

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2013-174



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 and medical records on September 13, 2013, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated May 29, 2014, 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 military record to show that he was medically retired from the Coast Guard on May 5, 2004, with a 30% disability rating as a result of three disabling medical conditions. He alleged that he should have been processed for a medical retirement under the Coast Guard's Physical Disability Evaluation System (PDES) and then medically retired from active duty instead of being allowed to enlist in the Reserve when his active duty enlistment contract ended. The applicant alleged that he learned of this error in his record on May 5, 2007, exactly three years after his release from active duty and that he has been pursuing correction of his record since that time. In support of these allegations, the applicant submitted several documents, which are included in the summary of the record below.

SUMMARY OF THE RECORD

On May 6, 1996, the applicant enlisted in the Coast Guard for 4 years. He had previously served in the Navy for 2 years during the Gulf War. He later extended his Coast Guard enlistment for another 4 years.

The applicant submitted copies of his own medical records to the Board. On his pre-enlistment physical examination, he advised the doctor that he had had an appendectomy at age 8 and that his right ear drum had been perforated while on active duty in the Navy but that he had

“no other significant med[ical] history.” His hearing was tested, and he was found fit for enlistment.

On June 5, 1998, the applicant complained of back pain and knee pain following a boat ride. He was diagnosed with a musculoskeletal strain.

On January 27, 2000, the applicant went to a clinic complaining of a dull pain in his left knee, which would increase when walking upstairs or when on boats.

On August 6, 2001, the applicant underwent a quinquennial physical examination and reported that he was in good health and not taking any medications. However, he reported having had some “knee pain/backpain, 2^o [secondary] to previous job, much improved after [unreadable].” He was found to have no disqualifying defects and was fit for duty.

On November 20, 2001, the applicant underwent surgery on his left knee after he injured it while playing soccer. At a follow-up examination on November 30, 2001, the doctor noted that the knee was “healing well” and placed the applicant in a limited duty status. Medical notes dated January 18, 2002, and February 20, 2002, show that the applicant was “healing well” and was advised to take Motrin if his knee felt sore. He reported that it had felt sore after he had been walking for 20 minutes.

On October 7, 2002, the applicant underwent another periodic physical examination. The doctor noted that the applicant reported having some “chronic, non-disabling [left] knee pain, NCD [not considered disabling].” The applicant was found fit for duty.

On March 24, 2003, the applicant went to the clinic complaining of chronic lower back pain. The doctor refilled his prescription for Motrin.

On October 28, 2003, the applicant went to the clinic complaining of a dull pain that had developed in his lower back after he had moved some furniture. He denied having any numbness, tingling, or weakness but stated that the pain got worse when he touched his toes or did a sit-up. The doctor prescribed ibuprofen and placed him in a limited duty status for 14 days with no lifting more than 25 pounds and no bending or twisting.

On November 7, 2003, the applicant went to the clinic with several concerns because, he told the doctor, he was considering separating from the Coast Guard when his enlistment ended. He listed his concerns as lower back pain for which he had to take ibuprofen on a regular basis, chronic left knee discomfort since his surgery in 2001, and recurrent toe fungus. Regarding the applicant’s back, the doctor noted that Xrays showed “mild degenerative disc disease at L1/2” and “otherwise normal lumbar spine film.” The doctor also reported that the results of neurological tests were normal, that the applicant’s gait, sensation, and strength were normal, and that he would put the applicant in a limited duty status with no lifting, bending, or twisting for two weeks. The doctor prescribed Naprosyn and Flexeril for the applicant’s back pain. Regarding his knee, the doctor noted that the applicant had had chronic, mild symptoms since the surgery but that the range of motion in the applicant’s left knee was normal and he was aware of the chronic nature of his knee symptoms.

On December 2, 2003, the applicant went to the clinic complaining of lower back pain. The doctor reported that there was no radiation of the pain or radiculopathy and diagnosed him with “mechanical lower back pain.” The applicant had a normal gait, sensation, and strength. The doctor referred him for physical therapy and placed him on limited duty for 50 days in that he was not to lift anything over 50 pounds. He advised the applicant to return in two months or sooner if his pain got worse.

On January 15, 2004, the applicant returned to the clinic for his follow-up examination. He reported that his back pain had improved as a result of physical therapy but that he still had some lower back pain. The doctor noted that there was no radiation or radiculopathy, diagnosed him with “mechanical lower back pain,” and told him to continue physical therapy. The doctor also extended the applicant’s limited duty status (no lifting anything over 50 pounds).

On February 19, 2004, the applicant returned to the clinic complaining of lower back pain. The doctor continued his limited duty status with “no deployment” and referred him for an MRI. The MRI, performed on March 1, 2004, showed a “small central disc protrusion” at L5/S1 with “no canal stenosis or nerve root impingement.”

