DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2005-170

Xxxxxxxxxxxxxxxxx
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FINAL DECISION

AUTHOR: Andrews, J.

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed this case on September 23, 2005, upon receipt of the applicant's completed application and military records.

This final decision, dated July 13, 2006, 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 correct his record to show that he did not have petit mal seizures while serving in the Coast Guard Reserve during World War II. He alleged that he "was not aware of the diagnosis until 2004" and that "I did not then nor do I now suffer from seizures of any kind. I have been thoroughly checked by [the Department of Veterans' Affairs (DVA)] and none of them agree with the original diagnosis."

SUMMARY OF THE APPLICANT'S RECORD

On December 22, 1941, the applicant enlisted in the Coast Guard. He became a motor machinist's mate. His record shows that he served overseas and performed sea service for 1 year, 4 months, and 18 days, including "under combat conditions and enemy fire."

On June 22, 1945, while at a discharge center in Cleveland, Ohio, the applicant was admitted to a U.S. Marine Hospital for inpatient treatment. His transfer orders indicate that his diagnosis was "pending." A doctor's medical certificate indicates "Question hysteria, Question epilepsy."

On July 16, 1945, a Medical Board of Survey consisting of two doctors at the hospital issued the following report with a diagnosis of "petit mal":

> In June 1944, after being in the invasion of Guam, [the applicant] felt very nervous and began to have blurring vision for several minutes. Since that time, he has had frequent episodes of blurring or "Blanking out" of vision. Has slight headaches which accompanies these episodes. Has had no fits or convulsions. Is easily irritated and becomes upset on slight nervous tension. … [Lab results normal.]
>
> Electro-encephalogram reveals following: "9 per second alpha rhythm. Also, there appeared a few 6 per second waves. Hyperventilation produced a moderate build-up with considerable 5-6 per second moderate voltage activity and bursts of high voltage 3 per second waves some of which were suggestive of the psycho-motor type of wave. There was no evidence for a focus of abnormality. Impression: This is a very abnormal record suggesting the diagnosis of epilepsy."
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> Psychiatric consultation: "Clinical picture and brain waves suggest diagnosis of Epilepsy-petit mal type. Treat with phenobarbital and discharge from the Service."
>
> We believe this patient is suffering from Petit mal type of Epilepsy and recommend discharge from USCG.
>
> Patient has been informed of the findings of the Board and does not wish to submit a statement in rebuttal.

The Medical Board of Survey reported that the applicant had no other physical defects or conditions.

On July 23, 1945, the commanding officer (CO) of the district, based upon the report of the Board of Medical Survey, ordered that the applicant be discharged "under Authority of Article 588, Coast Guard Regulations. … The cause of discharge will be shown as being by reason of physical disability, incident to service." The applicant was prescribed phenobarbital.

On August 1, 1945, the applicant was honorably discharged by reason of physical disability. The same day, he filed a pension form for disability benefits from the Veterans Administration (VA). The applicant received a "50% pension" for "epilepsy, petit mal, due to combat."

On September 11, 1947, the applicant underwent a physical examination pursuant to the continuation of his VA pension. The applicant told the doctor that "[w]hen I overwork myself and get tired this petit mal epilepsy comes on. I had an attack the beginning of September 1947. My stomach seems to be upset for about a week after these attacks. After these attacks my sight is hazy, but I know what is going on. After

these attacks I have sleepless nights." The doctor reported that the applicant claimed to have had "about 15 such seizures since Jan[uary] of 1947." An EEG showed "diffuse cortical abnormality with high voltage 2-5 per second waves, sometimes flattopped or bifid." Following this examination, on December 7, 1947, the applicant's disability rating was reduced from 50% to 10%.

From October 22, 1948, through October 8, 1949, the applicant served in the U.S. Navy Reserve. On October 28, 1949, the applicant enlisted in the U.S. Army. On October 29, 1948, he wrote to the VA to waive his disability benefits. He stated that he had suffered no symptoms for more than a year.

