

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2006-150

XXXXXXXXXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXXXXX

FINAL DECISION

AUTHOR: Andrews, J.

This proceeding was conducted 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 on July 21, 2006, upon receipt of the applicant's completed application and military and medical records.

This final decision, dated May 11, 2007, is approved 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 discharged on September 12, 2002, for "Alcohol Rehabilitation Failure," pursuant to the recommendation of an Administrative Separation Board (ASB), asked the BCMR to correct his record to show that he was retired due to a physical disability. The applicant alleged that the second "alcohol incident" in his record, which caused his discharge, was unrelated to his ingestion of alcohol. He alleged that the alcohol incident was instead caused by a sleep disorder that itself resulted from his hearing loss and tinnitus.

The applicant stated that he developed total right-side hearing loss and tinnitus while serving in xxxxxxxxxxxxxxxx, in 1995 and 1996. However, at that station, and later as the Executive Officer of a station in xxxxxxxxxxxx, he "was not put in compromising situations where [his] hearing would be put in question." However, in 2000, he was transferred to a buoy tender stationed in xxxxxxxxxxxx to fill the position of buoy deck supervisor. His job required constant attention to verbal orders and warnings because of the dangerous working conditions. Therefore, he was relieved of his deck duties because his supervisors were concerned for his safety.

The applicant alleged that following his first alcohol incident, he requested a physical examination. In August 2001, the doctor found him “not fit for duty and a safety hazard in [his] current position.” The doctor also documented problems with his “sleeping pattern” because of the tinnitus.

The applicant alleged that while stationed in xxxxxxxx, he was identified as a potential alcohol abuser and referred himself to a rehabilitative program. However, shortly after completing the program and a 90-day aftercare support plan, he apparently urinated one night in the ship’s berthing area. The applicant alleged that he has no memory of having done this and that a “medical provider opined that it was unlikely to have been a result of alcohol abuse.” He alleged that there was no evidence that his urination in the berthing area was related to alcohol abuse and so it should not have counted as an alcohol incident. However, his commanding officer (CO) ordered him to attend alcohol abuse training again during the Christmas holidays. When the applicant objected to this scheduling and the location, which would have kept him away from his family over Christmas, the CO initiated his discharge for alcohol rehabilitation failure.

The applicant stated that during the separation proceedings, he repeatedly requested processing under the Physical Disability Evaluation System (PDES) because of his hearing loss and tinnitus, but his request was denied. The applicant stated that his hearing loss and tinnitus clearly interfered with his performance of duty as a boatswain’s mate first class and that the Coast Guard should have initiated PDES processing as soon as it became clear that his hearing loss was a safety concern on deck. The applicant alleged that his CO’s determination that his urination in the berthing area was an alcohol incident and her failure to initiate PDES processing, contrary to the opinion of the doctor, violated the Personnel Manual and his due process rights. The applicant noted that the Department of Veterans’ Affairs (DVA) has awarded him a 30% disability rating under the Veterans’ Affairs Schedule for Rating Disabilities (VASRD).

SUMMARY OF THE RECORD

On January 14, 1992, the applicant enlisted in the Coast Guard. On January 21, 1992, during boot camp, the Service’s drug and alcohol abuse program was explained to him. In 1995, the applicant’s right ear was injured while he was serving aboard a cutter. He was diagnosed with near total hearing loss and tinnitus in his right ear. He was given a hearing aid. By 1998, the applicant had advanced to the rate of boatswain’s mate first class (BM1).

On April 5, 2000, a nurse at the Naval Addiction Treatment Facility in xxxxxxxx, noted that the applicant had been referred for alcohol screening because colleagues at his command had complained that he was “coming into work smelling like EtOH [alcohol].” He told the staff at the facility that he had not drunk alcohol for five days, but then a breathalyzer test showed his BAC to be 0.08. When told the test result, the applicant stated that he had taken Dimetapp the night before, gargled with Scope that morning, and was chewing Icebreaker gum.

On May 30, 2000, the applicant's commanding officer (CO) at Group xxxxxxxxx entered a Page 7 (form CG-3307) in the applicant's record, which he acknowledged by signature, to document the events of April 5, 2000, as his first alcohol incident. The Page 7 noted that the applicant had driven a Government vehicle to the treatment center and that two members had had to take time to retrieve him and the vehicle. The applicant was advised that he should "continue with any treatment that is directed" and that any further alcohol incident could result in his discharge.

In June 2000, the applicant was transferred to a buoy tender stationed in xxxxxxxx. A Page 7 in his record shows that he was late to muster twice in September 2000. He was again screened for alcohol abuse. After the applicant completed all of the questionnaires for alcohol screening, Mr. L, a licensed social worker and substance abuse professional at xxxxxxxx Mental Health Services, informed the command that "there was not sufficient evidence presented to diagnose chemical dependency or abuse."

