DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2021-037

[redacted]
FN (Former)

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 February 25, 2021, and assigned the case to a staff attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated August 30, 2023, 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 Fireman (FN/E-3), who was honorably discharged on March 1, 2001, due to a physical disability, asked the Board to correct his record by adding Traumatic Brain Injury (TBI), Post Traumatic Stress Disorder (PTSD), left leg injuries, and severe jaw trauma to his Central Physical Evaluation Board (CPEB) findings. The applicant also requested that we increase his CPEB disability findings to a level more reflective of his service-connected injuries.

To support his request, the applicant submitted copies of records that are included in the summary below.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on August 3, 1993.

In September 1995, the applicant was involved in a Motor Vehicle Accident (MVA 1). The applicant's medical records show that he sustained multiple mandibular fractures and the loss of teeth 7, 8, and 9. The applicant received a debridement of the maxillary wound, a closed reduction of the mandibular fracture, and intermaxillary fixation. The applicant's intermaxillary fixation was removed and the workup for his dentofacial deformity was completed in November 1995. The treatment plan at the time anticipated orthodontic preparation and subsequent bilateral sagittal split

osteotomy and Le Forte I osteotomy to correct skeletal dental malocclusion. The applicant began the first phase of his orthodontic treatment in September 1996, but medical records show that prior to the surgical phase, this treatment was discontinued with no reason being given. The applicant wore a maxillary prosthesis to replace his missing maxillary teeth. The applicant's injuries also included a closed comminuted fracture of the calcaneus of the right foot, in addition to soft tissue injuries to the left foot and ankle. The applicant's right foot and ankle continued to be symptomatic after the healing of the calcaneal fracture, and he subsequently underwent a subtalar arthrodesis[1] of the right ankle.

In 1997, the applicant was involved in a second motor vehicle accident (MVA 2). The applicant sustained a fracture of the medial malleolus of the left ankle, and an open reduction and internal fixation of the fracture was completed at the time of the injury. The fracture healed, but the applicant continued to have pain on range of motion of the left ankle with a popping sensation. The applicant also underwent an open debridement procedure of his left ankle for removal of hardware, osteophytes and loose bodies.

On May 18, 1998, the applicant was placed on the Temporary Disability Retirement List (TDRL) and temporarily retired.

On September 25, 2000, the applicant underwent an evaluation regarding his TDRL status which assessed the current state of the injuries to his lower extremities.

On October 25, 2000, the applicant underwent a dentofacial board that assessed his injuries and recommended a treatment plan.

On December 16, 2000, the applicant was seen at an Air Force Medical Center regarding the injuries to his jaw. A Colonel evaluated the applicant's injuries and possible corrective actions. The Colonel found "[f]rom an oral facial standpoint there is no impediment to patient's world-wide assignment."

On January 5, 2001, the Central Physical Evaluation Board (CPEB) convened and found that the applicant was disabled by a "right foot injury, other: moderately severe" and recommended the applicant receive a 20% disability rating.

On January 24, 2001, the applicant was counseled by an attorney appointed to advise him regarding the acceptance of the CPEB's findings and its recommended disposition and his right to reject the recommendation and demand a hearing. After being counseled the applicant signed the CPEB's findings and recommendations, checking the box that states, "I accept the Central Physical Evaluation Board findings and recommended disposition and waive my right to a formal hearing before a physical evaluation board."

On February 6, 2001, the Commandant of the Coast Guard took final action on the CPEB report and approved the findings and recommended disposition.

---

[1] Arthrodesis is the surgical immobilization of a joint by fusion of the adjacent bones.

On March 1, 2001, the applicant was removed from the TDRL and discharged by reason of physical disability with a 20% disability rating for which he received severance pay.

According to a June 28, 2016, rating decision from the Department of Veterans Affairs (VA), which was submitted by the applicant, as of February 25, 2016, the VA made the following changes to the applicant's VA disability ratings:

- For his "status post left ankle fusion, residual of fracture," the applicant's rating was raised from 20% to 40%;
- For his "status post right subtalar arthrodesis," the applicant's rating was raised from 20% to 40%;
- For his "right knee strain," the applicant's 10% rating was continued;
- For his "left knee strain," the applicant's 10% rating was continued;
- For his claim of a psychiatric disorder, specifically stress and anxiety as residuals of a head injury or traumatic brain injury, the VA denied a rating and explained its decision as follows: "The evidence does not show a current diagnosed disability. While your service treatment records reflect complaints, treatment, or a diagnosis similar to that claimed, the medical evidence supports the conclusion that a persistent disability was not present in service."

