


**DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2006-092

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FINAL DECISION


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 April 7, 2006, upon receipt of the applicant's completed application and records.

This final decision, dated January 11, 2007, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant asked the Board to correct his record by awarding him "retirement disability back pay from May 1996 until August 2001, when [he] began receiving Department of Veterans Affairs' (DVA) compensation." In support of his request the applicant stated the following:

For several years while serving in the Reserve, the Coast Guard tried to end my career because I was diagnosed with Type 2 Diabetes.^[1] In May of 1996, I was told by a Physical Evaluation Board [PEB] that I was not fit

¹ Diabetes Mellitus is a chronic syndrome of impaired carbohydrate, protein, and fat metabolism owing to insufficient secretion of insulin or to target tissue insulin resistance. It occurs in two major forms: type 1 and type 2. See *Dorland's Illustrated Medical Dictionary*, 29th Edition, p. 489. *Dorland's* further states that type 2 diabetes "is characterized by peak age onset between 50 and 60 years, gradual onset with few symptoms of metabolic disturbance (glycosuria and its consequences, and no need for exogenous insulin; dietary control without oral hypoglycemics is usually effective.)" *Id.*

for duty. I was then put on TDRL (temporary disability retired list)[²] with a 40% disability rating. I was told that I would receive \$840.00 a month for disability pay. A few days later I was informed that a mistake had been made and that I was not entitled to any disability pay at all. I was allowed to serve six more months and then I was retired on Reserve Transition Benefits with a total of 15 years of service . . .

In December 2005, I received a phone call from the Coast Guard Retirement Annuity Services, Coast Guard Personnel Command in Topeka, KS. Mr. [D] inquired as to why I was not currently receiving my Coast Guard Disability Retirement pay. He then stated by law, I should have been receiving the promised \$840.00 a month beginning in May 1996.

BACKGROUND

After serving approximately four years in the Navy, the applicant enlisted in the Coast Guard Reserve on May 20, 1985. He served continuously until his transfer to the retired list without pay (RET-2), effective December 1, 1996.

Prior to his placement on the retired list, the applicant underwent a Coast Guard periodic medical examination in February 1992, where it was discovered he had Adult Onset Diabetes Mellitus. His command notified him in April 1993 that he had been found medically unfit for continued duty and that he could request a waiver to remain on active duty. On May 22, 1993, the applicant's request for a waiver was favorably endorsed by his command. He was allowed to continue in a drill status until a final decision was made on his request for a waiver. The record indicates that the waiver was denied on August 12, 1993 but the applicant was allowed to remain in a drill status.

An Initial Medical Board [IMB] convened on October 29, 1994, and confirmed the diagnosis of "Adult Onset Diabetes Mellitus Insulin Dependence." The IMB report stated that the applicant was well until June 1986 when during a routine physical he was found to have glycosuria that was initially controlled with diet. Subsequently, during routine medical examinations, the applicant was noted to have hyperglycemia with glycosuria. Diabetes was noted on his medical examination dated February 18, 1992 for which he was treated with "Humulin N Insulin." Of this medication, the applicant was taking a daily average of "50 units qAM and 25 units qPM of Humulin N insulin." The IMB noted that the applicant performed his Coast Guard duties

² The TDRL is a pending list of individuals whose disabilities are not permanent. In order to be placed on the TDRL, the individual must have a disability that renders him or her unfit to perform the duties of his or her office, grade and rank, and the disability must be rated at a minimum of 30% disabling. Temporary Disability retired pay terminates at the end of 5 years. See Chapter 8 of COMDTINST M1850.2C (Physical Disability Evaluations Manual).

satisfactorily as well as his civilian duties as a tree-trimmer without incident. The IMB referred the matter to the Central Physical Evaluation Board (CPEB) stating the following:

It is the opinion of the Board that the diagnosis of adult onset diabetes mellitus, insulin dependent, is correct. The [applicant] does not meet the retention standard for enlisted personnel, according to COMDTINST 6000.1b, paragraph 3-F-10d: "Diabetes Mellitus." When proven to require any hypoglycemic drug in addition to the restrictive diet for control.

The [applicant] is expected never to be fit for full unrestricted duty, although by history he has performed satisfactorily in the duty to which he is assigned.

The applicant was notified of the IMB findings and on January 29, 1995, submitted a statement in rebuttal in which he non-concurred with the IMB recommendation. He stated that he did not want to terminate his association with the Coast Guard Reserve and requested to remain on limited duty until he had completed fifteen years of service, which would allow him to retire under the Reserve Transition Benefits program. The applicant stated that the Coast Guard had known about his condition since February 1992, and he was allowed to perform active duty without pay in 1993 and 1994. He stated that his diabetes was under control and that he monitored it daily.