On March 3, 2004, the doctor advised the applicant of the “very benign” results of his MRI. The applicant reported that his back was “much improved” and that the Tylenol #3 and Flexeril that the doctor had prescribed had worked well. The doctor reported that the results of a neurological test were normal, that the applicant had a normal gait, and that the applicant could bend over far enough to get within 6 inches of touching his toes. The doctor found him fit for full duty but advised him to do exercises for his back and to take ibuprofen if the pain returned.

On March 23, 2004, the applicant underwent a pre-separation physical examination. The doctor noted that the applicant had mild HFHL (high frequency hearing loss) and “L5-S1 small central disc protrusion in MRI [dated] 1 Mar[ch] 04 – ø [no] stenosis or nerve root impingement.” The official report¹ of his examination was not among the medical records submitted by the applicant.

On May 5, 2004, the applicant was honorably discharged from the Coast Guard due to “completion of required active service” with an RE-1 reentry code (eligible to reenlist). He had served on active duty in the Coast Guard exactly 8 years. Before his discharge, he signed a Page 7 acknowledging that he was “opting for separation at this time” and had been advised of his rights on separation.

The next day, May 6, 2004, the applicant enlisted in the Coast Guard Reserve for 6 years and was assigned to a Selected Reserve billet in a Marine Safety Office. However, he performed only 20 drills (10 full days) of inactive duty in his first year in the Reserve, through May 5, 2005,

¹ Chapter 4.B.6. of the Medical Manual states that in block 77 of the Report of Medical Examination, the examiner must “[l]ist ALL defects in order to protect both the Government, and evaluatee, in the event of future disability compensation claims. All defects listed which are not considered disqualifying shall be so indicated by the abbreviation NCD (Not Considered Disqualifying).” In addition, in block 74, the examiner must “[s]tate whether or not the examinee is qualified for the purpose of the examination.” *Id.*

and was reassigned to a Port Security Unit on April 5, 2005. Then he performed only 2 drills (1 full day) during his second year, through May 5, 2006, and no drills thereafter. He also performed no annual active duty for training while in the Reserve.

On January 12, 2006, the Department of Veterans' Affairs (DVA) responded to a new claim that the applicant had filed on May 16, 2005. The DVA raised the applicant's combined disability rating from 20% to 30% based on a 10% rating for small disc protrusion L5-S1 with lower back pain; a 10% rating for patellofemoral syndrome left knee, status post tibial plateau fracture; and a 10% rating for tinnitus. The first two conditions had been rated since the applicant's discharge from the Coast Guard on May 6, 2004, but the third rating—for tinnitus—was new and rated as of May 16, 2005. The DVA decision states that all three conditions were incurred while the applicant was in the Navy during the Gulf War. The DVA stated that the applicant's hearing loss in his right ear was also a condition incurred during the Gulf War but found that it was 0% disabling.

On June 10, 2007, the applicant's CO sent him a "Notice of Intent to Recommend Discharge," which stated that the CO had initiated the applicant's discharge from the Reserve because a "review of your record determined that you have a non-service connected disqualifying condition that prevents you from fulfilling duties relating to your rate and deployment in conjunction with worldwide assignment." The CO advised the applicant that he had "the right to request a retention waiver for your condition, per article 3.A.8. of [the Medical Manual], if you believe there is a reasonable expectation that you will become and remain fit for duty. The memorandum included as an attachment an "Acknowledgement of Command Intent" for the applicant's signature.

On June 25, 2007, the applicant signed an acknowledgement of the notification dated June 10, 2007. He did not request a waiver of his disqualifying conditions and objected to his discharge from the Reserve. Also on June 25, 2007, the applicant submitted a written response to the CO's memorandum. He objected to being discharged from the Reserve "due to unsuitability as a result of non-service connected medical conditions" because he had sustained his injuries while on active duty in the line of duty. He explained that while serving on the Pacific Strike Team, he had fractured his leg in multiple places and had to have a partial replacement of his left knee with steel pins inserted. In addition, he claimed that his tinnitus and lower back pain were service connected. He stated that he had injured his back during small boat operations in the Gulf of Mexico and had been diagnosed with partial hearing loss and tinnitus while on active duty. The applicant stated that because of these service-connected injuries, he should be evaluated by a medical board and receive a medical separation.

On July 31, 2007, the CO amended his June 10, 2007, notification memorandum to state that a "review of your record determined that you have a *previously rated service related* disqualifying condition that prevents you from fulfilling duties relating to your rate and deployment in conjunction with worldwide assignment." (Emphasis added.)

On August 23, 2007, the Personnel Command issued orders to discharge the applicant from the Reserve on September 8, 2007, due to "Disability – Other" with a JFR separation code, which denotes an "involuntary discharged directed by established directive for physical disability

not otherwise covered” under Article 12.B.15. of the Personnel Manual. The applicant was discharged from the Reserve on September 8, 2007.

