

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2012-021

XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX

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 after receiving the applicant's completed application on November 13, 2011, 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 July 12, 2012, 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 medically discharged because of a physical disability. He alleged that he was discharged on April 8, 1996, after just seven months in the Service due to a knee injury he had incurred. In support of his allegations, the applicant submitted some of his medical records, which are included in the summary of the record below.

The applicant did not state when he discovered the alleged error in his record. However, he stated that the Board should find it in the interest of justice to consider his application because "[t]his line was never seen by myself before nor anyone else."

SUMMARY OF THE RECORD

On September 5, 1995, at age 19, the applicant enlisted in the Coast Guard. Following boot camp, he advanced to seaman apprentice (SA/E-2) and assigned to a medium endurance cutter.

On March 13, 1996, the applicant was examined by a psychologist. He told the psychologist that he had been feeling anxious and depressed since he enlisted and that he wanted to get out of the Coast Guard. He said that he was not happy and felt he could not live on the pay. He said his only medical problem was seasickness and hives whenever he was at sea. The psycholo-

gist noted that a doctor had diagnosed the applicant with an “adjustment disorder with depressive symptoms”¹ and that he concurred in that diagnosis.

On March 13, 1996, the applicant was examined by a psychiatrist, the Head of the Mental Health Department at a Naval Hospital. The applicant told him that he had no desire to serve on a ship and that he had made a mistake by enlisting. The applicant said that he needed “to get out of the Coast Guard before I hurt someone or bring damage to my ship.” The psychiatrist stated that the applicant had no symptoms of neurosis, psychosis, or organic brain disorder but had poor impulse control and a “personality disorder not otherwise specified.”² The psychiatrist strongly recommended that the applicant be discharged “as soon as possible” because “one cannot expect his behavior to improve.”

Also on March 13, 1996, the applicant’s commanding officer (CO) notified him that he was initiating the applicant’s honorable discharge due to his diagnosed personality disorder. He advised the applicant that he had a right to disagree with the recommendation for discharge and to submit a statement about the recommendation. On the same day, the applicant acknowledged the notification and stated that he did not object to being discharged, that he was fully aware of the process and terms of his discharge, and that he felt the proposed discharge would be in his and the Coast Guard’s best interests.

Also on March 13, 1996, the CO asked the Personnel Command to issue discharge orders for the applicant because of his unsuitability due to a personality disorder. The CO noted the following about the applicant:

3. On 07 MAR 96 just two hours prior to [the cutter] getting underway [the applicant] refused to put on the uniform of the day and said he was not going to go on patrol. He said he wanted out of the Coast Guard as soon as possible and he did not want to stand his watches or have anything more to do with the ship. After consultation with the Executive Officer it was clear that [the applicant] could not be trusted to stand alert watches and would require close supervision. He was assigned messcooking duties. While he has been performing the duties as assigned adequately, it is evident that he has no desire to improve his attitude and performance to the point where he can be trusted as a watchstander or member of the boat launching detail, or any other duty where a sense of responsibility for others is required for the safe conduct of an evolution.
4. It was [due to the applicant’s] attitude, mood swings, and the fact that he kept to himself, and his lack of enthusiasm that we considered it prudent to have him medically evaluated. We have, in roughly four months he has been assigned, tried many leadership techniques and several people

¹ An “adjustment disorder” is a psychological response to an identifiable stressor that results in the development of emotional or behavioral symptoms. Adjustment disorders are normally temporary and disappear when the stressors disappear. Adjustment disorders are not personality disorders. American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION, TEXT REVISION (2000) (DSM-IV-TR), p. 679.

² A “personality disorder” is “an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual’s culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment.” DSM_IV-TR, at 685. “The diagnosis of Personality Disorders requires an evaluation of the individual’s long-term patterns of functioning The personality traits that define these disorders must also be distinguished from characteristics that emerge in response to specific situational stressors or more transient mental states The clinician should assess the stability of personality traits over time and across different situations.” *Id.* at 686. The Coast Guard relies on the DSM when diagnosing members with psychological conditions. See Coast Guard Medical Manual (COMDTINST M6000.1B), Chap. 5.B.1.

have counseled him. I do not believe that his attitude or performance will improve. More than this, the longer he is aboard the more likely he will become a significant discipline problem.

The applicant continued to serve in the mess on the ship while his discharge was pending. On March 19, 1996, he complained that he had fallen and injured his right knee. He was placed on "sick in quarters" status for 24 hours and restricted to light duty (no sea duty) until March 25, 1996, pending an orthopedic evaluation. The doctor gave him a brace and noted that he suspected a lateral meniscal tear. On March 21, 1996, the doctor noted that the applicant still complained of pain and that tests were needed to determine whether he had torn his ACL or meniscus. The doctor returned him to sick in quarters status.

On March 25, 1996, the applicant consulted an orthopedist at a Naval Hospital. He was diagnosed with a probable tear of the lateral meniscus in his right knee. He was given crutches and continued on light duty.

