

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2002-126

XXXXXXXXXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXXXXX

FINAL DECISION

██████████ Deputy Chair:

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The BCMR docketed the case on June 28, 2002, upon receipt of the applicant's application and military records.

This final decision, dated May 22, 2003, 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 asked the Board to correct his record to show that he was discharged from the Coast Guard in 1971, instead of being placed on the temporary disability retired list (TDRL) and permanently retired by reason of physical disability in 1976 with a 30 percent disability rating. He stated that because he was retired, rather than discharged, he is now unable to "buy back" his military time so that it can be included in the computation of his time as a civil servant. He stated that the Board should find it in the interest of justice to consider his application despite the long delay because he is a disabled veteran and wants proof that he was discharged.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on April 21, 1969. On March 28, 1970, during the towing of a disabled boat, a towline struck the applicant's left hand. As a result of this accident the distal phalanx of the middle and index fingers on his left hand were amputated.

In September 1970, the applicant wrote his congressman complaining that the Coast Guard had told him that he would not be separated or compensated for his injury. He stated that as a radioman, he could not do his job as well as he had before his injury. In response to an inquiry from the congressman, the Commandant sought information from the applicant's command.

According to a letter from the applicant's commanding officer (CO) to the Commandant on October 15, 1970, when the applicant returned from convalescent leave on May 26, 1970, he initially indicated that he wanted to stay in the service and complete his obligation. The CO stated that, despite his injury, the applicant had continued to serve as an above average radioman and had been advanced on June 16, 1970. However, in mid September, the CO stated, the applicant suddenly stated that he thought he had "paid his debt to the Coast Guard" and wanted to be discharged.

On November 20, 1970, an Initial Medical Board examined the applicant in accordance with the Coast Guard's Physical Disability Evaluation System (PDES) and found that his two injured fingers had lost 80 percent of their flexion and were sensitive at the tips but that he was fit for light duty. The applicant waived his right to rebut the board's findings, and the case was referred to a Central Physical Evaluation Board (CPEB) for final adjudication.

On January 7, 1971, the CPEB convened to review the applicant's case, found that he was fit for duty, and recommended that he be returned to full duty. On February 1, 1971, with the advice of counsel, the applicant rejected the CPEB's findings and asked for a hearing before a Formal Physical Evaluation Board (FPEB).

On April 12, 1971, the applicant was appointed counsel and informed that the FPEB would be convened aboard his cutter on April 26, 1971. At the FPEB, the applicant's counsel asked the board to find that he was 30 percent disabled due to the ankylosis (stiffness) of his fingers. The board heard the following testimony:

- A radioman testified about how hands and fingers are used in his work.
- A doctor stated that the stiffness and soreness of the applicant's two fingers were probably permanent.
- A fellow radioman on the cutter testified that the applicant could not type as fast as he used to or work very efficiently because he had to look at the keyboard as he typed; that the applicant had become anxious and depressed; and that the applicant reacted in pain whenever the tips of the two fingers were hit accidentally.

On April 27, 1971, the FPEB found that the applicant was unfit for duty by reason of physical disability and recommended that he be discharged with a 20 percent disability rating for ankylosis and with severance pay. The applicant acknowledged the

findings and recommendations and indicated that he would not submit a statement in rebuttal. The case was forwarded to the Physical Review Council (PRC) for review.

On July 2, 1971, the applicant's counsel wrote to the PRC and asked that it consider rating the applicant as 10 percent disabled by the tenderness of his scars in addition to the 20 percent disability for ankylosis. The counsel stated that at the time of the FPEB, he had not known that "tender scar" was a ratable disability.

On July 22, 1971, the PRC recommended that the applicant receive a 30 percent combined disability rating—20 percent for the ankylosis and 10 percent for tender scars—and be placed on the temporary disability retired list (TDRL). On July 26, 1971, the applicant acknowledged notification of the findings and recommendation of the PRC and stated that he concurred in them. The PRC's findings and recommendation were reviewed and found to be technically correct by the Chief Counsel on August 10, 1971, and approved by the Chief of the Office of Personnel on August 12, 1971.

