DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2002-056

Xxxxxxxxxxxxxxxxxxx
xxxxxxxxxxxxxxxxx

FINAL DECISION

ANDREWS, Deputy Chair:

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 application was docketed on February 28, 2002, upon the BCMR's receipt of the applicant's completed application and military records.

This final decision, dated January 16, 2003, 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 remove from his record all information indicating that he was absent without leave (AWOL) when he sustained a head injury in a car accident on December 24, 1972. The Coast Guard's determination that he was AWOL at this time has prevented him from receiving medical benefits for the injury from the Department of Veterans Affairs (DVA).

The applicant alleged that the records indicating that he was AWOL are false and unjust. He alleged that the Coast Guard dismissed the charges of willful misconduct and being AWOL and that he was honorably retired from the service on May 30, 1973. He alleged that he did not discover the error and injustice in his record until April 24, 1998.

In support of his allegations, the applicant submitted a transcript of a hearing before the Board of Veterans' Appeals on October 26, 2000. At the hearing, the applicant stated that he had been raised by his grandmother on a ranch in New Mexico

without electricity or running water. He stated that on October 29, 1972, he was assigned to mess duty on an icebreaker that was in dock at Long Beach, California, undergoing repair, when he "took it upon [him]self to leave when [he] heard that [his grandmother] was sick and needed help" preparing the ranch for winter. He alleged that before leaving, he "told a couple [of] chief petty officers," including his supervisor, that he "may have to be leaving suddenly" because his grandmother was ill. He alleged that he cannot remember his supervisor's reply, except that his supervisor shrugged. He alleged that other officers reacted in this same manner when he told them he might need to leave. Therefore, he assumed that it was "okay to leave." The applicant alleged that he had never used leave before and had accrued 30 days because he was saving it up since his "grandmother was always in bad health and needed care." He alleged that he had told his supervisor where he would be and that he assumed that the Coast Guard would deduct the time he was absent from his leave total. He alleged that because he was young, he did not know that there were procedures to follow before he could take leave.

Regarding the timing of the car accident, the applicant stated that he had taken care of his grandmother and the ranch but

> was coming back down before Christmas, because [he] wanted to go ahead and go to the Coast Guard office and say that [he] had been gone for a while, and explain to 'em what the reason was, that's when [he] went down—[he] didn't stay with [his] brother in Albuquerque, [he] was up in Pecos. [He] came down and [he] stayed with some friends there at the Harris Canyon, and that's when the accident happened. 'Cause [he] did want to go down—

The applicant's representative pointed out that he had not only accrued 30 days' leave but was entitled to an additional 30 days of leave for the next year. He argued that since the applicant had 60 days of leave to use, he was not AWOL when he injured himself in the car accident in December 1972, but on leave.

SUMMARY OF THE RECORD

On November 29, 1971, the applicant enlisted in the Coast Guard for four years. He had been born in Albuquerque in July 1951, and he provided an address in that city as his home of record. He was working for a construction company in Albuquerque at the time of his enlistment.

Upon completing training in February 1972, the applicant was assigned to a cutter as a seaman apprentice. Leave Records in the applicant's record indicate that in February 1972, he applied for and was granted eight days of leave and that, in June 1972, he applied for and was granted seven days of leave.

Entries in the applicant's record indicate that he did not show up for work on November 2, 1972, and that at the time, his intentions were "unknown." On November 13, 1972, his command reported him as a wanted absentee. On December 1, 1972, he was reported as a deserter.

Hospital records indicate that on December 23, 1972, the applicant was admitted to an Albuquerque hospital with a skull fracture incurred in a car accident. He was discharged from the hospital on December 29, 1972.

On January 8, 1973, a recruiting station in Albuquerque sent a message to Headquarters stating that the applicant had surrendered himself after having been AWOL from the cutter since October 29, 1972. On January 9, 1973, he was sent back to Long Beach. From January 10 to February 12, 1973, he was hospitalized due to the injuries he had received in the car accident.

On January 9, 1973, the applicant's command convened an informal Board of Investigation into his unauthorized absence and the circumstances of the accident. On February 2, 1973, the investigator reported that the applicant was AWOL at the time of the accident, which took place "near his place of residence at Albuquerque." The investigator reported that, after having been advised of his rights on January 18, 1972, the applicant told the investigator that he had been living with friends in Albuquerque and was "drinking with friends previous to [his] accident." He borrowed a friend's car to go to Santa Fe but, "[j]ust after departing, [he] struck a decorative archway on a dirt road and went off the road." The investigator stated that at the Albuquerque hospital, a "laboratory toxicology was performed and indicated a reading of 103 milligrams per cent in the [applicant's] blood stream." The New Mexico State Police told the investigator that any reading of 100 milligrams or higher was considered "intoxicated." The Board of Investigation concluded that the applicant's accident, head injury, and disability were caused by his intoxication while AWOL and recommended that he be charged for misconduct.

