

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2003-068

XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX

FINAL DECISION

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 April 21, 2003 upon the BCMR's receipt of the applicant's request for correction.

This final decision, dated April 29, 2004, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant asked the Board to correct his record to show that he received a medical discharge or was retired due to a physical disability, instead of his discharge by reason of unsuitability.

APPLICANT'S ALLEGATIONS

The applicant alleged that due to an acute shortage of personnel onboard the Coast Guard cutter to which he was assigned, he was subjected to extended periods of malnutrition and inadequate sleep and rest. He alleged that as a result of his treatment and the fact that his cutter was under "constant order[s] ... for search and rescue [missions], patrol[s] ... [and overall] combat readiness," he became overwhelmed and suffered a nervous breakdown.

The applicant alleged that in concealing the poor conditions aboard his cutter, his command permitted members who were senior in rank to him to shirk their assigned duties. He further alleged that when he was being processed for separation, Coast Guard medical officers had him taking so much medicine, "[he] could not do anything

... or think clearly [to] defend [himself]." He alleged that his command and medical personnel worked together to "cover themselves."

The applicant alleged that his transition to civilian life has been difficult, especially during the last six years. He alleged that because of his ordeal, he presently suffers from "shot nerves, stomach problems from ulcers, [and] heart problems from nerves" and "cannot work anymore." He alleged that his need for extensive medical treatment is evident because he is on disability retirement through the Department of Veterans Affairs (DVA).

The applicant alleged that contrary to the way his career turned out, he intended to make the Coast Guard his permanent career, as evidenced by his final conduct mark of 4.0. However, he alleged, the lasting effects of his nervous breakdown have remained with him. He asked that the Board grant him the requested relief because he is "tired of suffering" and dealing with the "neglect and abuse of the [DVA] medical system" He alleged that he discovered the error in his record on November 15, 2002.

SUMMARY OF THE RECORD

On November 1, 1965, the applicant enlisted as a seaman recruit in the Coast Guard for a term of four years. After completing recruit training on January 14, 1966, the applicant was promoted to seaman apprentice and assigned to a light vessel.

On November 16, 1966, the applicant was placed on 14 days of sick leave.

On January 30, 1967, a Board of Medical Survey issued a report, in which the applicant was diagnosed as suffering from "personality disorder, schizoid type" that existed prior to his enlistment and was not incurred or aggravated in the line of duty. The report also included the following information in the "Summary of Case History" section:

It is the opinion of this Board that the Evaluatee does not meet the Standards for enlistment in the USCG as set forth in the CG Medical Manual (CG-294), Chap.3., and he does not meet the standards as set forth in Army Regulations 40-501., Chap. 2.

Personal appearance of the Evaluatee before a Physical Evaluation Board would not be deleterious to his mental well being.

Disclosure of the information contained in this report to the Evaluatee will not adversely affect his mental well being.

If released into his own custody the Evaluatee is not likely to constitute a menace to himself or to the public safety and he is not likely to become a public charge.

The summary also noted that a narrative summary was attached to the report, but the summary could not be found in the applicant's record.

Also on January 30, 1967, the applicant signed a statement certifying that he had been informed of the medical board's findings that he was "unfit for USCG duty" and of the medical board's recommendation that he "be released from the USCG by reason of a pre-existing physical defect." The applicant indicated that he did not wish to submit a statement in rebuttal.

On February 1, 1967, the applicant's commanding officer (CO) concurred in the recommendations of the medical board and forwarded the report to the Commandant via the Group commander of the Third Coast Guard District.

On February 15, 1967, Dr. G, a chief medical officer of the United States Public Health Service (USPHS), approved the findings of the Board of Medical Survey. It was further noted that Dr. H, a USPHS medical director, and Dr. T, a USPHS surgeon, assessed the applicant as being indefinitely unfit for duty in the Coast Guard and recommended that he be released from the Coast Guard by reason of a pre-existing physical defect.

On February 20, 1967, the Commandant responded to the commander of the Third Coast Guard District. He ordered that the applicant be advised that his discharge by reason of unsuitability under Article 12-B-10(B)(2) of the Personnel Manual was being contemplated and that the applicant be afforded the opportunity to make a statement on his own behalf.

On March 1, 1967, the applicant was formally notified that, pursuant to Article 12-B-10 of the Personnel Manual, the Group Commander was recommending his honorable discharge from the Coast Guard by reason of unsuitability. In noting that the applicant had previously been advised of the findings and recommendation of the medical board, the Group Commander formally offered the applicant an opportunity to make a statement on his own behalf.

By memorandum dated March 1, 1967, the applicant formally acknowledged that he was notified of his CO's recommendation that he receive an Honorable Discharge from the Coast Guard by reason of unsuitability. The applicant further indicated that he did not wish to submit a statement on his behalf. On the same day, the Group Commander signed a First Endorsement on the applicant's acknowledgement. The endorsement indicated that the applicant had been afforded an opportunity to submit a statement on his own behalf, as ordered by the Commandant on February 20, 1967, and that the Group Commander recommended that the applicant receive an Honorable Discharge.

