

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2024-105


BM2 (former)

FINAL DECISION

This proceeding is conducted according to the provisions of 10 U.S.C. § 1552. The Chair docketed the case after receiving the completed application on July 24, 2024, and assigned it to an attorney to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision dated March 20, 2025, 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 alleges he is 100% disabled due to service-related injuries established by the Department of Veteran's Affairs rating, but at the time of his physical disability evaluation board the Coast Guard established him as 20% disabled. He previously served in the Coast Guard for over seven (7) years as a coxswain. He performed countless search and rescue missions and law enforcement duties donning heavy tactical gear and performing strenuous tasks. Over the course of performing his military duties he developed radiculopathy, a pinched nerve causing pain in his neck and left shoulder. During service, he received multiple steroid injections to assist with pain management and physical therapy session, which did not improve the pain. Medical determined the applicant had a herniated disc and the likely cause of his shoulder pain.

The applicant is requesting a change to his disability evaluation to 100% and his separation be medically retired. He claims the previous discharge with a medical evaluation of 20% is an injustice. He protests that as a young service member he did not understand the ramifications of his medical eval, nor did he know he could challenge the results. Given the increase in disability rating surrounding the same service-related injury, the applicant asserts it is appropriate to upgrade his discharge and disability rating.

SUMMARY OF THE RECORD

On October 14, 2008, the applicant received formal counseling on his Informal Physical Evaluation Board (IPEB) findings with the opportunity to appeal the finding of 20% disability. The applicant accepted the findings and waived his right to a Formal Physical Evaluation Board.

On January 23, 2009, the Coast Guard separated the applicant with a characterization, “honorable” and a separation narrative of “disability, severance pay” on his current DD214.

On October 1, 2023, the Department of Veteran’s Affairs sent the applicant a letter stating that his combined service-connected evaluation is determine at 100% disability.

VIEWS OF THE COAST GUARD

On February 5, 2025, a Judge Advocate (JA) for 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 Coast Guard Personnel Service Center (PSC).

The JA concurred with the PSC evaluation of the applicant’s request and the recommendation to deny their request. The applicant did not submit military medical records from his time of service to demonstrate the error he has asserted. The rating by the VA and the military are varying in purpose. The Coast Guard views an applicant’s medical record against their ability to complete their military responsibilities. The VA is much more focused on the injury itself and the extremity of that injury. The increased rating by the VA nearly fifteen (15) years after the applicant’s discharge does not in itself evidence of error by the Coast Guard.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On February 7, 2025, the Chair sent the applicant a copy of the Coast Guard’s views and invited him to respond within thirty (30) days. The applicant submitted a response on February 11, 2025, asserting that he believed the Board would have access to his military records, which is why he did not submit these original documents. The applicant shared his 2009 military medical reports from various civilian medical offices. These establish the steps taken by the applicant during service to improve the injury without avail.

The applicant states that he was young at the time of his discharge and being heavily pressured by command to accept the disability rating. He felt he had to accept the rating and did not know he could have appealed the 20% rating. He seeks a remedy to his perceived injustice by adding his name to the retirement list claiming he should have been medically retired.

APPLICABLE LAW AND POLICY

The Board may correct errors or remove injustices in a service member’s records pursuant to 10 U.S.C. § 1552(a).

(1) Error can be defined as either legal and/or factual.

(2) Injustice, when not also error, is treatment by the military authorities that “shocks the sense of justice.”¹ In addition, the Board has the authority to decide whether an injustice

¹ *Sawyer v. United States*, 18 Cl. Ct. 860, 868 (1989) citing *Reale v. United States*, 208 Ct. Cl. 1010, 1011, cert. denied, 429 U.S. 854, 50 L. Ed. 2d 129, 97 S. Ct. 148 (1976).

exists in an applicant's record on a case-by-case basis. The application must file within three years after discovery or reasonably should have discovered the alleged error or injustice for a correction or relief.²

33 C.F.R. § 52.24 (a)

Burden of Proof: "It is the responsibility of the Applicant to procure and submit with his or her application such evidence, including official records, as the Applicant desires to present in support of his or her case."

33 C.F.R. § 52.24 (b)

Presumption of Regularity: "The Board begins its consideration of each case presuming administrative regularity on the part of the Coast Guard and other Government officials. The Applicant has the burden of proving the existence of an error or injustice by the preponderance of the evidence."

Physical Disability Evaluation System, COMDTINST M1850.2D (2006)

Coast Guard Medical Manual, COMDTINST M6000.1C, Chapter 3.7.m.5-6 (2007)

(5) Non-Fitness for Duty Determination Physical Examinations. The Chief of Health Services retains the authority and responsibility to determine capability and capacity to conduct non-fitness for duty physical examinations for all eligible beneficiaries.