On February 8, 1973, the Coast Guard convened an Initial Medical Board (IMB) to evaluate his condition. The IMB reported that, after having been hospitalized with a head injury caused in a car accident, the applicant "turned himself in as a deserter" but was again hospitalized because he had unstable blood pressure and "had on one or two occasions blacked out." The IMB found him unfit for duty as it was determined that even a gentle bump on the damaged part of his head could cause serious harm. The IMB recommended that the applicant be further evaluated by a Central Physical Evaluation Board (CPEB). He was sent home to await orders.

On February 9, 1973, the applicant's attorney wrote a letter[1] to the District Commander complaining that he had not been permitted to cross-examine the people interviewed by the investigator. He also argued that the facts of the case did not prove that the applicant's injuries were caused by "gross negligence," which he argued was a minimum requirement for a finding of misconduct under paragraph 0406 of the Coast Guard Supplement to the Manual for Courts-Martial. He argued that factors other than the applicant's intoxication, such as his unfamiliarity with the car, the lack of street lighting, and the condition of the road, could have caused the accident.

On February 14, 1973, in response to the letter from the applicant's counsel on February 9th, the District Commander ordered the investigator to reinterview the witnesses against the applicant so that his counsel could "effectively take advantage of the rights of a party" to cross-examine them. On February 23, 1973, the investigator reported that he had reinterviewed the witnesses in the presence of the applicant's counsel, who cross-examined them. The investigator further stated that the Board of Investigation had again concluded that the accident was caused by the applicant's intoxicated state and that his injuries were "not incurred in the line of duty."

On February 26, 1973, in response to the investigator's report, the applicant's counsel submitted a letter reiterating his argument that the circumstances of the accident did not amount to "gross negligence."

On March 14, 1973, the District Commander forwarded the reports of the IMB and of the Board of Investigation to Headquarters. He had approved the investigator's findings and recommendations, including the finding that the applicant's injury "was not in the line of duty and was due to the member's misconduct." The District Commander stated that "[g]iven, as counsel admits, the intoxicated condition of the [applicant], it appears to be the grossest deviation from the standard of care required for such an intoxicated person to drive a vehicle with which he is unfamiliar, on a road with which he is unfamiliar, at night in snowy conditions. However, the circumstance of intoxication alone would be adequate to support a gross negligence finding, requiring a misconduct determination."

On March 27, 1973, the CPEB convened and found that the applicant was 30 percent disabled by an injury incurred not in the line of duty and due to intentional misconduct in that his actions "were taken in reckless disregard of the safety of the evaluee and others exposed to him, and was of such a degree as to constitute gross negligence and 'intentional misconduct' as defined in Article 17-A-14 of [the Personnel Manual]. The members further find that the evaluee's injuries were not directly caused by any intervening event but rather were proximately and directly caused by the gross negli-

[1] No copy of this letter appears in the applicant's military record. However, the content of the letter is summarized in a memorandum by the District Commander.

gence and intentional misconduct of the evaluee." The CPEB recommended that he be discharged without severance pay. On March 29, 1973, after consulting with his attorney, the applicant accepted the CPEB's findings and recommended disposition and waived his right to a hearing before a Formal Physical Evaluation Board (FPEB). The CPEB report we reviewed by the Physical Review Council and forwarded to the Chief Counsel for legal review.

On April 17, 1973, the Chief Counsel of the Coast Guard signed a Final Action by Reviewing Authority for the report of the Board of Investigation, in which he stated the following, in pertinent part:

> [T]here is no affirmative showing that his intoxication was the proximate cause of the accident in which he sustained his injury. Absent clear and convincing evidence of grossly negligent behavior, we feel that all doubts in this matter must be resolved in [the applicant's] favor and that a misconduct finding is not appropriate under these circumstances.
>
> However, when his injury was incurred, [he] was in an AWOL status, having been absent from his duty station without authorization since 29 October 1972. As outlined in Section 0406e. of the CG Supp. [to the Manual for Courts-Martial], a finding of "not incurred in line of duty" will be made when an injury is incurred by a member during a period of unauthorized absence which materially interferes with the performance of his military duties. Generally, any absence in excess of 24 hours is considered to be such a material interference … .
>
> Hence, from the facts as reported, we find that [the applicant's] … injuries were not incurred in the line of duty and were not due to his own misconduct.

On April 25, 1973, the Chief Counsel reviewed the report of the CPEB and stated that, to be consistent with his April 17th determination about the findings of the Board of Investigation, he could not agree with the CPEB's conclusion that the applicant's injuries were caused by "misconduct." However, he stated, since the applicant was AWOL at the time and his injuries were clearly not incurred in the line of duty, there was no impediment to his being discharged without severance pay or retirement in accordance with the CPEB's recommendation. On April 27, 1973, the findings and recommendations of the CPEB, amended in accordance with the Chief Counsel's determination, received final approval by the rear admiral serving as the delegate of the Commandant.

