DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2017-141

[redacted]

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the case after receiving the completed application on April 20, 2017, and assigned it to staff attorney [redacted] to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated March 16, 2018, 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, who received a regular military retirement on [redacted] asked the Board to correct his record by changing his career retirement for completing more than 20 years of service to a medical retirement and updating his DD 214[1] accordingly. The applicant, through counsel, explained that he was found 30% disabled by an informal Physical Evaluation Board (PEB) prior to his discharge. However, he asserted, he received erroneous advice and therefore selected a standard career retirement instead of a medical retirement "under the mistaken belief that he would preserve more benefit by electing a standard retirement." In accordance with a medical retirement, the applicant requested that his DD 214 be updated to reflect the appropriate reentry code, type of separation, separation authority, and narrative reason for separation.

Regarding the timeliness of his application, the applicant argued that it is in the interest of justice to grant relief despite the fact that more than three years have passed since his retirement. He stated that the Board should find it in the interest of justice because a Coast Guard employee gave him incorrect information about his pay with a medical versus career retirement, as well as about concurrent receipt of disability compensation.[2] "Accordingly, it is in the interest of justice to grant him the most favorable retirement he is entitled to."

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[1] A DD 214 is prepared to document a member's release or discharge from a period of active duty.

[2] Under 10 U.S.C. § 1414, veterans with at least 20 satisfactory years of service and service-connected disability ratings from the DVA of at least 50% may receive concurrent retired and disability pay (CRDP).

Explanation of Events

The applicant stated that around 2005, when he had 15 years of service, he was required to elect whether to have his future 20-year career retired pay be calculated normally (based on his High-3-Year Average) or take an immediate $30,000 Career Status Bonus (also known as CSB/REDUX) bonus and having his career retired pay reduced.[3] He chose the REDUX retirement plan and received the CSB. On July 14, 2009, the applicant was found unfit for duty by the PEB, based on a diagnosis of combat-related post-traumatic stress disorder (PTSD), and assigned a 30% disability rating, which entitled him to a medical retirement.[4] The applicant claimed that while he was waiting for his retirement to be finalized his "condition worsened" and he was admitted into a five-week PTSD in-patient recovery program from October 5 through November 18, 2009. He stated that on November 4, 2009, while he was still at the recovery program, he was contacted by the Coast Guard and asked to elect either a medical retirement or the CSB/REDUX retirement because he had recently passed his 20-year mark. He stated that he was counseled by an attorney and told that he could have either "a medical retirement at 30% pay or career retirement at 40% pay (reduced because of his prior CSB/REDUX election)."[5]

The applicant claimed that he was erroneously informed that choosing the medical retirement would only provide him with 30% of his pay rather than 40% of his pay that he would receive if he opted for a career retirement. He also asserted that he was "told incorrectly that he would not be eligible for concurrent receipt if he took a medical retirement." The applicant stated that he was unable to fully contemplate his options, as he was in the midst of in-patient treatment for PTSD. However, he elected the career retirement "under the false belief that he would end up better off collecting retirement and a limited concurrent receipt of disability compensation." He was retired on [redacted]. On March 11, 2010, he was rated by the Department of Veterans Affairs (VA) with an 80% disability rating. On January 25, 2012, he was rated by the VA again and received a 100% disability rating.

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[3] Articles 16.A.2.b. and 16.A.3.b. of the Coast Guard Pay Manual, COMDTINST M7220.29B, provide that a member is given a choice of retirement plans upon reaching 15 years of active duty service. The first is to retire with at least 20 years of service and receive retired pay calculated as 2.5% of the member's high 36-month average base pay for each full year of service and 1/12 of that amount for each additional full month of service. The second option is to receive a $30,000 Career Status Bonus (CSB) at the 15-year point and receive a slightly lower payment percentage upon retirement if the member retires with less than 30 years of service. If he chooses the latter option, he is entitled to 2.5% for each full year of service, plus 1/12% for each full month, reduced by 1% for each full year of service less than 30 years and by 1/12% less for each additional full month of service less than 30 years. When the member reaches 62 years of age, his retired pay multiplier is adjusted on a one-time basis to what it would have been had he chosen the first retirement option but then continues at the reduced rate. Article 16.A.4. states that for members who take the CSB, their annual cost of living adjustment (COLA) is likewise reduced by 1% when the regular COLA is at least 2%, and the COLA undergoes a one-time "catch up" adjustment when the member reaches age 62.

