DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2018-049

[redacted]
SN (former)

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, 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, a former seaman who was placed on the Temporary Disability Retired List (TDRL) on January 19, 1988, but subsequently found fit for duty and discharged, through counsel asked the Board to correct his record by upgrading his discharge to a medical retirement.[1] The applicant claimed that sarcoidosis,[2] a medical condition that he incurred while on active duty, "rendered him unable to continue his Coast Guard career."

The applicant argued that when he was placed on the TDRL he should have been medically retired because the injuries he received in the Coast Guard still plague him "to this day." He argued that the Coast Guard erred in not sending him to a Physical Evaluation Board following his August

[1] The applicant's attorney actually requested that the applicant be added to the "retired roster under the Temporary Early Retirement Authority (TERA)." However, TERA became effective in 1992, and the applicant is requesting medical retirement effective January 19, 1988. More importantly, to be eligible for TERA, a member must have at least 15 years of service but less than 20. The applicant served for less than four years. Therefore, the Board will assume that the applicant is requesting an upgrade to medical retirement. P.L. 102-484, National Defense Authorization Act, F.Y. 1993.

[2] Sarcoidosis is a "chronic, progressive, systemic granulomatous reticulosis characterized by hard tubercles" that "can effect almost any organ or tissue." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, 32ND ED. (2012), p. 1668. Acute sarcoidosis has "an abrupt onset and a high rate of spontaneous remission," while chronic sarcoidosis has "an insidious onset and slow development." *Id.*

22, 1995, Medical Board Evaluation.[3] He argued that his condition did leave him unfit for continued service. He explained that sarcoidosis "is unique in that it doesn't effect [sic] everyone in the same way. Whereas, in others, the condition may worsen over time … Sarcoidosis, is essentially an autoimmune disease, and particularly pulmonary sarcoidosis can lead to persistent dry cough, shortness of breath and arthralgia's (joint pain), among other symptoms." The applicant argued that his symptoms "would obviously have precluded [him] from completing basic military and seaman duties." He stated that he still suffers from sarcoidosis and he now has a 60% disability rating from the Department of Veterans' Affairs (VA) for this condition.

Regarding the timeliness of his application, the applicant acknowledged that the alleged error occurred on January 19, 1988. However, he argued that "this case certainly deserved to be determined on the merits." In support of his application the applicant provided several documents which are discussed in the Summary of the Record.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on April 30, 1984.

On December 18, 1987, the applicant was informed that he was being placed on the TDRL.[4] The Commandant had determined that he was "unfit to perform the duties of [his] rating by reason of a physical disability rated at 30 per centum disabling, and that such disability may be of a permanent nature." His temporary retirement would become effective on January 20, 1988.

The applicant was placed on the TDRL on January 19, 1988. He had served on active duty for three years, eight months, and twenty days.

On August 4 and 5, 1992, the applicant received his final TDRL medical examination.[5] On August 4, a pulmonologist noted that the applicant had been diagnosed in November 1987 with stage I sarcoidosis. The applicant had been on only an anti-inflammatory medication since 1988, when he discontinued prednisone (a steroid). He reported that there had been no change in his symptoms since he had last been examined. The doctor concluded that pertaining to the applicant's sarcoidosis, he was asymptomatic at that time. The doctor noted that sarcoidosis "is a disease manifested by exacerbations and remissions, and at [the] time there [was] no evidence of any duty-limiting, pulmonary disease." On August 5, 1992, the applicant was examined by a doctor specializing in rheumatology. This doctor agreed that there was no current evidence of "ongoing active sarcoidosis." He reported that from "the rheumatological standpoint, [he saw] no reason why this patient cannot return to active duty." He stated that he had discussed the case with the

[3] The applicant did not receive a Medical Board Evaluation on this date. He was removed from the TDRL and discharged in 1992.

[4] Under 10 U.S.C. § 1202, as in effect in 1988, a when a member had a disability that was not known to be permanent and stable, the member could be placed on the TDRL with retired pay.

[5] Under 10 U.S.C. §§ 1210, 1211, as in effect from 1988 to 1992, a member on the TDRL underwent periodic evaluations at least once every 18 months to determine whether there had been a change in the member's condition, and a member could not remain on the TDRL for more than five years. If the member became fit for duty while on the TDRL, the member would be allowed to reenlist on active duty or discharged if he did not reenlist. If the member did not become fit for duty, he would be medically separated or retired based on the percentage disability rating assigned.

pulmonologist and she agreed that the applicant could return to active duty. The applicant had also stated that he was "eager to return to active duty."

On October 1, 1992, the applicant's case was examined by the Central Physical Evaluation Board (CPEB). The CPEB found that the applicant was fit for duty and was "fit to perform the duties of his grade or rate." The recommended disposition was that he return to duty.

On November 13, 1992, the applicant was informed that the Commandant had approved the findings of the CPEB. The applicant was found fit to perform the duties of seaman and therefore would be removed from the TDRL. He was advised that if he applied to reenlist within fifteen days of notification, he would be reenlisted back onto active duty. If not, he would be removed from the TDRL and discharged at the end of the fifteen days.

