

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2014-213



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 August 22, 2014, and assigned it to staff member [REDACTED] to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated October 9, 2015, 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, a [REDACTED] in the Coast Guard, who voluntarily retired from the Coast Guard Reserve in March 2005, asked the Board to correct his record to show that he had been deemed unfit for duty at that time and was medically retired. Specifically, he requested the following:

- a. the removal of his March 19, 2005, transfer to the Retired Reserve;
- b. retroactive reinstatement to the Temporary Disability Retirement List (TDRL) from August 17, 2003, to March 18, 2005;
- c. transfer to the Permanent Disability Retirement List (PDRL) for combat-related disabilities based on ratings from the Department of Veterans' Affairs (DVA) for status-post stroke and below the knee paralysis, post-stroke upper right extremity weakness, stroke-related dementia, and stroke-related deep venous thrombosis and pulmonary embolism with weakness in his lower extremity; and
- d. back pay since his retirement on March 18, 2005.

The applicant alleged that while serving on active duty in March and July 2003, he suffered two strokes (cerebral vascular accidents (CVAs)) and incurred post-traumatic stress

disorder (PTSD).¹ He stated that he later suffered stroke complications of deep venous thrombosis² and pulmonary embolism,³ as well as a third stroke in 2004.

The applicant alleged that his first stroke occurred while on active duty in March 2003, after three weeks of “combat operations” in [REDACTED]. At that time, he alleged, he had an episode where he experienced “malaise and disorientation” as well as “weakness, dizziness, disorientation, and fuzzy thinking.” The applicant stated that he was given a “sick chit” and slept for about 36 hours subsequent to that incident. He alleged that his second stroke occurred while on active duty in July 2003, when he was in a hotel room. He alleged that it was at this time that he began to display strange behavior that eventually led to a bad Officer Evaluation Report (OER) and subsequent investigation.

The applicant stated that in both of the alleged stroke incidents in March and July 2003, he believed that his symptoms were because of extreme stress and therefore did not seek medical treatment. He argued that it was common for service members in combat zones to refrain from seeking mental health treatment for what appeared to be stress-related injuries. In addition, the applicant argued that only “perfunctory Navy active duty medical records” exist in his record, such as vaccine documents. However, he did not explain what documents are missing from his record.

To explain his failure to seek medical treatment for the alleged strokes in 2003, the applicant claimed that he was not given a proper medical examination at the time of his early departure from his active duty overseas assignment due to a “hasty re-deployment to CONUS under formal investigation followed by immediate interrogation.” The applicant alleged that due to his “unusual Coast Guard wartime attachment to the Navy,” it is likely that both components expected the other would provide exit exams.

The applicant stated that in August 2003, when he was interviewed by an investigator about his conduct, the interview was cut short because of his condition and he was taken back to his hotel room, where he felt confused, weak, and paralyzed. He alleged he attempted to call 911 but was physically unable to move and spent the night in that condition. He alleged that his symptoms took over two weeks to resolve themselves.

¹ Post-traumatic stress disorder (PTSD), once called shell shock or battle fatigue syndrome, is a serious condition that can develop after a person has experienced or witnessed a traumatic or terrifying event in which serious physical harm occurred or was threatened. PTSD is a lasting consequence of traumatic ordeals that cause intense fear, helplessness, or horror, such as a sexual or physical assault, the unexpected death of a loved one, an accident, war, or natural disaster. Families of victims can also develop PTSD, as can emergency personnel and rescue workers. Most people who experience a traumatic event will have reactions that may include shock, anger, nervousness, fear, and even guilt. These reactions are common; and for most people, they go away over time. For a person with PTSD, however, these feelings continue and even increase, becoming so strong that they keep the person from living a normal life. People with PTSD have symptoms for longer than one month and cannot function as well as before the event occurred.

² Deep venous thrombosis is a blood clot that forms in a vein deep inside a part of the body. It mainly affects the large veins in the lower leg and thigh.

³ Pulmonary embolism is a blockage of the main artery of the lung or one of its branches by a substance that has travelled from elsewhere in the body through the bloodstream (embolism). The most common cause is deep vein thrombosis (a blood clot in the deep veins of the legs or pelvis) that breaks off and migrates to the lung.

In September 2003, the applicant stated, his impairment was obvious when he returned to his civilian job. He was unable to manage multiple tasks, complete tasks on time, process information, make decisions, or execute projects successfully. The applicant also claimed that around that time, his mother noticed increasing word-finding difficulties, right-hand jerks, intermittent trembling/tremoring, and episodes of staring and “not being mentally there.”

The applicant stated that in mid-2004, he received a temporary leave of absence from his civilian employer, and he never resumed his Coast Guard Reserve duties. He alleged that he has been unemployable since November 2004 and has been going to “ongoing treatment for his numerous, and unstable physical and mental problems.” By 2005, the applicant stated, he was hospitalized for “seizures associated with stroke and PTSD,” and he was ultimately diagnosed as having vascular dementia.⁴

The applicant alleged that on March 7, 2005, he was arrested in the parking lot of the DVA hospital and taken by Coast Guard Investigative Service (CGIS) agents in handcuffs to the Coast Guard Base and to his employment. The applicant alleged that he was taken due to accusations of desertion, was questioned about his medical history, and was forced to give a blood sample and fingerprints. He said that he was then immediately released with no charges filed, driven to his car, and told to report for duty the next day, where he would be taken to Madigan Army Hospital for an independent evaluation. That evening, the applicant felt that he had a large seizure, went to the DVA hospital, and was admitted for five days.

