

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2007-080

XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX

FINAL DECISION

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the application on February 2, 2007, upon receipt of the applicant's military records,¹ and subsequently prepared the final decision as required by 33 C.F.R. § 52.61(c).

This final decision, dated February 21, 2008, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant, a [REDACTED] retired by reason of physical disability, asked the Board to correct her record to show that she was retained on active duty until she became eligible for retirement by reason of longevity (20 years of active service), at which time she then retired with a 60% disability rating in accordance with the findings of the Central Physical Evaluation Board (CPEB).² This correction would allow the applicant to receive both active duty retired pay and Department of Veterans Affairs (DVA) compensation under 10 U.S.C. § 1414.³

¹ Upon receipt of the applicant's BCMR application on July 27, 2006, the Board ordered her official military record from the National Personnel Records Center. In response, the Board received the applicant's PDR but not the medical record. However because the NPRC online ordering system at that time showed another registry number for the applicant's military record a second request was made. In response to the second request, the Board received some medical documentation, but nothing related to the applicant's 1997 medical board. On September 8, 1996, the Board requested a copy of the applicant's Coast Guard medical record from the Veterans Management Center at NPRC. In response to this request, the Board was told that the applicant's Coast Guard Medical record had been sent to the Department of Veterans Affairs Office in Denver, CO. Normally, the Veteran Affairs Management Center will forward the Board's request to the appropriate DVA office. After not receiving the Coast Guard medical record for approximately four months, the Chair undertook a review of the BCMR application and decided to docket it with the information available. Subsequently, in September 2007, the Board again attempted to obtain the applicant's Coast Guard medical record from the Denver, CO DVA office. No record has been received to date.

² The Physical Disability Evaluation System (PDES) consist of several boards, namely, the medical board, the central physical evaluation board (CPEB), the Formal Physical Evaluation Board (FPEB), and the Physical Review Council (PRC). The CPEB is a permanently established administrative body convened to evaluate on a records

BACKGROUND

On February 25, 1997, the CPEB met and diagnosed the applicant with pronounced intervertebral disc syndrome and rated the condition as 60% disabling. The CPEB determined that the applicant was unfit to perform the duties of her grade or rate and recommended that she be permanently retired.

In Section III (Recommendations Regarding Retention) on page 1 of the CPEB report, the CPEB was required to make recommendations regarding the applicant's retention by completing the following items:

"22. The evaluatee has between 18 and 20 years active duty and in the opinion of the CPEB, the evaluatee meets the medical requirements for retention [in accordance with] Chapter 17, CG [Personnel Manual]," to which the CPEB could have marked YES, NO, or NA. The CPEB checked NO.

"23. The evaluatee's request for retention (if submitted with the medical board IAW Chap. 17, CG Personnel Manual) has been approved," to which the CPEB could have marked YES, NO, or NA. The CPEB marked NA.

"24. Type of retirement if evaluatee is to be retained less than 6 months (IAW Chapter 17, CG Personnel Manual) and reevaluation is not required," to which the CPEB could have marked YES, NO, or NA. The CPEB marked NA.

The second page of the CPEB report contained the signed statement of the applicant's CPEB attorney, as follows:

I [CDR G] an attorney has been appointed to advise the evaluatee regarding acceptance of the [CPEB's] findings and recommended disposition which are set out on the page one of this form.

"I have reviewed those findings in light of the record in the evaluatee's case, Title 10 U.S. Code, Chapter 61; the Veterans Administration Schedule for Rating Disabilities, Applicable Coast Guard personnel regulations, and other applicable materials.

I consulted with the evaluatee on [March 11, 1997], and counseled [her] regarding acceptance or rejection of the [CPEB's] findings and recommendations, in accordance with [Commandant Instruction].

basis the fitness for duty of active and reserve members and the fitness for duty of members on the temporary disability retired list. See Chapter 4.A.1. of the Physical Disability Evaluation System Manual (COMDTINST M1850.2C).

³ Under 10 U.S.C. § 1414, which was enacted on December 28, 2001, veterans with at least 20 years of active service and disability ratings from the DVA of at least 50% may receive concurrent retired and disability pay.

Directly below the attorney's signed statement, the applicant signed and dated the following provision on the CPEB report:

I have been advised by the above named counsel regarding acceptance or rejection of the findings and recommended disposition of the [CPEB] and signed the appropriate statement below:

[Check in block] I accept the [CPEB] findings and recommended disposition and waive my right to a Formal Physical Evaluation Board . . .

