DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2007-176

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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. The Chair docketed the case on August 15, 2007, upon receipt of the applicant's completed application, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated June 12, 2008, 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, who was discharged on May 18, 1989, for unsuitability after incurring two "alcohol incidents" asked the Board to correct his record to show that he was discharged due to a medical disability. He alleged that he was diagnosed with a mental illness while on active duty and that his abuse of alcohol was just a symptom of the mental illness. He further alleged that he has received treatment for mental illness since his discharge.

The applicant claimed that he discovered the error in his record on April 1, 2007, when he was denied health care by the Department of Veterans' Affairs (DVA) because he did not complete at least two years of his enlistment. He argued that it is in the interest of justice for the Board to waive the statute of limitations so that he can receive medical care from the DVA.

SUMMARY OF THE RECORD

On April 18, 1988, at age 19, the applicant enlisted in the Coast Guard for a term of four years. On his pre-enlistment physical examination, he denied having abused alcohol. On April 26, 1988, during recruit training, the applicant signed a CG-3307 ("Page 7") acknowledging having received "a full explanation of the drug and alcohol abuse program." On June 17, 1988, he completed recruit training and advanced from seaman recruit to fireman apprentice (FA/E-2). On July 9, 1988, he reported for duty on a cutter.

On September 9, 1988, the applicant underwent a medical evaluation because of an "alcohol incident" on September 1, 1988. The doctor noted that the applicant's "supervisors also report an alcohol problem since he reported aboard. [The applicant] also has reported being depressed over his job assignment and has been unable to get along with his supervisors." The doctor diagnosed the applicant with an "adjustment disorder with depressed mood" and with "chronic episodic alcoholism." The doctor recommended that the following treatments: Alcoholics Anonymous meetings three times per week, an alcohol awareness program, an alcohol rehabilitation program, and psychotherapy.

On September 14, 1988, the applicant was taken to captain's mast and awarded nonjudicial punishment (NJP) for being drunk, loud, and disorderly and offending passengers on the Governor's Island ferry on September 1, 1988, in violation of Article 134 of the Uniform Code of Military Justice (UCMJ).[1]

On September 14, 1988, the applicant was seen by a psychotherapist, who noted that he was feeling "mild depression" and was in alcohol rehabilitation therapy.

On October 4, 1988, the Executive Officer (XO) of the cutter entered a Page 7 in the applicant's record stating that he was "required to participate in the following alcohol monitoring program in lieu of assignment to inpatient alcohol rehabilitation program." The monitoring program included supervised use of "Antabuse" for six months, mandatory attendance at Alcoholics Anonymous meetings three times per week, and weekly progress meetings with the unit's Collateral Duty Alcohol Representative (CDAR). The applicant acknowledged the Page 7 by signature.

On February 11, 1989, the XO entered a Page 7 in the applicant's record documenting the fact that his previously mandatory use of the drug "Antabuse" was thereafter to be voluntary because of his complaints of excessive drowsiness. The Page 7 further states that the "burden for avoiding future alcohol abuse incidents remains with you. Further incidents will lead to administrative processing for separation and disciplinary actions." The applicant acknowledged the Page 7 by signature.

On February 22, 1989, the applicant was taken to captain's mast and awarded NJP for being drunk and disorderly aboard the cutter on February 18, 1989, in violation of Article 134 of the UCMJ.

On March 13, 1989, the XO entered a Page 7 in the applicant's record to document the "drunk and disorderly disturbance" for which he was taken to mast and awarded NJP on February 22, 1989. The Page 7 notes that because it was his second alcohol abuse incident, he was being processed for separation pursuant to Article 20-B-2.d. of the Personnel Manual. The applicant acknowledged the Page 7 by signature.

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[1] Under Article 134 of the UCMJ, to be guilty of drunk and disorderly conduct, the finder of fact must determine (1) that the accused was drunk, disorderly, or drunk and disorderly on board ship or in some other place; and (2) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. Manual for Courts-Martial (2008).

On March 23, 1989, the applicant's commanding officer (CO) informed the applicant in a memorandum that he was initiating the applicant's discharge in accordance with Article 20-B-2 of the Personnel Manual because of his two alcohol incidents. The CO also informed the applicant that he was entitled to submit a statement on his own behalf. The applicant acknowledged receipt of the notification and indicated that he would submit a statement on his own behalf. He submitted a statement saying, "I sincerely regret my earlier disagreements and I am serious about my career status in the Coast Guard." He also wrote that he had at first found it difficult to adapt to military life but that he wanted to stay in the Service to become a health services technician.

