DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2018-159

[redacted]

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application on June 13, 2018, and assigned the case to a member of the staff to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated July 23, 2021, 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 Electrician's Mate First Class (pay grade E-6) who retired from the Coast Guard Reserve in 1994, asked the Board to correct his record by changing his retirement from a standard Reserve retirement to a disability retirement. To receive a standard retirement, a reservist must have at least 20 years of qualifying, credible service in the Coast Guard and Coast Guard Reserve. The applicant stated that his disability claim is based upon a myocardial infarction he suffered while he was serving with the Selected Reserve and on his exposure to hazardous and toxic substances during his military career. The applicant listed the date of discovery of the alleged error or injustice as March 6, 2018, but noted that he had been applying to the Department of Veterans' Affairs (VA) for disability benefits since 1998.

The applicant alleged that the myocardial infarction (MI) that he suffered in 1989 began while he was on duty as a reservist in the Selected Reserve (SELRES). The applicant stated that although he did not go to the hospital until later that evening, when his wife took him, his pain and symptoms began earlier in the day when he was on Base. The applicant alleged that in 1994, the Coast Guard human resources department that processed his retirement was negligent and misrepresented his retirement options. The applicant argued that the human resources department should have processed him for disability retirement because he had suffered a MI while on duty as a reservist.

The applicant further alleged that he was exposed to multiple toxic chemicals and substances while working on Coast Guard cutters built before 1991, including lead, asbestos, tetroethylene, benzene, trichloroethylene, and radiation. He claimed that while exposed to the chemicals and substances through his work on pre-1991 cutters, he was provided insufficient personal protective equipment by the Coast Guard to properly protect him from the harmful effects of the substances. The applicant also alleged that he had been exposed to chemicals at Superfund sites approved by the Department of Defense but did not specify which Superfund sites or when the exposure occurred.

The applicant included primarily medical documents to support his argument that his MI occurred while in service and that all of his current conditions should be linked to exposure to toxic substances. He alleged that the records of his MI are not in his military record because he was only eligible to use Coast Guard medical facilities while on active duty status. The applicant also included various personal accounts of his experiences and health issues and a couple of statements from former Coast Guard members stating that they supported the applicant's accounts of his medical conditions.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on April 4, 1969, for four years. He continued serving on active duty until March 19, 1979, when he was honorably discharged upon the expiration of his second enlistment. The applicant then transferred to the SELRES, where he drilled regularly and performed annual active duty training periods. When not on duty, he worked as a civilian electrician for the Navy.

The applicant's medical records show that beginning in March 1984, he was treated for coronary artery disease and hypertension by civilian physicians. At 7:35 p.m. on Tuesday, November 21, 1989, the applicant was admitted to a local hospital. An emergency room physician noted that the applicant reported that he had felt chest pain, as if someone had punched him in the chest, at about noon. He had been in a meeting and had not been exerting himself. The applicant told the doctor that he had felt sweaty and nauseated in the afternoon. When he began having severe chest that evening, his wife had driven him to the hospital. The applicant was admitted to the hospital, and tests showed that he had suffered an MI.

The applicant's Reserve Retirement Points Statement shows that he performed four drills (one drill weekend) and no active duty in November 1989. He did not drill in December 1989, but between January of 1990 and September of 1994, the applicant continued to drill as a member of the SELRES in a Fit for Full Duty Status. His performance evaluations show that he continued to perform his duties satisfactorily.

On September 10, 1990, the applicant was notified of his completion of twenty years of service satisfactory for retirement purposes per Chapter 67 Title 10 U.S.C.

On March 4, 1994, the applicant submitted a request to be placed in retired status as of May 1, 1994. On September 1, 1994, the applicant was assigned to the Individual Ready Reserve awaiting approval of his retirement request.

On December 14, 1994, the applicant was transferred to the Retired Reserve Without Pay (RET-2) effective January 1, 1995. As of December 31, 1994, the applicant had accrued a total of 25 years, 8 months, and 28 days of creditable service.

On August 10, 1998, the Department of Veterans Affairs issued a Rating Decision. The VA rated the applicant as being 30% disabled based on a dilated left ventricle, which was found to be service-connected, effective January 27, 1998. The VA denied the applicant's request for a service-connected disability rating for a left knee injury and back strain.

