

**DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2001-111

FINAL DECISION

ANDREWS, Deputy Chair:

This proceeding was conducted according to the provisions of section 1552 of title 10, United States Code. It was commenced on July 23, 2001, upon the BCMR's receipt of the applicant's completed application and military and medical records.

This final decision, dated June 20, 2002, is 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 asked the Board to correct his discharge form, DD 214, to show that he was separated because of a physical disability – depression – and assigned an appropriate separation code and an RE-1 reenlistment code, which would make him eligible to reenlist. Currently, his DD 214 shows that he was separated on July 14, 199x, after serving 14 years, 9 months, and 27 days on active duty, because of a personality disorder that rendered him unsuitable for military service. His reenlistment code is RE-3G, which means that he can reenlist if he can prove to military recruiters that the condition for which he was discharged no longer exists.

The applicant alleged that the Department of Veterans Affairs (DVA) has awarded him a 50-percent disability rating for dysthymic disorder.¹ He alleged that this diagnosis and rating proves that the Coast Guard erred in discharging him for "unsuitability." He alleged that he did not discover the error in his record until 1998.

¹ Dysthymic disorder, or dysthymia, is depression. It is considered a physical disability by the Coast Guard and the DVA. It is not considered a personality disorder. Medical Manual, Chap. 5-B, para. 10, 11.

SUMMARY OF THE APPLICANT'S RECORD

On September 18, 1979, the applicant enlisted in the Coast Guard. He served continuously on active duty thereafter. His military record contains no documentation of any misconduct during his service, and his performance evaluations were average.

In July 199x, the applicant was assigned to a cutter. On November 30, 199x, on his first performance evaluation on the cutter, he received several marks of 3 (on a scale of 1 to 7, with 7 being best) and a mark of "progressing" from his commanding officer in lieu of a recommendation for promotion. On December 27, 199x, the applicant complained of anxiety and depression and was prescribed Alprazolam² by a physician's assistant. He was also referred for psychiatric evaluation.

On January 12, 199x, the applicant was examined by Dr. X, a psychiatrist at a Naval hospital. He told the psychiatrist that he was severely stressed by certain family problems and by his dissatisfaction with his work. He stated that he was having personality conflicts at his command and did not want to be underway. He reported feeling depressed and having poor memory, concentration, and variable appetite. He had gained 22 pounds in five months. Dr. X found that he had no thought disorder and that his mood was natural and his affect was congruent. He diagnosed the applicant as suffering from "dependent personality traits" but found him psychiatrically fit for full duty, including sea duty. He did not prescribe any medication. He recommended that the applicant continue counseling.

On February 2, 199x, while his cutter was deployed away from its homeport, the applicant was referred to another psychiatrist, Dr. Y, because of "anxiety and [a] history of suicidal ideation." The applicant reported that he had suffered from anxiety, irritability, insomnia, and inability to concentrate since he was assigned to a cutter in July 199x. When the cutter was deployed, he also experienced a depressed mood, erratic appetite, more severe sleep disturbance, mood swings, and "significant suicidal ideation," including plans to jump overboard during rough weather. The applicant reported having similar symptoms in 1985 or 1986, when he was stationed in xxxx while there was concern about conflict with Libya.

Dr. Y found that the applicant's "affect was dysthymic with full range and appropriate to stated thoughts." He diagnosed a panic disorder with "limited symptom attacks," "obsessive compulsive traits," and "dependent traits." The doctor indicated that the applicant was having "significant problems with concentration and memory." He found him unfit for duty and unable to return to his ship. He recommended that the

² Alprazolam is prescribed for anxiety, with or without depression, and for panic disorders. *Monthly Prescribing Reference* (January 2000).

applicant be returned to his homeport and examined by Dr. X “for consideration of possible [medical] board.” He prescribed Clonazepam.³

On February 15, 199x, the applicant was again examined by Dr. X, who reported that his own diagnosis was “quite disparate” from that of Dr. Y. Dr. X found that the applicant suffered from “dependent personality traits” and “occupational problems.” He found no “major mental illness” that would justify initiating a medical board. Dr. X reported that “I believe [the applicant] dislikes the command, dislikes having to deploy and I believe he is trying to get separated from the [service].” Dr. X ordered psychological testing to help resolve the different diagnoses.