[4] Physical Disability Evaluation System Manual, COMDTINST M1850.2D.

[5] With a little over 20 years of service, if the applicant had not elected the CSB/REDUX retirement, his retired pay would have been a little over 50% of his High-3-Year average (2.5% x 20 years = 50%). Because he would be retiring almost 10 years shy of 30 years and the CSB/REDUX retirement reduces retired pay by 1% per full year less than 30 years and 1/12% per additional full month less, the applicant's CSB/REDUX retired pay would start at a little over 40% of his High-3-Year average and rise with a reduced COLA except for the one-time catch-up adjustment of his retired pay and COLA at age 62..

Allegations

The applicant stated that in accordance with 10 U.S.C. § 3991(b)(1) he is entitled to the most favorable retirement available to him. At the time of his retirement, he had the option of a career retirement under the CSB/REDUX program or a medical retirement. He claimed that he was given erroneous information "from government representatives that he would be better off with a career retirement and limited concurrent receipt of disability compensation." The applicant explained that the CSB/REDUX program does not limit retired pay for members who are later medically retired. He also asserted that concurrent receipt of retired pay and disability compensation is only available to veterans with over 20 years of service who were medically retired and who have at least a 50% disability rating from the VA.

The applicant argued that there would be "no rational reason that [he] (or any service-member) would elect career retirement and partial concurrent receipt of disability compensation when eligible for medical retirement and full concurrent receipt of disability compensation." He asserted that this is particularly true because he had previously elected to participate in the CSB/REDUX option. He argued that, had he been properly informed, "he indisputably would have taken the medical retirement and full concurrent receipt of disability compensation." Had he been medically retired, he claimed that he would not have been subject to the limitations of the REDUX program (aside from the 1% reduction in his cost of living allowance (COLA).

The applicant argued that one issue that complicated his situation was the fact that the Coast Guard "rarely handles cases of medical retirement due to combat-related PTSD." He claimed that he was told that he was "the first member medically retired with over 20 years of service for combat-related PTSD" from the Coast Guard. He asserted that this lack of experience likely contributed to his not receiving proper advice on his retirement options. Therefore, he argued that as "a matter of equity and propriety, relief is warranted and the applicant should be medically retired." With his application, he provided several documents which are described below in the Summary of the Record.

SUMMARY OF THE RECORD

The applicant served in the Army from October 25, 1988, to December 18, 1991. He enlisted in the Coast Guard on Octob[redacted]

On October 24, 2008, the applicant was seen at a VA medical facility by a social worker. The medical notes state the following:

> He is concerned about his future, the nature [of] his separation from the Coast Guard and his financial future.
>
> He had questions about the VBA compensation process and [social worker] discussed with him the application process before discharge (benefit before discharge program / BBD) as well as application process after discharge.
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> Regarding concerns about the nature and process of his separation from the Coast Guard, [the social worker] was not aware of these processes and suggested he inquire with DOD jag officers who would be more knowledgeable about the regulations.

On January 3, 2009, an Initial Medical Board found that the applicant did not satisfy medical retention standards due to his diagnosis of PTSD. The applicant indicated that he desired to submit a rebuttal statement in response to the findings. The applicant acknowledged notification of these findings on January 21, 2009, and submitted an undated rebuttal statement to the Medical Board's findings.[6] He took issue with a few specific statements found in the Narrative Summary of the board's findings. He also complained that some of his injuries were not properly evaluated by the board.

On February 25, 2009, the applicant's command positively endorsed the Medical Board's findings and forwarded the case to the Personnel Service Center (PSC) for a PEB.

On July 14, 2009, the PEB found that the applicant was not fit for duty due to PTSD. The findings state "occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks (although generally functioning satisfactorily, with routine behavior, self-care, and conversation normal), due to such symptoms as depressed mood anxiety, suspiciousness, [and] chronic sleep impairment." The PEB found that this disability was not incurred due to the applicant's willful neglect or misconduct, but that it was incurred while he was on active duty, that the disability was combat-related and was the "result of instrumentality of war," and it was the "result of armed conflict." The disability was found to be permanent and was rated at 30%. The recommended disposition was to permanently retire the applicant.

