DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2010-113

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FINAL DECISION

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case after receiving the applicant's completed application on February 26, 2010, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated October 21, 2010, is approved and 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 asked the Board to correct his record to show that he received a physical disability retirement on September 9, 1953, instead of a disability discharge with severance pay. He alleged that he received a 40% disability rating and that due to new rules regarding traumatic brain injuries (TBIs) and concurrent retirement and disability pay (CRDP),[1] he should be consi-

[1] Under 10 U.S.C. § 1414, which was enacted on December 28, 2001, veterans with at least 20 years of active service and disability ratings from the DVA of at least 50% may receive concurrent retired and disability pay as follows:

> (a)(1) Subject to subsection (b), a member or former member of the uniformed services who is entitled for any month to retired pay and who is also entitled for that month to veterans' disability compensation for a qualifying service-connected disability (hereinafter in this section referred to as a 'qualified retiree') is entitled to be paid both for that month without regard to sections 5304 and 5305 of title 38 [which statutes prohibit receipt of both disability retirement pay and retirement pay for years of service]. …
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> (2) Qualifying service-connected disability. In this section, the term 'qualifying service-connected disability' means a service-connected disability or combination of service-connected disabilities that is rated as not less than 50 percent disabling by the Secretary of Veterans Affairs.
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> (b) Special rules for chapter 61 disability retirees.
>
> (1) Career retirees. The retired pay of a member retired under chapter 61 of this title with 20 years or more of service otherwise creditable under section 1405 of this title , or at least 20 years

dered permanently disabled. The applicant argued that he "should have some benefit under CRDP."

The applicant stated that he discovered the alleged error in his record on April 14, 2009, and also that the Board should excuse the untimeliness of his application because he suffers from TBI and cognitive disability. He asked the Board to review his medical record from the Department of Veterans' Affairs (DVA).

SUMMARY OF THE RECORD

On February 8, 1949, the applicant enlisted in the Coast Guard. On October 12, 1952, while driv[redacted]. He was unconscious for three days and suffered many broken bones, including a broken skull and jaw bone, and contusions. When he regained consciousness, the doctors discovered that he suffered from "right wrist drop" as a result of nerve damage to his upper arm. His skull was wired together, his bones healed, and his wrist condition improved. A Board of Medical Survey report dated May 14, 1953, stated that his disabling conditions on that date were (1) numbness in the right forearm; (2) stiffness of the fingers of the right hand; (3) weakness of the right wrist; and (4) slight swelling of the right ankle. The board stated that although these conditions were improving, some residual disability that would render him unfit for duty was likely, so a Board of Physical Evaluation should be convened to separate him from the Service.

On July 7, 1953, a Board of Physical Evaluation convened to review the applicant's records and question him and his doctor about his conditions. The applicant waived his right to counsel. When asked about his physical complaints, he complained about the weakness in his wrist and about getting headaches in cold weather because of the wire that had been inserted in his head. The board found him unfit for duty based on a mild, incomplete paralysis of his right radial nerve, which was rated as 20% disabling, and a slight atrophy of his thigh muscle, which was rated as 0% disabling. The board recommended that he receive a 20% combined disability rating under the Veterans' Administration Schedule for Rating Disabilities (VASRD). On July 14, 1953, the applicant acknowledged receipt of the board's report and elected not to rebut the board's findings and recommendation. The case was reviewed by the Physical Review Council, which concurred in the findings and the rating and recommended that the applicant be separated with severance pay. The Chief Counsel found the proceedings correct and supported by the evidence. On August 26, 1953, the Commandant approved the recommendation and ordered that the applicant be discharged with severance pay.

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of service computed under section 12732 of this title, at the time of the member's retirement is subject to reduction under sections 5304 and 5305 of title 38, but only to the extent that the amount of the member's [disability] retired pay under chapter 61 of this title exceeds the amount of retired pay to which the member would have been entitled under any other provision of law based upon the member's service in the uniformed services if the member had not been retired under chapter 61 of this title.

(2) Disability retirees with less than 20 years of service. Subsection (a) does not apply to a member retired under chapter 61 of this title with less than 20 years of service otherwise creditable under section 1405 of this title, or with less than 20 years of service computed under section 12732 of this title, at the time of the member's retirement. …

On September 9, 1953, the applicant was discharged because of his physical disability, incident to service with a 20% disability rating and severance pay of $917.28.

Following his discharge, the applicant applied to the Veterans' Administration (VA) for disability benefits and was initially awarded a combined 40% disability rating, including 30% for "right radial nerve contusion, moderate, partially resolved"; 10% for "fracture, complete, comm., maxilla [jaw bone] malunion"; and 0% for his other fractures, scars, and brain concussion.

