

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

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Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2019-142**

  
DC3 (Retired)

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**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 May 22, 2019, and assigned the case to the Deputy Chair to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated September 4, 2020, 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 Damage Controlman Petty Officer 3<sup>rd</sup> Class (DC3/E-4) who was retired by reason of physical disability on August 7, 1997, asked the Board to correct his record by increasing his disability rating to account for a left shoulder injury and a left knee replacement. The applicant stated that, when he was medically retired from the Coast Guard with a disability rating of 30%, his disability rating did not include an injury to his left shoulder that he had incurred while on duty in 1988. The applicant also requested a small increase in his disability rating to account for his second left knee replacement that occurred in 2018. The applicant did not specify the amount by which he would like to have his disability rating increased.

The applicant explained that his left shoulder was partially separated while he was on base at a Naval Station in 1988. He stated that, while on base, some of his fellow Coast Guard members decided to play flag football, and the game got "a little rough." While he was playing, he felt a sharp pain in his left shoulder. He stated that, after the game was over, his shoulder was very sore and he had a serious bump on his collar bone. He later went to the medical department on base where an X-ray determined that he had separated his left shoulder. He stated that the medical officers told him that he needed an operation, but he never had the operation because it made him nervous. He stated that, to this day, he still experiences discomfort in his left shoulder. Specifically, his left shoulder occasionally tingles and feels numb. As a result, he tends to drop things. He stated that, if his shoulder gets worse, he may have to have an operation.

To address the delay in submitting his request, the applicant alleged that he had been trying to get the Coast Guard to recognize his left shoulder injury for years as part of his disability.

### SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on March 17, 1986. Before enlisting in the Coast Guard, the applicant served in the Navy and the Air National Guard.

On August 15, 1993, the applicant was hospitalized for a mental health issue. . On a report regarding the applicant's history and physical examination, the physician noted that applicant had a drinking problem and had experienced significant personality changes and black-outs. In a section regarding the applicant's past medical history, the physician noted that the applicant had a sustained ligamentous injury to his left knee and that he had undergone arthroscopic surgery to repair it. Additionally, the physician noted an injury to the applicant's left shoulder in which he had a partial acromioclavicular joint separation. The physician noted that the applicant continued to have some discomfort in his left shoulder and in the left side of his neck with accompanying tingling in his left hand. The applicant was diagnosed with alcohol dependence and an undetermined psychiatric diagnosis.

On August 16, 1993, the applicant received a psychological consultation while at the drug rehabilitation center. The physician noted that the applicant showed signs of depression and anxiety such as poor sleep, weight loss, and difficulty with memory and concentration. The applicant was diagnosed with alcohol dependence, major depression—single episode—moderate, and dependent personality disorder.

On May 31, 1996, the applicant received a psychological assessment. On the narrative summary of his assessment, the physician noted that the applicant had admitted to restarting alcohol approximately 10 months earlier but had recently stopped drinking. The physician further noted that the applicant was in therapy and reported feeling depressed for the past three to four years. The applicant was diagnosed with alcohol dependence, major depression, and fetishism. The physician recommended that the applicant be considered fit for full duty but noted that he was considered a dependent alcoholic who had broken Level III After Care and fetishism, both of which could be considered a separable condition under the Personnel Manual for unsuitability. He also noted that the applicant's major depression was a ratable disability that might be secondary to his alcohol dependence.

In an addendum to the applicant's psychological assessment, the applicant's physician determined that the applicant was not considered to be Fit for World Wide Assignment due to his alcohol dependence, major depression, and fetishism. The physician stated that the applicant would need continuous therapy for his diagnosis. Further, the applicant's physician stated that the applicant's Medical Board should be referred to the Physical Disabilities Evaluation System (PDES) secondary to major depression being a ratable disability.

On November 8, 1996, the applicant had a physical examination in conjunction with an Initial Medical Board. The physician noted that the applicant was experiencing weakness in his right shoulder, pain in his left shoulder, and tenderness in his right knee. The physician recom-

mended that the applicant receive an orthopedic evaluation. The physician stated that the applicant was qualified for either retention or separation.

