

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2007-091

**XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX**

FINAL DECISION

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 Chair docketed the application on February 16, 2007, upon receipt of a completed application, and subsequently prepared the final decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated October 25, 2007, is approved and 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 was discharged by reason of physical disability rather than by reason of unsuitability due to a personality disorder. He alleged that he suffered head trauma due to a motorcycle accident while on active duty in the Coast Guard and that he has continued to suffer from psychiatric problems since the accident. He further alleged that he was discharged from the Coast Guard with a mental disability and should have had a medical discharge.

The applicant stated that prior to the motorcycle accident he was a hardworking individual, but after the accident he was not able to cope with life and self medicated with alcohol and drugs for 18 years.

The applicant alleged that he discovered the alleged error on July 15, 1989, but was not aware until recently that his problems were due to the motorcycle accident. He argued that the Board should excuse his failure to file timely because he is an addict as a result of self medicating with alcohol and drugs.

The applicant stated that after leaving the Coast Guard, he joined the Army National Guard and there is a May 2004 entry in his medical file stating that he was fit for duty in the National Guard. There is also an entry in the applicant's medical file indicating that he had worked as a nurse for seventeen years after leaving the Coast Guard, but that he was fired for

abusing narcotics. The record indicates that in 2005 the applicant first reported to the Department of Veterans Affairs (DVA) complaining about his back. He indicated that he had fallen on some ice. In 2006, the applicant was diagnosed and treated by the DVA for diskitis¹ and osteomyelitis,² but the record indicates that the DVA did not consider these conditions to be service-connected.

BACKGROUND

Prior to enlisting in the Coast Guard the applicant had served in the United States Army and was honorably discharged in 1986. On May 18, 1987, he enlisted in the United States Coast Guard and was discharged on May 13, 1989.

Prior to his discharge from the Coast Guard, the applicant had a motorcycle accident on April 21, 1988. As a result, he suffered a closed head injury with traumatic encephalopathy and a compression fracture of the T-12 and L-1 vertebra.

On June 21, 1988, a medical board was held on the applicant. The medical board report stated that the applicant suffered some post traumatic amnesia with some memory loss of past and recent events. It reported that the applicant was discharged from the hospital on leave in an improved condition. The report also noted a follow-up evaluation in which the applicant's neurological status had improved, but a psychological evaluation still showed some amnesia. The applicant had some tenderness along the T-7 paraspinal muscles. The medical board stated that the applicant not fit for full duty, but he was fit for a period of limited duty, after which it was expected that the applicant would return to full duty. The medical Board made the following recommendations for limited duty:

[T]hat he be returned to six months limited duty, ashore, during which time he should avoid frequent bending, lifting, and physical fitness testing. He may have some difficulty remembering and this should be considered in his job description. He will be re-evaluated in neurosurgery and he will be followed by the Orthopedic Spine Clinic, Portsmouth Naval Hospital. The patient should continue phenobarbital . . . This case is referred to the reviewing authority, U.S. Coast Guard for disposition.

On September 15, 1988, the head of neurosurgery at a Naval hospital stated that the applicant's neurological examination was completely normal, but that he still showed some amnesia for the events related to the motorcycle accident. The neurosurgeon indicated that the applicant should have an EEG and neuropsychological evaluation.

On October 6, 1988, the medical board determined that the applicant was fit for full duty. The medical board referenced a SF-600 dated October 6, 1988 medical note that the applicant's

¹ Diskitis is "inflammation of a disk, particularly of an interarticular disk. *Dorland Illustrated Medical Dictionary*, 29th edition, p. 526.

² Osteomyelitis is inflammation of the bone caused by an infection. *Id.*

neuropsychological testing was normal and that he had reached pre-trauma status and ready for a return to full duty.

On October 24, 1988, the applicant underwent a medical examination for the Physical Disability Evaluation System (PDES) processing. The medical report stated that the applicant was physically qualified to perform all aspects of duties normally assigned to a SN. This report also noted that the applicant had been discharged from orthopedic and neurological care.

On October 25, 1988, the applicant signed a "Patient's Statement Regarding the Findings of the Medical Board" and expressed his desire not to rebut the medical board.

On November 10, 1988, the head of the neurology department of the military hospital where the applicant was treated after the accident wrote that the applicant had been examined that day and showed no focal findings. "His recent EEG and psychological test[s] were normal. I believe he is fit for full duty including aviation."

On December 23, 1988, the applicant was admitted to the psychiatric unit of a hospital for evaluation of severe anxiety and possible mood disorder. The narrative summary of the applicant's hospital stay stated that he was feeling frustrated, angry and anxious because he had not gotten the job he wanted and that he had begun to feel stress in dealing with the job that he had. The narrative summary also reported that the applicant was agitated and tremulous while talking to his supervisor. The summary noted that the applicant continued to be unable to recall the motorcycle accident and part of the hospitalization that resulted from that accident. The report also stated that the applicant wanted to get out of the Coast Guard and would do "whatever it [took] to get out."

