

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2002-039

XXXXXX, XXXXXX X., XXX XX XXXX
XXX-XXX, XXXX

FINAL DECISION

GARMON, Attorney-Advisor:

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was docketed on January 29, 2002, upon the BCMR's receipt of the applicant's request for correction.

This final decision, dated March 13, 2003, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant served in the Coast Guard during World War II. He asked the Board to delete the discharge notation: "by reason of physical disability existing prior to enlistment," from his record. He stated that the correction should be made to have "[his] ... personal records reflect true facts."

APPLICANT'S ALLEGATIONS

The applicant alleged that the discharge notation is inaccurate and has no basis in fact. He alleged that he successfully completed "rigorous boot camp and several crossings of the Atlantic [Ocean while encountering] the enemy with no indication of any physical disability." He asserted that on the return from one such enemy encounter, he was hospitalized due to what medical personnel initially diagnosed as epilepsy but what he was later told was "fatigue." He alleged that prior to being given the option to remain in the Coast Guard or to receive an honorable discharge with disability pay, he believes that he received electric shock therapy and other related

treatments for his fatigue condition. He contended that prior to his separation, he was never provided with a final diagnosis of his condition.

The applicant alleged that prior to his enlistment and after his discharge, he had never been told by any physician that he had a condition that existed since his childhood. He asserted that the Board should find it in the interest of justice to consider his application "because the notation was clearly not based on fact, [as he has] never had a condition during [his] service or afterwards that could be traced to [a pre-existing] condition."

SUMMARY OF THE APPLICANT'S RECORD

On December 3, 1942, the applicant enlisted as an apprentice seaman for three years in the Coast Guard Reserve at the age of 17. On the date of his enlistment, he was found to be physically qualified for enlistment and entered active duty. On August 18, 1943, the applicant was examined at a Coast Guard training station and found to be fit for sea duty.

On September 15, 1944, the applicant experienced an epileptic seizure, during which he fell but sustained no injuries. An entry in his medical history indicates that the applicant reported experiencing a similar attack between six and seven years earlier. The evaluating physician found that sea duty would be hazardous to the applicant's well being and recommended that he be "transferred ashore at the first port of call in the [United] States."

On October 10, 1944, the applicant was examined at a United States military hospital and found to be suffering from "930-yxx epilepsy." A Return Medical Certificate, entered in the applicant's medical record on this date, indicated that the applicant's condition was an incident of service and that the applicant was fit for duty. He was admitted to a military hospital for outpatient evaluation. On October 12, 1944, the applicant was again examined and found to be suffering from "u/o epilepsy, grand mal." The examining medical officer indicated that the applicant's condition was an incident of service and that the applicant was not fit for duty. As a result, the applicant was admitted for in-patient evaluation.

On October 25, 1944, the applicant was released with a final diagnosis of "undiagnosed disease" and was referred for further examination. A discharge entry in his medical records indicates that he reported having one other episode of "peculiar sensation in his jaw but [unlike on September 15th] no seizure or loss of consciousness." He stated that he had no history of headaches or dizziness but described an incident where he had been "kicked by a horse about 3 years [before] ... and was unconscious for a short period." During his hospitalization, he experienced no seizures and received no treatment.

On October 25, 1944, the applicant was transferred to a different hospital for in-patient treatment. His medical records indicate that he was diagnosed with "psychoneurosis, mixed type (002-X0X)." His history was assessed, as follows:

[The applicant] was always a repressed, shy, timid individual who could not express any hostility and who had neurotic traits in childhood. He has nightmares that have continued from childhood. He would have episodes of anxiety with its somatic overflow when exposed to tense situations but could function. He represses and suppresses his hostility and develops anxiety symptoms as a result. He has fainted several times prior to service life. While aboard ship he had a spell of unconsciousness in which he bit his tongue but from the behavior he went through during this attack it appears that this was hysterical and not epilepsy. Clinical and complete laboratory examination reveal no evidence of epilepsy and this workup includes hydration-pitressin and electroencephalogram tests. In reaction to having possible epilepsy as he was told aboard ship, his anxiety increased so that he had palpitation, tremors, anxiety dreams, increased perspiration, startle reaction, and inability to concentrate. He developed a chronic fatigue syndrome and became self-preoccupied with hypochondriacal rumination. In view of the symptom[s] of hysterical stupors, sea duty is dangerous for him. He is resistant to psychotherapy and the prognosis is guarded. He should be placed on limited duty ashore for the duration but if this is not feasible, he should be discharged from the service for medical reasons. His symptoms are endogenous in origin and will not be alleviated by removal of the provocative situations found in examination. He is not a danger to himself and others and can be released to his own custody.

On November 24, 1944, a Medical Board of Survey convened to evaluate the applicant's status and to make a recommendation on his fitness for further Coast Guard service. The Medical Board of Survey recommended that the applicant "be placed on limited shore duty for the duration or else be discharged from the service for medical reasons." The Report of Medical Survey included the following information: the applicant was diagnosed with 002-X0X psychoneurosis, mixed type; his disability was not the result of his own misconduct and was not incurred in the line of duty; his disability existed prior to enlistment and was not aggravated by service; he was unfit for general duty; and the probable future duration of his condition was permanent.

On November 25, 1944, the Chief Medical Officer forwarded the Report of Medical Survey to the District Coast Guard Officer (DCGO) of the Third Naval District.

On November 27, 1944, the applicant was discharged from in-patient treatment. He was assigned to temporary duty at a Coast Guard barracks unit while awaiting action on the Medical Board of Survey. On November 28, 1944, a Final Medical Certificate was issued for the applicant's discharge. The certificate mentioned the recommendation of the Medical Board of Survey and recommended an "indefinite absence on account of sickness pending further action on his survey." At the time of the

applicant's discharge from in-patient treatment, his condition was assessed as "improved" but he was found not fit for duty.

On December 5, 1944, the applicant sought follow-up treatment at a military skin clinic. He received two electrocardiograms on two separate occasions.

On December 6, 1944, the DCGO of the Third Naval District concurred in the recommendation that the applicant be discharged from the Coast Guard by reason of physical disability existing prior to enlistment and forwarded the report to the Commandant for approval. By memorandum dated December 22, 1944, the Commandant ordered the DCGO of the Third Naval District to honorably discharge the applicant but not prior to advising the applicant of his rights and benefits as a veteran to medical assistance from the Public Health Service.

On January 9, 1945, the applicant certified by his signature that the Civil Readjustment Office informed him of all his rights and benefits under the Serviceman's Readjustment Act of 1944. The form executed indicates that he desired to file an application for pension and received assistance in so doing.

On January 10, 1945, a Termination of Health Record sheet was entered in the applicant's medical record, certifying that the applicant was examined and found to be suffering from psychoneurosis that was neither incurred in nor aggravated during service. Also on this form, the applicant certified by his signature that, to the best of his knowledge and belief, he was suffering from psychoneurosis.

Under the authority of Article 588 of Coast Guard Regulations, Headquarters Letter dated December 22, 1944, the applicant was honorably discharged on January 11, 1945 by reason of physical disability existing prior to enlistment. As a result of the reason for his discharge, he was not recommended for reenlistment. At the time of his separation, he was serving as a radioman third class and had 2 years, 1 month, and 9 days of creditable service.

VIEWS OF THE COAST GUARD

On June 28, 2002, the Chief Counsel of the Coast Guard submitted an advisory opinion to which he attached a memorandum prepared by CGPC on this matter. In concurring with the analysis of CGPC, he recommended that the Board deny the applicant's request for relief.

The Chief Counsel argued that according to the applicant's request for removal of the abbreviated notation, "issued HD # A77011 by reason of physical disability existing prior to enlistment, Art. 588 Regs.: HL-12-22-44 (CG-783)," it is apparent that the applicant does not understand the terminology that describes his discharge. He

argued that the records reflect that the applicant was discharged for the psychological condition of neurosis, not the physical condition of epilepsy.