On May 2, 2001, the applicant urinated on a chief petty officer asleep in his bunk. He did not deny that he had been drinking alcohol that evening. His command told him to refer himself for alcohol screening but did not document it as his second alcohol incident, which would likely have resulted in his discharge.

On June 5, 2001, the CO of the buoy tender entered a Page 7 in the applicant's record to document the fact that on May 29, 2001, he had been screened again by Mr. L who "determined that [he] met the criteria for a diagnosis of Alcohol Abuser." After being screened again by Mr. V on July 3, 2001, with the same result, the applicant began a four-week outpatient alcohol rehabilitation program at the local clinic.

On July 19, 2001, the CO entered a Page 7 in the applicant's record to counsel him about having been late for muster a third time in a year.

On August 1, 2001, the CO documented the applicant's completion of the outpatient rehabilitation program. She advised him that he was required to abstain from consuming alcohol for three months and to attend an Alcoholics Anonymous meeting, or a similar meeting, twice a week. She also advised him that failure to comply with the aftercare program might result in an administrative discharge.

On August 24, 2001, the applicant's physician, Dr. K, signed a Report of Medical Examination, noting that the applicant had hearing loss and tinnitus in his right ear but finding him fit for duty, sea duty, and overseas duty.

On November 1, 2001, the CO entered a Page 7 in the applicant's record to congratulate him for completing the 90-day aftercare support plan.

On November 13, 2001, after drinking alcohol at a farewell party for a crewmate, the applicant urinated on a first class petty officer asleep in his bunk. The CO removed his access to classified materials and his qualification as inport officer of the deck;

referred him for further alcohol screening; prepared a Page 7 documenting his second alcohol incident; and advised him that he would be processed for separation.

On November 30, 2001, Dr. K noted that the applicant had reported that his hearing loss made his work on the deck of a buoy tender unsafe. The applicant told Dr. K that if the wind was blowing, it was harder to hear with his hearing aid in his ear, and that he was "having great difficulty sleeping because of the tinnitus." Dr. K diagnosed the applicant with tinnitus, hearing loss, and "possible sleep walking aggravated by EtOH [alcohol]." He also wrote that he had spoken to Mr. L,

regarding three incidents apparently where the patient has had alcohol on board. He once urinated on a sleeping shipmate and another time in the hall. He has no memory of the above incidents. The patient states that the last time this occurred recently he only had six to seven beers after being dry for 90 days. He tried his best not to have this reoccur, but then again had no memory of it the next morning when it was reported. There is some question of whether we are dealing with substance abuse here, which I find somewhat unlikely, or possibly a sleep disorder. I doubt that this patient, who presents a relatively reliable history, could have had sufficient alcohol to push himself to a blackout. It is unknown whether he has a real problem or whether he has some sleepwalking tendencies, or other type of sleep disorder which could be contributing to the situation. I am unsure of how to further evaluate the situation, but [Mr. L] seems to think that the xxxxx facility might be able to give the patient some help here.

Also on November 30, 2001, Mr. L reported to the command that he had diagnosed the applicant as alcohol dependent due to the fact that he had apparently abused alcohol even though he had been through treatment and knew he was prone to urinating in an inappropriate place after consuming alcohol. Mr. L recommended that the applicant be treated for alcohol dependency and tinnitus and assessed for a possible sleep walking disorder and depression.

On December 7, 2001, the CO entered a Page 7 in the applicant's record, which he refused to sign in acknowledgement. It states that the applicant was screened by Mr. L on November 28, 2001, who found that he met the criteria for substance dependence. It also states that the applicant was scheduled to attend alcohol dependency treatment at xxxx Naval Hospital. In addition, the CO advised him that "[m]embers refusing to undergo treatment, failing to complete treatment, or violating an alcohol rehabilitation aftercare plan normally will be separated from the Coast Guard."

On December 14, 2001, the applicant responded to the notification that his CO was initiating his discharge. He stated that he was not fit for discharge because he had a ratable disability under the VASRD that prohibited him from safely accomplishing his duties on the buoy tender. He also argued that he had not received proper rehabilitation treatment under the Wellness Manual.

On January 1, 2002, the applicant received orders to report to a Navy hospital for in-patient alcohol rehabilitation treatment. On January 3, 2002, the CO notified the applicant again that she was initiating his separation. She noted that after having agreed to begin treatment at xxxxx Naval Hospital beginning on January 8, 2002, he had stated on

January 2, 2002, that he was refusing treatment. The CO informed the applicant of his right to submit a statement on his own behalf and of his right to counsel and to a hearing before an ASB. The applicant acknowledged the notification on January 8, 2002, and requested counsel.

