

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2012-070

**XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX**

FINAL DECISION

This proceeding was conducted 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 upon receiving the completed application, including the applicant's military and medical records, on February 21, 2012, 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 September 27, 2012, 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, who was placed on the Temporary Disabled Retired List (TDRL) on [REDACTED] and thereafter found fit for duty and discharged, asked the Board to order the Coast Guard to re-process him through the Physical Disability Evaluation System (PDES) by convening a medical board to evaluate him and then award him a disability retirement.

The applicant stated that in [REDACTED] he was placed on the TDRL with a 30% disability rating due to depression. Thereafter, he applied for benefits from the Department of Veterans' Affairs and received a 20% combined disability rating, including 10% for depression and 10% for chronic back pain. The applicant stated that for a while his condition seemed to be under control and he "was able to find work and start to get [his] life back together." However, then his condition became much worse. He lost his job, his apartment, and did not have any contact with the DVA or the Coast Guard. He stated that when his TDRL payments stopped after he missed an appointment, he assumed that he had been discharged. As his condition worsened, his wife insisted that he contact the DVA for help. The DVA gave him therapy and medications and raised his disability rating for depression to 40%. The DVA is also providing vocational rehabilitation and reevaluating his back condition, which has worsened.

The applicant stated that he recently learned that when he was removed from the TDRL, he should have received either severance pay or a permanent disability retirement. He understands that his earlier lack of action might have jeopardized his entitlement to these benefits, but

he is hoping that he might still qualify for retirement or severance pay. In support of his request, the applicant submitted copies of military and medical records, which are summarized below, and the following documents:

- A letter from the DVA dated January 13, 2011, states that the applicant's combined DVA disability rating is 40%.
- Other DVA documents state that the applicant was put on the TDRL by the Coast Guard after more than 14 years of service and that his status at that time was "retired military member (receiving retired pay)."

The applicant stated that it is in the interest of justice to excuse the untimeliness of his application because he suffers from a mental disability and he "only recently began to improve mentally and to understand my status."

SUMMARY OF THE RECORD

The applicant originally enlisted on [REDACTED]. He served on continuous active duty and in [REDACTED] was hospitalized for a week. A hospital psychiatrist's report states that he was admitted because he had attempted suicide by turning on all the burners on his stove with no flame. His suicide was prevented by his landlord and a sheriff who had come to evict him due to his failure to pay rent because of gambling losses. He had lied to his wife, landlord, and command to cover up his problems, and his wife knew nothing of the debts or the eviction. The applicant reported that he had been feeling depressed for about three years since he learned that he and his wife could not conceive a child and a \$5,000 in vitro fertilization attempt had failed. The psychiatrist diagnosed the applicant with major depression, pathological gambling, compulsive lying, narcissistic personality disorder, dependent personality disorder, and possible alcoholism. He noted that the applicant was eligible for either PDES processing because he was not fit for duty due to his major depression or an administrative discharge because of his personality disorders.

On [REDACTED] the applicant was informed that an Initial Medical Board (IMB) had found him not fit for duty because of a physical disability and that his case would be referred to a Central Physical Evaluation Board (CPEB) for review. The diagnoses listed by the medical board are Depressive Disorder, Pathological Gambling, Compulsive Lying, and Alcohol Abuse. The applicant signed a form electing not to rebut the IMB's findings and recommendation.

On [REDACTED], the applicant's commanding officer (CO) forwarded the IMB report to the Personnel Command for review by the CPEB. The CO stated that the applicant should be discharged expeditiously because he could not be trusted. He opined that the applicant's illness was due to his own misconduct.

The report of the CPEB dated [REDACTED] shows that the CPEB recommended that the applicant be placed on the TDRL with a 30% disability rating due to a diagnosis of "Major Depression Without Melancholia, With Definite Industrial Impairment." On [REDACTED] after consulting counsel, the applicant by his signature accepted the findings and recommendation of

the CPEB and waived his right to a formal hearing. The CPEB's findings and recommendation were approved on [REDACTED]

The applicant's DD 214 shows that he was temporarily retired from active duty on [REDACTED] with more than 14 years of service, and placed on the TDRL.

On [REDACTED] the Personnel Command sent the applicant a letter advising him that he should undergo his first periodic psychiatric examination at a local DVA hospital in [REDACTED].