The Chief Counsel argued that based on a review of the information contained in the applicant's record, he finds no evidence to indicate that the reason for the applicant's separation, nearly 60 years ago, was in error. However, he pointed out that in accordance with Coast Guard regulations in effect at the time of the applicant's discharge, the record does not reflect that prior to his discharge, the applicant had been given the opportunity to demand a full and fair hearing on the results of the Medical Board of Survey.

The Chief Counsel argued that despite the absence of this information, the applicant clearly endorsed documents that described the condition for which he was being separated. Consequently, he argued that there is insufficient evidence in the record to support amending the applicant's discharge record.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On July 1, 2002, the Chair sent a copy of the views of the Coast Guard to the applicant and invited him to respond within 15 days. He was granted a three-month extension and responded on October 9, 2002.

The applicant argued that according to his recollection, the advisory opinion was incorrect regarding his stating that he experienced seizures prior to his Coast Guard service. He argued that in its review of his medical records, CGPC's memorandum confirmed that medical personnel "found no evidence of epilepsy but does reference 'chronic fatigue syndrome'." He contended that his state of chronic fatigue was precipitated by the "circumstances of stress from active warfare and assigned duties." He argued that the notation that his condition "existed prior to enlistment" is in direct conflict with what he understood to be "battle fatigue."

The applicant argued that he experienced no seizures during his childhood or after he was discharged from the Coast Guard. In support of his contentions, the applicant submitted a copy of his biography to "emphasize that [he] could hardly have handled the numerous responsibilities of the positions indicated with the burden of ... [psychoneurosis]." The applicant also submitted signed statements from (a) F, a close family friend; (b) F's daughter; and (c) Dr. W, his current physician.

The applicant's close friend, F, wrote that she lived with and helped raise him from age seven until his early teens. She wrote that she is aware of no record and has no knowledge of the applicant "displaying any type of mental disorder or disability throughout the years [she has] known him, up to and including the present date." She stated that she only recalled the applicant's receiving initial treatment after "being

thrown from a horse ... and knocked unconscious," when the applicant was ten or eleven. She stated that the applicant received no follow-up treatments and suffered no permanent injuries from the accident.

The daughter of F, C, wrote that she lived with the applicant during her teenage years. She stated that she has known the applicant for her entire life and never observed him losing consciousness or display any symptoms of mental disorders or behavioral problems.

The applicant's current physician, Dr. W, wrote that she has been treating the applicant since April 22, 2002. She stated that, although she is treating the applicant for some physical ailments, she has not found any evidence of a psycho-neurotic diagnosis.

The applicant stated that in light of the evidence he has presented, the Board should delete any references from his record which indicate that he had a pre-existing physical disability.

On December 5, 2002, the applicant submitted a letter, dated December 7, 1951, from the Veterans Administration, now currently the Department of Veterans Affairs, which states that its records "show that [the applicant] is in receipt of disability compensation on account of service connected disability" He stated that the letter supports his position that he did not suffer from any condition prior to service.

APPLICABLE LAW

During World War II, the Coast Guard functioned under the direction of the Navy, pursuant to 14 U.S.C. §§ 1, 3. By Executive Order No. 9666, dated December 28, 1945, the Coast Guard reverted to the Department of Treasury and operated under its own rules.

Personnel Bulletin No. 54-44, issued on April 6, 1944, provided that a discharge by reason of physical (or mental) disability of a member will be effected only upon authorization of the Commandant, based upon report of a Board of Medical Survey. The bulletin does not mention a member's right to demand a full and fair hearing or written acknowledgement in rejection of such hearing. The Commandant cancelled Personnel Bulletin 54-44 in 1948 by the issuance of Personnel Bulletin 19-48.