In March 2018, the Coast Guard issued "ALCOAST 090/18 Medical Documentation of Asbestos and Lead Exposure on Coast Guard Cutters Update." The ALCOAST update provided guidance for current and former Coast Guard members who may have been exposed to asbestos and/or lead while working on pre-1991 cutters. The update provided guidance on the documentation of potential exposure to hazardous materials for current and former members with active Service Treatment Records (STR). For those veterans and retirees without active STRs, the update provided a link to a website entitled "Information for Coast Guard Veterans and Retirees Filing for Veterans Affairs Disability Compensation Due to Asbestos- and Lead-Related Health Effects."

VIEWS OF THE COAST GUARD

On December 19, 2018, a judge advocate (JAG) of the Coast Guard submitted an initial advisory opinion in which she recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC). Following the receipt of new medical records submitted by the applicant, the JAG issued a supplemental advisory opinion on January 23, 2019, in which she maintained her recommendation that the Board deny relief in this case and adopted the supplemental findings and analysis provided by PSC.

In recommending the denial of relief, the JAG found the applicant's request to be untimely. The JAG stated that the applicant's claimed date of discovery, March of 2018, directly contradicted the applicant's claim that he has been applying to the VA for benefits since 1998. The JAG further stated that even if the applicant had simply been applying for VA disability benefits and not a change to the actual characterization of his retirement, the applicant should have been aware of the alleged error in his record, namely that he had not received a disability retirement upon separation from the Coast Guard. The JAG further found that the applicant failed to show by a preponderance of the evidence that he was entitled to a disability retirement. Even if the applicant had provided documentation to show that his MI occurred while on active duty status, the JAG stated that the applicant continued to serve in the SELRES for approximately four years before retiring. The JAG argued that a disability retirement would only have been appropriate if the applicant had been deemed unfit for service and separated due to his impairments. A disability retirement is not justified just because a member has or incurs an injury or illness during active duty service. Finally, the JAG stated that the applicant had not provided any documentation, other than personal claims and statements, to show that he was exposed to hazardous or toxic substances. Assuming the

applicant had been exposed, however, the JAG stated that the proper forum to address any disability claims arising from exposure to toxic substances is the VA, not the Coast Guard.

In the supplemental opinion, PSC found that according to the evidence submitted by the applicant, he had been given a 30% disability rating by the VA on August 10, 1998. PSC stated, however, that a disability rating by the VA is not indicative of whether an applicant was entitled to a disability retirement upon separation from the Coast Guard. PSC also stated medical documentation policy of asbestos and lead exposure on Coast Guard cutters applies to members with a prior permanent duty assignment on Coast Guard cutters constructed before 1991. Members who are no longer in service should file a claim with the VA.

In the supplemental advisory opinion, the JAG made additional findings and again recommended denying relief in this case. The JAG stated that while the applicant submitted voluminous medical records in response to the original advisory opinion, none of the documents substantiate the applicant's claim that he was on duty at the time of the MI. Nor do they show that he was ever found unfit for duty from the time of his MI in 1989 until his retirement. Although the applicant provided evidence that he had drilled during November of 1989, no other evidence was provided to establish that the MI occurred while the applicant was in an active status. On the other hand, the applicant acknowledged that the medical records of his MI would not be in his Coast Guard medical record because he had not been serving in an active duty status to be able to receive military medical care. The JAG argued that the applicant's own personal statements are not sufficient to establish by a preponderance of the evidence that the Coast Guard committed an error or injustice. Finally, the JAG stated that even if the applicant was on active duty status when the MI occurred, he would not necessarily be entitled to a disability retirement because he was fit for duty thereafter.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On December 21, 2018, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. In response to the advisory opinion, the applicant submitted voluminous medical records to support his claim, most of which came from the VA's medical records. Because so much additional documentation was submitted by the applicant, the PSC and JAG issued supplementary opinions to accommodate the new evidence

On April 23, 2019, the applicant sent a letter to the BCMR in response to the advisory opinion asking for a reconsideration of his claims. The applicant argued that because he had been given a disability rating of 30% by the VA in 1998, the "human resources" of the Coast Guard committed an error by not processing his retirement as a disability retirement in 1995. The applicant stated that he was distressed and unaware at the time of his retirement, and thus, it was the responsibility of the Coast Guard to properly process his retirement. The applicant also stated that the health records from the MI were not in his military medical records because of the applicant's reserve status at the time the MI occurred. The applicant claimed that he could only visit military or VA hospitals when on "weekend warrior" active status whereas the MI occurred on a Tuesday. In his reply, the applicant included his medical records in support of his claims.

