

**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. 2017-150**



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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. § 425. The Chair docketed the case after receiving the completed application on May 3, 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 January 12, 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 was medically retired from the Coast Guard in 1998, asked the Board to correct his military record by changing his Proceedings and Recommended Findings of Coast Guard Physical Evaluation Board, Form CG-3511A, to indicate that his injuries were "combat related."<sup>1</sup> He explained that he was injured while he was an instructor on an exchange tour with the U.S. Navy performing training flights. He stated that during a night training a flight, his aircraft [REDACTED] entered the aircraft striking [him.]" His helmet was "ripped" from his head and he sustained major head trauma, including concussion, lacerations, facial bone fractures, and the loss of his right eye.

The applicant's injuries were reviewed by the Physical Evaluation Board (PEB) on August 11, 1998. As a result, he was retired with 70% disability rating. He stated that he recently applied for, and was approved for, an increase in pay by the Combat Related Special Compensation (CRSC) Board. He stated that he was recently researching the income tax implications of this increase, and he discovered that his injuries should have been classified as "combat related" by the PEB in 1998 in accordance with the Physical Disability Evaluation System Manual. Regarding the timing of his application, he argued that his application is timely because he applied to this Board within months of discovering that his injuries should have been marked as "combat related"

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<sup>1</sup> Public Law 107-314, § 636(a)(1), enacted on December 2, 2002, authorized military retirees with combat-related disabilities to receive compensation for those disabilities in addition to their regular retired pay.



on his CG-3511A. In support of his application, he submitted various documents, which are described below in the Summary of the Record.

### SUMMARY OF THE RECORD

The incident at issue occurred on March 26, 1998. The applicant's final Officer Evaluation Report speaks highly of his handling of the "dramatic aircraft emergency":

[REDACTED] which shattered the aircraft windscreen and rendered the [applicant] unconscious [sic]. [The applicant] regained consciousness and with severe head injuries followed prebriefed emergency procedures assuming control of the aircraft and completed a successful night landing... His excellent physical condition and professional preparedness were key factors in the safe recovery of the mishap aircraft and student from extreme circumstances.

The PEB was held on August 11, 1998, and made the following findings on a CG-3511A:

- Anatomical loss of right eye: vision in the other eye 20/40, rated at 40%
- Fifth (trigeminal) cranial nerve, neuralgia rated as paralysis of: incomplete, severe, rated at 30%
- Epiphora; Unilateral, rated at 10%
- Scars, disfiguring, head face or neck: moderate, disfiguring, rated at 10%
- Loss of sense of smell, complete, rated at 10%
- Post-traumatic stress disorder, rated at 0%

Entries on the CG-3511A further show that the PEB determined that these disabilities were permanent; were a not result of misconduct or willful neglect; were incurred while the applicant was entitled to basic pay; and were either "a proximate result of his performance of active duty or incurred in the line of duty during a war or national emergency." There is no field on this 1998 CG-3511A for indicating whether the disabilities are "combat related."

The PEB found that the applicant was unfit to perform the duties of his grade or rating. The combined and rounded percentage of disability was 70%. The recommended disposition was permanent retirement. The applicant was counseled about these findings and opted not to submit a rebuttal.

On August 20, 1998, the Personnel Command notified the applicant that he would be retired effective September 20, 1998, with a permanent disability amount to 70%. He was retired on September 20, 1998, having performed 21 years, 2 months, and five days of active duty service. The narrative reason for his separation on his DD 214 is "Disability, Permanent."

On December 16, 2003, the applicant received a decision from the CRSC board, which determined that he met the criteria for CRSC. The board stated that his Department of Veterans Affairs (VA) combined disability rating was 70%, and that all 70% was determined to be "combat related." He was therefore informed that the Coast Guard would file the necessary documents to "adjust [his] retired pay accordingly."

