

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2009-137

**XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX**

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 upon receipt of the applicant's completed application on May 4, 2009, and subsequently prepared the final decision as required by 33 CFR § 52.61(c).

This final decision, dated January 14, 2010, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

RELIEF REQUESTED AND ALLEGATIONS

The applicant asked the Board to upgrade his reenlistment code from RE-3E (eligible to reenlist with waiver for erroneous enlistment) to RE-1 (eligible for reenlistment). The applicant enlisted in the Coast Guard on March 17, 1992 and was honorably discharged on April 15, 1992, by reason of convenience of the government due to erroneous enlistment (preexisting medical condition), with a JFC¹ separation code and an RE-3E² reenlistment code.

The applicant alleged that he needs his reenlistment code changed so that he can enlist in the Air National Guard. He stated that he has successfully completed two enlistments with the Army National Guard with no physical problems related to the condition that precipitated his discharge from the Coast Guard. The applicant submitted a copy of his separation document from the National Guard.

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.

The applicant stated that he did not discover the alleged error with respect to his reenlistment code until April 8, 2009. He stated that he did not know at the time of discharge that an RE-3E reenlistment code could disqualify him from enlisting in another branch of service without requesting a waiver.

Upon reporting to recruit training, the applicant underwent a pre-training medical examination on March 19, 1992, that determined he was not qualified for training due to bilateral shin splints. The applicant did not indicate any problems with shin splints during his March 10, 1992 enlistment medical examination. A March 19, 1992 medical note stated that the applicant was told in 1991 (prior to enlistment) that he suffered from bilateral shin splints.

On March 19, 1992, a medical board reviewed the situation and stated that the applicant was fit for duty. However, on March 23, 1992, the applicant reported to the medical clinic complaining of bilateral tibia pain and was placed on light duty. The applicant again reported to the clinic regarding his shin splints on March 31, 1992, and was continued light duty and directed to undergo a bone scan. The bone imaging revealed "Findings consistent with bilateral tibial stress fractures . . ." On April 10, 1992 a medical board recommended that the applicant be discharged from the Coast Guard due to bilateral tibial stress fractures.

The applicant was advised of the proposed discharge and provided with an opportunity to make a written statement. On April 13, 1992, by signature, the applicant acknowledged the proposed discharge and expressed his desire not to submit a written statement.

VIEWS OF THE COAST GUARD

On August 26, 2009, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request. The JAG noted that the application was not timely and that it was not in the interest of justice to waive the untimeliness because the applicant did not offer an explanation for his 17-year delay in applying to the Board.

The JAG also adopted the facts and analysis provided by Commander, Personnel Service Command (PSC) as part of the Coast Guard's advisory opinion. PSC noted that although the applicant had been told of his bilateral shin splints in 1991, he did not list the information on his enlistment medical examination document or on his pre-training medical examination form. PSC noted that bilateral shin splints is a disqualifying condition for enlistment under the Medical Manual. PSC further stated the following:

The applicant received a separation code of "JFC" which is administratively correct. Separation code "JFC" designates an erroneous entry (into the [Coast Guard]). Had the applicant disclosed this medical condition before accession into the Coast Guard, the applicant would have been disqualified for enlistment immediately. The explanation given for this code is, "Involuntary discharge directed by established directive (with no board entitlement) when individual erroneously enlisted, reenlisted, extended, or was inducted into a Service

component (not related to alcohol or drug abuse).” This is the appropriate separation code under the prevailing circumstances.

The only authorized RE code for this type of separation is RE-3E or RE-4. The applicant received an RE-3E.

APPLICANT’S RESPONSE TO THE COAST GUARD’S VIEWS

On August 28, 2009, 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.

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. The alleged error occurred at the time of the applicant’s discharge in 1992. Although the applicant was discharged in 1992 and received a DD Form 214 that listed the reason for his discharge, his SPD code, and his reenlistment code, he argues that the Board should waive the three-year statute of limitations because he did not know at the time of his discharge that the RE-3E would disqualify him from enlisting in another branch of the service without obtaining a waiver. He offered no explanation why he did not seek clarification of the RE-3E at the time of his discharge or immediately thereafter. The applicant should and could have discovered the alleged error within three years of his discharge from the Coast Guard. The applicant's reason for not filing his application sooner is not persuasive to the Board. Accordingly, the Board finds that the applicant’s reason for not filing his application within three years of his discharge is insufficient to support a waiver of the statute of limitations.

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 Board is not 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 bilateral shin splints were identified as a disqualifying condition

during his recruit training. A March 19, 1992 medical note stated that a private doctor told the applicant of his bilateral shin splints in 1991; but there is no evidence that the applicant shared this information with the Coast Guard prior to his enlistment. Under Article 3-D-10.d.(3) of the Medical Manual disease, pain, or fractures of the leg, knee, thigh or hip that interfere with walking, running, or weight bearing are disqualifying for enlistment. 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. Article 12-B-12 of the Personnel Manual authorizes the discharge of recruits by reason of erroneous enlistment who are undergoing training, have fewer than 60 days of active duty, and have a physical disability that existed prior to entry into the Coast Guard. The applicant had been on active duty for only 1 month at the time of his discharge due to erroneous enlistment. 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 codes to be erroneous. Each code was assigned in accordance with COMDTINST M1900.4B (Instructions for the Preparation and Distribution of the Certificate of Release or Discharge from Active Duty, DD Form 214).

5. The applicant argued that his reenlistment code should be changed so that he can enlist in the Air National Guard. The Board notes that an RE-3E code is not a bar to reenlistment, but means that a waiver must be obtained to reenlist the applicant due to an erroneous enlistment. Again, the applicant has presented no evidence that he has asked any recruiting personnel to request a waiver on his behalf. The applicant's recently completed service in the Army National Guard should support a waiver for enlistment since it is suggest that the bilateral shin splints did not interfere with his ability to perform his duties while in the National Guard.

6. Accordingly 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]

ORDER

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

Donna M. Bivona

Evan R. Franke

James E. McLeod