

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

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Application for the Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2011-144**

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**FINAL DECISION**

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 case upon receiving the completed application on April 4, 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 January 26, 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, who was honorably discharged for unacceptable conduct on March 30, 2004, asked the Board to correct his record to reflect a medical separation. The applicant stated that he should have received a medical discharge because he was required to see a doctor at the Coast Guard Academy, who recommended his discharge. Regarding his delay in applying to the Board, the applicant stated that he was unaware that he could contest his discharge until late 2009, when his father told him he could.

**SUMMARY OF THE EVIDENCE**

The applicant enlisted on November 5, 2002. Upon completing training, he was assigned to a small boat station. On July 25, 2003, the applicant was counseled in writing about failing to attend a mandatory medical appointment. He was advised that any future incidents would result in disciplinary action. On August 1, 2003, a psychiatrist noted that the applicant's parents divorced when he was 6 and that the applicant's father was imprisoned for homicide. Regarding the applicant's condition, the psychiatrist stated the following:

[The applicant] is referred by his command because of concerns that he is not able to master the PQS for small boat crewman. In addition, he has appeared depressed and withdrawn in recent weeks and has indicated he wants to be released from the Coast Guard. He presents after missing his first appointment an hour and a half late for this evaluation. He leads with, "sometimes I'm happy with what I'm doing and sometimes I don't care." He adds, "I get really angry sometimes

when what I do is my best ability and it isn't good enough." "The anger builds up and I can feel depressed." After having passed his COMMS quals, the evaluatee feels very stuck on getting past his boat crew qualifications. He states, "I just can't learn it." He feels used by the petty officers and that they turn around and pass direction for them to him. He wants very much to return to a life where he is better paid, has his own place, and can be around people he likes. He denies any mental health difficulties prior to the Coast Guard except for some distress when he went to jail for five days at age 16 for underage consumption of alcohol. An event which may have precipitated this evaluation occurred when he became angry with a cook in the galley over his being 10 minutes late. His command has tried to work with him by way of accommodating a switch from SA to FA and providing him with leave time. The switch to FA required a two-point waiver on his A.S.V.A.B. He denies any suicide thoughts now or ever and in addition, denies any violent thoughts toward anyone. He has had one visit with an EAP counselor which he says did not help him. He admits to being depressed but is able to pursue his interests when he is off work. ...

Discussion/Plan: The evaluatee's capacity to master new information from books is extremely limited. When faced with cognitive challenges in his school years, he simply ignored the task, knowing that he would be passed on in spite of his failures. I remain that there may be some ADHD residuals in this young man. ... He is not used to being held to a standard, and his solution to his dilemma is to withdraw and disengage. He rejects any talking therapy or medication that might assist his accommodation to Service life. When pressed, he guesses he might openly use some drugs in order to get discharged from the Coast Guard. While the prognosis for this member's satisfactory adjustment to Service life is poor, as long as he continues to do the job expected of him I would continue to work with him. I recommend he not carry a firearm for the foreseeable future. Should his work performance begin to deteriorate to the point where he cannot be trusted, or his depression deepens, or his anger becomes overtly manifested toward others, it might then be appropriate to recommend a discharge.

The psychiatrist diagnosed the applicant with "adjustment disorder with depressed mood (DSM-IV 309.0)"<sup>1</sup> and "schizoid/avoidant/paranoid personality traits."

On August 12, 2003, the commanding officer (CO) of the station put the applicant on performance probation with the following written counseling:

Your performance has been well below standard as shown by your inability to qualify as a boatcrewmember. Your attitude toward your duties has also been unacceptable. You constantly walk around the station giving off a disinterested attitude. You need to get more involved. You need to start working as a member of the team. It is time you motivated yourself and got certified as a boatcrewmember so you can start to benefit the unit and your shipmates. You will be under constant evaluation for the next six months to ascertain whether or not you can perform to the minimum standards already set down for you. You will meet with the XPO and me monthly to discuss your progress. After this probationary period or at any time during this period you may be recommended for discharge if you do not show an honest attempt to overcome the problems listed above. There is no room for dead weight in today's Coast Guard. We all have a job to do and it is my job to ensure you perform to the level we know all of our members can. An unsuitability discharge does not look favorable at the point in time when you try to find a job in the civilian community. I look forward to a positive and steadfast improvement in your attitude and your performance.

