

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2006-055

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XXXXXXXXXXXXXXXXXXXX

FINAL DECISION

AUTHOR: Andrews, J.

This proceeding was conducted under 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 17, 2006, upon receipt of the applicant's completed application, military records, medical records, and Record of Trial.

This final decision, dated October 19, 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 upgrade his bad conduct discharge by sentence of a special court-martial to an honorable discharge by reason of physical disability. The applicant alleged that when he committed the crime for which he was tried, he was suffering from mania and psychosis as a result of his bipolar disorder.¹ He alleged that

¹ Bipolar disorder is a mood disorder characterized by recurrent depressive episodes and manic episodes and sometimes by psychotic or catatonic features. American Psychiatric Association, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION, TEXT REVISION (2000) (DSM-IV-TR)*, p. 382 *et seq.* The Coast Guard relies on the DSM when diagnosing psychiatric conditions. *See* Coast Guard Medical Manual (COMDTINST M6000.1B), Chap. 5.B.1. The average age at onset is 20. DSM-IV-TR, at 386. Truancy and occupational failure are common features of the disorder. *Id.* at 394. Paranoia, grandiosity, distractibility, sleep disturbance, non-stop talking, poor judgment, and irritability are some of the common symptoms of bipolar disorder. Eugene Braunwald *et al.*, eds., *HARRISON'S PRINCIPLES OF INTERNAL MEDICINE, 15TH EDITION (McGraw-Hill, 2001)*, p. 2551. Under Chapter 5 of the Medical Manual, bipolar disorders constitute physical disabilities disqualifying for military service.

it is unjust for him to have been convicted by court-martial since, but for his bipolar disorder, he would never have gone AWOL and consumed illegal drugs in September 2002. The applicant alleged that his medical records show that he was already bipolar at the time he went AWOL. He alleged that the Coast Guard's diagnosis of a simple adjustment disorder² did not take into account the auditory hallucinations and other symptoms he was experiencing.

In support of his allegation, the applicant submitted a copy of a psychiatric evaluation dated November 3, 2003. He had been admitted to a hospital complaining of hearing voices and thinking that he was going to be killed. The psychiatrist noted that the applicant had suffered from depression since he was a teenager and diagnosed him with recurrent major depression with psychosis, polysubstance abuse, and a personality disorder not otherwise specified. In addition, the psychiatrist noted that schizophrenia and bipolar disorder were possibilities that needed to be ruled out. A psychologist later diagnosed the applicant with bipolar disorder. In December 2003, the psychiatrist prescribed lithium for him for bipolar disorder, as well as an anti-psychotic medication.

The applicant also submitted a copy of a letter from the Social Security Administration, dated July 5, 2004, which states that under the rules of that administration, he had become disabled on March 16, 2003.

SUMMARY OF THE APPLICANT'S RECORD

On October 22, 2001, at the age of 20, the applicant enlisted in the Coast Guard. During his pre-enlistment physical examination, the applicant denied having ever been diagnosed with an attention deficit or hyperactivity disorder, depression, or excessive worry; having ever been evaluated or treated for a mental condition; and having ever attempted suicide. He admitted that he had been treated for alcohol abuse at age 17 and that he had previously used marijuana and methamphetamines. Upon enlistment, he was advised of the Coast Guard's drug policy.

During boot camp, the applicant admitted that he had previously been diagnosed with an attention deficit disorder. However, he was allowed to complete boot camp and began "A" School to become a storekeeper. On January 23, 2002, while in "A" School, the applicant was counseled in writing about failing to pay debts. On February 7, 2002, the applicant was suspended from "A" School after having been charged with violating Article 92 of the Uniform Code of Military Justice (UCMJ). He was

² Adjustment disorders are defined as psychological responses to identifiable stressors that result in the development of clinically significant emotional or behavioral symptoms, including either "marked distress that is in excess of what would be expected given the nature of the stressor or ... significant impairment in social or occupational (academic) functioning." DSM-IV-TR, p. 679. Adjustment disorders disappear when the stressors disappear. *Id.* Adjustment disorders are not considered physical disabilities. Medical Manual, Chap. 5.

accused of disobeying a lawful order on January 30, 2002, by engaging in sexual activity with another student in her barracks with the door closed and then, after her roommate returned, in the roommate's presence.

On February 4, 2002, the applicant was referred for a psychiatric evaluation due to his poor performance at "A" School. He admitted that as a teenager he had been treated with Ritalin and Wellbutrin.