There were two other options the applicant could have chosen but did not. They are as follows:

I accept the [CPEB] findings and recommended disposition conditional upon the approval of my attached request for retention on active duty submitted IAW Chapter 17 CG Personnel Manual. If my retention request is not approved then I reject the CPEB findings and recommended disposition and demand a hearing before a Formal Physical Evaluation Board.

I reject the [CPEB] findings and recommended disposition and demand a hearing before a Formal Physical Evaluation Board.

On April 18, 1997, Commander, Coast Guard Personnel Command (CGPC) informed the applicant by letter that that office had approved the findings of the CPEB and that she would be permanently retired on July 1, 1997, pursuant to Title 10 of the United States Code. CGPC directed that the applicant detach from all duties effective June 30, 1997.

The applicant's DD Form 214, which she signed, shows that at the time of her retirement she had 19 years and 29 days of net active service and 2 months and 11 days of inactive service.⁴ The applicant indicated that she began her career in the Coast Guard as an enlisted person in 1978. On May 15, 1986, after attending officer candidate school, she was commissioned in the Coast Guard Reserve, serving on active duty. Subsequently, she was integrated into the regular Coast Guard.

ALLEGATIONS

The applicant alleged that she was not given information that she was eligible to request retention on active duty under Chapter 17-A-3.a.(1)&(2) of the Personnel Manual⁵ as part of her

⁴ The 2 months and 11 days of inactive duty was time spent in the delayed entry program and does not count toward a 20 year active duty retirement. See Article 12.c.2. of the Personnel Manual.

⁵ Chapter 17.A.3.a. of the Personnel Manual states that the following procedures have been implemented in Chapters 3 and 4 of the PDES Manual.

"1. Members may append a request for retention on active duty to their Medical Board at the time they sign the Form CG-4920 acknowledging the medical board findings. The request for retention then will be forwarded along with the Medical Board findings. Concurrent actions will be taken on their request by Commander, (CGPC-opm-1) or CG-emp-a) and the [CPEB], and a coordinated reply transmitted with the CPEB findings for the acceptance or rejection of the member. This procedure is intended for, but not limited to, those members that are within six months of eligibility for a normal 20 year retirement.

medical board statement. She alleged that she was told that she “had to be within 6 months of [a] 20 year retirement in order to accept the findings based on my request for retention and additionally I was told I could not request this because I was found permanently disabled.” She stated that if she had been given adequate legal guidance she would have accepted the CPEB findings conditionally upon the approval of her request for retention on active duty. She stated that it is now her understanding that a request for retention is not limited to those within six months of retirement and the pertinent regulation says nothing about permanent or temporary disability. The applicant claimed that she is now ineligible for concurrent receipt of military retired pay and DVA compensation because at the time of her discharge, she was approximately one year short of the 20 years needed for a regular retirement. At the time she was discharged she had 19 years and 29 days of active service. The applicant stated that she currently has a 70 percent disability rating and that she is functionally 100 percent disabled. The applicant stated that she discovered the alleged error on July 18, 2006 when reading a magazine article about concurrent receipt pay and the Board received her BCMR application on July 27, 2006.

VIEWS OF THE COAST GUARD

On June 19, 2007, the Judge Advocate General of the Coast Guard submitted an advisory opinion in which he requested that the Board accept the comments from Commander, Coast Guard Personnel Command (CGPC) as the views of the Coast Guard.

CGPC recommended that the Board deny relief in this case. CGPC stated the following:

The applicant’s request is not timely and the applicant has failed to substantiate any justification for the delay in presenting this case. She states that she discovered the alleged error or injustice on July 18, 2006, however she has not substantiated this assertion nor provided any justification for delay in filing.

The record received from the National Personnel Records Center and the BCMR does not contain a complete copy of the applicant’s medical record or PDES processing. The applicant’s record does contain the CPEB findings and recommendation.

“2. Members who have not previously requested retention on active duty, but who subsequently are found unfit for continued service by the CPEB, may request retention on active duty. If they desire, the members may make an acceptance of the CPEB findings conditional upon approval of the retention request.

“3. In the case of those members with more than 18 years but fewer than 20 years active duty, who have not requested retention as described in subparagraph (1) above, the CPEB will append to any unfit for continued service finding a specific opinion as to whether or not the member meets the medical requirements for retention established under this chapter. This provision is intended to encourage members who are approaching eligibility for a normal 20 year retirement to conditionally accept the CPEB findings and request retention on active duty.”

Article 17.A.3.b. of the Personnel Manual states that “[m]embers found unfit for continued service by a [FPEB] may submit a request for retention on active duty to Commander, (CGPC-opm-1) or CG-emp-1).

Article 17.A.3.c. of the Personnel Manual states that “when the Physical Review Counsel or the Physical Disability Appeal Board has determined that a member is unfit for continued service, the member may request retention on active duty.