(6) Medical Boards. Medical Boards are convened to evaluate the present state of health and fitness for duty of any active duty/selected reserve member.

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(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. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice.³ The applicant was discharged in 2009. Therefore, the applicant knew of the alleged error in his record or perceived injustice of his medical discharge in 2009, and his application is untimely.

² 33 C.F.R. § 52.22

³ 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.

3. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.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.”

4. For the reasons stated below, the Board will not waive the untimeliness of the applicant’s request. We have reviewed the records provided by the Coast Guard, and all records submitted by the applicant in this case. In sum, the applicant asserts that his initial rating decisions made by the Coast Guard in 2009 were erroneous because a subsequent disability claim made more than a decade gave the applicant a higher rating. A subsequent claim (as opposed an appeal of an initial claim) is not, on its face, evidence that the Coast Guard’s initial determinations were made in error or effected an injustice on the applicant.

5. The applicant signed his medical evaluation form and on the box to sign it states he agrees to waive his appeal or request for additional evaluations. An appeal was an option he could have checked on the same form one line down. It is clear the applicant was aware of his rights at the time of his military medical evaluation and choose to separate with the findings of the Coast Guard of being twenty (20%) disabled. The Board recognizes the applicant’s claim that he felt pressured to sign the form, but the process took close to two years so it is less moving that the pressure was urgent or driven by duress. The information to inform the applicant of an opportunity to appeal was present on the document he signed in 2009. The applicant chose not appeal and accepted the 20% disability rating with the severance payout. However, whether the applicant chose to appeal his initial rating is not directly relevant to the ultimate question of whether error or injustice occurred. But if the applicant is to be believed about his reasons for not appealing the initial decision, then he was clearly aware of an alleged error or injustice in his record at the time of his discharge, and he chose not to pursue relief at that time.

6. The Coast Guard and the Department of Veteran’s Affairs have different purposes for their rating determinations. The Coast Guard is reviewing the disability in terms of its impact on a member’s ability to complete their duty assignment.⁶ The VA reviews the severity of the service related injury itself. The applicant has not shown that at the time the Coast Guard conducted the medical review that it was completed in error. The increase disability rating by the VA in 2023 appears to have been made pursuant to a claim in 2021 and comes nearly fifteen (15) years after the Coast Guard evaluation of twenty percent (20%). This is the sole basis upon which the applicant asserts error in his Coast Guard record.⁷ As this was a new claim and not an appeal of

⁴ 10 U.S.C. § 1552(b).

⁵ *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

⁶ Physical Disability Evaluation System, COMDTINST M1850.2D (2006) Chapter 4.A.1. Purpose. The IPEB is a permanently established administrative body convened to evaluate the following on the basis of records only: a. the fitness for duty of active duty and reserve members.

⁷ Allegations that the applicant was pressured to leave the Coast Guard and did not understand his rights to appeal are not allegations of error or injustice in his records. As stated above, a failure of the applicant to appeal at the time

the VA's initial rating decision, the Board concludes that this reflects the injuries getting progressively worse over time. It is not evidence that any previous rating was erroneous.

7. This Board may be persuaded differently if the applicant could obtain the medical and other records he referred to – but did not provide – in his reply to the Coast Guard's opinion. In that vein, the Board hereby notifies the applicant, pursuant to 10 U.S.C. § 1553(a)(3)(B), of the following specific information or documents that did not accompany his claim, but could make a subsequent claim complete and reviewable by the Board:

- a. Medical records or other documentary evidence from the applicant's time in service that show the nature and extent of his injuries and the manner in which they limited his ability to perform his duties.
- b. VA medical records going back to the applicant's initial claims in 2008, or other records or evidence of the applicant's medical condition at the time of his retirement and after.
- c. The impact of the applicant's service connected disability on his ability to work or perform other functions at the time of his retirement, or following his retirement. This could be supported by statements of witnesses or other records.

8. The applicant may submit a new application to this Board that provides the substantial evidence required to support his claim, as well as the reasons why it is in the interest of justice to consider his untimely application. At that time, the Board will reconsider its decision to excuse the applicant's untimeliness. However, based on the record now before the Board, sufficient evidence has not been presented to warrant finding it in the interest of justice to do so. Therefore, relief is denied at this time.

(ORDER AND SIGNATURES ON NEXT PAGE)

is not probative of whether an error or injustice occurred. This Board applies the same standards of review regardless of whether he initially appealed, or the reasons why he chose not to.

ORDER

The application of former BM2 [REDACTED], USCG, for correction of his military record for change in disability rating to be medically retired is denied.

March 20, 2025