During his hospitalization in the psychiatric unit, the applicant underwent a psychological evaluation. The psychologist stated although there was some evidence that the applicant had problems learning new material, it was unlikely that the applicant had any deficits significant enough to contribute to his current behavioral and emotional difficulties.

The Alcohol Rehabilitation Center also evaluated the applicant. That evaluation revealed that the applicant had significant history of alcohol abuse that was currently in remission. However, the consultation report stated that the applicant was not an appropriate candidate for inpatient military alcohol rehabilitation treatment because he was not likely to be retained in the Coast Guard. Therefore, the alcohol rehabilitation consultant recommended that the applicant follow-up with an AA group after his discharge.

The applicant was discharged from the hospital psychiatric unit with a diagnosis of an "adjustment disorder with mixed disturbance of emotions and conduct, acute, moderate, [and] in complete remission;" alcohol abuse in remission; narcissistic personality disorder with features of grandiosity, sense of entitlement and uniqueness, hypersensitivity to criticism, history of interpersonal exploitation, and little empathy towards the impact of his behavior on others; and post left subdural hematoma secondary to motor vehicle accident in April 1998. The narrative summary contained the following recommendation:

Past history and present psychiatric examination indicate the presence of a chronic character-behavior disorder. This condition reveals itself through patterns of behavior which interfere with adequate adjustment and causes conflicts with the environment. As a result, his ability to function in a military environment is significantly impaired, and it would be of benefit to both the individual and the Coast Guard that he be strongly considered for administrative separation. It is recommended that the patient make contact with an Alcoholics Anonymous Organization and attend their meetings regularly. He should also continue on his current medication of INH 300 mg per day. It is further recommended that he obtain outpatient psychotherapy with the mental health provider of his choice.

On February 16, 1989, a Central Physical Evaluation Board (CPEB)³ was convened in the applicant's case. The CPEB found that the applicant was fit for duty. Counsel was appointed to assist the applicant in arriving at a decision whether to accept the findings and recommendation of the CPEB.⁴

On February 22, 1989, the applicant's commanding officer (CO) notified the applicant that he was recommending that the applicant be discharged from the Coast Guard by reason of unsuitability due to a personality disorder. The applicant acknowledged in writing the proposed discharge and that he could make a statement on his own behalf.

On March 1, 1989, the applicant submitted a statement in response to the proposed administrative discharge. The applicant wrote that he understood his psychological diagnosis and he agreed with the recommendation for an administrative discharge. He stated that he was having difficulty coping in the Coast Guard and that he felt that an administrative discharge would be the only solution for his personality disorder. "I feel that my motorcycle accident is the main cause for my change. I feel that because of my good record in the Army and the Coast Guard prior to the accident, my change for the worse came after the situation of the accident."

On March 10, 1989, the applicant's CO recommended that the Commandant discharge the applicant by reason of unsuitability due to a personality disorder.

On March 22, 1989, the applicant, with the assistance of counsel, rebutted the findings and recommendation of the CPEB and requested reconsideration of its decision and a hearing before the Formal Physical Evaluation Board (FPEB).⁵ The applicant stated that he wanted to make the CPEB record complete and wrote that the initial medical board was conducted on June

³ The Central Physical Evaluation Board is a permanently established administrative body that evaluates on a records basis the fitness for duty of active and reserve members and the fitness for duty of members on the temporary disability retired list. See Chapter 4.A.1. of the Physical Disability Evaluation System Manual (COMDTINST M1850.2C).

⁴ It is unclear from the record who referred the applicant's case to the CPEB.

⁵ The FPEB is a fact-finding body, which holds an administrative hearing to evaluate a member's fitness for duty and to make recommendations consistent with the findings. This hearing is not an adversarial proceeding, and the implication of litigation must be avoided. See Chapter 5.A.1. of the Physical Disability Evaluation System Manual (COMDTINST M1850.2C).

21, 1988, but a disposition medical board was never convened, although a medical examination was completed on October 24, 1988, for the PDES. The applicant noted that the October 24, 1988 examination was devoid of any neurological or psychological examinations since the June 21, 1988 IMB determined that the applicant had a severe closed head injury with traumatic encephalopathy. He further noted that the applicant had been hospitalized in the psychiatric unit of a hospital and was diagnosed with an adjustment and personality disorder.

On March 21, 1989, the Commandant approved the CO's recommendation that the applicant be administratively discharged by reason of unsuitability due to a personality disorder. In a subsequent message, the Commandant approved a delay in the applicant's administrative discharge to allow for completion of the PDES process.

On April 17, 1989, the applicant's PDES counsel wrote the Physical Review Counsel on behalf of the applicant. The applicant's counsel stated that the applicant had withdrawn his request for a hearing before the FPEB, and that the applicant had been recommended for an administrative separation that was on hold pending the completion of the PDES process. The applicant's counsel stated that the applicant wanted the administrative discharge to proceed as expeditiously as possible.

