

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2018-083

██████████
██████████ PO3

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 February 7, 2018, and assigned it to staff attorney ██████████ to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated December 7, 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 has been permanently medically retired from the Coast Guard since November 4, 1987, asked the Board to correct his record by awarding him back retirement pay and ensuring his pay is corrected in the Coast Guard's payment system. He asserted that he has not received his retired pay since September 1, 1989, because of a Department of Veterans Affairs (VA) "waiver." He stated that the VA has also denied him disability pay for the condition for which he was retired because it was not service connected. He argued that he should not be "retired military without pay."

The applicant stated that he was placed on the Permanent Disability Retired List (PDRL)¹ in 1987 for granulocytopenia. He asserted that the purpose of the PDRL is to compensate him for "the loss of [his] career" and that the amount of retired pay is not subject to adjudication based on whether the condition worsens or improves. He stated that he applied to the VA to receive compensation for this condition but was denied on June 13, 1983. He claimed that the purpose of the "VA waiver is to prevent duplication of disability payments for the same disability." He stated that he has always received payments from the VA for different disabilities other than granulocytopenia. At one point in his application he stated that he "receives nothing," although it is not clear if at that point he was alleging he does not receive payment from either the Coast Guard or the VA.

¹ Title 10 U.S.C. § 1201.

The applicant claimed that the mistake happened after he was retired from the Coast Guard and he was diagnosed with Hodgkin's lymphoma and his spleen was surgically removed. After his spleen was removed and he went through chemotherapy, his granulocytopenia "cleared up." He stated that his VA disability rating then went from 100% to 30%. He stated that because he never went below a 30% VA disability rating he "never missed the permanent 30%."² He stated that he found out later the 30% disability rating was for the spleen removal. The applicant repeatedly asserted that he was never informed about "this" (it is unclear if "this" is in reference to the alleged rating for the spleen removal or the drop in disability rating from 100% to 30%).³

The applicant argued that he deserved his back payments from September 1, 1989, to the present to account for the missed retirement payments from the Coast Guard. He stated that because the VA denied his claim for granulocytopenia, his Coast Guard retirement payments should never have stopped.

The applicant stated that he discovered the alleged error on October 28, 2016. On the application form to this Board where it asks for an explanation if the case has been untimely filed, the applicant stated "it says in the Federal handbook the military pay center handles these things, and no applications taken." He provided several documents in support of his application, the relevant ones are discussed below in the Summary of the Record.

SUMMARY OF THE RECORD

On July 1, 1982, a Medical Board convened and determined that the applicant was not fit for duty due to his diagnosis of granulocytopenia. As a result, he was placed on the Temporary Disability Retired List (TDRL)⁴ at age 18 with a 30% disability rating.

The applicant provided a copy of his application to the VA dated November 29, 1982. He was seeking disability compensation for "low white cell count, granulo cytpenia" and for a burn to his leg.

On June 13, 1983, the VA informed the applicant that his claim for disability benefits was denied. The decision stated that his second degree burns were found to be service-connected, but were rated at less than 10% disabling and he therefore would not receive compensation. "Blood condition" was found not to be service connected because it was "considered an acute and transitory condition with no residual disability."

On November 2, 1987, the applicant was informed by the Coast Guard that effective as of November 4, 1987, he would be removed from the TDRL and permanently retired on the PDRL. His disability was rated at 30%.

² To receive a medical retirement from the Coast Guard, a member must be rated at a 30% disability rating or higher. 10 U.S.C. § 1201(b)(3)(B). This is not applicable to VA proceedings.

³ The applicant cited 38 C.F.R. § 3.103, which pertains exclusively to the VA and states that a veteran's compensations may not be reduced until the beneficiary has been notified of the adverse action and given a period of sixty days to submit a response.

⁴ 10 U.S.C. § 1202.

The applicant provided a letter from the VA dated August 4, 1989. It states that his disability compensation was amended from \$1468 a month to \$210 a month. The applicant included a note on this document stating that this was when he was “taken from 100% to 30% with no reason why or for what.”