The VA also denied the applicant's claim of "unemployability" and so his overall, combined disability rating was increased from 70% to 90%.

VIEWS OF THE COAST GUARD

On August 24, 2021, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which he 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).

The JAG explained that while the applicant does not specifically request liberal consideration policy be applied to his case, the applicant does claim that he should have been diagnosed with PTSD and TBI in his request for a discharge upgrade. However, the JAG argued that the applicant provided no evidence to shows that he was or should have been diagnosed with either PTSD or TBI at the time of his discharge. The JAG stated that this argument is supported by the Department of Veterans Affairs (VA) entitlement letter which stated, "The evidence does not show a current diagnosed disability. While your service treatment records reflect complaints, treatment, or a diagnosis similar to that claimed, the medical evidence supports the conclusion that a persistent disability was not present in service." Accordingly, the JAG argued that the applicant has failed to prove, by a preponderance of the evidence, that he had PTSD or TBI at the time of his discharge that was related to combat or military sexual trauma.

The JAG argued that the applicant failed to submit a timely application and failed to show why it was in the interest of justice to excuse the delay. According to the JAG, the applicant alleged in his application that he only discovered the error on July 1, 2016, but the JAG argued the

applicant was discharged on March 1, 2001, but the applicant received the CPEB's findings and recommended disposition in 2001 and agreed with the CPEB's findings and recommended disposition, which included no finding of PTSD or TBI. Therefore, the JAG claimed that the applicant knew of the alleged error in 2001, which brings the applicant a decade past the statute of limitations with no explanation of justification for his delay. Accordingly, the JAG argued that the applicant's claims should be considered untimely.

The JAG further argued that even if the Board determines that the statute of limitations should be waived, the applicant cannot sufficiently prove that an error or injustice has taken place. The JAG stated that the applicant provided no evidence to support his claims that he should have been diagnosed with PTSD and TBI. Furthermore, the JAG stated that the VA's own letter states that there is no evidence to show that the applicant suffered from a psychiatric disorder while in the service or at the time of his discharge. According to the JAG, the VA's letter not only fails to support the applicant's claims, but it directly contradicts his claim that he is entitled to a finding of PTSD or TBI.

Regarding the applicant's claim that he is entitled to a higher disability rating due to his left leg injuries and "severe jaw trauma" the JAG explained that when determining disabilities, the armed forces assess to what extent a member has been rendered unfit to perform the duties of his office, grade, rank or rating due to a physical disability. The JAG stated that the applicant's records show that his jaw injuries resolved while he was on the TDRL, allowing the applicant to be deployable for world-wide service. Regarding the applicant's left leg injuries, the JAG stated that while there is some evidence to indicate that the applicant sustained service-connected injuries to his left leg in 1997, the applicant has failed to provide sufficient evidence to prove that the Coast Guard was erroneous in finding that only his right leg injuries were unfitting for military service at the time of separation. The JAG argued that the fact that the VA included the applicant's left leg injuries in its disability rating is not determinative because different issues are involved in military disability cases. The JAG explained that the VA determines to what extent a veteran's earning capacity is currently reduced as a result of specific service-connected injuries or a combination of injuries, while the armed forces determine to what extent a member has been rendered unfit to perform the duties of his office, grade, rank or rating due to a physical disability on the date of discharge. The JAG posited that at the time of the applicant's 2001 CPEB, that board must have determined that the left leg injuries were sufficiently corrected to not warrant a disability rating or else the board would have rated those injuries. Moreover, the JAG stated that the applicant was advised by counsel regarding the consequences of accepting the CPEB's findings and recommended disposition and with the advice of counsel, the applicant agreed to the CPEBs' findings and recommended disposition, which only included his right foot injuries, and waived his right to a hearing before the Formal Physical Evaluation Board. This, according to the JAG, is substantial evidence that the 20% disability rating accurately reflected the totality of the applicant's condition at the time.

Finally, regarding the applicant's request to increase the CPEB's disability rating from 20%, the JAG argued that the applicant provided no cogent evidence that the Physical Disability Evaluation System (PDES) and the CPEB erred in rating his disability at 20% in 2001. The JAG further argued that the documents relied upon by the applicant to support his claim that the CPEB's rating was erroneous and unjust—a VA entitlement letter—is not determinative in the applicant's

case. The JAG stated that any long-term diminution of the applicant's earning capacity attributable to military service, as determined by the VA's disability ratings are not binding on the Coast Guard, nor should those ratings be considered indicative of error or injustice on behalf of the Coast Guard. Accordingly, the JAG argued that the applicant has failed to prove, by a preponderance of the evidence, that the findings and recommendations of the CPEB were erroneous or unjust and his requests for relief should be denied.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 5, 2021, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. As of the date of this decision, no response has been received.