On July 28, 2009, PSC informed the applicant of the findings and recommendations of the PEB. He was informed that the PEB recommended that he be found unfit for duty but that these findings were unofficial until signed by the Final Approving Authority. He was advised to consult legal counsel, and he was entitled to Coast Guard counsel at no cost to him or civilian counsel at his own expense. He was told that he needed to elect counsel by August 4, 2009, and to elect whether he accepted or rejected the PEB findings by August 24, 2009.

The applicant's attorney, Commander W, submitted a request asking the PEB to increase the applicant's disability percentage for PTSD to 50% based on 10 U.S.C. § 1216a, enacted in 2008, which requires the military services to apply the VASRD rating schedule when assigning disability ratings, and 38 C.F.R. § 4.129, which states the following:

> When a mental disorder that develops in service as a result of a highly stressful event is severe enough to bring about the veteran's release from active military service, the rating agency shall assign an evaluation of not less than 50 percent and schedule an examination within the six month period following the veteran's discharge to determine whether a change in evaluation is warranted.

Medical notes dated September 30, 2009, state that on that date the applicant had a supportive psychotherapy appointment. One of the notes from this appointment states: "Vet is waiting to retire with 20 years or take a medical retirement from the military. He is stressed because he does not know what option will be in his best interest in the long run. He is frustrated with trying to get answers to help him make that decision."

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[6] As discussed below, PSC stated that it was unable to find a copy of this rebuttal statement, but the Board was able to locate this document in the applicant's medical record. The applicant also provided a copy with his response to the Coast Guard's advisory opinion.

Medical notes dated October 8, 2009, indicate that the applicant stated he was "awaiting medical retirement or I may just retire since I will have 20 years soon if I can't deal with the prolonged stress anymore."

On November 4, 2009, the applicant signed and acknowledged the PEB's report showing a 30% disability rating. He also initialed it next to an option indicating that he accepted the proposed findings of the PEB and the recommended disposition. A handwritten note states that he would remain on active duty until reaching 20 years of service on November 19, 2009.

On November 13, 2009, the applicant signed a request for a non-medical retirement for attaining 20 years of service. He asked to retire on February 1, 2010, and specifically requested that no action be taken on the PEB's proceedings. (The applicant submitted a copy of this letter in response to the Coast Guard's advisory opinion.)

On November 18, 2009, the applicant completed 20 years of active duty service on November 18, 2009. Mental health counseling notes made that day at the applicant's in-patient program state that he was admitted on October 5, 2009, into the PTSD Recovery Program, which was a specialized five-week "life skills adjustment focused program within the Stress Disorder Treatment Unit" for the treatment of chronic PTSD. The applicant was discharged from the program on November 13, 2009. The notes discuss the applicant's progress with his PTSD therapy while in the program and recommendations for his continued care.

An administrative entry in the applicant's record dated November 23, 2009, and executed by the applicant on November 24, 2009, is titled "Certificate of Full and Fair Hearing." It states that the applicant certified that the medical board process had been fully explained to him in that he was found to be suffering from PTSD. He certified that he was entitled to a formal hearing before a Physical Evaluation Board if he demanded one. He certified that by signing this document he could be separated from the Coast Guard without such a hearing and "without any disability compensation whatsoever." With this knowledge he certified that he did not demand a hearing before a Physical Evaluation Board and stated that he requested to be retired on February 1, 2010 in accordance with his "submitted and command approved request for retirement."

The applicant was retired on [redacted]. His DD 214 states that he had a total of 20 years, 2 months, and 13 days of active duty service. Among his many medals and awards is the Purple Heart Medal. The type of separation is "Retirement/Resume Retirement." He received an honorable character of discharge and the narrative reason for discharge is "Sufficient Service for Retirement." The reentry code is RE-2 (retired).

On March 3, 2010, the applicant was seen by a VA mental health specialist. The treatment notes state that the psychotherapist and the applicant "discussed some positive aspects of his being retired and having benefits."

On March 11, 2010, the applicant received a decision from the VA assigning him at an overall combined disability rating of 80% as of February 1, 2010. He was assigned 50% for PTSD, 50% for sleep apnea, and 20% for right shoulder arthritis with cuff tear. Decisions for bilateral

carpal tunnel syndrome, bilateral cubital tunnel syndrome with residual scar, herniated discs in lower back, and concussion syndrome/mild traumatic brain injury were all deferred.

On January 25, 2012, the applicant received an updated decision from the VA assigning him an overall combined disability rating of 100% as of February 1, 2010, based on his diagnosis of PTSD with major depressive disorder.