In March 1951, the applicant was admitted to a hospital and discharged with a diagnosis of petit mal epilepsy. A doctor reported the following:

> While on a routine march with full field equipment, patient felt suddenly dizzy and his vision became hazy for a few seconds. He did not know exactly where he was and what he was doing. He remembered later having seen men passing by or in front of him but he had felt during the spell that their presence did not interest him at all. He also noticed a little nausea and a feeling of not being there.
>
> [Patient's history] seems significant insofar as patient has had similar episodes previously; he refers all this to a fall he did during combat on Guam. An exploding shell burst nearby or something similar happened; patient fell and fractured his nose on the right side. He was not unconscious but had a feeling of not quite being there and noticing people around him without having any interest in finding out who they were. This lasted for about one week and then cleared away completely (1944). In 1945 while driving a vehicle he had suddenly a spell of dizziness and haziness before his eyes accompanied with nausea and a feeling as if the stomach wanted to burst out of his body. He could not do anything to stop that feeling which passed within a few seconds as he thought thereafter. He reported sick and was taken to hospital where he stayed for 4 months. During his stay at hospital another of these spells occurred lasting a few seconds. He heard something about "petit mal" after an EEG was taken.
>
> In civilian life after his discharge from the Coast Guard he had two more incidents quite similar. They seemed to occur when he was working extremely hard. Then they never reoccurred until recently. …
>
> Impression: In view of history petit mal is likely to be present, perhaps on traumatic basis.

Soon thereafter, the applicant was admitted to a psychiatric hospital apparently because another doctor reported that he found "no evidence to support the suspicion of petit mal but much to support a diagnosis of character and behavior disorder," which was impeding the applicant's performance of duty. The applicant's diagnosis upon release from this hospital was "passive dependency reaction, chronic, moderate, manifested by nausea and vomiting with anxiety when confronted with stressful situations."

In May 1951, the applicant was admitted to a hospital for further neurological observation. An EEG had shown "many irregularities of frequency, form and amplitude" that were "definite abnormalities." One doctor suggested that there might be a "disorder in the left parieto-occipital region." The applicant's provisional diagnosis upon admission was "epilepsy, psychomotor, probably secondary to minimal head injury, incurred during shelling in the South Pacific during WW II, manifested by momentary black-out spells." A doctor noted that the "I would call this petit mal, except that the EEG tracing is not at all petit mal." During this hospitalization, however, serial EEGs were made and the results were "well within normal limits, no abnormalities noted." The "final diagnosis" was "no disease found."

The applicant was discharged from the Army on February 5, 1954. His only diagnosis at the time was a "weak right thumb" due to a severe laceration in 1949. He applied to the VA for a pension and received a zero percent disability rating for "epilepsy, petit mal (History of)" and a 10% disability rating for his thumb injury.

On June 29, 2004, the applicant sought an increase in his VA benefits. He reported that the condition of his thumb had worsened and that his "neurological condition [had] also worsened. This condition was associated with left shoulder and neck pain and headaches. These conditions have all worsened. I have headaches daily and the shoulder and neck pain is constant." He stated that he had been misdiagnosed with epilepsy and that the neurological problem stemmed from a fall he sustained when an artillery shell exploded. He wrote, "I never considered the impact to be an injury. However, the pain was slight and over the years grew worse. The pain has now caused my neck to make turning to the left difficult. This also increased the headache that was diagnosed as epilepsy. The effect of this pain has caused sleep apnea and nightmares. This pain has persisted for about 57 1/2 years."

On September 1, 2004, the applicant underwent a physical examination pursuant to his application for increased benefits. The applicant denied ever having seizures or symptoms of seizures. The doctor reported that the applicant "does not have any active epilepsy, diagnosis of epilepsy, or treatment for epilepsy at this time, so this condition is not present at this time."

On September 17, 2004, the applicant's disability ratings were continued as 10% for his thumb condition and 0% for epilepsy, petit mal. The applicant's left shoulder condition and neck pain were found to be "not service connected." The DVA's report notes that its review of the applicant's military medical records indicated that "there are no records concerning a shoulder or neck injury. Separation physical dated 02-03-54 is negative for any complaints associated with the shoulders, neck or headaches."

In response to the VA's denial of increased compensation, the applicant wrote the following:

> When I was diagnosed as having petit mal, I believe the doctors were inexperienced and perhaps too young to evaluate accurately. Yes, I never had seizure. However, my left shoulder was the cause of the headaches and blurred vision along with the shoulder pain. … I told [a doctor] that the injury was caused while changing ships during the invasion of Bouganville or Guam (I don't remember). … Please correct the record — I never had a seizure and headaches still persist. …

On January 25, 2005, the applicant underwent an MRI of the brain. The doctor's impression was as follows:

> 1. Moderate cerebral cortical atrophy, most pronounced along the convexities. There is mild cerebellar atrophy.
> 2. Chronic right thalamic lacune. There are mild scattered foci of chronic microangiopathic changed in the cerebral white matter, and mild pontine involvement.
> 3. No recent infarct, hemorrhage or mass lesion identified.
> 4. No evidence for hippocampal sclerosis, migration anomaly or vascular malformation.
> 5. Cervical spondylosis, with mild canal stenosis, C3 through C6.

