

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2006-113

XXXXXXXXXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXXXXX

FINAL DECISION

AUTHOR: Ulmer, D.

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 case on May 9, 2006, upon receipt of the applicant's completed application and military record.

The final decision, dated February 15, 2007, 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 correct his DD Form 214 so that he is eligible to reenlist in a Reserve component of the armed forces. The applicant was honorably discharged by reason of convenience of the government due to an erroneous enlistment with a JFC¹ separation code and an RE-3E² reenlistment code. The applicant explained his situation in the following manner:

In 1987, I enlisted in the Coast Guard. Upon arrival they did an x-ray on my left thumb where I had surgery prior to going to boot camp. The

¹ A JFC separation code means that the applicant was involuntarily discharged due to an erroneous enlistment.

² An RE-3E reenlistment code means that the applicant is eligible for enlistment except for disqualifying factor: erroneous enlistment.

doctor at Cape May noticed that my thumb had not healed completely; so they "red tagged" me and discharged me. I was discharged for medical reasons. They told me once [the thumb] had healed I could return. The Coast Guard told me that they would make it like I wasn't even there yet.

SUMMARY OF RECORD

On April 20, 1987, the applicant began a four-year period of active duty. He underwent a pre-enlistment medical examination in January 1987 and was determined to be qualified for enlistment. Apparently in February 1987, the applicant had surgery on his left thumb for torn ligaments and muscle damage to the thumb.

On April 22, 1987, after reporting to recruit training, the applicant underwent a pre-training medical examination in which he informed medical personnel that he had had surgery on his left thumb. A more thorough examination of the thumb was performed and the medical narrative summary reported the following:

Medical examination disclosed some increased exostosis of the proximal interphalangeal joint of the thumb, and it was noted that return of function of the thumb appeared to be proceeding satisfactorily. However, since it had been only less than 2 months since surgery, and the evaluatee was about to enter a very strenuous physical training program, it was felt he was not quite ready to undergo this training. The evaluatee's motivation appeared to be excellent and in the opinion of the Red Tag Review Board, he was a desirable candidate. He was referred to the Medical Board for an evaluation.

On April 23, 1987, a medical board convened and expressed the following opinions and recommendations:

1. The evaluatee does not meet the minimum standard for enlistment in the U.S. Coast Guard as prescribed in Section 3-C-14n of [the Medical Manual], i.e., injury within the preceding 6 weeks. This condition existed prior to enlistment.
2. The disqualifying condition was not aggravated by, and has not caused a physical disability due to a period of active military service.
3. Disclosure to the evaluatee of information relative to his physical condition would not adversely affect the evaluatee's physical or mental health.

4. It is recommended that the evaluatee be separated from the U.S. Coast Guard in accordance with Article 12-B-12 of [the Personnel Manual].

5. It is recommended that the evaluatee be given favorable consideration for reenlistment in approximately 60 days or 2 months. It is the opinion of the [medical] board that it would require this length of time for the evaluatee to be ready to undergo the rigors of recruit training.

On April 24, 1987, the applicant was informed of the MB findings that he was unfit for duty due to a preexisting recent trauma to his thumb. The sentence "that these diagnoses (listed above) will be considered by the CPEB for its independent evaluation" was lined out on the Patient's Statement Regarding the Findings of the Medical Board. The applicant chose not to submit a statement in rebuttal to the medical board. He acknowledged the above with his signature on April 24, 1987. The applicant was discharged on April 29, 1987.

VIEWS OF THE COAST GUARD

On September 27, 2006, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request. The JAG adopted the facts and analysis provided by Commander, Coast Guard Personnel Command (CGPC) as the Coast Guard's advisory opinion. CGPC made the following conclusions:

1. The applicant's request is not timely and the applicant has failed to substantiate any justification for the delay in presenting this case and [it] should be denied due to its untimeliness. Additionally, there is no evidence that the applicant exhausted administrative review through the Discharge Review Board (DRB). The following opinion/conclusion has been provided in the event the Board for Correction of Military Records chooses to consider this case.

2. I find that the applicant's discharge was in accordance with Coast Guard policy . . . for processing personnel for convenience of the government. The applicant enlisted and reported to recruit training and was determined not physically qualified for enlistment due to surgery that was not completely healed . . . The narrative reason, [separation code] and reenlistment code are appropriate as prescribed in [the Separation Program Designator (SPD) Handbook].

3. The applicant's contention that the narrative reason for separation, SPD and reenlistment codes are a bar to enlistment/reenlistment is not fully founded. Reenlistment code RE-3 indicates the individual is "eligible for

reenlistment except for disqualifying factor" . . . In this case the RE-3 requires that the applicant substantiate that the previously disqualifying condition has sufficiently resolved to allow enlistment. Assignment of any other reenlistment code would not be consistent with the nature of applicant's discharge. Service policies vary, and RE-3E personnel may be eligible for accession with a waiver by the gaining Service.