On January 14, 2002, the applicant asked to appear before an ASB. He stated that he was not physically qualified for separation because his hearing loss rendered him unfit for duty as a boatswain's mate. The applicant complained that the person who diagnosed him as an alcohol abuser was not a physician or clinical psychologist. The applicant admitted that he "urinated in an area not designated as a head. It was inappropriate. It was deemed serious enough to warrant an alcohol incident." The applicant complained that after his first alcohol incident in April 2000, he was not sent to IMPACT training, as a doctor at an alcohol abuse clinic had recommended, and that after he was diagnosed as an alcohol abuser in May 2001, he received an 8-hour course instead of the more intensive rehabilitative treatment recommended under the Wellness Manual. The applicant also denied having disobeyed a direct order to attend another in-patient rehabilitation program since his response to his CO had been that he would "consider" attending the program after the holidays. The applicant further stated that he

chose to decline the treatment offered to me for several reasons. I am seeking more appropriate treatment. I do not think that treatment away from my home for up to four weeks, in a military environment, knowing that I am being processed for separation, and the fact that other conditions exist that may be contributory vice perceived alcohol abuse, as evident in a narrative summary by [Dr. K], would be appropriate or beneficial.

On January 19, 2002, Dr. K noted that after the applicant suffered significant right-side hearing loss and tinnitus in 1995, hearing aids were found to be ineffective due to the interference of wind noise on the deck of a cutter. Dr. K also noted that the applicant reported that his "very loud tinnitus is markedly interfering with his sleep patterns, possibly even producing depressive symptoms." Dr. K concluded that the applicant had a significant permanent disability. On February 1, 2002, Dr. K reported that the applicant's hearing loss dangerously interfered with his performance of duty as it involved buoy tending and that the problem was not correctable with hearing aids.

On January 23, 2002, the applicant's CO ordered an ASB to convene and render factual findings and a recommendation as to whether the applicant should be discharged.

On February 12, 2002, the applicant underwent a physical examination. Dr. S found that the applicant had significant hearing loss in his right ear but "no disqualifying mental or physical defects for the purpose of this evaluation: discharge from the Coast Guard. His hearing loss while not disqualifying for the purpose of this physical may be a ratable disability under the Veterans' Affairs Schedule for Rating Disabilities." Dr. S found the applicant to be "physically and mentally fit for discharge."

On March 20, 2002, the ASB convened to hear the applicant's case. He was represented by military counsel. According to the summary of the testimony prepared by the recorder, Dr. K testified that tinnitus "may result in severely affecting sleep patterns and

result in sleep deprivation” but that he did not know if the applicant suffered from a sleep walking disorder. Dr. K stated that he knew Mr. L and had no reason to disagree with Mr. L’s diagnosis. He also stated that consumption of alcohol would exacerbate sleep problems. The Command Drug and Alcohol Representative (CDAR) testified that the applicant was first referred for alcohol screening after he was late to muster on September 28, 2000. The CDAR stated that, after the applicant urinated on someone in a rack in May 2001, the command had advised him to self-refer for treatment to avoid having a second alcohol incident documented in his record. Upon self-referral, the applicant underwent a “four-week intensive out-patient program” at a local clinic.

On March 21, 2002, following eight hours of testimony, the ASB concluded that the applicant had been “involved in two separate, documented alcohol incidents and also refused required treatment.” The ASB recommended that the applicant be separated with an honorable discharge for “unsuitability due to alcohol abuse.” Their report included the following findings and opinions:

6. On August 1, 2001, [the applicant] successfully completed a four-week Alcohol and Other Drugs Awareness program provided by Counseling Associates of ...

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8. On November 12, 2001, 13 days after completing the support plan noted in Fact 7, [the applicant] was observed drinking alcohol. ...

9. During the early morning hours of November 13, 2001, following the evening mentioned in Fact 8, [the applicant] urinated on [a first class petty officer], while they were sleeping in first class berthing aboard the [buoy tender]. This incident was documented as a second alcohol offense. ...

10. [The applicant] was screened by [Mr. L], LICSW, and was found to meet the criteria for being substance dependent. ...

11. [The applicant] was scheduled to attend alcohol dependency treatment at xxxxxxxx Naval Hospital, xxxxxxxx, as recommended by [Mr. L] and [the buoy tender’s] Commanding Officer. ...

12. [The applicant] initially refused treatment at xxxxxx Naval Hospital due to the dates coinciding with the Christmas and New Year holidays. [His command] rescheduled the treatment to commence in January 2002. He again refused treatment due to the location of the program. He requested local treatment so that he could have the support of his family. ...

13. [The applicant] has documented hearing loss and tinnitus in his right ear. ...

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4. [The command] was reasonable in directing [the applicant] to attend xxxxxxxx Naval Hospital for inpatient rehabilitation in that local treatment was not successful. ...

5. [The applicant’s] refusal to attend required alcohol dependency treatment as xxxxxxxx Naval Hospital was a refusal under chapter 20.b.2 k. of [the Personnel Manual]. ...

6. [The applicant’s] hearing loss and tinnitus did not contribute to the two alcohol incidents. ...