On December 10, 1994, the applicant's commanding officer (CO) favorably endorsed his request that he be allowed to continue in the Coast Guard in a limited duty status. He stated that the Coast Guard could use the applicant's skill and that his illness had not interfered with his ability to do his job.

On February 21, 1995, Commander, Coast Guard Personnel Command (CGPC) notified the applicant's CO that the IMB could not be referred to the CPEB until CGPC had received the following: "Notice of Eligibility (NOE) or evidence that injury/illness was incurred while Reservist was eligible to receive basic pay."

On March 9, 1995, the applicant's unit responded that the applicant was not in an active status at the time the illness was incurred.

The CPEB met on February 21, 1996 and found the applicant unfit for duty due to "Diabetes Mellitus; Moderately Severe." The CPEB marked the block on the report form that indicated that the applicant's illness was incurred while he was entitled to basic pay and that it was the proximate result of performance of active duty or active duty training. The CPEB rated the disability as 40% disabling and recommended that the applicant be placed on the TDRL.

With advice of counsel, the applicant accepted the findings of the CPEB. The JAG found the CPEB findings to be in acceptable form and technically correct and to be supported by the evidence of record. The JAG further found the CPEB recommendation to be supported by the evidence of record.

On April 19, 1996, the CGPC (adm) approved the findings and recommendations of the CPEB and stated that the applicant would be placed on the TDRL, effective May 17, 1996. Retirement orders were prepared to this effect. The letter prepared by the applicant's CO that would have delivered the orders to the applicant contained a handwritten note: "hold do not do this [letter]." At the bottom of this letter is the following hand written note: "Call [the applicant] and tell him that he won't be retired on TDRL & to continue drilling until he hears otherwise - we're working on it. He's on hold for now."

On October 31, 1996, the applicant requested retirement, effective December 1, 1996. The applicant's CO favorably endorsed the applicant's request for retirement. On December 18, 1996, the CO of the Coast Guard Pay and Personnel Center wrote the applicant a letter confirming his eligibility for RTB (Reserve transition benefits) and notifying him of his transfer to RET-2 status effective December 1, 1996. The letter also informed the applicant that he would be entitled to retired pay upon reaching age 60 because he had at least fifteen but less than 20 years of satisfactory federal service.

VIEWS OF THE COAST GUARD

On August 22, 2006, the Board received an advisory opinion from the office of the Judge Advocate General (JAG) recommending that no relief be granted to the applicant. The JAG adopted the facts and analysis provided by CGPC as the Coast Guard's advisory opinion. CGPC made the following conclusions:

1. The application is not timely and may be denied for untimeliness. The Applicant indicates that he discovered the error based upon a telephone call from the Coast Guard Personnel Service Center in December 2005 which caused the Applicant to question his entitlement to TDRL payment. However, the Applicant admits that he was advised of the initial error in his TDRL orders in May 1996.
2. The applicant, a Selective Reserve enlisted member was processed through the PDES system for diabetes. The fourth endorsement to the IMB . . . clearly indicates that the Applicant was not on active duty at the time of the illness/injury. Accordingly, his case was improperly processed by the CPEB. The Applicant was issued orders to the TDRL; however such orders were not consistent with policy regarding processing

of Reserve members who incur illness/injury not in the line of duty. The Applicant's record substantiates his being issued both TDRL orders . . . which were not executed, and subsequently Reserve Retirement [orders] . . . [The record] indicates there was confusion regarding the execution of TDRL order, however, there is no record of cancellation of the original TDRL order. Based upon the [applicant's] statement he was advised in May 1996 that his TDRL order was cancelled along with the subsequent issuance of a Reserve Retirement order, it is presumed that the Coast Guard properly cancelled the original TDRL order. Additionally, a complete review of the Applicant's record . . . does not correlate his illness/injury to active duty. The CPEB erroneously classified his condition as occurring while entitled to basic pay and a proximate result of performance of active duty.

3. The applicant bases his recent claim for payment under the TDRL order upon erroneous information provided by PSC. The information presented by PSC to the Applicant was based solely upon the TDRL order and not upon a complete review of the applicant's record.

4. There is no evidence that the Applicant was treated unfairly in his processing. The error in processing his TDRL order was discovered prior to execution of the order and the Applicant was allowed to remain in the Selective Reserve until he met the 15-year threshold for a non-regular Reserve Retirement under title 10 § 12731b, U.S. Code. Additionally, the Applicant's original statement to the IMB expressed his desire to remain in the service until the 15-year mark . . . The Coast Guard's delay with the processing of his case through the PDES benefited the member with a Reserve Retirement that he would not have otherwise been eligible for due to insufficient service.