The applicant received a letter from the VA dated September 5, 1989. The letter stated that because the applicant was receiving retirement pay, VA compensation had to be withheld at a rate of \$241 from May 1, 1989, to September 1, 1989. The applicant wrote a note on this letter stating that September 1, 1989, is the last date he received a payment from the Coast Guard.

On December 11, 1989, the applicant received a letter from the VA with a summary of his disability compensation award amendments, as follows:

July 1, 1989	\$1529
October 1, 1989	\$1616
June 1, 1990	\$254
April 26, 2007	\$236

The applicant was informed that his combined evaluation for all of his disabilities was 30%.

The applicant provided a monthly pay stub from the Coast Guard for July 1 through 21, 2014. It states that his total entitlements were \$410 and his deductions were \$410 for “VA COMP.” His net pay was therefore \$0.

VIEWS OF THE COAST GUARD

On June 25, 2018, the Judge Advocate General of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case. In doing so, he adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC stated that the applicant’s retired pay is currently \$425 a month and “is being offset” by VA payments. PSC stated that according to correspondence with the Pay and Personnel Center (PPC), the applicant is currently receiving \$425 a month from the VA. PSC stated that it is unclear if perhaps the applicant believes he is eligible for Concurrent Disability Retired Pay, but a veteran must have served for over 20 years and be rated at least 50% disabled and in order to receive this benefit. The applicant had also mentioned some issues in his application which were “strictly VA related claims.” PSC noted if there are any issues with the applicant’s VA payments, then he should have the VA contact PPC-RAS for correction. However, PSC recommended denying relief.

PSC included an email chain between PSC and PPC regarding the applicant. PSC had asked PPC if the applicant was receiving compensation from the Coast Guard. PPC responded that the applicant’s retired pay is \$425 “and he is being offset by the VA for the same amount.”

When asked a follow-up question by PSC, PPC added that the applicant was not eligible for Concurrent Retirement and Disability Payment (CRDP) because a veteran must have at least twenty years of creditable service for retirement and at least a 50% disability rating.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On July 16, 2018, the Chair sent the applicant a copy of the Coast Guard’s views and invited him to respond within 30 days. After several extensions, the Chair received the applicant’s response on October 4, 2018. The applicant disagreed with the Coast Guard’s advisory opinion.

The applicant stated that retired pay is a statutory right and therefore cannot be waived except as authorized by law. He asserted that 38 C.F.R. § 3.703(b)(2)⁵ states that there is no prohibition against concurrent benefits from the Federal Employees’ Compensation Act (FECA) with the VA when the benefits are not for the same disability. He argued that he should therefore be receiving payment from the Coast Guard for his retirement for granulocytopenia and his VA disability payments because they are not for the same disabilities. The applicant stated that his retirement pay is not being offset, but instead the error cancels his Coast Guard pay entirely. He asserted that there is no offset happening at all. The applicant asked that the Board to instruct PPC-RAS to reinstate his 30% retirement, retroactive from September 1, 1989. He added that the “advisory opinion recommends correction of [his] retirement pay.”

Regarding the timing of his application, the applicant asserted that he was never clearly notified of “the loss of [his] Coast Guard 30% P.D.R.L. pay.” He stated that when his disability rating was reduced from 100% to 30% after his chemotherapy was successful, he assumed that the 30% was for the PDRL pay “because it was permanent.” He asserted that this is not his mistake and he only “recently became aware of the error.”

APPLICABLE REGULATIONS

Title 38 U.S.C. § 5304 states:

(a)(1) 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 C.F.R. § 3.700 states “Not more than one award of pension, compensation, or emergency officers', regular or reserve retirement pay will be made concurrently to any person based on his or her own service.”