The applicant claimed that after his arrest he submitted a request to retire based upon the recommendation of his Commanding Officer. He did not provide any other details regarding this conversation or recommendation. He stated that he concurrently requested and was granted a federal disability retirement as a USCG civilian employee.

The applicant stated that he pursued Social Security Administration and Department of Veteran’s Affairs (DVA) disability appeals from 2004 to 2009. He argued that these appeals support his current claims in that they are “forensic in nature, tracing the 2003 active duty origin of [his] complex medical conditions, to include military unfitness.” The applicant argued that a “totality of evidence” in the record indicates that his Coast Guard performance was substantially impaired due to medical unfitness by August 2003.

The applicant stated that although his application is not timely, it is in the interest of justice for the Board to consider it because his medical records from 2004 through 2013 and a 2013 forensic opinion of his condition “are now sufficiently clear to warrant relief for error or injustice.” The applicant also submitted a narrative of his counsel’s physical disability since 2010.

⁴ Vascular dementia is a term describing problems with reasoning, planning, judgment, memory and other thought processes caused by brain damage from impaired blood flow to your brain. You can develop vascular dementia after a stroke blocks an artery in your brain, but strokes don't always cause vascular dementia. Whether a stroke affects your thinking and reasoning depends on your stroke's severity and location. Vascular dementia also can result from other conditions that damage blood vessels and reduce circulation, depriving your brain of vital oxygen and nutrients.

In support of his allegations, the applicant submitted copies of some of his military and medical records, which are included in the summary below, and an evaluation dated December 20, 2013, by a staff psychologist and Director of Research at an "Evidence Based Treatment Center." The psychologist stated that based on her review of the applicant's medical records, OERs and the DVA Rating Decision from 2009, although the applicant was diagnosed with PTSD on June 30, 2004, "it is likely that [the applicant] was experiencing significant PTSD by July 2003 or earlier." The evaluation further concluded that the OER the applicant received upon early transfer from deployment "represents a clear marked change in performance that is likely attributable to the combination of trauma, PTSD symptoms, dissociative events, and/or stroke, and likely indicated that he was unfit for duty at the time."

SUMMARY OF APPLICANT'S MILITARY AND MEDICAL RECORDS

The applicant enlisted in the Coast Guard Reserve in 1980. He drilled regularly, performed his period of active duty training each year, and was commissioned an officer in [REDACTED]. The applicant also became a federal civilian employee for the Coast Guard in [REDACTED]. He performed 5 months, 21 days of active duty pursuant to the first Gulf War from January 6 to June 26, 1991. He received high marks on his Reserve OERs and was promoted to lieutenant commander in [REDACTED].

On October 1, 2002, the applicant was ordered to active duty to participate in operations in response to the terrorist attacks on September 11, 2001. He was initially assigned to the [REDACTED], but in December 2002, he was sent [REDACTED].

The applicant's military records include a criminal/security investigation, which states that he began telling other Coast Guard officers that he was an employee of the Central Intelligence Agency (CIA) while assigned to a Reserve port security unit (PSU) from 1999 to 2001. He told one officer that he was a CIA operative and was taking trips overseas for the CIA. He told another officer that he was providing information about commercial shipping to the CIA. In addition, he explained his lateness and absences from drills on "company business" and showed a CIA business card, which he alleged was his CIA supervisor's.

According to the investigation, after being deployed overseas to [REDACTED] the applicant showed the COs of two PSUs a CIA business card and claimed to be working for and paid by the CIA. Based on this claim, the applicant repeatedly told them he had secret information about when the invasion would start; retained control of operational records and other classified information; lied about whether certain information was available; told other officers not to ask questions about certain matters; and made frequent trips off the base while out of uniform.

The applicant was recalled from overseas in July 2003. His security clearance was suspended pending the resolution of the investigation. On July 17, 2003, he was interviewed by CGIS agents. The applicant told them that he was not an employee of the CIA, denied having claimed to be one, but admitted showing the CIA analyst's business card to the COs of two PSUs

in [REDACTED] to try to bolster his credibility with them; to create the impression that he was affiliated with the CIA; and to convince them that there was information being discussed at a higher security classification that he could not share with them and so they should stop asking questions about certain matters. He denied having claimed to work *for* the CIA but admitted to having claimed to work *with* the CIA based on having once met a CIA analyst. The applicant also admitted to attending meetings at the embassy in [REDACTED] while out of uniform.

On August 6, 2003, the applicant submitted a five-page statement for the investigation. He denied having had any unauthorized contacts with representatives of foreign governments or having provided and classified information to an unauthorized person. He admitted that he had said some “stupid” things overseas but claimed that none of them were illegal or involved violations of security. The applicant explained that his marriage was troubled; he had had three affairs, including one with a foreign national; and he was paying child support for a child born to one of his lovers. He further explained the degree to which he had previously discussed knowledge gained through his work for VTS with or in the hearing of family and friends.