On March 12, 2019, the applicant sent another letter to the BCMR providing evidence that he had been applying to the VA for disability benefits since 1998. The applicant stated that he was unaware that he could apply directly to the Coast Guard for a disability retirement without first obtaining a disability rating from the VA. The applicant again alleged that the Coast Guard had failed to educate him on the consequences of his potential disabilities through the retirement process. He also alleged that the Coast Guard did not perform medical evaluations when he left both active duty and the Reserve. The applicant further claimed that he was forced into voluntary retirement due to his medical conditions before he had intended to retire.

On June 21, 2019, the applicant sent a letter to the BCMR reiterating that because he was given a 30% disability rating by the VA, he should have been processed for disability retirement. The applicant also restated his allegations about being exposed to toxic and hazardous chemicals during his service. He stated that his illnesses and disabilities were present when he left the service

On July 15, 2019, the applicant sent another letter to the BCMR accompanied by another packet of medical records. In sum, between the application and the subsequent additional documents, the applicant provided approximately 800 pages of medical records and VA records.

On January 24, 2020, the Chair sent the applicant a copy of the Coast Guard's supplemental views and invited him to respond within 30 days. The BCMR received no additional responses from the applicant.

APPLICABLE LAW AND POLICY

For reservists on inactive duty in 1994, a disability retirement could be granted under the following conditions:

> § 1204. Members on active duty for 30 days or less: retirement
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> Upon a determination by the Secretary concerned that a member of the armed forces not covered by section 1201, 1202, or 1203 of this title is unfit to perform the duties of his office, grade, rank, or rating because of physical disability, the Secretary may retire the member with retired pay computed under section 1401 of this title, if the Secretary also determines that—
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> (1) based upon accepted medical principles, the disability is of a permanent nature and stable;
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> (2) the disability is the proximate result of performing active duty or inactive-duty training or of traveling directly to or from the place at which such duty is performed;
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> (3) the disability is not the result of the member's intentional misconduct or willful neglect, and was not incurred during a period of unauthorized absence; and
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> (4) either—
> (A) the member has at least 20 years of service computed under section 1208 of this title; or
> (B) the disability is at least 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs at the time of the determination.

Chapter 12.C.4 of the Reserve Administration and Training Manual (RATMAN)[1] in effect in 1994 prescribes requirements for the retirement of reservists being retired from inactive duty

[1] COMDTINST M1001.28 currently provides guidance on the policies for administration of the Coast Guard Reserve.

for reasons other than physical disability. For those reservists being processed for disability retirement, however, Personnel Manual, COMDTINST M1000.6 (series) and the Physical Disability Evaluation System (PDES), COMDTINST M1850.2 (series) provide guidance and instruction. Although physical evaluations are required for those members retiring from active duty, Chapter 8.C.4. states that "no physical standards are prescribed and no physical examination is specifically required for transfer to retired status."

The PDES Manual[2] governs the separation or retirement of members due to physical disability. Chapter 2.C.2. of the PDES Manual states that "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." Chapter 2.A.15. defines the term "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…" Chapter 2.C.2. further provides the following:

> b. The law that provides for disability retirement or separation (Chapter 61, Title 10, U.S. Code) is designed to compensate members whose military service is terminated due to a physical disability that has rendered the member 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 service 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 service member, because of a disability, was physically unable to perform adequately the duties of office, grade, rank or rating; or
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> (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 the service member unfit for further duty.
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> (2) Service members who are being process for separation or retirement for reasons other than physical disability shall not be referred for disability evaluation unless their physical condition reasonably prompts doubt that they are fit to continue to perform the duties of their office, grade, rank or rating.
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> (c) If the evidence establishes that service members adequately performed the duties of their office, grade, rank or rating until the time they were referred for physical evaluation, they might be considered fit for duty even though medical evidence indicates they have impairments.
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> (i) The existence of a physical defect or condition that is ratable under the standard schedule of rating disabilities in use by the [Department of Veterans Affairs] 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

[2] COMDTINST M1850.2B was in effect at the time of the applicant's retirement until it was replaced by COMDTINST M1850.2C on July 19, 1996.