On March 29, 1996, the applicant underwent a physical examination pursuant to his pending discharge. The doctor found him fit for discharge but noted that he had a "probable lateral meniscal tear." The doctor wrote that the applicant was being administratively discharged due to a personality order and "elects to follow up knee injury w/ VA." The applicant signed a form agreeing with the doctor's findings.

On April 2, 1996, the Personnel Command ordered the applicant's CO to discharge him with an honorable discharge due to personality disorder with the JFX separation code.

On April 8, 1996, the applicant signed several Page 7s with information about his separation and also the following statement for his record:

My medical condition has been explained to me in addition to my benefits through the Military System and the VA System. I voluntarily waive my right to seek medical help through the Military System and I elected to seek medical help through the VA System.

The applicant was honorably discharged on April 8, 1996. His discharge form DD 214 shows that he was discharged due to "Personality Disorder," denoted by a JFX separation code, and was not eligible to reenlist, denoted by an RE-4 reenlistment code.

In 2011, the applicant filed a disability claim with the Department of Veterans' Affairs (DVA) for a back condition and a left knee condition. The DVA examiner found his left knee to be normal, and the applicant denied ever having injured his right knee. The DVA denied the applicant's claim for disability benefits, finding that his conditions were not service-connected.

VIEWS OF THE COAST GUARD

On February 24, 2012, the Judge Advocate General (JAG) submitted an advisory opinion in which he recommended that the application be denied due to its untimeliness but stated that the Coast Guard would not object to partial relief being granted based on the recommendation in a memorandum on the case prepared by the Coast Guard Personnel Service Center (PSC).

PSC stated that the applicant was properly discharged for “Personality Disorder” after he was diagnosed with one in March 1996. PSC stated that although the applicant apparently injured his right knee while his administrative discharge was pending, it was not a condition that would have entitled him to a medical discharge and disability benefits. Moreover, PSC pointed out, the applicant was advised by his doctor that he could remain on active duty to receive military medical care for his right knee and voluntarily chose, instead, to be administratively discharged and receive medical care for his right knee from the DVA, if necessary.

PSC argued that the applicant was not entitled to a medical discharge because under Chapter 2.C.2.b. of the Medical Manual, “The law that provides for disability retirement or separation (10 U.S.C. 61) is designed to compensate a member whose military service is terminated due to a physical disability that has rendered him or her unfit for continued duty,” but the applicant was not diagnosed with any condition that rendered him unfit for duty. PSC noted that the applicant could have remained on active duty to receive treatment for his right knee but opted to be discharged instead.

However, PSC recommended that the Board grant partial relief by issuing him a DD 215 to change the reason for his discharge from “Personality Disorder” (JFX) to “Adjustment Disorder” (JFY) and to upgrade his reenlistment code from RE-4 to RE-3G (eligible to reenlist with a waiver) for the following reasons:

[T]he record including the mental health consult report all show that the member had difficulty adjusting to life in the Service. According to [ALCOAST 252/09], when a member is unable to adapt to military life, the FY series of separation codes was created with the narrative reason adjustment disorder. In the applicant’s case, a separation code of JFY with reentry code of RE-3G would be most appropriate and more favorable under today’s policy and should be applied as his record suggests adjustment disorder as a more accurate assessment rather than personality disorder.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On February 28, 2012, the Chair sent a copy of the views of the Coast Guard to the applicant and invited him to respond in writing within 30 days. No response was received.

APPLICABLE REGULATIONS

Article 12.B.16. of the Coast Guard Personnel Manual in effect in 1996 authorizes enlisted personnel to be administratively discharged for unsuitability due to a diagnosed personality disorders.

Chapter 5.B.2 of the Medical Manual lists the personality disorders that qualify a member for administrative discharge pursuant to Article 12.b.16. of the Personnel Manual. Adjustment disorders are listed in Chapter 5.B.3 of the Medical Manual, which states that they “are generally treatable and not usually grounds for separation. However, when these conditions persist or treatment is likely to be prolonged or non-curative (e.g. inability to adjust to military life ...) process in accordance with [Article 12 of the Personnel Manual] is necessary.”

Chapter 3.B.6. of the Medical Manual provides that “[w]hen a member has an impairment (in accordance with section 3-F of this Manual) an Initial Medical Board [IMB] shall be convened only if the conditions listed in paragraph 2-C-2.(b) [of the PDES Manual] are also met. Otherwise the member is suitable for separation.”

Chapter 3.F.12.b.(3) of the Medical Manual provides that an “internal derangement of the knee” is unfitting for retention on active duty if there is “[r]esidual instability following remedial measures, if more than moderate; or with recurring episodes of effusion or locking, resulting in frequent incapacitation.”

The PDES Manual governs the separation of members due to physical disability. Chapter 2-C-2 of the PDES Manual states the following:

a. The sole standard 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. ...

b. The law that provides for disability retirement or separation (Chapter 61, Title 10, U.S. Code) 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.

(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:

(a) the service member, because of disability, was physically unable to perform adequately the duties of office, grade, rank or rating; or

(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.

