

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2012-196

FINAL DECISION

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case after receiving the applicant's completed application on July 31, 2012, and subsequently prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated April 25, 2013, 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 was medically retired from the Coast Guard on [REDACTED] with a 60% disability rating for back and knee conditions. At the time of retirement, he was 35 days shy of 20 years of active duty service.¹ He asked the Board to correct his record to show that he was retired with exactly 20 years of active duty. The requested correction might make him legally entitled to concurrent retired and disability pay (CRDP) under 10 U.S.C. § 1414.²

The applicant alleged that he has suffered an injustice because he was advised to retire with a 60% disability rating just 35 days shy of having 20 years of active duty. Further, he alleged that had he been properly and fully counseled he would have chosen to remain on active duty for another six weeks to achieve 20 years of active duty. There is no evidence in the record of the actual counseling provided to the applicant about whether he should remain on active duty until he reached 20 years of active duty service. The applicant also stated that he currently has a 60% disability rating from the Department of Veterans' Affairs (DVA) but is not entitled to CRDP because he has less than 20 years of active duty.

¹ See Coast Guard advisory opinion at 2-3.

² Under 10 U.S.C. § 1414, veterans with at least 20 satisfactory years of service and service-connected disability ratings from the DVA of at least 50% may receive concurrent retired and disability pay (CRDP). Prior to the enactment of CRDP, which went into effect on January 1, 2004, veterans could not receive full retirement pay and disability pay simultaneously.

The applicant stated that he did not discover the alleged error until April 18, 2012. He stated that he was told and always believed that he had retired with 21 years of active duty service because he was told that he had 21 years of service for pay purposes. He restated his contention that he was not counseled that he had the option of remaining on active duty to complete 20 years of active duty service. [REDACTED]

VIEWS OF THE COAST GUARD

On February 8, 2013, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion stating that it was “not objecting to the BCMR granting relief” in this case.

The JAG noted that the application was not timely, but recommended that the Board consider it on the merits, as recommended by the Commander, Personnel Service Center (PSC) in a memorandum attached to the advisory opinion. The JAG agreed with PSC that the applicant’s untimeliness should be excused because the applicant’s delay in seeking a correction to his record was due mainly to the fact that legislation implementing CRDP was not enacted until December 28, 2001 and the law was not fully disclosed or explained to the applicant until approximately 2012 when he contacted the Pay and Personnel Center to discuss the offset of his DVA disability pay from his Coast Guard disability retired pay.

Further, the Coast Guard limited its recommendation for relief to the facts and circumstances of this case. The JAG stated that he did not object to granting relief in this case so that the applicant is eligible for benefits under 10 U.S.C. § 1414 because the Coast Guard Pay and Personnel Center determined that the “net effect [of granting relief beyond the impact of receiving the benefits described in 10 U.S.C. § 1414] will be minimal.”

The JAG stated that in deciding whether an applicant’s discharge 35 days shy of 20 years of active duty is unduly severe, the Board may take into consideration current standards and mores. He stated that according to PSC, if the Coast Guard were to [REDACTED] applicant today regarding his eligibility for CRDP, he would be encouraged to remain on active duty to complete 20 years of active duty, if otherwise eligible for retention. The JAG further stated the following:

[E]ven though we concur [with PSC] that the Coast Guard did not commit an error or injustice here when it awarded the applicant a permanent retirement based on his disability . . . “Congress did not limit the injustices that can be corrected under [10 U.S.C.] § 1552 to those caused by the military service. [Thus] even if an injustice in an applicant’s record was not caused by the Coast Guard, the Board may still correct it.” [Citation omitted.] . . . Here, it is not unreasonable for the [REDACTED] Board to conclude that, given the specific facts and context of this case and even though the Coast Guard did not commit an error or injustice, that ‘the applicant’s retirement date is unjust and requires correction under 10 U.S.C. § 1552. [Citation omitted.]

In a memorandum attached to the advisory opinion, PSC recommended that the Board grant relief to the applicant by crediting the applicant [REDACTED] with the 35 days needed to reach 20 years of active duty service and by awarding him any amount due as a result of the correction.

In addition to recommending that the applicant's untimeliness in submitting his application be excused, PSC stated the following:

1. The applicant was granted a perm[REDACTED] retirement 35 days short of 20 years active duty. . . .
2. The appropriate . . . separation process and policies were followed at the time of the applicant's separation. . . .
3. Although the Service was not under the obligation to retain the applicant, policy would allow the applicant to continue on active duty for the 35 days if requested. . . .
4. The applicant did not complete 20 years active service and thus is not entitled to [CRDP]. If applicant were to be counseled today, he would be encouraged to remain on active duty for 35 days if he meets the requirements for conti[REDACTED] service and [CRDP]. It is reasonable to expect that had the applicant known that [CRDP] would be enacted in the future, he would have made the choice back in 1997 to remain on active duty for 35 days because his physical condition would have allowed him to perform useful service in an established billet and that retention for 35 days would not have been detrimental to his heal or a hazard to associates. . . .

