DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
Coast Guard Record of:

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xxxxxxxxxxxxxxxxxxxxxxxxxx

BCMR Docket
No. 2001-067

FINAL DECISION

[redacted] 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 May 1, 2001, upon receipt of the applicant's complete application for correction of his military record.

This final decision, dated February 28, 2002, is signed by three duly appointed members who were designated to serve as the Board in this case.

The applicant, xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx (xxxxxxxxxxxxxxxxxx), asked the Board to correct his record by changing the reason for his discharge from expiration of enlistment to retirement by reason of physical disability.

The applicant enlisted in the Coast Guard on August 12, 1971, and served continually until his discharge on May 12, 1978. Prior to enlisting in the Coast Guard, the applicant had served in the Navy.

The applicant stated that the Board should waive the three-year statute of limitations in his case because he did not discover the error until May 2000.

EXCERPTS FROM RECORD AND SUBMISSIONS

The applicant made several allegations about the Coast Guard's handling of his medical problem and discharge. First, he alleged that the January 13, 1978, initial medical board (IMB) arbitrarily changed his duty status from not fit for duty (assigned in October 1977) to limited duty. Second, he alleged that the Coast Guard violated its regulations by not providing the applicant with a follow-up evaluation of his limited duty status before discharging him.

Background

A medical narrative summary indicated that the applicant was hospitalized from October 12, 1977 until October 31, 1977 for a back condition, lumbarization. The summary stated that the applicant slipped and fell on ice approximately four years earlier and had had problems with

his back since that time. The medical summary described the applicant's physical examination as follows:

> A general examination was unremarkable. His back had a normal curve, without lordosis or scoliosis. There was pain on palpation of the paravertebral muscles in the [lumbar] area. He was unable to bend more than 5 degrees without pain and his lateral flexion was limited. SLR [straight leg raising] was about 30 degrees.
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> * * *
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> HOSPITAL COURSE: He was treated with bed rest and Valium, following a conservative regimen. A Norton back brace was ordered and upon delivery, he was allowed to ambulate.
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> RECOMMENDATIONS: Not fit for duty. Return to orthopedic clinic in one month. He is discharged without medications.

An administrative remarks (page 7) entry in the applicant's record showed that he returned from 30 days sick leave on December 2, 1977.

A medical note showed that on December 5, 1977, the applicant visited the orthopedist wearing the Norton brace. The note stated that the applicant should return in four weeks and that he was fit for light duty. There was also a physical therapy note of the same date.

From January 10, 1978 until January 13, 1978, the applicant was hospitalized for a medical board evaluation. An orthopedic report dated January 13, 1978 stated that the applicant was suffering from mechanical low back derangement, lumbarization. It also stated "x-rays are essentially within normal limits with the exception of the presence of lumbarization for S-1." The report contained the following recommendation:

> In light of the foregoing medical course of this patient, it is doubtful that he will be able to resume a fully functional capacity in his usual occupation. The [applicant] seems motivated, and it maybe advisable to have the [applicant] undergo vocational rehabilitation to a less stressing type of position which does not entail lifting in excess of 20 lbs, repeated bending or stooping.

The applicant was discharged from the hospital on January 13, 1978 fit for light duty. He was not given a return appointment. This was also the finding of the medical board in its report dated January 13, 1978. The applicant signed a statement indicating that he did not wish to submit a rebuttal to the medical board finding. The military record indicated that in February 1978 the applicant was transferred from the cutter to another command because of his limited duty status.

The applicant having reenlisted in the Coast Guard for three years on May 13, 1975 was approaching the expiration of that enlistment in the spring of 1978. A note in the applicant's military record commented that he was recommended for reenlistment, but he was not going to reenlist. Therefore, on May 5, 1978, the applicant underwent a physical examination to determine his fitness for discharge. The applicant noted on the medical form that he had been hospitalized earlier for back problems, but he was currently in good health. On May 10, 1978,

the applicant was found physically qualified for discharge. On May 12, 1978, the applicant signed the following statement: "I have been informed of the findings of the physical examination given to me on May 5, 1978 for discharge and agree with the findings of the examining physician and do not desire to make a statement in rebuttal." The applicant was discharged the same date.

Veterans Administration (VA) Rating Decision

On May 7, 1981, the applicant filed a claim with the VA, now the Department of Veterans Affairs [DVA]. On February 9, 1982, the VA granted the applicant a 40% disability rating for "Intervertebral Disc Disease . . . with Chronic left Radiculopathy."

Views of the Coast Guard

On September 25, 2001, the Board received an advisory opinion from the Chief Counsel of the Coast Guard recommending that the applicant's request be denied for untimeliness and for lack of proof of error or injustice.

The Chief Counsel stated that the applicant submitted his application approximately 20 years after the three-year statute of limitations expired. He stated that the applicant offered no reason for not filing his application sooner. Therefore, since the applicant has failed to demonstrate an error or injustice in his record his application should be denied for untimeliness.