On December 27, 2016, the CRSC board provided the applicant with another decision which approved his request and found that the applicant had an 80% disability rating, of which

80% was “combat related.” He was informed that his payment would be processed given the decision of the board.

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

On October 5, 2017, the Judge Advocate General of the Coast Guard submitted an advisory opinion in which he adopted the findings and analysis provided in a memorandum on the case submitted by the Coast Guard Personnel Service Center (PSC), who recommended that the Board deny re [REDACTED]

PSC stated that the application should be denied as untimely because the applicant was discharged in 1998. Regarding the merits, PSC argued that the applicant received a full and fair hearing in accordance with the Physical Disability Evaluation System Manual at the time of his retirement. The CRSC was passed by Congress in 2002 and went into effect in 2003. This law, 10 U.S.C. § 1413a, allowed military retirees to receive monthly compensation to replace some or all of their VA disability if they had a combat-related injury. PSC noted that this law was not in effect in 1998, and the applicant was processed properly per the standards at the time and is now receiving CRSC from the Coast Guard for the injuries sustained in 1998. PSC therefore recommended that the Board deny relief.

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

On October 11, 2017, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within thirty days. The applicant responded on October 19, 2017, and stated that he disagreed with the Coast Guard’s advisory opinion. His main contention was that his application was submitted in a timely manner. He argued that he first became aware that his injuries should have been classified by the PEB as “combat related” in February 2017. He received a retroactive increase to his CRSC in late 2016, which prompted him to research the tax implications. After researching, he stated that he discovered his 70% payment from the Coast Guard should be tax exempt in accordance with the Internal Revenue Service disability income rules because it meets the “Combat Related” standards. He discussed this issue with the Coast Guard Pay and Personnel Center, and he stated that they informed him that the PEB had not designated his injuries as “Combat Related” so his retirement payment tax status could not be changed.

The applicant acknowledged that at the time his case was evaluated by the PEB, there was no entry on the CG-3511A for “combat related.” He asserted that the current version of the form now has this as an entry so that the PEB covers this issue. The applicant argued that the time frame in question should be when he discovered the error, which was February 2017, and he sent his application in April 2017. He claimed that 10 U.S.C. § 1552 does not apply to him because he did request a correction of his military record “within 2 MONTHS of discovering the error” (emphasis in original). He therefore requested that the Board set aside the Coast Guard’s advisory opinion and grant his requested relief.

### **APPLICABLE LAW AND POLICY**

Title 10 U.S.C. § 1413a, Combat-related special compensation, states the following:

(a) **Authority.**--The Secretary concerned shall pay to each eligible combat-related disabled uniformed services retiree who elects benefits under this section a monthly amount for the combat-related disability of the retiree determined under subsection (b).

(b) **Amount.**--

(1) **Determination of monthly amount.**--Subject to paragraphs (2) and (3), the monthly amount to be paid an eligible combat-related disabled uniformed services retiree under subsection (a) for any month is the amount of compensation to which the retiree is entitled under title 38 for that month, determined without regard to any disability of the retiree that is not a combat-related disability...

(c) **Eligible retirees.**--For purposes of this section, an eligible combat-related disabled uniformed services retiree referred to in subsection (a) is a member of the uniformed services who--

- (1) is entitled to retired pay (other than by reason of section 12731b of this title); and
- (2) has a combat-related disability...

(e) **Combat-related disability.**--In this section, the term "combat-related disability" means a disability that is compensable under the laws administered by the Secretary of Veterans Affairs and that--

- (1) is attributable to an injury for which the member was awarded the Purple Heart; or
- (2) was incurred (as determined under criteria prescribed by the Secretary of Defense)--
  - (A) as a direct result of armed conflict;
  - (B) while engaged in hazardous service;
  - (C) in the performance of duty under conditions simulating war; or
  - (D) through an instrumentality of war.