VIEWS OF THE COAST GUARD

On October 5, 2017, the Judge Advocate General of the Coast Guard submitted an advisory opinion recommending that the Board deny relief in accordance with a memorandum submitted by the Commander, Personnel Service Center (PSC).

PSC stated that the application is not timely and therefore should not be considered on the merits by the Board. The applicant retired from the Coast Guard in [redacted], after attaining 20 years of active duty service, and did not submit his application until 2017 without providing a valid reason for his delay. PSC provided the Board with the Coast Guard policies and regulations regarding retirement, which were available to the applicant prior to making a determination as to which retirement option to choose. The applicant completed 20 years of active duty service on November 18, 2009. PSC stated that an Initial Medical Board found that the applicant was not fit for duty on January 21, 2009, but that the applicant's rebuttal statement could not be located.[7]

PSC stated that on November 24, 2009, the applicant waived his right to a formal medical board hearing and affirmatively requested to retire as of [redacted]. The applicant was made aware of his right to seek legal counsel at no cost to him, who could have assisted him in making a decision regarding the medical board and retirement. PSC also noted that the applicant provided no evidence "pertaining to the alleged miscounseling he received." In addition, PSC noted that there were a few pieces of information in the applicant's statement to the BCMR that were found to be incorrect. The first was that the applicant had stated that he had elected career retirement while he was attending the in-patient PTSD program. PSC stated that the version of the PEB documentation that the applicant provided included the applicant's signature, a date of November 4, 2009, and a handwritten note seeming to indicate he wished to stay on active duty until he reached 20 years of service (November 18, 2009). But PSC asserted that the applicant did not officially waive his right to the formal PEB hearing and request a retirement based on 20 years of service until 24 November 2009, "which was after both completing the inpatient PTSD treatment and also after completing 20 years of active service."

The second incorrect item was that the applicant had stated that concurrent receipt of retired pay and disability compensation is only available to members with over 20 years of service who are medically retired with at least a 50% disability rating from the VA. PSC stated that based on the policies and regulations provided, this is incorrect. "Members who have completed at least 20 years of service and are eligible for a regular retirement are entitled to full [concurrent disability retired pay]." PSC stated that they were able to confirm that the applicant is currently receiving full concurrent retired and disability pay, which PSC noted, is contrary to the arguments made in his statement to the Board. PSC also provided a printout from the Defense Finance and Accounting

[7] See footnote 5 above.

Service website regarding Concurrent Retirement and Disability Pay (CRDP). The website notes that to be eligible for CRDP, a member must be eligible for retired pay based on his time in service. One way to become entitled to CRDP is to be "a disability retiree who earned entitlement to retired pay under any provision of law other than solely by disability, and you have a VA disability rating of 50 percent or greater."[8]

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 12, 2017, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within 30 days. The applicant, through counsel, replied on November 2, 2017, and disagreed with the Coast Guard's advisory opinion.

The first item the applicant brought up was the fact that "although the Coast Guard seems to have no record of it, [the] applicant had detailed legal representation" prior to his retirement.[9] He stated that he requested to have Coast Guard-appointed representation on January 21, 2009, when he acknowledged the results of his Initial Medical Board. He claimed that Lieutenant Commander (LCDR) W was assigned to him after his PEB results were released on July 14, 2009. The applicant claimed that LCDR W led him "to erroneously conclude that he would be better off selecting a 40% career retirement." He stated that she "assisted him with responding to the PEB but was not informed about the differences between the retirement options."

The applicant stated that it was "unclear and concerning" that the Coast Guard was willing to fight his claims yet willing to admit they "they are missing many of the records they should have." With his response to the advisory opinion, he attached a copy of his rebuttal to the Medical Board's report. He stated that it is "substantively irrelevant to this appeal other than to highlight that the [Coast Guard] was incapable of properly retaining records."[10] "The general lack of attention to detail and record keeping demonstrates that, at the time, applicant's command and the [Coast Guard] truly did not know how to properly process applicant's medical board and retirement." He pointed out that the Coast Guard did not contest that the applicant was the first member to be medically retired with more than 20 years of service for combat-related PTSD and he was the first to go through an in-patient PTSD treatment. He asserted that because he was the first Coast Guard member to go through these processes, his attorney was "uninformed of the implication of [his] retirement options."