On [REDACTED], the Personnel Command sent the applicant a letter noting that the Coast Guard had been unable to contact him by telephone. The Personnel Command asked the applicant to contact its Physical Disability Office and advised him that "[w]ithout your necessary assistance in evaluating your physical condition, the Coast Guard may be forced to close your record and terminate all retirement benefits in the near future. Please reply by [REDACTED]."

On [REDACTED], the Personnel Command received the report of the applicant's first periodic psychiatric examination, dated [REDACTED]. The psychiatrist's report stated that the applicant showed no signs or symptoms of depression, was working full time, and had no social impairment.

After reviewing the case and the report of the applicant's periodic examination, on [REDACTED], the CPEB found the applicant fit for full duty.

On [REDACTED], the Personnel Command sent the CPEB's report to the applicant with information from his assigned counsel and about his right to submit a written rebuttal to the CPEB's report within 15 working days. The Personnel Command also warned him that if he failed to reply within 15 working days, he "may forfeit important rights in the disability evaluation process." This package was sent with a return receipt requested and the green return receipt card is in the record with the applicant's signature on it.

On [REDACTED], the Personnel Command advised the applicant by letter that it had not received any reply from him in response to the [REDACTED], package. The Personnel Command advised him that if he did not submit a reply by [REDACTED], "the conclusive presumption is that you are accepting the CPEB findings and recommended disposition. In that event, your case will be forwarded immediately for approval and final administrative action." The Personnel Command included with this letter another copy of the CPEB's report and encouraged him to contact his assigned counsel.

On [REDACTED], the Personnel Command forwarded the CPEB's report to the Commandant for review and approval, noting that no response had been received from the applicant. The CPEB's report was approved.

On [REDACTED], the Personnel Command sent the applicant a letter stating that because he had been found fit for duty, he would be reenlisted on active duty in the same rank if he applied within 15 days by taking a copy of the letter to any Coast Guard recruiter. The letter

further stated that if he applied to reenlist within 15 days, his status on the TDRL and his disability pay would end upon his reenlistment on active duty, and that if he did not apply to reenlist within 15 working days, his status on the TDRL and disability pay would end on the 15th working day and he would be discharged.

On [REDACTED], the Personnel Command advised the applicant in a letter that because he had not reenlisted within the 15-day period, his honorable discharge would be effective as of [REDACTED].

VIEWS OF THE COAST GUARD

On June 15, 2012, the Judge Advocate General (JAG) submitted an advisory opinion in which he recommended that the Board deny relief in this case. In so doing, he adopted the findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC).

PSC stated that the applicant's request should be denied because he cited no error in his record and provided no basis for reopening his PDES processing. PSC stated that the applicant's record and the Coast Guard's actions are presumptively correct and the CPEB's findings and recommendation "were sustained at all levels of review and approval and are well supported by the evidence of record. There is no evidence of error or irregularity in the processing of this case." PSC noted the return receipt in the record showing that the applicant received the [REDACTED], mailing regarding the CPEB's report and his assigned counsel.

PSC stated that pursuant to regulation, after the applicant was found fit for duty, he had 15 working days to apply to reenlist but did not do so. Therefore, he was discharged. PSC argued that the applicant has failed to prove by a preponderance of the evidence that his record is erroneous or unjust or that he did not receive his full and fair due process rights. "Failing to meet his burden, the Coast Guard's actions are deemed correct, lawful, and done in good faith. Accordingly, his petition should be denied."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 23, 2012, the applicant responded to the views of the Coast Guard. He said that he disagrees with those views because he does "not believe the CG medical board was able to gather enough information to conclude a full evaluation of my conditions. I feel that a new evaluation of my conditions from the DVA can fully show the level of my physical and mental impairment." The applicant stated that the DVA had increased his disability ratings to 30% for depression and 20% for back pain for a combined rating of 40%. The applicant stated that the outcome of his case was apparently due to his failure to respond to the Coast Guard's correspondence, and that he is hoping that the Board "will look at my attempts seeking help as the years went to show that I was not then or now fit for duty or mentally & physically capable."