On February 19, 2002, the applicant was counseled about being absent without leave (AWOL) on February 15, 2002. He had not reported to his assigned work place. The Page 7 (counseling entry) states that it "is a final warning and that this behavior will not be tolerated by any supervisor."

On March 7, 2002, the applicant was taken to mast and disenrolled from "A" School for having disobeyed a lawful order on January 30, 2002. He was transferred to a cutter as a seaman apprentice.

On July 18, 2002, the cutter's log indicates that "all hands [were] present or accounted for with the exception of [the applicant]." A chief petty officer signed a statement saying that he had called the applicant's wife and family but no one had seen him. Late in the morning of July 19, 2002, the applicant called the chief petty officer and said that his marriage was troubled, that he wanted out of the Coast Guard, and that he needed to get away. Because the applicant seemed upset, the chief petty officer asked him if he was suicidal. The applicant denied being suicidal. The chief petty officer told him to report to the cutter or the nearest Coast Guard unit as soon as possible.

On July 24, 2002, while still AWOL, the applicant called the local police. He was drunk and threatened to kill himself. The police returned the applicant to the cutter. The applicant told his command that he had been trying to stay drunk all the time he was away and did not want to return to the cutter. He was immediately sent to a hospital because of his "suicide-related comments." Upon admission to the hospital, a psychologist noted that the applicant was agitated and had "persecutory" delusions. He also noted with a question mark, "?", on a form that the applicant might be experiencing auditory hallucinations because he complained of hearing names being called. The psychologist further noted that the applicant had poor judgment and insight. He provisionally diagnosed the applicant with major depression and alcohol dependence and noted that bipolar disorder was a possibility that needed to be ruled out. He further noted that the applicant admitted to having intentionally overdosed on ibuprofen at age 12 and on Ritalin at age 14.

On July 25, 2002, a doctor reported that during an interview the applicant was "alert, cooperative, talkative"; that he made appropriate eye contact and appeared relaxed; that his affect was inconsistent and "not congruent with [his] mood"; and that

he claimed to know people's hidden agendas and what they were thinking, which was contrary to what they were saying. The doctor also noted that the applicant "occasionally hear[d] name being called and sound of a radio playing." The doctor diagnosed the applicant with an adjustment disorder with depressed mood; a personality disorder, not otherwise specified, with narcissistic and antisocial personality traits; and alcohol abuse. The next day, the applicant reported that he was feeling less depressed and anxious and had no hallucinations or suicidal ideations.

Medical notes state that the applicant had a depressed mood and suicidal ideations "caused by difficulty with adjustment to military authority and lifestyle." He had been raised by a violent, abusive stepfather who sold illegal drugs; his father was schizophrenic and had been incarcerated; and his uncle was incarcerated. The applicant was treated with Celexa for mood stabilization and with Ativan to improve his sleep, which was sometimes disturbed. The applicant reported a history of "mania including excessive spending, heightened mood, grandiose thoughts lasting for several days, followed by 'crashing' from complete exhaustion," but admitted that he had been using stimulants at the time.

Upon the applicant's discharge from the hospital on July 30, 2002, Dr. N, a psychiatrist, diagnosed him with an Adjustment Disorder with Depressed Mood, as well as a Personality Disorder, Not Otherwise Specified, but with Cluster B Traits.³ Dr. N reported that the applicant had no mental disease, defect, or derangement and was "capable of distinguishing right from wrong and adhering to the right. He is responsible for his actions and possesses the mental and emotional capacity to understand and participate in board and other legal proceedings." Dr. N reported that the diagnosed disorders "are sufficiently severe that this seaman's ability to function effectively in the military environment is significantly impaired." He opined that retaining the applicant on active duty "could cause further deterioration and result in hospitalization, suicide gestures or attempts, or other undesirable behaviors." Dr. N recommended that the applicant be placed in a stress-free environment while his discharge was pending.

On July 31, 2002, the applicant was taken to mast for having been absent without leave (AWOL) from July 18 to 24, 2002. The Executive Officer of the cutter dismissed the charge because the applicant was "under emotional stress as outlined by psychiatric evaluation." However, the Executive Officer counseled the applicant in writing that

³ 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, p. 685. Cluster A personality disorders include paranoid, schizoid, and schizotypal. Cluster B disorders include antisocial, borderline, histrionic, and narcissistic. Cluster C disorders include avoidant, dependent, and obsessive-compulsive. People with Cluster B disorders "often appear dramatic, emotional, or erratic." *Id.* at 685-86. Personality disorders are not considered physical disabilities. Medical Manual, Chap. 5.