(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.

c. If the evidence establishes that service members adequately performed the duties of their office, grade, rank or rating until the time they were referred for physical evaluation, they might be considered fit for duty even though medical evidence indicates they have impairments.

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e. An evaluatee whose manifest or latent impairment may be expected to interfere with the performance of duty in the near future may be found “unfit for continued duty” even though the member is currently physically capable of performing all assigned duties. Conversely, an evaluatee convalescing from a disease or injury which reasonably may be expected to improve so that he or she will be able to perform the duties of his or her office, grade, rank, or rating in the near future may be found “Fit for Duty.”

ALCOAST 252/09, issued on April 29, 2009, states that the Department of Defense has created new separation codes to address the situation in which a member is unsuitable for military service because of a diagnosed adjustment disorder that prevents the member from adapting to military life. The ALCOAST specifies that the new separation code JFY should be used, and the re-entry code assigned can be either RE-3G or RE-4.

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 over this matter under 10 U.S.C. § 1552(a).
2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.³
3. Under 10 U.S.C. § 1552(b), an application to the Board must be filed within three years after the applicant discovers the alleged error or injustice. The applicant in this case was administratively discharged, rather than medically discharged, more than 15 years before he filed his application. Therefore, the application is not timely.
4. 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.”⁴
5. The applicant has provided no explanation for his delay or compelling reason to excuse the untimeliness of his application.

³ See *Steen v. United States*, No. 436-74, 1977 U.S. Ct. Cl. LEXIS 585, at *21 (Dec. 7, 1977) (holding that “whether to grant such a hearing is a decision entirely within the discretion of the Board”); *Flute v. United States*, 210 Ct. Cl. 34, 40 (1976) (“The denial of a hearing before the BCMR does not *per se* deprive plaintiff of due process.”); *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

⁴ *Allen v. Card*, 799 F. Supp. 158, 164-65 (D.D.C. 1992); see *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

6. The Board's cursory review of the merits of this case shows that although the applicant alleged that he should have received a medical disability separation from the Coast Guard due to a right knee injury, he was not discharged because of a physical disability.⁵ Instead, after failing to perform his duties adequately for several months and refusing to go on patrol, he was referred to a psychologist and a psychiatrist, whom he told that he wanted to get out of the Coast Guard and could not guarantee that he would not harm someone if he was not let out. The applicant was diagnosed with both an adjustment disorder and a personality disorder and processed for an administrative separation because of the personality disorder in accordance with Article 12.B.16. of the Personnel Manual. Although there is evidence that he injured his right knee while his administrative separation was pending, he signed a statement acknowledging that he could remain on active duty to receive military treatment for the injury but chose to accept the pending discharge and seek treatment for the injury from the DVA instead. There is no evidence that his right knee injury constituted a physical disability that rendered him unfit for continued military service,⁶ which is the only permissible basis for a medical disability separation.⁷ Therefore, the Board finds that the applicant's claim for a medical disability discharge has no potential to succeed on the merits.

7. The Coast Guard stated in its advisory opinion that it would not object if the Board granted alternative relief by correcting the narrative reason for the applicant's separation from personality disorder (JFX) to adjustment disorder (JFY) and by upgrading his reenlistment code from RE-4 (ineligible) to RE-3G (eligible with a waiver) in accordance with current policy under ALCOAST 252/09. The applicant submitted no response to this suggestion. Moreover, the applicant was in fact diagnosed with and discharged for a personality disorder in 1996 and assigned an RE-4, and he has not submitted any evidence to show that the diagnosis was erroneous or that his discharge for personality disorder with the RE-4 now constitutes a manifest injustice in his record. Given the applicant's failure to make any effort in this regard and the evidence of record supporting his personality disorder discharge, the Board will not direct the Coast Guard to change the reason for discharge or reenlistment code on the applicant's DD 214.

8. Accordingly, the Board finds insufficient grounds to excuse the untimeliness of the application in the interest of justice. The application should be denied.

⁵ PDES Manual, Chap. 2.C.2.b. ("The law that provides for disability retirement or separation (Chapter 61, Title 10, U.S. Code) is designed to compensate members whose military service is terminated due to a physical disability that has rendered the member unfit for continued duty.").

⁶ Medical Manual, Chap. 3.F.12.b.(3) (providing that an "internal derangement of the knee" is unfitting for retention on active duty only if there is "[r]esidual instability following remedial measures, if more than moderate; or with recurring episodes of effusion or locking, resulting in frequent incapacitation."); PDES Manual, Chap. 2.A.38. (defining a "physical disability" and "[a]ny manifest or latent physical impairment or impairments due to disease, injury, or aggravation by service of an existing condition, regardless of the degree, that separately makes or in combination make a member unfit for continued duty." [emphasis added]).

⁷ PDES Manual, Chap. 2.C.2.a. ("The sole standard 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.")

ORDER

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

Reid Alan Cox

Jeffrey E. VanOverbeke

Darren S. Wall