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On February 13, 2013, the Board received the applicant's response to the views of the Coast Guard. He stated that he had no objection to the advisory opinion.

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. 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 v[REDACTED] at a hearing. The Board concurs in that recommendation.
 3. The Board begins its analysis in every case by presuming that the disputed information in the applicant's military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust. 33 C.F.R. § 52.24(b).
- [REDACTED]

4. Under 10 U.S.C. § 1552 and 33 C.F.R. § 52.22, an application to the Board must be filed within three years after the applicant discovers the alleged error in his record. Although the applicant alleged that he did not discover the alleged error until April 18, 20012, the Board finds that the applicant knew or should have known that he had not been credited with 20 years of active duty service upon his retirement on [REDACTED]. His last DD 214 shows that he did not have 20 years of active duty when he retired due to a disability. Therefore, his application was untimely.

5. 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 instructed 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.”

6. The record shows that the applicant was retired from the Coast Guard in [REDACTED] due to disabling back and knee conditions with a 60% disability rating. There is no way the applicant could have known about the benefit of a 20-year retirement prior to the enactment of CRDP on December 28, 2001, and there is no evidence that the applicant was informed about CRDP by the Coast Guard or the DVA following its enactment in 2001, or its 2004 effective date, until he contacted the Coast Guard Pay and Personnel Center in early 2012 regarding offsets from his retired pay. In light of the above findings and given the Coast Guard’s recommendation for relief which indicates that his claim has merit, the Board finds that it is in the interest of justice to excuse the application’s untimeliness and to decide the case on the merits.

7. With regard to the merits, the Coast Guard recommended relief. The Board agrees with the Coast Guard that the applicant should have relief. In this regard, the record shows that the applicant was medically retired with a 60% disability rating on [REDACTED], just 35 days shy of the date on which he would have qualified for a full 20-year regular retirement. At the time, he was suffering from disabling back and knee conditions. Under Article 17.A.2.b. of the Personnel Manual then in effect, the policy was to retain disabled members with more than 18 years of active duty until their 20-year retirement date if their retention would not endanger the members’ health, would not be a hazard to themselves or others, and the member could perform useful service. He alleged that he was not counseled that he had the option of remaining on active duty until he completed 20 years of active duty service and there is nothing in the record which proves what counseling he actually received. Nor is there anything in the record to suggest that the applicant did not meet the requirements for retention when he retired in [REDACTED].

8. In a memorandum to the Board dated July 2, 1976, the delegate of the Secretary stated that in deciding whether a veteran’s discharge is unduly severe, the Board may take into account current standards and mores. Similarly, the Board may consider in this case whether the applicant’s separation 35 days shy of a 20-year retirement was unduly severe and not in accordance with current standards. The written standards for retention under Article 17.A.2.b. of the Personnel Manual have not changed since [REDACTED]. However, because of the enactment of CRDP, a member in the applicant’s circumstances today would not be separated 35 days shy of

his 20th active duty anniversary but would be retained until he had completed 20 years of active duty. The Board notes that because a veteran could not receive duplicate benefits (concurrent retirement and disability pay) in [REDACTED] the impact of the decision at the time was much less severe than the impact such a decision would have today.

9. In light of all the circumstances of this case, the Board is persuaded that the applicant's medical retirement just 35 days before he qualified for a regular, 20-year retirement constitutes an injustice.³ While the Coast Guard may not have committed an error or injustice in medically retiring the applicant on [REDACTED], 10 U.S.C. § 1552 does not limit corrections to those caused by the military services. Even if an injustice in an applicant's record was not caused by the Coast Guard, the Board may still correct it.⁴ In addition, the BCMR has the authority to decide whether an injustice exists in an applicant's record on a case-by-case basis.⁵ Given the evidence that the applicant was just 35 days from a 20-year active duty retirement, was performing duty although in a limited capacity, was not a danger to himself or a hazard to others, and given PSC's statement that under today's standards, a member in a similar situation would be counseled to remain on active duty, the Board finds that the applicant's retirement 35 days shy of a 20 year retirement is unjust and should be corrected.

10. Accordingly, the applicant's request should be granted by correcting his retirement date to his 20th active duty anniversary so that he shall have exactly 20 years of active duty and by paying him any amount due as a result of this correction in accordance with applicable laws and regulations.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

³ Under 10 U.S.C. § 1552(a), the Board may correct both errors and injustices in military records.

⁴ 41 Op. Att'y Gen. 94 (1952) (finding that "[t]he words 'error' and 'injustice' as used in this section do not have a limited or technical meaning and, to be made the basis for remedial action, the 'error' or 'injustice' need not have been caused by the service involved.").

⁵ Decision of the Deputy General Counsel, BCMR Docket No. 2001-043.

ORDER

The application of [REDACTED] for correction of his military record is granted.

The Coast Guard shall correct the date of his retirement to his 20th active duty anniversary so that he shall be credited with exactly 20 years of active duty. The Coast Guard shall pay him any amount due as a result of this correction in accordance with applicable laws and regulations.