On March 25, 2002, the applicant sought redress from his CO under Article 138 of the Uniform Code of Military Justice (UCMJ). He requested processing under the PDES based on his safety concerns about his hearing loss.

On May 9, 2002, the applicant's counsel asked the CO to reconsider and disapprove the ASB's recommendation. He noted that Dr. K has testified that the applicant's tinnitus could have caused sleep walking and so "it is not unreasonable to conclude that [the applicant's] urinating in the berthing areas could have likely been caused by a sleep deprivation disorder, and not a direct result of consuming alcohol the evening before." The counsel noted that none of the witnesses who observed the applicant during the evening testified that he appeared to be intoxicated and that none of the witnesses who observed his urination in the berthing area testified that he smelled of alcohol. The counsel stated that because the Personnel Manual does not require intoxication for conduct to be considered an "alcohol incident," the applicant's separation would be unfair since a sleep disorder may have contributed to his conduct. The counsel alleged that the applicant's refusal to attend rehabilitation treatment was reasonable since he had not been diagnosed as alcohol dependent by a physician or psychologist, as required by the Wellness Manual. The counsel argued that the applicant should have been processed under the PDES because he was not fit for duty.

On May 24, 2002, the CO forwarded the ASB's report and the letter dated May 9, 2002, from the applicant's counsel to the District Commander with a recommendation that the applicant be honorably discharged "for unsuitability due to alcohol abuse and refusing medical treatment." On June 25, 2002, the District Commander forwarded the CO's recommendation to the Coast Guard Personnel Command (CGPC), noting that he had carefully reviewed the discharge package and recommended that it be approved.

On July 31, 2002, the Chief Counsel reported to Commander, CGPC that the proceedings had been reviewed and were in substantial compliance with the regulations. The Chief Counsel agreed with the applicant that "only a physician or a psychologist may diagnose a member as alcohol dependent," and Mr. L was neither. However, the Chief Counsel stated, Commander, CGPC could still approve the applicant's separation based on his two alcohol incidents. He also advised Commander, CGPC to consider the applicant's claim that the second alcohol incident resulted from sleep deprivation.

On August 12, 2002, Commander, CGPC approved the ASB's findings, opinions, and recommendation and ordered that the applicant be honorably discharged. On August 15, 2002, CGPC issued orders for the applicant to be honorably discharged on September 12, 2002, with separation code GPD and "Alcohol Rehabilitation Failure" as the narrative reason for separation on his DD 214.

On August 26, 2002, the applicant underwent another physical examination pursuant to his pending discharge. Dr. K found him fit for discharge but noted that he was not fit for sea duty. The applicant objected to the finding that he was fit for discharge.

On September 6, 2002, a Navy audiologist wrote a letter stating that the type of hearing aid recommended for people with the unilateral, near-total hearing loss did “not allow reduction of background noise with enhanced speech range or enhanced speech recognition,” which would be needed aboard a cutter. The audiologist stated that the applicant had reported “extreme difficulty localizing sound sources, discerning the desired signal from background noise, and correctly understanding speech in background noise.” She concluded that he was “putting himself and his crew in great danger when called upon to work in a noise hazardous environment where it is imperative to understand spoken communications. ... A Medical Evaluation Board should be convened to place permanent medical restrictions on his duties.” The audiologist also prepared a similar report dated August 20, 2002.

On September 12, 2002, the applicant received an honorable discharge for “alcohol rehabilitation failure” under Article 12.B.16. of the Personnel Manual. He had completed 10 years, 7 months, and 29 days of active duty.

On February 27, 2003, the DVA awarded the applicant a 10% disability rating for hearing loss and a 10% rating for tinnitus, for a combined rating of 20%. On September 26, 2003, the DVA also awarded the applicant a 10% rating for degenerative disc disease in the lumbar spine, which increased his combined rating to 30%.

VIEWS OF THE COAST GUARD

On December 7, 2006, the Judge Advocate General (JAG) submitted an advisory opinion in which he recommended that the Board deny relief in this case. In so doing, he adopted the facts and analysis provided in a memorandum on the case by CGPC.

CGPC noted that the application was untimely and that the applicant had not justified his delay in seeking the requested correction. Moreover, CGPC argued that the Coast Guard committed no error or injustice in discharging the applicant for alcohol rehabilitation failure since he incurred two alcohol incidents, refused further rehabilitation treatment, and received due process through the ASB.

CGPC argued that although the applicant contends that his hearing loss interfered with his performance of duty, “[u]p until discharge proceedings were initiated for unsuitability due to alcohol abuse, the Applicant had been performing his duties of rate and grade.” CGPC noted that the applicant had successfully completed tours of duty after losing hearing in his right ear in 1995, completed buoy deck supervisor training in March 2001, and achieved his competencies as a small boat crewman and buoy deck supervisor and in aids to navigation in December 2001. CGPC alleged that there “is no evidence that the applicant’s hearing loss impacted his performance of duty until his assertion during the ASB process.” CGPC stated that the applicant was found fit for separation despite his hearing loss and that his hearing loss did not constitute grounds for PDES processing under applicable provisions of the PDES and Medical Manuals.