The Chief Counsel stated that he was perplexed by the applicant's contention that his duty status was changed arbitrarily from not fit for duty to limited duty. He stated that the applicant offered no explanation why his condition could not have improved with time. Moreover, the Chief Counsel stated that the applicant's failure to file a rebuttal to the IMB and his agreement with his May 5, 1978 fit for discharge diagnosis is compelling evidence that the applicant's condition had improved. The Chief Counsel noted that at the time of his discharge, the applicant stated that he was in good health. The Chief Counsel further stated as follows:

> [The applicant] appears to have placed great weight on the VA rating decision dated February 9, 1982 when he surmises that the Coast Guard acted arbitrarily and without merit: "Further evidence of record reflecting the chronic nature of the [applicant's] back condition is from the [VA's] rating decision dated February 9, 1982 . . . An equally plausible explanation, though difficult to prove after two decades, is the fact that Applicant waited three years to file his VA application precisely because his back did not bother him for those three years. Regardless, presenting evidence that came to light over three years after his discharge is not persuasive to show that the Coast Guard acted arbitrarily and without merit during the applicant's enlistment.

The Chief Counsel stated that the Coast Guard counseled the applicant upon his discharge and notified him that he might have VA rights. The applicant signed the "Termination of Health Record form on May 5, 1978 which stated, "[a]fter you are separated or retired, any claims for disability benefits must be submitted to the Veterans Administration. It is suggested

that you contact the VA Regional Office nearest your home as soon as practicable after your separation for certain benefits you may be entitled to."[1]

Applicant's Response to the Coast Guard Views

On October 16, 2001, the Board received the applicant's reply to the views of the Coast Guard.

The applicant stated that the physician who performed his discharge physical "committed an impropriety by not reviewing the full extent of the [applicant's] disabilities. Instead, the [discharge physician] believed the proper action would take place as the Coast Guard already had knowledged of the severity of the back condition, and therefore did only a cursory review of the applicant's physical condition." The applicant further stated as follows:

> There is sufficient evidence to show the disability was unfitting at the time of discharge as no condition as severe as the [applicant's] back condition could have improved that quickly. All of which was compounded by the poor examination and counseling services. The culmination of which allowed the [applicant] to be discharged from active service without the benefits that he rightly deserved.

The applicant denied that he was told he could go the VA. He was told, however, to sign the document or he would not be released to go home; so he signed it.

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 was untimely.

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[1] This entry appears on the document entitled "TERMINATION OF HEALTH RECORD" under the applicant's signature and reads as follows:

"you have been examined and found physically fit for separation from active duty. Any defects noted during this examination are recorded in block #74 of the attached report of medical examination (SF-88).

"The defects listed on report of medical examination do not disqualify you from performance of your duties or entitle you to disability benefits from the Coast Guard. To receive a disability pension from the Coast Guard, you must be found unfit to perform your duties before you are separated.

"After you are separated or retired, any claims for disability benefits must be submitted to the Veterans Administration [VA]. It is suggested that you contact the VA Regional Office nearest your home as soon as practicable after your separation for certain benefits you may be entitled to."

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 was discharged from the Coast Guard approximately twenty three years ago. Although the applicant claimed that he only recently discovered the error in May 2000, he should have discovered the alleged error at the time of his discharge or at the very latest on the date he filed a claim with the VA. He provided no explanation why he did not or could not have discovered the error sooner if he had exercised due diligence.

3. 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 length of the delay (discussed above) and the likelihood of success on the merits of the claim. See Allen v. Card, 799 F. Supp 158 (D.D.C. 1992).

4. 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 by discharging him in 1978 rather than retiring him due to physical disability. Contrary to the applicant's contention, the IMB did not arbitrarily change the applicant's duty status from unfit to limited duty. The applicant was discharged from the hospital in a limited duty status on October 31, 1977. Records show that he spent 30 days on sick leave, after which he saw an orthopedist for evaluation on December 5, 1977. After examining the applicant, the orthopedist stated that the applicant was fit for light duty and he should return to see him in four weeks. Therefore, the applicant's duty status had been updated prior to the convening of the IMB. Moreover, the IMB had an additional orthopedic consultation before reaching its conclusion that the applicant should remain on light duty. The applicant accepted the findings of the IMB and did not file a rebuttal. A service record entry indicated that the applicant was subsequently transferred from his unit to another command because of his light duty status.

5. The applicant was not forced out of the Coast Guard. It happened that his contract was due to expire on May 13, 1978 and he chose not to reenlist. As part of the separation process, the applicant underwent a discharge physical examination, wherein he was found fit for separation. He noted that he had had a problem with his back, but stated that he was currently in good health. Moreover, he agreed with the findings of the discharge physical examination. The applicant has not presented any contemporaneous evidence corroborating his allegation that he was he was not fit for separation at the time of his discharge.

6. Approximately three years after his 1978 discharge, the DVA rated the applicant's condition as 40% disabling. The fact that the applicant has received a disability rating from the DVA approximately three years after his discharge from the Coast Guard does not mean that the Coast Guard committed an error or injustice by discharging the applicant due to expiration of enlistment rather than by retiring him by reason of physical disability.

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 unlikelihood 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 xxxxxx xxxxxxxxxxxxxxxxxxxx, xxxxxxxxxxx, USCG, for correction of his military record is denied.