DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2018-041

[redacted]
[redacted] OS1

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the case after receiving the completed application on November 24, 2017,[1] and assigned it to staff attorney [redacted] to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated September 28, 2018, 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 honorably discharged on September 30, 2013, asked the Board to correct his record by upgrading his discharge to a medical retirement.[2] He requested that he be given the "full rights and privileges of a retired member" including "access to Tricare for [himself] and dependents, as well as base and commissary access." He argued that his conditions existed at the time of his discharge but stated that he was not given a Medical Evaluation Board (MEB) and instead was only referred to the Department of Veterans Affairs (VA).

The applicant stated that in August of 2013, he received a BCMR decision in his favor regarding a reenlistment bonus. He stated that he was given the option to either be paid the reenlistment bonus or to be released from active duty a few months early. Because being released from active duty early would mean he could move before the school year started, which he felt was better for his family, he chose that option. The applicant asserted that a Reserve recruiter informed him that he would need to complete a "retention physical" so that there would be no break in service between active duty and his entry into the Coast Guard Reserve. He stated that he was seen by a civilian doctor who "made it very clear that the results of [his] MRI were unacceptable, amongst other medical conditions incurred while on active duty, and that [he] was not fit for duty."

[1] The application was received by the Board on December 12, 2016.
[2] The applicant did not specify which injuries or conditions he believes qualified him for a medical retirement.

He claimed that with "the check of a box she ended [his] career." He stated that the doctor instructed him to follow up with the VA when he moved. He asserted that his medical examination and military career were over.

The applicant stated that since then, he has been rated with an 80% service-connected disability by the VA. He argued that it is "abundantly clear that the disabilities existed while on active duty, were all incurred during service, and were all present during the retention physical." He also argued that had he "not been leaving active duty already, [he] would have been placed on Medical Hold, been subject to Medical Review Board, and subsequently, been granted a Medical Retirement." He stated that he is not asking for additional monetary compensation, but he is seeking an upgrade to medical retirement for access to the associated benefits such as Tricare and commissary access.

Regarding the timing of his application, the applicant stated that he has been "working on this change for over 3 years, including [his] follow-up, as instructed, with the VA." He stated that it has been a long process. In support of his application, he provided several documents which are described in the Summary of the Record below. He provided a copy of a request he made to his state Senator requesting an upgrade to a medical retirement and the response from the Senator's office directing him to apply to the Discharge Review Board (DRB). He also provided a copy of an email from the DRB informing him that the DRB did not have the legal authority to mandate a medical retirement and directed him to apply to this Board.

SUMMARY OF THE RECORD

On July 25, 2013, the applicant received a decision from the BCMR. The applicant had been incorrectly counseled that he was eligible for a bonus if he signed a two year extension contract. The Coast Guard recommended that the applicant be given the opportunity to be expeditiously discharged because he was not entitled to the bonus he was promised. The applicant agreed with the Coast Guard's recommendation and requested to be discharged effective October 1, 2013. The Board found that the applicant had been incorrectly counseled regarding the extension contract and ordered relief by changing the term of the contract from 24 to 21 months, bringing the end of enlistment to September 30, 2013.

On August 8, 2013, the applicant filled out a Report of Medical History. On the portion asking "have you ever had or do you now have:" he answered "yes" to bronchitis; sinusitis; ear, nose, or throat trouble; painful shoulder, elbow or wrist; arthritis, rheumatism, or bursitis; recurrent back pain or any back problem; numbness or tingling; swollen or painful joints; broken, cracked or fractured bones; adverse reaction to serum, food, insect stings or medicine; car, train, sea, or air sickness; palpitation, pounding heart or abnormal heartbeat; nervous trouble of any sort, such as anxiety attacks; frequent trouble sleeping; received counseling of any type; depression or excessive worry; been evaluated or treated for a mental condition; been treated in an emergency room; been a patient in any type of hospital; and been treated by clinics, physicians, healers, or other practitioners within the past 5 years for other than minor illnesses.

In the explanation of "yes" answers he stated that in the winter months he experiences coughing due to bronchitis and sinusitis. For tinnitus he stated that he has ringing in his ears but

has not experienced hearing loss. He stated that he injured his wrist when he fell off a bike in 2001 while he was stationed at Petaluma, California, and it was "becoming more problematic as [he got] older." He stated that he suffered from constant back problems since an injury from weight lifting in 2008 at Guantanamo Bay, Cuba. He stated that he has arthritis in his back, three protruding discs, and pressure on a nerve. Regarding his knees, the applicant stated that he has a "constant knee ache" in both knees and he experienced pain on stairs or when he performed extended activity. He stated that he has experienced sea and air sickness intermittently. He stated that he experienced heart palpitations and elevated blood pressure. He indicated that he was currently being treated for post-traumatic stress disorder (PTSD) "to include anxiety, depression, mood swings, sleeplessness amongst others."