> ratable in accordance with the VASRD, such impairments do not necessarily render the member unfit for military duty…

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions based on 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.[3] The applicant claimed he discovered the alleged error on March 6, 2018. However, the applicant also stated that he had been applying to the VA for disability benefits since 1998, his VA records show that he has known of his service-connected disability for a long time, and he knew he had suffered an MI upon his retirement on December 31, 1994. Therefore, the preponderance of the evidence shows that the applicant knew of the alleged error in his record at the time of his retirement, 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.[4] 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"[5] 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."[6] Pursuant to these requirements, the Board finds the following:

a. Regarding his delay in applying to the Board, the applicant failed to explain or justify his very long delay in seeking a medical retirement. The applicant stated that he was unaware of the error until a patient advocate at the VA pointed out that he had not been given a disability retirement. However, a preponderance of the evidence shows that the applicant must have been aware that he had not received a disability retirement from the Coast Guard. And the voluminous VA medical records that the applicant submitted show that he attempted to obtain disability benefits from the VA soon after he retired from the Service. While the applicant claimed he was not aware that he could apply directly to the Board for a change in the characterization of his retirement prior to receiving a VA rating, he provided no compelling reason for waiting 20 years to contest his lack of a disability retirement after receiving a VA disability rating in 1998. The Board finds that the applicant's lack of explanation for the delay is not compelling because he failed to show that anything prevented him from seeking correction of the alleged error or injustice more promptly.

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[3] 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.
[4] 10 U.S.C. § 1552(b).
[5] *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).
[6] *Id*. at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

b. A cursory review of the merits of this case shows that the applicant's claim lacks potential merit. The disputed record is presumptively correct,[7] and the record contains no evidence that substantiates the applicant's claim for a disability retirement. Under 10 U.S.C. § 1204, a reservist had to be permanently disabled on the date of discharge by a disability that was the proximate result of performing active duty or inactive duty training to be entitled to a disability retirement in 1994. And under the PDES Manual, a member had to be "unfit to perform the duties of the member's office, grade, rank, or rating because of physical disability," to be processed for a disability separation. In addition, continued service until a member is retired or separated for reasons other than physical disability creates a presumption of fitness for duty. In this case, the applicant's MI occurred in 1989, but he continued to drill in the Reserve until he voluntarily requested retirement in 1994, and there is no evidence showing that he was unfit to perform his duties during that period. Thus, he has not overcome the presumption that he was fit for duty.

c. The VA's rating decision in 1998 is unpersuasive because pursuant to 38 C.F.R. § 4.1, in assigning ratings, the VA considers the extent to which all of a veteran's "service-connected" disabilities currently render him unable to work in civilian life, whether or not these disabilities rendered the veteran unfit for duty at the time of his separation from the Service. Therefore, VA ratings are "not determinative of the same issues involved in military disability cases."[8]

d. Finally, the applicant claimed that the Coast Guard committed an error when it failed to provide a physical evaluation prior to his retirement. However, Chapter 12.C.4. of the RATMAN clearly states that physical evaluations were only required when a member was being separated from active duty, not when a member retired from inactive duty in the Reserve. Thus, the applicant was not entitled to a physical examination before he retired.

e. In support of his argument for a disability retirement, the applicant also claimed that he was exposed to various toxic and hazardous chemicals while working on Coast Guard cutters. He stated that he suffers from various ailments and health issues that stem from his exposure to such substances. However, for this exposure to support his claim for a disability retirement, the applicant must have suffered from these health issues before he retired from the Coast Guard and must have been found unfit to perform his duties. The applicant provided no evidence, other than personal anecdote, that he was exposed to toxic substances as a reservist, and there is no evidence that he was unfit for duty before he retired from the Coast Guard.

4. Accordingly, the Board will not excuse the application's untimeliness or waive the statute of limitations to conduct a thorough review of the medical records and merits of the

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[7] 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.").

[8] *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.").

applicant's claims. His request should be denied. The Board notes that the VA was created in large part to provide benefits for veterans whose service-connected medical conditions worsen and become disabling after their separation from the military. In addition, the VA has created a system for veterans to apply for disability compensation relating to asbestos and lead exposure. The applicant should seek assistance from the VA if he would like to pursue disability compensation for exposure to toxic substances.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

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

July 23, 2021

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