DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2019-111

[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 on May 1, 2019, upon receipt of the completed application and the applicant's military records.

This final decision, dated March 1, 2023, is 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 medically retired from the Coast Guard for Post-Traumatic Stress Disorder (PTSD) on April 15, 1980, asked the Board to upgrade her permanent disability rating from the Coast Guard from 30% to 100%. She also requested reconsideration of the Board's prior decision in BCMR 2005-031, which denied her request to raise her paygrade from E-3 to E-4.

The applicant asserted her disability rating should be raised to 100% because her condition of PTSD caused by military sexual trauma (MST) was not taken into consideration when her disability rating was established. The applicant maintained that on October 31, 1979, she was sexually assaulted by male Coast Guard members who made an ice mold of a penis and tried to touch it to her genitalia. She maintained this incident was not taken into consideration because it was not until 2004 that she started to recall this event through fragmented memories. Additionally, she pointed out she was not present at her November 8, 1979, Physical Review Board hearing because she had been admitted to the Base hospital on October 31, 1979, after the sexual assault and was medically sedated until November 9, 1979. She stated that the sedation caused her to lose her memory of the time she was hospitalized. Further, the applicant stated, she did not receive her medical file from the Coast Guard until around 2009, and until that time she was under the impression she could not receive her medical file because it would be "deleterious" to her health. She maintained her position is supported by the fact that on August 16, 2018, the Department of Veterans Affairs (VA) approved her claim for PTSD based on MST and gave her a 100% disability rating.

Additionally, the applicant asserted her pay grade should be raised to E-4 because she met the requirements to be granted an E-4 rating when she retired. The applicant acknowledged that the BCMR had previously denied her request to raise her rating to an E-4 in BCMR 2006-031. She asked the Board to reconsider its past decision, but she did not offer any relevant new information about her pay grade for the Board to consider or provide any explanation of her delay in filing for reconsideration.

In support of her allegations, the applicant submitted military and medical records, the most significant of which are included in the Summary of the Record below.

SUMMARY OF THE RECORD

On October 23, 1978, the applicant enlisted in the Coast Guard. On January 19, 1979, after completing boot camp, she was advanced to seaman apprentice (SA/E-2) and transferred to a large Base, where she served for three months. As an SA/E-2, the applicant was not assigned a mark for leadership, but she received a mark of 3.4 for proficiency and a mark of 4.0 for conduct on a performance evaluation dated March 23, 1979.

In April 1979, the applicant began "A" School in Petaluma, California, to become a subsistence specialist (cook). Upon graduating from "A" School on July 3, 1979, the applicant was advanced to SNSS with a pay grade of E-3. Notes in her record indicate that she had not yet passed a course, MRN-4, required for advancement to E-4 and that she did not yet have the required time in grade (six months) as an E-3 for advancement to E-4.

On July 7, 1979, the applicant reported for duty in the mess of a large unit, where she was assigned to work in the cadet mess. On July 31, 1979, she was seen by a physician at a hospital at her own request. She informed her treating physician she had been fearful of losing control and wondered if she was losing her mind. Further, she stated she felt that her peers in the mess were talking about her and making derogatory sexual comments in her direction. She had not heard these remarks herself but believed they had been made. The applicant was treated with antipsychotic medications.

On August 22, 1979, an Initial Medical Board (IMB) was convened. The doctors found that the applicant was unfit for duty because she had "a recent history of a psychotic reaction sufficient to interfere with performance of duty or with social adjustment." The IMB found the applicant was suffering from an acute schizophrenic reaction, "probably precipitated by sexual guilt, and the stresses of a move to a new duty assignment." The IMB recommended that the applicant not return to active duty, be considered unfit for duty, and be placed on sick leave "pending a decision on her case." Further, the IMB made the following notes (1) the personal appearance of the applicant before a physical evaluation board would possibly be deleterious to her mental health; and (2) disclosure to the applicant of information relative to her mental condition would possibly adversely affect her mental health.

On August 23, 1979, the applicant signed a document titled "Patient's Statement Regarding the Findings of His Medical Board" where she acknowledged that the IMB convened on August 22, 1979, had found she was "not fit for duty" and recommended she be "refer[ed] to central PEB/sick leave pending disposition." The applicant chose not to submit a statement in rebuttal of the IMB's findings and recommendations.

The applicant was placed on sick leave from August 31, 1979, through October 28, 1979. On October 29, 1979, the applicant returned to duty for the week of her Formal Physical Evaluation Board (FPEB). Also on October 29, 1979, the applicant filled out and signed a form titled "Statement of Rights of Evaluee." This form explained the applicant's right to appear before a Physical Evaluation Board. The form had several options regarding appearance, evidence, and right to counsel. The applicant filled out the form by stating that she did not wish to appear in person before the Physical Evaluation Board, she requested Coast Guard counsel be appointed, she expected to present evidence at the hearing, and she required a three-day delay to prepare her case.