The applicant was seen for a medical examination on August 8, 2013. The first page indicates that the purpose of the examination was for retention and for separation (both boxes are checked). The doctor wrote more than a page of notes at the time of the examination. Many of the notes echo what the applicant had written in his explanation section on the Report of Medical History. The notes indicate that the applicant's back exhibited a decreased range of motion. The doctor noted that the applicant was "not in good general health due to above issues." The doctor diagnosed the applicant with chronic low back pain due to "disc disease" and disc protrusions, depression and anxiety secondary to deployment, tinnitus, and bilateral knee pain. The doctor also noted that the applicant was overweight. The doctor stated that the applicant needed to continue care "for all his issues at VA hospital closest to him." The doctor determined that the applicant was qualified for separation and was not qualified for retention.

Also on August 8, 2013, a Report of Medical Assessment was completed. The first page was completed and signed by the applicant on August 7, 2013. He indicated that his overall health was worse compared to his last medical assessment. He indicated that he did not have any illnesses or injuries since his last assessment that caused him to miss duty for longer than three days. He indicated that he did not have "any conditions which currently limit [his] ability to work in [his] primary military specialty or require geographic or assignment limitations." He also indicated that he intended to seek VA disability at the present time. The doctor stated that the applicant suffered from chronic low back pain secondary to disc disease and disc protrusions, depression and anxiety/PTSD secondary to deployment, tinnitus, bilateral knee pain, and stated that he is overweight. She stated that he needs to see his primary care physician and indicated that the purpose of this assessment was for the separation of the member. She stated that the applicant did not meet the physical standards for retention in the Coast Guard.

The applicant was honorably discharged on September 30, 2013. The narrative reason for separation is "Completion of Required Active Service." He received an RE-1 reenlistment code, indicating that he is eligible for reenlistment into the military. He had served a total of six years and two days on active duty and seven years, seven months, and ten days of prior inactive duty.

In the applicant's medical record is a copy of a VA decision dated April 8, 2014. He received a 10% rating for thoracolumbar spine intervertebral disc syndrome; 10% for lumbar radiculopathy; and 10% for tinnitus. A decision for "right wrist condition" was deferred. His applications for PTSD, left and right knee conditions were denied as not being service connected. His combined disability rating was 30%, effective from October 1, 2013.

There is a copy of a letter from the applicant in his medical record dated July 24, 2014, appealing the VA decision. He asserted that he provided enough evidence to prove that all of his conditions were service connected. He stated that he "was medically disqualified from duty and not permitted to enlist in the reserve force which began this process." He claimed that in addition to the pain he has suffered he had lost "irreplaceable benefits and military retirement."

The applicant's medical record contained a decision from the VA dated April 20, 2015. He received a 30% rating for PTSD; a 40% rating for thoracolumbar spine intervertebral disc syndrome; and 20% for lumbar radiculopathy, left lower extremity. The decision sheet also noted that he had been rated for cubital tunnel syndrome, right wrist for 10%. Given the changes made in this decision and the conditions that had previously been rated, he had a 50% disability rating effective October 1, 2013, and a 70% disability rating effective February 4, 2015.

The applicant provided a letter from the VA dated November 8, 2016, certifying that he had received a combined disability rating of 80% effective June 1, 2016. The letter does not indicate the injuries or conditions were considered in coming to this combined rating.[3]

VIEWS OF THE COAST GUARD

On April 24, 2018, 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. The JAG argued that the applicant inaccurately classified his "career as being ended by a physician 'with the check of a box.'" The JAG stated that for the applicant's previous BCMR decision, the Coast Guard had recommended denying relief when he had requested payment of a reenlistment bonus. The Board granted alternative relief, however, by "allowing the applicant to cancel his extension and be released from active duty immediately" if he so desired. The applicant agreed to forego the bonus and be discharged early. The JAG asserted that the BCMR made no decision on whether the applicant was eligible for the bonus or not. Upon separation, the applicant received an RE-1 reenlistment code. The JAG argued that the applicant "has not provided any evidence that he attempted to join the Coast Guard Reserve but was denied due to his medical condition."