The applicant's statement that she was improperly counseled regarding her entitlement to request retention as a condition of her acceptance of the CPEB findings is based solely upon her own assertion. The record and information provided by the applicant do not support that she was improperly counseled. [The CPEB report] clearly indicates that the applicant was provided legal counsel before accepting the findings of the CPEB. Additionally, since the applicant had over 18 years of service, her case was reviewed for consideration of retention pursuant to [the Personnel Manual] as indicated in section III of [the CPEB report]. The Board found that her disability did not meet the requirements for retention. This is the same standard that would have applied to her case had she submitted such a request for retention. Had the applicant elected to request retention, her case would not have received the same adjudication regarding the retention request. At the time she accepted the findings of the CPEB, she had the option to elect a conditional acceptance and retention request; the applicant elected not to make such an election.

The applicant contends that she would have remained on active duty for the additional year to gain eligibility for CRDP and that "there is a conflict of interest to discharge a member after their retirement physical and to avoid CRDP." CRDP was not legislatively enacted until after her retirement and therefore had no bearing on her election to accept the findings of the CPEB in 1997. The PDES process provides for a fair and impartial review of the service member's record and the applicant's record supports that she was provided legal counsel, due process and her case was adjudicated according to Coast Guard policy. There is no error or injustice presented in this case.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 11, 2007, the Board received the applicant's reply to the views of the Coast Guard. She disagreed with them. She stated that the Coast Guard took the position that her application was untimely since it was submitted more than three years after her retirement in 1997. She stated that 10 U.S.C. § 1551 counts the time from the later of when the error or injustice occurred and when it was discovered. She stated that she did not discover the alleged error until 2006 when reading a magazine article on concurrent receipt of military and DVA benefits. It was then that she learned the various retired statuses and the implication of the different types of retirement. She stated that as soon as she learned of the alleged injustice she contacted her Senator and was advised to seek relief from the BCMR. She submitted an email string showing that she contacted her Senator on May 5, 2006. The applicant argued that even if the Board determines that her application is untimely, the statute of limitation should be waived and her case considered on the merits in the interest of justice. In this regard, she argued that her military record is above reproach, that she is seriously disabled, and that her circumstances on their face indicated that she was a victim of error and/or injustice.

The applicant noted that the advisory opinion stated that her BCMR file did not contain a complete copy of her medical record or PDES processing. She indicated that she attempted to

obtain these records from National Personnel Records Center (NPRC) and the DVA but they were unable to locate additional documentation related to the CPEB proceedings other than the findings. She stated that Coast Guard Headquarters also informed her on October 9, 2007 that there were no pertinent records at Headquarters. She argued that the Coast Guard did not assert that there were any gaps in her record that made it impossible for them to respond to the application. The applicant also stated that “to the extent that [she] submits that she could in fact have been retained for the few months needed to complete 20 years’ active duty . . . reference to her OERs and overall PDR is proper, and [she] encouraged the board to do so.”

The applicant pointed to the statement from the Coast Guard lawyer who advised her while her case was in the PDES process. She stated that CDR G points to the confusing form used at the time and acknowledged that the applicant could very well have been confused. She stated that she was under the impression that because § III block 22 on the CPEB report was marked “No” and block 23 was marked “N/A” she was ineligible for the relief provided in Chapter 17 of the Personnel Manual. She recalled that she discussed this with her lawyer and was led to believe that she could not request such relief. She noted that today the Coast Guard uses a 20-page guide and clearer forms to make certain that evaluatees are fully and clearly informed; but she argued that these improved measures were not in place when she had to decide what to do. She stated again that it was her understanding that because she was more than six months from eligibility for a 20-year retirement and was found by the CPEB to be permanently disabled, she was ineligible for retention under Article 17 of the Personnel Manual, which was erroneous.

The applicant stated that the Coast Guard implication that it would have been futile for her to seek retention because the CPEB found that she did not meet the medical requirements is without merit. She argued that the CPEB made this finding without any input from her. Second, she argued that the CPEB would not have had final authority on her retention if she had checked that option on the CPEB form. She stated that if she had requested retention and the Commandant had disapproved it, she would have been entitled to a full and fair hearing before the FPEB. The applicant noted that a request for retention may be submitted even after action by the Physical Review Council and the Physical Disability Evaluation Board. She stated that the advisory opinion furnishes no information whatever as to the actual pattern and practice followed by the Coast Guard with respect to retention requests. She stated that the PEB attorney’s statement makes it clear that retention requests from personnel in the applicant’s position were favorably considered.