On November 20, 2007, the applicant’s congressional representative advised him in a letter that he should apply to this Board, the BCMR, to request a medical separation.

On July 30, 2009, the Discharge Review Board (DRB) sent the applicant an acknowledgement of having received an application requesting a medical retirement. The applicant acknowledged receipt of this acknowledgement in an undated letter and submitted the DVA’s rating decision and other documents summarized above.

On January 8, 2010, the applicant sent the DRB a letter inquiring about the status of his 2009 application. On June 10, 2013, the DRB sent the applicant a letter noting that the DRB had no authority to review his request and that he should apply to the BCMR.

VIEWS OF THE COAST GUARD

On March 5, 2014, the Judge Advocate General submitted an advisory opinion in which he recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC stated that the application was not timely submitted and should be denied on that basis. PSC also stated that the applicant voluntarily chose to be discharged from active duty in May 2004 and was not separated from the Coast Guard because of any disability.

Regarding the medical records, PSC noted that the applicant failed to include the report of his pre-separation physical examination and alleged that “there is no note in his medical file of a sustained limited duty status due to any injuries or any medical conditions that would have precluded him from completing his regularly assigned duties in the Coast Guard Reserve.” PSC alleged that the only authorized basis for PDES processing is a member’s unfitness to perform his duties, and “[t]here is no documentation in the applicant’s record that directly or indirectly implies that the applicant could not perform his duties. There is no evidence of record which suggests the applicant suffered from any injuries or illnesses which would trigger PDES processing.”

PSC stated that the applicant’s claim that he should have been medically retired instead of discharged when his enlistment ended because the DVA has rated his knee, back, and ear conditions “is a common (meritless) argument by service members to try to qualify for PDES or increase their PDES ratings, but it is not sustainable. A *significant* number of veterans receive compensation from the VA for medical conditions that were created or exacerbated while in the service which were not considered unfitting for duty by the military members’ command (and therefore did not qualify for a [medical evaluation board] while they were serving on active duty or in the Reserve.” Furthermore, PSC argued,

After reviewing the information that is available about the applicant for the years 2004 through 2007, we can only speculate that the Applicant’s Command chose

to recommend discharge based on a non-service connected disqualifying medical condition because the Applicant was not satisfactorily completing his drill requirements. Due to lack of documentation from the Applicant or the Applicant's records, it is not clear why he was not drilling or if the separation was in fact due to something completely different. However, PSC stands by the assumption that the Command separated the Applicant accurately and within policy.

PSC concluded that the applicant has submitted insufficient discharge and medical documentation to prove that he should have been medically retired in 2004 but that further review would be warranted if the applicant produces more discharge or medical documentation.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 6, 2014, the Chair mailed the applicant a copy of the views of the Coast Guard and invited him to submit a written response within 30 days. No response has been received.

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 must be submitted within 3 years of the applicant's discovery of the alleged error in his record. The applicant alleged that he should have been medically retired instead of discharged on May 5, 2004. The record shows that when he was discharged on May 5, 2004, the applicant clearly knew the extent of his medical conditions and knew that he was not being medically retired. Therefore, he should have submitted an application for correction by May 5, 2007. Because the applicant did not take any action to have the alleged error corrected by May 5, 2007, his application is untimely.
3. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.² In *Allen v. Card*, 799 F. Supp. 158 (D.D.C. 1992), the court stated that the Board should not deny an application for untimeliness without "analyz[ing] both the reasons for the delay and the potential merits of the claim based on a cursory review"³ to determine whether the interest of justice supports a waiver of the statute of limitations. The court noted 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."⁴
4. The applicant did not explain or provide any justification for not challenging his discharge from active duty within three years of his discharge. Instead, he alleged that he discovered the error on May 5, 2007. However, the preponderance of the evidence shows that he was fully aware of the extent of his medical conditions in 2004 and knew that he was not

² 10 U.S.C. § 1552(b).

³ *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

⁴ *Id.* at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

receiving PDES processing and a medical retirement. The Board finds that the applicant has not justified his failure to submit a request for correction within three years of his discharge from active duty.

5. A cursory review of the merits of this case indicates that the applicant's claim cannot prevail. The record clearly shows that the applicant was eligible, but chose not to reenlist on active duty when his enlistment ended on May 5, 2004, and he was discharged only because his enlistment ended and not because of his medical conditions. Regarding members who are being administratively discharged for non-medical reasons, Article 2.C.2.b. of the PDES Manual states the following:

The law that provides for disability retirement or separation (10 U.S.C., chapter 61) is designed to compensate a member whose military service is terminated due to a physical disability that has rendered him or her unfit for continued duty. That law and this disability evaluation system are not to be misused to bestow compensation benefits on those who are voluntarily or mandatorily retiring or separating and have theretofore drawn pay and allowances, received promotions, and continued on unlimited active duty status while tolerating physical impairments that have not actually precluded Coast Guard service. ...