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<sup>1</sup> Adjustment disorders are psychological responses to identifiable stressors that result in the development of emotional or behavioral symptoms. Adjustment disorders normally disappear when the stressors disappear. American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION, TEXT REVISION (2000), p. 679.

On August 16, 2003, the applicant was counseled in writing about failing to report for duty on time even though he had been woken beforehand to ensure that he could be on time. The applicant was discovered still in bed. He was advised that further infractions would result in disciplinary action.

On September 24, 2003, the applicant was punished at mast for being late for duty on both August 21 and 22, 2003—i.e., failing to obey an order in violation of Article 92 of the Uniform Code of Military Justice (UCMJ)—and for being absent without leave (AWOL) in violation of Article 86 of the UCMJ. He was awarded 10 days of restriction to the station with extra duties.

On January 22, 2004, the psychiatrist submitted the following report:

[The applicant] was first seen 1 Aug 2003. He is referred back because he has demonstrated no motivation to progress with his quals or become a petty officer. In addition, he has made despairing remarks to supervisors about not wanting to continue to live as he is living now. While he denies that he has a plan for suicide, he states that he has thought about dying but finds going AWOL a much better solution to his current difficulties. On this visit he states that “nothing has really changed. Every day has been the same—miserable every single day in the Coast Guard.” He mainly thinks about getting out to go back home to get a better paying job in construction. He has been discouraged that he is “always in trouble for something” and receiving marks of twos and threes “no matter how hard I work.” He did not want his name put back on an “A” School list because he doesn’t “want the responsibility of the third class petty officer.” He has struggled with his boat crewman quals and finds it “very hard to learn from the book.” Moreover, he recalls that in school he was “mostly daydreaming.” He adds he was not hyperactive, just “quiet – can’t pay attention to things I’m not interested in.” ... He continues to refuse any psychiatric help or medication for either his mood or difficulties focusing on learning material he is not interested in.

The psychiatrist diagnosed the applicant with “adjustment disorder with depressed mood” (DSM-IV 309.0); “adult residuals of ADD, suspected”; and “schizoid/avoidant/paranoid personality traits.” The psychiatrist concluded the following:

It is highly unlikely that [the applicant] will be able to accommodate to Service life and be an even marginally effective Coast Guard member. His distress at maintaining a lifestyle which he finds so disagreeable may eventually build to the point where he would go AWOL or make some harm to himself in order to persuade authorities to release him to go back home. I see nothing to be gained from continuing him on active duty. I recommend that he be found unsuitable [in accordance with Article 12.B. of the Personnel Manual]. He understands the action being contemplated. He knows right from wrong. He has no mental or physical disabilities. He refuses any intervention aside from discharge which might be helpful for him.

On February 3, 2004, the Station CO notified the applicant that he was initiating the applicant’s discharge for unsuitability. The CO advised the applicant that he had a right to object to the discharge, to consult an attorney, and to submit a statement. On February 6, 2004, the applicant acknowledged the notification and his opportunity to consult an attorney, waived his right to submit a statement, and noted that he did not object to being discharged.

On February 13, 2004, the Station CO sent a memorandum asking the Personnel Command to award the applicant an honorable discharge because he had been diagnosed as having an

“adjustment disorder with depressed mood” with “paranoid personality traits” and “adult residuals of ADD [attention deficit disorder].” The CO noted that the applicant’s “condition has had detrimental effects on the good order and discipline of the Station. The CO noted that the applicant was not a good candidate for the second chance program because of his continuing poor performance.

On February 17, 2004, the Group Commander endorsed the CO’s recommendation for discharge. He stated that based on the psychiatrist’s recommendation, the applicant “is not a candidate for the second chance program.” The Group Commander stated that the applicant had failed performance probation while assigned to the station and that he himself had witnessed the applicant’s lackluster performance and lackadaisical attitude since the applicant had been transferred to the Group.