On March 15, 199x, Dr. X reported that psychological testing had revealed that the applicant’s “emotional responses are consistent with a personality disorder with dependent traits predominating.” Dr. X stated that the applicant had “difficulty dealing with stress [and] conflict” and that he “becomes anxious, angry, [and] depressed when taken from those things which provide him [with] stability [and] security, such as his home, family, [and] girlfriend.” Dr. X diagnosed him with a “dependent personality disorder” but “no major mental illness.” He strongly recommended that the applicant be expeditiously administratively discharged for unsuitability. He did not prescribe any medication.

On April 29, 199x, the applicant’s commanding officer (CO) officially notified him that he was initiating an administrative, honorable discharge “by reason of unsuitability” because of his “documented personality disorder.” The CO informed him that he had a right to a hearing before an Administrative Discharge Board (ADB), to consult with an attorney, and to submit a written statement on his own behalf. The CO also told him that “[p]rior to any administrative action you will be given a physical examination by a medical officer to determine any disqualifying physical defects which are ratable as a disability.”

On April 30, 199x, the applicant acknowledged receiving the CO’s notification of his pending administrative discharge and rights. He indicated that he would submit a written statement.

On May 5, 199x, the applicant was assigned counsel to represent him before an ADB. However, on May 19, 199x, he signed a statement indicating that, after consulting with an attorney, he had decided to waive his right to appear before an ADB. Also on May 19, 199x, the applicant informed his CO that he believed it would be in the “best interests of the Coast Guard and myself that I be separated from the service.” He stated

³ Clonazepam is prescribed for panic disorders. *Monthly Prescribing Reference* (January 2000).

that he had been “dealing with many problems” that disrupted his performance and that his “command [had] done everything possible for me to deal with the problems.”

On May 27, 199x, the applicant’s CO recommended to the Military Personnel Command that he be administratively discharged because of his diagnosed personality disorder. He reported that the applicant’s performance had been “marginal” and that, in January 199x, he had confessed to the cutter’s executive officer that he was “having trouble mentally coping with stress induced by sea duty and that he had contemplated suicide.”

On June 8, 199x, the applicant, his counsel, and a witness signed an “Unconditional Waiver of Hearing Before Administrative Discharge Board.” The waiver indicates that he knew he was being recommended for an honorable discharge because of unsuitability.

On June 14, 199x, the Military Personnel Command ordered that the applicant be honorably discharged within 30 days by reason of unsuitability with a JFX separation code, which denotes the existence of a personality disorder.

On July 14, 199x, the applicant was discharged with a JFX separation code, an RE-3G reenlistment code, and “unsuitability” as the narrative reason for separation shown on his DD 214.

On March 27, 199x, the DVA found that the applicant was 10 percent disabled by dysthymic disorder and that this condition was service-connected. The rating was made effective retroactively to the date of his discharge from the Coast Guard. The decision was based on the applicant’s service records, a neuropsychiatric report dated March 24, 199x, and a DVA examination dated February 6, 199x. The examiner determined that his condition was “chronic and severe” since he complained of anxiety, depression, irritability, disturbed sleep, nightmares, difficulty concentrating, social isolation, poor appetite, and decreased libido.

On October 2, 199x, the DVA increased the applicant’s disability rating for dysthymic disorder to 50 percent, and this rating decision was made effective retroactively to the date of his discharge from the Coast Guard. The decision was based on an examination dated September 17, 199x. This rating was reconfirmed on October 29, 199x, based on a subsequent examination.

The applicant also submitted recent records of his counseling sessions. They indicate that he is being treated for an anxiety disorder with obsessive compulsive traits. He is currently attending college.

VIEWS OF THE COAST GUARD

On December 10, 2001, the Chief Counsel of the Coast Guard recommended that the Board deny the applicant's request.