CGPC also reported that the applicant requested transfer to several different operational units in February and March 2002 and that the Direct Access database shows that he was transferred early to an aids to navigation station for “disciplinary/derogatory performance” reasons—not because of his hearing loss. CGPC stated that it “is not uncommon for Coast Guard personnel being processed for administrative separation to be relieved of significant duties” and that the record shows that after the second alcohol incident the command of the buoy tender lost confidence in the applicant “based upon his alcohol abuse and the nature of his conduct, not his hearing loss.”

CGPC also argued that the fact that the applicant received 10% disability ratings from the DVA for his hearing loss and tinnitus does not prove that he was entitled to PDES processing because the “military disability system determines unfitness for duty whereas the VA ratings are based on an evaluation of the whole person, including an evaluation of the evaluatee’s employability status and earning capacity.”

The JAG concluded that the applicant’s request should be denied for untimeliness since he failed to provide any reason why his delay should be excused. In addition, the JAG argued that a cursory review of the merits of the case shows that no error or injustice was committed since the applicant incurred two alcohol incidents.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On December 8, 2006, the Chair sent the applicant the views of the Coast Guard and invited him to respond within 30 days. The applicant was granted an extension and submitted responses on January 29 and February 5, 2007.

The applicant’s attorney argued that although the applicant was discharged on September 12, 2002, and his application was received by the Board on April 10, 2006, the Board should consider the application to be timely. He alleged that the application was signed by the applicant on February 28, 2005,¹ and first mailed to the Board on March 15, 2005. The attorney stated that the applicant asked him about the status of his case in late 2005 because he had not heard anything, and the attorney advised him to check with the Board. The applicant contacted him again on March 2006 and told him that the Board had not received his application. Therefore, the attorney sent the Board a copy of the application on March 24, 2006.

The attorney argued that the Board should consider the case timely and on the merits because it was first mailed in a timely manner and because “justice and equity for the former member are better served by adjudicating the case on the facts rather than on a disputed issue of timeliness.” He argued that a review on the merits “is necessary to bring closure to this portion of the applicant’s life.”

Regarding the merits of his case, the applicant repeated his argument that since Mr. L did not have the proper credentials to refer him for further alcohol rehabilitation,

¹ The signature date on the applicant’s DD 149 is somewhat illegible as it could be read as February 28, 2005 or 2006.

his refusal to accept this treatment was not a proper basis for his discharge. The applicant also repeated his argument that he was not fit for duty and that his duties aboard the buoy tender had been reduced and adjusted because of his hearing loss.

APPLICABLE LAW

Regulations Regarding Separation for Unsuitability

Article 12.B.16.b. of the Personnel Manual in effect in 2002 authorizes the Commander of CGPC to discharge members for unsuitability by reason of alcohol abuse in accordance with Article 20.B.

Article 12.B.16.d. states that when a member is being discharged for unsuitability, “commanding officers shall: 1. Advise the member in writing, using the letter and endorsement described in Article 12.B.9., to inform the member of the reason(s) he or she is being considered for discharge. Specifically state one or more of the reasons listed in Article 12.B.16.b. 2. Afford the member the opportunity to make a written statement on his or her own behalf. ... 3. Afford the member an opportunity to consult with a lawyer ... if the member’s character of service warrants a general discharge.” Article 12.B.16.i. states that a “member with more than eight years’ military service under consideration for discharge for unsuitability is entitled to an administrative discharge board.”

Article 12.B.16.h. states that a member being considered for discharge for unsuitability must have a physical examination performed by a military or contract physician and that, “if it appears a mental or physical disability causes the unsuitability, a medical board will be requested.” Article 12.B.6.a. states that “[a]ll physical examinations for separations are good for 12 months.”

Article 12.B.6.c. states that, if a member is found physically qualified for separation and objects to that finding, “Form 88 together with the member’s written objections shall be sent immediately to Commander, (CGPC-epm-1) for review.”

Regulations Regarding Alcohol Abuse and Rehabilitation

Article 20.A.2.d.1. defines an “alcohol incident” as “[a]ny behavior, in which alcohol is determined, by the commanding officer, to be a significant or causative factor, that results in the member’s loss of ability to perform assigned duties, brings discredit upon the Uniformed Services, or is a violation of the Uniform Code of Military Justice, Federal, State, or local laws. The member need not be found guilty at court-martial, in a civilian court, or be awarded non-judicial punishment for the behavior to be considered an alcohol incident.” Article 20.B.2.h.2. states that “[e]nlisted members involved in a second alcohol incident will normally be processed for separation in accordance with Article 12.B.16.”