APPLICABLE LAW AND POLICY

Under Article 12.B.15. of the Personnel Manual, COMDTINST M1000.6A (September 2000), provides the following guidance on separating a service member separated due to a disability:

> **12.b.15.a. Medical Board.** A medical board shall be held in the case of an enlisted member when any condition listed in Article 17.B.4. exists or competent authority directs. Chapter 17.B. contains procedures for the medical board's report. If a member has remained in the Service with his or her written consent beyond the enlistment expiration under Article 12.B.11.f., the report shall clearly indicate the following:
>
> 1. Patient's status (held beyond normal enlistment expiration date or not).
>
> 2. Date of admission to sick list.
>
> 3. Whether the member concerned is physically qualified for discharge.
>
> **12.B.15.b. Discharge for Physical Disability.** Commander, (CGPC-epm-1) may direct or authorize a discharge for physical disability not incurred in or aggravated by a period of active military service through final action on a physical evaluation board under the following conditions:
>
> Article 12.B.15.c.
>
> 1. A medical board has expressed the opinion that:
>
> a. The member does not meet the minimum standards for retention on active duty,
>
> b. The member is unfit for further Coast Guard service by reason of physical disability, and
>
> c. The physical disability was neither incurred in nor aggravated by a period of active military service.
>
> 2. The member's commanding officer and district commander concur in the board's opinion.
>
> 3. The member has been fully informed of his or her right to a full, fair hearing and the member states in writing he or she does not demand such a hearing.

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 over this matter under 10 U.S.C. § 1552(a) because the applicant is requesting correction of an alleged error or injustice in his Coast Guard military record. The Board finds that the applicant has exhausted his administrative remedies, as required by 33 C.F.R. § 52.13(b), because there is no other currently available forum or procedure provided by the Coast Guard for correcting the alleged error or injustice that the applicant has not already pursued.

2. The application was not timely filed. To be timely, an application for the correction of a military record must be submitted to the Board within three years after the alleged error or injustice was discovered.[2] The record shows that the applicant received and signed the CPEB's findings on January 24, 2001. Therefore, the preponderance of the evidence shows that the applicant knew of the alleged error in his record as early as January 24, 2001, 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.[3] 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 "analyzing both the reasons for the delay and the potential merits of the claim based on a cursory review"[4] 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] Pursuant to these requirements, the Board finds the following:

   a. Regarding his delay in filing his application, the applicant failed to explain what caused his delay in applying to the Board for relief. The Board finds that the applicant's request for consideration is not persuasive because he has failed to show that anything prevented him from seeking correction of the alleged error or injustice more promptly.

   b. A cursory review of the merits of this case shows that the applicant's claim lacks potential merit. Not only has the applicant failed to submit evidence sufficient to overcome the presumption of regularity afforded to the Coast Guard's doctors, officers, and records regarding which of his medical conditions were unfitting for military service in 2001 and what percentage of disability rating was warranted, but the record shows that the applicant accepted the CPEB's findings on January 24, 2001, and waived his rights to a formal hearing. Furthermore, the applicant received counsel in connection with deciding whether to accept or reject the CPEB's findings and recommended disposition, and after

[2] 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.
[3] 10 U.S.C. § 1552(b).
[4] *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).
[5] *Id*. at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

being advised by his appointed counsel, the applicant agreed with the CPEB's findings and recommended disposition and waived his right to an FPEB. Moreover, even the VA entitlement letter submitted by the applicant as proof of his disability does not support his claim that he was suffering from PTSD and TBI at the time of his separation. The Board also notes that at no time during the applicant's Coast Guard medical evaluations or medical boards did he object to or contest the information that was recorded and relied upon by the CPEB.

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

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

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

August 30, 2023

[redacted]
Digitally signed by [redacted]
Date: 2023.09.29 17:05:28 -04'00'

[redacted]
Digitally signed by [redacted]
Date: 2023.09.29 17:28:42 -04'00'

[redacted]
Digitally signed by [redacted]
Date: 2023.10.01 13:24:23 -06'00'