The Chief Counsel argued that the applicant's request was untimely because it was not submitted within three years of his discharge or even within three years of when he was diagnosed with dysthymic disorder by the DVA. He alleged that, although the Board may waive its three-year statute of limitations, it "must deny relief unless the Applicant presents sufficient evidence to warrant a finding that it would be in the interest of justice to excuse the failure to file timely." He argued that, under *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995), in determining whether it is in the interest of justice to waive the statute of limitations, the Board must consider the reasons for the applicant's delay and "make a cursory review of the potential merits of the claim." In this case, he argued, the Board should deny the request for untimeliness because the applicant "has failed to offer substantial evidence that the Coast Guard committed either an error or injustice by not referring his case to a physical evaluation board."

The Chief Counsel alleged that the applicant "was properly discharged by reason of 'Unsuitability'" in accordance with Article 12.B.16. of the Personnel Manual. Under Article 2.A.38. of the Physical Disability Evaluation System (PDES) Manual, personality and adjustment disorders are not physical disabilities. He alleged that the applicant has not proved that he suffered from any physical disability that rendered him unfit for duty when he was discharged in 199x, which is the "sole basis" for a disability separation under Article 2.C.2.a. of the PDES Manual. Under Article 5.B. of the Medical Manual, he argued, members with prolonged personality or adjustment disorders are disqualified for service and should be administratively separated for unsuitability.

The Chief Counsel alleged that the applicant has "failed to offer any evidence of error or injustice in the psychiatric evaluation he received prior to his separation or in his separation process." He argued that psychological testing had confirmed Dr. X's diagnosis of a dependent personality disorder. Therefore, he alleged, Dr. X properly "found the applicant unsuitable for military service with no ratable physical disability." He alleged that Dr. X's finding and the DVA's rating "are not contradictory findings and are explained by distinguishing the function and purpose of the Coast Guard's [PDES] from those of the [DVA's rating system]." He alleged that under 10 U.S.C. chap. 61, the PDES is "designed to compensate members whose military service is terminated due to a service-connected disability and to prevent the arbitrary separation of individuals who incur disabling injuries," whereas the DVA's system is designed to compensate veterans "whose earning capacity is reduced, at any time, as a result of injuries suffered incident to, or aggravated by, military service." *Lord v. United States*, 2 Ct. Cl. 749, 754 (1983).

The Chief Counsel alleged that the applicant received all due process as provided in the Personnel Manual. He pointed out that the applicant waived his right to contest his separation for unsuitability before an ADB. Therefore, he argued, the applicant “has failed to demonstrate that either an error or an injustice occurred in his discharge,” and the Board should deny relief because, “absent strong evidence to the contrary, government officials are presumed to have carried out 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).

APPLICANT’S RESPONSE TO THE COAST GUARD’S VIEWS

On December 4, 2001, the Board sent the applicant a copy of the Chief Counsel’s advisory opinion and invited him to respond. No response was received.

APPLICABLE REGULATIONS

Article 12-B-16 of the Personnel Manual in 199x provided that members diagnosed with personality disorders listed in Chapter 5 of the Medical Manual may be considered unsuitable for military service and administratively discharged. Each member recommended for an unsuitability discharge must be informed of the reason in writing and afforded an opportunity to submit a statement in his own behalf. In addition, if the member has more than eight years of military service, he is entitled to counsel and to contest his discharge before an ADB.

Chapter 5-B of the Medical Manual governs the disposition of members with psychiatric disorders. According to paragraph 2 of Chapter 5-B, a member diagnosed with an adjustment disorder or a dependent personality disorder that interferes with his performance of duty should be administratively discharged. According to paragraphs 10 and 11 of Chapter 5-B, panic, anxiety, and dysthymic disorders are physical disabilities, and members diagnosed with them should be processed for disability separation under the PDES.

The PDES Manual governs the separation of members because of physical disability. Chapter 2-A-36 states the term “physical disability” includes mental diseases that render a member unfit for continued duty but not personality disorders. Chapter 2-A-6 states that personality disorders “may cause an evaluatee to be unfit for continued duty and yet not be physically [disabled] within the meaning of the law, thereby subjecting the evaluatee to administrative separation.”

Chapter 2-A-15 of the PDES Manual defines the term “fit for duty” as “. . . the status of a member who is physically and mentally able to perform the duties of office, grade, rank, or rating. . . .”

