DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2004-177

FINAL DECISION

Author: Ulmer, D.

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The application was docketed on August 25, 2004, upon receipt of the applicant's completed application and military records.

This final decision, dated May 5, 2005, 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 her military record to show that she was discharged from the Coast Guard by reason of physical disability with a 100% disability rating due to post-traumatic stress disorder (PTSD), rather than having been discharged by reason of unsuitability due to personality disorder. In December 2002, the applicant was assigned a 70% disability rating from the Department of Veterans Affairs for PTSD, which was increased to a 100% because she was unable to work due to her service connected disability/disabilities.

The applicant, who had previous Army service, enlisted in the Coast Guard on April 15, 1985. She completed indoctrination for prior service members on May 9, 1985. Shortly thereafter, she was assigned to duty at a United States Coast Guard Station in Florida. She was honorably discharged on January 15, 1986, by reason of unsuitability, with a JMB (personality disorder) separation code, and with a RE-4 (ineligible for reenlistment) reenlistment code. When discharged, she had served nine months and one day on active duty in the Coast Guard.

APPLICANT'S ALLEGATIONS

The applicant alleged that her discharge by reason of unsuitability was erroneous and unjust. She asserted that she suffered from PTSD that was incurred while she was on active duty. She stated that she was given the unsuitability/personality disorder discharge because her military psychiatrist determined that she was "unable to conform to military ways of thinking and living." She alleged that she was unable to conform to the military because she had been raped in the Army and suffered sexual harassment while in the Coast Guard. In this regard she stated the following:

> I could not believe that after being raped in the Army, that I had crossed over to another branch of the service where the men were constantly coming into my sleeping area in the middle of the night, trying to have non-consensual sex with me. And one other thing that I just could not conform to, (and this is only an example of the many other things that made, makes, and will continue to make, my life a living hell) was going out on night training with the kind of men who thought it was amusing to throw, fish bait (chum) into the Gulf of Mexico, trying to attract sharks, and at the same time, holding me upside down by my legs, dangling me over the bloody chum . . .

The applicant further alleged that she received poor medical care amounting to medical malpractice while in the Coast Guard. She stated that she should have been provided with a doctor who could have spent more time analyzing her situation and traumatic experiences. She stated that she did not have an opportunity for a second opinion with respect to her mental evaluation and that she had no say in the matter of her discharge.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on April 15, 1985. Neither her October 17, 1984 enlistment medical evaluation nor her April 16, 1985 pre-training medical evaluation contained any evidence that the applicant was in anything but good health. Both times she rated her health as good and stated that she was not taking any medications.

On October 23, 1985, the applicant was diagnosed with an adjustment reaction with mixed emotion features and suicidal ideation. The medical note stated that the applicant had problems with her work schedule and stated that she could not handle the 24-hour duty and that she was afraid of the boats and water. The medical note also indicated that the applicant had taken four Halcion pills. The doctor recommended that

the applicant be hospitalized and that she be evaluated for continuation in the Coast Guard.

On October 25, 1985, the applicant was admitted to an Air Force military hospital for evaluation of an overdose of Halcion. In the admission summary, the evaluation noted that the applicant had stated to the referring physician that she was afraid of boats and water, but that her CO stated that the applicant's record showed adequate job performance. The summary stated that the applicant denied suicidal ideation when she took the four Halcion pills in one evening. The summary further stated that the applicant did not relate any affective disorders, psychotic disorders, or substance abuse disorders.

On October 30, 1985, a Certificate of Psychiatric Evaluation was prepared. The report stated that the applicant had encountered job difficulties for the six months of active duty and that she was completely dissatisfied with the description of her job duties and her inability to be able to be trained into aviational electronics. (Apparently this is what she did in the Army. She was unable to train in this area in the Coast Guard because she did not score high enough on the pertinent tests.) The physician stated that from the very first the applicant let it be known that she wanted out of the Coast Guard and that she would not perform in any meaningful way for the Coast Guard in the future. With respect to her mental evaluation, he wrote the following:

> There was no evidence of any signs of depression on mental status evaluation, mood was not depressed, affect showed a normal range and modulation becoming tearful only when presented with the possibility that her discharge might not be as timely as she wished. There were no neurovegetative signs sufficient to warrant DSM-III diagnosis of depression. At the same time, she seems to have relatively realistic goals for herself and plans for the future. It is the undersigned's opinion that she has been so explicit in her statement about her unwillingness to perform for the Coast Guard that keeping her within the service would probably not be in the best interest of the patient or the Unites States Coast Guard.

