

# In the United States Court of Federal Claims

No. 08-731 C  
(Filed: August 28, 2009)

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**DENISE ARMSTRONG-WHITE**

Plaintiff,

v.

**THE UNITED STATES,**

Defendant.

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## OPINION

This military pay case is before the Court on the Government’s motion to dismiss and cross motions for judgment on the administrative record. Plaintiff challenges a Department of Homeland Security Board for Correction of Military Records (“BCMR” or “the board”) decision denying her application to have her military discharge re-characterized as a military medical retirement. Compl. ¶¶ 1, 13. The Government moves to dismiss for lack of subject matter jurisdiction on the basis that Plaintiff’s Complaint fails to cite a money-mandating statute. In the alternative, the Government moves for judgment on the administrative record on the basis that the record supports both the BCMR’s decision to deny Plaintiff’s application as untimely and the BCMR’s decision denying Plaintiff’s application on the merits. Plaintiff responds that if judgment on the administrative record is granted, it should be granted in her favor. Regarding the jurisdictional challenge, while Plaintiff’s Complaint may indeed be defective, her brief identifies the appropriate money-mandating statute under which the Court would have jurisdiction. The Court does not address the motion to dismiss because the Government is clearly entitled to judgment on the administrative record.

### **I. Background**

Plaintiff began service in the United States Coast Guard in 1997. Compl. ¶ 6. During 1999, she underwent a surgery in which she alleges the medical provider committed malpractice. Compl. ¶ 10. In May of 2000, “Plaintiff was discharged” “with no military medical separation or retirement.” Compl. ¶¶ 6, 11. In July 2005, more than five years after her discharge, Plaintiff

filed an application for correction of her military record. AR 265. On January 31, 2007, the BCMR denied Plaintiff's application. AR 43-53.

One reason the BCMR denied Plaintiff's application was that it found her application untimely. AR 51. In its decision, the BCMR explained:

An application to the Board must be filed within three years after the applicant discovers the alleged error in her record. 10 U.S.C. § 1552. The applicant was released from active duty without PDES [Physical Disability Evaluation System] processing on May 1, 2000. She knew or should have known about her lack of PDES processing and disability rating on that date. Therefore, her application was untimely.

AR 51. The BCMR went on to review the merits of the case, and found that Plaintiff "voluntarily ended her active duty upon the expiration of her . . . contract" in May of 2000. *Id.* "Although [Plaintiff] alleged that she was tricked into leaving active duty by Dr. R., the record shows otherwise," the BCMR found. *Id.* The board concluded that Plaintiff's "request should be denied for untimeliness because of the lack a compelling reason for her delay and the lack [of] any apparent merit in her claim that she was unjustly denied PDES processing." AR 52.

## **II. Discussion**

This Court "will not disturb the decision of [a] corrections board unless it is arbitrary, capricious, contrary to law, or unsupported by substantial evidence." *Chambers v. United States*, 417 F.3d 1218, 1227 (Fed. Cir. 2005). Here, the Court finds no flaw in the BCMR's decision.

Within the BCMR's jurisdictional statute, the following statute of limitations appears:

No correction may be made . . . unless the claimant . . . files a request for the correction within three years after he discovers the error or injustice. However, a board . . . may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice.

10 U.S.C. § 1552(b). "Plaintiff acknowledges that her application to the Board was five years after her" discharge, but argues that "[g]iven the weight and gravity of the allegations raised by Plaintiff, . . . justice . . . requires a waiver of any statute of limitations." Pl.'s Errata Objection to Def.'s Mot. to Dismiss ("Pl.'s Br.") 8. The BCMR disagreed. AR 51.

Most of Plaintiff's argument on the issue of timeliness is devoted to establishing that the BCMR could have waived the statute of limitations if it chose to do so. *See* Pl.'s Br. 7-10. Yet, there is no dispute here as to whether the BCMR had authority to waive the statute of limitations if it had found a waiver to be in the interest of justice. *See* Def.'s Reply 9. The BCMR simply decided that a waiver was not in the interest of justice here. To attack that decision, Plaintiff must demonstrate why the record shows that the BCMR's decision not to grant a waiver was arbitrary, capricious, contrary to law, or unsupported by substantial evidence.

Plaintiff fails to identify anything in the administrative record that would cast doubt on the BCMR's decision that the application was untimely. In fact, Plaintiff does not even cite the administrative record in her argument regarding timeliness. At one point, Plaintiff asserts that the statute of limitations "should be waived based on Plaintiff's mental illness." Pl.'s Br. 8. Plaintiff then claims that her "mental illness has been recognized by the VA since at least 2003." *Id.* But again, Plaintiff offers no support for these assertions. Nor does Plaintiff provide any explanation of the nature and impact of the asserted mental illness, or make any suggestion that she even presented this argument to the BCMR.

In contrast, the Government directs the Court to substantial evidence in the administrative record supporting the BCMR's decision. *See* Def.'s Reply 5-8. The BCMR's decision states, "The applicant alleged that she did not timely apply to this Board because she did not know about the BCMR until 2005." AR 51. Indeed, in response to a Coast Guard advisory opinion, Plaintiff had stated to the BCMR, "I was advised in July 2005 by the VA in Washington DC that I should have requested a change in my discharge status through the [BCMR] as soon as I was discharged and should have been advised of such. This was the first time that anyone mentioned this to me." AR 175. Thus, it appears to the Court that the BCMR fairly considered Plaintiff's stated reason for filing her application out of time but reasonably decided a waiver of the statute of limitations was not warranted in her case. The Court cannot find anything arbitrary or unlawful in the BCMR's decision.

Notwithstanding its finding of untimeliness, the BCMR proceeded to evaluate the merits of Plaintiff's claim. The board rejected Plaintiff's allegation that she was "tricked into leaving active duty," finding no evidence to support such a claim. AR 51. To the contrary, the BCMR was presented with substantial evidence that Plaintiff's release from active duty was voluntary. For example, Plaintiff had submitted a letter stating that she wanted to resign her commission to attend graduate school and care for her children. AR 358. In another letter, dated March 24, 2000, Plaintiff declines an extension on active duty, stating "I do not wish to accept the extension . . . . My intentions are to be released from active duty . . . ." AR 273. Substantial evidence supports the BCMR's decision. The Court can find no indication that it was arbitrary or unlawful.

### **III. Conclusion**

Plaintiff's cross motion for judgment on the administrative record is denied. The Government's motion for judgment on the administrative record is granted. The Clerk of the Court is directed to enter judgment in favor of the Government.

s/ Edward J. Damich  
EDWARD J. DAMICH  
Judge