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 concerning this matter pursuant to 10 U.S.C. § 1552.

2. The applicant was discharged from the Coast Guard nearly sixty years ago. The alleged error or injustice was or, with reasonable diligence should have been discovered in January 1945, when the applicant certified by his signature that he suffered from psychoneurosis and received his discharge papers. Title 10 U.S.C. § 1552(b) provides that applications for correction of military records must be filed within three years after the discovery of the alleged error or injustice. The application was not timely.

3. Failure to file within three years may be excused by the Board, if however, it finds it would be in the interest of justice to do so. The interest of justice is determined by taking into consideration the reasons the delay and the likelihood of success on the merits of the claim. See Dickson v. Secretary of Defense, 68 F.3d 1396 (D.D.C. 1995). The application in this case is dated January 16, 2002. Although the applicant claimed that he did not discover the alleged error until he closely examined a replacement copy of his discharge papers in October 2001, the Board notes that the applicant apparently received these replacement copies sometime in the mid 1990s. The Board is not persuaded that he has explained or satisfactorily demonstrated by competent evidence that it would be in the interest of justice to excuse the failure to apply within the time allotted.

4. In addition to the length of delay and the reasons for it, the Board must also perform a cursory review of the merits in deciding whether to waive the statute of limitations in the interest of justice. Allen v. Card, 799 F. Supp. 158 (D.D.C. 1992). To that end, the Board finds that the applicant has presented insufficient evidence to show that the Coast Guard committed an error or injustice in determining that his condition of psychoneurosis existed prior to enlistment. Although a copy of the applicant's separation document (DD form 214) is missing from his service record, it does include a Termination of Health Record sheet. This document, which the applicant authenticated with his signature one day before his separation, confirms that the applicant agreed with his diagnosis of psychoneurosis. Consequently, the preponderance of the evidence in the record indicates that the applicant agreed with the reason for his discharge in 1945.

5. Furthermore, the record indicates that after a review of the applicant's medical records, the Medical Board of Survey determined that the applicant's disability existed prior to his enlistment. In making this determination, the Medical Board relied not only on the applicant's own statements about his childhood and family history, which were apparently made in conjunction with receiving treatment for his disorder, but also on various medical observations of the applicant upon his admission for in-patient evaluation. Absent strong evidence to the contrary, military medical officials

are presumed to have performed their duties correctly, lawfully, and in good faith. *See Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979). Contrary to the applicant's assertion, the Board finds that his acceptance as fit for service, his subsequent combat experience, and his submissions concerning pre- and post-service conduct are insufficient to prove that the Coast Guard erred or committed an injustice in deciding that his condition of psychoneurosis existed prior to enlistment.

6. Although the applicant has submitted a statement from the DVA indicating that he has a service-connected disability, the Board finds that this statement is insufficient to warrant changing the medical finding that his psychoneurosis was not incurred in active military service. Insofar as the DVA's statement is the only one presented that connects the applicant's military service to his disability, the Board is not persuaded that the applicant's record is in error in light of the contrary evidence in his record.

7. The Chief Counsel stated that it is possible that prior to the applicant's discharge, he may not have been afforded the opportunity to demand a full and fair hearing by a Physical Evaluation Board, as set forth under Article 12-3-35B of the 1940 Coast Guard Regulations. Although it may be that the applicant was entitled to a hearing, there is insufficient evidence in the record to support a finding that he was not afforded all due process in effecting his separation from the Coast Guard. The record shows that the Coast Guard completed the Medical Board of Survey and that the applicant agreed with the reason for his discharge in 1945. Consequently, the Board finds that it is not in the interest of justice to waive the statute of limitations because the applicant has not demonstrated the likelihood of success on the merits in this case.

8. Accordingly, the applicant's request should be denied for untimeliness.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of XXX XXXXXX X. XXXXXX, XXX-XXX, USCGR, for the correction of his military record is denied.

Julia Andrews

Stephen H. Barber

Christopher A. Cook