The psychiatrist diagnosed the applicant as having an immature atypical personality disorder. He also diagnosed that she had the following psychological stressors: chronic job performance difficulties, difficulty with job supervisor, and an impending separation from her fiancé. The psychiatrist found that the applicant suffered from no mental disease or defect and that she was mentally responsible for her behavior and possessed the mental capacity to understand and cooperate intelligently as a respondent in any administrative proceeding. However, he stated that she was temperamentally and emotionally unsuited for continued service in the United States

Coast Guard. Therefore, he recommended her prompt administrative separation from the Coast Guard.

The applicant was advised by her commanding officer (CO) that the CO had initiated action to discharge her from the Coast Guard due to a personality disorder. The applicant was advised that she could write a statement in her own behalf. The applicant acknowledged notification of the proposed discharge and indicated that she would make a statement. On November 18, 1985, the applicant submitted a statement asking to be discharged. She stated, "I desperately need to be discharged from the Coat Guard as soon as possible."

On November 15, 1985, the applicant's CO asked the Commandant for permission to discharge the applicant by reason of personality disorder. He stated that the applicant had had problems adjusting to her assignment since reporting on May 20, 1985, and that she had complained frequently about the menial tasks she was required to perform as a seaman. He further stated the following:

> [The applicant] volunteered for and received a quota for EMT training which she dropped out of after a few classes. She stated a desire to mutual to ATC Mobile, only to change her mind after the OIC had set it up. She made unsubstantiated charges that the woman petty officer of the section worked her too hard. She consistently reacted to criticism, regardless of delivery, with tears and emotional outpourings. She refused to go on a SAR [search and rescue] mission until after the OIC intervened. She was counseled on numerous occasions by supervisors, the XPO, and the OIC on career enhancement, performance, and attitude to no avail.

The CO noted that the applicant had been admitted and discharged from an Air Force hospital. Upon reporting to her unit after being discharged from the hospital, the CO stated that the applicant told her OIC that she was contemplating suicide, after which she was returned to the hospital where she remained until her discharge.

On November 25, 1985, the applicant signed an administrative remarks (page 7) page acknowledging that she could consult with an attorney regarding the implication of her possible discharge. By her signature, she stated that she did not wish to speak with an attorney.

On December 13, 1985, the Commandant approved the request to discharge her from the Coast Guard by reason of unsuitability with a JMB separation code.

On January 13, 1986, the applicant underwent a separation medical examination, where her personality disorder was noted, but she was found fit for separation.

On January 14, 1986, the applicant signed a statement indicating that she agreed with the findings of the physical examination given to her on January 13, 1986, and did not desire to submit a statement in rebuttal.

The applicant was discharged on January 15, 1986.

Department of Veterans Affairs (DVA) Records

On January 21, 1994, approximately eight years after her discharge from the Coast Guard, the applicant filed a claim with the DVA for disability compensation. The DVA ordered a mental examination, which diagnosed the applicant as having a bi-polar disorder and compulsive/obsessive traits. The psychiatric report indicated that the applicant had transferred from the Army to the Coast Guard because she had been raped while in the Army. According the report, the applicant had done well in the Coast Guard until she was ordered to attend an Emergency Medical Technician School for law enforcement and search and rescue. The report stated that the applicant did not want to attend the course because the sight of suffering, blood, and pain repulsed her, but her commander ordered her to attend the school. The report further stated:

> While attending this school, she was called out one night in July 1986 to a boating accident where a boater who had gotten quite drunk, rammed his motor board against the dock and incurred very severe head injuries and quite possibly a neck dislocation. She came on the scene and did what she could to help the man, even though she was very upset by the sight of much trauma -- the man's nose had been pushed deeply into his skull and he was not only bleeding from the nose but spinal fluid also was dripping from his nose and he was very badly hurt and died in the hospital. This troubled her a great deal. In addition, for some unknown reason, the local paper, the News Herald of Panama City, Florida, came out with a kind of editorial saying that the Coast Guard technicians were very poorly trained and that the technician who took care of this boating accident was in a way responsible for boater's death. This troubled the veteran a great deal, adding to her concern about the actual accident and the effect on her. From then on, she began to have an alternating mood disorder.