On August 17, 2003, the applicant was released from active duty. He did not return to active duty or drill at his Reserve unit thereafter.

In January 2004, while the investigation was pending, the applicant was treated for a concussion that he received while playing ice hockey.

According to a CGIS report on the pending investigation dated March 10, 2004, on August 15, 2003, the FBI had sought permission to interview the applicant’s foreign lover. In December 2003, foreign officials agreed to interview her on behalf of the FBI. The applicant had verbally admitted in an interview that he had discussed some classified information with his foreign lover. He had also made trips to her country for personal reasons that he had claimed as work-related temporary duty. In addition, he had bragged to fellow officers about owning certain property where he would retire that he did not actually own.

The applicant’s final OER covers the period April 1, 2002, to March 31, 2004, and notes that as a reservist the periods from April 1 to December 20, 2002, and August 2003 to March 2004, were “unobserved” as the applicant had not returned to duty. On this OER, the applicant received the worst possible mark of 1 (on a scale of 1 to 7) for “Judgment,” “Responsibility,” and “Professional Presence” and low marks of 3 for “Directing Others,” “Teamwork,” and “Workplace Climate,” as well as a mark of “unsatisfactory for grade or billet” on the OER comparison scale. The supporting comments state that the applicant’s low marks resulted from “questionable actions and dishonest claims of his affiliation to the CIA.” The comments also note that the applicant was “admonished for persistent violations of force protection rules, [such as] persistently carry[ing] visible military weapons while wearing civilian clothes in public places in [REDACTED]” The OER notes that based on his behavior, the applicant was subsequently “assigned to duties to keep him away from certain people and was retrograded [to the Continental United States] (CONUS) early.”

On June 30, 2004, the applicant sought treatment from a counselor at a VA hospital. He stated that because of the classified investigation of his activities, he was being treated as a

“pariah” and felt depressed and anxious. He complained of erratic sleep, “decreased energy/motivation and memory/concentration; pt states still able to do work despite this.” He also claimed to have been a “lead planner for SEALs operation” and “rebuilding Iraqi coastal forces.” The applicant also told the counselor about “military traumas,” including one involving a child. The applicant denied prior mental health problems but stated that a brother had been diagnosed with PTSD after serving in Vietnam. The counselor reported that the applicant had “no overt cognitive impairment” and opined that he had an adjustment disorder. She noted that there was a need to rule out PTSD.

The investigation was delayed while the FBI sought information from the applicant’s foreign lover. According to a CGIS report dated August 16, 2004, she denied having knowingly received classified information from the applicant. When a CGIS agent tried to re-interview the applicant on August 3, 2004, he referred the agent to his attorney and refused to answer more questions. CGIS closed the investigation and forwarded it for action.

On August 5, 2004, the applicant sought treatment for chest pain in his right side. He noted that he had a history of pleurisy and had suffered a collapsed left lung in 1993. The applicant told the doctor that he played hockey each week and that he had suffered from depression and insomnia since returning from overseas. However, he was reluctant to begin treatment for depression.

On August 9, 2004, the applicant consulted a DVA doctor to have him be the applicant’s primary care physician. The applicant reported depression, anxiety, diarrhea, pleurisy, and other lung problems. The applicant told the doctor he had worked with Navy and SEAL operations and “in contaminated water and land” and wanted compensation. The doctor prescribed Prozac, advised the applicant to quit smoking, and referred him for a GI consult and to a doctor who dealt with chemical exposure and compensation.

On August 23, 2004, the applicant called his doctor’s office complaining of pleurisy symptoms. He was advised to report to the emergency room but declined.

At a drop-in appointment on September 22, 2004, the applicant complained of “pleuritic chest pain.” He stated that he had suffered a partial collapsed lung and pericarditis in 1993 and “[d]id well until August of this year when symptoms recurred.” The doctor diagnosed a pulmonary embolism, admitted the applicant to the hospital, and placed him on a blood thinner. Testing revealed “[o]cclusive and non-occlusive tibial/peroneal vein thrombus bilaterally. Distal popliteal vein thrombosis (peroneal branch) on left. Superficial femoral veins appears small bilaterally but were compressible.” The applicant was advised to stop playing ice hockey due to the potential for injury and bleeding. The pulmonary embolism was attributed to blood clots in the applicant’s legs. A doctor noted that it might be hereditary because the applicant’s father had suffered an early stroke.

After reviewing the investigation, on October 5, 2004, an attorney for the Coast Guard recommended permanently revoking the applicant’s security clearance; disposing of the numerous UCMJ violations at a Flag Mast; initiating a “show cause” board to revoke the applicant’s

Reserve commission; and consulting the FBI and other concerned agencies with regard to the disposition of the allegations of espionage and unlawful disclosure.

On November 6, 2004, the applicant called his doctor's office stating that he was in Canada and that the day before, he had started to feel dizzy and have tremors after which he took a four-hour drive and felt like he was in a dream. He tried to write his name and could not. The nurse advised him to call paramedics and get to an emergency room.

