

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2005-025

XXXXXXXXXXXXXXXXXXXXX
Xxx xx xxxx, SN/E-3 (former)

Author: Hale, D.

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 November 18, 2004, upon the BCMR's receipt of the applicant's completed application for correction.

This final decision, dated August 11, 2005, 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, a former seaman (SN; pay grade E-3) who served four years in the Coast Guard, asked the Board to correct his military record to show that on January 1, 1976, he received a disability discharge based upon a diagnosis of narcolepsy.¹ The applicant alleged that he should have been granted a disability discharge because he suffered from narcolepsy and that the Coast Guard failed to properly diagnose his illness. Instead, he was honorably discharged at the expiration of his enlistment with no disability benefits.

In support of his allegations, the applicant submitted a letter from Mr. P, one of his former commanding officers. Mr. P stated that he was the applicant's commanding officer from April 1972 through December 1974, and that he can "state positively that [the applicant] had Narcolepsy while he was on active duty with the Coast Guard." Mr.

¹ Narcolepsy is "recurrent, uncontrollable, brief episodes of sleep." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, 29TH ED. (2000), p. 1178.

P further alleged that the applicant routinely fell asleep at the "drop of a dime" and that he was written up for falling asleep on watch. Mr. P also alleged that if the applicant had been diagnosed with narcolepsy, then he would have been medically discharged from the Coast Guard.

SUMMARY OF THE RECORD

On January 3, 1972, the applicant underwent a physical examination for the purpose of enlistment into the Coast Guard. At the time of the examination he indicated that he was in good health and did not have any preexisting medical conditions. The examining physician found the applicant to be fit for recruit training. On January 14, 1972, the applicant enlisted in the Coast Guard for a term of four years.

On May 3, 1972, the applicant made his first of many visits to the Army Hospital at Fort Leavenworth, Kansas, with complaints of falling asleep and "pains in head." During the first visit, the applicant stated that his sleeping problem had existed for about one year. He told his doctors that his sleeping problems had begun "about a year ago" which indicates that the problem existed prior to his enlistment. He returned to the hospital several times in the following weeks with the same complaints, and during another visit to the hospital in early May, his record indicates that narcolepsy was a suspected cause of his sleepiness. Following more episodes of falling asleep and general lethargy, the applicant once again reported to the clinic on May 18, 1972. During the examination, the healthcare provider noted in the applicant's record that the applicant was "still falling asleep in chair" and indicated that he suspected narcolepsy as the cause of the applicant's sleeping problem and lethargy. Shortly thereafter, the applicant was referred for a neurology consult and an EEG.² The applicant was seen by a neurologist and had an EEG on June 26, 1972. The consult failed to reveal any problems and the EEG was normal.

On August 22, 1975, the applicant underwent a physical examination in anticipation of his release from active duty (RELAD). On the Report of Medical History form he completed prior to the physical, he placed a checkmark in the block that asked if he had ever had "frequent trouble sleeping." The examining physician noted that the applicant met the physical standards for RELAD and had no disqualifying defects.

On September 5, 1975, a reenlistment interview was conducted and the applicant stated that he did not want to remain in the Coast Guard. He was informed that he was not recommended for reenlistment due to his "inability to advance to a petty officer rating." On September 9, 1975, the applicant acknowledged that he had been advised of the reenlistment recommendation and that he had 15 days to appeal the action. There is nothing in the record to indicate that he appealed the action.

² An EEG (electroencephalogram) is "a recording of the potentials of the skull generated by currents emanating spontaneously from nerve cells in the brain." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, 29TH ED. (2000), p. 574.

On January 13, 1976, the applicant was honorably discharged from the Coast Guard. His discharge form (DD 214) indicates that he was discharged at the end of his enlistment with a separation code of JBK (completion of active required service) and a reenlistment code of RE-4 (ineligible to reenlist). The record also indicates he was not recommended for reenlistment because of his inability to be advanced to a petty officer rating and that he failed to complete certain service schools.