On January 28, 2005, the applicant underwent an EEG. The results were "within normal limits" and "[n]o epileptiform potentials [were] noted."

VIEWS OF THE COAST GUARD

On February 9, 2006, the Judge Advocate General of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny the applicant's request. He based his recommendation on a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC).

CGPC stated that the application "may be denied due to its untimeliness." Should the Board waive the statute of limitations, however, CGPC argued that the applicant's request should be denied because his military medical record "supports that he did in fact suffer a form of convulsive disorder (epilepsy, petit mal seizure) at the time of his diagnosis and discharge from the Coast Guard." He noted that the applicant was informed of the diagnosis and therefore applied for and received disability benefits from the VA. CGPC noted that the applicant's Army medical records show that he was hospitalized for a similar problem in 1951 but that the diagnosis at that time was not conclusive.

CGPC stated that although the applicant may not suffer from petit mal epilepsy now, in 1945 his symptoms apparently "met the criteria for this diagnosis." CGPC argued that the apparent lack of symptoms after the applicant left the military does "not discount the original diagnosis." CGPC alleged that "an individual who has been diagnosed with epilepsy may subsequently exhibit no further characteristics of the disease." Therefore, CGPC recommended that no relief be granted.

APPLICANT'S RESPONSE TO THE COAST GUARD'S VIEWS

On February 24, 2006, the Board received the applicant's response to the advisory opinion. He stated that "the cause of [his] pain and headaches was from an injury to my left rear shoulder. That pain emigrated up [the] tendon of [his] head and caused pain which caused [him] to remain quiet and alone as much as possible."

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. 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 applicant alleged that he was unaware that he had been diagnosed with petit mal epilepsy until 2004. However, he applied for a VA pension on the basis of that diagnosis on the same day he was discharged from the Coast Guard, August 1, 1945, and discussed his "petit mal epilepsy" symptoms with a VA doctor on September 11, 1947. Therefore, the Board finds that the preponderance of the evidence shows that the applicant was aware of his diagnosis and the reason for his discharge in 1945. His application was thus untimely.

3. The Board may waive the three-year statute of limitations if it is in the interest of justice to do so. 10 U.S.C. § 1552(b). 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 and consider the reasons for the delay. *Dickson v. Sec'y of Defense*, 68 F.3d 1396 (D.D.C. 1995); *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

4. As the applicant erroneously claimed not to have known of his diagnosis until 2004, he did not provide a reason for having delayed so many years to request the correction of his record. While the applicant may have forgotten about his diagnosis in the intervening years, his Coast Guard, Army, and VA medical records show that he must have been aware of the diagnosis in the years following his discharge.

5. While serving in the Coast Guard and the Army, the applicant was hospitalized several times because he complained of sudden spells of dizziness, blurred vision, nausea, and headache. On September 11, 1947, while he was a civilian, he told a VA doctor that he had had about fifteen "attacks" since January of that year. The record indicates that these spells usually occurred when the applicant was doing something that was very physically stressful. Military doctors reported that the results of some EEGs were abnormal while the results of other EEGs were normal. In 1945, while

the applicant was serving in the Coast Guard, and in 1951, while he was in the Army, some doctors diagnosed him with petit mal epilepsy. Others apparently thought that the symptoms might be caused by an underlying psychological problem. In January 2005, approximately sixty years after his discharge from the Coast Guard and fifty years after his discharge from the Army, an EEG showed "[n]o epileptiform potentials."

6. There is a great deal of contradictory and inconclusive evidence in the applicant's military medical records. Absent evidence to the contrary, the Board must presume that government officials, including the applicant's military doctors, have carried out their duties "correctly, lawfully, and in good faith." *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979). To be entitled to relief, the applicant must submit sufficient evidence to overcome this presumption and prove the alleged error or injustice in his record by a preponderance of the evidence. 33 C.F.R. § 52.24(b). On the basis of the applicant's medical records—both old and new—the Board is unable to conclude that the doctors necessarily erred in diagnosing him with petit mal epilepsy in 1945.

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

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

Philip B. Busch

Dorothy J. Ulmer

Richard Walter