In a medical note dated November 19, 2004, a doctor reported that in a phone call the previous day, the applicant stated that, while attending a business meeting in Canada about two weeks earlier, he had suddenly felt dizzy and confused, was unable to find words or write his name, suffered a severe headache, and felt weak on his right side. An EMT in Canada had advised him he might have suffered a stroke but there was no follow-up. The applicant's doctor asked the applicant to come to the hospital right away, but the applicant waited till the following day. He was admitted to the hospital and diagnosed with a "recent cerebrovascular accident." The test also showed a "subacute CVA in Lt parietal subcortical white matter, and evidence of old Rt BG and SCWM lacunae. Etiologies of strokes in a fairly younger person may be embolic, vascular disorders (inflammatory, etc.), hypercoagulable states, metabolic disorders. ... The staring episodes and Rt hand jerks may be manifestations of [seizures]." The applicant was advised to stop playing ice hockey since he was taking a blood thinner.

While in the hospital on November 30, 2004, the applicant told a neurological student that he thought he had had two previous strokes while on active duty: first in April 2004 (sic), when he was sleep-deprived and stressed and he slept for two days and felt disoriented, tired, had slow speech and a headache and felt "out of it" for about a week; and second in July 2004 (sic) "when he experienced a very traumatic return from Iraq" and felt a severe headache, left side weakness, slow speech, blurry vision, disorientation, vomiting, and was unable to get out of bed." On December 1, 2004, a doctor noted that a CVT could have been related to the applicant's blood clots and pulmonary embolism.

On December 23, 2004, Dr. H, a DVA practitioner, wrote a letter on behalf of the applicant stating that the applicant had "a number of significant health concerns related to his recent deployment in Iraq. In my opinion, it would be in his best interest if he could be excused from his normal activities for a minimum of one month (until the end of January) for a period of recuperation and further medical evaluation and treatment."

On February 7, 2005, the applicant underwent a DVA evaluation for PTSD. The applicant alleged that he had seen the body of a girl who had helped him being torn apart by dogs. He also alleged that he had seen the crews of two tugs that had been dropping land mines for the enemy killed; that his father had died on January 14, 2005, and that a friend had died of a myocardial infarction on January 15, 2005. The applicant told the doctor that he had been exonerated of all the charges against him, which was not true as the charges were still pending. The doctor diagnosed him with PTSD, major depressive disorder, a prior lung collapse and right lung embolism, and a possible stroke, resulting in right side weakness.

On February 8, 2005, Dr. S, a DVA practitioner, wrote a letter on behalf of the applicant stating that he “has a recently diagnosed (December 2004) blood coagulation abnormality that has resulted in both arterial (strokes) and venous clots (deep vein thrombosis or blood clots in the legs) as well as Pulmonary Emboli (blood clots in the lungs). Because of his propensity to form clots, he must be maintained on a blood thinner for the rest of his life. ... He is also being evaluated for possible seizures that affect his speech and cognitive skills. He will be hospitalized soon on the neurology service for continuous EED monitoring. ... I feel strongly that he is not medically stable at this time with these possible seizures in addition to his other medical problems to be returning to any type of work where he relies on his cognitive skills.” The applicant was also advised to stop playing ice hockey.

At a compensation and pension examination on January 28, 2005, the applicant claimed that he had “started noticing right-sided weakness with what he calls stroke-type of findings, dragging of the foot, difficulty in finding words” in July 2003, two days after he returned from the Persian Gulf and that he had experienced the same symptoms again in November 2004. The report states that the applicant’s MRI studies had been “negative except mild cerebral volume loss and small area of increased C2 and a flair signal within the right thalamus, likely a small old lacunar infarct, but no acute findings were detected. He does not have any pulmonary symptoms at this time.”

On February 10, 2005, the applicant underwent a CT scan of his head due to his complaints of altered mental status. The report stated the following:

FINDINGS: There is a 5-mm oval well-circumscribed low-density area in the right thalamic region. The rest of the brain parenchyma is normal in density. There is no mass effect or intracranial hemorrhage. There are no sub- or epidural collections. The lateral ventricles are midline and normal in size. The cisterns are intact. The sinuses are clear.

IMPRESSION: Negative, except for an old small right lacunar infarct⁵ in the region of the thalamus, which was present on a prior study from 01/09/04.

Also on February 10, 2005, the applicant was issued orders to return to active duty for a month from February 11 to March 12, 2005. The orders state that the purpose was to resolve the UCMJ charges against him in a disciplinary proceeding. However, the applicant did not report for duty and was charged with desertion. On March 3, 2005, the Coast Guard requested copies of the applicant’s DVA medical records.

On March 7, 2005, CGIS agents arrested him in the parking lot of the hospital where he was to be admitted for EEG monitoring. However, he was released the same day so that he undergo the monitoring. From March 8 to 11, 2005, the applicant underwent EEG for monitoring at the hospital for potential seizures because he had complained of a “variety of spells including staring and unresponsiveness, a variety of subjective symptoms, and twitching in the right side of his body.” The EEG study “reveal[ed] normal waking and sleeping EEG activity as

⁵ Lacunar infarcts are small deep infarcts caused by occlusion of the penetrating branches of the major cerebral arteries. An infarct is a small localized area of dead tissue resulting from failure of blood supply.

described above. There are no abnormalities present with a specific correlation with seizures. This study captures 14 subjective episodes without EEG change. This study therefore fails to provide evidence to document the presence of epileptic seizures.”