APPLICANT'S REPLY TO THE VIEWS OF THE COAST GUARD

On September 18, 2006, the Board received the applicant's response to the advisory opinion. He objected to the recommendation. The applicant stated that with three years and eight months of naval service plus the time spent in the Coast Guard Reserve, he should have had the necessary eight years to be eligible for placement on the TDRL. He stated that he never saw the email in which Coast Guard personnel stated that the TDRL orders should be rescinded. In this regard, he stated that he never received any official written notice that the TDRL orders would be rescinded and that all he received was a verbal statement saying such.

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 Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code.

2. The application was not timely. To be timely, an application for correction of a military record must be submitted within three years after the applicant discovered or should have discovered the alleged error or injustice. See 33 CFR 52.22. This application was submitted approximately nine years beyond the statute of limitations.

3. However, the Board may still consider the application on the merits, if it finds it is in the interest of justice to do so. In Allen v. Card, 799 F. Supp. 158, 164 (D.D.C. 1992), the court stated that in assessing whether the interest of justice supports a waiver of the statute of limitations, the Board "should analyze both the reasons for the delay and the potential merits of the claim based on a cursory review." The court further stated that "the longer the delay has been and the weaker the reasons are for the delay, the more compelling the merits would need to be to justify a full review." Id. at 164, 165. See also Dickson v. Secretary of Defense, 68 F.3d 1396 (D.C. Cir. 1995).

4. The applicant claimed that he did not discover the alleged error until December 15, 2005, when an employee from the Pay and Services Center (PSC) contacted him and told him that he should have been receiving disability retired pay since 1996. However, the Board finds that the alleged error should have been discovered at the time of the applicant's transfer to RET-2 because as he admitted, he was told prior to placement in RET-2 status that he was not eligible for the TDRL because his illness was not incurred while on active duty. He knew in 1996 that the Coast Guard was not following the recommendation of the CPEB that he be placed on the TDRL. Moreover, during the PDES processing, the applicant had assigned counsel who could have assisted him in raising the matter with the Coast Guard if he believed that he was being wrongfully denied placement on the TDRL. Rather, he accepted the Coast Guard's explanation and requested voluntary transfer to RET-2 on October 31, 1996. He now claims to have learned of the alleged error in December 2005 when an employee from PSC phoned him and told him that he should have been receiving pay since May 1996. However, that employee's opinion was based on the same information and documentation that the applicant knew about in 1996. The fact that the PSC employee offered an opinion different from that rendered earlier by the Coast Guard without offering a basis for that conclusion based on either new information or the misapplication of the law does not explain to the Board's satisfaction the applicant's failure to bring this claim in a timely manner. The information in the applicant's record was the same in 1996 as it was in 2005. Accordingly, the Board finds that the applicant has presented insufficient evidence to support a waiver of the three-year statute of limitations.

5. Nor is the Board persuaded based on a cursory review of the merits that the applicant is likely to prevail on his claim. Entitlement to disability retirement for reservists who serve on active duty for 30 days or less or who perform inactive duty training is different from that of reservists who serve on active duty for more than 30 days. Reservists in the latter category enjoy the presumption that the disability was incurred while entitled to basic pay. See 10 USC § 1201.³ However, for Reservists who serve on active duty for 30 days or less or inactive duty training, disability retirement is dependent upon whether the disability is the proximate result of performing active duty. See 10 USC § 1204 of the United States Code (Members on active duty for 30 days or less or on inactive-duty training)⁴; see also Article 12.D.3. of the Reserve Training and Administration (RATMAN) in effect at the time in question and Article 2.C.3.a.(3) of the PDES Manual.⁵ The applicant mainly performed weekend drills and one 12-day period of active duty per year. There is no evidence in the record that he served on active duty for more than 30 days while in the Coast Guard; therefore to be entitled to retired pay his diabetic disability must be the proximate result of performing active duty or inactive duty training. In this regard, his CO wrote that he was not in an active status at the time his illness was incurred and there is no evidence that the applicant challenged this assessment.

6. The applicant's record indicates that he was on a 12-day period of active duty when he was medically examined and found to suffer from adult onset diabetes. Even so, the applicant has not proven that his diabetes was the proximate result of performing active duty. Article 2.C.8.e. of the PDES Manual states that a disability is the proximate result of performing active duty, active duty for training or inactive duty for training when the disability occurs while the member is performing acts consistent with that status. The applicant has not presented the Board with evidence of any of the duties that he was performing at that time that could have resulted in his acquiring

³ Title 10 U.S.C. § 1201 provides that a member who is found to be "unfit to perform the duties of the member's office, grade, rank, or rating because of physical disability incurred while entitled to basic pay" may be retired if the disability is (1) permanent and stable, (2) not a result of misconduct, and (3) for members with less than 20 years of service, "at least 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs at the time of the determination."

