

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2018-076

████████████████████
██████████ CAPT (Retired)

FINAL DECISION

This is a proceeding under the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the applicant's completed application on January 13, 2018, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated August 23, 2019, 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 captain (O-6) in the Reserve, asked the Board to correct his record to show that he is entitled to Concurrent Retirement and Disability Pay (CRDP).¹ The applicant stated that pursuant to a statutory change of the CRDP eligibility criteria that took effect in January 2014, he is clearly eligible for CRDP. He stated that the change provides that if a veteran was "placed on a disability retirement, but would have been eligible for military retired pay in the absence of the disability, [the veteran] may be entitled to receive CRDP." The applicant stated that he had served in the Coast Guard Reserve for 32 years and met all of the qualifications for CRDP. He also asked the Board to award him retroactive pay and allowances for CRDP back to January 2014.

The applicant also claimed that although in BCMR Docket No. 2005-079 the Board directed the Coast Guard to reimburse him for medical expenses, he was never reimbursed even though he submitted receipts for medical expenses totaling \$10,424. He stated that he never received the reimbursement because he had moved to a new address.

Regarding the timing of his request, the applicant stated that he discovered on October 1, 2017, that the CRDP eligibility criteria had been changed in January 2014. He also stated that his wife had recently reminded him that he had never been reimbursed for medical expenses.

¹ 10 U.S.C. § 1414.

To support his request, the applicant submitted copies of his correspondence with the Coast Guard, of the decision and clarification in BCMR Docket No. 2005-079, of his 100% disability rating from the DVA, and of his disability rating and retirement by the Coast Guard. The DVA decisions show that the applicant's disability rating has remained 100%.

The applicant also submitted a print-out of an explanation of CRDP from the Defense Finance and Accounting Services (DFAS), which states the following in pertinent part:

Concurrent Retirement and Disability Pay (CRDP)

Concurrent Retirement and Disability Pay (CRDP) allows military retirees to receive both military retired pay and Veterans Affairs (VA) compensation. This was prohibited until the CRDP program began on January 1, 2004.

CRDP is a "phase in" of benefits that gradually restores a retiree's VA disability offset. This means that an eligible retiree's retired pay will gradually increase each year until the phase in is complete effective January 2014.

You do not need to apply for CRDP. If qualified, you will be enrolled automatically.

Eligibility

You must be eligible for retired pay to qualify for CRDP. If you were placed on a disability retirement, but would be eligible for military retired pay in the absence of the disability, you may be entitled to CRDP.

Under these rules, you may be entitled to CRDP if

- you are a regular retiree with a VA disability rating of 50 percent or greater.
- you are a reserve retiree with 20 qualifying years of service, who has a VA disability rating of 50 percent or greater and who has reached retirement age. (In most cases the retirement age for reservists is 60, but certain reserve retirees may be eligible before they turn 60. If you are a member of the Ready Reserve, your retirement age can be reduced below age 60 by three months for each 90 days of active service you have performed during a fiscal year.)
- you are retired under Temporary Early Retirement Act (TERA) and have a VA disability rating of 50 percent or greater.
- you are 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. You might become eligible for CRDP at the time you would have become eligible for retired pay.

In addition to monthly CRDP payments, you may be eligible for a retroactive payment. DFAS will audit your account to determine whether or not you are due retroactive payment. An audit of your account requires researching pay information from both DFAS and VA.

If you are due any money from DFAS, you will receive it within 30-60 days of receipt of your first CRDP monthly payment. If DFAS finds that you are also due a retroactive payment from the VA, we will forward an audit to the VA. They are responsible for paying any money they may owe you.

Your retroactive payment date may go as far back as January 1, 2004, but can be limited based on:

- your retirement date or
- when you first increased to at least 50 percent disability rating

No CRDP is payable for any month before January 2004.

Individual Unemployability

You are eligible for full concurrent receipt of both your VA disability compensation and your retired pay if you are a military retiree who meets all of the above eligibility requirements in addition to **both of the following:**

- you are rated by the VA as unemployable, generally referred to as Individual Unemployability (IU)
- you are in receipt of VA disability compensation as a result of IU

This is effective October 1, 2008 and is retroactive to January 1, 2005.

If you have any questions regarding your CRDP payment from DFAS, call 800-321-1080. For questions concerning disability ratings or disability compensation, please contact the VA at 800-827-1000.

BACKGROUND: BCMR Docket No. 2005-079

In BCMR Docket No. 2005-079, the Board found that the applicant had been erroneously discharged from a period of active duty on October 30, 2001, without being processed under the Physical Disability Evaluation System (PDES), because he had suffered a severe traumatic brain injury (TBI) when he was struck by a vehicle while serving on active duty orders on February 12, 2001. The applicant had remained in the hospital for months, and on September 12, 2001, a neuropsychologist had reported that although he was out of the hospital, he suffered from cognitive dysfunction and did not understand the severity of his condition. However, when the applicant's active duty orders ended on October 30, 2001, he was released without PDES processing. Thereafter, the Coast Guard Reserve retired the applicant based on his years of service on July 1, 2002, and in 2004, the Department of Veterans' Affairs found the applicant to be permanently and totally disabled with a 100% disability rating.