On October 31, 1979, the applicant was hospitalized, and her treating physician noted the applicant "has had several altercations in the galley. She pointed a knife at one of her peers this afternoon in a fit of anger. Will hospitalize pending [FPEB]."

On November 8, 1979, the applicant had a hearing before a Physical Evaluation Board. The applicant was not present at the hearing, but she was represented by assigned counsel. During the hearing, several witnesses testified, including the applicant's treating physician, who provided testimony regarding the applicant's working conditions and relationships, including that the applicant worked in an all-male galley "where there is a lot of rough and tumbling going on, a lot of passes being made." Her treating physician also described a "knifing incident" that he was aware of where a man grabbed a lemon from the applicant and put it in his pocket, at which time the applicant "became violently angry and she pointed this knife at the guy who took the lemon." The treating physician stated that after the incident, the applicant assured him she would not have stabbed anyone, but he did not want to take any chances, so he had her admitted to the hospital.

After the conclusion of the hearing, the FPEB found the applicant had been diagnosed with schizophrenia and was "unfit to perform the duties of her rate, that her unfitness is by reason of a condition which is physical disability . . . which is 50%." Further, the FPEB indicated that the applicant had had this mental impairment prior to enlisting in the Coast Guard. On November 8, 1979, the applicant was placed in a Home Awaiting Orders Status (HAOS) pending the completion of her medical retirement processing.

On December 19, 1979, the applicant's assigned counsel acknowledged receipt of the FPEB's findings and indicated they intended to submit a statement of rebuttal. On January 2, 1980, the applicant's counsel submitted a rebuttal, which challenged the FPEB's finding that the applicant had had any mental impairment prior to enlisting in the Coast Guard.

On December 31, 1979, the applicant's supervisor made the following entry on a CG-3307 ("Page 7") in her record:

> Member reported for duty at the [redacted] on 79JUL07. She was hospitalized for most of the month of August 1979, was absent on sick leave during the months of September and October 1979, and has been at home in an awaiting orders status since detachment from the [redacted] on 79NOV08. Thus, she has been observed for an insufficient period of time to assign any meaningful proficiency or leadership marks. A conduct mark of 4.0 has been assigned.

On January 21, 1980, the Physical Review Council (PRC), which reviewed the findings of the FPEB and the applicant's counsel's rebuttal, recommended that the applicant be placed on Temporary Disabled Retired List (TDRL) with a 50% disability rating. The PRC noted "there is no evidence of record that the evaluee had a psychotic disorder prior to enlistment." On March 14, 1980, the applicant signed a form stating she concurred with the findings of the PRC.

On April 2, 1980, the Commandant sent the applicant a letter informing her that she would be placed on the TDRL with a 50% disability rating as of April 16, 1980.

On April 15, 1980, the applicant was honorably retired by reason of physical disability as an SNSS/E-3. On April 16, 1980, she was placed on the TDRL. A notation indicates that she was not assigned any evaluation marks upon her separation because she had been in HAOS since November 9, 1979.

In September 1981, the applicant was evaluated at a mental health clinic. The doctor reported that she was living at home while attending college on the GI Bill. She had stopped taking her medication and was feeling much better. She was diagnosed with schizophrenia in remission.

On March 24, 1983, a Central Physical Evaluation Board (CPEB) recommended that the applicant be permanently retired with a 30% disability rating. On April 8, 1983, the applicant signed a form titled "Statement of Evaluee" stating "I reject the Central Physical Evaluation Board findings and recommended disposition and demand a hearing before a formal physical evaluation board." However, on April 11, 1983, after the applicant's counsel conferred with her by telephone, she changed her response to state she accepted the findings of the CPEB.

On May 11, 1983, the Commandant sent a letter to the applicant, addressing her as an SNSS, to inform her that she would be permanently retired from the Coast Guard on May 24, 1983, with a 30% disability rating and placed on the Permanent Disability Retired List (PDRL). On May 24, 1983, the applicant was permanently retired from the Coast Guard as an SNSS E-3 with a 30% disability rating.

On May 28, 2019, a doctor for the Coast Guard wrote, after reviewing her records in accordance with 10 U.S.C. § 1552(g), that based on the few medical records available, "[m]aking any recommendation with any confidence is difficult at best."

VIEWS OF THE COAST GUARD

On September 27, 2019, the judge advocate (JAG) submitted an advisory opinion recommending that the Board deny the applicant's requested relief.