On August 26, 1971, the applicant was placed on the TDRL. He was issued a discharge form DD 214 indicating his temporary retirement by reason of physical disability with an honorable character of service.

In December 1972 and again in June 1974, the applicant underwent physical examinations to determine whether he should remain on the TDRL or be discharged or retired by reason of physical disability. Each time, the doctor found that his fingers were less stiff but still tender, and he was retained on the TDRL.

On December 4, 1975, the applicant underwent his final physical examination to determine whether he should be discharged or retired by reason of physical disability. The doctor found that the fingers still "lack[ed] a few degrees flexion." The applicant told him that the fingers were always stiff in the morning, that they ached in cold weather, and that the tips were still sensitivity to touch. He worked at a post office.

On January 5, 1976, the CPEB recommended that the applicant be permanently retired with a 30 percent combined disability rating—20 percent for ankylosis and 10 percent for tender scars. On February 10, 1976, with the advice of counsel, the applicant accepted the findings and recommendation of the CPEB and waived his right to a formal hearing. The CPEB's findings and recommendation were reviewed and found to be technically correct by the Chief Counsel on February 20, 1976, and approved by the Chief of the Office of Personnel on February 23, 1976.

The applicant was permanently retired from the Coast Guard on March 8, 1976.

VIEWS OF THE COAST GUARD

On November 15, 2002, the Chief Counsel of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny the applicant's request for relief. A copy of the advisory opinion and an enclosed memorandum on the case by the Coast Guard Personnel Command (CGPC) are attached to this Final Decision.

On November 18, 2002, the BCMR sent the applicant copies of the Chief Counsel's advisory opinion and CGPC's memorandum and invited him to respond. No response was received.

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 submissions, 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 of the day the applicant discovers the alleged error in his record. 10 U.S.C. § 1552(b). The applicant was released from permanently retired from the Coast Guard in 1976. Therefore, his application was untimely.

3. The Board may waive the three-year statute of limitations if it is in the interest of justice to do so. 10 U.S.C. § 1552(b). To determine whether it is in the interest of justice to waive the statute of limitations, the Board should consider the reasons for the delay and conduct a cursory review of the merits of the case. *Dickson v. Secretary of Defense*, 68 F.3d 1396, 1405 (D.C. Cir. 1995); *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992). The applicant stated that the Board should consider his case because he is a disabled veteran and wants proof that he was discharged. No explanation was given for his delay, but the Board presumes that he has only recently decided that it would now be to his financial advantage if he had been discharged rather than retired. The Board finds that the applicant's reason for delay is not compelling. Moreover, the applicant's argument that the Board should consider his application because he is a disabled veteran somewhat contradicts his argument that the Coast Guard should not have retired him because of his physical disability.

4. The applicant submitted no evidence to support his allegation that the Coast Guard committed an error or injustice in processing him under the PDES and permanently retiring him because of his physical disability. The fact that now, more than 25 years after his retirement, he believes that a discharge would have been more favorable to him in the long run, with 20/20 hindsight, does not mean that the Coast Guard's actions and decisions were erroneous or unjust. The Board's review of the