On March 3, 2004, the Personnel Command issued orders for the applicant to be honorably discharged for unacceptable conduct on March 30, 2004, “by reason of unsuitability due to apathy, defective attitudes, adjustment disorder, [or] inability to expand effort constructively under Article 12.B.16. [of the Personnel Manual].”

On March 19, 2004, the applicant underwent a pre-discharge physical examination. He was found fit for service or separation and signed a statement indicating that he agreed with the doctor’s finding.

On March 30, 2004, the applicant received an honorable discharge for “unacceptable conduct” under Article 12.B.16. of the Personnel Manual.

### **VIEWS OF THE COAST GUARD**

On August 25, 2011, 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 the Personnel Service Center (PSC) in an attached memorandum.

The PSC stated that the application is not timely and should be denied due to untimeliness. Regarding the applicant’s request for a medical separation, the PSC noted that the applicant was found not to have any mental or physical disabilities when he was discharged and that the applicant did not object to his discharge. The PSC stated that the “law that provides for disability retirement or separation (10 U.S.C. [chapter] 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.” The PSC stated that the applicant was not entitled to a medical separation because he was discharged due to a diagnosed adjustment disorder and other unsuitable personality traits, which did not amount to a mental or physical disability. The PSC stated that the “applicant wanted to be released from the [Service] and embraced the opportunity for his separation when it was presented to him.” The PSC noted that the applicant’s discharge is presumptively corrected and argued that he has failed to substantiate any error or injustice in his record.

## **APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD**

On September 12, 2011, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to submit a response within thirty day. No response was received.

### **APPLICABLE REGULATIONS**

#### ***Medical Regulations***

Chapter 5.B.3. of the Medical Manual states the following about members diagnosed with adjustment disorders:

Adjustment Disorders. These disorders 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/sea duty, separation from family/friends) process in accordance with Chapter 12, Personnel Manual, COMDTINST M1000.6 (series) is necessary.

a. 309.0 With depressed mood.

Chapter 2.C.2.a. of the Physical Disability Evaluation System (PDES) Manual in effect in 2004 states that the "sole standard to be used 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 while entitled to basic pay." Chapter 2.C.2.b.(1) of the PDES Manual states the following:

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.

#### ***Discharge Regulations***

Article 12.B.16.b. of the Personnel Manual in effect in 2004 authorized discharges for unsuitability for military service for the following reasons:

1. Inaptitude. Applies to members best described as unfit due to lack of general adaptability, want or readiness of skill, clumsiness, or inability to learn.

2. Personality Disorders. As determined by medical authority, personality behavior disorders and disorders of intelligence listed in the Medical Manual, COMDTINST M6000.1 (series), Chapter 5.

3. Apathy, Defective Attitudes, and Inability to Expend Effort Constructively. A significant observable defect, apparently beyond the member's control, not readily describable elsewhere.

4. Unsanitary Habits. ...

Article 12.B.16.c. of the Personnel Manual states the following:

Commanding officers will not initiate administrative discharge action for inaptitude, apathy, defective attitudes, unsanitary habits, or financial irresponsibility until they have afforded a member a reasonable probationary period to overcome these deficiencies. When commands contemplate discharging a member for these reasons, they shall counsel the member that a formal probationary period of at least six months has begun and make an appropriate Administrative Remarks, CG-3307, entry in the member's PDR that administrative discharge processing will be initiated unless the member shows significant improvement in overcoming the deficiency during the probationary period. The member must acknowledge this entry in writing. Commanding officers are authorized to recommend discharge at any time during probation if the member is not attempting to overcome the deficiency.

Under Article 12.B.16.d. of the Personnel Manual, a member being discharged for unsuitability for military service is entitled to (a) notification of the specific reason for discharge under Article 12.B.16.b.; (b) an opportunity to submit a written statement; and (c) an opportunity to consult an attorney "if the member's character of service warrants a general discharge."

Under the Separation Program Designator (SPD) Handbook, which lists the possible codes and reasons for discharge entered on a DD 214, members being involuntarily discharged pursuant to Article 12.B.16. of the Personnel Manual when they "perform acts of unacceptable conduct (i.e., moral and/or professional dereliction)" may be discharged with an RE-4 reentry code, a JNC separation code, and "Unacceptable Conduct" as the narrative reason for separation.