APPLICABLE REGULATIONS

Chapter 8 of the PDES Manual in effect from July 1996 through 1999 and beyond (COMDTINST M1850.C) governs the disposition of members on the TDRL. Paragraph A.6. provides that a member cannot stay on the TDRL, entitled to temporary disability retired pay, for more than five years. Paragraph C states that members must be periodically examined while on the TDRL to determine if their conditions have changed. The examining physician prepares a report, which is forwarded to the Personnel Command for consideration by the CPEB. Paragraph E provides that after the member's final examination while on the TDRL, a CPEB will consider his case and make recommendations in accordance with Paragraph C.3.c. of Chapter 2. Thereafter, the procedures prescribed in Chapter 4 must be followed.

Paragraph C.3.c. of Chapter 2 of the PDES Manual requires the CPEB that reviews the case of a member on the TDRL to make findings as to his fitness for duty and, if unfit, his degree of disability due to the medical condition(s) that caused his placement on the TDRL.

Chapter 4 of the PDES Manual contains the procedures for CPEBs. Paragraph A.13.a. provides that the Chief Counsel's office must appoint counsel to advise each member undergoing review by a CPEB. Paragraph A.13.b. provides that the counsel normally contacts the member within five working days of receiving the CPEB report and advises the member "of the disability process and of the evaluatee's rights in light of the CPEB's findings and recommended disposition. ... Upon completion of counseling, the designated counsel will forward the CPEB's Findings and Recommended Disposition, CG-4809, to the evaluatee for signature and subsequent return."

Paragraph A.14.a. of Chapter 4 provides that a member found fit for duty by a CPEB may submit a written rebuttal to the CPEB for consideration by that board. If the member fails to do so within 15 working days from the date of written notification of the CPEB's findings, "the conclusive presumption is that the evaluatee is accepting the CPEB findings and recommended disposition and the case will be forwarded to [the Office of the Chief Counsel] for legal review."

Paragraph C of Chapter 4 provides that a CPEB's recommended findings are reviewed by a Physical Review Counsel and forwarded to the Chief Counsel's office for a legal review. Finally, they are forwarded to the Personnel Command for final action.

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. Under 10 U.S.C. § 1552(b), an application to the Board must be filed within three years after the applicant discovers the alleged error or injustice in his record. The applicant alleged that because of his disabilities, he has only recently been able to understand his status. The record shows that while on active duty, the applicant was diagnosed with depression, pathological gambling, compulsive lying, narcissistic personality disorder, dependent personality dis-

order, and alcohol abuse, and he was placed on the TDRL based on his depression. However, the record also shows that following his temporary retirement, he became fit for full duty and was employed full time in [REDACTED]. The applicant signed a return receipt in [REDACTED] acknowledging receipt of the CPEB's report and information from his assigned attorney. Given the medical reports and correspondence in the record, the Board finds that the preponderance of the evidence shows that the applicant was fit for duty and received the information sent to him in [REDACTED] and so was aware at the time that he had been found fit for duty and discharged because he failed to reenlist. Therefore, his application is untimely.

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."¹ The court further instructed 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."²

4. Regarding the delay of his application, the applicant stated that because of his disabilities, he has only recently improved and been able to understand his status. However, the record shows that the applicant was fit for full duty and employed full time in [REDACTED] and there is nothing in the record that supports his claim that he has been so incapacitated in the interim that he was unable to understand that he had been discharged without severance or retirement pay and to seek correction of his discharge. The Board finds that the applicant's explanation is not persuasive or compelling.

5. The Board finds no evidence of error or injustice in the record. The record shows that at the applicant's first periodic examination while on the TDRL, he was reported to be fit for duty and fully employed. His signature on the green return receipt card shows that he received the package with the CPEB's finding that he was fit for duty and information from his assigned attorney. No rebuttal was received from the applicant, and he did not reenlist on active duty when invited to do so. Because he failed to reenlist when invited to do so, his separation is considered administrative and voluntary, rather than medical and involuntary. Therefore, he was not entitled to severance pay or disability retired pay when removed from the TDRL.³ The Coast Guard's actions and these military and medical records are presumptively correct.⁴ The applicant has not submitted sufficient evidence to overcome the presumption of regularity. Based on the record before it, the Board finds that the applicant's claim cannot prevail on the merits.

6. Accordingly, the Board will not excuse the untimeliness of the application. The application should be denied.

¹ *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

² *Id.* at 164-65; see also *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

³ U.S. Coast Guard, COMDTINST 1910.1, "Eligibility of Regular and Reserve Enlisted Personnel for Separation Pay" (January 29, 1992).

⁴ 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.").