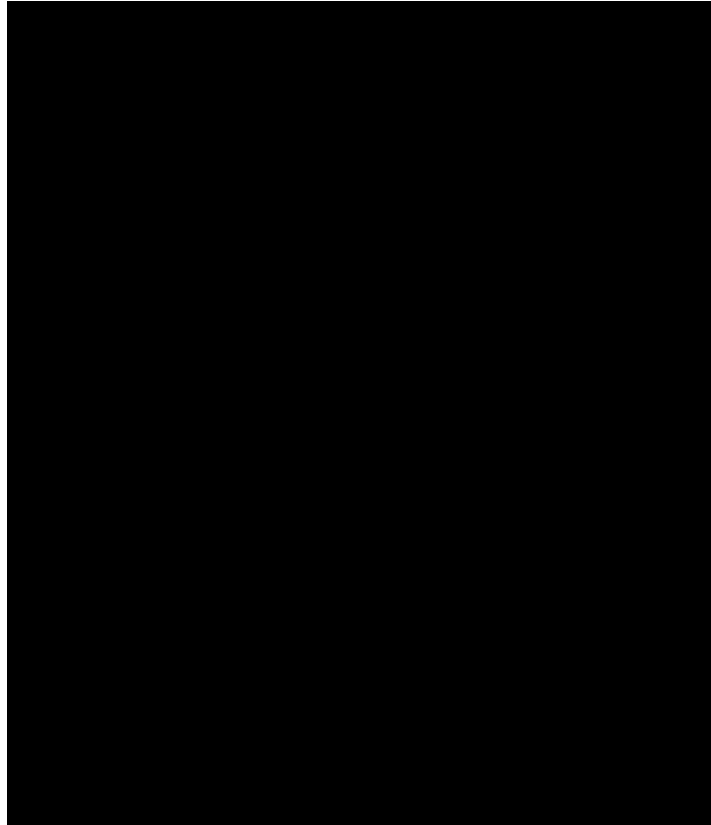
applicant's record did not reveal any errors made by the Coast Guard. Moreover, the record indicates that the applicant himself diligently sought a medical retirement with a 30 percent disability rating.

5. Accordingly, the Board will not waive the statute of limitations, and the applicant's request should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is denied.





Memorandum

Subject: ADVISORY OPINION IN CGBCMR
DOCKET NO. 2002-126 (XXXXXXX)

Date: 5420/3

From: Chief Counsel, U.S. Coast Guard

Reply to: G-LMJ
Attn. Of: 

To: Chairman, Board for Correction
of Military Records (C-60)

Ref: (a) Applicant's DD Form 149 filed 01 May 2002

1. Please accept enclosure (1), and the following comments, as the Coast Guard's advisory opinion recommending denial of relief in the subject case for lack of timeliness and lack of merit.
2. Summary of Case: The Applicant has requested that he receive a copy of a DD214 (Armed Forces of the United States Report of Transfer or Discharge) stating that he was discharged vice retired. On 21 August 1971, the Applicant was placed on the Temporary Disabled Retirement List with a ratable disability of 30%. [During the towing of a disabled boat, the towline parted and struck the Applicant on his left hand, resulting in the partial amputation of his middle and index fingers.] On 26 August 1971, the Coast Guard issued a DD 214 transferring the Applicant to the TDRL. On 08 March 1976, the Applicant was placed on the Permanently Disabled List with a ratable disability of 30%. Given that the Applicant was retired and not discharged, no DD 214 was issued at that time. The Applicant is now seeking a DD214 showing him as "discharged" vice "retired" to enable him to take advantage of a federal law that permits discharged veterans to "buy back" their military time and apply it toward their federal civil service pension.
3. Analysis:
 - a. *The application is untimely and lacks merit.*
 - (1) Under 10 U.S.C. § 1552(b), and further regulations in 33 C.F.R. § 52.22, an application must be filed within three years of the date the alleged error or injustice was, or should have been, discovered. Applicant was retired on 08 March 1976; he served two years four months and five days of active duty service. Therefore, the application is 23 year late. Under 33 C.F.R. 52.22, when an application is untimely, the applicant must set forth in the application reasons why

its acceptance is in the interest of justice. In addition, the Board must deny relief unless the Applicant presents sufficient evidence to warrant a finding that it would be in the interest of justice to excuse the failure to file timely. In making this determination, the Board must consider the reasons for delay and make a cursory review of the potential merits of the claim. Dickson v. Secretary of Defense, 68 F. 3rd 1396 (D.C. Cir. 1995). The Applicant has not provided any reason for his delay and a cursory review of his record shows no basis to excuse his lack of timeliness. Therefore, this application should be dismissed because it was not filed within three years of the date that an alleged error should have been discovered, and Applicant has presented no argument as to how justice will be served by granting the requested relief.