On March 11, 2005, the applicant’s counselor wrote his Coast Guard command a letter stating that the applicant was having “great difficulty with memory, organization, decision making, and persistence; that stress provoked deterioration; that it was “very hard to understand the Coast Guard’s treatment of this individual who has served honorably for many years”; and that such treatment was aggravating the applicant’s condition.

On March 14, 2005, the applicant submitted a request to transfer to retired status RET-2 (Retired Awaiting Pay at Age 60).

On March 16, 2005, a CGIS agent confirmed with Dr. H and Dr. S that they had written the letters dated December 23, 2004, and February 8, 2005, at the applicant’s request to avoid having to return to active duty as ordered.

On March 18, 2005, the Coast Guard issued orders that immediately transferred the applicant to the Retired Reserve in a non-pay status until age 60.

On April 1, 2005, a doctor wrote a letter to the Office of Personnel Management (presumably pursuant to his civilian employment) and listed the applicant’s diagnoses as deep vein thrombosis, pulmonary embolism and infarction, depression, PTSD, and acute reaction to stress. She explained that after the EEG study in March 2005, the psychiatrist had concluded that the applicant’s staring episodes were an acute reaction to stress, rather than seizures, and recommended that the applicant be admitted to another hospital for his “acute stress reaction, depression, anxiety, and a flare of his PTSD,” but the applicant declined further hospitalization. She noted that it was possible that his cognitive problems “are secondary to anxiety.” On April 15, 2005, this doctor wrote a letter to the Coast Guard noting that the applicant was having “difficulty speaking and functioning due most likely to his PTSD, anxiety and depression but very possibly due to these previous strokes as well.” She stated that she believed he had a “permanent and total disability” and would not be able to work.

During a psychological evaluation on May 12 and 14, 2005, the applicant told the psychologist that he had been “involved in the first Gulf War and in several additional military activities in various other countries.” He stated that in 2002, the Navy had “requested he be assigned to them because of his excellent reputation” and that he had been attached to the SEALs in [REDACTED]. He stated that on the first night of the war, he “made the decision not to let Coast Guard people participate” in securing oil platforms, which had angered the Coast Guard. He stated that he had “served 7 months in Iraq and was involved in numerous active and covert activities in the area.” The applicant told the psychologist that he had suffered a major stroke in November 2004 and that since then he had “realized that he had two other, less debilitating strokes – the first during his assignment in Iraq and the second during his interrogation by the Coast Guard.” The psychologist reported that the applicant was

alert, fully oriented and not confused. He spoke freely, volunteered a good deal of information and elaborated appropriately on his responses whenever asked to do so. His speech was fully coherent at all times and was very logical, well organized and goal directed. Mild word retrieval difficulties, a slight stutter and noticeable hesitation in responding were evident throughout the session. His answers were always appropriate to what he had been asked although he was somewhat prone to provide excessive, unnecessary detail. He was never tangential or rambling. His associations were very tight and there were no indications of thought disorder. He was never overly concrete nor perseverative. He presented as intellectually functioning in the high average range. ... [He] seemed acutely and unpleasantly aware of the multiple ways he finds himself changed from his condition prior to the Iraq assignment. He described himself as formerly a highly proficient “multi-tasker” but now finds himself often unable to get even a single task done.

On July 6, 2006, a CGIS agent signed a statement for the applicant, in which he stated that at one point during his interview with the in August 2003, the applicant’s demeanor changed and his “complexion became ashen and his gaze fixed.” The agent asked the applicant if he was alright and the applicant stated that he felt nauseous and was possibly going to vomit. The agent stated he believed that the applicant’s demeanor was a result of “the heat of the interview room on that summer day and the gravity of the situation relating to the questions he was being asked.” He noted that the applicant “left under his own power” at the end of the interview.⁶

A medical report dated September 24, 2007, stated that the applicant’s CT scan in 2004 showed evidence of a prior stroke. It also stated that because the applicant’s stroke was formally diagnosed within one year of the applicant’s discharge from military service, “it would presumptively be related to his military service” and that it is “at least as likely as not that [the applicant’s] reported episodes in April 2003 and July 2003 represented onset of his stroke condition and this occurred during deployment and active duty.”

On October 2, 2007, the applicant’s physician wrote a letter to the DVA Regional office and provided her assessment of the applicant based on her 22 psychotherapy sessions with him since 2006. She noted that the applicant now met the diagnostic criteria for vascular dementia.

In February of 2009, the DVA issued a rating decision for the applicant in which it made the following findings:

- 20% for service connection for status-post cerebral vascular accident, effective October 20, 2004 and resumed from June 1, 2005.
- 60% for service connection for pulmonary embolus with bilateral deep venous thrombosis, effective October 20, 2004.

⁶ In his application, the applicant alleged that the interview was cut short and that he was taken to his hotel room.

- 50% for service connection for vascular dementia with cognitive disorder not otherwise specified secondary to cerebral vascular accident, effective October 20, 2004.
- 10% for service connection for weakness, right upper extremity secondary to cerebral vascular accident, effective October 20, 2004 and resumed from June 1, 2005.
- Entitlement to special monthly compensation based on housebound criteria being met, effective from November 19, 2004 to June 1, 2005.
- Entitlement to Individual Unemployability, effective August 21, 2006.
- Basic eligibility to Dependent's Educational Assistance, established from August 21, 2006.

