

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2010-235

**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 August 24, 2010, and subsequently prepared the final decision as required by 33 CFR § 52.61(c).

This final decision, dated June 3, 2011, 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-3P (eligible to reenlist with waiver for physical disability) to RE-1 (eligible for reenlistment). The applicant enlisted in the Coast Guard on August 21, 1990, and was honorably discharged on March 25, 1991, because of a physical disability, with a JFR¹ separation code and an RE-3P reenlistment code.

The applicant asked to have his reenlistment code changed so that he can enlist in the Army National Guard. He was discharged in 1991 due to a kidney ailment. He alleged that because of his immaturity he did not understand the options available during the physical disability evaluation system (PDES) processing of his case. He also stated that at the time of his discharge he had had only one occurrence of the kidney ailment and that he has not had another one. He stated that he is currently in the best physical condition of his life, as proven by his March 2010 physical examination, a copy of which he submitted to the Board. He also submitted a letter from an Army officer attesting to his character, integrity, patriotism and motivation. He stated that he has attempted to enlist in the Army and Marine Corps over the last 19 years with no success.

¹ A JFR separation code means that the applicant was discharged because a physical disability evaluation proceeding determined that he had a physical disability that did not exist prior to entry on active duty.

The applicant stated that he discovered the alleged error in 1991, but argued that it is in the interest of justice to consider his application even though more than three years has elapsed since he discovered the error because he never had a chance to serve his country and because he is pursuing career in law enforcement. He also noted his attempts to reenlist, which were not successful allegedly because of his lack of knowledge and documentation.

BACKGROUND

On October 10, 1990, a medical board found that the applicant suffered from “Presumptive IGA Nephropathy (Idiopathic Recurrent Renal Hematuria)” and “Atypical Anxiety Disorder . . . with Avoidant Personality Disorder . . .”

On November 1, 1990, the Central Physical Evaluation Board (CPEB) considered the applicant’s case and found that he was unfit for duty due to “presumptive IGA Neuropathy (Idiopathic Recurrent Renal Hematuria) - Rated analogous to Nephritis, Chronic-mild.” The CPEB rated this condition as 10% disabling. The CPEB also found that the applicant suffered from General Anxiety Disorder which it rated as 0% disabling.

The applicant with the counseling of a law specialist accepted the findings and recommendations of the CPEB on November 14, 1990. The Chief of the Office of Personnel Training approved the CPEB findings on November 28, 1990 and directed that the applicant be discharged from the Coast Guard “without severance pay, by reason of less than six months’ service in accordance with Section 1212, Chapter 61, of title 10 of the U.S. Code.”

VIEWS OF THE COAST GUARD

On December 14, 2010, 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, Personnel Service Center (PSC) as the Coast Guard's advisory opinion.

PSC noted that although the application was not timely, the Board should still consider it because of its merits. PSC stated that the applicant was discharged from the Coast Guard and assigned an RE-3P reenlistment code in accordance with policy. PSC also stated the applicant is eligible to reenlist except for a disqualifying physical disability, but he must seek reenlistment through the recruiting process and persuade a recruiter that his physical disability has been resolved.

APPLICANT’S RESPONSE TO THE COAST GUARD’S VIEWS

On December 20, 2010, 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 applicant admitted that he discovered the alleged error at the time of his discharge in 1991. However, he argued that the Board should waive the three-year statute of limitations because he has attempted to reenlist but lacked the knowledge and documentation to prove that he has no disqualifying conditions. He did not explain why he could not have obtained the knowledge and documentation sooner. The applicant's reason for not filing his application sooner is not persuasive.

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. With respect to the merits, the Board finds that the applicant is not likely to prevail. The applicant was discharged due to a physical disability. He did not object to the discharge at the time of his separation. The fact that he has a current physical examination showing that he has no kidney problems does not prove that his diagnosis 19 years ago was incorrect. Nor has he shown the reenlistment code to be erroneous. It 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 Army National Guard. The Board notes that an RE-3P code is not a bar to reenlistment, but means that the applicant must be granted a waiver to reenlist. To be considered for enlistment in the Armed Forces, the applicant should apply through his local recruiting office and present them with the evidence he has presented to this Board. The Board notes that before applying for reenlistment the applicant may want to consider addressing his then-diagnosed General Anxiety Disorder, which the CPEB also found unfitting for military service.

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 because it is untimely.

ORDER

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

Andrew D. Cannady

Nancy L. Friedman

Dorothy J. Ulmer