On February 28, 1997, the Commander of the applicant's group sent a letter to the Commander of the Coast Guard Personnel Command. The Commander stated that he concurred with the findings of the Initial Medical Board. He stated that the applicant had no problem completing the tasks assigned to him as a Damage Controlman, including carpentry, plumbing, welding, and general maintenance and repair. In fact, the Commander noted that the applicant was always the first to volunteer and work extra hours if needed. However, the Commander also stated that the applicant had gone through periods of highs and lows over the past several years. During his "low" periods, the applicant was unable to complete even a simple task without excessive direction and supervisory follow-up. He stated that, while the applicant had been determined to be "fit" for his current assignment, the uncertainty and recurrent long-term nature of his conditions (depression, fetishism, personality disorder) render him unsuitable for continued military service. Further, he stated that the applicant's diagnosis of chronic recurrent depression is a ratable diagnosis and required evaluation and disposition through the PDES. He concluded by stating that he strongly recommended that the applicant's case be referred to a Central Physical Evaluation Board (CPEB) for final determination.

On March 4, 1997, the applicant signed a form that acknowledged that he was informed of the Medical Board's findings and recommendations. The Medical Board determined that the applicant had major depression, alcohol dependency, and fetishism, and recommended that he be considered not fit for duty and referred to the CPEB. The applicant also acknowledged that he felt that all of his impairments had been evaluated adequately and he did not desire to submit a rebuttal to the Medical Board's findings and recommendations.

On April 7, 1997, the applicant was appointed legal counsel for his case pending before the CPEB.

On April 29, 1997, the applicant received a total body bone scan. The report stated the following:

Report: Approximately three hours after the intravenous administration of 19.4 mCi of TC-99m MDP, anterior and posterior scintiphotos of the whole body were obtained and supplemented with additional spot-view images including the knees, ankles, feet, skull, and wrists.

Foci of abnormally increased radiotracer uptake are seen in the right acromioclavicular joint, posterior aspect of the medial condyle of the right femur, medial malleolus of the right tibia, and left wrist diffusely.

Impression: Most likely degenerative/post-traumatic changes in the above indicated areas.

On May 16, 1997, the applicant's counsel sent a memorandum to the President of the CPEB. Prior to the memorandum, the CPEB had assigned the applicant a 10% disability rating. The applicant's counsel contested the CPEB's determination and requested that the applicant be permanently retired at a 30% disability rating.

On May 20, 1997, the CPEB revised its findings and recommendations. The CPEB determined that the applicant was unfit for continued duty because of his major depressive disorder. The CPEB described the applicant's disability as follows: "major depressive disorder; occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks." The CPEB indicated that the applicant's disability was not the result of willful neglect, intentional misconduct, or unauthorized absence by the applicant; was incurred while the applicant was entitled to basic pay; and was the proximate result of performance of active duty or inactive duty training or incurred in the line of duty during war or national emergency. The CPEB did not rate the applicant's knee and shoulder conditions as permanently unfitting for military service. The CPEB assigned the applicant a 30% disability rating for his major depressive disorder and recommended permanent disability retirement.

On May 29, 1997, the applicant's counsel consulted with him regarding the acceptance or rejection of the CPEB's findings and recommendation.

On June 8, 1997, the applicant accepted the CPEB's findings and recommendations and waived his right to a formal hearing before a physical evaluation board.

On June 23, 1997, the Commander of the Coast Guard Personnel Command approved the findings of the CPEB.

On August 7, 1997, the applicant was retired from active duty in accordance with Article 12.C.10. of the Coast Guard Personnel Manual. His DD-214 shows "honorable" as the characterization of discharge; "disability, permanent" as the narrative reason for separation; SFJ (permanent disability retired) as his reenlistment code; and RE-2 (ineligible to reenlist due to retired status) as his separation code. The applicant signed his DD-214.

On July 26, 2018, the applicant had the first of two surgeries for a total knee arthroplasty. On November 13, 2018, the applicant had the second surgery.

### **VIEWS OF THE COAST GUARD**

On October 23, 2019, a judge advocate (JAG) of the Coast Guard submitted an 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).

PSC stated that the application was not timely filed. Further, PSC stated that the applicant failed to provide an explanation as to why it is in the interest of justice to consider his application.

PSC stated that the applicant was issued a permanent physical disability retirement due to a mental health condition. PSC argued that the applicant failed to present evidence to show that there was an error in the Medical Board's findings.

PSC argued that the applicant failed to present evidence to show that his left shoulder or left knee rendered him physically unable to perform his assigned duties. According to the Physical Disability Evaluation System Manual in effect in 1997, "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.” PSC stated that, while the applicant’s medical records document treatment for both right and left shoulder pain, it was not considered disqualifying by a Coast Guard medical officer during his November 8, 1996, separation physical examination. Further, PSC stated that the applicant’s total bone scan that occurred on April 29, 1997, confirmed that his shoulder and knee conditions were not unfitting.