The JAG argued the Board should deny relief for multiple reasons. First, the JAG maintains the applicant's claims are time barred. The JAG maintained that the applicant's claim that her disability rating should be increased to 100% based on PTSD caused by MST is untimely because the request for relief was filed more than three years after she reasonably should have discovered the error or injustice. The JAG stated the applicant knew or should have known of the alleged error "in 1979 when she was allegedly assaulted, in 1980 when she was placed on TDRL, 1983 when she was placed on the PDRL, in 2006 when she first applied to the BCMR, and or 2009 when she first spoke with the DVA."

Additionally, the JAG maintained that the applicant's claim that her pay rate should be raised from E-3 to E-4 is untimely because the Board denied this same requested relief in 2007, and the applicant's request for re-consideration is outside the applicable limitations period. The JAG also pointed out the applicant did not present any new information, evidence, or argument regarding her requested raise in pay rate.

The JAG acknowledged the Board may excuse the untimely filing of an application. Further, the JAG recognized the Department of Homeland Security has instructed the BCMR to apply "liberal consideration" to cases that arise regarding veterans with mental health conditions or who have experienced sexual assault or sexual harassment. However, the JAG argued that liberal consideration does not apply to the applicant's requests regarding her disability rating and pay grade because it applies only to applications in which the relief sought is related to the veteran's character of service, narrative reason for separation, separation code, or reenlistment code. The JAG also stated that the purpose of liberal consideration is to improve the characterization of discharge of a service member who was separated under less than honorable conditions, which is not an issue here because the applicant was medically retired with an honorable discharge. Additionally, the JAG maintained that the applicant's case has no chance of succeeding on the merits and there is no evidence to support her contentions. Thus, the JAG concluded that it is not in the interests of justice to waive the applicable limitation periods.

Second, the JAG asserted that the applicant's claims are barred by the doctrine of laches. The JAG claimed that the doctrine of laches bars the claims because there was a delay in filing that prejudices the government. The JAG stated that due to the length of time that has passed since the alleged sexual assault, all relevant personnel have retired, the medical records in applicant's official personnel file appear incomplete, and it "is forced to rely on Applicant's statements and sparse medical records in order to rebut her claims."

Third, the JAG maintained that the applicant's 30% disability rating was correct based on the information known at the time of the applicant's discharge. The JAG noted that the applicant never informed the Coast Guard she was a victim of MST or suffering from MST, so there was no related investigation or evidence for the Coast Guard to consider. Further, the JAG stated there is no evidence to support the applicant's contention she was a victim of MST on October 31, 1979. The JAG acknowledged that the VA has recently provided the applicant with a 100% disability rating but stated this determination is not binding on the Coast Guard or indicative of conflicting opinions between the Coast Guard and VA medical officials because the Coast Guard and VA applies different disability standards.

Fourth, the JAG asserted the applicant was not precluded from participating in her medical board hearing nor was she prohibited from knowing the outcome. In support of its position, the JAG pointed out that on October 29, 1979, the applicant waived her right to appear in person at the FPEB hearing and affirmed her right to counsel. Further, the JAG highlighted that on August 22, 1979, an IMB had reported that her personal appearance before the FPEB would be deleterious to her health or would adversely affect her health. The JAG also pointed out the applicant had declined, in writing, to provide a rebuttal to the IMB's findings.

Lastly, the JAG asserted that the Board should deny the applicant's requested relief regarding raising her pay grade from an E-3 to E-4 because the Board already denied this relief in a prior decision, and she did not provide additional evidence, policy interpretation, or statutory authority to support her assertion.

Based on these arguments, the JAG concluded the Board should deny the applicant relief because her claims are time barred and she failed to meet her burden of establishing via a preponderance of the evidence that the Coast Guard committed an error or injustice.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

In response to the views of the Coast Guard, the applicant reaffirmed many of the arguments she made in her application.

The applicant again asserted her disability rating should be raised because her condition of PTSD caused by MST was not taken into consideration when the disability rating was established. The applicant maintained she was constantly being sexually harassed by the men assigned to the galley. She stated that when she was hospitalized on October 31, 1979, for pointing a knife at the men in the galley, it was because the men had pointed an ice mold in the shape of a penis at her, had cornered her, and one man had tried to touch the ice mold to her private area. She stated that she was surrounded by men in the galley, and they were all laughing at her. She stated she felt trapped and felt no way out, so she had pointed the knife at them.

The applicant asserted that after the incident she was hysterical and went back to her treating physician's office and told him what had happened. She stated that her treating physician had told her she was a threat to the men, and she was readmitted to the hospital on October 31, 2019, where she was put on antipsychotic medicine until she sent home on a train on November 9, 1979, in HAOS. She stated that the medicines she was given on October 31, 2019, left her in a zombie like state, and she "had no knowledge of what was happening to me or around me during that time." She stated that the medicine affected her ability to recall what had happened to her, and she "had no memory of this incident until years later." She stated that she had filed for disability with the VA based on MST in September 2009 when she "realized that was what I had experienced as a result of being attacked in the galley by a group of men." She stated that the VA had diagnosed her with PTSD based on MST and ultimately gave her a 100% disability rating.