Given this rule, the Board finds that the applicant's claim regarding his discharge from active duty on May 5, 2004, lacks potential merit. In this regard, the Board notes that the applicant's command, the Pacific Strike Team, assigned him a reentry code that would allow him to reenlist on active duty and allowed him to enlist in the Reserve when he opted to leave active duty. Presumably, the command would not have done so had he been physically unfit for military service.⁵

6. The applicant claimed that his 10% disability ratings for three medical conditions from the DVA prove that he should have been medically retired from active duty. However, not every medical impairment ratable by the DVA makes a member unfit for duty.⁶ For example, the applicant was allowed to enlist in the Coast Guard and was repeatedly found fit for duty despite his high frequency hearing loss arising from his prior service in the Navy. He also continued serving on active duty for several years while sometimes seeking treatment for lower back pain and knee pain. DVA ratings are "not determinative of the same issues involved in military disability cases,"⁷ and the fact that the DVA assigned the applicant three 10% disability ratings for

⁵ 33 C.F.R. § 52.24(b).

⁶ PDES Manual, Article 2.C.2.i., states, "The existence of a physical defect or condition that is ratable under the standard schedule for rating disabilities in use by the Department of Veterans Affairs (DVA) does not of itself provide justification for, or entitlement to, separation or retirement from military service because of physical disability. Although a member may have physical impairments ratable in accordance with the VASRD, such impairments do not necessarily render him or her unfit for military duty. A member may have physical impairments that are not unfitting at the time of separation but which could affect potential civilian employment. The effect on some civilian pursuits may be significant. Such a member should apply to the Department of Veterans Affairs for disability compensation after release from active duty."

⁷ *Lord v. United States*, 2 Cl. Ct. 749, 754 (1983); see *Kirwin v. United States*, 23 Cl. Ct. 497, 507 (1991) ("The VA rating [in 1986] is irrelevant to the question of plaintiff's fitness for duty at the time of his discharge in 1978. Indeed, the fact that the VA retroactively applied plaintiff's 100% temporary disability rating only to 1982, and not 1978, gives some indication that plaintiff was not suffering from PTSD at the time of his discharge."); *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

his left knee and lower back conditions and tinnitus does not prove that the Coast Guard erred in finding him fit for separation in 2004.⁸

7. Because this cursory review of the merits reveals a lack of potential merit and the applicant did not justify his failure to timely seek correction of his discharge in 2004, the Board will not excuse the application's untimeliness or waive the statute of limitations with regard to the applicant's request that his discharge on May 5, 2004, be changed to a medical retirement. This request should be denied.

8. The Board notes that the applicant objected to his discharge from the Reserve in 2007, but in his application to the Board, he made no specific allegations or requests regarding his treatment by the Reserve in 2007. For example, he did not request incapacitation pay or a Notice of Eligibility; he did not provide any information about or make any allegations about his inactive duty; and he did not submit any medical records showing that he was being treated for back pain or knee pain in 2007 and could not perform active or inactive duty because of these conditions. Although the Coast Guard claimed that the applicant was discharged due to non-service connected medical conditions based on the June 10, 2007, memorandum, the record shows that the applicant's CO amended his memorandum on July 31, 2007, to state that the applicant was being discharged due to a "previously rated service related disqualifying condition." Given the lack of a specific request and allegations regarding the applicant's discharge from the Reserve in 2007 and the lack of supporting medical records from that time, however, the Board finds that this issue has not been properly presented or supported by substantial evidence, and so the Board will not address whether the applicant's discharge from the Reserve in 2007 was erroneous or unjust in this decision. If the applicant wants the Board to address this issue, he should file a new application with specific allegations, a request for relief regarding his discharge in 2007, and medical records supporting a claim that he was unfit for duty in 2007 and being treated for service-connected disabilities within six months of the date of this decision.

(ORDER AND SIGNATURES ON NEXT PAGE)

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.").

⁸ The medical records submitted by the applicant did not include the Report of Examination for his pre-separation physical examination, but a doctor's medical note shows that he did undergo a pre-separation physical examination on March 23, 2004. Presumably, the applicant would not have been discharged had the requirements of Article 2.C.2.b. of the PDES Manual been met. 33 C.F.R. § 52.24(b).

ORDER

The application of former [REDACTED], USCG, for correction of his military record is denied, but if within six months of the date of this decision, he submits an application regarding his discharge from the Reserve in 2007 with specific allegations, a specific request for relief, and supporting documentation as described in finding 8, above, the Board will grant further consideration.

May 29, 2014