On March 6, 1967, the District Commander signed a Second Endorsement on the applicant's acknowledgement, concurring with the recommendation that the applicant be honorably discharged from the Coast Guard by reason of unsuitability.

On March 14, 1967, the Commandant ordered the District Commander to discharge the applicant by reason of unsuitability under the authority provided in Article 12-B-10 of the Personnel Manual

On March 31, 1967, the applicant was honorably discharged by reason of unsuitability in accordance with the provisions of Article 12-B-10 of the Personnel Manual. At the time of his separation, the applicant was credited with 1 year, 5 months, and 1 day of active duty service.

Summary of the Applicant's DVA Submissions

On February 6, 2003, the DVA informed the applicant that his January 9, 2003 claim for increased compensation based on unemployability was denied. The decision indicates that the DVA has found the applicant to be 10% disabled by a military service-connected anxiety reaction, effective as of December 1, 1986. The DVA has also found the applicant to be significantly disabled by various non-service-connected disabilities, including diabetes, hypertension, peptic ulcer disease, and the residuals of a myocardial infarction and coronary artery bypass in 1997.

The DVA noted in its decision that a psychiatric examination of the applicant that was completed at a local DVA medical center on January 16, 2001, found no psychiatric disability.

VIEWS OF THE COAST GUARD

On August 13, 2003, the Judge Advocate General of the Coast Guard submitted an advisory opinion to which he attached a memorandum on the case prepared by CGPC. In adopting the analysis of CGPC, the Judge Advocate General recommended that the Board deny the applicant's request for relief.

The Judge Advocate General argued that the applicant submitted an untimely application and has provided no basis or reason why it is in the interest of justice to excuse the delay. He argued that the applicant's request was submitted more than thirty-three years after the time for filing his application for correction had expired. He argued that the record clearly shows that the applicant was, or should have been, aware of the alleged error within three years of his March 31, 1967 discharge. He asserted that because the applicant has offered no explanation in support of his claim that he did not discover the error until November 15, 2002, the Board should not find it in the interest of justice to waive the statutory three-year filing deadline for this case.

The Judge Advocate General argued that because the applicant has waited more than thirty-three years to challenge the alleged error before the Board, the doctrine of laches applies to the case and bars the applicant's entire claim. He asserted that the doctrine of laches prohibits an applicant from delaying his application to the Board "while the evidence regarding this contentions becomes lost, stale, or inaccessible or while the costs of investigating or correcting the matter accumulate." He argued that in this case, the Coast Guard has been caused substantial prejudice because its ability to "contact key witnesses" and obtain "key unit documents" may be severely hampered. In light of the delay between the alleged error and date of the application, he argued, the Board should dismiss the applicant's claim with prejudice.

The Judge Advocate General argued that the applicant's record fails to establish his claim that he was improperly counseled concerning the basis for his discharge. He argued that the applicant's record contains no evidence of an injustice committed against the applicant. He argued that neither the applicant's discharge itself, nor the manner in which the discharge was effected constitutes "treatment by military authorities that shocks the sense of justice." See Sawyer v. United States, 18 Cl. Ct. 860, 868 (1989), *rev'd on other grounds*, 930 F.2d 1577 (citing Reale v. United States, 208 Ct. Cl. 1010, 1011 (1976)).

The Judge Advocate General argued that the applicant presented no evidence to demonstrate that his discharge was erroneous or unjust. He pointed out that the record indicates that the applicant was evaluated by a Board of Medical Survey and subsequently diagnosed with a personality disorder that existed prior to his entry on active duty, rendering him unfit for continued service. He asserted that the record also shows that upon being notified of the medical findings and his recommended separation, the applicant chose to make no rebuttal statement. He asserted that the applicant has presented no evidence showing his evaluation, diagnosis, or administrative processing to be in error or unjust.

The Judge Advocate General argued that despite the fact that the applicant has developed health problems 36 years after his discharge, he presents no evidence that connects his current health problems with his Coast Guard enlistment. He asserted that the applicant's current conditions, for which he has received a DVA rating, did not exist at the time of his discharge. He asserted that in that the applicant bears the burden of proof, the evidence he has provided is clearly insufficient to overcome the presumption of regularity afforded his military superiors. 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).

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 16, 2003, the Chair sent a copy of the views of the Coast Guard to the applicant and invited him to respond within 30 days. He was granted two extensions totaling four months, but no response was received.

APPLICABLE LAW

Article 12-B-10. of the Personnel Manual in effect in 1967 covers discharges by reason of unsuitability. Article 12-B-10(b)(2) provides that members “considered [by medical authority to be] unsuitable for further service” may be separated with a “character or behavior disorder” listed in Chapter 5 of the Medical Manual.

Article 12-B-10(c)(2) states that “[w]hen psychiatric considerations are involved, the medical officer should be a psychiatrist, when available.” It further provides that the medical officer will submit a narrative summary, which describes the mental and physical conditions of the member, and a statement “to the effect that the individual was and is mentally responsible, ... and has the mental capacity to understand the action being contemplated in his case.”