On May 1, 1973, the Commandant ordered the applicant's command to discharge him by reason of physical disability in accordance with Article 12-B-9 of the Personnel

Manual. He also ordered the command to advise the applicant regarding his rights and benefits as a veteran.

On May 17, 1973, the applicant was taken to mast and convicted of unauthorized absence from November 2, 1972, to January 8, 1973. The charge of desertion was dismissed. He was issued a letter of reprimand, and his end of enlistment and pay base date were adjusted to account for the days he was AWOL.

On May 30, 1973, the applicant was honorably discharged from the Coast Guard because of his physical disability. His command assigned him an RE-3P reenlistment code, making him eligible to reenlist if he recovered from his disability.

VIEWS OF THE COAST GUARD

On August 29, 2002, the Chief Counsel submitted an advisory opinion in which he recommended that the Board deny relief in this case. He attached to his advisory opinion a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC). These documents are attached to this Final Decision below.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 3, 2002, the BCMR sent the applicant copies of the views of the Coast Guard and invited him to respond within 15 days. The applicant requested an extension and responded on September 26, 2002. He argued that there is no evidence in his record that he was ever notified in writing of the proposed action against him and the possible effects of his discharge. He alleged that the charge of unauthorized absence against him was dismissed by the Coast Guard and that all other charges against him were dismissed.

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 10 U.S.C. § 1552.

2. Under 10 U.S.C. § 1552(b), an application to the Board must be filed within three years after the applicant discovers the alleged error in his record. The applicant alleged that he did not know his record was in error until April 24, 1998. However, he was discharged and sent his DD 214 on May 30, 1973. Moreover, the record indicates that he knew he was considered to be AWOL from November 2, 1972, to January 8, 1973, and that, prior to being discharged, he was advised about the consequences of the CPEB's recommendations by his counsel. In addition, in accordance with *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992), and *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979), the Board presumes that the applicant's command obeyed the Commandant's May 1, 1973, order to advise him of his rights and benefits as a veteran before discharging him. Therefore, the Board finds that he knew or should have known of the AWOL determination, the nature of his discharge, and its consequences no later than 1973, and 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 reasons for the delay and conduct a cursory review of the merits of the case. *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992). The applicant did not explain why he delayed applying to the Board until 2002. The record suggests that he delayed applying until he was refused medical benefits for his head injury by the DVA.

4. The Board's cursory review of the record indicates that the applicant was properly found to have been AWOL from November 2, 1972, to January 8, 1973. He was reported absent from work on November 2, 1972; reported as a wanted absentee on November 13, 1972; and reported as a deserter on December 1, 1972. He submitted no evidence other than his own self-serving statements that he had told petty officers that he was leaving to take care of his sick grandmother; and the reports indicate that his intentions in leaving were unknown.

5. The applicant's allegations that he did not know the rules about applying for leave and that he believed that he could casually take leave are proved false by two leave applications in his record showing that he properly applied for and was granted eight days of leave in February 1972 and seven days of leave in June 1972. In addition,

his allegation that he had never taken leave and therefore was entitled to take 60 days of leave is proved false by these same two leave statements.

6. Although the applicant alleged that he was never notified of the consequences of his pending discharge, the record contains ample evidence that he knew he had been AWOL and was accorded all due process in both the administrative and medical proceedings that led to his discharge. In addition, the record indicates that he was formally found guilty of unauthorized absence at a captain's mast and that only the charge of desertion was dismissed.

7. The Board's review of the record has revealed no evidence of error or injustice committed by the Coast Guard in documenting his unauthorized absence from November 2, 1972, to January 8, 1973, and in discharging him for unfitness because of the injury he sustained while AWOL. The Board finds no merit whatsoever in the applicant's allegations.

8. Accordingly, the application should be denied because of its untimeliness and lack of merit.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

Barbara Betsock

Harold C. Davis, M.D.

Cynthia B. Walters

Memorandum

Subject: ADVISORY OPINION IN CGBCMR DOCKET NO. 2002-056 (XXXXXX)

Date: 5420/3

From: Chief Counsel, U.S. Coast Guard

Reply to Attn. of: G-LMJ-1 CDR Vachon x70116

To: Chairman, Board for Correction of Military Records (C- 60

Ref: (a) Applicant's DD Form 149 filed 5 March 2002
(b) Manual for Courts-Martial

1. Please accept enclosure (1) and the following comments as the Coast Guard's advisory opinion recommending denying relief in the subject case.