The Board directed the Coast Guard to correct his record to show that he was not transferred to the Retired Reserve; to process him under the PDES for a disability separation; to issue him a Notice of Eligibility so that all of his medical expenses would be reimbursed until the Coast Guard completed his PDES processing; to pay the applicant Incapacitation Pay pursuant to 37 U.S.C. § 204 if he provided documentation of his civilian income; and to reimburse him for the medical bills he had incurred since his separation from active duty and would continue to incur until his disability retirement under the PDES if he provided proof of the medical expenses by the date of his retirement following PDES processing. Pursuant to the Board's Order, the Coast Guard processed the applicant under the PDES and retired him due to physical disabilities rated as 70% disabling on February 8, 2007.

On May 9, 2007, the Office of the Judge Advocate General (JAG) submitted a request for clarification of the Board's Order in 2005-079 pursuant to 33 C.F.R. § 52.73. The JAG asked the Board to clarify its order and submitted copies of correspondence between the applicant and his attorney and the Coast Guard Personnel Command. In this correspondence, the applicant claimed that he was entitled to payment for the unused leave that he would have accrued from November 1, 2001, through February 8, 2007, if he had been on active duty. He alleged that the Board's order had placed him on active duty for that period and he would have accrued leave that he did not use and should be paid for. In response, the Personnel Command had told him that he was not entitled

to reimbursement for unused leave for that period because under the Board's order, he had remained on inactive duty and received Incapacitation Pay.

Upon receiving the JAG's request for clarification, the Chair forwarded a copy to the applicant, who submitted a response on June 13, 2017. He asked the Board to correct his record to show that he had remained on active duty from November 1, 2001, through February 8, 2007. He also asked the Board to address the question of whether he should be reimbursed for his family's medical expenses as well as for his own. He stated that the Coast Guard had taken the position that the Board's Order provides for reimbursement for only his own medical expenses. The applicant submitted a copy of a letter from an attorney dated May 10, 2006, stating only that "[e]nclosed is our check in the amount of \$4,659.09 in final satisfaction of all outstanding Anthem Blue Cross and Blue Shield liens for the [applicant]." In another letter he submitted, dated June 5, 2006, the Office of Claims and Litigation acknowledged that "[w]e have received check number ... for \$6,000.00 which represents full satisfaction of the Coast Guard's lien for medical services provided to [the applicant]." A third letter, dated February 8, 2007, from the Coast Guard to the applicant states that the following:

1. Your request for reimbursement of medical expenses outlined in [a letter from the applicant dated January 25, 2007,] was received on 31 Jan 2007 and has been reviewed.
2. My staff is committed to processing your reimbursement of expenses under the provisions of [the BCMR's Order] as expeditiously as possible. In order to do this, we require a detailed explanation of benefits that document the medical expenses being reimbursed under the \$4,659.09 lien applied by Anthem Blue Cross and Blue Shield. The explanation of benefits should include sufficient information to document the medical treatment received, medical treatment provider, dates of service, and the cost of treatment."

Because the applicant had raised a new issue regarding his medical expenses, the Chair forwarded the applicant's response to the JAG for an opinion. On August 7, 2007, the JAG responded, stating that the Coast Guard had implemented the Board's Order as written. The JAG stated that the "relief that the Board ordered the Coast Guard to effect pursuant to 37 U.S.C. § 204(g) would entitle the applicant to the same medical benefits that any active duty member would be entitled to. Dependent medical care benefits are provided to active duty members through the Tricare system."

The JAG stated that numerous Coast Guard offices had had a great deal of contact and dialogue with the applicant since the Final Decision was issued, and they had asked the applicant to consolidate any outstanding concerns he had with the implementation of the BCMR's Order and direct those concerns to a particular chief warrant officer at the Coast Guard Personnel Command as the point of contact. The JAG recommended that the Board direct the applicant to submit one consolidated package with detailed documentation of all the medical expenses for which he was seeking reimbursement either to the Board or the CWO so that they could be reviewed and so that the Coast Guard could "provide a consolidated review of his case and determine what if any outstanding payments are owed to the applicant." The JAG provided an address where the applicant could mail his consolidated package.

The JAG also submitted copies of the applicant's Leave and Earnings Statements (LESes) for September through December 2001. The LES dated October 31, 2001, showed that he had

accrued 23 days of unused leave. The LES dated December 31, 2001, showed that he sold and been paid for all 23 days of unused leave.

On October 25, 2007, the Board issued a Clarification of the Order in BCMR Docket No. 2005-079. The Board confirmed the Coast Guard's interpretation of the Order and directed that the applicant's record "shall continue to show that he was released from active duty on October 30, 2001, and that he remained a member of the Reserve on inactive duty from October 31, 2001, through February 8, 2007, when he was retired upon completion of his PDES processing." The Board also ordered the Coast Guard to "reimburse the applicant for the medical bills he incurred on behalf of himself or his dependents during the term of the NOE, in accordance with 37 U.S.C. § 204(g) and Article 7.E.7. of the Reserve Policy Manual in effect in 2001, if within six months of the date of this clarification the applicant submits those bills, along with supporting documentation of the medical services provided." The Board provided the name and address of the chief warrant officer (CWO) at the Personnel Command to whom the applicant should mail the package.

APPLICABLE LAW AND POLICY

Title 38 U.S.C. § 5304(a)(1) states, "Except as provided in section 1414 of title 10 or to the extent that retirement pay is waived under other provisions of law, not more than one award of pension, compensation, emergency officers', regular, or reserve retirement pay, or initial award of naval pension granted after July 13, 1943, shall be made concurrently to any person based on such person's own service or concurrently to any person based on the service of any other person."

