DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

[redacted]

BCMR Docket No. 2016-182

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 July 29, 2016, and assigned it to staff attorney [redacted] to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated July 6, 2018, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, who was placed on the Permanent Disability Retired List (PDRL) on March 13, 1990, asked the Board to correct his record by showing that an injury he sustained in "1974 or 1975" was combat related so that he is eligible for Combat Related Special Compensation (CRSC). He claimed that he was aboard the USCGC [redacted] when he sustained a head injury "caused by a projectile [from] a 5" gun carried by a shipmate, who was behind [him], during a military drill."

The applicant stated that before 1980, he had "suffered loss of consciousness" but he was afraid of being found not fit for duty (NFFD) so he did not see any medical professionals. He claimed that he hid his "discomfort, pain, dizziness, and the true state of [his] medical conditions" so that he could pursue his ambitions with the Coast Guard. He stated that in 1980 he was diagnosed with a seizure disorder and found NFFD, but he contested the diagnosis and "won [his] case."

The applicant stated that in 1985 he was at an auto shop when he had a seizure. He claimed that he refused treatment from paramedics because he did not want the Coast Guard to know about the incident because he wanted to save his career. However, he "was forced" to accept placement on the Temporary Disability Retirement List (TDRL) in 1986 and he was placed on the PDRL in 1990.

The applicant stated that he met with Dr. T for a physical examination (it was not clear when the examination was held). The applicant stated that he described the original injury to the doctor "as slight, though there was blood, hump and pain on the injured part" of his head. The injury had caused him "headaches and dizziness few minutes after the projectile incident." He claimed that he wanted to be a "good soldier" and not make a big deal out of it. Dr. T concluded from this information that a recently-discovered scar on the applicant's head came from "a major head injury." The applicant stressed that Dr. T did not receive any documentation in coming to this conclusion; he only considered the applicant's verbal account of the story and scar on his head. The applicant asserted that until recently he did not know what had caused his seizure disorder, but he now knows that it was caused by the head injury from 1974 or 1975.

The applicant also described medical complications and financial difficulties he has had. The applicant stated that he hoped that the Board would make a decision favorable to him and give him "the benefit of the doubt" for the sake of his wife and five children.

Regarding the timeliness of the application, the applicant stated that on September 15, 2014, his wife discovered a scar on the back of his head. He stated that he contacted the Disabled American Veterans in an attempt to obtain an attorney to assist him with his application to this Board, but he was unable to get representation. In support of h[redacted]lication, the applicant provided several documents, which are described below in the Summary of the Record. In addition he provided a letter from Dr. T dated May 23, 2016. Dr. T referenced a previous letter he had written for the applicant "agreeing … that his CRSC claim should be granted," but that letter was not provided. The May 23, 2016, letter includes the following:

> In December 2011, [the applicant] told me (without showing me anything) that he put in a CRSC claim to the USCG. He told me that his claim was denied. He added that he was writing a request for reconsideration so that the 'denial' will be reversed. That in order his claim will be granted, he needed an assessment from a medical doctor that his head injury inflicted during a military drill when he was on active duty was the cause of his seizure disorder – where he was awarded 100% service connected disability by the US Veterans Administration.
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> After explaining to me everything, I thoroughly studied his case and I agree with him. Thereby, I wrote him my assessment that his head injury was the cause of his current seizure disorder. …
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> A few days ago, he was in my clinic and I asked him about his CRSC claim. He said it was denied, even with my endorsement. The reason for denial is because it was just a slight injury. I know for a fact it wasn't a slight head injury when I examined him in 1975.
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> So I examined him again. To my surprise, the scar on his head is still clearly visible. It measured one and a half (1 ½) inches in length and about a quarter (1/4) inch in width. I have been in the medical profession for about 45 years now, and I will say without hesitation that this is not a slight head injury.
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> Definitely, in my professional opinion, it was a major head injury. I can see no other factors except that this head injury is the cause of his seizure disorder or epilepsy. [The applicant's] seizure was cause by this traumatic brain injury in 1974 or 1975 because [the applicant] didn't suffer or experience other common factors … that can induce epilepsy aside from traumatic brain injury.

Dr. T went on to list common factors that can lead to seizures, which he asserted the applicant did not have.