PSC argued that the fact that a physical defect or condition is ratable under the standard schedule for rating disabilities used by the Department of Veterans Affairs (VA) does not provide justification for retirement from military service because of physical disability. Although a member may have physical impairments ratable in accordance with the VA Schedule for Rating Disabilities, such impairments do not necessarily render him unfit for military duty. PSC suggested that the VA is the appropriate channel for the applicant to seek additional relief, such as a disability rating for the left shoulder or an increase in disability rating for the left knee.

PSC stated that the applicant’s petition to obtain copies of his Service Treatment Records could not be processed by the Coast Guard. PSC stated that the applicant should submit a request to the National Archives at <https://www.archives.gov/veterans>.

The JAG reiterated that the application was not timely filed. The JAG argued that the applicant should have discovered the alleged error in 1996 after he learned of the CPEB’s recommendations or in 1997 at the time of his medical retirement. The JAG stated that the applicant provided no justification for the more than twenty year delay in submitting his request.

The JAG argued that the applicant waived his right to contest his disability rating by accepting the CPEB’s findings and recommendations. The JAG stated that on June 8, 1997, after consulting with counsel, the applicant accepted the CPEB’s findings and recommendations and waived his right to a formal physical evaluation board. The JAG argued that the applicant had multiple opportunities to contest the sufficiency of the CPEB’s findings and recommendations, but neither the applicant nor his attorney raised the issue of his shoulder for consideration.

### **APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD**

On October 30, 2019, the Chair sent the applicant a copy of the Coast Guard’s views and invited him to respond within thirty days. No response was received.

### **APPLICABLE LAW AND POLICY**

Chapter 2.C.2. of the Physical Disability Evaluation System Manual in effect in 1997 discusses policies related to fitness for duty in relevant part:

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

...

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 Department of Veterans Affairs 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.<sup>1</sup> The applicant was medically retired on August 7, 1997, and the evidence shows that he knew at the time that he was being medically retired with a 30% disability rating pursuant to the CPEB's finding that he was unfit for duty due to major depressive disorder. Although the applicant's left knee replacement surgery did not occur until 2018, his medical records show that he had an injury to the left knee as early as 1993. Therefore, the preponderance of the evidence shows that the applicant knew of the alleged error in his record in 1997, 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.<sup>2</sup> 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"<sup>3</sup> 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."<sup>4</sup> Pursuant to these requirements, the Board finds the following:
  - a. Regarding the delay in applying to the Board, the applicant explained that he had tried to get his shoulder injury recognized by the Coast Guard for years. However, the applicant failed to provide any evidence of his efforts to get his shoulder injury recognized by the Coast Guard. Further, the applicant did not provide an explanation for the delay in requesting an increase in his disability rating for his left knee. The Board finds that the applicant's 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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<sup>1</sup> 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.

<sup>2</sup> 10 U.S.C. § 1552(b).

<sup>3</sup> *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

<sup>4</sup> *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 applicant requested that his disability rating be increased to take into account injuries to his left shoulder and left knee. As early as 1993, the applicant's medical records demonstrate that the applicant had a sustained ligamentous injury to his left knee and a sustained injury to the applicant's left shoulder as a result of a partial acromioclavicular joint separation. However, evidence of an injury or impairment is insufficient to demonstrate the existence of a physical disability as a basis for retirement. According to Chapter 2.C.2.a. of the Physical Disability Evaluation System Manual in effect in 1997, the sole standard in making a determination of physical disability as a basis for retirement was unfitness to perform the duties of office, grade, rank, or rating. According to the Commander of the applicant's group, the applicant had no problem physically completing the tasks assigned to him as a Damage Controlman. Further, there is no documentation in the applicant's record to suggest he was unable to adequately perform his duties due to his injuries to his shoulder or knee. The disputed record is presumptively correct,<sup>5</sup> and the record contains no persuasive evidence that substantiates his allegations of error or injustice in his official military record.

4. Accordingly, the Board will not excuse the application's untimeliness or waive the statute of limitations to conduct a thorough review of the merits. The applicant's request should be denied.

**(ORDER AND SIGNATURES ON NEXT PAGE)**

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<sup>5</sup> 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.").

**ORDER**

The application of retired DC3 [REDACTED], USCG, for correction of his military record is denied.

September 4, 2020

