

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

Application for Correction of  
Coast Guard Record of:

BCMR Docket  
No. 2000-188

**FINAL DECISION**

 Chair:

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 September 12, 2000, upon receipt of the applicant's complete application for correction of his military record.

This final decision, dated February 14, 2002, is signed by three duly appointed members who were designated to serve as the Board in this case.

The applicant, a retired seaman apprentice (SA; pay grade E-2), asked the Board to correct his record by restoring the "100% disability rating originally offered [to him during the disability evaluation disability system [PDES] proceedings]." The applicant was permanently retired from the Coast Guard on May 23, 1991 due to physical disability with a 50% disability rating. At the time he was diagnosed as suffering from "brain disease due to trauma - rated as dementia associated with brain trauma - considerable impairment of social and industrial adaptability." He alleged that he "was not in any condition [at the time of the PDES proceedings] to make any decision [in his] own behalf." The applicant's mother stated that she was not permitted to assist the applicant in making any decisions with respect to his disability hearings. She stated that because of the applicant's decisions in this regard, he has been living with her for the past 15 years and she has paid for everything, including rent and groceries.

The applicant stated that the Board should waive the three-year statute of limitations in his case because he cannot work full-time and he has a problem with his brain.

**EXCERPTS FROM RECORD AND SUBMISSIONS**

On May 14, 1985, the applicant, a member of the Coast Guard Reserve serving a period of active duty, was involved in a serious motor vehicle collision and suffered severe head injuries.

An Initial Medical Board (IMB) met to determine the applicant's fitness for duty. The IMB dictated its report on July 18, 1985 and the three IMB members finalized it on July 30, 1985. In addition to finding that the applicant suffered from severe head injuries, the IMB also determined that the applicant was incompetent. The IMB further found the applicant was not fit for duty and referred his case to the Central Physical Evaluation Board (CPEB) for review.

On July 22, 1985, a lieutenant commander (LCDR) was appointed to represent the applicant's interests. He submitted a rebuttal on the behalf of the applicant challenging the IMB finding of incompetence. The LCDR further wrote as follows:

Since his discharge from , [the applicant] has lived at home with his parents and has shown marked improvement in his ability to handle his own affairs. He has opened his own bank account, he has written letters to colleges he had previously attended requesting transcripts, and is performing tasks around the house, which require some judgment and thought. Further, he has joined a health club and is actively pursuing a physical fitness program on his own.

[I have] spoken to [applicant] and his parents. [Applicant] believes he is fit for full duty and desires to remain in the Coast Guard Reserve. [Applicant's] parents submit that he has made marked improvement during his time at home.

[The applicant] . . . disagrees with the findings of mental incompetency and post traumatic encephalopathy of the [IMB] . . . and . . . requests that a disposition medical board be ordered . . .

In a letter to the Commandant, the applicant's commanding officer (CO) agreed that the applicant was not fit for duty and he also stated that he had determined that the applicant's injuries were incurred as a result of his own misconduct and were not in the line of duty. On September 25, 1985, the CPEB stated it had reviewed the IMB, but final determinations could not be made based on the current evidence. The CPEB ordered a disposition medical board (DMB), including reports from a competency board, a physical examination, a line of duty determination, and current functional capabilities.

On December 11, 1986, the DMB issued its report, in which it found the applicant was not fit for duty and diagnosed him as suffering from head injuries. The DMB did not find that the applicant was incompetent, but stated that he was not intellectually able to perform the duties of his rate. The DMB considered a mental competency report dated October 29, 1986. It stated the following:

[The applicant] is fully alert, cooperative, pleasant and in no acute distress. Patient is dressed appropriately and he is well groomed. His kinetics are appropriate and there is no evidence of increased or decreased motor activity, anxieties, agitation or stereotyped movements. Facial expression is totally appropriate and the patient exhibits excellent eye contact. There is no evidence of pathological affects and/or moods. Speech is logical, coherent, and goal directed without blocking, circumstantial[ly] or tangential[ly]. There are no associational defects. Thought content is negative for the presence of illogical thinking or perceptual abnormalities. There is no evidence of delusions, hallucinations, feelings of unreality, phobias, depersonalization or other pathological manifestations. Sensorium is perfectly clear and lucid. The

patient is well oriented as to time, place, person and circumstance. He has a good knowledge of information. The [applicant's] memory for recent and remote events is good except for amnesia surrounding his MVA on . Retention and recall is good and the patient was able to repeat six digits forwards and backwards. Serials given were done extremely well. Proverb interpretation and abstract thinking was also done without difficulty and the patient interpreted several proverbs easily. Other cognitive tasks like similarities and differences were made well and without difficulty. Judgment and insight are excellent and the patient has a good understanding of his present condition.

The DMB also considered a neurology report dated October 14, 1986. It stated that the applicant appears to have recovered from his injury except for the speech difficulty. A contract psychiatrist who treated the applicant wrote on October 27, 1986 that the applicant was not mentally or emotionally incompetent in accord with current [REDACTED] statutes, i.e., he does appreciate the nature, quality and severity of his impairment and the facts and circumstances of the medical board proceedings now convened on his behalf.

On February 3, 1987, the applicant, himself, submitted a rebuttal disagreeing with the IMB "statement of mental incompetence." He stated that the medical evidence did not support a finding of mental incompetence.

In March 1987, the CPEB met to consider the applicant's case. According to the transcript of the Formal Physical Evaluation Board (FPEB), the CPEB gave the applicant a 50% disability rating for "brain disease due to trauma, rated as non-psychotic organic brain syndrome with brain trauma, considerable impairment of social and industrial adaptability." The CPEB also stated that the applicant's condition was permanent, but did not occur in the line of duty and was due to the applicant's misconduct.<sup>1</sup> Apparently, the applicant did not accept the finding of the CPEB, particularly the line of duty/misconduct finding, and requested that his case be reviewed by the FPEB.

On May 19, 1987, the FPEB met to hear the applicant's case. The applicant and his appointed counsel were present for the hearing. The applicant and the FPEB stipulated that the applicant had a 50% disability for brain disease due to trauma and that he would be placed on the temporary disability retired list (TDRL)<sup>2</sup>. The only issue left before the FPEB was the line of duty/misconduct issue. The FPEB determined that the applicant's impairment was the result of misconduct not in the line of duty.

<sup>1</sup> According to Chapter 5-A-4.B. of the Administrative Investigations Manual, injury or disease incurred by a member of the Coast Guard while in active service will be considered to have been incurred "in the line of duty" except when incurred as a result of the member's own misconduct, while deserting the service, while absent without leave, or while in prison. Article 5-B-1.C. defines misconduct as wrongful conduct. "Simple or ordinary negligence or carelessness, standing alone, does not constitute misconduct."

<sup>2</sup> A member is placed on the TDRL when the disability is not permanent. Chapter 8.A.1. of COMDTINST M1850.2C (Physical Disability Evaluation System).

On July 7, 1987, the Physical Review Council (PRC) reviewed the FPEB's findings. It found that the applicant's injuries were incurred in the line of duty and were not due to his own misconduct, based on a subsequent determination reached by the Coast Guard in an administrative investigation. Therefore, the PRC recommended that the applicant be placed on the TDRL with a 50% disability rating. The Commandant approved this recommendation and the applicant was placed on the TDRL on [REDACTED]

On [REDACTED] and [REDACTED], the applicant underwent periodic physicals examinations,<sup>3</sup> as required by regulation. There was no finding of mental incompetence during the physical or neurological examinations. After the [REDACTED] periodic examination, the applicant's condition was considered stable enough to refer his case to the CPEB for a final determination of fitness for duty.