2. Summary of the Case: In May 1973, Applicant was discharged by reason of physical disability due to injuries he sustained in an automobile accident. Applicant now requests that his record be corrected to reflect that his physical disability was incurred "in the line of duty" insofar as the charge of "unauthorized absence" was dismissed by the Coast Guard due to the fact that the Applicant was home on leave at the time of the accident. Contrary to Applicant's allegation, it was the charge of "*desertion*" not "unauthorized absence" that was removed from his record. The desertion charge was removed due to his conviction for the lesser included offense of "unauthorized absence." See, CG-3312 dated 17 May 1973 and Part IV, ¶3, ¶9.d. of reference (b). There is record evidence that Applicant was taken to Captain's mast and found guilty of Article 86, UCMJ. See, Personnel Action Sheet, CG-3312 dated 17 May 1973. There is no evidence that Applicant's unauthorized absence was dismissed or that there was any error or injustice in his nonjudicial punishment. And, with respect to the transcript testimony that Applicant submits of a hearing before the Board of Veteran's Appeals dated 26 October 2000, such transcript bears no evidence, other than the Applicant's own self-serving memory, on the question of whether the Applicant's unauthorized absence was ever excused or otherwise dismissed.

3. Summary of the Facts: See Enclosure (1), Matters of Record.

4. Analysis: The Board should deny relief in this case because Applicant failed to prove that the Coast Guard committed either an error or injustice that would merit a waiver of the Statute of Limitations. Furthermore, Applicant has failed to prove that the Coast Guard dismissed his unauthorized absence. To the contrary, there is record evidence that the Applicant was taken to nonjudicial punishment (NJP) also knows as Captain's mast. Additionally, the record shows that the Applicant was afforded all due process attending to

his discharge by reason of physical disability pursuant to the applicable CG PERSMAN provisions.

a. *Applicant failed to submit a timely application and has not provided any basis or reason why it is in the interest of justice to excuse the delay. Alternatively, a cursory review of the merits of this case reveal that no error or injustice occurred.* The record shows that Applicant was or should have been aware of the allegations he made in his application within three years of his May 30, 1973, discharge date. On his DD214 certificate, block 11, the Applicant's reason and authority for discharge is listed as "12-B-9, CG PERSMAN [and] COMDT (GPE) message 012033Z May 73." That provision of the PERSMAN authorized discharges based on a disability that was neither incurred in nor aggravated by a period of active military service. Additionally, the Applicant signed an acknowledgement stating that he had been advised by his counsel regarding acceptance or rejection of the findings and recommended disposition of the CPEB and accepted those findings in lieu of a hearing before a formal physical evaluation board. See CG-4809 dated 29 March 1973. In those findings, the CPEB found "that the injuries sustained by the [Applicant] were not incurred in the line of duty . . . [and] were sustained as the foreseeable, direct and proximate result of the [Applicant's] . . . intentional misconduct."[2] See CG-4808 dated 28 March 1973. In light of the aforementioned documents, the Applicant knew or should have known of the alleged errors or injustice pertaining to his discharge no later than May 1973. Therefore, Applicant submitted his application almost *twenty-nine* (29) years after the Statute of Limitations expired.[3]

(1) Under 10 U.S.C. §1552(b) and further regulations in 33 C.F.R. §52.22, an application must be filed within three years of the date the alleged error or injustice was, or should have been, discovered. If an application is untimely, the applicant must set forth in the application reasons why its acceptance is in the interest of justice. In addition, the Board must deny relief unless Applicant presents sufficient evidence to warrant a finding that it would be in the interest of justice to excuse the failure to file timely. In making this determination, the Board must consider the reasons for delay and make a cursory review of the potential merits of the claim. Dickson v. Secretary of Defense, 68 F. 3d 1396 (D.C. Cir. 1995).

(2) Based on the Applicant's submission in support of his application, it seems that Applicant is under the impression that he never received nonjudicial punishment for his unauthorized absence. However, there is documentary evidence recording the date and disposition of the Captain's mast. See, Personnel Action Sheet, CG-3312 dated 17 May 1973. The Applicant's bare assertion that the Coast Guard dismissed his unauthorized absence is not enough to rebut the record evidence.

b. The Board should not find the Applicant's uncorroborated testimony at a hearing before the Veteran's Administration more than twenty-five years after the fact as sufficient

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[2] In the Chief Counsel's endorsement of the CPEB and informal investigation report, he disagreed with the finding that the Applicant's injuries were sustained due to misconduct but agreed that the injuries were not incurred in the line of duty. See, G-LGL memo 1850 dated 25 Apr 1973 and "Action by Final Reviewing Authority" dated 17 April 1973.

[3] The Applicant failed to explain this long delay as required in Block 11.b. of his DD149.

evidence that the Coast Guard dismissed the Applicant's unauthorized absence. To do so would be unfair and contrary to the equitable doctrine of laches.