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

The existence of a physical defect or condition that is ratable under the standard schedule of rating disabilities in use by the [Department of Veterans Affairs] 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 the member unfit for military duty. . . .

Title 33 C.F.R. § 4.127 provides that “[m]ental deficiency and personality disorders will not be considered as disabilities under the terms of the [DVA] schedule [for rating disabilities].”

Under the provision of the Separation Designator Handbook, members involuntarily discharged because of personality disorders must be assigned a JFX separation code and either an RE-3G code, which allows them to reenlist if their conditions are resolved, or an RE-4 code, which prohibits reenlistment.

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 over this matter pursuant 10 U.S.C. § 1552.
2. An application to the Board should be filed within three years of when the applicant discovers the alleged error in his record. 10 U.S.C. § 1552(b). The record indicates that the applicant knew or should have known that he was being discharged administratively, instead of under the PDES, at the time of his discharge in July 199x. Moreover, the record indicates that he knew or should have known of his dysthymia when he was first rated by the DVA in March 199x. Therefore, the Board finds that his application was untimely.
3. Pursuant to 10 U.S.C. § 1552(b), the Board may waive the three-year statute of limitations if it is in the interest of justice to do so. To determine whether it is in the interest of justice to waive the statute of limitations, the Board should consider the reason for the delay and conduct at least a cursory review of the merits of the case. *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).
4. The applicant did not explain why he delayed applying to the Board; he merely alleged that he did not discover the error until 1998. As stated in finding 2,

however, the Board finds that he knew or should have known of the alleged error in his record by 199x at the latest. However, in light of the fact that in 199x, the DVA decided that the applicant had been 50 percent disabled by a dysthymic disorder—a physical disability—since the date of his discharge, the Board finds that it is in the interest of justice to waive the statute of limitations and consider the merits of the case.

5. As the Chief Counsel argued, absent strong evidence to the contrary, government officials, including Dr. X and the applicant's command, must be "presumed to have carried out 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). The record indicates that the applicant has received various psychiatric diagnoses over the years: His homeport psychiatrist, Dr. X, diagnosed him with a dependent personality disorder, and this diagnosis was confirmed by psychological testing prior to the applicant's discharge; Dr. Y, the psychiatrist who examined him when his cutter was deployed, diagnosed him with a panic disorder with "limited symptom attacks," "obsessive compulsive traits," and "dependent traits"; the DVA diagnosed him with dysthymic disorder in 1996; and he is now being treated for an anxiety disorder with obsessive compulsive traits. In light of this medical history, the Board cannot find that the applicant has proved by a preponderance of the evidence that Dr. X erred in finding in 199x that he suffered from a dependent personality disorder—rather than a panic, dysthymic, or anxiety disorder—that made him unsuitable for further military service.

6. Under Chapter 2-A-36 of the PDES Manual and 33 C.F.R. § 4.127, personality disorders are not "physical disabilities," and under Article 12-B-16 of the Personnel Manual, Chapter 5-B of the Medical Manual, and Chapter 2-A-6 of the PDES Manual, a member diagnosed with a personality disorder may be administratively discharged. The record indicates that the applicant was diagnosed with a personality disorder by a psychiatrist and through psychological testing and that his condition was interfering with his performance of duty. Therefore, the applicant has not proved that the Coast Guard erred in deciding to discharge him administratively or that he was entitled to a disability separation.

7. The record indicates that the applicant received all due process while undergoing separation. In accordance with Article 12-B-16 of the Personnel Manual, he was assigned counsel, allowed to submit a written statement in his own behalf, and afforded an opportunity to contest his discharge before an ADB, which he waived in writing.

8. The applicant has not proved that the Coast Guard committed any error or injustice in assigning him an RE-3G reenlistment code. Under the Separation Designator Code Handbook, that is the best of the two reenlistment codes authorized for members involuntarily discharged because of personality disorders.

9. The applicant has not proved by a preponderance of the evidence that the Coast Guard committed any error or injustice with respect to his discharge or reenlistment code.

10. Accordingly, the applicant's request should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

James K. Augustine

Murray A. Bloom

Betsy L. Wolf