The applicant stated that the Coast Guard's main argument in their advisory opinion is that the applicant did not contest the 30% disability rating he received from the PEB. He argued that this is a distraction from the real issue of his claim. He stated that "it is of no import" that he did not appeal the disability rating from the PEB decision. The heart of his claim to the Board is that he was entitled to a medical retirement and "no reasonably informed person would elect a career retirement over a medical retirement in those circumstances" (emphasis in original). The applicant stated that his argument is that he was misinformed by his Coast Guard-appointed counsel at the

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[8] https://www.dfas.mil/retiredmilitary/disability/crdp.html.

[9] The applicant did not allege this fact in his initial application.

[10] In its memorandum, PSC did state that after a "thorough review" the applicant's rebuttal statement could not be located. However, the Board will note that it was able to locate the applicant's rebuttal statement in his medical records, so it was in fact properly located in his records.

time regarding his retirement options. He is not disputing the 30% disability rating or the PEB process. He asserted that the Coast Guard "has done nothing to address that point as they do not even seem to be aware that they appointed applicant counsel."

Regarding PSC's contention that the application is untimely, the applicant stated that he realized the alleged injustice after having his law firm "review his records during the correction of an erroneous G.I. Bill recoupment action taken against applicant's daughter earlier this year." He said, once that action was corrected, he "was able to shift his focus to applying for this well-deserved correction." The applicant asserted that it is in the interest of justice to consider his application on the merits because he is "a retired and disabled combat veteran with a purple heart and 100% combat-related disability rating from the VA. The least the Coast Guard can do is ensure he receives a fair retirement through the review of this application."

In response to PSC's assertion that the policies and regulations governing retirement were "available" to the applicant at the time he was making his decision, he agreed but stated that he was "in the midst of suffering from PTSD and in-patient mental health care, [and therefore] simply did not know to refer to them to inform himself of the full effects of his retirement options." He stated that he relied on his appointed Coast Guard counsel to assist him in choosing the best retirement option. He claimed that while he was at the in-patient treatment program, LCDR W spoke to him on the phone several times. He stated that she first told that him that it was in his best interest to accept the PEB's results and medically retire "because she thought she would get him upgraded to 50% or 70% based on her 22 September 2009 rebuttal to the PEB." She also advised that he request to reach 20 years of active duty service prior to retirement. He therefore signed the PEB findings on the condition that he be allowed to reach 20 years of service. After her appeal of the PEB's results was denied, she advised the applicant to take the career CSB/REDUX retirement "believing that the 40% career retirement was better than the 30% medical retirement." He stated that she told him that he could not receive CRDPif he was receiving only 30% medical retired pay—a fact which he now knows to be false. He claimed that LCDR W told him that he would never get paid more than 30% of his pay with the medical retirement and even though he had elected the REDUX option, he would still get 40% under a career retirement. The applicant stated that he specifically recalled her saying "Well, 40 is more than 30, right?" He stated that he agreed with his attorney based on her misinformation. Based on LCDR W's erroneous advice, on November 13, 2009, the applicant revoked his earlier request for a medical retirement and signed a supplementa[redacted] ndard career retirement.

In response to PSC's claim that the applicant elected the career retirement on November 24, 2009, after he was released from his in-patient treatment, the applicant argued that the Coast Guard failed to appreciate that the November 24, 2009, document referenced a November 13, 2009, request for retirement that the applicant had submitted while he was at his in-patient treatment. The final paragraph states "IAW [in accordance with] my submitted and command approved request for retirement." The applicant stated that the only request is the one he submitted while he was at the in-patient PTSD treatment on November 13, 2009.

In response to PSC's assertion that the applicant had incorrectly stated the qualification for concurrent receipt of disability retired pay, he acknowledged that he had incorrectly stated the qualification and apologized to the Board for this "error and oversight in that regard."

Additional Documents

With his response to the advisory opinion, the applicant provided several additional documents. The applicant's appointed attorney, LCDR W, responded to the PEB asking for reconsideration of the 30% disability rating (the applicant pointed out that the Coast Guard also seemed to be unaware of the existence of this document). LCDR W argued that the applicant should receive at least a 70% disability rating or, in the alternate, at least a 50% disability rating.

The applicant also provided his request for standard retirement dated November 13, 2009, as discussed in the Summary of the Record above. He argued that this letter proves that he made the decision about his retirement while at the in-patient treatment center and not afterwards as PSC asserted.

APPLICABLE LAWS & REGULATIONS

Title 10 U.S.C. § 3991(b)(1) states that a person who is "entitled to retired pay computed under more than one formula … is entitled to be paid under the applicable formula that is most favorable to him."