Title 38 U.S.C. § 5305 states, "Except as provided in section 1414 of title 10, any person who is receiving pay pursuant to any provision of law providing retired or retirement pay to persons in the Armed Forces, ... and who would be eligible to receive pension or compensation under the laws administered by the Secretary [of Veterans Affairs] if such person were not receiving such retired or retirement pay, shall be entitled to receive such pension or compensation upon the filing by such person with the department by which such retired or retirement pay is paid of a waiver of so much of such person's retired or retirement pay as is equal in amount to such pension or compensation. To prevent duplication of payments, the department with which any such waiver is filed shall notify the Secretary of the receipt of such waiver, the amount waived, and the effective date of the reduction in retired or retirement pay."

Title 10 U.S.C. § 1414, as in effect on January 1, 2004, provided that veterans who had qualified for retired pay from the armed forces based on their years of service and who had disability ratings from the DVA of at least 50% could receive concurrent retired and disability pay (CRDP) as follows:

(a) Payment of both retired pay and compensation.--

(1) In general.--Subject to subsection (b), a member or former member of the uniformed services who is entitled for any month to retired pay and who is also entitled for that month to veterans' disability compensation for a qualifying service-connected disability (hereinafter in this section referred to as a "qualified retiree") is entitled to be paid both for that month without regard to sections 5304 and 5305 of title 38. During the period beginning on January 1, 2004, and ending on December 31, 2013, payment of retired pay to such a qualified retiree is subject to subsection (c).

(2) **Qualifying service-connected disability.**--In this section, the term “qualifying service-connected disability” means a service-connected disability or combination of service-connected disabilities that is rated as not less than 50 percent disabling by the Secretary of Veterans Affairs.

(b) Special rules for chapter 61 disability retirees.

(1) **Career retirees.**--The retired pay of a member retired under chapter 61 of this title with 20 years or more of service otherwise creditable under section 1405 of this title, or at least 20 years of service computed under section 12732 of this title, at the time of the member's retirement is subject to reduction under sections 5304 and 5305 of title 38, but only to the extent that the amount of the member's retired pay under chapter 61 of this title exceeds the amount of retired pay to which the member would have been entitled under any other provision of law based upon the member's service in the uniformed services if the member had not been retired under chapter 61 of this title.

(2) **Disability retirees with less than 20 years of service.**--Subsection (a) does not apply to a member retired under chapter 61 of this title with less than 20 years of service otherwise creditable under section 1405 of this title, or with less than 20 years of service computed under section 12732 of this title, at the time of the member's retirement.

(c) **Phase-in of full concurrent receipt.**--During the period beginning on January 1, 2004, and ending on December 31, 2013, retired pay payable to a qualified retiree shall be determined as follows: ...

(11) **General limitation.**--Retired pay determined under this subsection for a qualified retiree, if greater than the amount of retired pay otherwise applicable to that qualified retiree, shall be reduced to the amount of retired pay otherwise applicable to that qualified retiree.

This statute, 10 U.S.C. § 1414, has been amended a few times, including in 2014, but none of the changes have affected the applicant's eligibility for CRDP.

IEWS OF THE COAST GUARD

On May 22, 2018, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request to be retroactively approved for CRDP and for reimbursement of medical costs.

The JAG stated that when the applicant was being retired in 2007 pursuant to the Board's Order and subsequent PDES processing, he—

was given the option of receiving retired pay calculated based on his Reserve points accumulated and his base pay (sometimes referred to as 'Plan A') or retired pay calculated based upon his percentage of disability ('Plan B'). Applicant's Plan A amount was \$2,067.00 and his Plan B amount was \$6,324.00. He selected Plan B. His current (May 1, 2018) Coast Guard disability retired pay gross amount is \$7,613.00.

The JAG stated that when the applicant initially retired, he was erroneously paid both disability retired pay and CRDP from the Coast Guard. When the error was caught in 2009, the erroneous CRDP payments stopped, and his debt for the prior overpayments was waived by the Coast Guard. Therefore, the JAG argued, the applicant should have filed his application within three years of the June 24, 2009, letter he was sent explaining the correction and waiver, and so his application is untimely. The JAG noted that there were no changes to the CRDP law in 2014 that affected the applicant's entitlements.

The JAG stated that CRDP was established to allow certain members to receive both longevity retired pay from the armed forces and disability compensation from the VA. A veteran retired for longevity from the armed forces with at least a 50% disability rating from the VA may receive both the longevity retired pay and the VA compensation. Therefore, the JAG alleged, the sum of the amount of longevity retired pay a member would be entitled to (if retired for longevity) *plus* the amount of the member's VA compensation is the maximum amount a qualifying veteran may receive under CRDP.

The JAG stated that members retired for disability from the armed forces are also entitled to CRDP, but CRDP "only applies to the portion of retired pay that the member would have received if the member was retired based on longevity." Thus, the CRDP payment cannot exceed the amount equal to the following: the longevity pay the member would have been entitled to *plus* the member's VA disability compensation *minus* the member's disability retired pay from the armed forces. And a member's disability retired pay from the armed forces *plus* CRDP cannot exceed the member's longevity retired pay *plus* VA compensation unless the member's disability retired pay by itself exceeds the member's longevity retired pay *plus* VA compensation, in which case the CRDP amount is zero.

