

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

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Application for the Correction of  
the Coast Guard Record of:

BCMR Docket No. 2000-190

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**FINAL DECISION**

**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 docketed on September 18, 2000, upon the BCMR's receipt of the applicant's military and medical records.

This final decision, dated July 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 [REDACTED] pay grade E-4) in the Coast Guard, asked the Board to correct his military record to show that he injured his knee and was treated for ulcers and a hernia while serving in the Coast Guard in the 1980s. He asked for "service connection"<sup>1</sup> and "disabilities" for these conditions. He stated that he did not apply earlier for relief because he did not know about the BCMR.

**SUMMARY OF THE APPLICANT'S MEDICAL AND MILITARY RECORDS**

On February 11, 1980, the applicant underwent a physical examination prior to enlisting under the delayed entry program. On a "Report of Medical History" he prepared for that examination, the applicant certified that he had not previously experienced any injuries or significant health problems other than tonsillitis, a broken collar bone, and a broken wrist.<sup>2</sup> He did not report any problems with his back or knees. On October 14, 1980, the applicant was enlisted in the Coast Guard for a term of four years.

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<sup>1</sup> When the Department of Veterans' Affairs (DVA) determines that a medical condition is service-connected, treatment of the condition is paid for by the DVA.

<sup>2</sup> The applicant's official medical record is empty except for a receipt indicating that the applicant took possession of his medical records on November 22, 1986, and did not return them. The medical records summarized here were received from the DVA.

On the same day, he recertified that the medical history he had provided on February 11, 1980, was true.

On October 22, 1980, while still in boot camp, the applicant sought treatment for aches in his knees and lower back. The doctor reported that he stated that he had injured his knees and lower back six years previously. X-rays showed no damage, but the doctor found that he had strained his knee and lumbar back muscle and prescribed a muscle relaxant, heat, and back exercises. He was assigned to limited duty for a few days. At follow-up appointments, the applicant reported that the treatment was working, and he showed a "full range" of motion.

On February 25, 1981, the applicant sought treatment for lower back pain after picking up some boxes. He was assigned to limited duty for 10 days and prescribed heat and a muscle relaxant.

On June 30, 1981, an x-ray of the applicant's digestive system revealed "marked spasm of the duodenal bulb together with some cobble stoning of [unreadable] relief. On 1 spot film there is suggestion of a very shallow [unreadable] wall ulcer crater in the mid portion of the bulb." Thereafter, he took Tagamet and Mylanta for the ulcer.

On October 28, 1981, at a follow-up examination for his ulcer, the applicant complained of occasional back pain and was advised to treat it with heat and back exercises. On November 3, 1981, he sought treatment for hemorrhoids. Thereafter, he was occasionally treated for them.

On January 22, 1983, the applicant sought treatment for back pain after he had to push his car somewhere. He told the doctor he had injured it the week before, as well. The doctor prescribed a muscle relaxant and heat.

On August 25, 1983, the applicant underwent a physical examination. The doctor reported that the applicant had had tenderness in his left knee and back but that he was fit for duty.

In April 1984, the applicant underwent a physical examination in anticipation of being discharged. His knees were examined by an orthopedist, who found no swelling, weakness, or ligament damage. Another doctor found that he had had hemorrhoids, an ulcer, and occasional lower back pain while in the service, but that none of the conditions was disabling. He was found fit for discharge. On May 23, 1984, he signed a statement indicating that he agreed with the findings of the examining physician.

In June 1984, the applicant again sought help for lower back pain. He stated that he had been lifting boxes from his car. He was prescribed heat and a muscle relaxant and assigned to limited duty for several days.

On October 13, 1984, the applicant was released into the Reserve upon the expiration of his enlistment in the regular Coast Guard. Thereafter, he served in the Reserve, performing regular drills. On a Report of Medical History he completed for a physical examination in 1987, he indicated that he occasionally suffered from hemorrhoids and recurrent back pain. He also indicated that he had had a problem with his

knee. He did not report any hernias or other conditions and was found fit for duty. The applicant was released from the Selected Reserve into the Individual Ready Reserve on June 1, 1988.