On March 8, 1991, the CPEB met and found the applicant to be competent, but unfit for duty because of "brain disease due to trauma." It recommended that the applicant be permanently retired with a 50% disability rating. On April 2, 1991, the applicant accepted the CPEB findings and recommended disposition and waived his right to a formal hearing before the FPEB. He was counseled regarding the acceptance of the CPEB findings and recommendation by counsel who was appointed to assist the applicant in this regard.

After review by the PRC and the Coast Guard Chief Counsel, the Commandant placed the applicant on the permanent disability retired list on [REDACTED].

#### **Department of Veterans Affairs [DVA] Rating Decision**

On September 13, 1988, the DVA rated the applicant as being 50% disabled due to residuals from a closed head injury with amnesic syndrome. It also noted that the applicant was competent.

The applicant submitted a copy of a more recent DVA rating decision dated March 21, 2000. The DVA rated the applicant condition as 100% disabling retroactive to May 4, 1998, the date of his new claim with that agency. The rating decision also noted that the applicant was competent. Prior to the rating decision, the applicant underwent a psychological evaluation and was diagnosed as suffering from major depressive disorder, post-traumatic stress disorder, dementia secondary to head injury, and post traumatic encephalopathy.

The psychological report stated that the applicant's intellect was in the low average range. His memory, attention span and concentration were impaired.

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<sup>3</sup> Article 8-B.C. states that "each evaluatee on the TDRL shall be examined periodically by one or more medical officers to determine whether there has been any significant change in the physical impairments for which temporarily retired. These examinations are required: a. at least once in each 18 month period; 2. not less than 9 months prior to the termination of 5 years from when the member was first placed on the TDRL; and c. at such other times as specified by the CPEB, FPEB, PRC or the PDAB (Physical Disability Appeals Board)."

Judgment and insight were poor. There were no delusions or paranoid ideation. No perceptual distortions were noted. The psychologist concluded that the applicant was 100% disabled and was not employable. He stated that the applicant's condition had deteriorated over the last several months and would continue to do so.

### **Views of the Coast Guard**

On February 27, 2001, the Board received an advisory opinion from the Chief Counsel of the Coast Guard. He recommended that the applicant's request be denied because it is untimely or in the alternative for lack of proof of error or injustice.

The Chief Counsel stated that the applicant submitted his application approximately six years after the three-year statute of limitations expired. He stated that the applicant should have discovered the error at the time he was issued his retirement documents in 1991.

The Chief Counsel stated that if an application is untimely, the applicant must set forth reasons why it is in the interest of justice for the Board to waive its three-year statute of limitations. The applicant's reason that he did not file his application sooner because he has a problem with his brain and cannot work fulltime is insufficient to support a waiver. Therefore, the Chief Counsel argued that the applicant's case should be dismissed with prejudice 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 failed to request a review by the FPEB and accepted the findings of the 1991 CPEB that he be permanently retired with a 50% disability rating. The Chief Counsel asserted, "Applicant's decision to waive his right to a FPEB was an affirmative election not to exhaust his intra-service administrative remedies that should now bar relief from the Board."

The Chief Counsel stated that the applicant failed to prove that there was reasonable doubt regarding his mental competency to accept the March 1991 CPEB. In this regard the Chief Counsel wrote the following:

[T]he record clearly indicates the Coast Guard took affirmative steps to ensure that Applicant's mental competency was fully and properly evaluated prior to any further physical evaluation board. Specifically, the Coast Guard referred Applicant to the Chief, Psychiatric Services, [at an Air Force hospital] for a systemic mental status examination . . . That testing revealed that Applicant was mentally competent. . . Applicant accepted those findings and emphatically contested the 1985 finding of mental incompetency by the IMB. . . Finally, while DVA findings have no legal moment as to Coast Guard administrative proceedings, their most recent finding also found Applicant [is] mentally competent . . . Therefore, there can be no doubt that Applicant was mentally competent in March

1991 when he chose, with the assistance of counsel, to accept his CPEB findings granting him a 50% disability rating.