On April 3, 1989, the CO submitted a recommendation, which was required by Article 20-B-2 of the Personnel Manual, that the applicant be discharged because of his two alcohol abuse incidents. The CO requested that the applicant be retained on active duty despite Coast Guard policy as follows:

> 3. I request that [the applicant] be retained for further service. I am now satisfied that he fully realizes the seriousness of his situation. He wants to continue within the Coast Guard and overcome his problem with alcohol. I believe he can become a fully functioning member in good standing.
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> 4. The alcohol abuse program manager in MLC (k) has directed us to obtain an inpatient bed reservation for treatment, which will be utilized should Commandant authorize retention.
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> 5. Should he not be retained, I recommend an Honorable Discharge.

On April 12, 1989, the command of the cutter informed Headquarters that the applicant "no longer desires to remain in the Coast guard and this unit concurs with discharge." On April 18, 1989, the applicant submitted a written request to be discharged to the Commandant through his chain of command. On April 19, 1989, the Commandant approved the expedited discharge of the applicant for unsuitability with separation code JMG.

On May 10, 1989, the applicant underwent a medical examination in preparation for his discharge. He complained of feeling weak because the "ship's food upsets [his] stomach." The doctor found that he had no physical disabilities and was fit for discharge. He also recommended that the applicant attend Alcoholics Anonymous meetings or other support treatment.

On May 18, 1989, the applicant was honorably discharged from the Coast Guard for "unsuitability" with separation code JMG, which denotes alcohol abuse, and an RE-4 reenlistment code (ineligible to reenlist). He had completed one year, one month, and one day of active duty.

On January 20, 1993, the applicant underwent a psychiatric evaluation and was diagnosed with recurrent depression, alcohol dependency, and borderline personality traits. The applicant reported to the doctor that he had felt "down" since age 8 when he was molested by a brother's friend. He complained of having flashbacks and nightmares about the molestation and about his "experience in the government." He admitted to "heavy alcohol intake since age 8," smoking marijuana, and experimenting with other drugs.

Subsequent medical records show that the applicant has been diagnosed at various times with post-traumatic stress disorder (PTSD), cocaine addiction, marijuana abuse, alcohol abuse, borderline personality disorder, recurrent major depression, an unspecified psychotic disorder, and chronic homelessness. On April 30, 2002, the applicant was hospitalized after threatening suicide when he was evicted from a homeless shelter. A doctor noted that the applicant was "mildly ill" but was "manipulative—presenting symptoms in exaggerated or made-up manner." He diagnosed the applicant with a personality disorder and a "polysubstance abuse induced mood disorder."

On January 29, 2007, the applicant filed a claim with the DVA for medical benefits for depression, bipolar disorder, schizophrenia, and PTSD. He claimed that while on active duty, he suffered hazings, beatings, and torment from shipmates and officers. The DVA denied his claims, finding that while on active duty, the applicant was only treated for alcoholism that existed prior to his enlistment and for "an adjustment disorder with depressed mood due to discontentment with the ship." The DVA found insufficient evidence that the applicant's mental illness was incurred during or caused by his military service.

VIEWS OF THE COAST GUARD

On January 2, 2008, the Judge Advocate General (JAG) submitted an advisory opinion in which he recommended that the Board deny relief in this case. In so doing, he adopted the facts and analysis provided in a memorandum on the case by CGPC.

CGPC stated that the application was untimely and that the applicant had not justified his delay in seeking the requested correction. Moreover, CGPC argued that the Coast Guard committed no error or injustice in discharging the applicant since he incurred two alcohol incidents, was found medically fit for discharge, and ultimately requested to be discharged in writing. CGPC stated that there is nothing in the applicant's military medical or personnel record to support his claim that he suffered hazings, beatings, unfair treatment, or mental or physical disability while on active duty.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 7, 2008, the Chair sent a copy of the Coast Guard's advisory opinion to the applicant's address of record and invited him to respond within thirty days. When the mailing was returned by the Post Office, the BCMR staff called the applicant, who provided a new address. A copy of the advisory opinion was sent to the applicant at his new address on January 28, 2008, with another invitation to respond within thirty days. On March 5, 2008, the applicant requested a thirty-day extension of the time to respond. The extension was granted, but no response was received.

APPLICABLE REGULATIONS

Article 12-B-16.b.(5) of the Personnel Manual in effect in 1989 authorizes the discharge members for unsuitability by reason of alcohol abuse. Article 12-B-16.d. states that members

being honorably discharged for unsuitability shall be informed of the pending separation and afforded an opportunity to submit a statement.

Article 20-A-2.d. defines an "alcohol incident" as "[a]ny violation of the UCMJ, Federal, State, or local laws, or injury resulting in the member's loss of ability to perform assigned duties, in which alcohol is determined to be a significant or causative factor." Article 20-B-2.d. states that "[e]nlisted members involved in a second alcohol incident will normally be processed for separation by reason of unsuitability due to alcohol abuse under Article 12-B-16. In those cases where the commanding officer/officer in charge feels that an exceptional situation warrants consideration for retention, the enlisted member will be screened and a letter request for retention and treatment … shall be forwarded via the chain of command to Commandant …"

Chapter 5-B-4 of the Medical Manual in effect in 1989 states that members diagnosed with a substance abuse disorder should be processed for administrative separation in accordance with Article 20 of the Personnel Manual. Chapter 5-B-16 of the Medical Manual states that adjustment disorders are "generally treatable and not grounds for separation."