[y]our recent unauthorized absence from 18-24 July 02 is unacceptable and is a clear violation of the UCMJ. Although you were under severe emotional stress from marital difficulties, there is simply no excuse for such behavior. ... [T]he psychiatric evaluation conducted at Madigan Army Medical Center ... states you had been experiencing depression for several months prior to this incident, but had not been properly treated. However, the evaluation also states that you are "capable of distinguishing right from wrong and adhering to the right." Now that you understand your psychological condition, it is your responsibility to follow the treatment plan prescribed, and request assistance as appropriate. Any future violations of the UCMJ, regardless of the circumstances, will not be tolerated, and most certainly will result in the forwarding of such charges to be disposed of at either Captain's Mast or be referred for trial by Court-Martial.

On August 1, 2002, the applicant's commanding officer (CO) informed him in writing that he was initiating the applicant's honorable discharge due to a diagnosed personality disorder. The CO advised the applicant that he could submit a statement on his own behalf. In response, the applicant signed a document indicating that he waived his right to submit a statement and did not object to being discharged.

On August 8, 2002, the CO recommended to the Coast Guard Personnel Command (CGPC) that the applicant receive an honorable discharge for unsuitability based on the diagnosed personality disorder, as well as "general inaptitude and financial irresponsibility." The CO noted that on July 17, 2002, upon returning from a deployment, the applicant had discovered that his wife had left him, and that her departure had apparently triggered his going AWOL and threatening suicide.

On August 19, 2002, the applicant was treated for "public drunkenness/blacking out" after he was arrested by the police.

On September 6, 2002, CGPC ordered that the applicant be honorably discharged no later than October 4, 2002, by reason of "Personality Disorder," if no disciplinary action was pending.

On Monday, September 16, 2002, the applicant failed to report for duty and was therefore AWOL. On September 17, 2002, he called his command and admitted to illegal drug use with another member. He stated that the other member had jumped off a balcony and was not breathing. He was unable to tell the command where they were. The applicant and the other member returned to the unit the next day. The applicant was sent for a psychological evaluation. He reported that he had started "popping pills," after which he was "out of it," "happy," "racing," having hallucinations, and not sleeping and that he had thought about killing the other member who was "tripping" with him. The psychologist, Dr. P, reported that the applicant had no delusions or hallucinations other than "traces of light" that were the "lingering effects of drugs." He also reported that the applicant intended to continue using drugs despite the probable consequences. Dr. P assessed the applicant as having a "long history of polysubstance abuse" and probably an antisocial personality disorder. Urinalysis revealed that the

applicant had used ecstasy and methamphetamine. The applicant's command asked CGPC to hold the discharge orders in abeyance because disciplinary action was pending.

On December 10, 2002, the applicant was formally charged with violating Article 86 of the UCMJ by being AWOL from September 16 to 17, 2002, and with violating Article 112a by wrongfully using a controlled substance. He was also charged with wrongful distribution of a controlled substance in violation of Article 112a.

On February 5, 2003, the applicant complained of having mood swings and asked for a mental health evaluation. On February 10, 2003, his defense attorney asked that he be examined to determine his mental responsibility at the time of the offenses and his competency to stand trial. The attorney stated that the applicant had told him that on September 14, 2002, he had tried to commit suicide by ingesting both drugs and alcohol.

On February 12, 2003, the lieutenant serving as trial counsel informed the military judge that the questions concerning the applicant's mental condition at the time of the offense had been addressed in a conference call between himself, the defense attorney, Dr. N, and Dr. P. Dr. P had stated that in his medical opinion, the applicant "did not have a severe mental disease or defect at the time of the alleged criminal conduct" and "was able to appreciate the nature and quality or the wrongfulness of his conduct." Dr. N agreed with Dr. P's opinion based on his observation of the applicant from July 24 to 30, 2002. On the basis of these opinions, the defense attorney agreed and acknowledged by his signature that a formal examination by a Board of Medical Officers was not warranted.

At a special court-martial on February 13, 2003, the applicant pled guilty to violating Article 86 and Article 112a of the UCMJ. He admitted that he had bought illegal drugs on September 14, 2002; had ingested them with a fellow member; and had been AWOL from September 16 to 17, 2002. Pursuant to a plea agreement, the specification for distributing a controlled substance was dismissed. He was sentenced to a bad conduct discharge. The applicant was placed on appellate leave while his appeal was pending.