Title 10 U.S.C. § 1414 governs concurrent retirement and disability pay (CRDP). CRDP applies to retired members who receive VA disability compensation for a qualifying service-connected disability. This law provides for concurrent receipt of both military career retired pay and VA disability compensation without the reduction prescribed by other laws. The main limitations under this provision are that the retiree's combined VA rating must be at least 50% and he must be eligible to receive military career retired pay.

According to the Personnel Manual in effect at the time, COMDTINST M1000.6A, Article 12.C.16.a.3., for members who elect to receive the Career Status Bonus, his pay is determined by multiplying 2% times the number of active service years up to 20 and 3.5% for each year and full month of active service after 20 years. That is multiplied by the high 36-months' average of basic pay, whether or not it is consecutive, in order to derive gross monthly retired pay. "After retirement, the individual may obtain a disability rating from the VA and receive disability compensation from that agency. If [redacted] must waive an amount of the Coast Guard retired pay equal to the disability compensation."

Article 12.C.16.b. discusses retirements due to physical disabilities. A member who has at least eight years of service "may receive retired pay based on monthly basic pay…or high 36-month average" based on the formulas in this section. Subsection 2 instructs members to multiply the number of years by 2.5% and the number of full months by 1/12 of 2.5% to obtain the "multiplier," and then to multiply that number by their monthly basic pay or their high 36-months' average to get the gross monthly retired pay.

Chapter 17 of the Personnel Manual is titled Retaining Personnel Unfit for Continued Service on Active Duty. Article 17.A.1.d. states that a member who is found unfit for continued

service due to physical disability who is retained until completing 20 years of service "normally will be processed for physical disability separation on retirement."

The Coast Guard Pay Manual, COMDTINST M7220.29B, Article 16.A.2.b., states that a member is given a choice of retirement plans upon reaching 15 years of active duty service. The first is to retire under the program in effect prior to August 1, 1986. The second option is to receive a $30,000 Career Status Bonus (CSB) at the 15 year point and receive a lower payment percentage at retirement if the member retires with less than 30 years of service. If he makes this election, he is entitled to 2.5% for each full year of service, plus 1/12% for each full month, reduced by 1% for each full year of service less than 30 years and 1/12% less for each full month less than 30 years. When the member reaches 62 years of age, his retired pay multiplier will be adjusted on a one-time basis to what it would have been had he chosen the first retirement option. A note at the bottom of this section states that members who do not complete twenty years of active duty must repay the unearned portion of this bonus.

Article 16.A.4.b. states that members who elect the CSB receive an annual Cost-of-Living Adjustment (COLA) equal to the COLA minus 1% when the COLA is equal to 2% or more. When the member reaches age 62, he will receive a one-time catch up adjustment to apply a full COLA for each retirement year. After this one-time catch up, later years will again be set at the COLA minus 1% when the COLA is at 2% or more.

Article 16.C.5.a. states that retired members who have a 100% disability rating from the VA are entitled to receive restoration of any VA disability compensation deducted from their retired pay.

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.[11] The applicant was retired in [redacted] and knew at the time that he had requested a career retirement, rather than a disability retirement, and he knew how his retired pay would be calculated in either case. He also received counseling and was provided information regarding his choices at the time he selected a CSB/REDUX retirement and during the year before he retired. Therefore, although the applicant claimed that he discovered the alleged error recently, the preponderance of the evidence shows that the applicant knew the information that he is now claiming is erroneous at the time of his retirement. Therefore, the Board finds that 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.[12] In *Allen v. Card*, 799 F. Supp. 158 (D.D.C. 1992), the court stated that the Board

[11] 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.
[12] 10 U.S.C. § 1552(b).

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"[13] 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."[14]

4. Regarding the delay of his application, the applicant argued that it is in the interest of justice to grant his request because he was given incorrect information regarding his retirement options, but he submitted no evidence of the alleged miscounseling. He has not shown that either the Coast Guard or the Department of Defense provided him with inaccurate information about the pay and benefits given a CSB/REDUX retirement versus a disability retirement. And the record shows that he knew the effect of his election of a CSB/REDUX retirement on his career retired pay when he made that election approximately five years before he retired as well as during the year before he retired when he was considering his retirement options. Nor has he submitted any evidence supporting his claim that he was miscounseled about his entitlement to CRDP, which he now admits he is receiving. The Board notes that the applicant has PTSD but does not find that it excuses his delay in applying to the Board because the record shows he has been able to file to contest his rating at the VA. The applicant's explanation for his delay is not compelling because he failed to show that anything prevented him from seeking correction of the alleged error or injustice more promptly.