Article 20.B.2.k. states that “[m]embers refusing to undergo the treatment the commanding officer and competent medical authority deem necessary, failing to com-

plete this treatment, or violating an alcohol rehabilitation aftercare plan normally are processed for separation.”

Chapter 2.C.8. of the Health Promotion (Wellness) Manual in effect in 2002 states that alcohol abuse is a “maladaptive pattern of alcohol use that meets the following criteria as published in the Diagnostic and Statistical Manual, Fourth Edition (DSM), code number 305.0.” Chapter 2.C.9. states that “alcohol dependence” is a “diagnosis made by a physician or psychologist using the criteria as published in DSM, code number 303.9.” Chapter 2.C.25. states that a “licensed individual practitioner (LIP)” is a “qualified physician or licensed psychologist who can provide an appropriate diagnostic screening for substance abuse or dependency. To be qualified, the physician or psychologist must attend a formal addictions oriented training program provided by U.S. Navy, DoD or other MLC(kma) recognized addiction programs.”

Chapter 2.F.1. states that if a member is involved in an alcohol incident or alcohol-related situation but treatment is not recommended, the member should be ordered to attend an alcohol awareness education program such as the Navy’s PREVENT course, the Coast Guard’s IMPACT course, or a similar community-based program. Chapter 2.F.2. states that personnel involved in an alcohol incident who are diagnosed as alcohol abusive and are recommended for outpatient treatment will normally be referred to a military facility for such treatment but that approved local facilities may also be used for outpatient treatment. Chapter 2.F.3. states that “[p]ersonnel diagnosed as an alcohol abuser or alcohol dependent (DSM codes 305.0 and 303.9) and requiring a greater level of care than that provided at outpatient treatment will normally be referred to a more intensive outpatient/partial hospitalization program at a Navy ATF.” Chapter 2.F.4. states that “[a]ctive duty Coast Guard personnel diagnosed as alcohol dependent (DSM code 303.9) will be primarily referred to ATF or equivalent treatment facilities when the member requires monitoring to abstain from the use of alcohol or other substances. Inpatient rehabilitation is an intensive residential treatment program that provides treatment and berthing on site.”

Chapter 2.G.9.a. states that to receive permission from CGPC to send a member to outpatient or inpatient rehabilitation treatment, a CO must submit a request for authorization for the treatment along with

- (1) an alcohol/drug abuse or alcohol/drug dependency determination by a Navy CAAC or equivalent screening facility;
- (2) a medical diagnosis by a physician or licensed clinical psychologist based on DSM criteria and a brief explanation of the diagnosis, including any secondary diagnosis;
- (3) a copy of an SF-600 indicating that an HIV-1 screening was performed. The confidentiality of the patients who test positive for HIV-1 is to be respected and safeguarded; and
- (4) pertinent information from supporting documents such as Page 7 entries, marks for the last three years, evaluations by the CAAC, a qualified physician, licensed clinical psychologist, and supervisor, and health record entries.

Chapter 2.G.3. states that “[m]embers diagnosed as alcohol abusive or alcohol dependent (DSM codes 305.0 or 303.9) who refuse treatment will normally be separated from the Coast Guard.”

Regulations Regarding PDES Processing

Article 3.B.6. of the Medical Manual in effect in 2002 provides that “[w]hen a member has an impairment (in accordance with section 3-F of this Manual) an Initial Medical Board shall be convened only if the conditions listed in paragraph 2-C-2.(b) [of the PDES Manual] are also met. Otherwise the member is suitable for separation.”

Article 3.F. provides that members with medical conditions that “are normally disqualifying” for retention in the Service shall be referred to an IMB by their commands. Article 3.F.6.b. states that the retention of members with hearing loss “will be determined on the basis of ability to perform duties of grade or rating.”

Chapter 2.C.2. of the PDES Manual states the following:

b. The law that provides for disability retirement or separation (10 U.S.C., chapter 61) is designed to compensate members whose military service is terminated due to a physical disability that has rendered him or her unfit for continued duty. That law and this disability evaluation system are not to be misused to bestow compensation benefits on those who are voluntarily or mandatorily retiring or separating and have theretofore drawn pay and allowances, received promotions, and continued on unlimited active duty status while tolerating physical impairments that have not actually precluded Coast Guard service. The following policies apply.

(1) Continued performance of duty until a service member is scheduled for separation or retirement for reasons other than physical disability creates a presumption of fitness for duty. This presumption may be overcome if it is established by a preponderance of the evidence that:

(a) the member, because of disability, was physically unable to perform adequately in his or her assigned duties; or

(b) acute, grave illness or injury, or other deterioration of the member’s physical condition occurred immediately prior to or coincident with processing for separation or retirement for reasons other than physical disability which rendered the service member unfit for further duty.