The JAG stated that as a Coast Guard disability retiree with over 20 years of service and a VA disability rating of 50% or higher, the applicant has been eligible for CRDP since retirement. However, his disability retired pay far exceeds the sum of his longevity retired pay plus his VA compensation. And so his CRDP amount is zero because of requirements in the law concerning calculations for chapter 61 retirees. The JAG noted that under 10 U.S.C. § 1414, disability retired pay remains subject to the offsets required by 38 U.S.C. §§ 5304 and 5305 on any retired pay they receive that is in excess of the amount of retired pay they would be entitled to if they had not retired for disability under chapter 61. Because the amount of disability retired pay the applicant receives from the Coast Guard far exceeds the amount of longevity retired pay he would receive if he had retired for years of service, instead of for disability, the JAG concluded, his CRDP amount is unlikely to rise above zero unless his compensation from the VA greatly increases.

The JAG stated that the applicant's monthly disability retired pay from the Coast Guard for the 70% disability rating is (as of May 2018) \$7,613. Because he has a 100% disability rating from the VA, he also receives \$3,139.67 from the VA.

Regarding the medical reimbursements, the JAG noted that in BCMR Docket No. 2005-079, the Board directed the Coast Guard to reimburse the applicant for medical bills incurred during the period of his Notice of Eligibility (NOE), and the Board gave the applicant another six months to provide those bills to the Personnel Command in its Clarification dated October 25, 2007. The JAG stated that although the applicant claimed that his receipts were lost due to a new address and not forwarded to the Personnel Command, he did not explain how he knows this or why he did not pursue the matter at the time. The JAG stated that "[d]ue to the length of time that has transpired from the Board's October 25, 2007, Clarification, it is not reasonably possible to determine what amounts for medical expenses were paid to applicant and if any amounts are still due."

The JAG concluded that both of the applicant’s claims are untimely and may be denied based on their untimeliness. He argued that if the Board were to waive the statute of limitations and consider the applicant’s claims on the merits, then both claims should be denied on the merits.

To support this recommendation, the JAG submitted the follow records:

- The Personnel Command’s separation orders, effective as of February 9, 2007, state that the applicant was being permanently retired by reason of disability.
- A Statement of Creditable Service dated February 26, 2007, shows that the applicant had performed 34 years of satisfactory service toward retirement by earning more than 50 points per year.
- A letter to the applicant dated March 16, 2007, from the Personnel Service Center, shows the calculation of his retired pay. The letter notes that the applicant was entitled to retire under either Plan A or Plan B. If retired for years of Reserve service (longevity) under Plan A, his percentage/multiplier would be 0.2288, while if retired for disability under Plan B, his percentage/multiplier would be 0.70 because he was retired from the Coast Guard with a 70% disability rating. The letter states that a captain’s monthly base pay in 2007 is \$9,035.70, and so multiplying by 0.2288 would yield \$2,067 in longevity retired pay under Plan A, while multiplying by 0.70 would yield \$6,324.00 in disability retired pay under Plan B. The letter also states the following (emphasis added):

SINCE PLAN B IS THE HIGHER OF THE TWO, THE FOLLOWING NET PAY COMPUTATIONS ARE PROVIDED:

GROSS RETIRED PAY:	6324.00
<u>CONCURRENT RETIREMENT DISABILITY PAY (CRDP):</u>	2067.00
LESS SURVIVOR BENEFIT PLAN COST:	.00
LESS TOTAL ALLOTMENTS (LISTED ON NEXT PAGE):	.00
LESS VA COMPENSATION:	2471.00
LESS GARNISHMENT:	.00
LESS FEDERAL INCOME TAX WITHHELD (M-01):	.00
LESS ADDITIONAL FITW AT YOUR REQUEST:	.00
LESS () STATE TAX WITHHELD, AT YOUR REQUEST:	.00
DELTA DENTAL	.00
NET RETIRED PAY:	5920.00

THE FOLLOWING INFORMATION IS APPLICABLE TO BOTH PLANS:

HIGHEST GRADE OR RANK (GRADE RETIRED):	O-6
SERVICE TIME (RESERVE POINTS):	3294
SERVICE TIME (FOR PAY PURPOSES):	38-06-17

YOUR MONTHLY RETIRED PAY WILL BE SENT TO THE FOLLOWING FINANCIAL INSTITUTION VIA DIRECT DEPOSIT ...

PLEASE ADVISE US IF ANY OF THE ABOVE INFORMATION IS INCORRECT, OR IF YOU HAVE ANY QUESTION CONCERNING YOUR RETIREMENT PROCESSING. ...

YOU MUST COMPLETE AND RETURN THE ENCLOSED COMPUTATION ELECTION WITHIN 30 DAYS. INDICATE YOUR ELECTION, SIGN, DATE & RETURN TO PSC (RAS).

This letter shows that on March 16, 2007, the applicant signed the form to elect to have his retired pay computed under Plan B.

- A CRDP Calculation Worksheet shows that the applicant's CRDP was calculated to be \$2,067 in 2007.
- A letter to the applicant from the Pay & Personnel Center dated June 24, 2009, states that the applicant had recently called the center about CRDP and informs him of the following:

As you know, we recently completed an internal review of CRDP with Coast Guard Headquarters. I am sorry to inform you that we incorrectly paid CRDP for Chapter 61 retirees whose Coast Guard disability rating/percentage exceeded their longevity percentage. This problem was primarily caused by the complexity of the statutory language of this entitlement; Title 10 U.S. Code, Section 1414(b).

This miscalculation resulted in your CRDP payments being higher than they should have been. Your CRDP payment has been \$2,237.00. We are correcting your CRDP payment effective with your July 1, 2009 monthly payment. Your corrected CRDP amount is \$0.00 which represents a \$2,237.00 decrease in your monthly Coast Guard pay. I am very sorry if this correction to your monthly pay creates a negative impact on your personal finances. We recognize that we have an obligation to provide top-notch service for our customers; we made a mistake and must correct that mistake in a responsive and fair manner.