In 1985, the applicant applied to the Department of Veterans Affairs (DVA) for disability benefits, claiming that he had suffered from narcolepsy while on active duty with the Coast Guard. The DVA denied the applicant's claim on August 21, 1985, noting that the "evidence shows that the [applicant's] sleeping sickness existed prior to entry on active duty. This condition is not shown to have been aggravated incident to military service." For the next nine years, the applicant made numerous appeals of the DVA's decision and submitted several letters from physicians who had recently diagnosed him with narcolepsy. None of the documents submitted by the applicant state that his narcolepsy was connected to his Coast Guard service.

On June 16, 1994, the Social Security Administration determined that the applicant was disabled and unable to perform "significant work" as of March 8, 1991. The record does not state whether the applicant was awarded payments for his claimed disability.

The applicant's record contains a letter from the DVA dated July 26, 1996, which indicates that the DVA did in fact award the applicant disability compensation. The letter states that the DVA initially rated him as having a 20% disability due to narcolepsy, but that it had increased to 80%. The letter states that his entitlement to individual unemployability was granted effective July 17, 1993.

BCMR records indicate that the applicant submitted an application to the BCMR in 1988 wherein he sought to have his RE-4 reenlistment code upgraded to an RE-1 (eligible for reenlistment). That application was denied because it was filed nearly 13 years after he was discharged.

VIEWS OF THE COAST GUARD

On March 30, 2005, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he adopted the findings of the Coast Guard Personnel Command (CGPC) and recommended that the Board deny the applicant's request.

The JAG argued that relief should be denied because the applicant was never diagnosed with narcolepsy while he was in the Coast Guard. The JAG noted that the applicant was evaluated for narcolepsy but that "qualified medical personnel decided

that he did not warrant that diagnosis at the time.” The JAG further noted that despite the letter submitted by the applicant’s commanding officer attesting to the applicant’s narcolepsy, the “opinion of qualified medical personnel should be taken over that of the ... commanding officer.” The JAG also stated that the applicant’s medical record contains admissions by the applicant that he had a sleeping problem prior to enlisting in the Coast Guard. Finally, the JAG noted that the DVA evaluated all of the evidence submitted by the applicant and determined that he “was not entitled to veteran’s benefits for narcolepsy because it was a condition that existed before the applicant’s entry into military service.”

The JAG also noted that the applicant did not explain why he waited so long to seek this correction to his military record, and that he did not explain “his delay in seeking to have his record corrected until now, 29 years after his discharge and well beyond the statutory limit for application to the BCMR.” The JAG further stated that absent strong evidence to the contrary, government officials are presumed to have carried out their duties correctly, lawfully, and in good faith. *Arens v. United States*, 969 F.2d. 1034, 1037 (1992); *Sanders v. United States*, 594 F.2d. 804, 813 (Ct. Cl. 1979).

Finally, the JAG stated that even if the DVA had decided that the applicant’s narcolepsy was service connected, such a finding would still be insufficient to prove that he was entitled to a change in his discharge. The JAG added, “A DVA rating awarded to applicant is not determinative of the same issues involved in military disability cases. *Lord v. United States*, 2 Ct. Cl. 749, 754 (1983), quoted in BCMR Docket No. 33-96. The DVA determines to what extent a veteran’s earning capacity has been reduced as a result of specific injuries or combination of injuries. 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.”

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On April 6, 2005, the BCMR sent the applicant a copy of the views of the Coast Guard and invited him to respond within 30 days. No response was received.

APPLICABLE REGULATIONS

Chapter 3.I.1. of the Coast Guard Medical Manual states that certain conditions will be considered as rendering an individual unfit for retention because of physical disability. It further states “Each case must be decided upon the relevant facts and a determination of fitness or unfitness must depend upon the individual’s ability to perform the duties of his office, grade, rank or rating in such a manner as to fulfill reasonably the purpose of his employment on active duty.”