The Board's enabling statute, 10 U.S.C. § 1552, provides that the Secretary, acting through boards of civilians, may correct a military record "when he considers it necessary to correct an error or remove an injustice." Thus, the Secretary is not compelled to correct a record, but may exercise considerable discretion in determining whether such a correction is "necessary" to make the Applicant whole. In the present case, the Board should decline to grant the requested relief based upon the equitable doctrine of laches. See, e.g., Sargisson v. United States, 12 Cl. Ct. 539, 542 (1987).

Applicant took no action to correct the alleged "error" in 1973, instead waited almost twenty- nine years to challenge it before the BCMR. Where an Applicant's unexcused delay has caused substantial prejudice to the government, the claim for relief is generally barred under the equitable doctrine of laches. See, e.g., Sargisson v. United States, 12 Cl. Ct. 539, 542 (1987). The relevant period of delay may run even before the particular claim accrues, runs independent of any statute of limitations, and may involve periods of delay as short as eleven months. Id. Underlying the laches bar is the fundamental principal that equity aids the vigilant; the doctrine prohibits Applicants from delaying their BCMR applications, absent circumstances excusing the delay, while the evidence regarding their contentions becomes lost, stale, or inaccessible, or while the costs of investigating or correcting the matter accumulate. . the Coast Guard's ability to contact key witnesses has been severely hampered by the mere fact that they no longer serve in the Coast Guard. Therefore, considering the substantial delay between the "error" and date of application in this case and that the Applicant has the burden of production and proof, the Board should dismiss Applicant's claim with prejudice.

5. Recommendation: The Coast Guard therefore recommends that the Board deny the relief requested.

GENELLE T. VACHON
By direction

Encl: (1) CGPC ltr 5420 dated 16 May 2002
(2) Applicant's Service Record

U.S. Department of Transportation
United States Coast Guard

Commander
United States Coast Guard
Personnel Command

2100 Second Street, S.W.
Washington, DC 20593-0001
Staff Symbol: CGPC-adm-2
Phone: (202) 267-6969
FAX: (202) 267-4381

5420

From: Commander, Coast Guard Personnel Command
To: Commandant (G-LMJ)

Subj: PROGRAM INPUT ON CGBCMR APPLICATION (XXXXXX)

Ref: (a) CGBCMR Application 2002-036

1. Comments on the application contained in reference (a) are attached as enclosure (1).

2. I recommend relief be granted.

D. A. DiIULIO
Acting

Encl: (1) Comments concerning CGBCMR Application 2002-032

Enclosure 1 - CGBCMR 2002-056

RELIEF REQUESTED BY APPLICANT:

1. The applicant requests that his "AWOL" (Absent Without Leave) status at the time of an automobile accident be removed from his record so he may receive Veterans Administration Benefits.

APPLICANT'S STATED BASIS FOR RELIEF:

1. The applicant states his "AWOL" status was dismissed by the Coast Guard.

MATTERS OF RECORD:

1. The application is not timely.

2. November 29, 1971: Per Form CG-3301 (Enlistment Contract – U.S. Coast Guard) applicant enlisted in the Coast Guard for a period of 4 years.

3. February 20, 1972: Per Form CGHQ-3299 (Service Record Card), applicant reported for duty to the U.S. Coast Guard Cutter Burton Island in Long Beach, CA.

4. November 2, 1972: Per Form CG-3312 (Personnel Action Sheet), applicant, "Failed to return from authorized liberty at 0645 this date. Intentions Unknown."

5. November 13, 1972: Per Form DD 553 (Absentee Wanted by the Armed Forces), notice was distributed to various Coast Guard units and applicant's family members alerting them of applicant's absentee status.

6. December 1, 1972: Per Form CG-3312, applicant was "Declared a deserter from the U.S. Coast Guard from 0645, 2 November 1972 having been UA (Unauthorized Absence) from the USCGC Burton Island, Long Beach, CA since that time."

7. December 23, 1972: Per Form CG-3312, applicant was "involved in auto accident and admitted to Bernalillo County Medical Center for fractured skull. Released from hospital on 29 December 1972."

8. January 8, 1973: Per Form CG-3312, applicant "surrendered to USCG Recruiting Office, Albuquerque, New Mexico at 1400, 8 January 1973 having been AWOL seventy one days."

9. January 9, 1973: Per Form CG-3312, applicant "reported on USCG Base Terminal Island at 1610, January 9, 1973."

10. January 10, 1973: Per Form CG-3312, applicant was "admitted as Inpatient at U.S. Naval Hospital, Long Beach, CA."

11. January 10, 1973: Per Form CG-3312, "Coast Guard District Eleven convened a Board of Investigation into the accident of" the applicant.