- (2) Per the analysis contained in enclosure (1), the Board should also deny relief in this case because the Applicant has failed to submit any documentation to support a change in his status from “retired” to “discharged.”

4. Recommendation: The Coast Guard recommends that the Board deny the relief requested for the reasons described above.



By direction

- Encl: (1) CGPC ltr 5420 of 06 September 2002
(2) Applicant's Service Record
(3) Applicant's Health Record

U.S. Department
of Transportation

**United States
Coast Guard**



Command
United States Coast Guard

2100 Second Street, S.W.
Washington, DC 20593-0001
Staff Symbol: CGPC-adm-2
Phone: (202) 267-6969
Fax: (202) 267-4381

5420

MEMORANDUM

From : [REDACTED]
CGPC-c

Reply to : [REDACTED]
Attn of: [REDACTED]

To: Commandant
(G-LMJ)

Subj: PROGRAM INPUT ON CGBCMR APPLICATION (xxxxxxxxxxx)

Ref: (a) CGBCMR Application 2002-126

1. Comments on the application contained in reference (a) are attached as enclosure (1).
2. I recommend no relief be granted.

#

Enclosures (1) Comments concerning CGBCMR Application 2002-126
:

Enclosure 1 - CGBCMR 2002-126

RELIEF REQUESTED BY APPLICANT:

1. The applicant requests to receive a copy of his DD-214 stating he was discharged vice retired.

APPLICANT'S STATED BASIS FOR RELIEF:

1. The Applicant does not necessarily allege an error, but requests that his DD-214 be changed to reflect that he was discharged and not retired, so that he can take advantage of a provision of the federal law that allows non-retired veterans to "buy back" their military time and apply it toward their federal civil service pension.

MATTERS OF RECORD:

1. The application is not timely.
2. April 21, 1969: Applicant enlisted in the Coast Guard.
3. August 12, 1971: Per ltr 1856 SUBJ: RETIREMENT FROM ACTIVE DUTY; PLACEMENT ON TEMPORARY DISABILITY RETIRED LIST; ORDERS; TRAVEL, effective on August 26, 1971, applicant was placed on the Temporary Disability Retired List (TDRL) with a 30 percent physical disability rating. Applicant was entitled to receive retired pay, and he was required to report for a periodic physical examination at least every 18 months.
4. August 25, 1971: Per Form DD-214 (Armed Forces of the United States Report of Transfer or Discharge), applicant was temporary retired for disability under Article 12-B-9, Code 374.
5. August 26, 1971: Per CG-3307 (Administrative Remark), applicant was temporary retired from the U. S. Coast Guard for physical disability.
6. February 23, 1976: Per ltr 1856 SUBJ: PERMANENT RETIREMENT; REMOVAL FROM TEMPORARY DISABILITY RETIRED LIST, the final action on a Physical Evaluation Board (PEB) removed the applicant from the TDRL and was permanently retired effective on March 8, 1976.
7. March 8, 1976: Per CGHQ-3433 (Statement of Service – Retired Personnel), applicant was retired with a 30 percent permanent physical disability. Member served two years, four months and five days of active duty.

8. Per Commandant Instruction (COMDTINST) M1900.4D, Chapter 1.B.3 Ineligible Personnel, the DD-214 will NOT be issued to members “who are being removed from the temporary disability retired list (TDRL).

CONCLUSIONS:

1. Applicant was temporary retired and placed on the TDRL on August 26, 1971. Applicant was removed from the TDRL and placed on permanent retirement on March 8, 1976. In accordance with COMDTINST M1900.4D, applicant received a DD-214 when he was temporarily retired and he was not entitled to a subsequent DD-214 when he was permanently retired. Applicant’s DD-214 is correct, and there is no documentation to support that the applicant was discharged vice being retired.
2. Altering an accurate document in an effort to assist the Applicant in obtaining a more advantageous federal civil service pension would be inappropriate.

RECOMMENDATION:

1. I recommend no relief be granted.