Over the years, the applicant applied for increased benefits for various conditions. In April 2009, he sought compensation for TBI. A clinical psychologist who examined him for the DVA reported the following:

> It is likely that some of his memory decline is attributable to the traumatic brain injury in question, but that probably does not account for the severity we see presently. History shows he was able to work successfully despite a significant alcohol dependency after injury. Given recent cardiac difficulties which could have produced vascular dementia to some degree, I cannot say that his cognitive disorder (mild dementia) is due solely to military experience – as stated previously, attributing causality in this case would require resorting to speculation.

On November 27, 2009, the DVA awarded the applicant a 50% disability rating for service-connected "depression associated with brain concussion."

VIEWS OF THE COAST GUARD

On June 18, 2010, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief because of the untimeliness of the application. He stated that the applicant has provided "no rationale for his approximately 50+ year delay." In addition, he adopted the findings and analysis provided in a memorandum prepared by the Coast Guard Personnel Service Center (PSC).

The PSC stated that the record shows that the applicant was separated from the Service because of partial paralysis of his right radial nerve and a slight atrophy of his thigh muscle and that he was not separated because of any cognitive issues. "Had [he] recovered the full use of his right hand, he would have been retained on active duty."

The PSC noted that under VASRD rule 4.3, in determining service connection and assigning disability ratings, the DVA resolves all reasonable doubt in favor of the claimant. The PSC also noted the DVA is "the appropriate avenue for relief" for veterans suffering from disabilities that increase following their separation from the Service.

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 10 U.S.C. § 1552.

2. An application to the Board must be filed within three years of when the applicant discovers the alleged error in his record. 10 U.S.C. § 1552(b). Because there is no evidence that the applicant was cognitively impaired upon his discharge in 1953, and he apparently worked and supported himself for years thereafter, the Board concludes that he knew or should have known that he had received no disability rating for his concussion or cognitive impairment upon his separation in 1953. Therefore, his application was filed more than 50 years late.

3. Pursuant to 10 U.S.C. § 1552(b), the Board may excuse the untimeliness of an application if 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 to determine 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 argued that the Board should excuse the untimeliness of his application because he now suffers from a cognitive disability. However, the record shows that his cognitive disability has been diagnosed relatively recently and does not explain why he did not apply sooner.

5. The Board's cursory review of the record indicates that it lacks potential merit. The applicant clearly suffered a severe head trauma while in the Service, but there is no evidence that he was disabled by this head trauma when he was discharged in September 1953. His Coast Guard medical records show that he was discharged because of his wrist condition, which was rated as 20% disabling, and not because of his other residual conditions. These Coast Guard medical records are presumptively correct. 33 C.F.R. § 52.24(b); *see Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992) (citing *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979), for the required presumption, absent evidence to the contrary, that Government officials have carried out their duties "correctly, lawfully, and in good faith.").

6. Although the VA awarded the applicant a 40% disability rating soon after his discharge, the VA's rating does not prove that the Coast Guard's rating was erroneous. Under 10 U.S.C. § 1201, the military services award disability ratings based upon the member's degree of unfitness for duty upon the date of discharge. Post-discharge increases in veterans' service-connected disabilities are compensated by the DVA, not by the military service. In accordance with 38 C.F.R. § 4.1, the DVA considers the extent to which all of a veteran's "service-connected" disabilities currently render him unable to work in civilian life, whether or not these disabilities rendered the veteran unfit for duty at the time of separation. DVA ratings are "not determinative of the same issues involved in military disability cases." *Lord v. United States*, 2 Cl. Ct. 749, 754 (1983); *see Kirwin v. United States*, 23 Cl. Ct. 497, 507 (1991); *Dzialo v. United States*, 5 Cl. Ct. 554, 565 (1984) (holding that a VA disability rating "is in no way determinative on the issue of plaintiff's eligibility for disability retirement pay. A long line of decisions have so held in similar circumstances, because the ratings of the VA and armed forces are made for different purposes."). Therefore, the fact that the VA assigned the applicant a 40%

combined disability rating soon after his discharge does not prove that the Coast Guard erred in assigning him just a 20% rating and discharging him with severance pay.

7. The Board notes that the applicant argued that he should receive CRDP. However, to receive CRDP, a veteran must have qualified for a regular retirement with at least 20 years of service. 10 U.S.C. § 1414. The applicant served on active duty for less than 5 years and so clearly cannot qualify for CRDP.

8. Based on the record before it, the Board finds that the applicant's claim cannot prevail on the merits. Accordingly, the Board will not excuse the application's untimeliness or waive the statute of limitations. The applicant's request should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of former SN xxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is denied.