The JAG stated that in order to qualify for a medical retirement, a member has to be evaluated by an MEB. A Commanding Officer or medical authority convene an MEB when they question the member's fitness for continued duty. The JAG argued that the applicant's "ability to perform his duties was never in question." The JAG stated that merely having a "physical disability does not automatically render an individual unfit for duty." The applicant was discharged because he chose to terminate his extension agreement early pursuant to his BCMR decision, not because of a medical condition. The JAG stated that the applicant was thoroughly examined prior to his discharge and the physician noted several "defects and conditions." The JAG argued that these conditions did not prevent the applicant from being able to perform his duties, though. He was therefore appropriately found qualified for separation and "counseled to seek treatment form the [VA] for his non-duty disqualifying medical issues."

[3] The associated VA decision was not in his medical record.

The JAG noted that the applicant did not identify a "particular duty disqualifying condition that would warrant his medical retirement." The applicant provided documentation from the VA verifying that he has a combined disability rating of 80% but he did not provide additional documentation to show what conditions were rated. The JAG noted that the effective date of the combined rating is June 1, 2016, which is several years after the applicant was discharged. The JAG explained that while the VA provides disability ratings for service-connected disabilities, that is not the same as a duty-disqualifying disability at the time of discharge. The JAG argued that the VA decision is not binding on the Coast Guard.

With the JAG's advisory opinion, he adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC). PSC stated that the application is not timely and therefore should not be considered beyond a cursory review. PSC argued that the applicant has not shown that an error or injustice occurred. He was found fit for separation because he was performing his duties at the commensurate paygrade. PSC therefore recommended that the Board deny relief.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On April 30, 2018, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within 30 days. On May 16, 2018, the applicant responded and stated that he disagreed with the Coast Guard's advisory opinion.

The applicant stated that his previous BCMR decision offered him either the bonus payment or early termination of the enlistment contract. He stated that he made his decision based on what was best for his family and because he had planned to enter the Coast Guard Reserve. He claimed that he was not required to have a separation physical but he was required to have a retention physical if he wished to enlist in the Coast Guard Reserve. He emphasized that his medical examination sheet has both boxes checked for retention and separation. The applicant claimed that he was told "personnel issues are separate from medical issues, and what happens during a physical does not affect the way a member is discharged, unless that member is discharged medically." He asserted that because he was determined to be unfit for duty he was prevented from enlisting in the Coast Guard Reserve. He gave the names of several people who, he alleged, could attest to the fact that the applicant had intended to join the Reserve after discharge.

The applicant asserted that his medical issues were disqualifying. He complained that since returning from deployment in 2008 he received civilian medical care. He claimed because of this the Coast Guard was unaware of the severity of his conditions. Regarding the timeliness of his application, he stated that his first VA application is dated the day after his release from active duty. He asserted that the award dates are "fluid … as they change with appeals, updates to percentage (or level of disability), and recalculation of final award." He stated that every condition that was identified during his Coast Guard physical has been recognized as a disability by the VA. He stated it "has been a long road" to get to the BCMR but that it was not the first avenue he pursued.

APPLICABLE REGULATIONS

The Physical Disability Evaluation System (PDES) Manual, COMDTINST M1850.2D, Article 2.A.38. defines "physical disability" as "[a]ny manifest or latent physical impairment or impairments due to disease, injury, or aggravation by service of an existing condition, regardless of the degree, that separately makes or in combination make a member unfit for continued duty." Article 2.C.2. states the following:

> Fit For Duty/Unfit for Continued Duty. The following policies relate to fitness for duty:
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> 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 evaluee concerned to the requirements and duties that a member may reasonably be expected to perform in his or her office, grade, rank or rating. In addition, before separation or permanent retirement may be ordered:
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> (1) There must be findings that the disability:
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> (a) is of a permanent nature and stable, and
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> (b) was not the result of intentional misconduct or willful neglect and was not incurred during a period of unauthorized absence.
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> b. The law that provides for disability retirement or separation (10 U.S.C. 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:
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> (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
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> (a) the member, because of disability, was physically unable to perform adequately in his or her assigned duties; or
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> (b) acute, grave illness or injury, or other significant 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.
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> (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 articles 2.C.2.b.(1)(a) or (b) are met.
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> (3) The determination of a grave or serious condition or significant deterioration must be made by a competent Coast Guard medical officer. Such medical authority will consult with the CGPC senior medical officer, as necessary, to ensure proper execution of this policy in light of the member's condition. The member's command may concurrently submit comment to the CGPC senior medical officer.
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> c. If a member being processed for separation or retirement for reasons other than physical disability adequately performed the duties of his or her office, grade, rank or rating, the member is deemed fit for duty even though medical evidence indicates he or she has impairments.
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> f. The following standards and criteria will not be used as the sole basis for making determinations that an evaluee is not fit for duty by reason of physical disability:

(1) inability to perform all duties of the office, grade, rank, or rating in every geographic location and under every conceivable circumstance. Where feasible, and if requested by the evaluee, consideration should be given to providing the member an opportunity for a change in rating to one in which the disability is no longer a disqualifying factor;

(2) inability to satisfy the standards for initial entry into military service, except as specified in article 2.C.2.g.;

(3) lack of a special skill in demand by the service;

(4) inability to qualify for specialized duties requiring a high degree of physical fitness, such as flying, unless it is a specific requirement of the enlisted rating;

(5) the presence of one or more physical defects that are sufficient to require referral for evaluation or that may be unfitting for a member in a different office, grade, rank, or rating; or

(6) pending voluntary or involuntary separation, retirement, or release to inactive status (see article 2.C.2.b.(1)).

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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. 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 DVA for disability compensation after release from active duty.

The Military Separations Manual, COMDTINST M1000.4, Article 1.A.9.a. states:

"Not fit for duty" is a local medical term meaning the member is unable to perform the immediate duties to which assigned for a short period of time. A finding of "not fit for duty" does not qualify the member for processing in the Physical Disability Evaluation System (PDES), and does not mean the member is not qualified for separation. A member could be "not fit for duty" and still be separated if the existing impairment does not lead to a physical disability.

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 submission and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552.

2. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice.[4] The applicant was discharged in 2013. Therefore, the preponderance of the evidence shows that the applicant knew of the alleged error in his record—the lack of a medical retirement as a result of his medical conditions—in 2013, and 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.[5] 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

[4] 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.
[5] 10 U.S.C. § 1552(b).

and the potential merits of the claim based on a cursory review"[6] 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."[7]

4. Regarding the delay of his application, the applicant explained that it has been a "long road" to the BCMR. He stated that he applied to the VA the day after he was discharged and there are several VA decisions in his medical file which indicate that he has been actively pursuing obtaining VA compensation. However, the BCMR process is separate from the VA disability compensation process. The Board therefore finds that the applicant's explanation for his delay is not compelling because he failed to show that anything prevented him from seeking correction of the alleged error or injustice more promptly.

5. A cursory review of the merits of this case indicates that the applicant cannot prevail. Under Article 2.C.2.a. of the PDES Manual, "[t]he 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." Under Article 2.C.2.b., when a member is voluntarily separating—as the applicant was in 2013—the member's performance of duties creates a presumption of fitness and the existence of medical impairments is insufficient to require the member to remain in the Service for PDES processing. In addition, under Article 2.C.2.b., a member who is voluntarily separating may only be retained for PDES processing if the member is physically unable to perform his duties or if an "acute, grave illness or injury, or other significant 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." In this case, the record shows that the applicant was ably performing his duties in 2013, and the applicant himself indicated on August 8, 2013, on a Report of Medical Assessment that he did not have "any conditions which currently limit [his] ability to work in [his] primary military specialty or require geographic or assignment limitations." While his medical records and the VA's disability ratings clearly show that the applicant had impairments, there is no evidence that he was physically unable to perform his duties or that an acute, grave illness or injury or significant deterioration of his condition occurred immediately before or coincident with his processing for his voluntary separation. None of the complaints the applicant listed on the Report of Medical History at his separation physical was new, and he had been serving on active duty despite those conditions for many years in some cases. In addition, he was assigned an RE-1 reenlistment code, showing that he was welcome to reenlist in the Service or the Reserve. The Board sees no reason to disturb the findings in the applicant's medical records, which are presumptively correct,[8] or to upgrade his discharge to a medical retirement.

6. The applicant also claimed that as a result of his separation physical he was unable to join the Coast Guard Reserve. He has provided no evidence that he attempted to join the Reserve

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[6] *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).
[7] *Id*. at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).
[8] 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.").

and failed on account of the physical examination findings. He alleged several times that he had intended to join the Reserve and he provided the names of several people who could attest to this fact. The Board does not doubt that the applicant intended to join the Reserve. However, the applicant appears to have made no actual attempts to join the Reserve after he was released from active duty and instead apparently assumed that he was unable to join based on his physical examination results. The applicant received an RE-1 reenlistment code on his DD 214, making him eligible for reenlistment. Therefore, based on the record before it, the Board finds that the applicant's claim cannot prevail on the merits.

7. 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 former OS1 [redacted], USCG, for correction of his military record is denied.

September 28, 2018

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