On July 11, 1994, the DVA denied the applicant's claim stating that a personality disorder is not a disability for which compensation can be granted. With respect to the applicant's diagnosed bi-polar disorder, the DVA stated that "There are no medical findings to establish that the currently diagnosed bipolar disorder was incurred in service or manifested to a degree of 10% within the year after discharge."

In August 2000, the applicant requested that the DVA reopen her claim and consider granting her a service-connected disability for PTSD based on the boating

incident, which took place on July 21, 1985.[1] On April 21, 2001, the DVA granted the applicant a 10% disability rating for PTSD dating back to August 21, 2000. The rating decision stated that a 10% evaluation is granted whenever there is occupational and social impairment due to mild or transient symptoms that decrease work efficiency and ability to perform occupational tasks only during periods of significant stress or when symptoms are controlled by continuous medication.

The applicant appealed the 2001 disability rating, and on May 13, 2002, the DVA increased the applicant's disability rating to 50%. On December 20, 2002, the applicant's disability rating was increased to 70% but she was granted 100% entitlement because she was unable to work due to her disabilities.

VIEWS OF THE COAST GUARD

On January 12, 2005, the Board received an advisory opinion from the Office of the Judge Advocate General (JAG). He recommended that the applicant's request for relief be denied because it was untimely and for lack of proof of error or injustice.

The JAG argued that the applicant has failed to show by a preponderance of the evidence why it is in the interest of justice to excuse her eighteen-year delay in filing an application with the Board within three years of her discharge from the Coast Guard. He stated that absent strong evidence to the contrary, it is presumed that Coast Guard officials carried out their duties lawfully, correctly, and in good faith. Arens v. United States, 969 F. 2d 1034, 1037 (D.C. Cir. 1990). He stated that the applicant has failed to meet her burden of proving error. He argued that the record actually shows that the Coast Guard acted properly and in accordance with established procedures in discharging the applicant as it did.

The JAG argued that the only evidence submitted by the applicant to support her allegation that the Coast Guard committed an error in evaluating her condition is the 2001 DVA rating granting her a service connected disability for PTSD. The JAG noted that the DVA findings regarding the applicant's disabilities have no bearing or legal effect on the Coast Guard's medical findings. In this regard, the JAG stated that the DVA determines to what extent a veteran's civilian earning capacity has been reduced as a result of physical disabilities. In contrast, the Coast Guard determines if a member is unfit to perform her military duties and then rates the extent the unfitting medical condition prevents the member from performing her duties. He further stated as follows:

> The procedures and presumptions applicable to the DVA evaluation process are fundamentally different from, and more favorable to the

[1] There is no documentation of this event in the military record.

> veteran than, those applied under the PDES (Coast Guard's Physical Disability Evaluation System). The DVA is not limited to the time of Applicant's discharge. If a service-connected condition later becomes disabling, the DVA may award compensation on that basis. The DVA's finding that the applicant is currently severely disabled is not relevant to the Coast Guard's finding that she was not disabled at the time of her discharge from the Coast Guard in 1986. The sole standard for a disability determination in the Coast Guard is unfitness to perform duty . . . In any event any long-term diminution in the Applicant's earning capacity attributable to his military service is properly a matter of the DVA, not the Coast Guard or the BCMR.

The JAG attached comments from the Commander, Coast Guard Personnel Command (CGPC) as Enclosure (1) to the advisory opinion. CGPC stated that the applicant's diagnosed personality disorder is not a basis for a physical disability separation, but may be a basis for an administrative separation. CGPC stated that there was no basis at the time of the applicant's discharge for a medical separation, and there was no information of the alleged attempted rape or sexual harassment prior to or immediately afterward her discharge. He noted that prior to 1994 the applicant made no mention of any traumatic experiences in the Coast Guard. CGPC stated that contrary to the applicant's assertion that her traumatic state prevented her from obtaining sustainable employment, the DVA record contains information suggesting the applicant "worked as a receptionist at a fashion design company for three years" after her discharge. The DVA record also contains information that the applicant stated that she stopped working when she got married in 1992.