Title 10 U.S.C. § 1201 provides that a member of the armed forces who is found to be “unfit to perform the duties of the member’s office, grade, rank, or rating because of physical disability incurred while entitled to basic pay” may be retired if the disability is (1) permanent and stable, (2) not a result of misconduct, and (3) for members with less than 20 years of service, “at

⁵ 38 C.F.R. § 3.703 is entitled “Two Parents in Same Parental Line.” The applicant was citing 38 C.F.R. § 3.708.

least 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs at the time of the determination.”

Title 10 U.S.C. § 1414 states:

(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 [which prohibit concurrent pay]. ...

(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 [10 USCS §§ 1201 et seq.] with 20 years or more of service ... 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 ... 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.

Title 38 U.S.C. § 1155 provides that “[t]he Secretary [of the VA] shall adopt and apply a schedule of ratings of reductions in earning capacity from specific injuries or combination of injuries. The ratings shall be based, as far as practicable, upon the average impairments of earning capacity resulting from such injuries in civil occupations.”

Title 38 C.F.R. § 3.708 pertains to individuals who are entitled to payment from the Office of Workers’ Compensation Programs under FECA and pension or compensation from the VA. This section states that an individual must elect which benefit he will receive because he may not receive both. Section (b)(1) states that this election applies when these benefits arise from the same disability or death. Section (b)(2), which the applicant cited, states that there “is no prohibition against payment of benefits under the Federal Employees’ Compensation Act concurrently with other benefits administered by the [VA] when such benefits are not based on the same disability or death.”

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.⁶ The applicant was placed on the PDRL in 1987. The applicant had already filed a claim with the VA by then and knew in September 1989 that he was

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

receiving his disability retired pay from the VA instead of the Coast Guard. Therefore, the preponderance of the evidence shows that the applicant knew of the alleged error in his record no later than 1989, and 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.⁷ 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”⁸ 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.”⁹

4. Regarding the delay of his application, the applicant explained that he recently learned of the alleged error. The Board finds that 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, particularly in light of the fact that he pointed to a document from the VA dated September 5, 1989, and stated that his last payment from the Coast Guard was on September 1, 1989.

5. A cursory review of the merits of this case indicates that the applicant’s claim cannot prevail. The applicant believes that he is entitled to both disability retired pay from the Coast Guard for granulocytopenia and disability compensation from the VA for a different condition. It is unclear if the applicant believes that he is eligible for such payments under CRDP, but CRDP is only available to members who served at least twenty years on active duty and have at least a 50% disability rating.¹⁰ Therefore, he is not eligible for CRDP. The applicant pointed to 38 C.F.R. § 3.103, which states that the VA may not reduce a beneficiary’s compensation until he has been properly notified. This provision does not apply to the Coast Guard and the Board notes that from the documents provided by the applicant it appears that the VA has complied with this law by informing the applicant in writing when there was a change to his compensation. The applicant also cited 38 C.F.R. § 3.708. However, this too is inapplicable because it pertains to individuals who are entitled to both disability pay from the VA and payment from the Office of Workers’ Compensation Programs under FECA. FECA provides compensation for disabilities incurred by federal civilian employees—not by military members. The record shows that the applicant’s retired pay has been offset by his VA payments as required by 38 U.S.C. § 5304, which states that “not more than one award of pension, compensation, ... shall be made concurrently to any person based on such person’s own service.” The Board knows of no law that requires or allows the Coast Guard to continue to pay a veteran disability retired pay when the veteran has waived that right in order to receive tax-free disability compensation from the VA even if the VA rates the veteran’s disability under a different code and medical condition on the Veterans Affairs Schedule for Rating Disabilities (VASRD). The Board has found no evidence of error or injustice

⁷ 10 U.S.C. § 1552(b).

⁸ *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

⁹ *Id.* at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

¹⁰ Title 10 U.S.C. § 1414.

in the applicant's military record, which is presumptively correct.¹¹ Based on the record before it, the Board finds that the applicant's claim 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.

(ORDER AND SIGNATURES ON NEXT PAGE)

¹¹ 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.").

ORDER

The application of PO3 [REDACTED], USCG (Retired), for correction of his military record is denied.

December 7, 2018