The applicant argued that if she had been afforded an opportunity to request retention, either by submission to the CPEB or in a live “full and fair” FPEB hearing, she could have made a very strong case for retention for the few months remaining before her 20 years were complete. She stated that she was serving as a Training Officer at Training Center Petaluma and her command wanted her to remain on active duty, where she was slated to “fleet up” to the Branch Chief position. She stated that her chain of command was shocked that she was not being retained, as is evidenced by a statement from her then executive officer.

The applicant stated that she fully understands that the concurrent receipt legislation was not enacted until after she was retired. Nonetheless, the applicant stated that had she correctly understood her options, she would have requested retention.

Statement from the applicant's PEB Attorney

The applicant's PEB attorney wrote that Item 22 in Section III of the CPEB Form stated "The evaluatee has between 18 and 20 years active duty and in the opinion of the CPEB, the evaluatee meets the medical requirements for the retention IAW Chap 17, CG PERSMAN" with three boxes for a mark of yes, no, or na was often the source of confusion. The applicant's counsel stated that the assumption was that if the box was marked "no" the member did not have between 18 and 20 years of service and that the box was only marked yes if the member had between 18 and 20 years of service. He stated that item 22 was rarely marked no for members with over 18 years of service. He stated that the CPEB form has been revised to remove the language contained in item 22 and that the decision to retain a member found unfit for medical reasons is ultimately a personnel decision that involves the member, command, and the needs of the service.

The applicant's counsel stated that if the applicant had requested retention until she completed 20 years of active service with a positive command endorsement, she would have been retained. He stated that the applicant's then XO's statement supports the probability that the applicant would have received a positive command endorsement for retention. He stated that to the best of his knowledge, an officer with 18 or more years was all but assured of being retained to complete 20 years of service if that officer's command was willing to retain the officer in their command. He stated that some officers with less than 18 years of active service who requested retention with a positive command endorsement were also retained.

The applicant's PEB attorney stated that until 2001, he represented all LCDRs (pay grade O-4) and above being evaluated in the PDES program. With respect to the allegation that he failed to advise the applicant of her right to ask for retention pursuant to the Personnel Manual, the PEB attorney stated that he remembered speaking to the applicant on more than one occasion and that if his recollection was correct, he remembered her concerns or dilemma about being involuntarily retired. "She seemed confused or uncertain about what she should do in light of her findings and the confusion created by sections 3. 22 and 23 on her [CPEB form]. She was reluctant to accept her findings, despite the 60 percent rating. There would be only one obvious reason for her reluctance to accept a 60 percent rating and that would be because she wanted to be retained." The applicant's PEB attorney further stated:

It's very difficult to reconstruct the events associated with this case without having a copy of [the applicant's] initial medical board, command endorsement, and my notes. Based on the known circumstances, [the applicant] could very easily have been confused by the information on her [CPEB form] and she may have concluded that her command had not supported her retention. Furthermore, I do not recall contacting her command or discussing her retention with the Coast Guard. If I had, I believe that I would remember doing so. As a result of all of these factors and my limited recollections, I would urge the BCMR to grant relief.

In early 1998, my staff and I drafted a 20 page "Questions & Answers" guide intended to help our PDES clients better understand the Coast Guard's PDES process. The guide addresses retention requests. This guide has been made available to all of our PDES clients since 1998. It is updated annually. [The applicant] would not have had the benefit of this guide and possibly not even the benefit of receiving a letter from GCPC or counsel addressing her right to request retention

The applicant also submitted a letter from the Assistant Training Officer for whom she worked prior to retirement. This individual stated that the applicant's skills in the training field were highly sought after. He stated that she never needed a back brace, a walker or wheelchair to complete her work and she was never a hazard to those with whom she worked. He further stated as follows:

Based on my personal observations, it is my opinion that [the applicant] could have continued her excellent performance of duties in the billet assigned at Training Center Petaluma, without presenting a hazard to those with whom she served, beyond her retirement in 1997. Though I am not a medical specialist, it is also my opinion that she could also have continued her training and performance consulting duties in a training and administrative work environment beyond her retirement, without being a detriment to her own health.

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 section 1552 of title 10 of the United States Code.
2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.31, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.
3. The applicant's request for correction of her record to show that she had the necessary 20 years of service for a regular active duty retirement is not timely. To be timely, an application or request for correction of a military record must be submitted within three years after the applicant discovered or should have discovered the alleged error or injustice. See 33 CFR 52.22. The applicant claimed that she did not discover the alleged injustice until July 18, 2006, when reading an article in a military related magazine about concurrent receipt pay. However, the law establishing concurrent receipt pay was enacted on December 28, 2001 and therefore the applicant should have filed her application within three years of the date the law was enacted. Therefore, her application is not timely.