The applicant provided a copy of the first page of an article titled Persisting Symptoms After Mild Head Injury: A Review of the Postconcussive Syndrome.[1] The abstract states that "[s]eemingly mild head injuries frequently result in persisting postconcussive syndromes." He provided documentation showing some of his current medical conditions. The applicant provided documents providing evidence of his current financial standing. He provided several pictures showing a healed abrasion to the back of his head. Lastly, he provided two affidavits from individuals attesting that the scar was one and half inches long and a half inch wide.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on March 17, 1973. An entry in his military record shows that he was stationed aboard the USCGC [redacted] between June 1974 and June 1975. The cutter was homeported in New York.

On an Abstract of Medical History, which lists the applicant's medical visits from January 1973 to April 1977, there is one entry listed as follows:

[redacted]

USCG Support Center, N.Y.	Soft tissue trauma	Began: 13 May 75	Ended: 13 May 75	OP

After this entry, he had entries for headaches dated September 4, 1975, and April 13, 1977, on this Abstract.

That applicant's first Central Physical Evaluation Board (CPEB) convened on December 9, 1981. The only diagnosis was that the applicant was "fit for duty." The PEB recommended that he be returned to duty. The recommendation was approved on January 18, 1982, and the applicant remained on duty.

On May 27, 1982, the applicant applied to this Board for correction of his reenlistment. On his application, Block 14 asked the date of the discovery of the error or injustice and "if more than three years since the alleged error or injustice was discovered, state why the Board should find it in the interest of justice to consider this application." The applicant replied to this question despite the fact that this application was timely. He received a favorable decision on August 19, 1983.

[redacted]

An Initial Medical Board decision dated October 10, 1984, states that the applicant had been diagnosed at a Naval hospital with recurrent episodes of loss of consciousness. Since 1979 the applicant had been "affected by … recurrent episodes of loss of consciousness associated with urinary incontinence on some occasions, oral lacerations and followed by a postictal state." After being admitted to the hospital again after another attack, the applicant was in a mostly stable condition until October 1984, when he was observed [redacted] a grand [redacted] eizures on a ship. The Initial Medical Board noted that an EEG, radionuc[redacted]ain scan, [redacted] series, and computerized cranial tomogra[redacted]in normal limits. The board also noted that despite the test results, the applicant was considered handicapped because he would require anti-convulsant medication and close medical supervision. He was diagnosed with seizure disorder, idiopathic and the board recommended that his case be reviewed by the CPEB.

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[1] Journal of Clinical and Experimental Neuropsychology, 1986, Vol. 8, No. 4, pp. 323- 346.

On November 6, 1984, the applicant rebutted the Initial Medical Board decision. The applicant asserted that in 1980, a medical board had found that he had a Micturition Syncope, not a seizure disorder, and that he was fit for duty.

On May 21, 1985, the applicant rebutted another Medical Board's findings dated April 23, 1985.[2] He stated that while he may have "episodes of fainting," he disagreed with the diagnosis of seizure disorder, idiopathic. He stated that the test results of his brain scan, EEG, cranial tomography, and skull series "were within normal limits." He asserted that he had continued to work well and without any disruptions as indicated by his evaluations. The applicant noted that since the beginning of the Medical Board process, he had taken only two days of regular leave and no sick days, further proving that he is able to complete his job satisfactorily. He therefore requested that he be returned to fit for full duty and that his diagnosis of seizure disorder be struck from his record.

On September 27, 1985, the applicant refused medical treatment from local county paramedics. A copy of this document is in the applicant's medical file and he provided a copy with his application. On his copy, he wrote "what actually happened is I had a seizure attack at the Automotive Center … The … County Paramedic came over, but I refused treatment."

On a report dated May 16, 1986, a third Medical Board re-evaluated the applicant for the diagnoses of seizure disorder and recurrent episodes of loss of consciousness associated with urinary incontinence, oral buccal lacerations and postictal somnolence. The board noted the applicant's two prior approved Medical Boards were dated October 10, 1984, and November 27.[3] The board noted that the diagnoses of seizure disorder, idiopathic, and recurrent episodes of loss of consciousness had been documented since 1979. The applicant had been witnessed having grand mal seizures three times in the last year. Based on the applicant's clinical history, the board found that the applicant had a seizure disorder, idiopathic, which he did not have prior to enlisting in the Coast Guard. In the diagnostic summary, the applicant was listed as having seizure disorder, recurrent episodes of loss of consciousness, urinary incontinence, and buccal lacerations and postictal somnolence. The board found that a result of these diagnoses and their effect on the applicant's ability to function, their recommendation was that he be reviewed by the CPEB.