Article 12.B.6.c. of the Coast Guard Personnel Manual states that “if a member

objects to a finding of physically qualified for separation, the Standard Form 88 together with the member's written objections shall be sent immediately to Commander, (CGPC-epm-1) for review." If necessary the member may remain in service beyond the enlistment expiration.

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. An application to the Board must be filed within three years after the applicant discovers the alleged error in his record. 10 U.S.C. § 1552. The record indicates that the applicant signed and received his discharge documents in 1976. The Board finds that the applicant knew or should have known the non-disability nature of his separation in 1976. Thus, his application was untimely by more than 29 years. Moreover, the Board notes that the applicant filed an application with the BCMR in 1988 in which he sought an upgrade of his reenlistment code. Therefore, the Board finds that he was aware of the time constraints imposed upon applicants to the BCMR.

3. Pursuant to 10 U.S.C. § 1552, 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 conduct a cursory review of the merits of the case. *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

4. The applicant has submitted insufficient evidence to prove that at the time of his discharge from the Coast Guard he suffered from a physical disability (narcolepsy) that caused him to be unfit to perform his military duties, which is the basis for a separation or retirement by reason of physical disability. See 2.B.4.2. of the Physical Disability Evaluation System (PDES) Manual. A cursory review of the merits in this case reveals that the applicant was never diagnosed with narcolepsy or any other disability during his time in the Coast Guard. The record shows that immediately after his enlistment the applicant complained of falling asleep and pains in his head for which he sought treatment. Coast Guard medical personnel, including a neurologist, thoroughly evaluated him and did not find that he suffered from a medical condition. The Board finds it significant that the applicant's Coast Guard medical record shows no treatments for any sleeping complaints after August 1972; that he was found fit for separation in August 1975; and that he was discharged by reason of expiration of enlistment in January 1976.

5. The only evidence submitted by the applicant that he suffered from narcolepsy while on active duty is a letter from a former CO, which the Board finds unpersuasive because the CO offered no evidence that he had the medical training or expertise to make such a diagnosis. His further comment that the applicant routinely fell asleep and was written up for falling asleep on watch lacks sufficient detail to persuade the Board that the applicant suffered from a debilitating condition while on active duty, and it is not corroborated by any counseling entries in the applicant's performance record. In addition, the CO's letter appears to have been written well after the applicant's discharge assisting in the applicant in obtaining DVA benefits. Although narcolepsy is listed in 3.I.1. of the Coast Guard Medical Manual as a potentially disqualifying condition, the applicant has provided insufficient evidence that he suffered from narcolepsy while on active duty or that he was unable to perform the duties of his office, grade, or rank at the time of his discharge. The Coast Guard's discharge of the applicant by reason of expiration of enlistment was proper.

6. The fact that the applicant obtained a DVA rating for narcolepsy in 1993, more than sixteen years after his discharge from the Coast Guard, is not proof that he suffered from the condition while on active duty or at the time of his discharge in 1976. He certainly could have developed the condition during the intervening 16 years.

7. The Board notes that the applicant completed his four-year enlistment, stated that he did not want to reenlist, and accepted a voluntary discharge at the end of his enlistment. He was given a complete physical examination prior to his discharge, and although he noted that he had a history of "trouble sleeping," he did not object to the examining physician's determination that he was qualified for separation. If the applicant objected to the finding that he was qualified for separation, there was a process in place for him to indicate this and prepare a rebuttal for review by a higher Coast Guard authority. See Article 12.B.6.c. of the Coast Guard Personnel Manual. However, there is no evidence in the record that he attempted to avail himself of this process.

8. Accordingly, due to the length of the delay, the unpersuasive reason for not filing his application sooner, and the probably lack of success on the merits of his 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 APPEAR ON NEXT PAGE]

ORDER

The application of former SN XXXXXXXXXXXXXXXX, xxx xx xxxx, USCG, for correction of his military record is hereby denied.

Joseph L. Brinkley

James G. Parks

Kenneth Walton