In 1998, the applicant sought disability benefits from the DVA for "internal derangement of the knees," hemorrhoids, a hiatal hernia, a duodenal ulcer, and hearing loss. "Service connection" has been denied for everything but hemorrhoids. The DVA found that his derangement of the knees was unrelated to his complaints on active duty. It found that while he had been treated for an ulcer in service, he did not submit any evidence of current disease. It found that his hearing loss did not amount to a disability, and that he had not been treated for a hernia while serving on active duty.

In 1999, the applicant sought disability benefits from the DVA for "chronic lower back pain." He included in his application a letter from his chiropractor, who concluded that there was a "direct causal relation" between his current back pain and his military service. The DVA reviewed his medical records and denied service connection for "chronic lower back pain" because it determined that the applicant's back pain while serving in the military did not meet the definition of the word "chronic." It found that his back pain in the Coast Guard had occurred in discrete "acute episodes" and that he had not been treated continuously for back pain since his discharge. It also found that the chiropractor's statement was conclusory as it lacked a "full rationale."

#### VIEWS OF THE COAST GUARD

On February 26, 2001, the Chief Counsel of the Coast Guard recommended that the Board deny the applicant's request for its untimeliness or for lack of merit.

The Chief Counsel interpreted the application as a request for a "medical retirement with a disability rating based on an alleged knee injury, ulcers and hernias he allegedly sustained while on active duty." He alleged that the applicant knew or should have known of the alleged error in his record upon his separation in 1984. Therefore, he argued, relief should be denied because the applicant filed his application some 12 years after the expiration of the BCMR's three-year statute of limitations. The Chief Counsel alleged that the applicant's excuse for not applying to the Board sooner—his lack of knowledge of the BCMR—is "insufficient evidence to support a waiver under 33 C.F.R. § 52.22 of the three-year timeliness requirement." Therefore, he argued, the Board should not waive the statute of limitations for this case. *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

The Chief Counsel also argued that the Board should deny relief because the applicant has not proved that the Coast Guard committed any error or injustice in not processing him through the Physical Disability Evaluation System (PDES) at the time of his separation in 1984. He alleged that the applicant has not presented sufficient evidence to overcome the presumption that Coast Guard officials acted "lawfully, correctly, and in good faith" in finding him fit for duty and separation. *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979). He alleged that the applicant had not proved that any of the medical conditions he suffered from in 1984 met the criteria for PDES processing under the provisions of the PDES Manual.

Finally, the Chief Counsel argued that none of the applicant's medical conditions entitled him to a physical disability retirement. He alleged that the purpose of the PDES is to compensate members whose military service is terminated because of a service-connected disability, and that the applicant was not terminated because of any medical condition. He alleged that the "sole basis for a physical disability determination ... is unfitness to perform duty." 10 U.S.C. § 1201; PDES Manual, Article 2.C.2.a. He alleged that the applicant had not presented sufficient evidence to prove that he was unfit for duty at the time of his separation and that his continued performance of active duty up to the day of his separation created a presumption of fitness, under Article 2.C.2.b.(1) of the PDES Manual, which the applicant had failed to overcome.

### APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On February 27, 2001, the BCMR sent the applicant a copy of the views of the Coast Guard and invited him to respond within 15 days. No response was received.

### APPLICABLE LAW

#### *Disability Retirement Statute*

Under 10 U.S.C. § 1201, Coast Guard members serving on active duty for more than 30 continuous days in 1984 could be medically retired and paid disability benefits under the following circumstances:

Upon a determination by the Secretary concerned that a member of a regular component of the armed forces entitled to basic pay ... is unfit to perform the duties of his 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 determines 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.

Under 10 U.S.C. § 1204, members of the Coast Guard Reserve serving on active duty for periods of 30 days or less or on inactive duty training in 1988 could be medically retired if they were rendered unfit for duty by a permanent, stable disability that

was the proximate result of their military service and if they met the requirements in 10 U.S.C. § 1201(1), (2), and (3).