In the rating decision, the DVA noted that there were no medical records from the applicant's most recent period of active duty but that DVA law required the DVA to give the applicant's reports of malaise and disorientation greater weight in lieu of their inability to obtain the records. The DVA stated that their decision was effective October 20, 2004, which was the date the applicant's original claim for "lack of concentration and memory loss" and "difficulty finding words" was received.

The DVA noted the applicant was diagnosed in November 2004 with CVA with probable hypercoagulability and that the applicant's doctor diagnosed him with status-post stroke roughly one year from the applicant's discharge from active duty. The DVA noted that they were giving weight to the applicant's doctor's opinion in granting service connection for stroke and its residuals, such as right-lower extremity weakness.

The DVA did not make any decisions or ratings based on PTSD. The DVA rating decision states that the applicant withdrew his appeals for service-connected PTSD and seizure disorder based on the grants made in the rating decision.

VIEWS OF THE COAST GUARD

On March 17, 2015, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case. In doing so, he adopted the findings and analysis provided in the memorandum, dated March 19, 2015, signed by Commander, Personnel Service Center (PSC).

PSC stated that the application was not timely and should not be considered by the Board beyond a cursory review. They specifically noted that the applicant retired from the Coast Guard in 2005 and did not provide sufficient justification for a delay in filing ten years later.

PSC stated that the applicant was ordered to active duty for his participation in operations in "response to the world trade center and pentagon attacks" from October 2002 to August 2003.

PSC stated that he was then released from his active duty orders on July 19, 2003, pursuant to a Coast Guard investigation of his conduct.

PSC stated that the last performance evaluation of the applicant for the period of April 1, 2002 to March 31, 2004 shows a decline in performance, particularly in relation to his other evaluations of record. PSC specifically noted that per the OER, the applicant's low marks were related to the applicant's "questionable actions and dishonest claims of his affiliation to the CIA." PSC also noted that the applicant's performance was rated "unsatisfactory for grade or billet."

PSC noted that the applicant's medical records indicate that he was diagnosed with "adjustment disorder related to Coast Guard investigation" on June 30, 2004. PSC noted that more than a year after he stopped performing active or inactive duty, the applicant had been diagnosed with moderately severe PTSD by the DVA, as well as "major depressive disorder, right lung embolism, left lung collapse, and right-side paralysis and possible cerebrovascular accident." PSC noted that at the time of his diagnosis, the applicant's "psychological impairment was suggested it be precluding of employment but not permanent, [and] rather an "exacerbation of symptoms of his PTSD and MDD via the impact of bereavement, recent medical hospitalization and investigation." To this end, PSC cited the Article 2.C.2.e. of the Physical Disability Evaluation System Manual, which states that an "evaluee convalescing from a disease or injury that reasonably may be expected to improve so that he or she will be able to perform the duties of his or her office, grade, rank, or rating in the near future may be found fit for duty."

PSC stated that there was no documentation in the applicant's record that an evaluation by the Coast Guard's Physical Disabilities Evaluation System (PDES) was ever initiated by the applicant's command, a medical officer, or the applicant himself (despite medical evaluations diagnosis impairments).

PSC also noted that on March 3, 2005, the Coast Guard requested a copy of all medical records regarding the applicant and that a mental health counselor responded to the request on March 11, 2005, stating that the applicant had severe limitations that impacted his abilities in all areas...and was not fit for military service.

PSC noted that in March 2005 the applicant was detained by CGIS agents on a charge of desertion. PSC stated that per the applicant's account of events, he was instructed to report for duty for an independent evaluation at Madigan Army Medical Hospital. However, the applicant then requested retirement. PSC noted that according to the applicant's statement, he also requested and was granted a disability retirement from the Coast Guard as a civilian in March 2005.

PSC noted that the applicant was awarded compensation from the DVA after they found service connection for status cerebral vascular accident (20%), pulmonary embolus (60%), vascular dementia (50%), and weakness in the right upper extremity (10%). PSC found the applicant's argument that since the DVA rated his conditions, the Coast Guard should have processed him through PDES and medically retired him to be meritless. PSC specifically stated that the "argument is common but meritless as a significant number of veterans receive compensation

from the VA for medical conditions that were created or exacerbated while in the service that were not considered unfitting for duty by the military members' Command (and therefore did not qualify for a Medical Evaluation Board (MEB)) while they were serving on Active Duty or in the Reserve." PSC also noted that there are no Coast Guard medical evaluations included in the record that concur with the findings of the February 7, 2005 psychiatric evaluation or December 20, 2013 psychological report.

PSC recommended that no relief be granted in this case and stated that the applicant did not prove by a preponderance of evidence that he suffered an injustice due to a Coast Guard error. PSC stated that the applicant was properly processed for retirement pursuant to Coast Guard policy and particularly noted that the applicant had voluntarily requested retirement from the Coast Guard. Furthermore, PSC stated that the "disability evaluation system is not to be misused to bestow compensation benefits on those who are voluntarily retiring."