(2) A member being processed for separation or retirement for reasons other than physical disability shall not be referred for disability evaluation unless the conditions in paragraphs 2.C.2.b.(1)(a) or (b) are met.

c. If a member being processed for separation or retirement for reasons other than physical disability adequately performed the duties of his or her office, grade, rank or rating, the member is presumed fit for duty even though medical evidence indicates he or she has impairments.

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f. The following standards and criteria will not be used as the sole basis for making determinations that an evaluatee is unfit for continued military service by reason of physical disability.

(1) Inability to perform all duties of his or her office, grade, rank or rating in every geographic location and under every conceivable circumstance. ...

• • •

(5) The presence of one or more physical defects that are sufficient to require referral for evaluation ...

(6) Pending voluntary or involuntary separation, retirement, or release to inactive status.

i. The existence of a physical defect or condition that is ratable under the standard schedule for rating disabilities in use by the [DVA] does not of itself provide justification for, or entitlement to, separation or retirement from military service because of physical disability. Although a member may have physical impairments ratable in accordance with the VASRD, such impairments do not necessarily render him or her unfit for military duty ... Such a member should apply to the [DVA] for disability compensation after release from active duty.

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. An application to the Board must be filed within three years after the applicant discovers the alleged error in his record. 10 U.S.C. § 1552(b). The applicant was discharged for alcohol rehabilitation failure on September 12, 2002, and his application was not received until April 10, 2006. The applicant alleged that he first mailed his application on March 15, 2005, but the Board did not receive the alleged mailing, and the applicant did not exercise due diligence to ensure that his application was received. Therefore, the Board finds that his application was untimely.

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

4. The applicant explained the untimeliness of his application by alleging that he assumed that his application had been timely received by the Board. Because the applicant did not exercise due diligence in ensuring that his application was timely received, the Board finds that his explanation for the delay is not compelling.

5. The applicant alleged that he was disabled and entitled to PDES processing prior to his discharge and that he should have received a disability retirement. The Board, however, has reviewed the applicant's records and finds that he has submitted insufficient evidence to prove that the Coast Guard committed error or injustice by refusing to process him under the PDES and by discharging him due to alcohol rehabilitation failure. In this regard, the Board notes the following facts:

(a) The applicant did not seek PDES processing based on his claim that his hearing loss and tinnitus interfered with his performance of duty until after his second alcohol incident occurred on November 13, 2001, which under Article 20.B.2.h.2. of the Personnel Manual would trigger his CO's initiation of his discharge for alcohol rehabilitation failure. Indeed, on August 24, 2001, Dr. K found that the applicant was fit for duty, sea duty, and overseas duty despite his hearing loss and tinnitus. There is no evidence that the applicant's hearing loss worsened between that date and November 30, 2001, when Dr. K first noted that the applicant was complaining that his hearing loss made his work unsafe.

(b) Although the applicant had significant hearing loss, under Article 3.F.6.b. of the Medical Manual, his CO was not required to initiate PDES processing unless she believed that he was unable to perform the duties of his grade and rating. The record indicates that the applicant continued to perform his duties aboard the buoy tender as a BM1 until he was transferred for disciplinary reasons in April 2002. Chapter 2.C.2.b.(1) of the PDES Manual states that "[c]ontinued performance of duty until a service member is scheduled for separation or retirement for reasons other than physical disability creates a presumption of fitness for duty." Subparagraph (a) states that the presumption may be overcome if the member is unable to perform adequately in his assigned duties. However, there is insufficient evidence to prove that the applicant was unable to perform his assigned duties adequately. The fact that Dr. K changed his finding of fitness after the applicant began claiming that he could not work safely, even though there had been no significant deterioration in his hearing since August 2001, does not persuade the Board that the applicant was unable to perform his duties adequately. The Board finds that the applicant has not overcome the presumption that he was fit for duty and, therefore, for an administrative discharge.

(c) Chapter 2.C.2.b.(2) of the PDES Manual states that a "member being processed for separation or retirement for reasons other than physical disability shall not be referred for disability evaluation unless the conditions in paragraphs 2.C.2.b.(1)(a) or (b) are met." Likewise, Article 3.B.6. of the Medical Manual states that even if a member has an impairment, he is fit for separation unless the conditions cited under Chapter 2.C.2.b. of the PDES Manual are met. The applicant has not proved by a preponderance of the evidence that he was unable to perform his duties adequately or that an acute deterioration of his hearing rendered him unfit for further duty. Therefore, he has not met the criteria under either paragraph 2.C.2.b.(1)(a) or (b) of the PDES Manual.

(d) The applicant's CO initiated his discharge after his second alcohol incident in accordance with Articles 12.B.16.b. and 20.B.2.h.2. of the Personnel Manual.