CGPC stated that no evidence exists to suggest that the applicant's condition warranted introduction into the physical disability evaluation system at the time of her separation. He asserted that she received the proper psychological attention and completed an additional separation physical evaluation to confirm her physical qualification for separation. He also stated that the applicant stated that she did not wish to consult an attorney about her pending discharge, and the only statement she offered was "I desperately need to be discharged from the Coast Guard as soon as possible."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On February 2, 2005, the BCMR received the applicant's reply to the views of the Coast Guard. She disagreed with the comments in the advisory opinion. The applicant denied that she ever volunteered for EMT training or that she worked for three years at a fashion design company. She stated that she only worked at the design company for seven months. She stated that due to the worsening of her PTSD symptoms, she had to stop working as a stripper when she became married. She also stated that the

increasing severity of the PTSD symptoms led to the failure of her marriage. The applicant stated that she did not share the truth about her alleged rape and sexual harassment because she was intimidated and ashamed.

With respect to the untimeliness of her application, she stated that the injustice occurred in 1986, but she did not realize that she had suffered an injustice until 2004 while being interviewed at the DVA. She stated that the 1986 date on her application for discovery of the alleged error in her record is a mistake. She stated that due to the trauma, intimidation, and shame she did not know what her rights were before her discharge.

APPLICABLE LAW

Disability Statutes

Title 10 U.S.C. § 1201 provides that a member who is found to be "unfit to perform the duties of the member's office, grade, rank, or rating because of physical disability incurred while entitled to basic pay" may be retired if the disability is (1) permanent and stable, (2) not a result of misconduct, and (3) for members with less than 20 years of service, "at least 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs at the time of the determination." Title 10 U.S.C. § 1203 provides that such a member whose disability is rated at only 10 or 20 percent under the VASRD shall be discharged with severance pay. Title 10 U.S.C. § 1214 states that "[n]o member of the armed forces may be retired or separated for physical disability without a full and fair hearing if he demands it."

Physical Disability Evaluation System (PDES) Manual (COMDTINST M1850.2C)

Article 2.C.2a. states that the sole standard in making determinations of physical disability as a basis for retirement or separation shall be unfitness to perform the duties of office, grade, rank or rating because of disease or injury incurred or aggravated through military service. Each case is to be considered by relating the nature and degree of physical disability of the evaluee concerned to the requirements and duties that a member may reasonably be expected to perform in his or her office, grade, rank or rating.

Article 2.C.2.i states in pertinent part that although "a member may have physical impairment ratable in accordance with the VASRD, such impairments do not necessarily render him or her unfit for military duty."

Personnel Manual (COMDTINST M1000.6A)

Article 12.B.16 of the Personnel Manual lists unsuitability (personality disorder) as a basis discharge.

Medical Manual (COMDTINST M6000.1B)

Chapter 5.B.2. lists the following as personality disorders: Paranoid, Schizoid, Schizotypal, Obsessive Compulsive, Histrionic, Dependent, Antisocial, Narcissistic, Avoidant, Borderline, and Personality disorder NOS (includes Passive-aggressive).

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's military record and submissions, the Coast Guard's submissions, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code.

2. The application was not timely. To be timely, an application for correction of a military record must be submitted within three years after the applicant discovered or should have discovered the alleged error or injustice. See 33 CFR 52.22. This application was submitted approximately fifteen years beyond the statute of limitations.

3. The Board may still consider the application on the merits, however, if it finds it is in the interest of justice to do so. The interest of justice is determined by taking into consideration the reasons for and the length of the delay and the likelihood of success on the merits of the claim. See Dickson v. Secretary of Defense, 68 F.3d 1396, 1405 (D.C. Cir. 1995); Allen v. Card, 799 F. Supp. 158, 164 (D.D.C. 1992). The applicant claimed that she did not discover the alleged error until 2004. However, she should have discovered it at the time of her discharge. The applicant knew that she was being discharged due to a personality disorder. She received notification of the discharge, wrote a statement in her own behalf, and waived her right to speak with an attorney. Although she currently states that because of the trauma, intimidation, and shame she allegedly suffered in the Coast Guard, she was not aware of any of her rights, the psychiatrist wrote in late 1985 that she did not have a mental illness and that she was mentally responsible for her behavior and possessed sufficient mental capacity to understand and cooperate intelligently in any administrative proceeding. In addition, eight years had elapsed between the applicant's discharge and her first DVA examination in 1994 in which she was diagnosed with a bi-polar disorder Even though she was diagnosed with the mental disorder in 1994, the medical examination did not state that she was mentally incompetent to handle her own affairs then or in 1986. The applicant's reason for not filing her application sooner is not persuasive.