The Chief Counsel stated that the findings of the DVA regarding the applicant's alleged 100% disability have no bearing on the Coast Guard's medical findings. DVA ratings are not determinative of the issues involved in military disability retirement cases. Lord v. United States, 2 Ct. Cl. 749, 754 (1983). The DVA determines to what extent a veteran's earnings capacity has been reduced as a result of specific injuries or combinations of injuries. The Armed Forces determine to what extent a member has been rendered unfit to perform the duties of his rate and specialty because of a physical disability.

The Chief Counsel stated that although the DVA's March 2000 determination awarded the applicant a 100% rating as of May 4, 1998 for traumatic brain injury and mood disorder, the applicant had not provided any evidence showing that his condition was in fact 100% disabling in 1991 when he appeared before the CPEB.

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

On August 15, 2001, the Board received the applicant's reply to the views of the Coast Guard. After reciting the history of his injuries and disability ratings, the applicant asked the Board to review all pertinent facts to ensure an equitable and fair decision.

#### **APPLICABLE LAW**

Section 1204 of title 10, United States Code (Members on active duty for 30 days or less: retirement:) 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 of the alleged error or injustice. See 33 CFR 52.22. The applicant retired from the Coast Guard approximately nine 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 of the injury to his brain and because he cannot work fulltime. The applicant's brain injury resulting from a motor vehicle accident is well documented in his military record. The applicant's competency is also well documented in his service record. The applicant's injury, as diagnosed, is not a basis for waiving the statute of limitations. He has failed to explain what about his injury prevented him from challenging the 1991 50% disability rating within the proscribed time limit. Accordingly, the applicant's reason for not filing his application sooner is not persuasive.

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 50% disability rating or that he was not mentally competent at the time he made the decision to accept that disability rating. After the IMB's finding of incompetency, the applicant's representative and the applicant objected to it and requested the CPEB convene a DMB. A competency board was held as part of the DMB. It determined that the applicant was not incompetent, although he was not intellectually able to perform the duties of his rate. The applicant's psychiatrist, the CPEB, FPEB, and PRC concurred with this finding. The applicant has not presented any evidence, not previously considered by the Coast Guard, that he was incompetent at any stage of his PDES proceedings, except the initial determination by the IMB.

5. The applicant indicated that at some point during the PDES proceedings he was offered 100% disability rating. The applicant's military record does not support this contention. In addition, there has been no other evidence presented that corroborates this allegation. The record shows that during the FPEB hearing, the

applicant, who was represented by counsel, stipulated with the Coast Guard to the 50% disability rating. It also shows that the applicant accepted the later 1991 CPEB determination that he be permanently retired with a 50% disability rating.

6. Approximately nine years after his discharge, the DVA rated the applicant's condition as 100% disabling. The fact that the applicant received a higher disability rating from the DVA approximately nine years after his discharge from the Coast Guard does not mean that the Coast Guard committed an error or injustice by assigning the applicant a lower rating at the time of his discharge. The Board notes that the DVA's initial rating of the applicant's condition in December 1988 was the same as that given by the Coast Guard upon the applicant's discharge in 1991.

7. Moreover, the Court of Federal Claims has stated, "[d]isability ratings by the Veterans Administration [now the Department of Veterans Affairs] and by the Armed Forces are made for different purposes. The Veterans Administration determines to what extent a veteran's earning capacity has been reduced as a result of specific injuries or combination of injuries. [Citation omitted.] The Armed Forces, on the other hand, determine to what extent a member has been rendered unfit to perform the duties of his office, grade, rank, or rating because of a physical disability. [Citation omitted.] Accordingly, Veterans' Administration ratings are not determinative of issues involved in military disability retirement cases." Lord v. United States, 2 Cl. Ct. 749, 754 (1983).

8. 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.

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

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



**ORDER**

The application of  
military record is denied.

USCGR (Ret.), for correction of his