PSC noted that the applicant was extensively investigated by CGIS upon his return from active duty in Iraq. PSC states that the investigation "would have suspended or initiated medical evaluation had the Applicant's Command or a Coast Guard Medical Officer elected to refer the applicant for an evaluation. However, the record showed that there was no initiation of the PDES process, and adequate performance of duties is presumed even though medical evidence indicates that he has impairments."

Finally, PSC pointed out that the applicant will be compensated for his Coast Guard service because he qualified for and will receive retirement pay upon reaching 60 years of age and that the applicant stated that he had received a medical retirement as a civilian in the Coast Guard and currently receives compensation from the DVA as well.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

The applicant was several extensions of the time to respond to the advisory opinion and submitted his response on August 11, 2015. The applicant pointed out that the advisory opinion was not written by a physician and did not contain a forensic analysis or address the forensic analysis the applicant obtained.

The applicant also argued that the Coast Guard's legal arguments are based on a superficial review and mistaken facts. The applicant repeated his allegation that he unknowingly suffered two strokes in 2003. The applicant alleged that the DVA had diagnosed him as "status post-strokes" and as suffering from PTSD by August 2004 and with major depression by January 2005. The applicant alleged that he was not performing drills during this period only because of his medical condition. He noted that he applied for DVA and Social Security benefits in the fall of 2004.

The applicant alleged that when the applicant's command ordered him to active duty on February 10, 2005, they did so because they thought he was feigning illness or exaggerating disabilities to avoid duty and the investigation. His DVA doctors objected to his being recalled to active duty because he was unfit. The Coast Guard ignored their objections and arrested him to have him undergo an examination by their own doctors, but he was released the same day so he

could return to the DVA's care for EEG monitoring. The applicant stated that his GAF score was assessed at just 35 on March 11, 2005, just a few days before his retirement, which proves that he was both disabled and incompetent.

The applicant argued that under Appendix A at 8-17 of the Reserve Policy Manual, his command had a duty to process him for a medical separation and should have resolved reasonable doubt in his favor. However, the command did not do so "despite the increasing awareness since mid-2004 of the causal-connection between his strokes, PTSD and alleged 2003 bizarre duty performance."

The applicant alleged that his retirement was actually involuntary and a "constructive disability discharge without pay under legal duress." Citing *Murphy v. United States*, 69 Fed. Cl. 593 (2006), the applicant argued that the law "permits disability benefits when a retirement is deemed involuntary under duress."

APPLICABLE LAW AND POLICY

Article 8.C.12. of the Reserve Policy Manual, COMDTINST M1001.28A (RPM), states that members may request transfer to RET-2 status at any time after receipt of notification of completion of 20 years satisfactory federal service...

Article 8.D.3 Members of the RPM states that a member who is on Inactive Duty or Active Duty for 30 Days or less, and who is determined by the Commandant to be unfit to perform the duties of their office, grade, rank, or rating because of physical disability resulting from injury, may be permanently retired with retired pay, if the Commandant also determines that:

- a. The disability is of a permanent nature, and
- b. Is the proximate result of performing active or inactive duty, or
- c. Is not a pre-existing condition or the result of the member's intentional misconduct or willful neglect, and was not incurred during a period of unauthorized absence, and
- d. Either:
 - (1) The member has at least 20 years service computed under 10 U.S.C. 12733, or
 - (2) The disability is at least 30 percent.

Article 2.A.15. of the Physical Disability Evaluation System Manual, COMDTINST M1850.2D (PDES Manual), defines "Fit For Duty" as "the status of a member who is physically and mentally able to perform the duties of office, grade, rank or rating. This includes specialized duty such as duty involving flying or diving only if the performance of the specialized duty is a requirement of the member's enlisted rating."

Article 2.A.23. of the PDES Manual defines "incurrence of disability" as the moment "when the disease or injury is contracted or suffered as distinguished from a later date when the member's physical impairment is diagnosed or the physical impairment renders the member unfit for continued duty."

Article 2.C.2. of the PDES Manual states the following:

Fit For Duty/Unfit for Continued Duty. The following policies relate to fitness for duty:

a. The sole standard in making determinations of physical disability as a basis for retirement or separation shall be unfitness to perform the duties of office, grade, rank or rating because of disease or injury incurred or aggravated through military service. Each case is to be considered by relating the nature and degree of physical disability of the evaluatee concerned to the requirements and duties that a member may reasonably be expected to perform in his or her office, grade, rank or rating. ...

b. 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. The following policies apply:

(1) Continued performance of duty until a member is scheduled for separation or retirement for reasons other than physical disability creates a presumption of fitness for duty. This presumption may be overcome if it is established by a preponderance of the evidence that:

- (a) the member, because of disability, was physically unable to perform adequately in his or her assigned duties; or
- (b) acute, grave illness or injury, or other deterioration of the member's physical condition occurred immediately prior to or coincident with processing for separation or retirement for reasons other than physical disability which rendered him or her unfit for further duty. ...

(2) A member being processed for separation or retirement for reasons other than physical disability shall not be referred for disability evaluation unless the conditions in paragraphs 2.C.2.b.(1)(a) or (b) are met.

• • •

i. 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.