Chapter 2.C.3. of the Physical Disability Evaluation Manual in effect in 1998, COMDT-INST M1850.2C, required a PEB to make findings about whether the member was unfit for continued military service because of a physical disability and, if so, what disability code and percentage disability rating should apply and—

(b) whether or not each disability was the result of intentional misconduct, willful neglect, or incurred during unauthorized absence. ...

(c) whether or not each disability was incurred while entitled to receive basic pay. ...

(d) that the evaluatee either:

- 1. has at least 8 years of service; or
- 2. has less than 8 years of service; and
  - a. whether or not each disability is the proximate result of performance of active duty; (see paragraph 2.C.9.) or
  - b. whether or not each disability was incurred in line of duty in time of war or national emergency; or
  - c. whether or not such disability was incurred in the line of duty after 14 September 1978.

(e) whether each disability "is permanent" or on the basis of accepted medical principles "may be permanent."

(f) whether the disability resulted from an injury or disease which was caused by an armed conflict or an instrumentality of war. (NOTE: Dual compensation laws do not apply in these circumstances.)

(g) whether the disability occurred during either combat, extra hazardous service, under conditions simulating war or by an instrumentality of war. (see Public Law 94-455, Section 505 Tax Reform Act of 1976)

(h) whether or not the evaluatee is mentally competent.

## 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>2</sup> The applicant was retired pursuant to the PEB's recommendation in 1998. He received and accepted the PEB's findings and recommendation, after consulting counsel,<sup>3</sup> before his retirement. The record shows that the applicant applied for CRSC in 2003, very soon after the law was enacted, and knew at the time that his PEB report, issued in 1998, did not reflect a "combat-related" determination. Therefore, he knew of the alleged error in his record—the fact that his 1998 PEB report did not show that his injuries were determined to be combat-related in 2003—no later than 2003. 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>4</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>5</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>6</sup>
4. Regarding the delay of his application, the applicant explained that his application should be considered timely because he discovered the alleged error in February 2017. But as explained in finding 1, above, the applicant knew both the contents of his PEB report and the fact that his injuries had been found to be combat-related under the new CRSC law no later than 2003. The Board finds that the applicant's explanation for his delay is not compelling.
5. The Board's cursory review of the merits of this case indicates that the applicant's claim cannot prevail. The applicant's military record is presumptively correct,<sup>7</sup> and the CG-3511A form completed by the PEB in 1998 clearly shows that his disabilities were a "proximate result of performance of active duty or active or inactive duty training or incurred in line of duty during war or national emergency." The CG-3511A did not allow for an entry regarding whether a disability was "combat-related," and so the applicant has not shown that his CG-3511A is erroneous by lacking such an entry. Moreover, the PEB's determination is not keeping the applicant from reaping the benefits of this law as it was intended. Two letters to the applicant dated in 2003 and

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<sup>2</sup> 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.

<sup>3</sup> PDES Manual, Chap. 4.A.10.f.(5) (stating that a member receives legal counsel before deciding whether to accept the findings and recommendation of a PEB or rebut them and demand a formal hearing).

<sup>4</sup> 10 U.S.C. § 1552(b).

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

<sup>6</sup> *Id.* at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

<sup>7</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.").

2016 show that the CRSC board has found that his injuries were combat-related, and he is being compensated by the Coast Guard accordingly. Based on the record before it, the Board finds that the applicant's claim that his CG-3511A is erroneous or unjust cannot prevail on the merits.

6. Accordingly, the Board will not excuse the application's untimeliness or waive the statute of limitations. The applicant's request should be denied. If he has questions about taxes being deducted from his Coast Guard pay, he should contact the Coast Guard Pay & Personnel Center's Retiree and Annuitant Services Branch at [REDACTED] or an appropriate tax advisor.

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



**ORDER**

The application of retired [REDACTED], USCG, for correction of his military record is denied. If he has questions about taxes being deducted from his Coast Guard pay, he should contact the Coast Guard Pay & Personnel Center's Retiree and Annuitant Services Branch at [REDACTED]

January 12, 2018