12. February 2, 1973: Per letter 5830 from CWO2 xxxxxxxx (investigating officer for applicant's board of investigation) to Commandant via Commander, Eleventh Coast Guard District, Subj: Informal Board of Investigation; completion of, the recommendations were that applicant should be "charged with misconduct," that the applicant be required to pay his own hospital expenses as a result of his accident and "That should any disability claim arise as a result of XXXXXX's (applicant) accident it should be denied."

13. February 8, 1973: Per Form NAVMED 6100/1 (Medical Board Report Cover Sheet), a medical board was convened to determine applicant's fitness for duty. The board's opinion in paragraph seven read "the patient (applicant) is unfit for duty by virtue of the defect he has in his skull. This would predispose him to serious brain trauma should he sustain even a gentle bump on that portion of his head." The board diagnosed the applicant with "Skull Defect, Postoperative, #7381 secondary to Depressed Skull Fracture, #8030 is correct." The board recommended that applicant be referred to a Physical Evaluation Board for final adjudication. It was noted on this form that disciplinary action was pending.

14. February 8, 1973: Per Form NAVMED 6100/2 (Medical Board Statement of Patient), applicant endorsed a form which informed him of the medical board's findings that he was unfit for duty and that he appear before a physical evaluation board.

15. February 12, 1973: Per Form CG-3312, applicant was "released from inpatient at U.S. Naval Hospital, Long Beach, CA."

16. February 14, 1973: Per letter 5830 from Commander, Eleventh Coast Guard District to CWO2 xxxxxxx, (First endorsement on CWO2 xxxxxxx's ltr 5830 of 2 Feb 73) it was requested that CWO2 xxxxxx reinterview member's in his informal board of investigation to allow applicant's counsel "full opportunity to effectively take advantage of the rights of a party." CWO2 xxxxxx was also requested to "include a specific opinion as to whether or not the injuries were incurred in the line of duty."

17. February 15, 1973: Per CG-3307 (Administrative Remarks) applicant "Departed for 30 days sick leave this date."

18. February 23, 1973: Per letter 5830 from CWO2 Xxxxxx to Commandant, via Eleventh,

Coast Guard District, (Second endorsement) CWO2 Xxxxxx advised that counsel for applicant was present when CWO2 reinterviewed member's in his informal board of investigation and that applicant's counsel "did take advantage of counsel's right to cross examine." CWO2 Xxxxxx advised "It is the board's opinion that the accident was a result of misconduct and was caused by the member's intoxicated state at the time of the accident and the injuries sustained as a result of that accident were not incurred in the line of duty."

19. February 26, 1973: Per letter 5830 from applicant's counsel to CWO2 Xxxxxx, Subj: Rebuttal of Findings of Board of Investigation, it was "requested that the finding of misconduct in the second endorsement to the investigation be disapproved."

20. Per undated letter 5830 from Commander, Eleventh Coast Guard District to Commandant, (Third endorsement on CWO2 Xxxxxx's ltr 5830 of 2 Feb 73), the Eleventh Coast Guard District notified Commandant "The proceedings of the board are approved, subject to the following comments." The comments contained in the letter concerned the applicant's counsel's complaint about cross-examination of witnesses (which was corrected per CWO2 Xxxxxx's letter of February 23, 1973) and the board's finding of misconduct. Commander, Eleventh Coast Guard District agreed with CWO2 Xxxxxx's opinion that the applicant's actions did require a misconduct determination.

21. March 14, 1973: Per letter 6100 from Commander, Eleventh Coast Guard District to Commandant, Subj: SA Xxxxx x. Xxxxxx xxxxxxxxxxxxxx USCG, Medical Board findings; forwarding of, the findings of the applicant's medical board and informal board of investigation were forwarded to Commandant concurring with the findings of both boards. A request was made to place the applicant in "home awaiting orders status pending action of the Central Physical Evaluation Board."

22. March 16, 1973: Per CG-3307, applicant "Returned from 30 days sick leave this date."

23. Per undated form entitled "Appointment of Counsel for CPEB Evaluee", LT xxxxxxx xxxxxx was appointed counsel for the applicant's CPEB scheduled for March 27, 1973.

24. March 27, 1973: Per CGHQ-4808 (Coast Guard Central Physical Evaluation Board Findings and Recommended Disposition) a Central Physical Evaluation Board was convened declaring: "It is the opinion and decision of the members that the injuries sustained by the evaluee were not incurred in line of duty as defined by the provisions of Article 17-A-19 of CG-207. It is further the opinion and decision of the members that the evaluee's injuries were sustained as the foreseeable, direct and proximate result of the evaluee's actions, which were taken in reckless disregard of the safety of the evaluee and others exposed to him and was of such a degree as to

constitute gross negligence and 'intentional misconduct' as defined in Article 17-A-14 of CG-207. The members further find that the evaluee's injuries were not directly caused by any intervening event but rather were proximately and directly caused by the gross negligence and intentional misconduct of the evaluee." The CPEB diagnosed the evaluee with "Skull, Loss of part of, Bother Inner and Outer Tables – Without Brain Hernia – Area Intermediate 2 cm. x 4.7 cms." The boards recommended disposition was for applicant to be separated without severance pay.