The previous incorrect CRDP payments were not your fault, and you should not have been expected to recognize an error in CRDP pay because of the complexity of this statute. Since the calculated CRDP overpayment in your case exceeds Coast Guard authority for providing you with a direct waiver for all prior overpayments, we have prepared and submitted a waiver request on your behalf with a positive endorsement recommending approval. We will notify you of the results as soon as the process is completed.

We received an independent validation of our review through the Defense Finance and Accounting Service (DFAS), after the Department of Defense Inspector General (DODIG) conducted reviews of their CRDP Calculations; our CRDP corrections used DFAS methods. ...

- An explanation of how to calculate CRDP indicates that pursuant to the calculation, the applicant's CRDP is zero because his disability retired pay exceeds the amount he would be receiving if he had retired for longevity and was also receiving VA disability compensation.
- Program Guidance dated February 14, 2004, includes the following information (emphasis added):

GENERAL: Section 1414 of title 10, United States Code was amended by section 641 of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108-136), effective January 1, 2004. Subject to certain limitations, section 1414 provides concurrent payment of military retired pay and Department of Veterans' Affairs (VA) disability compensation without regard to the reduction otherwise prescribed by sections 5204 and 5305 of titled 38, United States Code, for members receiving VA disability compensation for a qualifying service-connected disability. One limitation is the requirement that a member's current, combined VA disability rating must be not less than 50%. A second limitation applies to members retired under the provisions of chapter 61 of title 10, United States Code, based on unfitness for duty because of disability. These retirees remain subject

to the offset either in whole or in part, as prescribed herein. The law also provides for a ten-year phase in of benefits.

• • •

ENTITLEMENT: CRDP is a restoration of an existing retired pay that would otherwise be offset under sections 5304 and 5305 of title 38, United States Code. Thus, CRDP may not exceed the amount of the reduction imposed under these sections of law. Such limitation is explicitly prescribed by 10 U.S.C. 1414(c)(11) during the phase-in period. Effective January 1, 2014, qualified retirees will receive full concurrent payments of both retired pay and VA disability compensation. However, those members retired for disability under chapter 61 of title 10, United States Code, will remain subject to the offset required under sections 5304 and 5305 of title 38, United States Code, on any retired pay they receive that is in excess of the amount of retired pay they would be entitled to under any other provision of law based upon the member's service in the uniform services if the member had not retired under chapter 61 of title 10, United States Code. This additional retired pay is referred to herein as Excess Disability Retired Pay (EDRP).

EXAMPLE: A member retires after 22 years of service with high-three basic pay of \$3,000 and has been determined to have a qualifying service-connected disability rated at 100% by the VA. However, the member was retired under chapter 61 with a disability rating from the Secretary of the Military Department of only 60%. The member receives retired pay of \$1,800 monthly (60% of \$3,000). Had this member retired under longevity provisions with 22 years of service, the retired pay would have been \$1,650 monthly (55% of \$3,000). The difference in these two amounts, or \$150 (\$1,800 - \$1,650) is the amount by which the disability retired pay exceeds the longevity retired pay and remains subject to reduction.

- The applicant's Statement of Monthly Income for the month of April 2018, shows that his gross disability retirement pay was \$7,613.00 and that a deduction of \$3,139.67 was made to offset the compensation he receives from the VA. No amount of CRDP is listed.
- In two emails dated May 1, 2018, the CWO who was named as the designated recipient of receipts in the Board's Clarification wrote the following:

I do recall the [applicant's] case a Reserve who was involved in a pedestrian/vehicle accident and the BCMR gave him relief – this case wrapped up prior to my departure and [the applicant] had submitted numerous bills/statements/documents for payment of his and his dependent medical bills. This was part of my pass-off to my relief (I don't recall the LT's name) and I had been working with [a commander, the Chair of the BCMR, and the Reserve Policy Management Branch] on weeding through what were legitimate (payable under a NOE) and extraneous requests (i.e., dependent medical) and seeking clarification from the BCMR on the intent of the order. There were issues with what and how FINCEN could pay him under the NOE an especially since he had numerous other medical and non-medical bills for himself and his spouse he was submitting.

His was a rather extensive size case and with receipts/decisions amounted to nearly a full archive box of materials. At that time we were not digitizing files, so there should have been an extensive paper file.

... I know we had a significant amount of bills he was submitting for reimbursement (which were pending at the time I left). I have had no further interaction with [the case].

APPLICANT'S REPOSENSE TO THE VIEWS OF THE COAST GUARD

The applicant complained that the advisory opinion of the Coast Guard was missing significant documents and misstated the date of his VA disability rating. He alleged that following his PDES processing, he never received a CG-4920 form, offering an opportunity to rebut the

findings of the medical board. He alleged that the 70% disability rating he received from the Coast Guard “was calculated and approved without fair consideration.” He stated that he should have received a 100% rating from the Coast Guard because “[t]otal disability will be considered to the extent when the evaluatee’s disability is sufficient to render it impossible for the average person to follow a substantially gainful occupation.” He stated that the 70% rating he received was unethical and that he was denied disability severance pay under 10 U.S.C. § 1212, as well.

The applicant stated that the VA has provided him with Vocational Rehabilitation and Employment Services to help him have a better life and regain lost skills. “It was time well spent, but nothing really changed.” He spends his days walking the dog and helping with the house cleaning, and he receives physical therapy twice a week. He suffers from retrograde amnesia “at varying levels” almost weekly and suffered transient global amnesia once in 2017. His wife takes care of him by writing a list of what he needs to do each day before she leaves for work.