Additionally, the applicant stated that she was not able to present her story and adequately defend herself during the FPEB hearing because she was not permitted to attend. She maintained that during the hearing, her treating physician and others mischaracterized the events that took place, seemed to place some form of blame on her because of previous events she experienced during her childhood, and suggested the men of the galley attacked her "because of the clothes I wore or I was looking for a date or something of that nature." Further, she asserted she had symptoms of PTSD at the time of the hearing that were not considered.

Lastly, the applicant reiterated that her pay grade should be raised to E-4 because she met the requirements to be granted an E-4 rating when she retired.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions based on the applicant's military record and submissions, the Coast Guard's submissions, and applicable law:

1. The Board has jurisdiction over this matter under 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. The applicant was retired and placed on the PDRL with a 30% disability rating in pay grade E-3 in 1983. The Board issued its decision on her first application in 2007, and she stated that she received her medical records in 2009. Therefore, the preponderance of the evidence shows that the applicant knew of the alleged errors in her record—her pay grade and percentage disability rating from the Coast Guard—no later than 2009, and her application is untimely.

3. The JAG argued that "liberal consideration" does not apply to the applicant's requests for relief, and the Board agrees. Under 10 U.S.C. § 1552(h), the Board grants liberal consideration during the "review of a discharge or dismissal [which] is based in whole or in part on matters relating to post-traumatic stress disorder or traumatic brain injury as supporting rationale, or as justification for priority consideration, and

whose post-traumatic stress disorder or traumatic brain injury is related to combat or military sexual trauma, as determined by the Secretary concerned." In such cases, the Board must "review the claim with liberal consideration to the claimant that post-traumatic stress disorder or traumatic brain injury potentially contributed to the circumstances resulting in the discharge or dismissal or to the original characterization of the claimant's discharge or dismissal." While it is possible that PTSD resulting from MST was one of the mental health conditions that caused the applicant's medical retirement, the Board is not actually reviewing her discharge. The applicant already has an honorable discharge, and the Board is reviewing her pay grade and percentage of disability. Therefore, 10 U.S.C. § 1552(h) and the Board's liberal consideration guidance do not apply in this case.

4. 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 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" 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."

5. Regarding the delay in applying to the Board, the applicant explained that she only recently received a 100% disability rating from the VA due to PTSD resulting from MST, but she did not submit any evidence to support the claim. However, in light of her previously diagnosed schizophrenia, the Board finds that the applicant's explanation for the delay is compelling because her mental health may well have prevented her from seeking correction of the alleged errors more promptly.

6. The Board's cursory review of the merits of this case shows that the applicant's request for reconsideration regarding her pay grade lacks potential merit. To receive reconsideration, an applicant must submit new material evidence of the alleged error or injustice,[1] and the applicant has submitted no new evidence regarding her pay grade that was not already considered in the Board's decision in BCMR 2005-031. Therefore, the Board will not reconsider this issue.

7. The applicant's request for a 100% disability rating has not been previously considered by this Board. However, the Board's cursory review of the merits shows that her request for a 100% disability rating from the Coast Guard cannot prevail based on the current evidence in the record. The records show that the applicant's mental health disability was considered by an IMB, CPEB, FPEB, and PRC prior to her separation from the Coast Guard in 1980, and her mental health was rated as 50% disabling at that time. Then in 1981, her doctor reported that her mental health disability was in remission and that she was attending college, and in 1983, the CPEB reduced her disability rating from 50% to 30%. These records regarding her percentage of disability due to her mental health are presumptively correct, and the applicant has not submitted anything to prove

[1] 10 U.S.C. § 1552(a)(3)(D).

that she was more than 30% disabled by her mental health when she was permanently retired in 1983.

Unlike VA ratings, which may rise and fall with a veteran's percentage of disability over the years, Coast Guard disability ratings do not change once the member has been permanently medically retired. Coast Guard ratings are based only on the member's unfitness for duty and percentage of disability at the time of permanent retirement from active duty.[2] Therefore, the applicant's disability rating from the Coast Guard must be based on the degree to which she was mentally disabled in 1983—not her current level of disability—and she has not submitted anything to show that she was more than 30% disabled by her mental health condition when she was permanently medically retired from the Coast Guard in 1983.

8. Accordingly, the Board will not excuse the application's untimeliness or waive the statute of limitations to conduct a more thorough review of the merits. The applicant's request should be denied. The Board will reconsider her request for a 100% disability rating, however, if the applicant submits new material evidence, such as her VA medical records.

(ORDER AND SIGNATURES ON NEXT PAGE)

[2] PDES Manual, COMDTINST M

ORDER

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

March 1, 2023

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