A CPEB convened on June 27, 1986, found that the applicant was not fit for duty (NFFD) based on his diagnosed "seizure disorder with recurrent episodes of loss of consciousness, urinary incontinence, buccal lacerations and postictal somnolence rated as epilepsy, grand mal, averaging at least one major seizure in four months over the last year." The board found that the condition was incurred while the applicant was entitled to receive basic pay, was the proximate result of the performance of active duty, and was not a result of misconduct or willful neglect. The applicant was assigned a 60% disability rating, and the CPEB recommended that he be temporarily retired. The CPEB's recommendation was accepted on July 8, 1986, and the applicant was placed on the TDRL on August 19, 1986.

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[2] Either the applicant included an incorrect date or the document he is rebutting was not located in his file.
[3] No year was provided with November 27.

The applicant received a periodic physical examination on March 7, 1988. The medical officer noted that the applicant was working part time averaging four hours of work a day. The applicant recorded six major convulsive seizures in the last year with incontinence and postictal somnolence and ten minor seizure episodes. The medical officer found that based on the applicant's "history and clinical examinations, the diagnoses are correct and stand unchanged." The applicant continued to require anti-convulsant medication and remained impaired by frequent convulsions.

The applicant received a second physical examination on November 7, 1989. The doctor stated that the applicant would continue on the TDRL due to the generalized seizure disorder.

The applicant underwent another CPEB evaluation on December 7, 1989. He was assigned a 60% disability rating for a "seizure disorder with recurrent episodes of loss of consciousness, urinary incontinence, buccal lacerations and postictal somnolence – rated as epilepsy grand mal – averaging at least 1 major seizure in 4 months over the last year." The CPEB recommended that he be permanently retired. This recommendation was approved on January 24, 1990.

The applicant completed a Claim for Combat-Related Special Compensation on December 8, 2010. On the application, he claimed that his injury occurred in [redacted] "on refresher training" while simulating war. He provided a statement in support of his claim, which states many of the same points he covered in his application to this Board. He also stated that after he got hit with the projectile he went to sickbay, but while there the general quarter alarm sounded and he had to return to his billet immediately. He claimed that due to the hectic activities surrounding the refresher training, which lasted one week, he was unable to return to sickbay. Because the swelling and pain subsided after a few days, he "totally forgot the whole thing and did not [go] back to sickbay." The applicant claimed that while he was on leave to another country, he saw Dr. T soon after the head injury.

On November 14, 2011, the Disability Evaluations branch of PSC concluded their review of the applicant's request for CRSC and determined that "based on a preponderance of the evidence in [his] application, [he did] not meet the overall criteria for CRSC." PSC explained that in order for the applicant's condition to be deemed "combat-related' within the meaning to 10 U.S.C. § 1413a, he had to establish that the disability was incurred as the direct result of armed conflict, while engaged in hazardous service, in the performance of duty under conditions simulating war, or through an instrumentality of war. Therefore, not all military job-related injuries are "combat-related." PSC stated that while the projectile that the applicant described qualified as an instrumentality of war, his application was denied because the applicant could not prove that the seizure disorder "was more likely than not caused by the projectile striking [his] head." The fact that the seizure disorder was diagnosed while the applicant was on active duty did not establish that the projectile described was the cause of the disorder.

On January 19, 2012, this Board administratively closed another case from the applicant. The applicant had submitted a second application to the Board sometime in 2011.

On February 13, 2012, the Disability Evaluations branch of PSC concluded their review of the applicant's request for reconsideration, which was dated December 15, 2011. After reviewing

the applicant's request for reconsideration, PSC again denied his request. The evidence the applicant had submitted was largely the same as he submitted to this Board. PSC stated that despite Dr. T's statement it was "less likely than not that the head injury [he] suffered in 1975 caused [his] seizure disorder." Their decision states the following:

> Our determination is based on the medical research in the area of head trauma which indicates that the 10-year incidence of epilepsy after traumatic brain injury is estimated at about 2 percent. The severity of the traumatic brain injury strongly correlates with the risk of developing post-traumatic epilepsy. In one population-based study, the cumulative five-year probability of seizures was 0.5 percent in patients with mild injury (i.e. those with loss of consciousness or amnesia less than 30 minutes); 1.2 percent for those with moderate injuries (i.e. loss of consciousness for 30 minutes to 24 hours or skull fractures); and 10 percent in those with severe injuries (i.e. loss of consciousness or amnesia for more than 24 hours or subdural hematoma or cerebral contusion). Other subsets of patients at much [redacted] risk of developing post-traumatic epilepsy include those with early seizures (i.e. within 1-week of head trauma), intracranial hemorrhage or cerebral contusion, depressed skull fracture, and penetrating head injury.
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> In addition, we considered the facts of your case as taken from your statement in support of your claim and the narrative summary from your medical board conducted in 1981, which are: you were an ammo provider on USCGC [redacted] in 1974 and 1975; while on general quarters, you were hit in the back of your head by the sharp pointed edge of a projectile carried by a shipmate; you suffered slight injury and swelling at the back of your head; you felt a minor pain; the pain and swelling discontinued a few days later; you occasionally bumped your head on the bulkhead during rough seas; you saw medical providers for occasional complaints of headache; otherwise you were well until October 1980 when you had two episodes of black-out spells; you were diagnosed with seizure disorder in 1980.

PSC stated that there were no indications that the applicant had suffered from early seizures, amnesia, loss of consciousness, intracranial hemorrhage, cerebral contusion, skull fracture, or a penetrating head injury. Therefore the applicant's VA rating of 100% disability rating would remain as it had been, with 0% being combat-related. The applicant was informed in this decision that if he disagreed he could apply this this Board.

On September 13, 2016, the CRSC Board concluded its review of the applicant's application. The board found that based on a preponderance of the evidence the applicant did not meet the criteria for CRSC in accordance with 10 U.S.C. § 1413a. The board stated that the applicant provided insufficient documentation to link the disability to the injury. The board recommended that if the applicant would like reconsideration, he should provide documentation supporting the presence of the USCGC [redacted] at the time in question, a citation or other award to support a combat-related determination or drill, and an injury report, witness statement, or medical document indicating a head injury from the time in question.

The CRSC Board also made several findings related to the claims and documentation that the applicant provided. The board noted the applicant had claimed that the injury happened between 1974 and 1975 while he was on the USCGC [redacted] while in [redacted]. However, according to the Coast Guard History website,[4] the USCGC [redacted] went to [redacted] for the first time in April 1980 during the [redacted]. The board stated that based on an internet search, Dr. T, the only doctor able to link the applicant's head injury to the seizure disorder, is a well-known venereologist. Regarding the article that the applicant had provided the first page of, the board noted that the full article states that head injuries can cause symptoms after six weeks

[4] The Coast Guard has since changed their History website and the link provided in the decision is no longer active.

when there was no loss of consciousness. The applicant's disability rating therefore remained at 100%, with 0% being combat-related.

VIEWS OF THE COAST GUARD

On January 23, 2017, 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 noted that the application is not timely because the applicant was discharged in 1986 and did not provide any justification for the untimeliness of his application. PSC stated that the applicant applied for CRSC on December 8, 2010, and was denied because it was found that the applicant did not provide enough evidence to establish that his seizure disorder was "more likely than not caused by the projectile striking [his] head." While the November 14, 2011, letter acknowledges that a projectile hitting the applicant's head would qualify as an instrumentality of war, it was still found that there was not enough evidence to establish eligibility for CRSC. PSC also cited the February 13, 2012, denial of CRSC, noting that the decision had found that there was insufficient evidence to find causation between any head injury in 1975 and his seizure disorder. PSC cited the applicant's third request for CRSC, which was denied on September 13, 2016.

PSC argued that the applicant has not shown that the Coast Guard's determinations to deny him CRSC was erroneous or unjust and therefore recommended that the Board deny relief. PSC stated that the applicant's almost identical request has been reviewed on three occasions and given a thorough examination. The applicant has been unable to provide "any further evidence to persuade PSC to believe that CRSC Board erred in their review of the applicant's case or in their final determination that he does not qualify for CRSC in accordance with 10 U.S.C. 1413.a." PSC argued that the applicant has received all the proper due process in the review process of his requests. Further, PSC argued, Coast Guard officers are presumed to have performed their duties in the review of his request correctly, lawfully, and in good faith absent evidence to the contrary.[5] Therefore, PSC recommended that the Board deny relief.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 30, 2017, 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 applicant responded on February 26, 2018, and stated that he disagreed with the Coast Guard's advisory opinion.