4. With respect to the merits of the case, the Board finds that the applicant is not likely to prevail on them. The applicant has submitted insufficient evidence to prove that the Coast Guard committed an error or injustice by discharging her due to a personality disorder rather than due to a physical disability. The applicant was diagnosed as suffering from a personality disorder in late 1985 and made no mention of any traumatic events suffered in the Coast Guard or the Army at or prior to that time. She stated on her discharge examination form that she was in good health and taking no medications. Moreover, when given the opportunity to write a statement about her discharge, she made it known that she wanted to be discharged as soon as possible. The psychiatrist who diagnosed the applicant's personality disorder stated that he found no evidence of "mental defect, emotional illness or psychiatric disorder." The Board is satisfied that at the time of her discharge, the applicant did not suffer from a mental disability.

5. In addition, Article 2.C.2.b. of the PDES Manual states, "The law that provides for disability . . . separation . . . is designed to compensate a member whose military service is terminated due to a physical disability that has rendered him or her unfit for continued duty." Article 2.C.2.a. states that the sole standard in making determinations of physical disability as a basis for retirement or separation shall be unfitness to perform the duties of one's rank or rating. The applicant has not presented persuasive evidence that she was unfit to perform her duties at the time of her discharge due to a physical disability. The 2001 diagnosis for PTSD is not proof that she was unfit for duty in 1986. Her PTSD symptoms could have begun during the fifteen years that elapsed between her discharge and PTSD diagnosis. The Board notes that the DVA did not diagnose the applicant with PTSD until 2001 and made the rating retroactive only to August 2000, not to 1986.

6. The applicant asserted that a rape in while in the Army, sexual harassment while in the Coast Guard, and witnessing and failing to save a fatally ill individual while in the Coast Guard caused her PTSD. Even assuming she was exposed to these events, she still has not established that she actually suffered from PTSD while she was on active duty. The 1985 psychiatric examination was contemporaneous with the applicant's discharge and is much more reliable as to the applicant's mental state at that time. It revealed that the applicant did not suffer from any mental disease or defect, but suffered from an atypical personality, which is not a physical disability under Article 2.A.7. of the Physical Disability Evaluations System Manual.

7. Moreover, the applicant noted on her discharge medical examination that she was in good health and taking no medications. On January 14, 1986, the applicant signed an entry stating that she agreed with the findings of the physical examination given to her on January 13, 1986, and did not desire to make a statement in rebuttal. The Board is persuaded by the October 31, 1985, psychiatric evaluation that the applicant understood her actions at the time she executed these documents

8. Neither the applicant's 1994 DVA bi-polar diagnosis nor the 2001 PTSD diagnosis proves that the Coast Guard's 1985 diagnosis that the applicant did not have a mental disease or defect to be in error. In Lord v. United States, 2 Cl. Ct. 749, 754 (1983), the Court of Federal Claims recognized the differences between the DVA and the Armed Forces disability systems. The Court stated, "The Veterans Administration determines to what extent a veteran's earning capacity has been reduced as a result of specific injuries or combination of injuries. [Citation omitted.] The Armed Forces, on the other hand, determine to what extent a member has been rendered unfit to perform the duties of his office, grade, rank, or rating because of a physical disability. [Citation omitted.] Accordingly, Veterans' Administration ratings are not determinative of issues involved in military disability retirement cases." Since the applicant's PTSD symptoms were manifested well after her discharge from the Coast Guard, the matter should be handled by the DVA.

9. The applicant received all due process to which she was entitled under the Coast Guard Personnel Manual and has failed to prove that the Coast Guard committed an error or injustice in her case.

10. Her allegation that she was the victim of medical malpractice is unsubstantiated.

11. Accordingly, due to the length of the delay, the unpersuasive reason for not filing her application sooner, and the probable lack of success on the merits of her claim, the Board finds that it is not in the interest of justice to waive the statute of limitations in this case, and it should be denied because it is untimely.

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

ORDER

The application of _____ USCG, for correction of her military record is denied.

Quang D. Nguyen

Dorothy J. Ulmer

Eric J. Young