Article 2.C.2.a. of the Physical Disability Evaluation System (PDES) Manual in effect in 1989 states 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 while entitled to basic pay." Article 2.C.2.b. states the following:

> The law that provides for disability retirement or separation … is designed to compensate members whose military service is terminated due to a physical disability that has rendered the member unfit for continued duty. That law and this disability evaluation system are not to be misused to bestow compensation benefits on those who are voluntarily or mandatorily retiring or separating and have theretofore drawn pay and allowances, received promotions, and continued on unlimited active duty status while tolerating physical impairments that have not actually precluded Coast Guard service. The following policies apply.
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> (1) Continued performance of duty until a service member is scheduled for separation or retirement for reasons other than physical disability creates a presumption of fitness for duty. This presumption may be overcome if it is established by a preponderance of the evidence that:
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> (a) the service member, because of disability, was physically unable to perform adequately the duties of office, grade, rank or rating; or
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> (b) acute, grave illness or injury, or other deterioration of the member's physical condition occurred immediately prior to or coincident with processing for separation or retirement for reasons other than physical disability which rendered the service member unfit for further duty.
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> (2) Service members who are being processed for separation or retirement for reasons other than physical disability shall not be referred for disability evaluation unless their physical condition reasonably prompts doubt that they are fit to continue to perform the duties of their office, grade, rank or rating.

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 applicant alleged that his discharge for unsuitability was erroneous and unjust and asked the Board to correct his record to show that he was medically discharged. An application to the Board must be filed within three years after the applicant discovers the alleged error in his record.[2] The applicant was discharged in 1989, and he knew or should have known at that time that he had not been medically discharged. Therefore, although he alleged on his application that he discovered the error on April 1, 2007, the Board finds that his application was untimely.

3. Pursuant to 10 U.S.C. § 1552(b), the Board may excuse the untimeliness of an application if 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 to determine 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." The court further instructed that "the longer the delay has been and the weaker the reasons are for the delay, the more compelling the merits would need to be to justify a full review."[3]

4. The applicant did not justify his delay in applying to the Board but argued that it is in the interest of justice for the Board to waive the statute of limitations so that he can become eligible for medical benefits from the DVA. The Board finds this argument uncompelling.

5. The applicant alleged that he was mentally ill in 1989 and entitled to a medical separation. Under Article 2.C.2.a. of the PDES Manual in effect in 1989, 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 while entitled to basic pay." The record shows that the applicant was fit for duty in 1989, and his command even tried to retain him on active duty despite his alcohol incidents. The only mental conditions with which the applicant was diagnosed while on active duty were (a) chronic, episodic alcoholism, which apparently pre-existed his enlistment, and (b) an adjustment disorder with depressed mood because he disliked his job, crewmates, and supervisors in the Coast Guard. These diagnoses are presumptively correct,[4] and neither condition qualified the applicant for disability processing or a medical separation under the Medical Manual and PDES Manual. Under Chapters 5-B-4 and 5-B-16 of the Medical Manual in effect in 1989, adjustment disorders were not disqualifying medical disabilities, and members who repetitively abused alcohol were to be processed for administrative separation under Articles 20-B-2 and 12-B-16 of the Personnel Manual, *not* for medical evaluation and separation under the

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[2] 10 U.S.C. § 1552(b).
[3] *Id*. at 164-65. *See also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).
[4] 33 C.F.R. § 52.24(b).

PDES Manual. Although after his discharge the applicant apparently blamed the Coast Guard for many of his mental problems, there is no persuasive evidence in the record indicating that the applicant incurred or aggravated any mental disability, such as PTSD or bipolar disorder, during his thirteen months in the Service. The applicant has submitted insufficient evidence to overcome the presumption of regularity accorded his military records and the Coast Guard's decision to discharge him for alcohol abuse.[5] The Board also notes that the applicant received due process under Article 12-B-16 of the Personnel Manual in that he was informed of the pending discharge and given the opportunity to submit a statement on his own behalf.

6. Accordingly, because of the lack of a compelling excuse for the application's untimeliness and the apparent lack of merit in the applicant's claim, the Board finds that it is not in the interest of justice to waive the statute of limitations in this case. Therefore, the application should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

[5] Absent evidence to the contrary, the Board presumes that Coast Guard officers have performed 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); 33 C.F.R. § 52.24(b).

ORDER

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

Evan R. Franke

Robert S. Johnson

Adrian Sevier