⁴ Title 10 U.S.C. § 1204 states in pertinent part that upon a determination by the Secretary concerned that a member of the armed forces, with less than 20 years of satisfactory service, on active duty for 30 days or less or on inactive duty training and is unfit to perform the duties of his office, grade, rank, or rating because of physical disability, may be retired with retired pay, if the Secretary determines that based upon accepted medical principles, the disability is of a permanent nature and stable, that the disability was incurred as the proximate result of performing active duty or inactive duty training, and the disability is at least 30% disabling.

⁵ This provision states that "When considering the case of evaluatees [on active duty for 30 days or less] the [CPEB] shall . . . in lieu of a finding of entitlement to basic pay, the board must find whether or not each disability is the proximate result of performing active duty or inactive duty training."

diabetes. In *Charles v. Rice*, 28 F.3d 1312, 1321 (1st Cir. 1994), the Court of Appeals affirmed the district court's ruling that a plaintiff who was discharged from the Puerto Rico National Guard due to HIV and who had twenty years of service was not entitled to disability retired pay. The Court stated "The record in this case is devoid of proof that plaintiff acquired HIV as a result of performing duties in the Guard." *See also Candelaria v. United States*, 5 Cl. Ct. 266 (1984) (holding that "myocardial infraction is the result of a slowly-developing disease and is not in and of itself an injury. In the absence of independent evidence that while serving on a tour of duty plaintiff suffered an independent blow or trauma which acted as a precipitating cause of his myocardial infraction, plaintiff does not fall within the meaning of section 1204 of Title 10 of the United States Code.") In light of the above, the Board finds that the applicant has failed to prove that the Coast Guard committed an error or injustice by not placing him on the TDRL as a result of his diabetes mellitus for which he was Insulin dependent.

7. The Coast Guard committed errors in processing the applicant's case. The referral of the applicant's diabetic disease to the CPEB was improper because he was not on regular active duty, nor was he under active duty orders for a period in excess of 30 days when he was diagnosed with diabetes. The CPEB further exacerbated the situation by not adequately reviewing the record to determine whether the applicant was on regular or long term active duty at the time it rendered its findings and recommendation. While the CPEB marked on its report form that the applicant was entitled to basic pay and that his disability was the proximate result of performing active duty, it is clear from a review of the applicant's record that he had performed no long-term active duty since joining the Coast Guard Reserve.⁶ Therefore, the CPEB's marking of the two blocks constituted administrative error. TDRL orders, with an effective date of May 17, 1996, were prepared based on the CPEB's administrative error. It is unclear from the record whether the erroneous TDRL orders were officially delivered to the applicant, although he knew about them. However the CPEB's error was discovered on or about May 7, 1996, several days prior to the effective date of the orders. The applicant suffered no injustice as a result of this series of errors because he was never placed on the TDRL and never received disability retired pay from the Coast Guard.

8. The applicant argued that the Coast Guard knew that he had been diagnosed with high levels of glucose in his blood and urine as early as 1986. However, these findings did not cause the applicant to be unfit for continued service. When his condition evolved into diabetes mellitus with insulin dependence he became unfit for

⁶ There is no evidence in the record that the applicant served on active duty for more than 30 days subsequent to his 1985 enlistment in the Coast Guard Reserve. While he served on active duty in the Navy prior to joining the Coast Guard, there is no evidence that he suffered from diabetes during this period.

continued duty. See Article 3.F.10.e. of the Medical Manual and Article 9.B.48.a. of the PDES Manual.

9. It should be noted that after the applicant was diagnosed as unfit, the Coast Guard allowed him to remain in the Reserve until he earned 15 years of satisfactory service for retirement under the Reserve Transition Benefit program. The applicant was diagnosed with an unfitting condition in 1992 and could have been discharged at that time. Rather, he was allowed to remain in the Reserve to earn the necessary satisfactory years of service to be transferred to RET-2 and to receive retired pay at age 60.

10. The applicant indicated that he currently has a 100% disability rating from the DVA. It is not clear to the Board why the DVA concluded that the applicant's diabetes is service connected since the applicant was erroneously processed under the PDES. Moreover, DVA disability ratings are not determinative of the same issues involved in military disability cases. See *Lord v. United States*, 2 Cl Ct. 749, 754 (1983). Because the applicant was a reservist who served on active duty for periods less than 30 days and on inactive duty drills, his diabetes mellitus must be the result of performing active duty for him to be entitled to disability retirement from the Coast Guard. He has not proven this to be the case.

11. Accordingly, the applicant's request for relief should be denied