On May 5, 2003, the applicant's defense attorney requested clemency on the sentence on the basis of the applicant's difficult childhood, his cooperation in admitting that he had used illegal drugs and in pleading guilty, and his regret for his mistakes. On June 10, 2003, the convening authority approved the sentence.

On October 7, 2003, the Coast Guard Court of Criminal Appeals affirmed the applicant's conviction and sentence. On April 20, 2004, the Commandant of the Coast

Guard denied clemency. On June 4, 2004, the Officer Exercising General Court-Martial Jurisdiction ordered that the sentence be executed.

On July 16, 2004, the applicant received a bad conduct discharge pursuant to the sentence of the court martial.

VIEWS OF THE COAST GUARD

On May 19, 2002, 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 by CGPC in an attached memorandum.

CGPC stated that the applicant "was provided due process and represented by legal counsel during his court martial proceedings." CGPC stated that his "contention that his mental health status was not considered during the course of the trial proceedings was inaccurate" since his defense attorney clearly concurred that at the time of the offense and at the time of the trial the applicant did not lack mental responsibility due to a severe mental disease or defect. CGPC noted that the applicant's medical record was included in the Record of Trial.

CGPC alleged that "[t]here is no support for the applicant's assertion that he suffered from bipolar disorder at the time of his offense" because he had been diagnosed by competent medical authority with only an adjustment disorder and personality disorder. CGPC stated that the applicant's post-trial mental health conditions and treatments "do not substantiate any injustice or omission in [his] court martial and subsequent punitive discharge."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 6, 2006, the applicant responded to the views of the Coast Guard. He argued that the fact that he was suffering from bipolar disorder in September 2002 is proved by the fact that during his hospitalization in July 2002, he "reported hearing voices and hearing the radio playing when there was no source, and was demonstrating delusional grandiosity when he stated that his mother ran a mental health clinic." The applicant stated that his illness is also proved by his reported symptoms of mania and rapid speech. The applicant stated that when he returned home after his trial, he admitted to his mother that he "had been having psychotic symptoms from early adolescence and was keeping them hidden."

APPLICABLE LAW

Under 10 U.S.C. § 1552(f)(2), the BCMR may not overturn a conviction by court martial but may take "action on the sentence of a court-martial for purposes of clemency."

Rule 706 of the Rules for Courts-Martial provides that, if an accused's mental capacity or responsibility is called into question, the convening authority may order a mental examination by a board of one or more physicians to determine the mental capacity and mental responsibility of the accused. The board's findings are to include the accused's diagnosis at the time of the crime, whether he lacked substantial capacity to appreciate the criminality of the conduct, whether he lacked substantial capacity to conform his conduct to the requirements of law, and whether he had sufficient mental capacity to understand the nature of the proceedings and to assist in his defense. The mental capacity of a person to stand trial is ultimately decided by the military judge. If the military judge determines that the member lacks the mental capacity to stand trial, the member may be administratively discharged because of the mental disability. *See* Rules 801(e) and 909 (Discussion).

Article 12.B.1.e.1. of the Personnel Manual, under the title "Cases Involving Concurrent Disability Evaluation and Disciplinary Action," states the following:

Disability statutes do not preclude disciplinary separation. The separations described here supersede disability separation or retirement. If Commander, (CGPC-adm) is processing a member for disability while simultaneously Commander, (CGPC-epm-1) is evaluating him or her for an involuntary administrative separation for misconduct or disciplinary proceedings which could result in a punitive discharge or an unsuspended punitive discharge is pending, Commander, (CGPC-adm) suspends the disability evaluation and Commander, (CGPC-epm-1) considers the disciplinary action. If the action taken does not include punitive or administrative discharge for misconduct, Commander, (CGPC-adm) sends or returns the case to Commander, (CGPC-adm) for processing. If the action includes either a punitive or administrative discharge for misconduct, the

medical board report shall be filed in the terminated member's medical personnel data record (MED PDR).

Article 2.C.11. of the Physical Disability Evaluation System (PDES) Manual states the following:

a. Disability statutes do not preclude disciplinary or administrative separation under applicable portions of the Personnel Manual, COMDTINST M100.6 (series). 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 an 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 [CGPC]. ...

b. 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 medical record.

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. The application was timely.