4. However, the Board may still consider the application on the merits, if it finds 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 in assessing 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." For the reasons discussed below, the Board, having performed a cursory review of the merits in this case, finds it unlikely that the applicant will prevail on the merits of her claim and therefore finds that it is not in the interest of justice to waive the statute of limitations in this case.

5. The applicant has failed to prove that she was not given information about requesting retention on active duty under Chapter 17 of the Personnel Manual as part of her medical board statement. Neither the applicant, nor the Board was able to locate a copy of her medical board. The Board attempts to find all pertinent military records; however, according to 33 CFR § 52.24, the applicant has the burden of proof and it is the applicant's responsibility "to procure and submit with his or her application such evidence, including official records, as the applicant desires to present in support of his or her case." Moreover, as discussed below, having the actual medical board report would not strengthen the applicant's case.

6. The Board finds that the medical board probably would not have been of assistance to the applicant in proving that she was provided with erroneous information about requesting retention on active duty. Pursuant to Chapter 3 of the Physical Disability Evaluations Systems (PDES) Manual, neither the Medical Board Report nor the "Patient's Statement Regarding the Findings of the Medical Board," samples of which are in the PDES Manual, contained an entry or question about retention. The "Patient's Statement Regarding the Findings of the Medical Board," which the applicant would have been required to complete, explained the findings of the medical board to the applicant and required that she affirmatively indicate whether she desired to submit or not submit a rebuttal to the medical board. Again, there is nothing on this statement that required an acknowledgement of the opportunity to request retention. Article 3.H. and Exhibit 3-4 of the PDES Manual indicate that it is the responsibility of the applicant's command to inform her about the opportunity to request retention after receipt of the medical board. Accordingly, the Board presumes that the applicant's command notified her of her right to request retention under the Personnel Manual upon completion of the medical board in accordance with the regulation. The applicant's current statement to the contrary about an event that occurred approximately nine years ago is insufficient to prove error or injustice on the part of the Coast Guard.

7. The applicant alleged but failed to prove by a preponderance of the evidence that her CPEB attorney erroneously advised her that she could not request retention because she was not within 6 months of having 20 years of active service and because her disability was permanent. Contrary to the applicant's contention, her CPEB attorney verified by his signature on page 2 of the CPEB form that he had reviewed the findings on page one of the CPEB report (that included section III) in the applicant's case, as well as the applicable laws and regulations, and that he had consulted and counseled her regarding acceptance or rejections of the findings and recommendations. Moreover, the applicant acknowledged that she had been counseled by her CPEB attorney with respect to accepting or rejecting the CPEB findings and recommended disposition and that she accepted them and waived her right to a FPEB.

8. In addition, the Board finds it highly improbable that the applicant's PDES attorney would have provided such erroneous advice since the Personnel Manual clearly states that an evaluatee may request retention not only after the medical board, the CPEB, and the FPEB, but also after findings of unfitness by the Physical Review Council and the Physical Disability Appeal Board, which are the last two steps available in the PDES process. Indeed, the applicant's CPEB attorney stated that he remembered speaking to the applicant on more than one occasion and remembered that she had concerns about being involuntarily retired. However, he never stated that he advised the applicant that she could not submit a request for retention because she was not within 6 months of having 20 years of active duty or because her disability was of a permanent nature. Therefore, the Board concludes that the applicant's PEB attorney performed his duties in accordance with applicable regulations and did not provide advice that was inconsistent with Coast Guard regulations. The evidence offered by the applicant is insufficient to prove otherwise.

9. In addition, the Board presumes that the applicant read the CPEB report and that if she was confused by any of the information on that form she had the opportunity to discuss it in detail with her attorney at that time. Further, she could have read Chapter 17 of the Personnel Manual for herself. The Board notes that each of the three options in section III regarding retention on the CPEB report form mentions Chapter 17 of the Personnel Manual. Confusion, if any, could have been cleared up by reading the Personnel Manual.

10. The argument and evidence suggesting that she might have been allowed to remain on active duty, if she had requested it, do not prove that the Coast Guard committed an error or injustice in processing the applicant for separation under the PDES. Without persuasive proof of error or injustice on the part of the Coast Guard, the Board will not correct this applicant's record to grant her a year of active duty that she did not earn.

11. Due to the untimeliness of the applicant's application and the probable lack of success on the merits, the Board finds that it is not in the interest of justice to waive the statute of limitations in this case.

12. Accordingly, the application should be denied because it is untimely and because of its lack of apparent merit.

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

ORDER

The application of XXXXXXXXXXXX, USCG (retired), for correction of her military record is denied.