25. Per Article 17-A-19 of CG-207 (Coast Guard Personnel Manual-PERSMAN) of 1981 (the most closely dated and available PERSMAN to the time of applicant's board) the term "line of duty" does not apply when an injury "is found to have been incurred under the following circumstances: (1) As the result of the person's misconduct. (2) While avoiding duty by deserting the service. (3) During a period of unauthorized absence."

26. Per Article 17-A-14.(b)(2) of CG-207, "In order to support an opinion of misconduct, it must be found that the injury or disease (a) was intentionally incurred, or resulted from such gross negligence as to demonstrate a reckless disregard of the consequences, and (b) was either immediately caused by the act under consideration or set other events in motion, all constituting a natural and continuous chain of events, which caused the injury or disease, and (c) was reasonably foreseeable or the likely result of such act."

27. Article 17-A-14(a) states "Intentional misconduct and willful neglect are terms descriptive of misconduct. Misconduct is wrongful conduct."

28. Article 17-A-14 (b) states "Physical evaluation boards shall apply the following rules in making recommended findings concerning misconduct:" Article 17-A-14(b)(1): …there must be clear and convincing evidence that the injury or disease was either the proximate result of the person's misconduct. Or that it was incurred in the circumstances noted in subparagraph (6) hereof." Article 17-A-14 subparagraph (6) states "A finding of misconduct will normally be required independently of the above rules when injury occurs while the person is engaged in the commission of an act which is wrong in itself."

29. March 29, 1973: Per reverse of Form CG-4809 (Statement by Counsel) applicant endorsed a statement which read "I accept the Central Physical Evaluation Board findings and recommended disposition and waive my right to a formal hearing before a physical evaluation board." This form also documents that applicant's counsel "consulted with the evaluee on 29 Mar 73, and counseled him regarding acceptance or rejection of the CPEB's findings and recommended disposition."

30. March 30, 1973: Per letter 1326 from Commander, Eleventh Coast Guard District to

applicant, Subj: Home Awaiting Orders Status, applicant was "placed in Home Awaiting Orders status pending the outcome of your Central Physical Evaluation Board."

31. Per Article 17-D-13.c(4) of the PERSMAN "Awaiting orders Status" Article 17-D-13.c(6) states "Prior to the departure of the evaluee from the vicinity of his duty station, those parts of the separation processing requiring the presence of the evaluee will be completed so that, if separation or retirement is directed, such action can be implemented by mail."

32. April 17, 1973: Per letter 5830 entitled "INVESTIGATION INTO THE ACCIDENT AND INJURIES TO SA XXXXX X. XXXXXX (xxxxxx), USCG ON 24 DECEMBER 1972 - ACTION BY FINAL REVIEWING AUTHORITY" the final reviewing authority, ADMIRAL W.L. Morrison (Chief Counsel, U.S. Coast Guard) declared "Absent clear and convincing evidence of grossly negligent behavior, we feel that all doubts in this matter must be resolved in XXXXXX's favor and that a misconduct finding is not appropriate under these circumstances." Admiral Morrison continued "However, when his injury was incurred, XXXXXX was in an AWOL status, having been absent from his duty station without authorization since 29 October 1972. As outlined in Section 0406e. of the CG Supp. MCM, a finding of 'not in line of duty' will be made when an injury is incurred by a member during a period of unauthorized absence which materially interferes with the performance of his military duties." ADMIRAL Morrison's final conclusion read "Hence, from the facts as reported, we find that SA XXXXX X. XXXXXX (xxxxxxxx), USCG, sustained injuries on 24 December 1972; that his injuries were not incurred in the line of duty and were not due to his own misconduct."

33. April 25, 1973: Per Commandant (G-LGL) note 1850 concerning applicant, "the investigation into the accident, which caused the injuries resulting in the present retirement proceeding, concluded that evaluee's injuries were not incurred in line of duty and were not due to his misconduct. The Chief Counsel's office, therefore, does not concur with the CPEB on its finding of "misconduct." Nevertheless, since the evaluee's disability was clearly not incurred in line of duty, as found by both the CPEB and the Final Reviewing Authority, XXXXXX is not entitled to retirement or separation with severance pay. Accordingly, no objection is interposed to the CPEB's recommended final action of separation without severance pay."