The applicant signed the endorsement page included with the November 13, 1992, letter on November 30, 1992. He indicated that he did not wish to reenlist with the Coast Guard.

On December 4, 1992, the applicant was informed that because he did not wish to reenlist within the fifteen-day period, his status on the TDRL was terminated on December 3, 1992. He was therefore discharged effective December 3, 1992. The letter states that his honorable discharge certificate and button were enclosed. He was also provided with a DD 215 changing his reentry code to an RE-1 so that he could reenlist with the military should he so choose.

The applicant provided documentation from the VA dated July 23, 2015, showing that he has a 60% service-connected disability rating due to sarcoidosis. Eighteen other problems were listed but this was the only condition for which the applicant received a service-connected disability rating.

VIEWS OF THE COAST GUARD

On April 26, 2018, the Judge Advocate General 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 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 did not present evidence to show that the there was an error in the Medical Board's findings that he was fit for duty. The final TDRL examination found that he was asymptomatic at the time and he was able to return to active duty. PSC therefore asserted that there was no reason to change the applicant's record "without evidence to support that his condition was unfitting at the time of being discharged." PSC recommended that the Board deny the requested 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. The applicant, through counsel, replied on May 30, 2018, and stated that he disagreed with the Coast Guard's advisory opinion.

The applicant stated that he suffered from sarcoidosis, "which ultimately led to his discharge" from the Coast Guard. The applicant highlighted the fact that the pulmonologist noted during his August 4, 1994, medical examination that sarcoidosis "is a disease manifested by exacerbations and remissions." He argued that the doctors and CPEB "failed to acknowledge that although the applicant's sarcoidosis was in a remission at the time of his last TDRL check-up, the condition was going to exacerbate eventually, which is exactly what happened." He asserted that he opted not to go back onto active duty and then his condition "worsened to the point that his quality of life is now greatly diminished." He stated that he is suffering from a medical condition that is a direct result from his active duty service and "he is forced to live without being made whole by the military." The applicant argued that this is a *prima facie* case of material injustice because of the applicant's sacrifice of his bodily health in order to serve the Coast Guard. He therefore requested that the Board upgrade his discharge to a medical retirement effective January 19, 1988.

APPLICABLE REGULATIONS

The Physical Disability Manual, CONDTINST M1850.2, Chapter 2.C.2.i. states that the "existence of a physical defect or condition that is ratable under the standard schedule for rating disabilities in use by the [VA] 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. … Such a member should apply to the [VA] for disability compensation after release from active duty."

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.[6] The applicant was placed on the TDRL in 1988 and was discharged in 1992. The preponderance of the evidence shows that he knew his diagnosis and the nature of his illness at the time. Therefore, the preponderance of the evidence shows that the applicant knew of the alleged error in his record no later than 1992, and his application is untimely.

[6] 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.

3. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.[7] 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"[8] 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."[9]

4. Regarding the delay of his application, the applicant explained that "this case certainly deserves to be determined on the merits." The Board finds that the applicant's argument 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 it cannot prevail. The record contains no evidence that substantiates the applicant's allegations of error or injustice in his official military record, which is presumptively correct.[10] The record shows that the applicant was placed on the TDRL in 1988, presumably because his doctors had reported that his disability due to sarcoidosis was either not permanent, not stable, or both, which is required for a permanent medical separation or retirement under 10 U.S.C. §§ 1201 or 1203. After over four years on the TDRL, the applicant was examined by two doctors specializing in pulmonary and rheumatology medicine for his final TDRL examination. Both doctors found that the applicant was fit for duty, and the applicant told one of the doctors that he was "eager" to return to active duty. However, after being given the option of returning to active duty, he chose to be discharged rather than reenlist, as indicated by his November 30, 1992, endorsement. Therefore, he was removed from the TDRL and discharged. These records are presumptively correct,[11] and the applicant has submitted nothing to rebut them. The applicant argued that because the VA recently granted him a 60% disability rating he should have received a medical retirement in 1988. However, in accordance with the Physical Disability Evaluation System Manual, Chapter 2.C.2.i., a VA rating does not provide entitlement to a military medical retirement. Under 10 U.S.C. § 1201 and the PDES Manual, medical retirements are based on the member's permanent unfitness to perform duty at the time of separation, not many years later.

6. The applicant now has a significant, service-connected disability, but providing for veterans who become disabled because of service-connected disabilities years after their separation from the Service is exactly the purpose of the VA's medical system and disability benefit system. Based on the record before it, the Board finds that the applicant's claim for a medical retirement from the Coast Guard retroactive to 1988 (or 1992) cannot prevail on the merits. Accordingly, the Board will not excuse the application's untimeliness or waive the statute of limitations. The applicant's request should be denied.

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[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] 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.").
[11] *Id.*

ORDER

The application of former SN [redacted], USCG, for correction of his military record is denied.

September 28, 2018

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