The applicant first addressed PSC's assertion that his application was untimely. He stated that he first submitted his application for CRSC in December 2010. He stated that at that time there was no mention of an untimely application and in fact he was told that he could submit an application for reconsideration if he wished. He did submit a request for reconsideration and when that was denied he was told that he could submit an application with this Board. The applicant

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

asserted that in September 2014 he was told by "military personnel" that his injury was not minor because it measured one and a half inches in length. He stated that he submitted his application within three years of learning that his head injury was not in fact minor. He therefore requested that the Board waive the untimeliness of his application.

The applicant reasserted many of the arguments he stated in his original applications. He emphasized that he had wished to make a career out of the Coast Guard. He claimed that he tried to "hide the true state of [his] health" so that he could stay as long as possible. The applicant stated that he was unsure as to why there is not more documentation from his head injury in 1975, but he again stated that he did go to sick bay after he was hit in the head but he left in a rush. The applicant stated after he was placed on the TDRL, he was hoping he would recover and he could come back on active duty and continue his career. Unfortunately, [redacted]eizures became more frequent. He went on to explain medical difficulties he has had recently and since submitting his application to the Board. He asked that the Board give him the "benefit of the doubt" and grant his request for relief. He submitted a few documents with his reply, but other than a few VA documents, all of them had been submitted with his original application.

APPLICABLE REGULATIONS

Title 10 U.S.C. § 1413a(a), enacted in 2002, states that the Secretary concerned must pay eligible "combat-related disabled uniformed services" retirees a monthly amount for their combat-related disability. Subsection (c) states that an eligible combat-related disabled uniformed serviced retiree is a person who is entitled to retired pay and "has a combat-related disability." Subsection (e) states that "combat-related disability" is a disability that:

> [T]hat is compensable under the laws administered by the Secretary of Veterans Affairs and that –
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> (1) Is attributable to an injury for which the member was awarded the Purple Heart; or
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> (2) Was incurred (as determined under criteria prescribed by the Secretary of Defense) –
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> (A) As a direct result of armed conflict;
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> (B) While engaged in hazardous service;
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> (C) In the performance of duty under conditions simulating war; or
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> (D) Through an instrumentality of [redacted]

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 concerni[redacted]s 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 retired because of seizure disorder in

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

1986; CRSC was enacted in 2002; and the applicant's request for CRSC based on his claim that his seizure disorder was caused by a projectile during a drill simulating combat was first denied by the Coast Guard in 2011. Although the Coast Guard has continued to review and deny the applicant's reconsideration requests, the preponderance of the evidence shows that the applicant knew of the alleged error in his record no later than 2011, and so 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 on September 15, 2014, his wife discovered a scar on the back of his head. He then stated in his response to the Coast Guard's advisory opinion that "military personnel" told him in 2014 that his injury was not minor. 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. The applicant has applied to this Board in 1982 and 2010 and both times he was required to fill out a DD 149, as he also was to submit this application. The application asks why the Board should consider the application if more than three years has passed since the alleged error or injustice. The Board therefore finds that the applicant was aware of the three-year requirement and finds that his explanation is not compelling.

5. A cursory review of the merits of this case indicates that the applicant's claim cannot prevail. The record shows that the applicant sustained a "soft tissue injury" while in New York on May 13, 1975, and suffered two headaches later the same year. His seizure disorder did not begin until 1979. There is no evidence supporting his claim that he suffered a major head injury as a result of an instrument of war in 1974 or 1975, as he described, and these medical records are presumptively correct.[10] In addition, there is no evidence that the USCGC [redacted] was in [redacted] in 1974 or 1975, and the Coast Guard denies it. Although a drill simulating war could have been conducted anywhere, there is no evidence other than the applicant's claim that he sustained a severe head injury during such a drill. After examining him and reviewing his records in 1980, the Coast Guard's doctors concluded that his seizure disorder was "idiopathic," meaning of unknown cause or spontaneous origin. This conclusion shows that that at the time, he had not reported or been treated for a serious head injury that the doctors thought might have caused his seizures. The applicant provided a recent photograph showing a scar on his head, but the photograph does not prove that he received the scar during a drill simulating war. Nor is Dr. T's letter persuasive because there is no evidence showing that Dr. T treated the applicant for a head

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[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] 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.").

injury while the applicant was a member of the Coast Guard. Based on the record before it, the Board finds that the applicant's claim for CRSC 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)

[redacted]

ORDER

The application of retired [redacted], USCG, for correction of his military record is denied.

[redacted]

July 6, 2018