### *Applicable Provisions of the Coast Guard Manuals*

The Coast Guard Medical Manual (CG-294) in effect in 1984 governed the disposition of members with physical disabilities. According to Chapters 3-G and 3-I, the following conditions disqualify members for continued service in the Coast Guard and trigger processing through the PDES: (a) inoperable hiatal hernias whose symptoms remain severe despite treatment; (b) ulcers that cause repeated absences from duty despite good medical management; (c) internal derangement of the knee that causes recurrent episodes of incapacitation and that is not remedied by medical treatment; and (d) various spinal problems that require frequent hospitalizations, outpatient treatments, or absences from duty. Hemorrhoids are not listed as a disqualifying condition. Hearing loss may be considered a disqualifying condition when "the unaided average hearing loss in the better ear is 45 decibels or more in the normal speech range."

Article 12-B-15(a) of the Coast Guard Personnel Manual in effect in 1984 (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 PDES Manual.

Article 2-C-2 of the PDES Manual in effect in 1984 (COMDTINST 1850.2) members are presumed fit for duty until it is proved that they are not fit to perform the duties of their rates. "Entitlement to disability retirement or separation arises only on a determination that a member is not fit to perform the duties of his grade and rating. It does not rest merely on the existence of an impairment or a condition ratable under the Veterans Administration Schedule for Rating Disabilities, VASRD." PDES Manual Article 2-C-2.c. Under Article 3-D of the PDES Manual, evaluation by a medical board was required upon "[a]ny indication that a determination of fitness for duty is required."

Although some of the provisions in the manuals were slightly revised before the applicant was released from the Reserve in 1988, no substantive changes affecting the applicant's entitlements were made.

### 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 three years of the day the applicant discovers the alleged error in his record. 10 U.S.C. § 1552(b). The applicant was released from active duty into the Reserve in 1984 and released from the Selected

Reserve in 1988. He knew or should have known more than ten years prior to his application to this Board the content of his military medical record and the fact that he was not being awarded disability benefits from the Coast Guard. Therefore, his application was untimely.

3. The Board may waive the three-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 consider the reasons for the delay and conduct a cursory review of the merits of the case. *Dickson v. Secretary of Defense*, 68 F.3d 1396, 1405 (D.C. Cir. 1995); *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992). The applicant stated the he did not apply to this Board earlier because he did not learn of its existence until recently. No other explanation was given for his delay. The Board finds that the applicant's reason for delay is not compelling. Nevertheless, the merits of his case must also be reviewed.

4. The applicant asked the Board to grant him "service connection" for several medical conditions. "Service connection" is determined by the DVA (not by this Board), based on an examination of a veteran's military medical records. Based on its review of the applicant's records, the DVA has apparently denied "service connection" for his hernias, knee problems, "chronic" back pain, ulcers, and hearing loss, for the reasons stated in the DVA's Rating Decisions. This Board has no control over the DVA's determinations; it can only correct inaccurate military records. The applicant has not identified or proved the existence of any error in his military medical records. He has not proved that all of the medical conditions he suffered and medical treatments he received while serving on active duty were not accurately recorded in his military medical file.

5. The applicant also asked the Board for "disabilities," which may reasonably be interpreted as a request for a medical retirement because only members who are medically retired from the Coast Guard receive disability payments from the Coast Guard directly, rather than from the DVA. However, the applicant has not proved that he was unfit for duty because of a physical disability in 1984, when he was released from active duty into the Reserve, or in 1988, when he stopped drilling with the Reserve. His medical records show only that he had suffered from occasional back and knee strains, hemorrhoids, and an ulcer, which were properly treated and were not considered disabling. Moreover, on May 23, 1984, the applicant signed a form indicating that he agreed with the finding of his physician that he was fit for duty and separation. Only members who are unable to perform their duties because of a physical disability may be processed through the PDES and awarded a medical retirement and disability benefits. PDES Manual, Article 2-C-2.

6. The applicant has not proved by a preponderance of the evidence that the Coast Guard committed any error or injustice in recording his medical conditions and treatments or in not awarding him a medical retirement. Therefore, the Board finds that it is not in the interest of justice to waive the statute of limitations in this case.

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

**ORDER**

The application of  
tion of his military record is hereby denied.

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