The applicant alleged that the first time he ever heard that he had a choice between Plan A and Plan B was when he received the advisory opinion.

The applicant argued that logically, he must have been awarded CRDP by the BCMR, and the people who took it away from him did not understand that. He stated that the “decision to award both full pension and CRDP should stand.” He stated that when the letter about “usurping” his CRDP arrived in 2009, he was a single parent trying to raise a son and had no legal help. He made a phone call about the letter “but must have felt defeated” and then he lost the letter. After he married, however, he told his wife that he used to make a lot more money, and she looked into it and found the letter about CRDP. The applicant stated that he “had no knowledge that [the letter] existed and no recollection that I called about it.” The applicant stated that he twice wrote letters to the Coast Guard Personnel and Pay Center asking about CRDP, but they ignored his letters.

The applicant concluded by requesting (1) restoration of CRDP retroactive to June 2009; (2) reimbursement for \$10,424.00 in medical expenses; (3) an increase in his Coast Guard disability rating to 100%; and (4) an award of disability severance pay as recompense for his suffering over the past seventeen years.

In support of these statements, the applicant submitted the following documents:

- In a letter dated July 31, 2006, the Personnel Command advised the applicant that an Informal Physical Evaluation Board (IPEB) had found him unfit for duty and recommended that he be permanently retired with a 70% disability rating. The Personnel Command stated that to help him decide whether to accept the findings and recommendation or reject them, he was entitled to legal counsel and could choose either military counsel at no cost to him or civilian counsel at his own expense. The letter lists enclosures, including the IPEB report and a form for electing counsel. The copy of this letter that the applicant submitted does not include his signature on the form to show whether he accepted or rejected the IPEB’s recommendations.
- An article from the Cleveland Clinic called “Caregiving: Recognizing Burnout.”
- A copy of the Board’s Order page from the Clarification of the Order in Docket No. 2005-079.

- The June 24, 2009, letter about erroneous CRDP payments and waiver of the debt for overpayments.
- Questionnaires the applicant has completed regarding his need for independent living services.
- Documents concerning the applicant's rehabilitation efforts.
- A news article about the reasons the applicant was fired from his job in 2003.
- The first page of the VA's disability rating decision dated November 20, 2006, showing that he has a 100% rating for "major depressive disorder/amnestic disorder," as well as lower ratings for a visual field defect, chronic back strain, right shoulder impingement syndrome, chronic neck pain, and residuals from his head trauma.
- A scientific article called "Vision and Brain Injury: Post-Trauma Vision Syndrome: Part II."
- A letter dated February 7, 2006, that the applicant's attorney sent him about the Board's "significant decision" in 2005-079 with recommendations about collecting medical receipts and applying for Incapacitation Pay.
- A note stating, "Board called. Understands. 'Sleep well.'"
- A note stating, "Mike [his attorney] called. NFW is asking for more."
- Two photographs of the applicant in the hospital and an image of his brain while in critical care.

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 when the applicant discovers the alleged error in his record.² The record shows that the applicant was informed that his CRDP payment had been reduced to zero in 2009. Therefore, his application is untimely.
3. Pursuant to 10 U.S.C. § 1552(b), the Board may excuse the untimeliness of an application if it is in the interest of justice to do so. In *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992), the court stated that to determine whether the interest of justice supports a waiver of the statute of limitations, the Board "should analyze both the reasons for the delay and the potential merits of the claim based on a cursory review." The court further stated 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."³

² 10 U.S.C. § 1552(b).

³ *Allen v. Card*, 799 F. Supp. 158, 164-65 (D.D.C. 1992); *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

4. The record shows that the applicant suffers from a disability due to a traumatic brain injury he incurred while on active duty. Because his disability may well have prevented him from applying to the Board sooner, the Board finds that it is in the interest of justice to waive the statute of limitations in this case.

5. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.⁴

6. The applicant alleged that he is being erroneously and unjustly denied CRDP and that the Coast Guard failed to reimburse him for medical expenses as directed in the Board's prior decision and clarification. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in the military record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.⁵ Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."⁶

7. **Plan A vs. Plan B:** A reservist who qualifies to retire based on his years of service (longevity) may choose to be retired due to disability, instead, if he incurs a disability rated of 30% or higher while on active or inactive duty. Although the applicant alleged that he was never offered this choice, the letter to the applicant dated March 16, 2007, proves that he was offered the choice between Plan A (longevity retired pay) and Plan B (disability retired pay). The letter also shows that, because the amount of the applicant's Coast Guard disability retired pay under Plan B greatly exceeds the amount of longevity retired pay he would receive from the Coast Guard Reserve if he chose Plan A, he naturally chose Plan B—a disability retirement with disability retired pay. Therefore, he was retired from the Coast Guard Reserve under Plan B, with a pay multiplier of 0.70 (70% of a captain's basic pay), instead of under Plan A, with a pay multiplier of 0.2288 (22.88% of a captain's basic pay).

8. **CRDP Law for Plan A Longevity Retirement:** With a 100% disability rating from the VA, the applicant also qualified for a VA disability pension. But under 38 U.S.C. § 5304, a veteran may not normally receive dual compensation—i.e., a veteran may not normally receive both a disability pension from the VA and longevity or disability retired pay from a military service. Therefore, a military retiree's longevity or disability retired pay is normally offset by the amount of any disability pension received from the VA. However, there is an exception to this law for veterans with disabilities rated as at least 50% in the CRDP statute, 10 U.S.C. § 1414. Under paragraph (a) of § 1414, a veteran with at least a 50% disability rating who retires based on his years of service (a Plan A veteran) may receive both retired pay and a disability pension from the VA. This dual compensation is CRDP. Therefore, the Plan A veteran's total compensation is his VA disability pension plus his longevity retired pay. According to the Coast Guard, however,

⁴ *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

⁵ 33 C.F.R. § 52.24(b).