5. A cursory review of the merits of this case indicates that the applicant's claim cannot prevail. The record contains no evidence that substantiates his allegations that he was erroneously counseled about how his career or disability retired pay would be calculated, and the attorney and officers who provided this counseling and information are accorded a presumption of regularity that the applicant has not overcome.[15] The applicant's particular diagnosis (PTSD) would not confuse his counselors, as he alleged. Although the applicant alleged that he made an erroneous decision because he was forced to make it while undergoing treatment for PTSD, this allegation mischaracterizes the events. The notes of a social worker in his medical record show that after being diagnosed with PTSD, he was considering the financial aspects of his retirement more than a year earlier in October 2008. During the entire year before he made his decision, the applicant knew that he would likely have the option of a disability retirement or a career retirement because he had more than nineteen years of service and was being processed for separation because of PTSD. Although he alleged that his attorney miscounseled him, the record shows that she was sufficiently knowledgeable of the law to complain to the PEB about the assignment of a 30% disability rating instead of a 50% rating pursuant to 10 U.S.C. §1216a and 38 C.F.R. § 4.129, and she knew that his CSB/REDUX retired pay would be calculated with approximately a 40% multiplier while disability retired pay for a 30% disability rating would be calculated with a 30% multiplier. The fact that she said to him at some point that the 40% retired pay multiplier he would receive with a CSB/REDUX career retirement is more than the 30% multiplier he would receive with the disability retirement offered by the PEB does not mean that she failed to mention the

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[13] *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).
[14] *Id*. at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).
[15] 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.").

difference in the COLAs or otherwise miscounseled him about his retired pay or benefits. The Board notes that the applicant claimed his military attorney also misled him about his entitlement to CDRP but now admits that he is receiving CDRP.

6. The applicant alleged that there is no sound reason why any member who had been properly counseled would have elected the CSB/REDUX career retirement with an approximate 40% multiplier, instead of a disability retirement with a 30% multiplier, but he failed to submit any evidence or information supporting this claim. The two retirements come with different pay and benefits, but the applicant was entitled to CDRP with either. Just as he chose a $30,000 bonus with reduced future retired pay at his 15-year mark, he may well have chosen the 40% multiplier of a career retirement even though the COLA would be reduced. The applicant also argued that in accordance 10 U.S.C. § 3991(b)(1), he is entitled to the highest retired pay he is eligible for, but nothing in the law requires the Coast Guard to allow veterans to change their choice of retirement whenever they change their minds about which kind of retirement is best for them. Nor did he show that his retired pay would currently be higher if he had elected [redacted]ability retirement.

7. The Board notes that the applicant was offered a 30% disability rating for PTSD by the PEB despite the *apparent* requirement for a 50% rating under 10 U.S.C. § 1216a, enacted in 2008, and 38 C.F.R. § 4.129 and despite his attorney's objection to the 30% rating to the PEB based on those laws.[16] The record shows that the applicant, knowing about this issue, still elected to waive his right to a formal hearing before the PEB and take a career retirement instead of remaining on active duty for the time it would take to have the formal hearing and subsequent reviews. The applicant did not submit this issue to this Board, however, and the Coast Guard did not address it. Therefore, the Board will make no findi[redacted]

8. Accordingly, the Board will not excuse the application's untimeliness or waive the statute of limitations for the applicant's complaints in this case. The applicant's request should be denied, but the Board will grant further consideration if the applicant reapplies within a year with arguments concerning whether the PEB erred in offering the applicant a 30% disability rating for PTSD in July 2009 in light of 10 U.S.C. § 1216a and 38 C.F.R. § 4.129.

(ORDER AND SIGNATURES ON NEXT PAGE)

[16] *See Sabo v. United States*, 127 Fed. Cl. 606, 613 (2015).

ORDER

The application of [redacted], USCG (Retired), for correction of his military record is denied, but the Board will grant further consideration if he reapplies within a year with arguments concerning whether the PEB erred in offering him a 30% disability rating for PTSD in July 2009 in light of 10 U.S.C. § 1216a and 38 C.F.R. § 4.129.

March 16, 2018

[redacted]