of its untimeliness and for lack of merit.

ORDER

The application of
of his military record is hereby denied.

, USCG, for correction