34. April 27, 1973: Per Reverse of Form CGHQ-4808 (Action of the Chief Counsel) the Chief, Office of Personnel approved the final action of the Central Physical Evaluation Board and stated "Pursuant to 49 C.F.R. 1.45(b) and 1.46(b), it is directed that SA Xxxxx x. Xxxxxx xxxxxxxxxxxxx, USCG, be separated from the U.S. Coast Guard without entitlement to any of the benefits under Chapter 61, Title 10, U.S. Code, in accordance with section 1207 of that title."

35. The 1973 49 C.F.R. 1.45(b) permitted the Coast Guard Commandant to "Exercise the authority of the Secretary over and with respect to any personnel" and redelegate(d) and authorize(d) successive redelegations of that authority within the organization under his jurisdiction." The 1973 C.F.R. 1.46(b) permitted the Coast Guard Commandant to "Carry out all the activities of the Coast Guard, including, but not limited to, law enforcement, safety of life and property at sea, aids to navigation, search and rescue ice breaking, oceanographic research and military readiness functions."

36. May 1, 1973: Per message date time group 012033Z May 73 from Commandant to Coast Guard Base, Terminal Island, CA, applicant was to be "separated from USCG without entitlement to any of the benefits under Chapter 61 Title 10 U.S. Code..." The message continued by stating the "cause of discharge will be shown as physical disability due to own misconduct."

37. May 17, 1973: Per CG-3312 applicant's Commanding Officer held "Commanding Officer's Nonjudicial Punishment" for applicant's unauthorized status from 2 November 1972 until 8 January 1973. The notes within this form declare: "The mark of desertion under date of 1 December 1972 for the absence commencing 2 November 1972 is hereby removed as erroneous by reason of conviction of unauthorized absence." Applicant's sentence was "a letter of reprimand."

38. May 30, 1973: Per CG-3307, applicant was "Discharged this date by reason of physical disability due to own misconduct."

39. May 30, 1973: Per Form CG-3309 (Record of Discharge, Release from Active Duty, or Death), the reason for applicant's discharge was listed as "Physical disability due to own misconduct.

40. May 30, 1973: Per DD Form 214N (Armed Forces of the United States Report of Transfer or Discharge) applicant received an Honorable discharge. The authority of applicant's discharge was listed as "Article 12-B-9, CG PERSMAN" and Commandant message 012033Z May 73.

41. Per PERSMAN 12-B-9(c) "The Commandant may direct or authorize the discharge of an enlisted person for physical disability that was not incurred in or aggravated by a period of active military service under the following conditions: (1) A medical board has expressed the opinion: a. That the individual does not meet the minimum standards for retention on active duty. b. That he is unfit for further Coast Guard service by reason of physical disability, and c. That the physical disability was neither incurred in nor aggravated by a period of active military service. (2) The individual's commanding officer and/or district commander concur in the opinion

of the board. (3) The individual has been fully informed of his right to a full and fair hearing and has stated in writing that he does not demand such a hearing."

42. May 30, 1973: Per letter 1910 from Commander, Eleventh Coast Guard District to applicant, Subj: Discharge; processing for, applicant was advised his records were being processed for discharge and requested applicant send his Armed Forces Identification Card so his record and pay account could be closed out.

43. Other than the May 30, 1973 letter to applicant, there is no record in applicant's entire service record which would substantiate that applicant was notified in writing of the proposed action and the reasons and the possible effect of the discharge.

44. March 10, 1999: Per a statement from the Department of Veterans Affairs Albuquerque Regional Office submitted by the applicant with his BCMR application, "service connection may be granted for disability incurred or aggravated in the line of duty in the active military, naval or air service. Line of duty is defined by the law as an injury or disease incurred or aggravated during a period of active military, naval or air service unless such injury or disease was the result of the veteran's own willful misconduct. A service department finding that injury or disease occurred in the line of duty is binding on the Department of Veterans Affairs (VA) unless it is patently inconsistent with the requirements of laws administered by the VA. Requirements as to line of duty are not met if at the time the injury was suffered or disease contracted the veteran was: (1) Avoiding duty by desertion or was absent without leave which materially interfered with the performance of military duty…"

CONCLUSIONS:

1. Applicant has submitted his BCMR application for the purpose of obtaining an "in line of duty" finding for the injuries he sustained while in an AWOL status.

2. The May 17, 1973 "Commanding Officer's Nonjudicial Punishment" found applicant guilty of unauthorized absence.

3. Both the CPEB and Final Reviewing Authority investigations into the circumstances of applicant's injuries found that they were clearly not incurred in line of duty due to his AWOL status at the time of the accident. Applicant's AWOL status was carefully investigated and confirmed during both of these processes.

4. Applicant offers no evidence to contradict the findings and decisions made concerning his AWOL status and the "not in line of duty" determination for his injuries. The record indicates he was given full due process throughout each of the proceedings conducted in this matter.

RECOMMENDATION:

1. I recommend no relief be granted.