⁶ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

the sum of the applicant's VA disability pension plus the longevity retired pay he would receive under Plan A is still less than the amount of his Coast Guard disability retired pay under Plan B.

9. **CRDP Law for Plan B Disability Retirement:** If the rule in paragraph (a) of 10 U.S.C. § 1414 applied to veterans who opt to retire for disability (Plan B veterans), then Plan B veterans would—all else being equal—receive higher compensation overall than Plan A veterans because their disability retired pay exceeds the longevity retired pay they would have received under Plan A (otherwise, they would have picked Plan A). To prevent or minimize this inequality, paragraph (b)(1) of § 1414 provides that a Plan B veteran's disability retired pay remains subject to reduction under 38 U.S.C. § 5304 but only to the extent that the Plan B veteran's disability retired pay exceeds the amount of longevity retired pay that he would have received under Plan A. Therefore, if a Plan B veteran's disability retired pay exceeds the amount of longevity retired pay he would receive under Plan A, the difference, or "excess"—which the CRDP Program Guidance calls "Excess Disability Retired Pay"—remains subject to offset by the veteran's VA disability pension.

10. **CRDP Calculations Above Zero:** If a Plan B veteran's "excess" (the amount of his disability retired pay minus the amount his longevity retired pay would have been under Plan A) is smaller than his VA disability pension, then the "excess" offsets only a part of his VA disability pension and CRDP. In that case, in addition to his disability retired pay, the Plan B veteran receives CRDP equivalent to his VA disability pension minus the "excess" amount, in accordance with paragraph (b)(1) of 10 U.S.C. § 1414. Take, for example, a veteran whose Plan A longevity retired pay would be \$6,000; whose Plan B disability retired pay would be \$7,000; and whose VA disability pension is \$3,000. Because the difference between the veteran's disability retired pay and longevity retired pay is \$1,000, that is the amount of his "excess." Under § 1414, this veteran will have the same total compensation whether he chooses Plan A or Plan B as shown below:

Plan A: (\$6,000 in longevity retired pay) + (\$3,000 in CRDP [entire VA disability pension]) = \$9,000

Plan B: (\$7,000 in disability retired pay) + (\$2,000 in CRDP [the \$3,000 VA disability pension minus the \$1,000 "excess"]) = \$9,000.

11. **How CRDP Entitlement Can Be \$0:** The Coast Guard alleged that the applicant's "excess" is not smaller than his VA disability pension, however, and so his CRDP is zero. If the applicant's "excess" is larger than his VA disability pension, his situation is akin to that of a veteran whose Plan A longevity retired pay would be \$3,000; whose Plan B disability retired pay would be \$8,000; and whose VA disability pension is \$4,000. Because the difference between this veteran's disability retired pay and longevity retired pay is \$5,000 (\$8,000 - \$3,000 = \$5,000), his "excess" is \$5,000 and subject to reduction/offset by his VA disability pension. Under 10 U.S.C. § 1414, however, this veteran would still receive more total compensation from the Coast Guard and VA together under Plan B than under Plan A:

Plan A: (\$3,000 in longevity retired pay) + (\$4,000 in CRDP [entire VA disability pension]) = \$7,000

Plan B: (\$8,000 in disability retired pay) + (\$0 in CRDP [because the \$4,000 VA disability pension minus the \$5,000 "excess" is less than zero]) = \$8,000.

12. **Applicant's CDRP Entitlement Is \$0:** According to the Coast Guard, the applicant's situation is similar to the example provided in finding 11 because his "excess"—the difference between his disability retired pay under Plan B and the amount of longevity retired pay that he would have received under Plan A—is greater than his VA disability pension. The applicant's April 2018 LES shows that his disability retired pay before deductions was \$7,613 (calculated with a multiplier of 0.70 due to his 70% disability rating). Given a multiplier of 0.2288, his longevity retired pay in April 2018 (if he had retired based on his years of service) would have been approximately \$2,488. Therefore, the applicant's "excess" in April 2018 was approximately \$5,125 ($\$7,613 - \$2,488 = \$5,125$), which was substantially greater than his approximately \$3,140 VA disability pension. Because his "excess" was greater than his VA disability pension, his VA disability pension is entirely offset by the "excess" because his VA disability pension minus his "excess" equaled less than zero, and so he was entitled to \$0 in CRDP pursuant to 38 U.S.C. § 5304 and 10 U.S.C. 1414(b)(1).

13. **Plan B Provides More Money for Applicant:** The preponderance of the evidence shows that the applicant continues to receive more total compensation from the Coast Guard and VA together under Plan B than he would under Plan A. According to the applicant's April 2018 LES, under Plan A and paragraph (a) of 10 U.S.C. § 1414, he would have received both longevity retired pay of approximately \$2,488 plus \$3,140 in CRDP (VA disability pension), providing a total compensation for his military service of approximately \$5,628 per month under Plan A. However, the applicant instead received total compensation for his military service of approximately \$7,613 per month under Plan B in 2018 because he received a disability pension of about \$3,140 from the VA plus \$4,473⁷ from the Coast Guard, which is his gross disability retired pay of \$7,613 minus the amount of his VA disability pension. Therefore, changing the applicant's record to show that he retired under Plan A, instead of Plan B, would reduce his total monthly compensation from the Coast Guard and VA combined by about \$2,000, which would not be in his interest.