Although the applicant alleged that his urination on a sleeping FS1's bunk on November 13, 2001, was caused by tinnitus-induced sleep deprivation instead of intoxication, he did not deny that he had drunk many beers that evening. Article 20.A.2.d.1. of the Personnel Manual does not require a member to be intoxicated for his conduct to count as an "alcohol incident." The ingestion of alcohol must only be a "significant or causative factor," and the applicant has not proved that his CO erred in finding that his ingestion of many beers that evening was a "significant or causative factor" in his urination on the sleeping FS1. Moreover, because of a prior occurrence on May 2, 2001, the applicant knew that his ingestion of alcohol could lead to such an incident.

(e) Dr. K reported on November 30, 2001, that he doubted that substance abuse was involved in the applicant's "three incidents," based on the "relatively reliable history" that the applicant himself presented to him, and that sleepwalking or another sleep disorder might be the cause of the second documented alcohol incident. However, Dr. K's speculations—reported without any mention of the applicant's history of serial alcohol abuse screenings due to tardiness, coming to work smelling of alcohol, and repeated inappropriate urination—are insufficient to overcome the presumption of regularity² afforded his CO that his ingestion of many beers was a "significant or causative factor" in the applicant's urination on the sleeping FS1 on November 13, 2001.

(f) The CO initiated that the applicant's discharge before he refused further rehabilitation treatment. The applicant alleged that he was entitled to refuse further treatment because he had not been diagnosed as alcohol dependent by a physician or psychologist pursuant to Chapter 2.C.9. of the Health Promotion (Wellness) Manual. However, the applicant had already been found to abuse alcohol—a determination which Chapter 2.C.8. does not require to be made by a physician or psychologist—and Chapter 2.F.3. states that members who abuse alcohol may be referred for an "intensive outpatient/partial hospitalization program at a Navy ATF," such as xxxxx Naval Hospital, where he was ordered to go. Therefore, the Board is not persuaded that the applicant's refusal to obey his CO's order was reasonable. Moreover, since she had already informed him that she would initiate his administrative separation for alcohol abuse, his refusal clearly did not factor into her decision.

(g) The ASB found that the applicant's CO acted reasonably in ordering him to go to xxxxxxx Naval Hospital for further treatment since he had incurred an alcohol incident soon after completing his four-week outpatient treatment and three-month aftercare plan at a local clinic. Even if the CO should have gotten the recommendation from a physician or psychologist, rather than a licensed social worker trained in addiction treatment, however, any misunderstanding of the issue was cured by the Chief Counsel, who noted in his review of the ASB proceedings that the applicant was correct in alleging that "only a physician or a psychologist may diagnose a member as alcohol dependent." The Chief Counsel did not conclude that the applicant was legally entitled to refuse alcohol treatment and pointed out that the lack of a diagnosis of alcohol depend-

² Absent evidence to the contrary, the Board presumes that Coast Guard officers have performed their duties "correctly, lawfully, and in good faith." *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979); 33 C.F.R. § 52.24(b).

ence by a physician or psychologist did not negate the fact that the applicant had incurred two documented alcohol incidents.

(h) The applicant did in fact fail alcohol rehabilitation treatment since in the interim between his two alcohol incidents he underwent at the command's instigation (although he was allowed to self-refer) a four-week outpatient rehabilitation program followed by a three-month aftercare plan. Therefore, it was not unfair for the reason for his discharge to be characterized as "alcohol rehabilitation failure."

(i) The fact that the DVA has awarded the applicant a 10% disability rating for tinnitus, a 10% rating for hearing loss, and a 10% rating for degenerative disc disease of the lumbar spine does not prove that the Coast Guard committed error or injustice by not processing him under the PDES and separating him with a disability rating. As stated in Chapter 2.C.2.i. of the PDES Manual, having a DVA disability rating is not justification for PDES processing because not every ratable disability renders a member unfit for military duty.³

(j) The applicant received due process during his processing for discharge. He was informed about the Service's policy regarding alcohol abuse during boot camp. After his first alcohol incident, he was notified that a second such incident could result in his discharge. He was screened and provided alcohol rehabilitation treatment. After the second documented alcohol incident, he was notified of the reason for his CO's action; he was allowed to and did submit a statement on his own behalf; he was allowed to consult an attorney; he appeared before an ASB represented by the attorney; and his rebuttal to the ASB was considered by the reviewing authorities.

6. Accordingly, because of the lack of a compelling reason for the application's untimeliness and the apparent lack of merit of his claim, the Board finds that it is not in the interest of justice to waive the statute of limitations in this case. His request should be denied because it is untimely and lacks merit.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

³ See *Lord v. United States*, 2 Ct. Cl. 749, 754 (1983) (holding that disability ratings awarded by the DVA are not determinative of the issues involved in military disability retirement cases).

ORDER

The application of former xxxxxxxxxxxxxxxxxxxx, xxxxxxxxxx, USCG, for correction of his military record is denied.

Toby Bishop

James E. McLeod

Adrian Sevier