Article 12-B-10(e)(1) provides that the following procedures will govern the processing of all recommendations for discharge by reason of unsuitability for members with fewer than eight years of active duty service:

[The member] will be notified in writing of the proposed discharge action and the reasons therefore, and shall be given an opportunity to make any statement in his own behalf that he may desire. If [the member] does not desire to make a statement, he shall set forth such fact in writing over his signature and it shall constitute his statement.

Article 3.F.16.d. of the Medical Manual states that a “personality [disorder] ... may render an individual administratively unfit rather than unfit because of a physical impairment. Interference with performance of effective duty will be dealt with through appropriate administrative channels (see section 5-B).”

Article 5.B. deals with psychiatric conditions (including personality disorders). Article 5.B.2.b. provides that personality disorders, such as schizoid type, are “disqualifying for appointment , enlistment, and induction ... or shall be processed in accordance with Chapter 12, [of the] Personnel Manual”

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. Under 10 U.S.C. § 1552(b), an application must be filed with the Board within three years of the date the alleged error or injustice was discovered or should have been discovered. On March 31, 1967, the applicant was discharged from the Coast Guard after being found unsuitable for further military service due to a personality disorder. On November 21, 2002, more than thirty years later, he submitted his application for correction of his military record. Contrary to the applicant's claim that he did not discover the error until November 15, 2002, the record indicates that the applicant either knew or should have known of the alleged error or injustice in his discharge in March 1967, when he signed and received his discharge papers. Therefore, the application is untimely.

3. Failure to file within three years may be excused by the Board, however, if it finds that it would be in the interest of justice to do so. The Board's regulations state that "[i]f an application is untimely, the applicant shall set forth reasons in the application why its acceptance is in the interest of justice. An untimely application shall be denied unless the Board finds that sufficient evidence has been presented to warrant a finding that it would be in the interest of justice to excuse the failure to file timely." 33 C.F.R. § 52.22. In this case, the applicant failed to explain why the Board should waive the statute of limitations. Because the alleged error or injustice was or with reasonable diligence should have been discovered in March 1967, the Board is not persuaded by the applicant's claim that he only first learned of the alleged error on November 15, 2002.

4. In addition to examining the length of delay and the reasons, *vel non*, for it, the Board must also perform a cursory review of the merits to determine the likelihood of success on the merits of the claim. See Dickson v. Secretary of Defense, 68 F.3d 1396 (D.D.C. 1995).

5. The applicant alleged that he should have received a medical discharge or been discharged due to a physical disability. The record indicates that on January 30, 1967, a Board of Medical Survey diagnosed the applicant as suffering from a "personality disorder, schizoid type." Subsequently, Dr. G, a chief medical officer of the USPHS, approved the medical board's findings and Dr. H, a USPHS medical director, and Dr. T, a USPHS surgeon, recommended the applicant's release from the Coast Guard by reason of a pre-existing physical defect. Moreover, the applicant signed a statement acknowledging that he had been informed of (1) the findings of the January 30, 1967 medical board and (2) the recommendation of the medical board, and did not wish to make a statement in rebuttal. The Board notes that the applicant's record does not contain a copy of the narrative summary, which was referenced in the Board of Medical Survey report. However, the absence of such evidence does not overcome the

strong but rebuttable presumption that Coast Guard medical officers have acted correctly, lawfully, and in good faith in executing their duties. 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). The Board finds that the preponderance of the evidence in the record indicates that the applicant was properly diagnosed with a personality disorder prior to his discharge from the Coast Guard.

6. Moreover, Article 12-B-10(e)(1) of the Personnel Manual in effect in 1967 provided for the discharge of members unsuitable for continued service, who like the applicant had been diagnosed with a type of personality disorder listed in Chapter 5-B of the Medical Manual. Accordingly, as a member with fewer than eight years of active duty service, the applicant was entitled to and received (1) notice that he was being recommended for separation under Article 12-B-10 of the Personnel Manual and (2) an opportunity to make a written statement on his own behalf, but he waived the right to do so. Consequently, the applicant has not proved that he was denied any due process by the Coast Guard. The Board finds that the applicant's discharge was properly effected under Article 12-B-10 of the Personnel Manual and Article 5-B of the Medical Manual.

7. The applicant has presented no objective evidence that shows that at the time of his discharge, the condition of his health was misdiagnosed or that he was otherwise entitled to a disability separation. The applicant's DVA records establish that in 1986, he was diagnosed with chronic anxiety reaction and later in 1997, he suffered a heart attack and was diagnosed with diabetes, hypertension, and peptic ulcer disease. While these conditions may render a member medically unfit for service, the applicant was not found to be suffering from these current ailments during his enlistment in the Coast Guard. Therefore, the Board cannot find that the applicant should have received a medical discharge.

8. Accordingly, the Board finds that it is not in the interest of justice to waive the statute of limitations in this case, and the applicant's request should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

Jordan S. Fried

J. Carter Robertson

Kathryn Sinniger