APPLICANT'S RESPONSE TO THE COAST GUARD'S VIEWS

On September 28, 2006, a copy of the Coast Guard views was sent to the applicant so that he could submit a response to them. The Board did not receive a response 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.³
2. The application was not timely. To be timely, an application for correction of a military record must be submitted within three years after the applicant discovered or should have discovered the alleged error or injustice. See 33 CFR 52.22. This application was submitted approximately nineteen years beyond the statute of limitations.

³ The Board notes the Coast Guard's argument that it could deny the applicant's request solely because he failed to exhaust his administrative remedies by applying to the Discharge Review Board (DRB) within the fifteen years allotted for him to do so. Section 5213(b) of the CFR states, "no application shall be considered by the Board until the applicant has exhausted all effective administrative remedies afforded under existing law or regulations, and such legal remedies as the Board may determine are practical, appropriate, and available to the applicant." This provision is intended to require an applicant to seek relief through other avenues that are available at the time of filing an application with the Board. The fifteen-year window for applying to the DRB had closed at the time the applicant filed his application with the BCMR and therefore was not an available remedy. The Coast Guard has presented no law or regulation and the Board is aware of none that permits the denial of an application based solely on the ground that an applicant failed to avail himself of a past remedy that no longer exists at the time of filing his or her BCMR application. Section 1552 of title 10 of the United States Codes empowers the Secretary to correct any military Coast Guard record to remove an error or injustice. Therefore, the Board is not persuaded by the Coast Guard's suggestion that this applicant's case should be denied because he failed to apply to the DRB during the fifteen years allotted for doing so. It is one factor, however, that the Board may consider in deciding the merits of an application.

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." The court further stated 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." Id. at 164, 165. See also Dickson v. Secretary of Defense, 68 F.3d 1396 (D.C. Cir. 1995).

4. The applicant claimed that he did not discover the alleged error until June 1, 2005. However, he should have discovered the alleged error upon his discharge from the Coast Guard in 1987. He signed the DD Form 214 that contains the reason for discharge, the SPD code, and the reenlistment code. He argued that the Board should waive the three-year statute of limitations because he wants to serve in the Reserve and the DD Form 214 is preventing him from doing so. The applicant's reason for not filing his application sooner is not persuasive to the Board. Accordingly, the Board finds that the applicant has presented insufficient evidence to support a waiver of the three-year statute of limitations.

5. Nor is the Board persuaded to waive the statute of limitations based on a cursory review of the merits. In this regard, the Board finds that the applicant is not likely to prevail on his claim. The applicant's thumb was identified as a disqualifying condition during his pre-training medical examination. Under Article 3-C-14(b)(14) of the Medical Manual then in effect, an injury of a bone or joint without fracture or dislocation within the preceding six weeks prior to enlistment was disqualifying for enlistment.⁴ The applicant's problem with his thumb was quite serious since it required surgery to repair torn ligaments and muscle damage. In the opinion of Coast Guard medical personnel the applicant did not meet the medical qualifications for enlistment and recommended his discharge as being in the best interest of the Service and the applicant so that the thumb could heal completely. Article 12-B-12 of the Personnel Manual authorizes the discharge of recruits undergoing training who have fewer than 60 days of active duty and who have a physical disability that existed prior to entry into the Coast Guard. The applicant had been on active duty for only ten days at the time of his discharge. The applicant has offered nothing to prove that the Coast Guard's diagnosis was erroneous or that his discharge was improper. Nor has he shown the reenlistment or separation code to be erroneous. Each code accurately describes the reason for the applicant's discharge as required by COMDTINST M1900.4B (Instructions for the Preparation and Distribution of the Certificate of Release or Discharge from Active Duty, DD Form 214).

⁴ Although no exact date in February is given for the surgery, the applicant offered no objections at the time of discharge or denied that it occurred within six weeks of his enlistment.

6. The applicant argued that his reenlistment code should be changed because the Coast Guard personnel told him that once his thumb healed he could return to the Coast Guard, and he now wants to join a branch of the Reserve. However, the applicant has presented no evidence that his thumb has healed or that it has healed without residual damage; nor has he presented any evidence that he has been denied enlistment in the Coast Guard Reserve or any other of the Reserve components. Except for his own statement, the applicant has presented the Board no reasonable basis on which to consider changing the RE-3E reenlistment code.

7. The Board notes that an RE-3 code is not a bar to reenlistment, but means that a waiver must be obtained to reenlist the applicant. Again, the applicant has presented no evidence that he has asked any recruiting personnel to request a waiver on his behalf.

8. Accordingly due to the passage of time, the lack of a good cause explanation for not complying with the statute of limitations, and a 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 and it should be denied.

[ORDER AND SIGNATURES ON NEXT PAGE]