14. **Coast Guard Not Miscalculating CRDP:** The record shows that the Coast Guard mistakenly overpaid CRDP to the applicant from February 2007 through June 2009, but it corrected his pay as of July 1, 2009, and waived the debt for the prior overpayments. While the applicant is legally entitled to CRDP, he has not proven by a preponderance of the evidence that he is currently entitled to CRDP in an amount greater than zero. Therefore, he has not proven that the Coast Guard is currently miscalculating his CRDP under paragraph (b)(1) of 10 U.S.C. § 1414 and 38 U.S.C. § 5304. Under those statutes, his CRDP amount will remain zero until his disability pension from the VA significantly increases and becomes greater than his "excess"—the difference between his disability retired pay under Plan B and the amount in Reserve longevity retired pay that he would have received under Plan A.

15. **Disability Severance Pay:** The applicant claimed in his response to the advisory opinion that he was erroneously denied disability severance pay under 10 U.S.C. § 1212. But paragraph (a) of § 1212 states that a member is entitled to disability severance pay "upon separation from his armed force under section 1203 or 1206 of this title." These two statutes—10 U.S.C.

⁷ The April 2018 LES shows that because of an allotment of \$19.17 and an SBP premium payment of \$494.92, the applicant's payment from the Coast Guard was actually \$3,959.24.

§§ 1203 and 1206—concern disability discharges (not retirements) for members on active duty and reservists, respectively, whose disability ratings are less than 30%. The disability retirement statutes—10 U.S.C. §§ 1201 and 1204—apply to members who, like the applicant, are retired from the military with a disability rating of at least 30%. Members like the applicant who are retired based on a disability rating of 30% or higher receive disability retired pay computed under 10 U.S.C. § 1401. No one receives both disability severance pay and disability retired pay: Members whose disability ratings are less than 30% receive a single lump sum of disability severance pay while those with disability ratings that are 30% or higher receive disability retired pay.

16. **Reimbursement for Medical Expenses:** The applicant alleged that the Coast Guard failed to reimburse him for medical expenses totaling \$10,424 pursuant to the Board's prior Order and Clarification in BCMR Docket No. 2005-079. The applicant submitted no evidence about this issue but alleged that he did not receive the check in the mail because he moved. However, the applicant was presumably receiving his retired pay from the Coast Guard by direct deposit. Therefore, the reimbursement(s) for his medical expenses would have been paid by direct deposit, and moving to a new address would not have caused the applicant to lose the reimbursements. Although the applicant claimed that the Board's Order regarding medical expenses was not implemented, the Board's Clarification was issued, in part, to settle a disagreement about whether the applicant was entitled to be reimbursed for his dependents' medical expenses under the Board's Order as well as his own. And in response to the Coast Guard's request for that Clarification, the applicant submitted correspondence showing that the Coast Guard was paying his past medical expenses. The correspondence also shows that the financial transactions were complex because many of the medical expenses had already been paid by the applicant's family health insurance—Anthem Blue Cross and Blue Shield—and so much of the money owed by the Coast Guard went to Anthem Blue Cross and Blue Shield pursuant to a lien. More than a decade has passed since the Board issued the Clarification and the Board cannot now determine, based on the record, whether the applicant submitted documentation for any medical expenses in 2006 or 2007 that were not reimbursed. The applicant has not proven by a preponderance of the evidence that the Coast Guard failed to implement the Board's Order and Clarification by reimbursing him for the medical expenses. However, the applicant may request reconsideration of this issue. If he does so, he must photocopies of all the receipts supporting his claim.

17. **Lack of CG-4920:** In his response to the JAG's advisory opinion, the applicant claimed that he was never afforded the opportunity to agree or disagree with the findings of the Physical Evaluation Board. Under the PDES Manual, the applicant would have been afforded military counsel to assist him through the PDES process, and this counsel should have discussed the findings of the Physical Evaluation Board with him and advised him regarding his response. The applicant, however, did not raise this issue in his application; his medical records are not available to the Board; and the Coast Guard has had no opportunity to respond to this claim because it was not included in the application.

18. **Disability Processing an Evaluation:** In his response to the JAG's advisory opinion, the applicant also claimed that the 70% rating is unethical and "was calculated and approved without fair consideration." He asked the Board to raise this rating to 100%. Because the applicant did not make this claim in his original application, the Coast Guard has had no chance to consider this claim and this new request. Moreover, the records of the applicant's PDES processing are not

in the record before the Board. Therefore, the Board finds that this issue is not ripe for decision. But if the applicant submits another application contesting these issues about his PDES processing and Coast Guard disability rating, the Board will consider it.

19. **Conclusion:** Accordingly, the applicant's requests should be denied, but as noted in findings 16 and 18, above, he may submit another application to have the Board consider either or both of the following issues:

- The applicant may request reconsideration of reimbursement of his medical expenses but must submit copies of all the receipts for those expenses; and
- The applicant may contest the fairness of his PDES processing and 70% disability rating from the Coast Guard, but if he does, he should enclose with his application, if possible, a complete copy of his Coast Guard medical records, including the records of his PDES processing, and copies of his VA rating decisions and records.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of Captain [REDACTED] USCGR (Retired), for correction of his military record is denied, but he may submit another application as explained in findings 16 and 18 above.

August 23, 2019

