

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2007-107

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XXXXXXXXXXXXXXXXXXXXXXXXXXXX

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 March 8, 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 November 15, 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 misconduct due to fraudulent enlistment. He alleged that he was discharged because of a Bipolar Disorder and that he "was lied to." He stated that his career is ruined and he cannot get proper medical attention.

BACKGROUND

The applicant enlisted in the Coast Guard on January 14, 2003, for four years. On enlistment form 1966/1 the applicant indicated that he had used marijuana. On his medical enlistment form 2807 dated December 26, 2002, in addition to marijuana, the applicant stated that he had also used other drugs; on form 2807-2 he denied that he had seen a psychiatrist, psychologist, counselor or other professional for any reason and further explained that it had been over a year since he last used marijuana.

On July 11, 2003, an Initial Medical Board (IMB)¹ was convened because the applicant had been diagnosed with a Bipolar I disorder. The IMB reported the applicant's medical history as follows:

¹ An IMB is the written report of a medical board convened to evaluate a member's fitness for duty and to make recommendations consistent with the findings. Article 2.A.24. of the Physical Disability Evaluation System Manual.

According to a review of health record, systems, and social and family histories, [the applicant] has a past history of Bipolar Manic Disorder at age 17 and using illegal substances. He was hospitalized at age 17 for three days treated with Seroquel and Klonopin. He underwent psychological counseling until age 18. The patient stopped the medicine because in his own words "I did not need it." He had no trouble at college but took friend's Xanax (used PRN for stress at college). He admitted the use of cocaine, speed, acid, and ecstasy quitting at age 19. In May 2003, the member was displaying anxiety symptoms and voiced suicidal intentions. He was sent to Manatee Glens Hospital and was inpatient from 17 to 20 May 2003. The applicant was discharged on Depakote 500 mg two at bedtime and Lexapro 10 mg in the morning and referred to outpatient psychiatric care. On 31 May 2003, [Dr. S], Board Certified Psychiatry . . . evaluated the patient. [Dr. S] changed the patient's treatment to Topomax 25 mg TID, Lithium 400 mg in am and 900 mg before bed and Risperidone 1 mg twice a day. He stated that he was taking the medication and having no side effects. Also, the patient was receiving psychotherapy on weekly basis . . .

Dr. P, a psychiatrist from the Life Skills Support Center, also diagnosed the applicant as suffering from Bipolar I Disorder. Dr. P recommended that the applicant continue on Lithium and Topomax, that he have convalescent leave duty status, and that he not carry a firearm. She found that the applicant was not suitable for military duties.

The IMB agreed that the applicant suffered from Bipolar I Disorder, that he was unable to perform the duties of his rank and rate, and that he was never expected to be fit for full duty. The IMB recommended that the applicant's case be referred to the Central Physical Evaluation Board.²

On August 15, 2003, the applicant's OIC concurred that the applicant should be discharged from the Coast Guard. However, the OIC stated that the applicant's condition appeared to have pre-existed his enlistment, that he should be held accountable for any dishonesty that may have occurred during his entry application process, and that the people who processed the applicant should be thoroughly reviewed.

The OIC stated that he reviewed the applicant's record and found several indicators of possible fraudulent enlistment. The OIC noted that on his enlistment documents the applicant stated (1) that he had not consulted a mental health professional in the past seven years; (2) that he used marijuana only once since age 16 or in the past seven years; and (3) that he had not been involved in the illegal purchase, etc., of drugs. However, the IMB reported that the applicant underwent psychological counseling until age 18 and was diagnosed with Bipolar Manic

² 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).

Disorder. The IMB also noted that the applicant had used several kinds of illegal drugs since the age of 16.

The commanding officer (CO) also recommended that the applicant be discharged and assigned a reenlistment code that precludes future military service.

On October 15, 2003, Commander, Coast Guard Personnel Command (CGPC) stated that the applicant failed to indicate that he had been treated for Bipolar Manic Disorder prior to enlisting in the Coast Guard. CGPC told the applicant's OIC to advise the applicant that he was being considered for an honorable discharge by reason of misconduct due to fraudulent enlistment and to offer him the opportunity to make a statement.

The applicant was subsequently advised that CGPC was contemplating discharging him with an honorable discharge by reason of misconduct due to fraudulent enlistment. The applicant was advised that he could submit a statement in his behalf. The applicant acknowledged the proposed discharge, waived his right to make a statement, and did not object to being discharged from the Coast Guard.

On November 11, 2003, CGPC approved the applicant's discharge from the Coast Guard with an honorable discharge by reason of misconduct due to fraudulent enlistment. The applicant was discharged on December 8, 2003.

VIEWS OF THE COAST GUARD

On August 23, 2007, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request. The JAG stated that pursuant to Article 12.B.18.b.5. of the Personnel Manual, service members found to have procured enlistment through any material misrepresentation, omission, or concealment which if known at the time, might have resulted in rejection, are subject to administrative discharge by reason of fraudulent enlistment. In cases of fraudulent enlistment, members are discharged by reason of misconduct.

The JAG noted that the Coast Guard discovered the applicant's fraudulent enlistment during an IMB that reported the applicant's past history of having Bipolar Manic Disorder at age 17 for which he was hospitalized for three days and treated with psychotropic medications. The IMB also noted that the applicant had received psychological care until age 18 and that he admitted to having used cocaine, speed, and ecstasy until age 19. In contrast to the information provided to the IMB, the JAG noted that the applicant stated in his enlistment papers that he had not consulted with mental health professionals in the last 7 years and that he had only used marijuana once on February 1, 2001.