2. The Board begins deliberation of each application by presuming administrative regularity on the part of the Coast Guard.⁴ Government officials, including the doctors who examined and diagnosed the applicant for the Coast Guard, are presumed to have acted "correctly, lawfully, and in good faith."⁵ The applicant must overcome this presumption and prove by a preponderance of the evidence that his bad conduct discharge was erroneous or unjust and requires correction. "[T]he Secretary and his boards have an abiding moral sanction to determine insofar as possible, the true nature of an alleged injustice and to take steps to grant thorough and fitting relief."⁶

3. The applicant argued that when he went AWOL and ingested ecstasy and methamphetamine in September 2002, he suffered from bipolar disorder and so should not be held liable for his crimes. He alleged that the fact that some of the symptoms he

⁴ 33 C.F.R. § 52.24(b).

⁵ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁶ *Caddington v. United States*, 178 F. Supp. 604, 607 (Ct. Cl. 1959).

had reported in July 2002 are common symptoms of bipolar disorder and the fact that he was diagnosed with bipolar disorder in late 2003 prove that he was suffering from bipolar disorder in September 2002. Upon admission to the hospital on July 24, 2002, a psychologist interviewed the applicant and noted that the applicant might be having auditory hallucinations and that bipolar disorder was a possible diagnosis that needed to be “ruled out.” However, while in the hospital, the applicant admitted that his symptoms occurred when he was using “stimulants.” Upon the applicant’s discharge from the hospital on July 30, 2002, Dr. N diagnosed him *not* with bipolar disorder but with an adjustment disorder and a personality disorder with antisocial, borderline, histrionic, and narcissistic traits. Dr. P, the psychologist who interviewed the applicant in September 2002 and who had access to his medical records, made a provisional diagnosis of antisocial personality disorder. The Board also notes that in 2002, the applicant already had a long history of polysubstance abuse, which sometimes induces the symptoms of a mood disorder.⁷ Therefore, the Board finds that even though the applicant had experienced some symptoms common to bipolar disorder and was later diagnosed with bipolar disorder, he has not proved by a preponderance of the evidence that he was suffering from bipolar disorder when he went AWOL and ingested ecstasy and methamphetamine in September 2002.

4. The Board notes that the applicant claimed that he had suffered psychotic symptoms since early adolescence. The record indicates that the applicant claimed upon his pre-enlistment physical examination that he had never been evaluated or treated for any attention deficit disorder or mental condition and had never attempted suicide, but later admitted to having been treated for an attention deficit disorder and to having intentionally overdosed on medication twice.

5. Moreover, the existence of a mental illness *per se* does not automatically excuse a member from liability for any crimes committed. Instead, the deciding factors are whether the member lacked substantial capacity to appreciate the criminality of his conduct and whether he lacked substantial capacity to conform his conduct to the requirements of law.⁸ Dr. P reported to the applicant’s attorney on February 12, 2003, that the applicant did not lack substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law in September 2002. Dr. N reported on July 30, 2002, that the applicant was “capable of distinguishing right from wrong and adhering to the right” and agreed with Dr. P’s assessment on February 12, 2003. On the basis of their medical opinions, the applicant’s attorney did not pursue a determination by a formal sanity board. The applicant has not proved that Dr. P and Dr. N erred or failed to use their best professional judgment in making these determinations or that his attorney erred or failed to use his best professional judgment in deciding not to pursue a sanity board after discussing their opinions with them by telephone.

⁷ DSM-IV-TR, p. 405.

⁸ Rule 706, Rules for Courts-Martial.

6. Under Article 12.B.1.e.1. of the Personnel Manual, even if the applicant had been diagnosed with bipolar disorder in 2002, he would not have been entitled to a medical separation by reason of physical disability because disciplinary proceedings that may result in a punitive discharge supersede the statutes and regulations regarding medical separations.

7. Therefore, the Board finds that the applicant has not proved that his bad conduct discharge was erroneous. In addition, in light of the record and the above findings, the Board finds that the applicant's receipt of a bad conduct discharge was not unjust as it does not shock the Board's sense of justice.⁹ His punitive discharge was the result of a plea agreement he voluntarily made after he bought illegal drugs, used them with a fellow member, and was AWOL. His record reveals other instances of similar misconduct.

8. Accordingly, the applicant's request should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

⁹ *Sawyer v. United States*, 18 Cl. Ct. 860, 868 (1989), *rev'd on other grounds*, 930 F.2d 1577 (citing *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976) (finding that for purposes of the BCMRs under 10 U.S.C. § 1552, "injustice" is "treatment by military authorities that shocks the sense of justice"); *see also* Decision of the Deputy General Counsel, BCMR Docket No. 2001-043 (finding that the Board has authority to determine whether an injustice has been committed on a case by case basis).

ORDER

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

Philip B. Busch

Francis H. Esposito

William R. Kraus