On April 25, 1989, the applicant signed a letter in which he waived all PDES processing and stated that he accepted the administrative discharge from the Coast Guard.

On May 1, 1989, the Commandant approved the findings of the CPEB and stated that the applicant shall not be retired or separated by reason of physical disability.

On June 13, 1989, the applicant was discharged from the Coast Guard by reason of unsuitability due to a personality disorder.

VIEWS OF THE COAST GUARD

On July 19, 2007, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request. He based his recommendation in part on a memorandum on the case prepared by Commander, Coast Guard Personnel Command (CGPC).

CGPC stated that the applicant's request is not timely because he stated that he discovered the alleged error or injustice on July 15, 1989. CGPC stated that the applicant did not provide any justification for the delay in bringing his claim after the expiration of the Board's three-year statute of limitations.

CGPC stated that the applicant's discharge is neither erroneous nor unjust and noted that the applicant voluntarily elected not to pursue further PDES processing and was properly discharged for a long standing personality disorder. CGPC argued that evidence does not support a causal relationship between the applicant's personality disorder and his motorcycle accident of April 1988. CGPC further stated:

The CPEB found the applicant fit for duty; the applicant submitted a rebuttal and requested a [FPEB]. The applicant was represented by legal counsel and afforded all due process in his PDES processing. On April 25, 1989, the applicant withdrew his request for a FPEB and requested to be administratively discharged in lieu of any further PDES processing.

APPLICANT'S RESPONSE TO THE COAST GUARD'S VIEWS

On July 23, 2007, a copy of the views of the Coast Guard was mailed to the applicant for him to submit a reply. The mailing was returned to the BCMR with the notation "not deliverable as addressed, unable to forward." The BCMR was not able to locate the new mailing address for the applicant.

SUMMARY OF APPLICABLE LAW

Pertinent Provision of the PDES Manual (COMDTINST M1850.2C)

The PDES Manual governs the separation of members due to physical disability. Article 2.C.2.a. provides that the "sole standard" to be used 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."

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. The applicant had been discharged for approximately seventeen years before he filed this application with the Board. To be timely, an application for correction of a military record must be submitted within three years after the alleged error or injustice was discovered or should have been discovered. See 33 CFR 52.22.
3. However, the Board may still consider the application on the merits, if it finds it is in the interest of justice to do so. In *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992), the court stated that in assessing whether the interest of justice supports a waiver of the statute of limitations, the Board "should analyze both the reasons for the delay and the potential merits of the claim based on a cursory review." See also *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).
4. Although the applicant discovered the alleged error on July 15, 1989, he argued that it is in the interest of justice to waive the statute of limitations in his case because he was an addict due to self-medicating with drugs and alcohol. He stated that he is recently discovered that his problems are a result of the motorcycle accident that occurred while he was in the Coast Guard.

There is evidence in the record that the applicant abused alcohol even while in the Coast Guard, but there is no evidence in the record that the applicant's alcohol abuse or other alleged drug use was so severe that he was not aware of the basis for his discharge or that he was unable to file an application with the BCMR.

5. Even though the Board is not persuaded to waive the statute based on the applicant's reason for not filing his application within the time period allowed, the Board must still perform a cursory review of the merits in deciding whether to excuse the applicant's untimely filing. A review of the merits indicates that the applicant is not likely to prevail on his request for a change in the reason for his discharge, as discussed below.

6. First, after approximately six months on limited duty after his motorcycle accident, a medical board and the CPEB found that the applicant was fit for full duty. During the PDES process, the applicant was physically and mentally evaluated. The applicant alleged that he suffered from a mental disability at the time of discharge; however the psychologist found that he suffered only from an adjustment and a personality disorder, neither of which is considered to be a physical disability. See Article 2.A.7. of the PDES Manual.

7. Second, the applicant expressed his decision to accept an administrative discharge from the Coast Guard in writing, even though the PDES process was incomplete. In a written statement he waived all PDES processing and stated that he accepted the administrative discharge from the Coast Guard. The applicant was afforded due process and had assigned counsel for the PDES process. Therefore, the Board presumes that counsel advised the applicant about the ramifications of his decision to accept an administrative discharge from the Coast Guard due to a personality disorder rather than continuing to contest the findings of the CPEB.

8. Third, the applicant has presented no evidence, except for his own allegation that he currently suffers from a mental disability, and even if he had presented such evidence, there is no medical evidence of a causal relationship between any alleged current disability and the 1988 motorcycle accident.

9. Therefore, due to the passage of time, the lack of a persuasive reason for not filing his application in a timely manner, and the probable 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.

10. Accordingly, the Board finds that the application should be denied because it is untimely and because it lacks merit.

[ORDER AND SIGNATURES ON NEXT PAGE]

ORDER

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

Philip B. Busch

Jordan S. Fried

Eric J. Young