Article 2.C.11. of the PDES Manual states the following:

a. Disability statutes do not preclude disciplinary or administrative separation under applicable portions of the Personnel Manual, COMDTINST M1000.6 (series). If a member is being processed for a disability retirement or separation, and proceedings to administratively separate the member for misconduct, disci-

plinary proceedings which could result in a punitive discharge of the member, or an unsuspended punitive discharge of the member is pending, final action on the disability evaluation proceedings will be suspended, and the non-disability action monitored by [PSC]. ...

b. If the court martial or administrative process does not result in the execution of a punitive or an administrative discharge, the disability evaluation process will resume. If a punitive or administrative discharge is executed, the disability evaluation case will be closed and the proceedings filed in the member's official medical record.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's military records and submissions, the Coast Guard's advisory opinion, and applicable law:

1. An application to the Board must be filed within three years of the day the applicant discovers the alleged error in his record.⁷ In the present case, the applicant had retained an attorney to represent him in the investigation, and he made a voluntary request for retirement in March 2005. He was applying for DVA benefits and a civilian retirement based on his medical conditions in 2004 and 2005. The preponderance of the evidence shows that the applicant knew of his medical diagnoses and the alleged error and injustice in his record in March 2005. Therefore, his application is untimely.

2. 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 (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."⁸ 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."⁹

3. The applicant failed to justify his delay in applying to this Board. The record shows that he had hired an attorney to represent him to the Coast Guard in 2004 and that, based on his claims and diagnoses, he was able to timely pursue a civil disability retirement from the Coast Guard, DVA benefits, and Social Security disability benefits. The Board finds that the applicant has not justified his long delay in applying to the BCMR.

4. The Board's cursory review of the merits shows that the applicant's claim cannot prevail. The laws for disability retirement or severance pay do not apply unless a member incurs or aggravates his disability while serving on active or inactive duty or his disability is the proximate result of performing active or inactive duty.¹⁰ Although the applicant alleged that he

⁷ 10 U.S.C. § 1552(b).

⁸ *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

⁹ *Id.* at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

¹⁰ 10 U.S.C. §§ 1201 *et seq.*

incurred seizures or strokes while on active duty in March 2003 and July 2003, there is no contemporaneous medical or military record of any medical consultation or treatment at those times. He performed no active or inactive duty after August 17, 2003, and only the applicant's own self-serving claims to doctors and counselors since December 2004 suggest that he incurred a seizure or stroke in March or July 2003. Moreover, the applicant is not a credible witness. Although he alleged that his lies about working for the CIA were caused by strokes incurred while deployed overseas in 2003, the record shows that he had a long-standing habit of telling self-serving lies about himself, his work, military matters, and military duties, and he started telling such lies long before he began serving on active duty in October 2002. Therefore, his claims regarding the onset of his medical conditions and his doctors' forensic opinions based on these claims are not reliable.

5. Following the suspension of his security clearance and the investigation of his misconduct, the applicant was found to have committed several offenses under the Uniform Code of Military Justice and recommended for Flag Mast. In February 2005, he was recalled to active duty for a month for the disposition of these charges, refused to report for duty, and was charged with desertion. The preponderance of the evidence shows that a week after being arrested on March 7, 2005, the applicant opted to request retirement, instead of undergoing disciplinary proceedings for the numerous UCMJ charges against him. Although the applicant alleged that he is entitled to a disability separation despite his request to retire, under Article 2.C.11. of the PDES Manual, disciplinary proceedings suspend any processing for a disability separation and may result in an administrative or punitive separation despite impairments.

6. The record shows that on the date of separation, the applicant had been diagnosed with concussion (due to an ice hockey game), deep vein thrombosis, and a suspected CVA in 2004 and PTSD (based on his claims) and an acute stress reaction that involved staring fixedly (seizures had been ruled out by EEG monitoring) in 2005. The DVA has awarded him a 20% rating for service-connected status-post CVA; a 60% rating for service-connected pulmonary embolus with bilateral deep venous thrombosis; a 50% rating for service-connected vascular dementia with cognitive disorder not otherwise specified secondary to a CVA; and a 10% rating for weakness in his right arm secondary to the CVA—all effective as of October 20, 2004. The DVA did not award him a rating for service-connected PTSD. However, when he suffered the diagnosed pulmonary embolism and CVA in 2004, he had not served any active or inactive duty for more than a year. In addition, DVA ratings are “not determinative of the same issues involved in military disability cases.”¹¹ Although the DVA's doctors have decided that the applicant's conditions are service-connected based on his claims, their decision does not prove that the applicant actually incurred or aggravated these conditions while on active or inactive duty; that any of his active or inactive duty was the proximate cause of these conditions; or that the Coast Guard erred in retiring him pursuant to his request instead of convening disciplinary

¹¹ *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 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.”).

proceedings. Even if there were evidence that one of his medical conditions had been incurred or aggravated while on—or was the proximate cause of—active or inactive duty, under Article 2.C.11. of the PDES Manual, such a finding would not make his administrative retirement in lieu of disciplinary proceedings erroneous or unjust.

7. The Board finds insufficient evidence of error or injustice in this case to warrant excusing the applicant's long delay in filing his application. 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 ON NEXT PAGE)

ORDER

The application of [REDACTED] USCGR (Retired), for correction of his military record is denied.

October 9, 2015