The JAG stated that the threshold question is whether it was proper to administratively separate the applicant upon discovery of fraudulent enlistment while the applicant was in the PDES process. The JAG stated that the Personnel Manual and the Physical Disability Evaluation System (PDES) Manual are clear that misconduct can suspend and cancel PDES processing as

happened in the current case. The JAG stated that both Article 2.C.11 of the PDES Manual and Article 12.B.1.e. of the Personnel Manual direct that:

Disability statutes do not preclude disciplinary or administrative separation under applicable portions of the Personnel Manual . . . If a member is being processed for a disability retirement or separation and proceedings to administratively separate the member for misconduct, disciplinary proceedings which could result in a punitive discharge of the member, or a unsuspended punitive discharge of the member is pending, final action on the disability evaluation proceedings will be suspended, and the non-disability action monitored by Commander, Coast Guard Personnel Command.

If the court martial or administrative process does not result in the execution of a punitive or an administrative discharge, the disability evaluation process will resume. If a punitive or administrative discharge is executed, the disability evaluation case will be closed and the proceedings filed in the member's official record.

Furthermore, the JAG stated that although the use of information learned during the course of mental health treatment to administratively separate a member may have a chilling effect on the Coast Guard's ability to maintain a vital and fit military organization, there are no prohibitions against the practice.

The JAG concluded that the applicant had failed to carry his burden of production and persuasion that he was not properly separated from the Coast Guard by reason of misconduct.

Attached to the advisory opinion was a memorandum from CGPC, which also recommended denial of the applicant's request for a physical disability separation, but which recommended that the Board correct the record to show that the applicant did not receive a DD Form 214 upon his discharge. In this regard, CGPC noted that Chapter 1.B. of COMDTINST M1900.4D (DD 214 Instruction) states that a "DD Form 214 will NOT be issued to members: . . . who are being separated under fraudulent enlistment criteria." However, the JAG did not recommend that such a correction be made. He noted that since a DD Form 214 is already in the record, it should remain there because the Board has no authority to correct a record in a manner adverse to the member's interests. *See Doyle v. United States*, 599 F.2d 984, 1000 (1979), *amended on other grounds* 609 F.2d 990, 220 Ct. Cl. 326, *cert. denied* 100 S. Ct. 2961, 446 U.S. 982, 64 L. Ed. 2d 837. The JAG noted that the lack of a DD Form 214 would certainly add another barrier to the applicant's effort to obtain DVA benefits, should he choose to seek them.

APPLICANT'S RESPONSE TO THE COAST GUARD'S VIEWS

On August 28, 2007, a copy of the views of the Coast Guard was mailed to the applicant for him to submit a reply. The BCMR did not receive a reply from the applicant.

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. The application was timely.

2. The applicant enlisted in the Coast Guard on January 10, 2003, and approximately six months later underwent an IMB for Bipolar I Disorder. The IMB reported that according to a review of the applicant's medical record and social and family history, he had a past history of Bipolar Manic Disorder at age 17 and had been hospitalized for the condition for three days and treated with psychotropic medications.

3. The applicant failed to report on his enlistment medical form that he had been diagnosed and treated for a Bipolar Disorder at age 17 for which he was hospitalized for three days. On enlistment form 2807-2 the applicant indicated that he had never seen a psychiatrist, psychologist, counselor, or other mental health professional for any reason. Comparing the applicant's enlistment medical form to the information contained in the IMB report, the Coast Guard determined that the applicant had enlisted fraudulently.

4. Article 12.B.18.b.5. of the Personnel Manual states that service members found to have procured enlistment through any material misrepresentation, omission, or concealment of information, which if known at the time, might have resulted in rejection, are subject to administrative discharge by reason of fraudulent enlistment due to misconduct. Bipolar disorders are listed in the Medical Manual as disqualifying for Coast Guard service. See Article 5-B-10 of the Medical Manual. In this case, the applicant had to know that he had been hospitalized and treated with medication for a bipolar disorder, but still marked on his enlistment medical form that he had never been treated by a psychiatrist, psychologist, or counselor. He gained entry to the Coast Guard by withholding this information. The Board notes that the applicant does not deny that he was diagnosed with a bipolar disorder at age 17, prior to enlisting in the Coast Guard.

5. The Coast Guard properly terminated PDES processing upon learning of the fraudulent enlistment and administratively processed the applicant for separation by reason of misconduct due to fraudulent enlistment. As the JAG stated, both Article 2.C.11 of the PDES Manual and Article 12.B.1.e. of the Personnel Manual permit the Coast Guard to suspend disability proceedings while pursuing administrative separations for misconduct or disciplinary proceedings. This provision further provides that if the administrative separation proceedings result in discharge by reason of misconduct, the PDES processing is closed and the medical board filed in the applicant's medical record.

6. In light of the above, the Coast Guard acted properly when it suspended disability proceedings in the applicant's case and administratively discharged him for misconduct due to

fraudulent enlistment. The applicant was provided with the due process required by regulation for the administrative separation proceedings.

7. The Board agrees with the JAG that since the Coast Guard has issued the applicant a DD Form 214 for his active duty time, we should not act to remove it, because to do so would cause his record to appear worse. The Board's policy is not to correct a record to make it appear worse or to cause harm to the applicant.

8. The applicant has failed to prove that the Coast Guard committed an error or injustice in this case. Accordingly, the Board finds that the application should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

Patrick B. Kernan

William R. Kraus

Kathryn Sinniger