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 does not constitute a physical disability but that prevents the member from adapting to military life. The ALCOAST specifies that the new separation code JFY should be used when a member's involuntary discharge is "directed by an established directive when an adjustment disorder exists, not amounting to a disability, which significantly impairs the member's ability to function effectively in the military environment. ... For enlisted personnel, the re-entry code assigned can be either RE-3G or RE-4. CG PSC (epm-1) will review the separation packages and make the determination for which re-entry code should be applied."

## **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 Board notes that the applicant did not apply to the Discharge Review Board, but that board does not have jurisdiction over the application because it has no authority to award the applicant the disabled severance or retired pay that would be due as a result of a medical separation.

2. 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 in his record. The applicant was discharged for "Unacceptable Conduct" and signed his DD 214 on March 30, 2004, and thus

knew that he had not received a medical separation on that date. Therefore, his application is not timely.

3. 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.” *Id.* at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

4. Regarding the delay of his application, the applicant explained stated that he did not know until 2009 that he could contest his discharge. The Board does not find this explanation compelling because he failed to show that anything prevented him from complaining about his discharge and learning about the Board more promptly.

5. A cursory review of the merits of this case indicates that the applicant’s request lacks merit. The record shows that the applicant was discharged because of an “adjustment disorder with depressed mood” that made him unable to adapt to military life. Under Chapter 5.B.3. of the Medical Manual, members diagnosed with this condition are not processed for disability separations but are instead, like the applicant, processed for administrative separations under Article 12.B. of the Personnel Manual. Under Chapter 2.C.2.a. of the PDES Manual, the only reason for processing a member for a disability separation is unfitness for duty because of a disability, but the psychiatrist expressly stated that the applicant had no mental or physical disability and that he refused treatment for his diagnosed adjustment disorder with depressed mood. The applicant submitted nothing to refute these records, which are presumptively correct under 33 C.F.R. § 52.24(b). *See Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992) (citing *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979), for the required presumption, absent evidence to the contrary, that Government officials have carried out their duties “correctly, lawfully, and in good faith.”). Based on the record before it, the Board finds that the applicant’s request for a medical/disability separation cannot prevail on the merits.

6. Although he was discharged because of an adjustment disorder that made him unable to adapt to military life, the applicant’s DD 214 shows that he was discharged for “unacceptable conduct.” Because the applicant was repeatedly late for duty and the definition of “unacceptable conduct” includes “professional dereliction,” the applicant’s DD 214 is not technically inaccurate,<sup>2</sup> even though “professional dereliction” seems slightly overblown as a term applied to a 22-year-old non-rate with an adjustment disorder, learning disorder, and apathetic attitude. When the applicant was discharged in 2004, however, there was no separation code specifically for members unable to adjust to military life. Now there is, pursuant to ALCOAST 252/09. Therefore, the applicant’s DD 214 could be corrected to show that he was discharged because of an “adjustment disorder,” instead of “unacceptable conduct.” However,

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<sup>2</sup> *See, e.g.*, final decisions in BCMR Docket Nos. 2005-041, 2009-197, and 2010-026, in which the applicants had been discharged and assigned the JNC separation code after being counseled about lackadaisical attitudes, poor performance, failing to obey orders, etc., as young non-rates and petty officers.

the applicant did not request this relief and it is not clear whether he would want his diagnosis printed on his DD 214.

7. Accordingly, the applicant's request for a medical separation should be denied because of its untimeliness and lack of merit, but if within six months of the date of this decision, he submits a new application requesting a discharge due to "adjustment disorder," instead of "unacceptable conduct," the Board will consider the request on the merits.

**[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]**



**ORDER**

The application of former xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is denied, but if within six months of the date of this decision, he submits a new application requesting a discharge due to “adjustment disorder,” instead of “unacceptable conduct,” the Board will consider the request on the merits.

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Katia Cervoni

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Lillian Cheng

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Ashley A. Darbo